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THE CIVIL DIGEST, 1911-1923.

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BY

V. V. CHITALE, B.A., LL.B.

AND

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ABBREVIATIONS EXPLAINED.

Reports.

All. or A.	Indian Law Reports, Allahabad Series.
A. L. J.	Allahabad Law Journal.
1922 All. or 1922 A.	All-India Reporter, Allahabad.
B. R. or B. D.	Decision of the Board of Revenue, Mad. (N. R. K. Tatachariar).
Bom. or B.	Indian Law Reports, Bombay Series.
Bom. L. R.	Bombay Law Reporter.
1922 Bom.	All-India Reporter, Bombay.
Bur. L. T.	Burma Law Times.
Bur. L. J.	Burma Law Journal.
Cal. or C.	Indian Law Reports, Calcutta Series.
C. L. J.	Calcutta Law Journal.
C. W. N.	Calcutta Weekly Notes.
1922 Cal.	All-India Reporter, Calcutta.
Cr. L. J.	Criminal Law Journal.
I. A.	Law Reports, Indian Appeals.
I. C.	Indian Cases.
Lah. or L.	Indian Law Reports, Lahore Series.
1922 Lah.	All-India Reporter, Lahore.
Lah. L. J. or L. L. J.	Lahore Law Journal.
L. B. R.	Lower Burma Rulings.
L. R. (P. C.)	The Law Reporter, Privy Council Section.
L. R. (A.)	" Allahabad Section.
L. R. (O.)	" Oudh Section.
Mad. or M.	Indian Law Reports, Madras Series.
M. L. J.	Madras Law Journal.
M. L. T.	Madras Law Times.
L. W.	Madras Law Weekly.
M. W. N.	Madras Weekly Notes.
1922 Mad.	All-India Reporter, Madras.
Mys. L. J.	Mysore Law Journal.
N. L. J.	Nagpur Law Journal.
N. L. R.	Nagpur Law Reports.
1922 Nag.	All-India Reporter, Nagpur.
O. & A. L. R.	Oudh and Agra Law Reporter.
O. C.	Oudh Cases.
1922 Oudh	All-India Reporter, Oudh.
O. L. J.	Oudh Law Journal.
P. R.	Punjab Record.
P. L. R.	Punjab Law Reporter.
P. W. R.	Punjab Weekly Reporter.
Pat. or P.	Indian Law Reports, Patna Series.
1922 Pat. or 1922 P. H. C. C.	Patna Supplement to C. W. N.
1922 P.	All India Reporter, Patna.
1922 P. C.	All-India Reporter, Privy Council Section.
Pat. L. R.	Patna Law Reporter.
Pat. L. J.	Patna Law Journal.
Pat. L. W.	Patna Law Weekly.
R. or Rang.	Indian Law Reports, Rangoon Series.
S. L. R.	Sind Law Reporter.
1922 S.	All-India Reporter, Sind.
U. B. R.	Upper Burma Rulings.
U. P. L. R.	U. P. Law Reporter.
1922 U. B.	All-India Reporter, Upper Burma.
1922 R.	All-India Reporter, Rangoon.

Other Abbreviations.

Appl.	Applied.	Expl.	Explained.
Appr.	Approved.	Foll.	Followed.
Dist.	Distinguished.	F. B.	Full Bench.
Disc.	Discussed.	P. C.	Privy Council.
Diss.	Dissented from.	Ref.	Referred to.

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Accession No. _____

TABLE OF CONTENTS.

	Col.
Madras Canal and Public Ferries Act ...	1
Madras City Civil Courts Act (VII of 1892) ...	1
Madras City Municipal Act (V of 1878), S. 188 ...	2
Madras City Municipal Act (I of 1884) ...	5
Do. (III of 1904) ...	5
Do. (IV of 1919) ...	5
Madras Civil Courts Act (III of 1872) ...	6
Madras City Police Act (III of 1888) ...	6
Madras City Tenants' Protection Act (III of 1922) ...	6
Madras Civil Courts Act (III of 1873) ...	6
Do. (VII of 1892) ...	7
Madras Court of Wards Act (I of 1902) ...	8
Madras District Municipalities Act (IV of 1884) ...	10
Madras Estates Land Act (I of 1908) ...	20
Madras Educational Rules ...	20
Madras Endowments and Escheats Regulation Act (VII of 1817) ...	20
Madras Estates Land Act (I of 1908) ...	20
Madras Forest Act (V of 1882) ...	94
Madras Hereditary Offices Regulation (VI of 1831) and General Clauses Act ...	96
Madras Hereditary Village Offices Act (III of 1895) ...	98
Madras High Court Rules of Practice (Appellate Side) ...	99
Madras High Court Rules of Practice (Civil, R 49) ...	102
Madras High Court Rules of Practice (Criminal) ...	105
Madras High Court Rules of Practice (Original) ...	106
Madras Hindu Transfers and Bequests Act (I of 1914) ...	107
Madras Irrigation Cess Act (VII of 1865).	108
Madras Impartible Estates Act (II of 1904) ...	108
Madras Inams Act (VIII of 1869) ...	108
Madras Land Encroachment Act (III of 1905) ...	115
Madras Land Revenue Assessment Act (I of 1876) ...	118
Madras Local Boards Act (V of 1884) ...	119
Do. (XIV of 1920) ...	122
Madras Permanent Settlement Regulation (XXV of 1802) ...	124
Madras Motor Vehicles Act (XI of 1890).	124
Madras Municipal Election Rules ...	124
Madras Planters' Labour Act (I of 1903).	128
Madras Presidency Small Cause Court Rules ...	129
Madras Proprietary Estates Village Service Act (II of 1894) ...	129
Madras Regulation (XXXI of 1802) ...	132
Madras Provincial Insolvency Rules ...	132
Do. (V of 1804) Court of Wards.	133
Madras Rent Recovery Act (VIII of 1865)	134
Madras Revenue Recovery Act (II of 1864) ...	138
Madras Salt Act (IV of 1889) ...	143
Do. (XXVIII of 1860) ...	144
Madras Surveys and Boundaries Act (IV of 1897) ...	145
Madras Towns Nuisances Act (III of 1889) ...	146
Motor Vehicles Act (VIII of 1914) ...	147
Madras Village Courts (I of 1889) ...	147
Mahomedan Law—	
Applicability ...	148
Conversion ...	150
Custom ...	152
Divorce ...	154
Dower ...	158
Family Arrangement ...	170
Gift—	
Conditional Gift ...	171
Consideration ...	173
Construction ...	175
Death-illness ...	177
Delivery of possession ...	178
Revocation ...	187
Undivided share ...	188
Validity of ...	189
Guardianship ...	191
Guardianship—Age of Majority ...	191
De facto Guardian ...	191
Guardian for Marriage ...	198
Right to ...	199
Joint Family ...	202
Legitimacy ...	203
Maintenance ...	207
Marriage—	
Ante-nuptial Agreement ...	209
Breach of Promise ...	210
Forms of ...	212
Incidents ...	214
Repudiation ...	216
Validity ...	218
Religious Office ...	220
Succession—	
Co-heir ...	224
Debts ...	226

MAHOMEDAN LAW—Succession—(*Contd.*) COL.

Step-son ... 228
Vesting of Property ... 229
Waqf—
Alienation ... 230
Construction ... 231
Creation of ... 233
Management ... 236
Mosque ... 238
Mutwalli ... 240
Objects of ... 250
Sajjadanashin ... 252
Validity ... 254
Will ... 261
Maintenance ... 265
Majority Act (IX of 1875) ... 266
Malabar Compensation for Ten. Imp. Act (I of 1900) ... 268
Malabar Law—
Adoption ... 276
Aliasanthana ... 277
Applicability ... 278
Custom of Impartibility ... 279
Devaswom ... 279
Gift ... 282
Kanom ... 285
Karnavan—Anandravan, Rights of ... 290
Decree against ... 292
Delegation of management ... 293
Powers of ... 294
Removal of ... 298
Rights of Junior Members ... 299
Landlord and Tenant ... 300
Land Tenure ... 301
Maintenance ... 304
Mortgage ... 307
Partition ... 308
Stanom ... 310
Tarwad ... 311
Malabar—Tavazhi ... 315
Malabar Marriage Act (IV of 1896) ... 315
Malicious Prosecution ... 316
Malabar Martial Law Ordinance (I of 1922). 316
Malabar (Restoration of Order) Ordinance (I of 1922) ... 316
Malabar Wills Act (V of 1898) ... 316
Malicious Prosecution—
Abatement of Suit ... 317
Burden of Proof ... 317
Civil Action ... 317
Damages ... 317
Elements to be proved ... 318
Innocence ... 320
Malice ... 321
Prosecution ... 324
Reasonable and Probable Cause ... 327
Sanction ... 331
Martial Law Ordinance (IV of 1919) ... 332
Married Women's Property Act (III of 1874) ... 332
Martial Law Ordinance (II of 1921) ... 333
Master and Servant— ... 333
Contract of Service ... 334
Crown Servants ... 334
Dismissal from Service ... 335
Fraud by Servant ... 337
Offence by Servant ... 338
Reasonable Notice ... 339
Resignation by Servant ... 340
Test by Servant ... 340

MASTER AND SERVANT—(*Contd.*) COL.

Tort by Servant ... 340
Miscellaneous ... 341
Maxims ... 342
Measure of Damages ... 347
Merchandise Marks Act (IV of 1898) ... 347
Merger ... 348
Merchant Seamen's Act (I of 1859) ... 348
Do. Shipping Acts ... 348
Mesne Profits ... 349
Do. and Improvements Act (XI of 1885) ... 353
Mines and Minerals ... 353
Minor— 354
Adjudication as Insolvent ... 355
Admissions of Guardian ... 355
Alienation by Guardian ... 355
Compromise ... 358
Contract by Guardian ... 359
Contract by Minor ... 361
Custody ... 363
Debts by Guardian ... 363
Decree against ... 364
Estoppel ... 368
Plea of Minority ... 369
Miscellaneous ... 369
Mortgage—
Adverse Possession ... 372
Abandonment ... 372
Accession ... 372
Co-mortgagors ... 374
Construction ... 375
Co-sharer ... 383
Discharge ... 384
Equity of redemption ... 385
Foreclosure ... 386
Instalment ... 388
Interest ... 388
Moveables ... 392
Redemption ... 394
Rights of mortgagee ... 399
Shares ... 407
Sub-mortgagee ... 408
Substitution of new mortgage ... 410
Time for ... 410
Undivided share ... 411
Municipal Board ... 412
Murshidabad Act (XV of 1891) ... 412
Mussalman Waqf Validating Act (VI of 1913) ... 412
Mutation ... 414
Mutawalli ... 415
Native Converts Marriage Dissolution Act (XXI of 1866) ... 415
Native Passenger Ships Acts (X of 1887) 415
Nattukkottai Chetties ... 416
Negotiable Instruments ... 418
Do. Act (XXVI of 1881). 422
Nobad Taluq ... 452
Northern India Canal and Drain Act (VIII of 1873) ... 453
Notary Public ... 454
N.-W. F. P. Regulation (VI of 1901) ... 454
Do. Rent Act (XII of 1881) ... 454
Notice ... 455
Oaths Act (X of 1873) ... 456
Occupancy Holding—
Determination ... 462
Disposition by Will ... 462

OCCUPANCY HOLDING—(*Contd.*) COL.

Effect of Mortgage ... 462
Ejectment ... 464
Exchange ... 467
Execution Sale ... 467
Landlord's right after transfer ... 471
Partition ... 474
Position of (Purchaser) Transferee ... 474
Transferability ... 478
Sub-lease ... 478
Succession ... 478
Transferability ... 478
Miscellaneous ... 481
Order in Council (1908) ... 482
Official Referee ... 482
Ootacamund Municipality ... 482
Orissa Tenancy Act (II of 1913) ... 483
Oudh Civil Digest (1912) ... 485
Oudh Courts Act (XIV of 1891) ... 486
Oudh Estates Act (I of 1869) ... 487
Do. (III of 1910) ... 498
Oudh Land Law ... 499
Oudh Land Revenue Act (XVII of 1876) ... 499
Oudh Laws Act (XVIII of 1876) ... 500
Oudh Rent Act (XXII of 1886) ... 512
Oudh Partition ... 512
Oudh Rules of Practice ... 530
Oudh Settlement ... 531
Oudh Sub-Settlement Act (XXVI of 1866) ... 532
Oudh Talukdars Act ... 533
Oudh Waste Land Rules ... 533
Pakka Adatia ... 533
Paper Currency Act (XX of 1882) ... 534
Do. (II of 1910) ... 536
Pardanashin Lady— 536
Admissions ... 537
Burden of Proof ... 537
Compromise ... 542
Examination of ... 543
Knowledge of transaction ... 544
Power of Attorney ... 545
Who is ... 546
Parentage—Proof of ... 547
Pargana of Karwai Raj Act (I of 1911) ... 547
Parol evidence ... 547
Parsi Intestate Succession Act (XXI of 1865). 547
Parsi Marriage and Divorce Act (XV of 1865) ... 547
Parsis ... 548
Partition— 548
Accounts ... 549
Decree ... 549
Effect of ... 550
Entries ... 551
Equities ... 552
Jurisdiction ... 553
Minors ... 553
Mode of division ... 553
Oral ... 554
Occupancy Holding ... 554
Parties ... 555
Principles ... 555
Prior Partition ... 556
Procedure ... 557
Right to ... 557
Shamilat ... 559
Subject-matter of ... 559
Suit ... 560
Trees ... 564
Unregistered deed ... 564

COL.

Partition Act (IV of 1893) ... 565
Partner ... 569
Partnership— 569
Accounts ... 569
Authority of Partner ... 571
Dissolution ... 572
Good-will ... 573
Liability of Partners ... 573
Rights of Partners ... 575
Suit ... 576
Sub-Partner ... 576
Part Payment ... 578
Part Performance ... 578
Party Wall ... 583
Pasturage ... 583
Patents and Designs Act (II of 1911) ... 583
Patna High Court Rules ... 585
Patni ... 587
Patta and Pattadar ... 587
Pattidar ... 587
Patwari Papers ... 587
Pauper—Appeal ... 587
Do Suit ... 587
Payment into Court ... 587
Pedigree ... 587
Penalty ... 587
Pension ... 587
Pensions Act (XXIII of 1871) ... 588
Permanent Lease ... 593
Permanent Settlement ... 593
Permanent Tenancy ... 593
Perpetual Injunction ... 593
Perpetuity ... 593
Persona Designata ... 593
Personal Covenant ... 593
Personal Decree ... 593
Petroleum Act (VIII of 1899) ... 593
Possession—Burden of Proof ... 594
Pleaders' Act (I of 1846) ... 594
Possession—Constructive Possession ... 595
Co-sharers ... 596
Evidence ... 597
Meaning of ... 598
Suit for ... 599
Trespasser ... 599
Miscellaneous ... 600
Possessory Right ... 601
Do Title ... 601
Post Office Act (VI of 1898) ... 604
Post Diem Interest ... 604
Posthumous Son ... 604
Poundage ... 605
Power of Attorney ... 605
Powers ... 608
Practice— 609
Abandonment of Plea ... 610
Additional Evidence ... 611
Adjournment ... 611
Administration ... 613
Admissions ... 613
Alternative Claims ... 613
Amendments ... 614
Amendment of Decree ... 614
Amendment of Plaints ... 614
Appeal ... 616
Appellate Court ... 619
Burden of Proof ... 625
Case-Law ... 626
Cause of Action ... 626
Chief Court ... 626

PRACTICE—(*Contd.*)	COL.
Civil Dispute	626
Commission	627
Commissioner	627
Consolidation of Suit	627
Costs	628
Court Fee	629
Decree	629
Death of Party	629
Declaratory of Relief	629
Delay in Indian Litigation	630
Delay—Limitation	630
Discretion	630
Ejectment	632
Evidence	634
Exclusion of Irrelevant Evidence	640
Execution	640
Ex parte Hearing	640
Do. Order	641
Finding of Fact	641
Formal Defect	641
High Court	642
Inconsistent Pleas	646
Inherent Power	649
Injunction	649
Insolvency	650
Interest	650
Issues	650
Judge	652
Judgment	655
Judicial Order or Proceeding	661
Jurisdiction	662
Justice, Equity and Good Conscience	663
Law governing	663
Limitation	664
Legal Representative	664
Limitation—Defence	664
Do. Misjoinder of Causes of Action	665
Do. Plea	665
Local Inspection	665
Do. Investigation	665
Minor	665
New Plea—	665
Appeal	665
Appellate Court	671
Change of Case	674
Costs	676
Formal Defect	676
Limitation	676
Minority	677
Pardanashin Lady	678
Question of Fact	678
Question of Law	678
Revision	680
Second Appeal	680
When can be raised	683
Non-joinder of Parties	684
Notice	685
Notice of Hearing	685
Parties	686
Partition Suit	687
Plea—Limitation	687
Pleader	688
Pleader's Fees	690
Pleadings—	692
Admissions	692
Cause of Action	692
Defence	693
False Averment	693

PLEADINGS—(*Contd.*)	COL.
Fraud	693
Liberal Construction	694
Highway	694
Object of	696
Proof	696
Redemption	697
Relief	698
Variation	701
Verification	705
What is	705
Miscellaneous	705
Precedents—	707
Application of	707
Conflicting Decisions	707
Custom	707
Discretion	707
English or American	707
Obiter Dicta	709
Privy Council	709
Stare decisis	710
Uniformity in	711
Value of	711
Miscellaneous	712
Preliminary Decree	713
Privy Council	713
Professional Etiquette	713
Promissory Note—Decree on Original Cause of Action	714
Receiver	714
Record	714
Remand	714
Res judicata	716
Restitution	716
Retrial	716
Revenue Court	716
Review	716
Revision	716
Sanction	717
Second Appeal	718
Sentence	719
Stare decisis	719
Stay of Trial	719
Subordinate Courts	720
Subsequent Events	721
Succession Certificate	723
Summons	723
Third Party	723
Transfer of Case	723
Trial	723
Vakalat	726
Valuation	726
Witness	726
Preamble	729
Precedents	729
Pre-emption—	729
Basis of Claim	729
Collusion	731
Co-sharer—	732
Partition	732
Amount of Share	732
Priority	733
Right to Pre-empt	733
Vendor's right	735
Who is	735
Custom—	736
Applicability	736
Partition	738
Presumption	739
Proof	740
Miscellaneous	748

PRE-EMPTION—(*Contd.*)

		COL.
Custom or Contract	...	749
Decree	...	752
Joint Vendees	...	760
Lis pendens	...	761
Loss of Right	...	762
Mahomedan Law—	...	765
Applicability	...	765
Demand	...	767
Easement	...	770
Formalities	...	770
Law Applicable	...	771
Miscellaneous	...	772
Nature of Right	...	773
Notice	...	776
Price	...	776
Priority	...	780
Resale to Vendor	...	781
Rival Pre-emptors	...	782
Subject-matter	...	782
Suit for—		786
Benami	...	786
Burden of Proof	...	786
Cause of Action	...	787
Good Faith	...	788
Parties	...	788
Right to Sue	...	789
Subsequent Events	...	790
Value of Claim	...	791
Miscellaneous	...	791
Time for Pre-emption	...	792
Transfer, nature of	...	793
Waiver of Right	...	797
Wajib-ul-arz—		799
Construction	...	799
Evidentiary—Value of	...	803
Partition	...	804
Preferential Claim	...	805
Miscellaneous	...	807
Who can Pre-empt	...	807
Miscellaneous	...	808
Preferential Heir	...	810
Pregnancy	...	810
Preliminary Decree	...	810
Prescription	...	810
Presidency Banks Act (XI of 1876)	...	810
Presidency Small Cause Courts Act (X of 1882)	...	811
Presidency Towns Insolvency Act (III of 1909)	...	817
Press Act (I of 1910)	...	844
Press and Registration of Books Act (XXV of 1867)	...	850
Presumption	...	851
Prevention of Cruelty to Animals Act (XI of 1890)	...	851
Priest	...	852
Primogeniture	...	852
Principal and Agent	...	852
Principal and Surety	...	856
Printing Press and Newspapers Act (XXV of 1867)	...	856
Priority	...	857
Prisons Act (IX of 1894)	...	857
Privacy	...	857
Private Award	...	857
Privies	...	857
Privilege	...	857
Privilege Document	...	857

		COL.
Privity	...	858
Privy Council—		858
Compromise	...	858
Concurrent findings	...	858
Criminal Case	...	862
Death of Party	...	866
Delay in Indian Litigation	...	866
Differing decisions of Lower Courts	...	867
Ex parte Hearing	...	867
Interlocutory Orders	...	868
New point	...	868
Record	...	870
Miscellaneous	...	871
Prize	...	873
Probate	...	873
Probate and Administration Act (V of 1881)	...	874
Procedure	...	918
Proceedings	...	918
Processual Law	...	918
Proclamation of Sale	...	918
Professional Etiquette, Ethics and Misconduct	...	918
Profits *a prendre*	...	918
Projection	...	918
Promissory Note—		918
Alteration	...	918
Assignment	...	919
Consideration	...	919
Construction	...	922
Execution by Manager	...	923
Executor	...	924
Inadmissibility—Suit	...	925
Liability	...	925
Stamp	...	926
Miscellaneous	...	927
Proof	...	927
Proprietary Rights	...	927
Proprietors of village	...	927
Prostitute	...	928
Provident Funds Act	...	928
Provident Insurance Societies Act	...	928
Provincial Insolvency Act—		929
After-acquired Property	...	952
Applicability	...	952
Date of Adjudication	...	954
Effect of Order	...	954
Exemption from vesting	...	956
Jurisdiction	...	957
Proceedings against Insolvent	...	958
Proceedings by Insolvent	...	964
Reputed Ownership	...	964
Suit against Receiver	...	965
Vesting of Property	...	966
Vesting Order—Absence of	...	969
Miscellaneous	...	969
—S. 53 (1907)—		
Burden of Proof	...	983
Construction	...	985
Enquiry under	...	985
Fraudulent Preference	...	987
Do. Transfer	...	988
'Good Faith'	...	990
Jurisdiction	...	990
Order of Adjudication, Date of Operation.		991
Valuable Consideration	...	991
Miscellaneous	...	992

PROVINCIAL INSOLVENCY ACT—(*Contd.*)

S. 75 (1920)— COL.
Aggrieved Person ... 1019
Applicability ... 1021
Jurisdiction ... 1022
Leave to Appeal ... 1023
Limitation ... 1024
Notice of Appeal ... 1025
Parties ... 1025
Miscellaneous ... 1026
Provincial Small Cause Courts Act— 1028
Jurisdiction ... 1028
"Decided" Meaning of ... 1040
Error in Procedure ... 1041
Error of Law ... 1043
Findings of Fact ... 1044
New Plea ... 1046
Question of Costs ... 1046
Question of Jurisdiction ... 1046
Question of Limitation ... 1047
Review Cases ... 1047
Miscellaneous ... 1048
Provincial Decree ... 1078
Public Authority ... 1078
Public Body ... 1078
Public Charity ... 1078
Public Charity and Charitable Trust ... 1078
Public Company ... 1078
Public Conveyances Act ... 1078
Public Demands Recovery Act ... 1079
Public Documents ... 1080
Public Nuisance ... 1080
Public Office ... 1080
Public Place ... 1080
Public Policy ... 1080
Public Purpose ... 1080
Public Religious Trust ... 1080
Public Road ... 1080
Public Servant ... 1080
Public Street ... 1080
Public Temple ... 1080
Public Trust ... 1080
Public Way ... 1080
Public Worship ... 1080
Puisne Mortgage ... 1080
Punjab Alienation of Land Act ... 1080
Punjab Canal and Drainage Act ... 1089
Punjab Canal Colony ... 1090
Punjab Chief Court Rules ... 1090
Punjab Colonisation of Government Lands Act ... 1090
Punjab Court of Wards Act ... 1091
Punjab Courts Act— 1092
Delay ... 1096
Interlocutory order ... 1096
Material Irregularity ... 1097
Onus wrongly laid ... 1099
Question of Fact ... 1099
Question of Law ... 1100
Scope of ... 1101
Miscellaneous ... 1101
Punjab Custom ... 1113
Punjab Electoral Rules ... 1113
Punjab Excise Act ... 1113
Punjab General Clauses Act ... 1114
Punjab Government Tenants Act ... 1115
Punjab Lambardari Rules ... 1115
Punjab Land Revenue Act ... 1115
Punjab Land Revenue Rules ... 1124

COL.
Punjab Laws Act ... 1125
Punjab Limitation (Ancestral Land Alienation) Act ... 1126
Punjab Municipal Act ... 1130
Punjab Pre-emption Act ... 1140
Punjab Redemption of Mortgages Act ... 1165
Punjab Restriction of Habitual Offenders' Act ... 1166
Punjab Tenancy Act ... 1166
Purakudi ... 1187
Purchaser ... 1187
Purohit Office ... 1187
Putra Pautradi ... 1187
Putravakasam Gift ... 1187
Pyatbaings ... 1187
Quantum Meruit ... 1187
Quarries ... 1187
Quasi Executor De Son Tort ... 1187
Quasi Judicial Order ... 1187
Question of Law ... 1188
Rabid Animal ... 1188
Railway Receipt ... 1188
Railway Company Rules ... 1188
Railways Act ... 1199
Rain Water ... 1237
Raiyat ... 1237
Rangoon Municipal Act ... 1238
Rangoon Rent Act ... 1238
Rangoon Small Cause Courts Act ... 1240
Rash and Negligent Act ... 1241
Rateable Distribution ... 1241
Ratification ... 1241
Reasonable and Probable Cause ... 1241
Receipt ... 1241
Receiver ... 1241
Reciprocal Promises ... 1244
Recission of Contract ... 1244
Recitals ... 1244
Recognised Agent ... 1244
Record ... 1244
Record of Rights ... 1244
Rectification ... 1248
Recurring Right ... 1248
Redemption ... 1248
Re entry ... 1248
Reference ... 1248
Reformatory Schools Act ... 1248
Refusal or omission to decide particular issues ... 1249
Register—Entry in ... 1249
Registered Holder ... 1249
Registered Patnidar ... 1249
Registration ... 1249
Registration Act— 1257
Family arrangement ... 1262
Lease ... 1265
Mortgage ... 1266
Partition Deed ... 1268
Relinquishment or Release ... 1272
Sale ... 1275
Scope of ... 1277
Transfer of Future Interest ... 1278
Trusts ... 1279
Miscellaneous— 1280
Award ... 1296
Compromise ... 1297
" Decree " Meaning of ... 1304

	Col.
REGISTRATION ACT—(*Contd.*)	
Transfer of Decree	... 1305
Affecting such Property	... 1325
Collateral Fact	... 1328
Compromise Petition	... 1333
Construction	... 1334
Essential terms	... 1334
Moveable and immoveable	... 1335
Possession under unregistered deed	... 1336
Miscellaneous	... 1337
Registry Separate	... 1350
Regulations	... 1350
Regulation (Bengal)	... 1350
Re-hearing	... 1351
Re-imbursement	... 1351
Relationship	... 1351
Release	... 1351
Religious Brotherhood	... 1352
Religious Community	... 1352
Religious Endowments—	1352
Alienation by Manager	... 1352
Dedication	... 1354
Founder's Rights	... 1356
Idol	... 1358
Management of Trusts	... 1359
Mutt	... 1362
Trustees	... 1363
Miscellaneous	... 1364
Religious Endowments Act	... 1366
Religious Freedom Act	... 1373
Religious Office	... 1373
Religious Trusts	... 1374
Relinquishment	... 1374
Remand	... 1374
Remainder	... 1374
Remainderman	... 1374
Re-marriage	... 1374
Rent	... 1374
Rent Charge	... 1374
Rent-free Tenure	... 1374
Rent Sale	... 1374
Repeal	... 1375
Representation	... 1375
Representative	... 1375
Representative Suit	... 1375
Repute	... 1375
Reputed ownership	... 1375
Relevancy	... 1375
Requisites for Gift	... 1375
Res judicata	... 1375
Residence	... 1375
Residuary Legatee	... 1375
Restitution	... 1375
Restitution of Conjugal Rights	... 1375
Restoration of Suit of Appeal	... 1382
Restraint of Trade	... 1382
Restraint on Alienation	... 1382
Resulting Trust	... 1382
Resumption	... 1382
Retainer	... 1382
Retracted Confession	... 1382
Re-trial	... 1382
Retrospective Effect of Statutes	... 1382
Retrospective Effect or Operation	... 1382
Re-union	... 1382
Revenue	... 1382
Revenue Court	... 1382
Revenue Jurisdiction Act	... 1382

	Col.
Revenue-paying Estate	... 1383
Revenue Records	... 1383
Revenue Recovery Act (Ben. Act)	... 1383
Revenue Sale	... 1384
Revenue Sale Law	... 1385
Reversioner	... 1386
Review	... 1386
Revision	... 1386
Revision Petition	... 1386
Revocation	... 1386
Right of Appeal	... 1387
Right of Assignee	... 1387
Right of Election	... 1387
Right of Foreclosure	... 1387
Right of Guardianship	... 1387
Right of Occupancy	... 1387
Right of Reply	... 1387
Right of Suit	... 1387
Rights and Liabilities of Partners	... 1389
Rights and Liabilities of Purchasers	... 1389
Rights and Liabilities of Surety	... 1389
Right to begin	... 1389
Right to give in Marriage	... 1390
Right to Maintenance	... 1390
Right to Partition	... 1390
Right to Possession	... 1390
Right to re-open Settled Account	... 1390
Right of Way	... 1390
Right, Title and Interest	... 1390
Riparian Owners	... 1390
Riparian Proprietors	... 1391
Riparian Rights	... 1391
Risk Note	... 1396
Rival Decree-holders	... 1396
Rivers and River beds	... 1396
Riwaj-i-am	... 1396
Road	... 1399
Road-cess and Public Works Cess Act	... 1399
Road-cess Returns	... 1399
Robakaries	... 1399
Rules of Practice	... 1399
Ryoti Land or Village	... 1399
Ryotwari Tenure	... 1399
Sajjadanashin	... 1399
Salary	... 1399
Sale	... 1399
Sale Certificate	... 1399
Sale in execution	... 1399
Sale in invitum	... 1399
Sale of goods	... 1399
Salt Act	... 1399
Salvage	... 1400
Sanction	... 1400
Sanyasi	... 1400
Sapindas	... 1400
Saranjam Inam	... 1400
Sarbharakar	... 1400
Sarvamaniam	... 1400
Scheduled Districts Act	... 1400
Scheme Suit	... 1400
Sea Customs Act	... 1400
Second Appeal	... 1401
Secondary Evidence	... 1401
Secretary of State	... 1401
Security for Costs	... 1403
Self-acquired Property	... 1403
Separate Acquisition	... 1403

	COL.
Servant Domestic	... 1403
Service Inam	... 1403
Service of Notice	... 1403
Service of Summons	... 1403
Set-off	... 1403
Setting aside	... 1403
Settled account	... 1403
Settlement	... 1403
Settlement Record	... 1404
Shah Jog Hundi	... 1404
Sham Transaction	... 1404
Shamilat	... 1404
Shamilat Land	... 1406
Sham Transaction	... 1406
Shareholder	... 1406
Shebaits	... 1406
Shiahs	... 1406
Shikmi Tenure	... 1406
Shipping	... 1406
Ship, Shipment, Shipper	... 1410
Shivaijama Tenure	... 1410
Shrine	... 1410
Shrotriem	... 1410
Signature	... 1410
Sind Courts Act	... 1410
Sind Courts Criminal Circulars	... 1411
Sind Court Rules	... 1411
Sind Incumbered Estates Act	... 1411
Sind Judicial Commissioner's Rules	... 1412
Sind Municipal Act	... 1413
Sir Land	... 1413
Slander	... 1413
Societies Registration Act	... 1413
Sohaq Grant	... 1413
Soldiers' (Litigation) Act	... 1413
Soldiers' Ordinance	... 1414
Solicitor	... 1414
Solicitor's Clerk	... 1414
Sonthal Parganas	... 1414
Sonthal Parganas Act	... 1414
Sonthal Parganas Civil Rules	... 1415
Sonthal Parganas Settlement Regulation	... 1415
Sovereign	... 1419
Special Damage	... 1419
Special Marriage Act	... 1419
Special or Second Appeal	... 1419
Specific Moveable	... 1419
Specific Performance	... 1420
Specific Relief Act—	1424
Appeal	... 1425
Applicability and Scope of	... 1425
Claim for Mesne Profits	... 1427
Constructive Possession	... 1427
Co-owners	... 1428
Dispossession in due course of Law	... 1429
Regular Suit	... 1430
Review	... 1431
Scope of inquiry	... 1431
Miscellaneous—	1433
Applicability	... 1475
Cause of Action	... 1477
Construction	... 1483
Discretion of Court	... 1484
Duty of Court	... 1488
Further Relief—	1489
Amendment of Plaint	... 1489
Cancellation of Document	... 1490

	COL.
SPECIFIC RELIEF ACT—Further Relief (*Contd.*)	
Injunction	... 1491
Joint Possession	... 1491
Meaning of	... 1492
Partition	... 1494
Possession with Defendant	... 1495
Possession with Plaintiff	... 1496
Possession with Third Party	... 1498
Redemption	... 1499
Suit to set aside decree	... 1500
Miscellaneous—	... 1500
Interested to deny	... 1503
Jurisdiction	... 1504
Legal Character	... 1504
Object of	... 1511
Right to Property—	... 1511
Cloud on Title	... 1511
Creditor of insolvent	... 1512
Interest in subject-matter	... 1513
Public Way	... 1514
Reversioner	... 1515
Temple Property	... 1517
Miscellaneous—	1517
Cause of Action	... 1525
Co-owners	... 1526
Easement	... 1527
Encroachment	... 1530
General Right	... 1531
Nuisance	... 1531
Scope of	... 1533
Waste	... 1535
Miscellaneous	... 1536
Spes Successionis	... 1544
Stage Carriages Act	... 1544
Stamp Act	... 1544
Standing Committee	... 1569
Standing Crops or Timber	... 1569
Stare Decisis	... 1570
Statute-interpretation	... 1570
Statutory Body	... 1570
Stay of Execution	... 1570
Stay of Proceedings	... 1570
Stay of Sale	... 1570
Stay of Suit	... 1570
Step-in-aid	... 1570
Step mother	... 1570
Stifling Prosecution	... 1570
Stipend	... 1570
Strait Settlements Ordinance	... 1570
Street	... 1571
Street Drains	... 1571
Street private	... 1571
Stridhanam	... 1571
Sub-agent	... 1571
Submission	... 1571
Subordinate Courts	... 1571
Subrogation	... 1571
Subsequent Events	... 1571
Substituted Security	... 1571
Substituted Service	... 1571
Substitution of securities	... 1571
Sub-tenant	... 1571
Succession	... 1571
Succession Act	... 1571
Succession Certificate Act—	1588
Assignee from certificate-holder	... 1590
Claim for Part	... 1591

SUCCESSION CERTIFICATE ACT—(*Contd.*) COL.

"Debt," Meaning of ... 1591
Divided Hindu Family ... 1593
Joint Hindu Family ... 1593
Legatee under Will ... 1595
Minor as Applicant ... 1595
Partnership ... 1595
Scope of ... 1595
Time for producing certificate and effect of non-production ... 1596
Miscellaneous ... 1598
Succession (Property Protection) Act ... 1607
Suits Valuation Act ... 1608
Sunni Law ... 1617
Summary Procedure (Civil) ... 1617
Summary Settlement Act ... 1617
Summons ... 1617
Super tax- Act ... 1617
Surety ... 1617
Surrender ... 1617
Survey and Boundary Marks Act ... 1618
Survey Maps ... 1618
Survey Records ... 1618
Survivorship ... 1618
Symbolical possession ... 1618
Tacking ... 1618
Talab-i-istihad ... 1618
Talab-i-Mowazi Bat ... 1618
Talak ... 1618
Taluqdar ... 1618
Tax ... 1619
Taxation of Costs ... 1619
Tayazhi ... 1619
Tazias ... 1619
Tejimandi Transaction ... 1619
Temple Committee ... 1619
Temporary injunction ... 1619
Tenancy ... 1619
Tenancy-at-will ... 1619
Tenancy from year to year ... 1619
Tenancy-in-common ... 1619
Tenant ... 1619
Tenant-in-common ... 1619
Tender ... 1620
Tenure ... 1620
Testament ... 1620
Testator ... 1620
Thakbust Map ... 1620
Thak Map ... 1620
Thekadar ... 1620
Third party ... 1620
Thumb impression ... 1620
Ticcadar ... 1620
Tidal Navigable River ... 1620
Time ... 1620
Title-deeds ... 1620
Toda Giras Allowance Act ... 1620
Tort— ... 1620
Act of God ... 1621
Animals ... 1622
Breach of Contract ... 1623
Cause of Action ... 1623
Conspiracy ... 1624
Conversion ... 1625
Defamation— ... 1625
Fair comment ... 1625
Imputation of Caste ... 1627
Justification ... 1628

TORT—Defamation—(*Contd.*) COL.

Malice ... 1628
Privilege ... 1629
Publication ... 1633
Suit ... 1634
Easement ... 1635
False imprisonment ... 1635
Joint tort-feasors ... 1635
Liability ... 1636
Malicious Proceedings ... 1637
Negligence ... 1639
Nuisance ... 1645
Principal and Agent ... 1648
Public Officer ... 1648
Secretary of State ... 1648
Statutory Body ... 1649
Trespass ... 1649
Wrongful dismissal ... 1652
Miscellaneous ... 1652
Tort-feasor ... 1654
Trade Mark— ... 1654
Acquisition ... 1654
Assignment of ... 1654
Good Will ... 1655
Infringement of ... 1655
Law applicable ... 1658
Trade name—Distinction between ... 1658
What is ... 1658
Trade name ... 1658
Trade usage ... 1659
Tramways Act ... 1659
Transfer of case ... 1660
Transfer of Property ... 1660
Transfer of Property Act— ... 1669
S. 3—Actionable claim ... 1673
Immoveable Property ... 1674
S. 6—Notice ... 1675
Easement ... 1681
Mere Possibility ... 1681
Mere Rights to sue ... 1687
Not transferable Right ... 1692
Personal Right ... 1693
Public Office ... 1695
Right of re-entry ... 1696
Rights in future ... 1696
Scope of ... 1697
Unlawful object ... 1697
S. 41—Attestation ... 1719
Disqualified person ... 1720
Enquiry ... 1720
Husband and wife ... 1722
Involuntary Sale ... 1722
Notice ... 1722
Ostensible owner ... 1723
Reasonable care ... 1725
Rival Transferees ... 1726
Scope of ... 1727
Miscellaneous ... 1728
S. 51—Alienee from Limited Owner ... 1738
Estoppel ... 1739
Good faith ... 1739
Improvements by Mortgagee ... 1740
Improvements by Stranger ... 1740
Improvements by Tenant ... 1741
Improvements *Pendente Lite* ... 1742
Invalid transfer ... 1742
Knowledge of defective title ... 1743
Measure of Compensation ... 1743

COL.

TRANSFER OF PROPERTY ACT—(*Contd.*)

Miscellaneous ... 1744
S. 52—Active prosecution ... 1745
Appeal ... 1745
Contentious suit ... 1746
Effect of ... 1748
Immoveable property ... 1748
Involuntary transfer ... 1749
Lease *Pendente Lite* ... 1751
Nature and Scope of ... 1752
Partition *Pendente Lite* ... 1754
Pendency of Proceedings ... 1754
Pre-emption ... 1756
S. 53—Miscellaneous ... 1757
Embarrassed circumstances of transferor 1759
Frame of suit ... 1761
Fraud carried out ... 1763
Fraud not carried out ... 1765
Future creditors ... 1768
Inadequate consideration ... 1768
Intention to defraud ... 1769
Partial consideration ... 1776
Plea in defence ... 1777
Preference ... 1778
Sham transaction ... 1779
Subsequent transferee ... 1781
Miscellaneous ... 1781
S.54—Admissibility of unregistered deed 1785
Applicability ... 1786
Consideration ... 1788
Contract to sell ... 1790
Easement ... 1796
Immoveable property ... 1797
Non-payment of price ... 1797
Priority ... 1801
Registration ... 1802
Sale of equity of redemption ... 1804
Sale of reversion ... 1806
Sale when complete ... 1806
Title by delivery ... 1808
Title by estoppel ... 1810
Transfer for dower ... 1812
Vendee in possession ... 1812
Miscellaneous ... 1813
S. 55—Caveat Emptor ... 1814
Contract to the contrary ... 1814
Covenant for title— ... 1815
S. 55 (2)—Applicability ... 1815
Compromise of dispute as to title ... 1816
Continuing Breach ... 1816
Cost of Litigation ... 1816
Covenant for quiet enjoyment ... 1816
Deficiency in extent ... 1817
Eviction by paramount title holder ... 1818
Notice of defect ... 1818
" Professes to transfer " ... 1820
Refund of Purchase money ... 1820
Registered conveyance ... 1822
Miscellaneous ... 1822
Disclosure of defect ... 1825
Execution of conveyance ... 1824
Production of title deeds ... 1826
Purchase money left with vendee ... 1827
Relief against forfeiture ... 1828
Right to possession ... 1828
Sale subject to incumbrances ... 1830
Vendee's charge ... 1830
Vendor's lien ... 1831

COL.

TRANSFER OF PROPERTY ACT—(*Contd.*)

Miscellaneous ... 1835
S. 58 (*a*) Mortgage, meaning of ... 1838
S. 58 (*b*) Simple Mortgage ... 1852
S. 58 (*c*) Mortgage by conditional sale. 1858
S. 58 (*d*) Unfructuary Mortgages ... 1867
S. 58 (*e*) English Mortgage ... 1870
S. 59 Delivery of Possession ... 1871
Equitable Mortgage ... 1872
Invalid attestation ... 1877
Marksman as attestor ... 1878
Meaning of attestation ... 1878
Modification of Mortgage ... 1881
Mortgage before T. P. Act ... 1881
Oral Mortgage ... 1881
Proof of attestation ... 1881
Proof of execution ... 1885
Registration ... 1885
Scribe as attestor ... 1887
Who can be attestor ... 1890
S. 60—Charge ... 1890
Clog on Redemption ... 1890
Duty of mortgagee ... 1904
Mortgage money ... 1904
Partial redemption ... 1907
Redemption out of Court ... 1912
Right of Redemption ... 1912
Rights of mortgagor ... 1923
Splitting up of security ... 1925
68 (*a*) Personal Liability ... 1945
68 (*b*) Loss of Security ... 1948
68 (*c*) Failure to secure possession ... 1951
68 [Waste] ... 1954
S. 76 [Miscellaneous] ... 1977
S. 76 (*a*) Management of property ... 1978
S. 76 (*b*) Collections of rents ... 1980
S. 76 (*c*) Payment of Government Revenue ... 1980
S. 76 (*d*) Repairs and improvements ... 1983
S. 76 (*f*) Policy of insurance ... 1983
S. 76 (*g*) Account of sums spent ... 1984
S. 76 (*h*) Occupation Rent ... 1985
S. 76 (*i*) Accounts of sums received ... 1988
S. 101—Doctrine of merger ... 2030
Extinction of mortgage ... 2030
Keeping alive ... 2033
Payment by stranger ... 2040
Subrogation ... 2042
Miscellaneous ... 2047
S. 106—Applicability ... 2049
Covenant for renewal ... 2050
Holding over ... 2050
Nature of Tenancy ... 2051
Notice to quit ... 2053
Permanent tenancy ... 2058
Miscellaneous ... 2058
S. 108—Accession ... 2063
Applicability ... 2063
Covenant for quiet enjoyment ... 2064
Disclosure of defect ... 2066
Duty to give possession to lease ... 2066
Duty to surrender possession to lessor 2066
Payment of rent ... 2067
Property rendered unfit ... 2068
Removal of superstructure ... 2068
Removal of trees ... 2069
Repairs ... 2069
Transfer of interest ... 2070

	Col.
TRANSFER OF PROPERTY ACT—(*Contd.*)	
Waste	2072
Miscellaneous	2073
S. 111.—Forfeiture	2075
Breach of condition	2076
Co-lessor	2077
Denial of title	2078
Non-payment of rent	2081
Overt Act	2082
Miscellaneous	2083
Merger	2084
Notice to quit	2085
Surrender	2087
Miscellaneous	2087
Transfer of Property (Validating) Act	2111
Treasure Trove Act	2111
Treaties	2112
Trees	2112
Trespass	2112
Trustee	2112
Trustee Act	2112
Trusts—	2112
Co-trustees	2112
Creation of	2114
Intention of the author	2118
Reimbursement	2119
Removal of Trustee	2119
Transfer of Office Trustee	2120
Transfer of Trust Property	2121
Miscellaneous	2121
Trusts Act	2123
Ultra vires	2147
Umpire	2148
Uncertified payment	2148
Unchastity	2148
Unconscionable Bargain	2148
Underground Rights	2148
Under-proprietor	2148
Under-proprietary Right	2148
Under-raiyati Holdings	2148
Under-ryot	2148
Under-tenure	2148
Undisclosed Principal	2148
Undue influence	2148
Undue preference	2148
Unfair preference	2148
Unfair Transaction	2148
Unincorporated Society	2148
U. P. Court of Wards Act	2149
U. P. Electoral Rules	2153
U. P. Government Rules	2153
U. P. Land Revenue Act	2154
U. P. Local Rates Act	2176
U. P. Municipalities Act	2177
U. P. Registration Rules	2189
U. P. Rent Act	2189
U. P. Tenancy Act	2190
U. P. Town Improvement Acts	2190
Universities Act	2191
Unlawful consideration	2192
Unliquidated damages	2192
Unprofessional conduct	2193
Unrecorded co-sharer	2193
Unregistered Association	2193
Unseaworthiness	2193
Unsigned Documents	2193
Upper Burma Civil Court Regulations	2193
Upper Burma Courts Manual	2193

	Col.
TRANSFER OF PROPERTY ACT—(*Contd.*)	
Upper Burma Land and Revenue Regulations	2194
Upper Burma Registration Regulation	2195
Uralan	2195
Usage	2195
Use and Occupation	2195
Usufructuary Mortgage	2195
Usurious Loans Act	2195
Usury	2195
Utbundi Tenure	2195
Vacant Site	2195
Vaccination Register	2196
Vakil Vakalatnama	2196
Valuation of Suit	2196
Varam Patta	2196
Variance between Pleadings and Proof	2196
Vatan	2196
Vatan Act	2196
Vendor and purchaser	2197
Venue of Suit	2197
Verification	2197
Vested Rights	2197
Vicinage	2197
Village Abadi	2197
Village Chowkidari Act	2197
Village Community	2197
Village Service Inams Act	2197
Village Site	2198
Vis Major	2198
Vizagapatam Agency Rules	2198
Voidable Assignment	2198
Voidable Sale	2198
Void Agreement	2198
Void or Voidable	2198
Voluntary Payment	2198
Vritis	2198
Vyavahara Mayukha	2198
Wager	2198
Wagering Contract	2198
Waging War	2198
Waiver	2198
Wajib-ul-arz—	2199
Alluvion and Diluvion	2199
Binding effect	2200
Construction of words in	2200
Custom of pre-emption	2203
Custom of resumption	2205
Evidentiary Value	2205
Family Custom	2209
Groves	2210
Miscellaneous	2210
Wakf	2211
Want of Jurisdiction	2211
War	2211
Ward	2211
Warranty	2211
Waste Land Rules	2211
Waste Lands Act	2212
Water	2212
Water Course	2212
Water Rate of Cess	2212
Way	2212
Well	2212
Widow	2212
Wife	2213
Wild animals	2213

	Col.
Will—	
Accumulation	2213
Administrator	... 2213
Attestation	... 2213
Bequest	... 2214
Codicil	... 2214
Construction—	... 2217
Absolute estate	2217
After-acquired Property	... 2218
Deed *inter vivos*	... 2221
Duty of Court	... 2221
English Rules	... 2222
Gift over	... 2223
Intention of testator	... 2224
Joint Power	... 2226
Life estate	... 2231
Meaning of words	... 2231
Persona designata	... 2233
Residuary clause	... 2236
Vested estate	... 2237
Miscellaneous	... 2237
Essentials	... 2238
Executor	... 2241
Formalities	... 2242
Legacy	... 2244
Oral will	... 2244
Power	... 2244
	... 2247

	Col.
Will—(*Contd.*)	
Probate	... 2247
Proof of—	2248
Attestation	... 2249
Disposing state of mind	... 2250
Evidence	... 2251
Non-registration	... 2252
Onus of Proof	... 2253
Signature	... 2255
Miscellaneous	... 2255
Revocation	... 2256
Testamentary Capacity	... 2260
Trust	... 2262
Validity of	... 2262
Winding up	... 2264
Withdrawal of suit	... 2264
Witness	... 2264
Words and Phrases	... 2264
Workmen's Breach of Contract Act	... 2282
Worldly affairs—Abandonment of	... 2292
Worshipper	... 2292
Worship, Right of	... 2292
Written Statement	... 2292
Wrongful attachment	... 2292
Zaildar	... 2292
Zamindar	... 2293
Zoroastrian Religion	... 2293
Zur-i-Peshgi Lease	... 2293

THE CIVIL DIGEST

(1911—1923)

VOL. IV.

MADRAS CANAL AND PUBLIC FERRIES ACT (II of 1890).

——S 19—*Ferry contractor's servant — Levy of toll—Presumption.*

The fact that the ferry contractor's servant levied excessive toll does not give rise to a presumption of the contractor's guilty connivance at the exaction made. (*Ayling, J.*) EMPEROR *v.* ARUMUKHAM PILLAI. **13 Cr. L. J 124 : 13 I. C. 780 : (1912) M. W. N. 69.**

MADRAS CITY CIVIL COURTS ACT (VII of 1892).

——S. 3—*Ejectment Suit—Jurisdiction of Small Cause Court and City Civil Court—Pres. Sm. C. C Act, S. 41.*

A suit in ejectment is not excluded from the cognizance of the City Civil Court, Madras, simply because an application to eject the tenant could be filed in the Small Cause Court. 22 M. 256; 38 Bom. 309 ; 4 L W. 402, Ref. (*Coutts Trotter and Ramesam, JJ.*) DORAISWAMI AIYANGAR *v.* NARAYANA AIYANGAR **16 L. W. '37 : (1922) Mad. 445 : (1922) M. W. N. 462: 43 M. L. J. 288.**

MADRAS CITY MUNICIPAL ACT (V OF 1878).

——Ss. 33 and 52—*Rules under S. 413—Sp. Rel. Act, S. 45.*

Where an objection against the inclusion of the applicant's name in the list of candidates for election was allowed, but the name was not directed to be struck off, *held*, that an application lies under S. 45 of Sp Rel. Act praying for the continuance of his name in the list. (*Bakewell, J.*) VIJIARAGHAVALU PILLAI, *In the matter of.* **24 I. C. 134 : 26 M. L. J. 310.**

——S. 58—*President of Corporation—Power of, to appoint and dismiss servants.*

The Officers of the Madras Corporation hold their office at pleasure. The President can appoint and dismiss subordinate officers and the latter have no cause of action against the Corporation for the dismissal. No notice or framing of a charge is necessary before dismissing a person holding office at pleasure. (*Wallis, C. J. and Oldfield, J.*) CHELLAM AIYAR *v.* CORPORATION OF MADRAS. **42 I. C. 513 : 6 L. W. 284.**

MADRAS CITY MUNICIPAL ACT (V OF 1878), S. 188.

——S. 104—*Profession tax—Basis of tax—Powers of High Court in appeal.*

In appeals from orders imposing a profession tax, the High Court can consider the circumstances of the case and say whether the basis of the imposition of profession tax is right or not. (*Turner, C. J. and Kindersley, J.*) SUNDARAM SASTRI *v.* PRESIDENT OF MUNICIPAL COMMISSION, MADRAS. **22 I. C. 237 : (1913) M. W. N. 932.**

——S. 150—*Applicability—Possession without use—Construction of section.*

S. 150 governs the possession of a vehicle without use. So a Motor Car under repair can be taxed though not in the owner's possession. The words 'let out for hire' 'kept' and 'used' are distinctly used. The words 'for hire' do not qualify the word 'kept'. (*Ayling and Napier, JJ.*) KRISHNA ROW *v.* PRESIDENT OF THE CORPORATION OF MADRAS. **40 Mad. 545 : 5 L. W. 121 : 35 I. C. 581 : 32 M. L. J. 99.**

——S. 172—*Revision of assessment—Application for—Who should hear.*

According to the section, ordinarily and always one of the Commissioners hearing an application for revision of assessment should be resident in or representative of the division in which the applicant resides or carries on business or the property assessed is situate. (*Benson and Sundara Aiyar, JJ.*) NARAYAN RAO *v.* PRESIDENT OF THE CORPORATION OF MADRAS. **17 I. C. 945 : 23 M. L. J. 591.**

——S. 176 and Sch. V, Class III—"*Dealer of every description*"—*Money-lender, if—Question of law.*

Whether a money-lender is within the phrase "Dealer of every description" in Cl. (3), Sch. 5 of the Act is a question of law under S. 176 of the Act. (*Sadasiva Aiyar, J.*) SWAMI CHETTY *v.* CORPORATION OF MADRAS. **14 Cr. L. J. 47 : 18 I. C. 271 : 23 M. L. J. 591.**

——Ss. 188 (1) and 150—*Omission to pay tax or to appeal—Plea of non-liability to tax.*

A person prosecuted under S. 188 of the Act for failure to pay tax within the prescribed period after service of notice cannot plead non-liability if he has not appealed to the standing

MADRAS CITY MUNICIPAL ACT (V OF 1878), S. 224.

committee against the imposition 34 M. 130, Foll. (*Abdur Rahim and Sadasiva Aivar, JJ.*) CROWN PROSECUTOR *v.* SUBRAYA NAICKER.
14 I. C 207 : 13 Cr. L. J. 207.

——Ss. 224, 427 and 443 -*Latrine—Meaning of—Requisition to execute work—Default—Liability—Omission to appeal.*

The word "latrine" includes water closet and conveniences with water connections. If a work or alteration is not completed within fourteen days, because the period is not reasonably sufficient for the purpose, the person concerned has committed no offence nor is there any Civil liability. (1918) 1 Ch. 62 Foll Though a party fails to appeal to the standing committee under S. 22 (1) he can defend a suit instituted against him under S. 443 of the Act. (*Wallis, C. J. and Napier, J.*) CORPORATION OF MADRAS *v.* APPASAMI PILLAI.
25 M L. T. 353 : 50 I. C. 247 : (1919) M W. N. 712

——S 247—*Object of—Construction—Power of corporation*

The powers given by S. 247 are for the purpose of promotion of the health, safety and convenience of the public and should be strictly construed. The Corporation by their purchase of a house abutting on a private street do not acquire for the public any further right than that of access to the house as an easement of necessity as had been previously enjoyed and the owner of the private street is entitled to restrain the public from trespassing to the same extent to which he was before entitled. Where a person put up stones to demarcate true limits of his private street, just at the place where it abutted on a public street, it is an obstruction within the meaning of S. 247 and therefore the Corporation can demand its removal. Such an order unfortunately happens to be an encroachment on the usual right of an owner to put a fence. (*Wallis, C. J. and Phillips, J.*) RUDRAPPA ACHARY *v.* CORPORATION OF MADRAS.
34 I. C. 735 : (1916) 1 M. W. N. 394.

——Ss. 262 and 325—*License to keep a timber depot—Erection of sheds.*

A license under S. 325 of the City Municipal Act to keep a timber depot does not cover the permission required under S. 262 to erect a shed necessary therefor. The President must fix the period for which and the boundaries over which the shed is to be erected. 42 Mad. 7. Foll. (*Spencer and Krishnan, JJ.*) NADAMUNI NADAR, *In re.*
21 Cr. L. J. 1 : 10 L. W 662 : 27 M. L. T. 125 : (1920) M W. N. 111 : 54 I. C. 49 : 38 M. L. J. 84.

——Ss. 262 and 420—*Erection of pandal—Offence—"Shall be made"—Meaning of.*

The expression "shall be made" in S 262 means only shall be constructed and not shall be composed of, and the mere existence of a pandal with inflammable materials does not, where there onno evidence that the accused constructed it, csestitute an offence. (*Sundara Aiyar and Spncer, JJ.*) EMPEROR *v.* ANDIASAVALOO NVIDOO.
(1912) M. W. N. 84 : 13 I. C. 832 : 13 Cr. L. J. 144.

MADRAS CITY MUNICIPAL ACT (V OF 1878), S. 426 (1).

——Ss. 282 and 420—*Pandal—Erection of—Inflammable materials—Offence.*

It is unlawful under the Act for any one to construct or allow to exist an inflammable pandal, without the written permission of the President of the Municipality. (*Sadasiva Aiyar and Napier, JJ.*) EMPEROR *v.* S. VARADACHARIAR.
24 M. L. T. 180 : 8 L. W. 581 : 47 I. C. 672 : 19 Cr L. J. 948.

——Ss. 337 and 115—*Slaughtering fees—Right to farm out.*

Under the Act, the Madras Corporation cannot farm out the right of collecting slaughtering fees. 20 W. R. 940, Ref. (*Wallis, J.*) CORPORATION OF MADRAS *v.* MASTHAN SAIB.
11 I. C. 665 : 21 M. L. J 788.

——S. 366—*Small-pox patient—Order for removal of—To Isolation Hospital—Disobedience—Offence.*

Before the removal of a person can be ordered by the Health Officer under S. 366 of the Municipal Act (1904), the officer has to be satisfied not only that a person is suffering from an infectious disease but also that the infected person has no proper lodging or is lodged in a place which is occupied by more than one family. The person against whom such an order is observed must be given an option of removing to the Isolation hospital or to some other proper place. The prosecution must make out not only that there has been disobedience to the order of the Health Officer but also that the disobedience was unlawful and negligent and had also the effect of spreading the disease. (*Seshagiri Aiyar, J.*) KANDASWAMI MUDALIAR, *In re.*
26 M. L. T. 386 : 10 L. W. 627 : 20 Cr. L. J. 785 : 53 I. C. 689 : 38 M. L. J. 80.

——S. 409 (19)—*By-law 177—"Food"—Meaning of—Aerated waters, if food.*

The term "food" does not include drinks and so a man found selling unwholesome aerated waters is not guilty of an offence under S. 409 (19) of the Act. (*Ayling and Hannay, JJ.*) EMPEROR *v.* GANAPATHY AIYAR.
39 M. 362 : 26 I. C. 311 : 16 M. L. T. 585 : 16 Cr. L. J 7 : 27 M. L. J. 732.

——S. 413—*Rules under—R. 5—Presidency Magistrate—Order of revision by High Court.*

A Presidency Magistrate authorised under R. 5 of S. 413 to make inquiries and decide the fitness of a candidate for election to a municipal Council is not a Court subject to the High Court and the latter cannot interfere in revision with his order. He is a referee between the President of the Municipal Council and the candidate. (*Ayling and Seshagiri Aiyar, JJ.*) VIJIARAGHAVALU PILLAI *v.* EMPEROR.
36 Mad. 581 : 16 M L. T. 128 : 25 I. C. 345 : 15 Cr. L. J. 593 : 27 M L. J. 227.

——S. 426 (1)—*License—Unsigned—Validity.*

A license which has been acted upon, but not signed by the President as required by S. 426 (1) is not invalid. (*Wallis, J.*) CORPORATION OF MADRAS *v.* MASTHAN SAIB.
11 I. C. 665 : 21 M. L. J. 788.

MADRAS CITY MUNICIPAL ACT (I OF 1884).

——S. 110 — *Profession tax —Liability of gross or net income.*

Net income is the proper basis of taxation. (*Sheppard and Boddam, JJ.*) SUBRAMANIAM *v.* PRESIDENT, MUNICIPAL COMMISSION, MADRAS.
22 I. C. 278 : (1913) M. W N. 935.

——**(III OF 1904).**

——**Ss. 3 (27), 248 (1)**—*"Public street"—Drains included in—Projections of Window*

"Public street" in S. 3 (27) includes the space covered by drains and hence, where a sun-shade projects on such drains, the President can, under S 248 (1), order its removal after due notice. (*Sadasiva Aiyar and Napier, JJ.*) CORPORATION OF MADRAS *v.* MOHANLAL SOWCAR.
30 I. C. 683. (Mad.)

——**(IV OF 1919.)**

——**S. 288** -*Permission to use machinery—License fee -- Onus on municipality to prove nature of machine.*

Permission granted under S. 288 of Act IV of 1919 for the use of a machinery is distinct from permission required for erecting it in payment of license fee is necessary for both purposes. The onus is on the municipality to show that the machinery makes such noise or vibration as amounts to a nuisance to the neighbourhood and also that it is dangerous under the last part of S 288 (1). In a prosecution for non-payment of license fee, the fact that the accused did not appeal to the standing committee does not estop him from objecting the validity of the imposition. (*Krishnan, J.*) A. E. SMITH, *In re*
18 L.W. 879 : 33 M L.T. 185 : 1924 M. 389 : 45 M. L. J. 731.

——**Sch. IV, R. 7**—*Insurance Company—Income—Onus.*

Under the proviso to R. 7 of Sch. IV of the Madras City Municipal Act, the onus is on an Insurance Company to show that its income could not have exceeded a certain figure, if it wants to claim the benefit of the proviso. (*Ayling and Venkatasubba Rao, JJ.*) THE SUN LIFE ASSURANCE COMPANY OF CANADA *v.* THE CORPORATION OF MADRAS.
15 L. W 330 : (1922) M. W. N. 155 : 31 M. L. T. 271 : 66 I. C. 800 : 1922 Mad 85 : 42 M. L. J. 283 (H. C.)

——**Sch. IV, R. 17**—*Reference to High Court —Scope of.*

On a reference under R. 17 of Sch. IV of the Act, the High Court is not bound to give a decision on the questions involved in the suit other than those specifically referred for decision; even as regards these, the High Court can refuse to answer any of them, if the same is not necessary for the decision of the case. "Mortality tables" explained. (*Ayling and Venkatasubba Rao, JJ.*) THE SUN LIFE ASSURANCE COMPANY OF CANADA *v.* THE CORPORATION OF MADRAS.
15 L. W. 330 : (1922) M. W. N. 155 : 31 M. L. T 271 : 1922 Mad. 85 : 66 I. C. 800 : 42 M. L. J. 283 (H.C.).

MADRAS CIVIL COURTS ACT (III OF 1872), S. 12.

MADRAS CITY POLICE ACT (III OF 1888).

——**S 71 (xi)**—*Scope of—Obstruction other than by vehicles and animals—Intention.*

S. 71 (xi) is not limited to cases of obstruction caused by vehicles and animals only but only prohibits any obstruction of a thoroughfare in any manner on proof of an intention to obstruct. (*Kumaraswami Sastri, J.*) KUPPAMMAL *v.* EMPEROR.
14 L. W. 617 : 65 I. C. 639 : (1921) M. W N. 770 : 41 M. L. J. 562.

MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922), Ss. 9 and 10—*Tenant against whom decree in ejectment was passed before Act—Cannot apply under S. 9—Application as legal representative of tenant—Duty of court to determine representative character.*

Where a decree has been passed before the Act came into force for the ejectment of a tenant, it is not open to the tenant to apply under S. 9 of the Act, for an order directing the landlord to sell the land to him. Where an application is made under the Act by a person claiming to be the legal representative of a tenant it is the duty of the court to adjudicate upon his title if there was any contest regarding it and consequently the representative character of the applicant should be determined by the court in the application itself. (*Spencer and Venkatasubba Rao, JJ.*) LATIFA BI *v.* MOTTAI AMMAL.
46 Mad. 836 : 17 L. W. 341 : (1923) M W. N. 233 : 32 M. L. T. 290 : 1923 Mad 320 : 44 M. L. J. 271 (H C.).

——**S. 9**—*Trust land—Tenant of—No right to enforce compulsory sale of land under S. 9.*

A tenant in occupation of trust land belonging to a temple or mosque cannot enforce a compulsory sale thereof under S. 9 of the Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court. (*Spencer and Venkatasubba Rao, JJ.*) PARTHASARATHY AIYANGAR *v.* DORASWAMI NAYAGAR.
46 Mad. 823 : (1923) M. W. N. 148 : 1923 Mad. 308 : 44 M. L. J. 91.

MADRAS CIVIL COURTS ACT (III OF 1873).

——**Ss. 12 and 13**—*Jurisdiction—Decree by Dt. Munsif for more than Rs. 5,000—Appeal—Forum.*

A suit, of which the subject-matter as valued by plff. was within the jurisdiction of the Dt. Munsif was accepted and decided by him and he passed a decree for more than Rs. 5,000. *Held* that an appeal from his decree lies to Dt. Court as usual and not to the High Court. (*Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.*) PUTTA KAUNAYYA CHETTI *v.* RUDRABHATTA VENKATA NARASAYA
40 Mad. 1 : 32 M. L. J. 221 : 5 L W. 580 : 39 I. C. 439 : (1917) M W. N. 367 (F.B.).

——**S. 12**—*Jurisdiction.*

A suit to recover Rs. 1,200 from the defts. and also loss sustained by the improper action of the defts. which the plff. values at Rs. 16,000 in his plaint is beyond the jurisdiction of the Dt. Munsif's Court. (*Munro and Sankaran Nair, JJ.*) KALIBA SAHIL *v.* BALGIA NACHIAAL.
(1911) 1 M. W. N. 320 : 9 I C 886 : 9 M. L. T. 483.

MADRAS CIVIL COURTS ACT, (III OF 1873), S. 13,

——— S. 13—*High Court—Powers of revision —Interlocutory orders.*

The High Court can interfere in revision with the interlocutory orders of Subordinate Courts. This section does not relate to revision. (*Miller and Sundara Aiyar, JJ.*) CHALASAMY RAMIAH *v.* CHALASAMY RAMASAMY **11 M. L. T. 155 : 13 I. C. 903 : (1912) M. W. N. 199.**

———S. 14—*Amending Court-fees Act (VI of 1905)*

The valuation for purposes of jurisdiction of a suit to recover possession of land from a tenaut is not its market value under S. 14 but one year's rental payable by the tenant, for the year next before the date of presenting the plaint under S. 7, Cl XI (*cc*), of the Court-fees Act (*Sadasiva Aiyar and Phillips, JJ.*) NARAYANASWAMI NAIDU *v.* VENNAVALLI SESHAGIRI RAO **39 Mad. 873 : 18 M. L. T. 398 : 2 L. W. 1031 : 31 I. C. 104 : 29 M. L. J. 572.**

——— S. 16—*Hindu converts to Mahomedanism —Law applicable—Custom—Mahomedan law.*

Under S. 16 of the Madras Civil Courts Act where the parties are Hindu converts to Mahomedanism the Mahomedan law of succession *prima facie* applies to them and a custom at variance with the Mahomedan law if proved may be given effect to. (*Sir Lawrence Jenkins*). MAHOMED IBRAHIM ROWTHER *v.* SHAIK IBRAHIM ROWTHER. **45 Mad. 308 : 30 M. L. T. 85 : 15 L. W 354 : (1922) M. W. N. 470 : 36 C. L. J. 64 : 24 Bom L. R. 944 : L. R. 3 P. C. 149 : 26 C. W. N. 793 : 49 I. A. 119 : 1922 P. C. 59 : 43 M. L. J. 69 (P. C.)**

———S. 16—*Scope of.*

The scope of this section is considered and the principle underlying it is stated in this decision. (*Tyabji and Spencer, JJ.*) KUNHAMBI *v.* KALNATHAR. **38 M. 1052 : 16 M. L. T. 17 : 24 I. C. 528 : 27 M. L. J. 156.**

———S. 24—*Affidavit sworn before Nazir in the absence of Head Clerk.*

An affidavit sworn before the Head Clerk of a Dt. Munsif's Court who was acting for the Deputy Nazir in his absence is none the less a valid affidavit. It is a declaration which a Court of justice is bound to receive as evidence of the facts stated in it. (*Oldfield and Napier, JJ.*) KOTAYYA PILLAI. *In re*. **27 I. C. 159 : 16 Cr. L. J. 111.**

———(VII OF 1892).

———S. 3—*Suits relating to office—Valuation.*

A suit for a declaration relating to an office and not to property is incapable of valuation and is not excepted from the provisions of S. 3 of the Act. (*Bakewell, J.*) MURZA HYDRR ALI SAHIB *v.* HUSSAIN RAJA SAHIB. **24 I. C. 316 : 1 L. W. 398.**

———S. 5 (2)—*Transfer of suit—C. P. Code, S. 24.*

S. 24, C.P.C. does not authorise the transfer of a suit from the file of the Small Cause Court to that of the City Civil Court. This can be done by the Chief Justice of the High Court under S. 5 (2) of the City Civil Courts Act. (*Wallis, C. J.*) BAGIAMMAL *In re.* **38 I. C. 367 : (1917) M. W. N. 288 : 32 M. L. J. 258.**

MADRAS COURTS OF WARDS ACT, (I OF 1902), S. 45.

MADRAS COURTS OF WARDS ACT (I OF 1902)

———S. 4— *'Ward'— Meaning.*

(Per *Krishnan. J.*) "Ward" does not a mean person who was once a ward but is no longer a ward of the Court of Wards. (*Oldfield and Krishnan, JJ.*) SRINIVASA RANGA ROW *v.* RAJAH OF KARVETNAGAR. **40 I. C. 811 : 5 L. W. 725.**

———S. 8—*Collector—Powers of.*

The position of Collector managing an estate is different from that of a trustee in the matter of granting long leases. (*Boddam and Sankaran Nair, JJ.*) NAGU CHETTY *v.* BHASKARA. **(1911) 1 M. W. N. 6 : 9 I. C 41 : 9 M. L. T. 191.**

———S. 35—*Court of Wards — Powers of— Hindu widow proprietrix.*

'Property' in S. 35 means moveable and also immoveable property itself and not the interest only of a ward widow therein. Powers of Court of Wards under the Act are not limited but absolute and they can sell the entire property, not merely the ward's limited estate. (*Wallis, C J. and Burn, J.*) N. NAVANEETHA KRISHNA *v.* RAMASAMI PANDIA KALVAR. **40 Mad. 871 : (1917) M. W. N. 201 : 39 I. C. 263 : 33 M. L. J. 277.**

———Ss. 37 and 41—*Notification of claim— Failure—Interest—Revival.*

The person having pecuniary claims against the estate under Court of Wards must himself or through agent, notify his claim to the collector and should not rely on the notification made by any other person. The claim for interest in the estate must be revived after the estate is handed over to the Ward. (Per *Oldfield, J.*) According to S. 41 the Court of Wards should not only discharge the debts during its tenure but should also reduce the amount of debts still due. S. 41 postpones unnotified debts to those notified under S 38 (1) of the Act even after the Court has passed the estate to the Ward. (Per *Krishnan, J.*) This is not a permanent injunction. A creditor disabled to enforce his debt, during the tenure of Court of Wards. is not necessarily disabled after the cessation of Court's tenure. (*Oldfield and Krishnan, JJ.*) SRINIVASA RANGA ROW *v.* RAJAH OF KARVETNAGAR. **40 I. C. 811 : 5 L. W. 725.**

———S. 43 (5), 32 and 55—*Payment—Calculation of.*

Ss. 32 and 55 show that the calculation mentioned in S. 43, Cl. (5), determines the net income that a managing Court of Wards shall set apart for payment. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) LODD GOVIND DOSS *v.* RAJAH OF KARVETNAGAR. **30 I. C. 357 : 29 M. L. J 219.**

———S. 45—*Lim. Act, S. 15—Exclusion of time.*

The provision for exclusion of time when calculating the limitation prescribed by the Lim. Act applies only when the decrees have been transferred for execution to the Collector. An amendment of it in execution petition ought not to be permitted to revive a barred claim. (26 M. 378 ; 26 M. L. J. 83 ; Weldon *v.* Neal. 19 Q. B. D 394, Foll.) (*Wallis and Sadasiva Aiyar, JJ.*) KUMARA VENKATA PERUMAL RAJA BAHADUR VARU *v.* VELAYUDA REDDI. **24 I. C. 195 : 27 M. L. J. 25.**

MADRAS COURT OF WARDS ACT, (I OF 1902) S. 49.

——S. 49 — *"Suit relating to property of Ward"—Suit on pro-note.*

A suit for money on promissory note against a ward is a suit relating to the property of the ward within S 49 (1) of the Act. (*White, C. J. and Sankaran Nair, J.*) VENKATACHELAPATHY *v.* BOMMAVARA SATYANARAYANA. **25 I. C. 890 : 37 Mad. 283.**

——S. 59—*Release by the Court of Wards of an estate—Appointment of guardian—Powers of guardian—"Property of the minor", meaning of—Trust property not included—Direction for taking accounts trust property by the District Court, validity of— Consent of parties cannot give jurisdiction.*

Where on the withdrawal by the Court of Wards from the management of an estate, a guardian is appointed for the property of the Ward under S. 59 of the Act, such guardian has authority only over the property of the Ward over which the Ward has beneficial interest and not over the properties of a religious institution of which the Ward happens to be a trustee. The expression "property of the minor" in S. 59 of the Court of Wards Act has reference only to the property of which the minor is owner. Where the District Court gives directions to such a guardian appointed under S. 59 of the Act for the examination of the accounts of trust property a commissioner and for the checking of the collections in a temple of which the Ward is a trustee, such directions are beyond the powers of the District Court. The District Court which is incompetent to deal with the matter cannot acquire any jurisdiction by the consent of the parties. 36 Cal. 193 at p. 206 : 16 C. L. J. 77 and 36 Mad. 39 Ref. Such a guardian managing the trust properties would be a trustee *de son tort* and he would be liable for the Acts done in his unauthorised management to the real trustee and not to the District Court. (*Spencer and Venkatasubba Rao, JJ.*) VARADACHARIAR *v.* RAJA RAMAKRISHNAMMA GARU. **(1923) M W. N. 203 : 32 M. L. T. (H C) 258 : 17 L. W. 744 : 1923 Mad. 497 : 44 M. L. J. 367.**

——S. 63 — *Ward — Trustee of temple—Manager—Power to suspend archakas—Liability of minor trustee.*

A manager, appointed by the Court of Wards under S 63 of Act I of 1902 to discharge the duties of a temple trustee, during the minority of ward, who is the trustee of the temple has power to suspend or dismiss temple servants and archakas, who are bound to obey his orders. A minor trustee is not liable for acts done by the officer appointed by the Court of Wards under the statutory authority conferred by S. 63 of Act I of 1902. (*Wallis and Sankaran Nair, JJ.*) GOVINDA IYENGAR *v.* RAGHU NATH DORASINGHAM. **15 I. C. 902.**

——S. 66—*Rules under—R.* 58—*Remissions—Power to grant Onus.*

The Manager has no greater authority than the Collector under R. 58 and the party who sets up the plea must show that the Manager was specifically authorised to grant remissions. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) MADHAVA BHUNIJ SANTO *v.* RAMACHANDRA MARDARAJ. **31 I. C. 468.**

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S. 21.

——*Ootacamund municipality By-law* 54 *—Other building material, meaning of—Whether includes sand.*

"Other building material" within the meaning of the By-Law No. 54 of the Ootacamund Municipality, must be "*ejusdem generis*" to bricks, stones and road metal in its potentially deleterious effect on the public thoroughfares and therefore the sand cannot be included in it. (*Ayling, J.*) *In Re* HASSAN SAHIB. **30 I. C. 1004 : 16 Cr. L. J. 716.**

——S. 10—*Status of Municipal Councillor.*

The status of the Municipal Councillor in Madras Presidency created by S. 10 of the Act is subject to election rules framed by the Governor-General in Council. The term 'election' means a valid election not set aside under R. 36. (*Ayling and Spencer, JJ.*) NATARAJA MUDALIAR *v* MUNICIPAL COUNCIL OF MAYAVARAM. **36 Mad. 120 : 10 M. L. T. 219 : 12 I. C. 311 : (1911) 2 M. W. N. 233 : 21 M. L. J. 878.**

——Ss. 18 and 28—*Chairmen, election of—Candidate presiding over his own election meaning of "chairman" "Taking part in a ballot"—Meaning of.*

Rule 4 of the rules for election of chairmen of Municipalities under the Madras District Municipalities Act, provides that a candidate for the post of a chairman of a municipality cannot preside or act as a returning officer at an election meeting in which his name has been proposed and seconded. The reason for this rule is that a man cannot be allowed to judge his own cause. The phrase "taking part in a ballot" in rule 4 is not restricted to the mere act of voting, but applies both to the act of presiding and acting as a returning officer.

The word "chairman" in S. 28 includes "chairman delegate" whom a chairman appoints under S. 18, when he cannot act as a chairman. Rule 11 of the rules for the decision of election Municipal disputes, provides that the party trying to have the election set aside must prove that not only the rules were not complied with but that by such non-compliance the results of the election were materially affected.

A Subordinate Judge while dealing with an election concern under the Madras Municipal Election Rules sits as a Court, subordinate to the High Court and the latter Court can interfere in revision under S. 115, C. P. C. (*Wallace, J.*) A. K. G. AHMAD THAMBI MARICAIR *v.* V. S. BALASA MARACAYAR. **16 L W. 878 : 46 M 123 : 1922 M. W. N. 813 : 1923 Mad. 254 : 44 M. L. J. 69.**

——Ss. 21 and 27—*Powers of Municipal Council*—Bona fide *exercise—Discretion—Interference of Courts.*

A Municipal Council is a Corporation with power to contract and to do all things necessary for the purposes of its constitution, the Municipal fund being held by it for the purposes of the Act. The Court will not interfere with the operations

MADRAS DISTRICT MUNICIPALITIES ACT, (IV OF 1884) S. 24.

of a Municipal Council if they are within its authorisation and the Council Acts *bona fide*. It is the best judge not only of what is most conducive to its own interest but also of what is proper and fitting as regards third parties and it will be left unchecked to take or not to take lands for promoting sanitation. (*Oldfield, J.*) N. N. KRISHNASWAMI IYER, *In re.* **48 I. C. 128 : 35 M. L. J. 251.**

———S. 24—*Street drains—Vest in the Municipality—Adverse possession.*

Under S. 24 of the Madras Dt. Municipalities Act, drains attached to the street vest in the Municipality though the sites of the drains may belong to the owners of the shops abutting the street. There can be no adverse possession against the Municipality unless the user of a drain as a drain is openly prevented. (*Sadasiva Aiyar and Burn, JJ.*) ARUNACHELLA CHETTIAR *v.* MUNICIPAL COUNCIL OF MAYAVARAM.
11 L. W. 202 : 55 I. C. 493 : (1920) M. W. N. 229 : 39 M. L. J. 222.

———Ss. 32 and 280—*Chairman—Delegation of powers—Complaint by the delegate.*

Where the chairman authorises a person under S. 32 even to lodge a complaint, he need not be specially authorised under S. 280 to complain in respect of offence under the Act. (*Abdur Rahim and Ayling, JJ.*) KRISHNASAMI NAIDU, *In re.*
12 L. W 427 : 22 Cr. L. J 315 : 60 I. C. 1003 : (1920) M. W. N. 648.

———Ss. 39 A, 268 and 280—*Complaint by secretary—Municipal Council—Power to withdraw.*

A Municipal Council cannot withdraw a complaint duly instituted by the Secretary of the Council under S 268 of the District Municipalities Act. (*Sankaran Nair and Ayling, JJ.*) PARMANANDA NADAR *v.* KARUNAKARA DOSS
15 Cr. L. J. 299 : 23 I. C. 507 : 27 M. L. J. 817.

———S. 45—*Suit by municipality for recovery of money due from toll contractor—Contract not in writing—Effect of.*

In a suit by a Municipal Council against a contractor who had bought in an auction the right to collect certain fees or tolls in the Municipality for the balance of money due from him, the defence was that the contract was not in writing as required by S. 45 and that the claim was therefore unsustainable. *Held*, that the defendant having enjoyed the right of collecting the tolls for a year, was liable on an implied contract and the Municipal Council was entitled to a decree against him. (*Lawford* v. *Bellericay Rural Council*, (1903) 1 K. B. 772 followed. (*Krishnan, J.*) SRIRANGAM MUNICIPAL COUNCIL *v.* BODI.
18 L W. 180 : (1923) M. W. N. 872 : 1924 M. 162 : 45 M. L. J. 164.

———S. 45—*Contract—Not conforming to section—Suit on contract, if maintainable.*

If a contract by the Municipality, as per example, a lease of the right to sell in a market is not in writing in accordance with the provisions of S. 45 of the Municipal Act, no suit could be maintained upon it. (*Benson, O. C. J. and Sundara Aiyar, J.*) MADURA MUNICIPAL COUNCIL *v.* VEERANNA KONE. **16 I. C. 890.**

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884) S. 60.

———S. 53—*Profession tax—Carrying on business within the Municipality—Shipping Company.*

The Clan Line Steamers, a shipping company which earned its profits by carriage of goods by sea, and in the course of its business traded with a port in Madras at which the ships called for cargo could not be said to exercise their trade of carrying on their business within the port so as to make them liable for professional tax under S. 53 of the Madras District Municipalities Act. The test is where, in substance, the business of making contracts is carried on and controlled. GRAINGER *v.* GOUGH (1896) A. C. 325, LOWELL AND CHRISTMAS, LTD. *v.* COMMISSIONER OF TAXES. (1908) A. C 46 Ref. (*Wallis, C J. and Napier, J.*) THE MUNICIPAL COUNCIL OF COCANADA *v.* THE CLAN LINE STEAMERS, LTD. **42 Mad. 455 : 25 M. L T. 192 : 51 I. C. 692 : 10 L. W. 15 : 36 M. L. J. 226.**
[Affirming on appeal 46 I. C. 500 : 34 M. L. J. 145.]

———S. 53—*Profession tax—'Carrying on business'—Test for—Bill of lading.*

A shipping company registered at Glasgow was represented by an agent in Madras where they paid professional taxes. The company was represented by another agent at Cocanada, and this agent's functions were to negotiate for shipment of cargo and receive payments by commission but the shipping arrangements were made by the agent at Cocanada through the agent at Madras and the booking space was made by the latter's order but bills of lading were signed by the agent at Cocanada. *Held*, that from the substance of the matter it appeared that the agent at Cocanada did not act independently but his actions were controlled by the agent at Madras and therefore the company was not liable to pay profession taxes at Cocanada, and that a bill of lading which is only an evidence of the contract of affreightment cannot be regarded as the contract itself. When a company is paying profession tax at a place where it has its head office, it need not pay such tax at any other place. where it carries on a subsidiary business through an agent acting not independently under instructions from the head office A merchant does not exercise his trade in every place where he has customers. It is the duty of the Court to look at the question broadly and in substance. (*Coutts-Trotter, J.*) CLAN LINE STEAMERS, LTD *v.* MUNICIPAL COUNCIL OF COCANADA. **46 I. C. 500 : 34 M. L. J. 145.**
[Affirmed on appeal 51 I. C. 692 : 42 M. 455.]

———S. 53—"*Person in receipt of pension*"—*Meaning of.*

A 'person in receipt of pension' in S. 53 of the Act means a person who receives a pension. (*Sundara Aiyar and Miller, JJ.*) MAHADEVA SASTRI *v.* MUNICIPAL COUNCIL, KUMBAKONAM.
21 I. C. 847 : (1913) M. W. N. 935.

———Ss. 60 and 53—*Profession tax—"Holding office"—Meaning of—District and Sessions Judge, Cuddalore, staying at Kodaikanal.*

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S. 61.

The word "holding" does not necessarily involve any suggestion of discharging duties connected with the office. Where the District and Sessions Judge of Cuddalore spent his vacation in Kodaikanal and paid profession tax there, he is not liable to pay the tax again at Cuddalore. (17 Mad. 453, Dist.) The liability to pay professional tax arises from participation in the benefit and convenience conferred by municipality upon residents within municipal limits.

No distinction can be drawn between administrative and judicial functions of a Dist. and Sessions Judge. (*Sankaran Nair and Ayling, JJ.*) HENRY MOBERLY *v.* MUNICIPAL COUNCIL OF CUDDALORE.
38 M. 879 : 23 I. C. 398 : (1914) M. W. N. 171

——— **Ss. 61 and 53**—*Owner and occupier—Capacity of—Person in dual capacity—Suit to recover tax—Declaration of right.*

Where a person has a dual capacity as the trustee of a temple and the head of a mutt, and in his former capacity occupies a building owned by him in his latter capacity, he is an occupier for refund of money, paid by him in that capacity. In a suit to recover only a tax illegally paid, no declaration as to future rights and liabilities should be given. A person casually investing his surplus money in mortgage or personal security is not a money lender within the meaning of S. 53 read with Sch. A, Cl. 3 of the Act which requires a continuous and systematic lending amounting to trade to make a money-lender. (*Sadasiva Aiyar and Tyabji, JJ.*) MUNICIPAL COUNCIL OF TIRUPATI *v.* PRYAG DOSSJEE.
1 L. W. 513 : 16 M. L. T. 98 : 26 I. C. 96 : 27 M. L. J. 231.

——— **Ss. 72 and 73 (2)**—*Theatre unfit for use and unused owing to removal of part roofing—Exemption from tax.*

Where a part of the roof is removed for the purpose of effecting repairs and the building is rendered unfit for use, it cannot be held to be completely demolished or destroyed within S. 73 (2) of the Act as to completely exempt it from liability to tax. As a building actually unused, it is liable for half the usual tax under S. 72 of the Act. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) MUNICIPAL COUNCIL OF TANJORE *v.* KRISHNA PILLAI.
44 Mad. 354 : 13 L. W. 225 : (1921) M. W. N. 139 : 40 M. L. J. 306.

——— **S. 89**—*Penal Code, S. 166—Attachment cart while in motion for want of license.*

An attachment of a cart for want of license just at time when the goods of passengers are placed in it and the passengers are about to get into it is illegal under S. 89 of the Act. A seizure under such circumstances is an offence under S. 166 of the Penal Code. (*Miller, J.*) SUBRAYA IYER *v.* EMPEROR.
14 I. C. 199 : 13 Cr. L. J. 199.

——— **Ss. 92, and 191**—*Contract Act, Ss. 11 and 23—Lease of right to collect slaughtering fees—Legality.*

A Municipal Council has no power to farm out the right to collect slaughtering fees. A lease of such a right is void under Ss. 11 and 23 of the Contract Act. (*Ayling and Spencer, JJ.*) MUNICIPAL COUNCIL OF KUMBAKONAM *v.* ABBAH SAHIB.
36 M. 113 : 10 M. L. T. 168 : 11 I. C. 669 : (1911) 2 M. W. N. 95 : 21 M. L. J. 790.

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S. 160.

——— **Ss. 103, 92 and 11**—*Toll gate kist—If tax—Prosecution for non-payment under S. 92.*

A "toll-gate kist" is not a tax under S. 103 but it is "money due under a contract" under S. 92. Therefore a prosecution for such non-payment will not lie under S. 111 of the Act. (*Ayling, J.*) MOHAMAD IBRAHIM SAHIB *v.* MUNICIPALITY OF ANAKAPALLI.
30 I. C. 750 : 16 Cr. L. J. 702.

——— **Ss. 113, 117, 216 to 221**—*Municipal Council—Duty of to remove night soil—Right of, to levy fees for transport from owner's premises.*

Under the provisions of the District Municipalities Act of 1884 as amended by the Act of 1897, it is the duty of the Municipal Council to remove night soil from occupiers' building or land and it is illegal for the council to charge any fees for such transport (*Sadasiva Aiyar and Napier, JJ.*) SOUTH INDIAN RAILWAY CO., LTD. *v.* MUNICIPAL COUNCIL, TRICHINOPOLY.
43 Mad. 905 : 12 L. W. 411 : 59 I. C. 697 : (1920) M. W. N. 618.

——— **Ss. 147 and 269**—*Amending Acts (3 of 1897) and (5 of 1909)—Water—Contract for use of—Prior to Amending Act—No term in contract for payment for excess user for domestic purposes—Change in the law—Effect of.*

Under S. 147 of the Dt. Municipalities Act as amended in 1909, no agreement is necessary to make the person using water for domestic purposes in excess of the prescribed limits or for non-domestic purposes liable for tax in respect of the water consumed by him. This liability is not in any way affected by the fact that the person prior to the passing of the Amending Act of 1909 entered into a contract with the Municipality for the use of water and was liable under the contract for using water for non-domestic purposes only. Payments due in respect of excessive use of water for domestic purposes can be recovered under S. 269 as a tax.

Per *Spencer, J.*—When a new liability is imposed by newly enacted provisions of law it has the effect of annulling all contracts made prior to the enactment. (*Sadasiva Iyer and Spencer JJ.*) THE MUNICIPAL COUNCIL OF CONJEEVARAM *v.* VENKATACHARIAR.
11 L. W. 574 : 57 I. C. 718 : (1920) M. W. N. 469 : 39 M. L. J. 58.

——— **S. 160**—*Encroachment—Municipality's power to remove, when title lost by adverse possession.*

Where a part of a street vested in a Municipality is effectively occupied and acquired by adverse possession against the Municipality, it ceases to be a street and the Municipality has no power to remove the encroachment on it under S. 168 of the Act (23 M. L. J. 479, Dist.) (*Sadasiva Aiyar and Tyabji, JJ.*) CHAIRMAN, MUNICIPAL COUNCIL *v.* SUBBA PANDITHER.
38 M. 456 : 14 M. L. T. 187 : 20 I. C. 956 : (1913) M. W. N. 904 : 25 M. L. J. 297.

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S. 168.

——S. 168—*Public street—Encroachment—Adverse possession—Drains.*

The streets and drains therein in Municipal Towns are vested in the Municipalities by Govt for the purposes for which they were constituted. Their right is not a mere right of easement, but a special kind of property in the site previously unknown to law, but created by statute Although the soil may belong to one person another person may be the owner of a building above the soil and the right to occupy a portion of the space above the soil may be acquired by limitation. Though an encroachment has been in existence for the statutory period and the Municipality's right to the space covered thereby is extinguished, still the statutory right of the Municipality to demolish the encroachment on a drain in the street is not lost. (*Sundara Iyer and Sadasiva Iyer, JJ.*) BASAVESWARASWAMI *v.* HAVALIJI HUSSAIN. **38 M. 6 : 12 M L. T. 405 : 17 I. C. 158 : (1912) M. W. N. 1080 : 23 M. L. J. 479.**

——Ss 172 and 173—*Misfeasance—Liability of Municipality for—Gravel negligently thrown on public road—Injury—Damage—Negligence of contractor—Effect of.*

It is the duty of Municipalities to lay and maintain roads so that the public may pass over them safely and they are not liable for the injuries resulting to the public through the negligent or improper performance of that duty. The liability of statutory bodies for negligence is not based on whether a profit is derived by the levy of a cess or toll from the public. The question whether it gives them an income over expenditure is not a criterion for enforcing liability. Municipalities in India do not act in the exercise of sovereign power as agents of the State in paying or maintaining roads (1915) M. W. N 39, Dist. In the case of statutory bodies entrusted with the performance of public trusts, their liability cannot be shifted on to a contractor employed by them for a particular purpose. They may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But they are not thereby themselves relieved from liability to those injured by the failure to perform it. The public have a right to use the full breadth of a public road and any obstruction to such use amounts to misfeasance.

Per *Napier, J.*—S. 173 of the Madras Dt. Municipalities Act does not apply to the case of a contractor executing repairs to the road under the orders of a Municipal Council.

Quaere.—Whether a public body can be liable for mere non feasance. Whether the making of roads by the Government is an act of sovereign power. (*Seshagiri Aiyar and Napier, JJ.*) THE MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* WILLIAM FOSTER. **44 I. C. 308 : 41 M. 538.**

——S. 188. (1)—*Scope of—Livery stable, meaning of.*

Under Cl. (1) of S. 188 of the Act, a license ought to be taken out for keeping a place as is indicated in the clause. In all such cases, the element of letting out on hire is involved in the use of the place. A stable is a "livery stable" within Sub-Cl. (I) of (1) of S. 188 whether the number of horses kept in it for hire is one or more than one. (*Sadasiva Aiyar and Napier, JJ.*) PUBLIC PROSECUTOR *v.* MAHOMED SHERIFF SAHIB. **49 I. C. 348 : 20 Cr. L. J. 156 : 36 M. L. J. 27.**

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S. 249.

——Ss 188 (1) (b) (5) and 189—*License, application for—To boil paddy—No order passed within thirty days—Scope of, S. 188 (5).*

Where no order was passed on an application for license to boil paddy till after the expiry of thirty days fixed by S 188 (5) of the Act. and the accused boiled paddy, *Held*, no offence was committed as the place must be deemed to have been licensed for the next official year under S. 188 (5). S. 188 (5) should not be read subject to the reference to the refusal of the license in S. 189 of the Act. (*Oldfield and Seshagiri Aiyar, JJ.*) *Re* MATURI VENKATASUBBAYYA. **40 Mad. 589 : 41 I. C. 655 : 18 Cr. L. J. 831.**

——S. 196 (5)—*License—Discretion of Municipality.*

Under the section a Municipality has an absolute discretion to refuse to grant license. 28 M. 520, Doubted. (*Seshagiri Aiyar and Napier, JJ.*) NAGALINGA THEVAN *v.* MUNICIPAL COUNCIL, KUMBAKONAM. **2 L. W. 368 : 28 I. C. 709 . 17 M. L. T. 311.**

——Ss. 207, 217 and 264-A—*Latrines—Order of Council regarding—Failure to comply with—Prosecution—Council not bound to call on the accused to provide moveable receptacles.*

A Municipal Council is not bound to call upon the accused to provide moveable receptacles under S. 217 of the Dt. Municipalities Act before proceeding to take action under S. 264-A. There is no duty imposed by the Act on the Municipal Council as a necessary condition precedent to the institution of the prosecution under S. 264-A to have constructed the latrine themselves under S. 264. (*Sadasiva Aiyar and Napier, JJ.*) THE PUBLIC PROSECUTOR *v.* SETTIGIRI NARAYANA REDDI. **42 Mad. 57 : 48 I. C. 161 : 19 Cr. L. J. 981 : 35 M. L. J. 442.**

——S. 222—*Offensive liquid—Letting into street—Offence.*

An occupier of land within a Municipal area allowing offensive liquid to flow into the street is guilty of an offence under the section, though there are no side drains for the street. (*Sadasiva Aiyar, J.*) PUBLIC PROSECUTOR *v.* ATTAWAR RAMA RAO. **38 I. C. 768 : 18 Cr. L. J. 384.**

——Ss. 249, 338 (b) and 365—*Notification issued in July 1920 purporting to be under the Act before the new Act came into force—Validity—Conviction—Penal statute—Construction.*

The accused was convicted and sentenced for the offence of storing and selling grain wholesale within the Cannanore Municipal limits without the license of the Municipal Chairman under Ss. 249 and 338 (b) of the Madras District Municipalities Act V of 1920 contrary to a notification issued in July 1920 by the Municipal Council constituted under the repealed Act of 1884 purporting to act under S 249 of the new District Municipalities Act V of 1920, some 2 months before the new

MADRAS DIST. MUNICIPALITIES ACT, S. 250.

Act was put in force. On revision, *held*, that the notification was not a valid one under the new Act because the Council purported to act before the new Act came into force and the notification was therefore invalid and consequently accused was not guilty of the offences under the new Act. The fact that the petitioner was in no way prejudiced is immaterial when the question arises in connection with the application of a penal provision as a strict construction of the law is required in such a case. The notification cannot be supported as a "rule" "by law" or "regulation" under the proviso to S. 305 of the new Act, as the conditions requisite for that purpose are not satisfied. (*Oldfield and Krishnan, JJ.*) SESHA PRABHU *v.* EMPEROR.

(1922) M. W. N. 79 : 66 I. C. 429 : 31 M. L. T. 314 : 23 Cr. L. J. 285 : 42 M. L. J. 149 (H. C.).

——S. 250—*Rebuilding of factory which was burnt down not within section.*

S. 250 only applies where a person intends for the first time to construct or establish any factory, workshop or workplace. It cannot apply to a case where without changing the machinery, the shed in which it is kept is rebuilt as the prior one was burnt down. (*Krishnan, J.*) GARINE SATYANARAYANA, *In re.*

17 L.W. 249 : 24 Cr. L. J. 453 (2) : 1923 Mad. 375 (1)

——S, 250 (1) (a)—R. 4, note. 1—*Rules under Registration of voter—Refusal of—Liability of Chairman—Good faith.*

An application made by the plff's. firm to be registered as a voter was rejected and the firm's representative was not allowed to vote. In a suit for damages by plff. it was, *held* (1) that the test to be applied was whether the Chairman passed his order in good faith after "due care and diligence", (2) that the Chairman who was responsible for the ambiguous entry should have *held* an enquiry if he had a doubt as to the identity of the representatives and (3) that as he had acted improperly he was liable. 31 B. 37 ; 24 C. 107 Foll. (*Ayling and Seshagiri Aiyar, JJ.*) DRAVIYAM PILLAY *v.* CRUZ FERNANDEZ.

18 M. L. T. 518 : 31 I. C. 322 : 29 M. L. J 704.

——S. 261—*Notice—Suit for compensation for breach of contract.*

Notice under the section is not necessary for suits for compensation for breach of contract. A suit to recover compensation for breach of contract to remove rubbish which was interfered with by Municipal servants is not governed by the section. (*Spencer and Napier, JJ.*) MUNICIPAL COUNCIL OF KUMBAKONAM *v.* VEERAPERUMAL PADAYACHI.

(1915) M.W.N. 143 : 28 I.C. 45: 28 M L.J 147.

——S. 262 (2) — *Profession tax levied on wrong estimate—Suit for recovery of—Bar.*

A suit against a municipality for recovery of professional tax levied by them on the ground that it was based on a wrong estimate of income is barred under S. 262 (2) of the Dist. Municipalities Act. The remedy is by way of appeal to the Council under S 97 of the Act. (*Krishnan, J.*) MUNICIPAL CHAIRMAN, VIRUDUPATTI *v.* SARAVANA.

54 I. C. 454 : 10 L. W. 592.

MADRAS DIST. MUNICIPALITIES ACT, S 287.

——Ss. 263 and 280—*Sanitary Inspector—Authority to prosecute for deviation from plan—Complaint for exceeding time—Conviction—Legality.*

A Sanitary Inspector expressly authorised by the chairman to prosecute for deviation from the plan attached to an application for license preferred a complaint not only for such deviation but also for exceeding the time limited by license. *Held*, that the Sanitary Inspector was not expressly or impliedly authorised to prefer a complaint about exceeding the time limit and the conviction of the petitioner for that offence was consequently illegal. (*Sadasiva Iyer and Odgers, JJ.*) KALIAPERUMAL NAIDU *v.* EMPEROR.

21 Cr. L. J. 327 : 55 I, C. 599 : 11 L. W. 120.

——Ss. 278 and 264—*Nuisance—Liability in damages for Erection of latrine—Site approved by Municipality.*

The erection of a latrine under the orders of municipality on a site approved by the latter does not render the owner exemp from liability in damages for nuisance to a neighbouring occupier. The power given to the Municipality to supervise the erection of a latrine is a permissive obligation and should be exercised without more injury to private interests than is absolutely necessary. The provision in S. 278 of the Act for award of compensation for damage caused by the Municipal Council does not take away the common law right to sue for injunction. (*Seshagiri Aiyar and Phillips, JJ.*) RAMA RAO *v.* MARTHA SEQUERIA **42 Mad. 796: 10 L. W. 147: 26 M. L. T. 122 : 52 I C. 921. (1919) M W. N. 618 : 37 M L. J 224.**

——S. 279—*Acquisition of land—Inam land Transferee from Municipality — Liability to assessment.*

A Municipal Council acquired certain Inam land under the Land Acqn. Act and by several transfers plff. became the owner of it. The plff. contended that the Govt. was entitled only to quit rent as from the Inamdar and not ground rent. *Held*, that when the land vested in Govt. it became ordinary Govt. property liable to assessment in the hands of any person who might afterwards become its occupier. If the plff. claimed to hold the land free from the payment of assessment he must show some grant exempting him from such payment. The Govt. order conferring an absolute property and all transferees from a Municipality simply removed all the objections to the transfer on the ground that the transferer is a Municipal Council and did not exempt the transferee from payment of revenue. (*Sundara Iyer and Phillips, JJ.*) CHALLA PALLI HANUMANUDU *v.* SECRETARY OF STATE.

36 Mad. 373 : 15 I. C. 376 : 11 M. L. T. 207 : 22 M. L. J. 445.

——S. 287—"*Final*"—*Meaning of—Suit in Civil Court.*

The word "final" in S. 287 of the Madras Municipal Act applies to proceedings before the Corporation and aims at barring an appeal from the Standing Committee to the general body of the Commissioners and not to exclude the jurisdiction of Courts It is open to the Civil Court

MADRAS DIST. MUNICIPALITIES ACT, S. 303.

to entertain a suit for an injunction against the President restraining him from demolishing a building. 31 B. 604; 36 C. 671 Dist. (*Benson, O. C. J. and Sankaran Nair, J.*) VALLI AMMAL v. CORPORATION OF MADRAS. **38 Mad 41 : 12 M. L. T. 469 : 16 I C 971 : (1912) M W. N. 1162 : 23 M. L J, 531.**

——— **S. 303 (2) (b) and (c)**—*Rules framed by the Governor in Council—Validity of—By-law—Construction.*

Before a rule framed by a rule making authority is declared *ultra vires* the Court must be satisfied not only that it had no power to act under the power under which it is purported to act, but also that it has no power at all under any law to act, 18 M. 236 followed. Rules framed by the Governor in Council relating to the election of Chairman and Vice-Chairman of the District Municipalities and published as Notification No. 1134 under S. 303, (2) of the Madras District Municipalities Act though not authorised under that provision of law, can yet be supported under S. 303 (2) (c) of the Act. Consequently such rules are *intra vires* (*Krishnan, J.*) SECRETARY OF STATE FOR INDIA v. APPA RAO. **(1923) M. W. N. 450 : 19 L W. 536 : 45 M. L. J. 156 : 1924 Mad. 92.**

——— **S, 352**—*Election—Rejection of nomination paper by Chairman—Appeal to Local Government—Right of party aggrieved—Liability of Chairman—Injunction—Right to vote—Infringement of*

Where a person standing as a candidate for a Municipal election has his nomination paper rejected by the Muncipal Chairman improperly and on a mistaken view of the rules, and the Local Government on appeal by the aggrieved candidate refuses to perform the statutory function of interpreting the rules and deciding on the validity or otherwise of chairman's couduct he has a right to sue in a Civil Court for a declaration that his nomination is valid and for injunction restraining the conduct of the election without him as a candidate. If however the election has been held the remedy of the aggrieved candidate is by an election petition preferred to the Sub Court or the District Court. Where a person having a right to vote or to stand as a candidate for an election is wrongfully deprived of that right, the person so depriving him is liable in damages unless he is himself acting in a judicial capacity. Under R 31 of the election rules made under the Madras District Municipalities Act the decision of the Municipal Chairman as to the validity or otherwise of a nomination paper i not final and the Local Government is vested with the power to finally decide upon the interpretation of the rule. (*Schwabe C. J. and Wallace, J*) SARVOTHAMA RAO v. CHAIRMAN, MUNICIPAL COUNCIL, SAIDAPET. **17 L W. 431 : (1923) M W. N 266 : 32 M. L T. (H. C.) 178 : 45 M L J. 23 : 1923 Mad. 475.**

——— **Sch. V**—*Wholesale dealer—Who is.*

A trader who stores bags and sells grain by the bulk without breaking the bags is a wholesale dealer within the meaning of Sch. 5 of the Act.

MADRAS ESTATES LAND ACT. (I OF 1908).

(*Oldfield and Krishnan. JJ.*) SESHA PRABHU v. EMPEROR **31 M. L. T. 314 : 66 I. C. 429 : 23 Cr. L. J. 285 : 1922 M. W. N. 79 : 42 M. L. J. 149 (H. C.).**

——— **Sch V, cl. (q)**—*Construction—Conversion of paddy into rice is an industrial process—Danger—Presumption.*

The last clause of cl. (q) of Sch. V of the Act qualifies each of the clauses preceding it and not merely the last clause. The object seems to be to bring under municipal control by the method of issuing licenses the keeping or using of things which are dangerous to human life, health or property. Conversion of paddy into rice is an industrial process within the meaning of the clause. Ordinarily any large machinery is dangerous to human life, but it cannot be presumed that any particular machinery is. (*Krishnan, J.*) K. V S. RAMACHANDRA RAO v. CROWN. **18 L.W. 618 : (1923) M. W. N. 767 : 75 I. C. 691 : 33 M. L. T. (H. C.) 234 : 45 M. L. J. 555.**

——— *Madras District Municipalities and Local Boards Amendment Act (II of 1922)—Election of—President by members not taking oath of allegiance is invalid.*

Under Madras Act II of 1922 the election of a President of a Local Board by persons who though elected as members thereof have not taken the oath of allegiance is invalid. (*Spencer and Devadoss, JJ.*) RAJABHADAR MUDALIAR v. VISVANATHA REDDY. **75 I. C. 620 : 45 M. L. J. 543 (1).**

MADRAS EDUCATIONAL RULES.

——— **R. 59-A** — *If exhaustive — Corporal punishment—Power of school-master.*

Power of a school-master in inflicting corporal punishment is dealt with in Rule 59-A, which however is not exhaustive on the subject. (*Oldfield and Venkatasubba Rao, JJ.*) SANKUNI v. VENKATARAMANI. **42 M. L. J. 560 : 45 M. 548 : (1922) M. W. N. 246: 15 L W. 501 : 31 M. L. T. 26. (H. C.) : 1922 M. 200.**

MADRAS ENDOWMENTS AND ESCHEATS REGULATION (VII OF 1817).

——— **S. 13**—*Scope of—Appointment of trustee—Board of Revenue—Responsibility of.*

Quaere.—Whether the Board of Revenue under Reg. VII of 1817 can divest itself of all responsibility by appointing a hereditary trustee. (*Wallis, C. J. and Seshagiri Iyer, J.*) SEETHARAMA CHETTY v. SIR S. SUBRAMANIA IYER. **39 Mad. 700. 19 M. L. T. 25 : 32 I. C. 211 : 3 L. W. 43 : 30 M. L. J. 29.**

MADRAS ESTATES LAND ACT (I OF 1908).

——— *Relinquishment of holding to landlord—Effect*

Per Sadasiva Iyer, J.—The *Kudivaram* in an abandoned holding may be deemed to become vested in the landholder for some legal purposes till the landholder inducted a new tenant into the land and this vesting entitles the landlord to redeem any mortgage created by the ryot prior to the relinquishment. *Per Napier, J.*—The Kudivaram interest in an abandoned holding is an abeyance until it comes into existence by the admission of a new *ryot* and is in abeyance as

long as the landlord can according to law treat the land as private land. (*Sadasiva Iyer and Napier, JJ.*) SRI RAJAH VENKATA *v.* LANKA LAKSHMINARAYANA.
(1921) M. W. N. 615: 66 I. C 376: 15 L. W. 218: 45 M. 47: 30 M. L. T. 188 : 42 M. L. J. 161.

———*Land tenures—Jeroyti land.*

Where the grantor and grantee of a service *inam* land, agree that the service should cease from a certain date, no formal steps are necessary to convert it into *jeroyti* land. Under the Act, the presumption is that the ordinary nature of the land is *jeroyti* and as soon as it is deprived of its special nature, it resumes its ordinary nature of *jeroyti*. (*Sadasiva Aiyar and Napier, JJ.*) ZAMINDAR OF TARLA *v.* KANDA BARIKIVADU.
44 Mad. 697 : 29 M L. T. 368: 63 I. C. 8 : (1921) M. W. N. 565 : 40 M. L. J. 466.

———*Agreement of a fixed grain* pattam *between Landlord and Tenant.*

A tenant cannot go behind an agreement of a fixed grain *pattam* between him and his landlord and reopen it on the ground that the *pattam* agreed upon included some cesses and dues declared to be illegal in the case of *waram* lands. (*Sadasiva Iyer and Spencer, JJ.*) SIVANUPANDIA THEVAR *v.* ZEMINDAR OF URKAD 6 L. W. 412: 43 I. C. 498 : 41 M. 109 : 34 M. L. J. 139.

———*Scope of—General law—How far applicable.*

As the Mad. Est. Land Act—a comprehensive tenancy code—is explicit, a discussion of the general law is irrelevant. (*Oldfield and Sadasiva Aiyer, JJ.*) MUTHU REDDI *v.* MUTHU VENKATAPATHI REDDI. 4 L. W 168 : 37 I. C. 1 : (1916) 2 M.W. N. 180 : 31 M. L. J. 354.

———*Policy of—Zamindari Lands.*

Per *Abdur Rahim, J.*—An examination of the provisions of the Act shows that one principal object of the legislature was to assure the ryots or cultivators of Zemindari lands in the possession of their holdings on payment of fair and customary rent. (*Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) SUNKARA VENKATARATNAM *v.* VARADARAJA APPA RAO. 40 Mad. 529: (1916) 2 M. W. N. 7 : 3 L. W. 592 : 35 I. C. 213 : 30 M. L. T. 118 : 31 M. L. J. 123.

———S. 1—*Applicability—Cause of action before Act—Suit filed after coming into force of the Act—Suit for rent— Exchange of pattas and muchilikas.*

Even without an exchange of pattas and muchilikas a landlord can sue for rent though the cause of action arose before that new Act came into force if the suit is after Act of 1908. (*Sankaran Nair and Seshagiri Iyer, JJ.*) PRESIDENT, TANJORE BOARD *v.* MUTUVIRA AMBALAGARAN.
24 I. C. 722.

———S. 2 -*Applicability of—Pending proceedings — Rent Recovery Act (VIII of 1865)—Defence of non-tender of patta, if available on appeal.*

S. 2 of the Madras Estates Land Act which repeals Act VIII of 1865 does not affect pending proceedings and so a defence of non-tender or

dispensation of a pattah which was open to the tenant under the *earlier* Act is open to him on appeal even though the new Act came into force by that time. (*Wallis, J.*) ARCHAKAN *v.* KALLUR VENKATA REDDI.
14 I. C. 329.

———S. 2—*Applicability—Suit filed before the Act come into force.*

A tenant's right to sue for declaration is not affected by the Act if the suit is filed before the coming into operation of the Act. (*Benson and Krishnaswami Aiyar, JJ.*) SAMIYASI KAVUNDAN *v.* AKKULAMMAL. 9 M. L. T. 282: 9 I. C 278: (1911) 2 M. W. N. 339.

———S. 3—*Rentals —Deduction from assets—Effect.*

In the case of lands granted in *inam* in 1798, where it is not shown that the rentals on them had been deducted from the assets of the zamindari for the purpose of assessing peishcush, that fact alone does not disentitle them to be treated as part of the estate. (*Ayling and Odgers, JJ.*) TOTA VARAHALIAH *v.* SREE VENKATA SURYANARAYANA. 18 L. W. 324: (1923) M. W. N 732: 1924 M. 117.

———Ss. 3, 40 and 51—*Rent—Commutation—Kanganom, deduction of—Basis of calculation.*

In assessing money rent in respect of a shrotriam village where the ryots have occupancy holdings, the total out-turn of the fields without deducting *Kanganom* from the out turns must be taken into consideration. *Kanganam* falls within the definition of rent. (*Abdur Rahim and Odgers, JJ.*) RANGACHARIAR *v.* DORAISAMI REDDY.
(1921) M. W. N. 600 : 41 M. L. J. 332.

———S. 3 (1)— *Agriculture—Meaning of—Pasture.*

The general meaning of agriculture is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. Although an extended meaning is sometimes given to the word "Agriculture" it is clearly intended by the legislature that it does not include pasture. (*Sadasiva Aiyar and Moore, JJ.*) RAVU SESHAYYA GARU *v.* RAJAH OF PITTAPUR. 3 L. W 485: (1916) 1 M. W. N. 396: 34 I. C. 730: 31 M. L. J. 214.

———S. 3 (1)—*Agriculture—Pasturage.*

"Agriculture" does not include pasturage. (*Sadasiva Aiyar and Tyabji JJ.*) RAJAH OF VENKATAGIRI *v.* JAYAMBU AYYAPPA REDDY.
38 Mad. 738: 14 M. L. T. 405; (1913) M. W. N. 919 21 I C 532: 25 M. L. J. 578.

———S. 3, Cls (2) (5), (11) and (15)—*Inam—Estate—Lardholder—Ryot—Rent—Meaning—Presettlement inam excluded from assets of Zamindari —Assignee from inamdar of an interest in his holding—Assignment under Thirmanam document—Relationship between parties — Construction of Thirmanam document—Lease under S. 105, Tr. of P. Act or mortgage with possession —Rent under S. 3, Cl. (11) of Estates Land Act —Amounts payable in future under contract if—Regulation XXV of 1802, S. 4—Construction.*

MADRAS ESTATES LAND ACT (I OF 1908), S. 3.

An inam within the ambit of the Pittapur Estate was granted by the then Zamindar of Pittapur to the plaintiff's ancestors under a sanad and a cheku nama dated 22-6-1800. The grant was made free of kattubadi and purported to be sarvadumbala or absolute. The plaintiff assigned an interest in his holding to 1st defendant under a document dated 20-1-13 and described as a (Thirmanam document) which provided that, in accordance with a prior agreement, the property which had been placed in 1st defendants possession in 1910-11, should remain in it until the end of the year 1917-18 in consideration of a cash payment of Rs. 160 at the date of the prior agreement aforesaid and other subsequent payments on plaintiff's behalf, in all Rs. 1,280; and that 1st defendant should "pay all dues other than extra taxes, which might be levied hereafter;" and should at the end of the term "surrender without any relinquishment." There was no evidence of any advances prior to those enumerated in the Thirmanam document of 1913; and those enumerated in the said document of the cash payment of Rs. 160 were made, after and when the prior agreement was executed, and the former after possession had been given. There was no power of sale and no provision for accounting. In 1912 the Revenue Officer engaged in the preparation of a record of rights for the 2nd defendant's (Pittapur) estates under the Madras Estates Land Act entered 1st defendant as occupancy ryot in respect of the holding instead of plaintiff. In a suit by the plaintiff for declaration that the 1st defendant was not an occupancy tenant of his inam, *held*,

(1) That the Thirmanam document was a lease within S. 105 of Transfer of the Property Act, and not a mortgage with possession.

(2) that the first defendant was not a ryot within S. 3, Cl. (15) of the Estates Land Act.

(3) that the suit inam was not a part of the Pittapur Estate but a presettlement inam excluded from the assets of that Zamindari and did not fall under S. 2 (3), (*d*), as it was not a whole village and plaintiff was not a landholder under S. 3, Cls. (2) and (5) of the Estates Land Act.

The word "payable" in S. 3, Cl. (11) of the Estates Land Act means "payable according to the terms of the contract between the parties to it;" and Cls. (11) and (15) are applicable whatever the stage or stages at which those terms, so far as they relate to payment for the use of the land have to be or have been to be fulfilled. The payments in consideration of which the Thirmanam document was given were "rent" within the meaning of S. 3, Cl. (11) notwithstanding that the only payment contemplated were those to be made in future after the beginning of and in the course of the relation between ryot and landholder.

Lands in respect of which the Zamindars purported to make grants either absolute or subject to a small Kattubadi are "Iakhiraj lands (or lands exempt from the payment of public revenue) and all other lands paying only favourable quit rents" within the meaning of S. 4 of Regulation XXV of 1802. (*Oldfield and Ramesam, JJ.*) KOPPI REDDI NOKAYYA *v.* MANDALEKA BHEEMANNA.

(1923) M. W. N. 176 : 17 L. W. 712 : 45 M. L. J. 91 : 1923 Mad. 454.

MADRAS ESTATES LAND ACT (I OF 1908) S. 3.

———**Ss. 3 (2) (a), 6 (1) and 8 (1)**—*"Permanently Settled Estate"—Meaning of—Exchange of lands with Govt.—Substituted land if "estate"—Occupancy right.*

The settlement referred to in S. 3 (2) of the Madras Estates Land Act must be effected formally and there should be some recorded evidence of it. Where therefore certain Govt. ryotwari lands were transferred to a Zamindar in lieu of monetary compensation or reduction of peishcush for the acquisition by Govt. of other lands forming part of the settled estate of the Zamindar. *Held*, that the lands so transferred were not part of an "estate" within S. 3 (2) and that a suit to eject the tenants thereof could be maintained in a Civil Court. (*Lord Dunedin*). ZAMINDAR OF SANIVARAPUPET *v.* ZAMINDAR OF SOUTH VALLUR.

42 Mad 355 : 17 A. L. J 273 : 9 L W. 411 : 23 C. W. N. 673 : 21 Bom. L. R. 622 : 26 M. L. T. 32 : 30 C. L. J. 82 : 49 I. C. 818 : (1919) M. W. N. 496 : 36 M. L. J. 279. (P. C.).

[Affirming but on different grounds. 39 Mad 944 : 34 I. C. 444].

———**S. 3 (2) (a)**—*Permanently Settled Estate—Area of, if can be varied by agreement.*

The area of a permanently settled partible estate may be extended or decreased by agreement between a Zamindar and the Govt. when the rights of third persons are not affected thereby. There is nothing in law to prevent a Zamindar from consenting to the Govt. imposing ryotwari assessment on the whole or portions of his Zamindari lands provided the existing rights of others in such lands are left intact. (*Sadasiva Aiyar and Napier, JJ.*) WARADARAJA APPARAO *v.* GONEPALLA PUNNAYYA.

19 M. L. T. 338 : 34 I.C. 626 : 30 M. L. J. 545.

———**S. 3 (2) (c)**—*Jagir—Inam.*

A grant of land revenue made by the Nawab of the Carnatic to a member of his family for subsistence is not a *jagir* though termed as such in the deed of grant, but is an inam. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) SAM *v.* RAMALINGA MUDALIAR.

40 Mad. 664 : 34 I. C. 803 : 30 M. L. J. 600.

———**S. 3 (2) (d)**—*Inam—Grant—Melwaram—Presumption.*

In the case of an inam grant there is no presumption that both the warams were granted or only the melwaram was granted. It is a question of fact to be decided on the facts and circumstances of each case. 41 M. 1012 ; 43 M. 166 ; 43 M. 567 Explained ; 44 M. 588 D sapp. (*Mr. Ameer Ali.*) SRI CHIDAMBRA SIVAPRAKASA PANDARA SANNADHIGAL *v.* VEERAMA REDDI.

45 Mad. 586 : (1922) M. W. N. 749 : 68 I. C 538 : 49 I. A. 286 : 16 L.W. 102 : 31 M. L T 54 : 43 M. L. J. 640 : (1922) P. C. 292 (P. C.).

———**Ss. 3 (2) (d) and 189**—*Inam—Grant of melwaram—Presumption as to—Suit by inamdar to eject his tenants—Forum.*

There is no presumption of law that an inam grant of a village, though to a Brahman, did not include the *Kudivaram* also. Each case must be

considered on its own facts (*i.e.*) the terms of the grant and all the circumstances, so far as they could be ascertained. A Zamindar granted a village in 1783 to a Brahman together with gardens wells, tanks, etc., as a *Sarva Agraharam* to be cultivated and enjoyed by the grantee heriditarily. It appeared that in 1788 the grantee was residing in the place. The evidence in the case including the inam register of 1865 and the subsequent dealings with the property were inconsistent with any persons other than the inamdars having a right of occupancy. *Held*, that the land in suit was not an estate and suit to eject the tenants from certain lands which had been waste at the time of the grant lay in the Civil Court. 41 M. 1012 (P.C.) Foll. (*Viscount Cave*). UPADRASHTA VENKATA SASTRULU *v.* DIVI SITHARAMUDU.

43 Mad. 166 : 17 A. L. J. 725 : 21 Bom. L. R. 925 : 26 M. L T 175 : 30 C. L. J. 441 : 10 L. W. 633: 24 C. W. N. 129 : 46 I. A. 123 : 51 I. C. 304: 37 M L.J. 42 (P. C).

[Reversing on Appeal 38 Mad. 891 : 24 I. C. 224 : 26 M. L. J. 585.]

———S. 3 (2) (d)—*Inam—Grant of "Melwaram"—No presumption—Agraharam—Suit to eject tenants—Forum.*

In the absence of evidence as to the terms of the grant there is no presumption of law that the grant of an inam by a Native Ruler prior to the British Rule conveyed only the melvaram (Royal share of the Revenue.) Meaning of the terms "Kudivaram" and "Melwaram" pointed out. *Held*, accordingly that a grant of an Agraharam in Inam made by a Reddi King of Nellore more than 400 years ago and recognised and confirmed by the British Government under S. 15 of Madras Regulation XXXI of 1802 conveyed both the melwaram and Kudiwaram rights. The Agraharam was not an 'estate' within S. 3 (2) (*d*) of the Madras Estates Land Act and the Agraharamdar was entitled to eject the tenants in a Civil Court. (*Sir John Edge*). SURYANARAYANA *v.* PATANNA.

41 Mad. 1012 : 25 M. L T. 30: (1918) M. W. N. 859: 23 C. W. N. 273 : 9 L. W 126 : 29 C. L. J. 153 : 1 U. P. L. R. (P. C.) 11 : 21 Bom. L. R. 547: 45 I. A. 209 : 48 I. C. 689 : (1919) M. W. N. 463 : 36 M. L. J. 585 (P. C.)

[Reversing on appeal 22 I. C. 339 : 38 Mad. 608.]

———S 3 Cl. 2 (d)—*Estate—Grant of village in inam—Mouza—Presumption—Grant of both the warams.*

The grant of a whole village in inam will not be presumed to be the grant only of melwaram interest unless it is shown that the kudiwaram interest was already in the hands of some one else than the donee. The mere fact that there were about 300 inhabitants in the village after the date of the grant does not prove that at the date of the grant there were any tenants in the village holding lands with any right of occupancy by custom or otherwise. The use of the expression mouza does not necessarily import the meaning that there were occupancy tenants on the land. (*Spencer and Venkatasubba Rao, JJ.*) JAVVADI SOORAYYA *v.* TUVVALA SURAYYA RAO NAIDU.

44 M. L. J. 41 : 17 L. W. 555 : 1923 Mad. 623.

———S. 3 (2) (d) and (5)—*Estate—Agraharam village—Pre-settlement grant—Claim of occupancy right.*

There is no presumption that the grant of an agraharam in inam conveys only the melwaram. 41 M. 1012 ; 43 M. 166 ; 44 M. 588 Ref. *Held*, on the construction of a shrotriem grant of an agraharam village of the year 1689 that the use of the expression "Mauza" and "Shrotriem" in reference to the village did not indicate that it was a grant of the melwaram only. It was found however on the evidence that the grantees were in actual possession of the lands, harvesting the crops and mortgaging and selling and letting the land on terms inconsistent with the existence of an occupancy right in any one till the year 1885 when disputes arose regarding claim to occupancy rights. *Held*, that the grant was one of both the warams and the village was not an estate under S. 3 (2) (*d*) and (5) of the Mad. Est. Land Act. (*Schwabe, C J., Oldfield and Coutts, Trotter, JJ.*) SUBRAMANIYA SOMAYAJULU *v.* SEETHAYYA.

16 L. W. 462 . 31 M L. T. 347 : 46 Mad. 92 : (1922) M W. N. 614 : 1923 Mad. 1 (F.B.).

———S. 3 (2) (d)—*'Estate'—Burden of proof.*

Any person asserting that an *inam* village or part thereof is an 'estate' has to prove that the grant was of the land revenue only, to a person not owning the kudiwaram. (*Wallis C. J., Coutts-Trotter and Ramesam, JJ.*) MUTHU GOUNDEN *v.* PERUMAL IYER.

44 Mad. 588 : 13 L. W 483 : 29 M. L. T. 398 : 63 I. C. 790 : (1921) M. W. N. 263 : 40 M. L. J. 429 (F. B.).

———S. 3 (2) (d)—*Inam—Situated in permanently settled estate—Part of village—Owner of such Inam if landholder—Post settlement Inam—Rights of grantee to both warams.*

Per *Sadasiva Iyer, J.*—The presumption that a grant to an Inamdar is a grant of the proprietary rights in the land applies to a post settlement inam grant. *The Chief Justice.* (*Sadasiva Iyer. J. dissenting*). It was not the intention of the legislature to apply the provisions of the Madras Estates Land Act, as between an Inamdar and his tenant where the land is situated in a permanently settled estate and consists of any part of a village and the Inamdar is the owner of the Kudivaram as well as the Melvaram. An Inamdar who holds under a Zamindar subject to the payment of quit rent to him is not a landholder within S. 3. Cl 5 of the Act. 38 M. 33 Dist. (*Wallis, C. J. and Sadasiva Iyer, J.*) SRI GADADHRADOSS BAWAJI MAHANE *v.* SURYANARAIN PATNAIK.

12 L. W. 77 : 56 I. C. 92: (1920) M. W. N. 303 : 38 M. L. J. 342.

[Opinion of Sadasiva Iyer, J. upheld on appeal.]

———S. 3 (2) (d) and (e)—*Inam—Presettlement Inam—Grant of village to person in possession—Village not included in the sanad of Zemindari—Estate.*

There is no presumption that the land revenue alone was granted in the case of inams granted by the Zamindar prior to the permanent settlement. 41 M. 1012 Foll. A grant of village as an agraharam to the grantees in possession at the date of the grant and the properties granted not

being included in the sanad granted by the Govt. as being within the ambit of the Zamindari. show that the inam is not an estate. In the construction of grants of agraharam inams, the presumption as to the nature and extent of the grant where the grant is by sovereign power is also applicable to a case where the grant was by a Zamindar. (*Seshagiri Iyer and Odgers, JJ.*) NANDIGAM SUBBARAYADU *v.* KANNAM SAHEB.
54 I. C. 22 : (1919) M. W. N. 836.

———Ss. 3 (2) (d) and 8—*Inam—Presumption—Presettlement inam—Grant with* ashtabhogam *—Ejectment—Jurisdiction of Court—Burden of proof.*

The presumption in all cases of grants of *inams* is that only the *melvaram* was granted. Presettlement inams must be presumed to be of land revenue only. A grant with *ashtabhogam* does not necessarily import the grant of the *kudivaram* also. In a suit for ejectment, deft. objecting to the jurisdiction of the Civil Court, must prove that the plff. was not the owner of the *kudivaram* right at the time of the grant of the inam. It cannot be laid down as a broad proposition of law that the *Inamdar* must have the occupancy right when the tenants have no occupancy rights in themselves, though it is open to the courts from such a state of facts to infer that at the time of the grant the grantee had the *Kudivaram* right. (28 M. 843, Per *Miller, J.* Diss.) Per *Spencer, J.*—In a suit for ejectment, where plff. relies on the exception to S. 8 for ousting the jurisdiction of the Revenue Court the plaint should specifically show by what acts the plff. acquired the *Kudivaram* interest of his ryots and became entitled to both *varams*. (*Sadasiva Aiyar and Spencer, JJ.*) MOGADASU VENKATADASU *v.* VENKAMAMIDI UDAYAN ARAYANA. **6 L. W. 142 : 41 I. C. 122 : 33 M. L. J. 548**

———S. 3 (2) (d)—*Inam—Meaning of—Tanjore Palace Estate.*

The Tanjore Palace Estate was a grant of Govt. Land Revenue alone to persons not owning Kudivaram rights and is an 'estate' within S. 3 (2) (*d*) which also applies to estates in which no reversionary interest is reserved to the Crown. Per *Wallis, C. J.*—S. 3 (2) (*d*) restricts the scope of the Act by excluding minor inams but Cl. (*e*) of S. 3 (2) extends the Act to estates of one or two villages, *held* as permanent undertenures. 'Inam' includes jagirs and grants which are called mokasha and having no reversionary right vested in Govt. Per *Wallis, C. J.*—All Jagirs are Inams but all Inams may not be Jagirs. Per *Sadasiva Aiyar, J.*—'Inam' in Madras Acts does not mean a gift of property by a superior individual to an inferior one. (*Wallis, C. J., Sadasiva Ayyar and Seshagiri Ayyar, JJ.*) SUNDRAM AYYAR *v.* RAMACHANDRA AYYAR.
40 Mad. 389 : (1917) M. W. N. 383 : 40 I. C. 975 : 5 L. W. 789 : 32 M. L. J. 333 (F. B.)

———S. 3 (2) (d)—*Inam—Recognised—Meaning of.*

The word 'recognised' implies something more than mere acquiescence ; it means something done by the Govt. as for instance by acceptance of service jodi or the like. (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) SAM *v.* RAMALINGA MUDALIAR. **40 Mad 664 : 34 I. C. 803 : 30 M. L J. 600.**

———S. 3 (2) (d)—*Inam—Kudivaram—Portion of, with grantee.*

A village will not cease to be an estate merely because the grantee owns kudivaram in certain lands under cultivation. This is so notwithstanding the presumption that *kudivaram* rights in lands not occupied by tenants is with the inamdar (*Abdur Rahim and Ayling, JJ.*) VARADARAJA APPA RAO *v.* KATNANI KURUVANNA.
3 L. W 196 : 32 I. C. 722: 19 M. L. T. 159: 30 M. L. J. 249.

———Ss. 3 (2) (d) and 6—*Inam—Agraharam—Whole village—Minor inams.*

An *Agraharam* or a whole village of which the land revenue has been granted as *inam*, falls within the definition "estate" under S. 3, Sub-S. 2, Cl. (*d*) of the Mad. Est. Land Act. The mere existence of minor *inams* within the *agraharam* does not take it out of the section. A minor *inam* is not an estate within S. 3, Sub-S. 2, Cl. (*d*). In the case of grant of an *Agraharam* the onus of showing that the grant is only of the revenue of a portion of the village is on the person who sets up such a case. (*Wallis, C. J. and Srinivasa Iyengar, J.*) NARAYANASWAMI NAIDU *v.* NALAM SUBRAMANIAM. **39 Mad. 683 · 18 M L. T. 148 : 2 L. W. 683 : 30 I. C. 375 : (1915) M. W. N 590 : 29 M. L. J. 478.**

———S. 3 (2) (d) — *Inam — Suit in Revenue Court—Estate.*

An Inamdar cannot take proceedings under the Act and at the same time say that his inam is not an estate under the Act. (*Sankaran Nair and Ayling, JJ.*) DEVI BHUKROJI KASIDORE *v.* ALLAMADAGA NARAYAN REDDY. **28 I. C. 492 : (1915) M. W. N. 209.**

———S. 3 (2) (d)—*Inam—Agraharam—Grant—Presumption—Burden of proof —Civil Courts Jurisdiction of.*

There is no presumption that grantee of land situated in an agraharam were not possessed of the kudivaram rights on the date of grant. Such grantees alleging that the land revenue and not land was subject of the grant, must in order to oust the jurisdiction of Civil Courts. prove that the agraharam is an estate within the meaning of S 3 (2) (*d*) of the Act. (*Ayling and Napier, JJ.*) RAVULAPATI PAPI REDDI *v.* NANDURU PEDA VENKATA CHARYALU. **16 M. L. T. 247 : (1914) M. W. N 794 : 26 I. C. 67 : 27 M. L. J. 567.**

———S. 3 (2) (d)—*Inam village—Presumption.*

Proof or admission of the Inam character of a village will raise a presumption that the land revenue alone has been granted in *Inam* but no presumption arises as to the grantee being a person not owning the *Kudivaram*. The onus is on the party seeking to oust the jurisdiction of the Civil Courts. The party seeking to oust the jurisdiction of Civil Courts must establish his right to

do so by procuring that the suit is by statute cognizable by a Revenue Court (*Oldfield and Napier, JJ.*) SRIMATH KIDAMBI *v.* PIDIPITI KUTUMBARAYADU. **39 Mad. 21 : 25 I. C. 891 : 27 M. L. J. 233.**

——S. 3 (2) (d)—*Jagir—Resumed jagir.*

A resumed jagir is not an estate within S. 3 (2) (*d*) of the Act. (*Sadasiva Iyer and Tyabji, JJ.*) VUNGARALA SESHAYYA *v.* TUDAPALLI SUBBA RAO, **25 I. C. 61.**

——S. 3 (2) (d)—*Inams—Grant of land revenue of portion of village—Suits for rent—Jurisdiction.*

An inam of the land revenue of a portion of a village is not an estate within S. 3 (2) (*d*) of the Act and Civil Courts have jurisdiction to entertain suits for rent. (*Wallis and Ayling, JJ.*) MUNIAPPA REDDI *v.* SUBBA RAO. **25 I. C. 8 : 1 L. W. 585.**

——S. 3 (2) (d)—*Inam—Lands partly cultivated and partly immemorial waste—Waste lands let to tenants—Surrender—Estate.*

Where immemorial waste lands of a small extent are granted as *inam* along with a large extent of other cultivated lands the presumption is that the former are ryoti lands. The fact that such lands are let to tenants from time to time does not show that such tenants acquired permanent occupancy rights therein. Therefore a surrender by such tenants cannot give the landlord any kudivaram interest in the lands. 26 M. L. J. 99: 8 C. L. J. 324 ; 6 B. 598; 20 B. 415 : 25 M L. J. 617 : 21 I. C. 916. Dist. Such a village is therefore an estate, within 3 (2) (*d*) of the Act. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) UPADRASTE VENKATA *v.* DEVI SITARAMUDU. **38 Mad. 891 : 24 I.C. 224 : 26 M. L. J. 585.**

——S. 3 (2) (d)—*Kudivaram—Presumption.*

When a tenant has no occupancy right in his holding and the land is not private land, the presumption is that the occupancy right is in the landholder either by original grant or by prior or subsequent acquisition. (*Miller and Spencer, JJ.*) PONNUSWAMY PADAYACHI *v.* KARPUDAYAN. **38 Mad. 843 : 1 L W. 218 : 24 I. C. 217 : 15 M. L. T. 299 : 26 M. L. J. 285.**

——S 3. Cl. (2) (d)—*Inam—When—"Estate"*

All inamdars are not landholders under the Act and merely because the landlord is an inamdar and the tenant has permanent occupancy right, the inam lands will not become an "Estate" unless the other terms of the definition are satisfied. A few acres of inam land forming part of a village which has not been granted in inam do not form part of an "estate." (*Sadasiva Aiyar, J.*) MOHANAMBAL *v.* DAVOODSA ROWTHER, **23 I. C. 859.**

——S. 3 (2) (d)—*Inam—Grant of waste land—Presumption—Jurisdiction—Burden of proof.*

The presumption in cases of grant by an inamdar of an eternal waste is that both warams therein were granted so that in a suit brought by him in the Civil Court to eject tenants therefrom the burden of proving that the grant was only of land revenue that the *inamdar* was only the

holder of an estate within the meaning of S. 3, Cl. 2 (*a*) of the Madras Estates Land Act and the Civil Courts had on that account no jurisdiction, lies on the tenants. (*Seshagiri Aiyar, J.*) VAGOTI CHENGIAH *tv.* PUTTA RAMUDU. **23 I. C. 553 : (1914) M. W. N. 367.**

——S. 3 (2) (d)—*Inam—Shrotriem—Mirasdar—Ekabhogam—Kudivaram—Meaning of.*

Where a Shrotriamdar, is also a Mirasdar owning presumably the Kudivaram right, the shrotriem inam is not an "estate" within the meaning of S. 3, Cl 2 (*d*) of the Madras Estates Land Act, so that a suit to compel acceptance of patta could not be brought in a Civil Court. 'Kudivaram' is used in two senses ; (1) right of occupancy, and (2) share of the cultivator whoever he may be in the produce. A Kudivaram right in its complete sense, is not held unless the holder has got the power of alienation of the right of occupancy and unless he does not acknowledge himself merely the tenant of one really owning the Kudivaram right. Kudivaram means a right of occupancy in S. 3 (2) (*d*). An ekabhogam mirasdar in the Chingleput District (Madras) owns the kudivaram right in the village and the inam is not an estate. (*Sadasiva Aiyar and Spencer, JJ.*) CHINNAN *v.* KONDAM NAIDU. **1 L. W. 41 : 23 I. C. 113 : 26 M. L. J. 169.**

——S. 3 (2) (d)—*Inam—Pre-settlement—Whether "estate"—Suit by Inamdar—Jurisdiction.*

An Inam granted prior to the Permanent Revenue Settlement is not an "estate" as defined by the Madras Estates Lands Act and a suit by the Inamdar for rent is therefore not cognizable by a Revenue Court. *Sadasiva Aiyar, J.*) BILA SANYASI NAIDU *v.* AGNIHOTRASSE VENKATACHARYULU. **1 L. W. 241 : 23 I. C. 96 : (1914) M. W. N. 318 : 26 M. L. J. 258.**

——S. 3 (2) (d)—*Inam—Grant by Zamindar—Presumption of grant of Melwaram—Onus.*

Where an inam is granted by a Zamindar or Jaghirdar the presumption is that the grant is only of the melvaram ; and where an inamdar claiming under such a grant seeks to eject the tenants in occupation of the land from 1804 the burden is upon him to prove his title to eject and he will discharge the burden only when he gives proof that the tenants were let in by himself or his predecessors in title. (*Sadasiva Aiyar and Tyabji, JJ.*) PINGALE VISHWANATH ROW *v.* CHINNAKOLANDAI NAINAR. **1 L. W. 197 : 22 I. C. 369 : [This is no longer law 43 Mad. 166 : 51 I. C. 304 (P.C.).]**

——Ss. 3 (2) (d) and 6—*Inam—Agraharam—Within Zamindari—Exclusion at settlement—Estate—Ejectment—Jurisdiction—Onus.*

An *agraharam inam* excluded at the permanent settlement from the assets of the *Zamindar* as *Lakhiraj* land, ceases to be the property of the *Zamindar* and cannot be regarded as an estate within S. 3 (*e*) of the Act In a suit for ejectment of the tenant the onus of proving facts which would oust the jurisdiction of the Civil Court is on the tenant though the landlord is bound to prove that he has a right to eject the tenant, the latter

having no occupancy rights 1915 M. W. N. 639, Foll. Where the ancestors of the tenants, *settled in* the agrabaram only 50 years before the suit and all this time the *melvaram* and the *kudivaram* had both been in the enjoyment of the *agraharamdars* and there was no evidence that the whole land was not at their disposal at some previous time, *held* that the inference was that the *melvaram* and the *kudivaram* always belonged to the *agraharamdars* and that they were entitled to eject the tenants. (*Benson and Sundara Aiyar, JJ.*) TADIKONDA BUCHI VIRABHADRAYYA *v.* SONTI VENKANNA. 20 I. C. 769 : (1913) M. W N. 782 : 24 M. L J. 659.

——Ss. 3 (2) (d) and 6—*Agraharam Inam—Occupancy rights—Acquisition by* raiyat.

In the absence of evidence that an *agraharam inam* included the *Kudivaram* or that the *inamdar* himself was at the time of the grant the owner of the *Kudivaram*, the inam would be an *estate* within S 3 of the Act. In such a case if the land is not old waste the raiyats acquire occupancy rights under S. 6 of the Act. (*Benson, O. C. J. and Sundara Aiyar, J.*) VENKATANARASIMHA APPA RAO *v* MUPPIDI SUBBA REDDI. 24 M. L. J. 655 : 20 I. C. 753 :

[This is no longer Law *See* 41 Mad. 1012 : 43 Mad. 166 : 40 M. L J. 429.]

——S. 3 (2) (d)—*Inam—Post settlement inam.*

Inam granted by a Zamindar subsequent to the permanent settlement may be an estate provided it consists of one or more villages. (*Sundara Iyer and Sadasiva Iyer, JJ*) SIVINI APPALANARASIMHULU *v.* MURADA SANYASHI. 17 I. C. 120 : 38 Mad. 33.

——S. 3 (2) (d)—*Inam Land belonging to a mosque—Permanent lease of—Land, if an estate.*

Land belonging to a mosque and the holder of which claims under a permanent lease from one of the inamdars is not an estate within S. 3 of the Act. (*Abdur Rahim, J.*) MUTHUSAWMI PILLAI *v* JAFAR HUSSAIN KHAN. 14 I. C. 215.

——S. 3 (2) (d)—*Estate—Grant of waste land by Zamindar to Mission.*

Waste land granted by Zamindar to a Missionary Society on favourable terms is not an estate It is simply a grant of land to a sinant on favourable terms. A Civil Court can therefore entertain a suit against a tenant for share of the crop and for rent. (*Munro, J.*) BAPTIST MISSIONARY SOCIETY *v* RATNAKARA PATRO. 12 I. C. 777 : (1911) 2 M. W. N. 517.

——S. 3 (2) (d)—*Inam— Shrotriem—Estate—Onus of proof—Suit by shrotriemdar—Small Cause Court.*

In a suit by landlord for rent the tenant pleaded that he and his ancestors were permanent tenants and therefore plffs. could not as shrotriemdars sue on the Small Cause side. *Held*, that it must be proved by the deft. that the land in question formed part of an estate as defined in the Act. (*Wallis, J.*) ARUNACHALLA SHASTRI *v.* KRISHNA SASTRI. 9 I. C. 272 : 9 M. L. T. 360.

——S. 3 (2) (e)—*Scope of.*

The Act applies not only to whole estates as defined in S. 3 (2) but also to parts of an estate. The owner of a portion of an estate is a landholder within Estates Land Act whether the part was severed before the passing of the Act or after, and suits of ejectment of tenants by him can be brought only in Revenue Courts. (*Wallis, C J. and Seshagiri Aiyar, J.*) CHIPURAPALLI APPAYYA *v.* SRI RAJA KAKERAPUDI RAMACHANDRA RAJU. 27 M. L. J. 490 : 16 M. L. T. 362 : 26 I. C. 732 : (1914) M. W. N. 763.

——S. 3 (2) (e)—*Inam—Village carved out of a permanently settled estate.*

An inam village carved out of a permanently settled estate and owned by certain Agraharamdars and afterwards purchased by the Zamindars is an estate within the meaning of Estates Land Act (Madras Act I of 1908) and so its provisions apply to it. (*Sundara Iyer and Ayling, JJ.*) NARAYANASWAMI NAIDU GARU *v.* GANGAIBARAM SITAYYA 15 I. C. 784.

——S. 3 (3)—*Holding—Ejectment suit—Necessity of ascertaining the holding—Jurisdiction.*

A tenant suing under the Madras Estates Land Act for the ejectment of a co-tenant must get the holding, in respect of which he is suing, ascertained in as much as the Act grants relief only in cases of ascertained holdings as is shown by the definition of a holding under S. 3 (3). Where a co-tenant sued in a Civil Court for the ascertainment of his share held by him and the other co-tenant and for the ejectment of the latter on the ground that he was in possession of it as a non-occupancy tenant, *Held* that although a Civil Court could not grant the relief regarding ejectment lay as it was the function of Revenue Court yet there was no reason why he should have been refused the other relief without which under the Madras Estates Land Act, a suit for ejectment could not be maintained in the Revenue Court (*Olafield and Ramesam, JJ.*) RAMAMURTHY *v.* BULLI RAJU. 68 I. C. 907.

——S. 3 (5)—*Landholder—Post settlement inam on favourable rent Grantee if a landholder.*

Held by the majority of the Full Bench. (The *Chief Justice* and *Devadoss, J dissenting*) Where a Zemindar makes a post settlement inam grant of a portion of a village with both varams on a permanent kattubadi, the grantee is a landholder within S. 3 (4) of the Estates Land Act, 44 M. 676 : 41 M. L. J. 512 : approved. (*Schwabe C. J. Oldfield, Phillips, Devadoss and Venkatasubba Rao, JJ.*) JARUGUMILLI BRAHMAYYA *v.* CHALLAGHALI ACHIRAJU. (1922) M. W. N. 280 : 45 Mad. 716 : 31 M. L. T. 91 (H. C.) : 43 M. L. J. 229 : 1922 Mad. 373 (F. B.).

——S. 3 (5)—*Grant of zamindari waste land as Inam—Suit for rent Civil Court.*

Where a Zemindar granted as an inam a portion of his Zemindari 'out of the never cultivated waste lands' at a low fixed rent, the inamdar is not a landholder within S. 3 (5) of the Act and a suit by the inamdar to recover rent from his tenants is triable by a Civil Court. (*Spencer and Odgers, JJ.*) YEDITH BHUPATIRAJU *v.* BHAVARAJU VENKATARATNAM. 41 M. L. J. 512 : 70 I. C. 452 : (1921) M. W. N. 821.

MADRAS ESTATES LAND ACT, S. 3, (5).

——S. 3, cl. (5)—*Minor inamdar is a land holder—Tenants under him have occupancy rights.*

Where a Zemindar made post settlement inam grant of a portion of a village with both the warams on a permanent kattubadi. *Held*, (Per *Kumaraswami Sastri, J. dissenting*) such minor inamdar is a "landholder" within the meaning of S. 3, Cl. (5) of the Act, and the tenants have permanent rights of occupancy. (*Wallis, C.J. and Oldfield, J.*) VENKAYYA *v.* SATHIRAJU.
44 Mad. 714 . 14 L. W. 180 : 64 I. C. 470 : 41 M. L. J. 117.

——S. 3, cl. (5)—*Minor inamdar is a landholder —Tenants under him have occupancy rights.*

Where a Zemindar granted after permanent settlement a portion of a village consisting of ryoti lands with both warams on a quit rent payable to himself *Held*, Per *Ayling* and *Coutts-Trotter JJ.* (*Kumarasami Sastri, J. dissenting*) that such grantee was a landholder within the meaning of S, 3 (5) of the Act and that the tenants of such a minor inamdar had permanent rights of occupancy in their holdings. (*Ayling, Coutts-Trotter and Kumaraswami Sastri, JJ.*) GADADHAR DAS BAVAJI *v.* SURYANARAYAN PATNAIK. **44 Mad. 677 : 14 L. W. 453 : 64 I. C. 317 : (1921) M. W. N. 413 : 41 M. L. J. 97.**

——S. 3 (5)—*Landholder—Assignee of an arrear of rent.*

Per *Sadasiva Aiyar, J.*—Even an assignee of arrears of rent from the owner of the estate or even a part of the arrears, is a 'landholder' within S. 3 (5) for the purpose of persuing his remedies as landholder under the Act. (*Wallis, C. J., Oldfield and Sadasiva Aiyar, JJ.*) BOLLAPRAGADE LAKSHMANA GARU *v.* CHINTAPALLI ACHIREDDI.
44 Mad 433 : 62 I. C 890 : 29 M. L. T 203 13 L W. 603 : (1921) M. W. N. 198 : 40 M. L. J. 319 (F. B.).

——S 3 (5)—*Order of Collector under, is not a final order—Limitation Act, Art. 14.*

The order of Collector rejecting an application under S. 3 (5) for recognition as sole landholder is not a final order and a suit to set aside such an order is not affected by the limitation prescribed by Art. 14 Lim. Act (*Oldfield and Seshagiri Aiyar, JJ.*) VENNISAMI THEWAR *v.* CHELLASAMI THEWAR. **13 L. W 104 : 29 M L T. 145 : 62 I. C. 276 : (1921) M. W. N. 193.**

——S. 3 (5)— *Inam — Karnam service— Grantee in possession— Abolition of service— Land holder.*

An inamdar to whom karnam service inam lands are granted by Zamindar with full disposing powers on payment of quit rent is not a landholder within S. 3 (5) as he holds the land under the Zamindar and not under a transfer from him. At the time of the passing of the Madras Estates Land Act, 1908, respondents held possession of certain lands as Karnam service Darmilla Inam. Appellants had been let into possession in 1906 and were in possession at the date of the suit. Their ancestors had the occupancy rights in these lands at the time of the grant in their favour. In 1913 under certain arrangements with the Zamindar respondent obtained the right to enjoy the suit land heriditarily with the powers of alienation subject to a small annual payment but without any obligation to render service. *Held*, that the respondents did not by reason of the grant in 1913 at a favourable quit rent acquire the status of a landholder under S. 3 (5) of the Act, as he was neither a person owning an estate or a part thereof nor a person entitled to collect rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title. Per *Spencer and Bakewell, JJ.* The respondent did not cease to be a ryot by reason of the favourable grant and S. 6 explanation and not S. 8 applied under circumstances of the case. (*Wallis, C J. Ayling, Oldfield, Coutts Trotter and Seshagiri Aiyar, JJ.*) MARINAVIRASWAMI *v.* BOYINAPALLAI VENKATARAYADU. **57 I. C 778 : 12 L. W. 51 : 39 M. L. J. 225 (F. B.).**

——S. 3 (5)—*Inamdar—Grantee of lands in permanently settled estate, whether landholder.*

Per *Sadasiva Aiyar, J.*—An Inamdar to whom lands were granted by the Zamindar after the settlement out of lands included in the permanently settled estate, is a landholder within the definition of S 3 (5). *Wallis, C. J. Contra.* The definition of "Rent" in Cl. 11 applies to 'Rents' in Cl. (5) of S. 3 and the latter part of it includes persons entitled to collect rents due to the owner of the estate such as farmers or assigns of such rents by way of mortgage, etc. (*Wallis, C.J. and Sadasiva Aiyar, J.*) GADADHARDOSS BAVAJI *v.* SURYANARAYAN. **(1920) M. N. 303 : 56 I. C. 92 : 12 L. W 77 . 38 M. L. J. 342**

[Opinion of Sadasiva Aiyar, J. upheld on appeal .

——S. 3 (5)— *Landholder— Death of— Arrears of rent.*

In a suit for rent the legal representative of a deceased plff. has the right to collect the arrears of rent, and not necessarily the person entitled to the estate after plff.'s death. Where rival claims are preferred it is the duty of the Court to enquire into the matter and determine who is the proper representative. *Ayling and Krishnan, JJ.*) PARAMASWAMI AIYANGAR *v* ALAMU NACHIAR AMMAL. **42 Mad 76 : 9 L W. 26 : 49 I. C. 11 : (1918) M W N. 107 : 35 M. L. J. 632.**

——Ss. 3 (5) 53, 111 and 112— *Landholder —Person entitled to arrears of rent.*

A person to whom arrears of rent are due is a landholder though his estate has terminated but he has not a first charge on the holding. He can distrain the moveable property or the trees on the holding of the defaulter but is not entitled to attach the holding itself. 41 C. 926 (P. C.) 2 M. 67 P. C. (*Spencer and Seshagiri Aiyar, JJ.*) SUNDARAM AIYAR *v.* KULATHU AIYAR
39 Mad. 1018 : 2 L. W. 86 : 18 M. L. T. 316 : (1915) M.W.N. 731 : 31 I. C. 81 : 29 M. L J. 505 : Also 29 M. L. T. 203 (F. B.).

——S 3 (5)—*Receiver—Landholder.*

A Receiver of an estate is a landholder under S. 3 (5) of the Act. It is not necessary that a person should also be the beneficial owner of the estate, to come within the section. A

MADRAS ESTATES LAND ACT, S. 3, (5).

Receiver has the same powers of management as an owner, and he can let a tenant into possession of cultivable land. (*Wallis, C. J. and Srinivasa Aiyangar, J.*) NARAYANASWAMI NAIDU *v* NALAM. SUBRAMANIAM. **39 Mad. 683 ; 18 M L. T. 148 : 2 L. W. 683 : 30 I. C. 375 : (1915) M W. N. 590 : 29 M. L. J. 478.**

——**Ss. 3 (5) and 77**—*Suit for rent—Rival landlords—Procedure.*

Where, in a suit under S. 77 of the Madras Estates Land Act for recovery of rent, the tenant disputes the title of the plff. as a landholder and sets up the title of a third person, there are three courses open to a Court, *viz*, the Court may, by itself, determine who the landholder is who should collect rent, or it may direct the plff. to apply to the Collector to declare him to be the landholder or may apply S. 194 of the Madras Estates Land Act. If it finds there has been no *bona fide* payment of rent to a third person, it may give the tenant the option of paying the same into Court. Where the parties themselves are before the Court the proper course is for the Court before which the suit is filed to make the enquiry. If a ryot disputes the plff.'s title to rent no decree can be passed until that question has been decided in favour of the Plff (*Ayling and Tyabji, JJ.*) SONA ALAGA KUDUMBAN *v.* SIVARAMA AIYAR. **29 I. C. 31 (M.)**

——**S. 3 (5)**—*Landholder--Lessee from transferee of Zamindar—Right to lease and cultivate —Estate holder.*

A person obtaining a lease of land with the right of leasing it to others from one who derives his title from a Zamindar is an estate holder under S. 3 (5). (*Oldfield and Tyabji, JJ.*) VINJAMURI VEERA VENKAYA *v.* GENAMURTHI VEERABHADRUDU. **26 I. C 735 (Mad.)**

——**S. 3 (5)**—*Landholder—Alienee of a portion of Melvaram interest—Tenants of, whether Ryots—Ejectment.*

An alienee in perpetuity of a portion of Melvaram right in the land of a Zamindar becomes a landholder within S. 3, cl. (5) and the tenants holding ryoti lands under him for agriculture, are ryots, though the part owned by the alienee does not fall within the definition of an estate in S. 3 (2). A suit to eject such tenants lies only in the Revenue Courts. 26 M. L. J. 600: 15 M. L. T. 401: (1911) M. W. N. 517. Foll. (*Sadasiva Aiyar and Spencer, JJ.*) KANTIVENKANNA *v.* CHILKANI RAMA RAO GARU. **26 I. C. 510: 38 Mad. 1155.**

——**S. 3 (5)**—*Co-sharers—Mortgage by—One of them redeeming and taking possession—Recognition as landholder—Rent suit for—Maintainability of.*

Where one of the co-sharers all of whom had executed a usufructuary mortgage redeems it and obtains possession of the whole estate, he is the person entitled to collect whole rents and also entitled to be recognised as landholder and he has a right to sue for rents The power given to the Collector under para. 2 of Cl. 3 does not exclude the power of a Civil Court to recognise that person as landholder who is entitled to collect the whole rents. (*Sadasiva Aiyar and Napier, JJ.*) SUBRAMANIA PETHANNAR *v.* MUTHIAN CHETTIAR. **1 L. W. 1004: 26 I. C. 279: (1915) M. W N. 157.**

MADRAS ESTATES LAND ACT, S. 3. (6).

——**S. 3,(5)**—*Landholder—Cowledar under an inferior proprietor—Whether a tenant.*

A *cowledar* under an inferior proprietor holding under conditions, that he is to be in possession of lands, pay kist to Govt. bear establishment charges, act under missal conditions and pay a profit to the inferior proprietor, is not a tenant but one merely dealing with the land on behalf of the inferior proprietor. An inferior proprietor by whom an estate is held under missal conditions is a landholder under S. 3, Cl (5) of the Act. (*Sankaran Nair and Ayling, JJ.*) TUNGALA MALLANNA *v.* GOTHUNUKKALA RAMARAJU **(1914) M. W. N. 343: 23 I. C. 531: 15 M. L. T. 401.**

——**S. 3 (5)**—*Joint landlords—Joinder as defts.*

Where there is no dispute between the plff. and any of the defts. as to the title to the land, a co-sharer landlord is entitled to sue but any person refusing to join as co-plff may be impleaded as defendant. (*Sankaran Nair and Bakewell, JJ.*) MAYALSAMI THEVAR *v.* SATHAYAPPA PORANDAN. **(1913. M. W. N. 696: 21 I. C. 334: 25 M. L. J. 351.**

——**S. 3 (5)**—*Jurisdiction—Revenue Courts—Landholder—Who is.*

The test which is decisive of jurisdiction is whether the plff. is a landholder and not whether the land in question is an estate. An inamdar to whom a grant of a portion of his lands is made by a Zamindar and who by reason of such under tenure is entitled to collect the rent is a landholder. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) APPALANARASIMHULU *v.* MURADA SANYASHI. **17 I. C. 120 : 38 Mad. 33.**

——**S. 3, (5)**—*Ijaradar, if a landholder.*

An ijaradar, is a landholder within the Act. (*Sundara Aiyar, J.*) BACHU *v.* BHOGI REDDI. **36 Mad. 126: 10 M L. T. 282: 12 I.C 171: (1911) 2 M. W. N. 251.**

——**Ss. 3, (6) and 20**—*Tank-beds in Zemindari—Cultivation of by Zemindar—Ryots, right to tank-bed and bunds--Custom—Grant.*

The rights of a tenant in a Zemindari tank-bed and bunds are not higher than those of grazing, cutting fuel and fishing and arising either by grant or by custom. If a tank-bed must necessarily be used for the storage of water, for the welfare of the raiyats under the *ayacut*, it must be maintained as such and the landlord as also the assignees of the tank should be restrained from converting it to any other purpose. Where, however, the maintenance of storage tank is unnecessary and the raiyats under the *ayacut* got their accustomed supply from other sources and no damage is caused to them by the tank-bed being used for the cultivation or for the purposes other than the storage of water, the Zamindar is under no obligation to preserve the tank for the storage of water, (*Phillips and Napier, JJ.*) SAMAYAN SERVAI *v.* MOIDEEN. **51 I. C. 899. (Mad.).**

MADRAS ESTATES LAND ACT, S. 3, (7).

——— **Ss. 3 (7) (2) and 6**—*Lease expiring and possession given up before Act passed—No occupancy-right—Old waste--Whether tenants acquire occupancy right—'Passing of the Act'—"Coming into force of the Act," meaning of—Possession, meaning of.*

"Passing of the Act" does not mean "the coming into force of the Act." Under S. 1 the Act came into force on the 1st July 1908 but the Act was passed when it received the assent of the Governor-General on the 28th June 1908. The tenants in possession of cartain *Lankas* in which they had no occupancy-right under leases gave up possession of the Lankas on the 30th June 1907. The Madras Estates Land Act received the assent of the Governor General on 28th June 1908 and came into force on the 1st July 1908. The lands were again let to the tenants and possession given to them about a month later. The letting, was however, for the whole of the Fasli 1318 as well as for the two subsequent faslis. *Held*, that as they had no possession legal or actual on 1—7—08. they could not be said to be ryots "now in possession" of the lands within S. 6. *Held also*, that whatever might be the meaning of "the time of letting" in S. 3 (7) (2) whether the date of lease or the date of execution of lease, they came within the definition of "Old waste" in S. 3 Cl. (7) (2) of the Act and consequently S. 6, Cl. (1) did not apply. The word "possession" does not include a mere right to possession. (*Spencer and Krishnan, JJ.*) MUGA PULA GANGA *v.* VENKATA VIJAYA GOPALA RAJU GARU. **20 M. L. T. 520 : 38 I. C. 26 : (1917) M. W. N. 143 : 31 M. L. J. 870.**

——— **S. 3 (7)** — *Old waste — Meaning of—Acquisition of occupancy rights.*

Where land which had been uncultivated for 10 years immediately preceding 1900 was let in that year and was re-let to the defts. after the expiry of the first lease and was in the occupation of the defts. at the time of the passing of the Act and a suit for ejectment was brought by the landholder, *Held*, that such land did not come within the definition of "old waste" and that the period of 10 years mentioned in S. 3 (7) Cl, 1 of the Act refers to the period immediatedly prior to the letting to the defts. The landholder plff. is entitled to only the stipulated rent but not to eject the tenants. Per *Wallis, C. J.*—Old waste means ryoti land admission to which is not to confer a right of occupancy. Per *Srinivasa Aiyangar, J.*—The words "at the time of letting" refer not to the first letting but to the letting which is the subject of dispute. (*Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) SANKARA VENKATARATNAM *v.* VARADARAJA APPA RAO. **40 Mad. 529: (1916) 2 M. W. N. 7: 3 L. W. 592: 35 I. C. 213: 20 M. L. T. 118 : 31 M. L. J. 123.**

——— **Ss. 3 (7) (16) (b) and 6 (4)**—*Old waste—Ejectment—Ryot—Burden of proof.*

The party trying to oust the Civil Court's jurisdiction must establish his right to do so. The party asserting that the land falls within the exceptions to S. 3 (16) (*b*) or S. 6 (4) of the Act must prove it. The plff. landlord of a village in which there

MADRAS ESTATES LAND ACT, S. 3, (10).

was an estate classed as 'old waste' agreed to keep the defts. who were cultivating a piece of land in it without the plff.'s permission and who repeatedly asked for the pattas to cultivate the lands in question. They were cultivating as *Sivaijama* tenants paying usual rent without pattas. He refused to confer on them the occupancy rights but reserved the right to eject them at the end of an agricultural year, in case he refused to renew the tenure. In the suit for eviction it was *held*—(1) that the land in question was presumed to be the old waste ryoti land; (2) that the defts. having been admitted to possession of the lands, were *ryots*; (3) that the defts. were not trespassers and liable to be ejected as such under S. 163; and (4) that the suit being governed by Ss. 153 and 157 ought to have been brought in a Revenue Court. (*Oldfield and Sadasiva Aiyar, JJ.*) PRESIDENT DT. BOARD, TANJORE *v.* RAMASWAMI THONDAMAN. **35 I. C. 121.**

——— **S. 3 (7)**—*'Old waste'—Interposition of tenancy—Effect of.*

The character of "old waste" of a land declared to be such is not lost in consequence of the interposition of a tenancy during which nothing by way of fulfilling the requirements of the Act impair that character, is done by the tenant. (Per *Oldfield, J.*) A Revenue Court can try suits to eject such tenants, (*Oldfield and Tyabji, JJ.*) SANKARA VENKATARATNAM *v.* VARADARAJA APPA RAO BAHADUR. **(1915) M. W. N. 192: 28 I. C. 252 : 29 M. L. J. 184.**

——— **Ss. 3 (7), 6 and 161**—*Presumption— 'Old waste.'*

The presumption of occupancy right in the case of a ryot in a *Zamindari* extends also to a ryot to whom *Banjar* lands in a *Zamindari* are let at a favourable rent, 23 M. 318 Foll. If such a *ryot* is in possession on the date the Act came into force he acquires by virtue of S. 6 an occupancy right in the land. 25 C. 1. (P. C.) Dist. Land continually under cultivation since 1884 cannot be classed as 'Old Waste' under S. 3 (7) of the Act. (*Tyabji and Spencer, JJ.*) BRUNDAVANA CHANDRA *v.* PRAGADA RAMMAYYA. **1 L. W. 486 : 25 I. C. 664 : 26 M. L. J. 600.**

——— **S. 3, Cl. 7 (2)**—*Scope—Whether retrospective.*

S. 3, Cl. 7 (2) of the Act is applicable only to a letting after the passing of the Act. (*Sankaran Nair and Ayling, JJ.*) TUNGALA MALLANNA *v.* GOTTUMUKKALA RAMARAJU. **(1914) M. W. N. 343 : 23 I. C. 531 : 15 M. L. T. 401.**

——— **Ss. 3 (10), 8 and 185**—*Private land—Test of—Concurrent findings—Privy Council.*

The concurrent findings of fact as to the lands being ryoti lands must be accepted as binding on the appellants before the Privy Council. *Semble*: The acquisition of *Kudivaram* rights in certain lands by the landlord and his letting them out as *Kambattam* lands on terms negativing occupancy rights with a view to prevent the assertion of such right is not sufficient to convert ryoti land into private land. Such a conversion should be proved by very clear and satisfactory evidence,

MADRAS ESTATES LAND ACT, S. 3, (11).

(*Sir Johan Edge.*) RAJA YERLAGADDA MALLIKARJUNA PRASAD *v.* RAJULAPATI SOMAYA.
42 Mad. 400 · 17 A. L. J. 233 : 36 M. L. J. 257 : 23 C. W. N.626 : 21 Bom. L. R. 627 : 26 M L. T. 1: 30 C. L J. 77: (1919) M W.N. 541 49 I C. 708 : 10 L. W. 400. (P. C.).

——S. 3 (11)—' *Rent' —Collections by ryot from Sub-tenant is not—*

When a ryot sublets to sub-tenants, the payments he collects from them by agreement are not 'rent' within S. 3 (11) and a mere interest in a portion of the melwaram without a right to collect rents from the ryots of the estate will not convert a ryot into a land-holder (*Spencer and Odgers, JJ.*) YEDITHA BHUPATHIRAJU *v.* BHAVARAJU VENKATARATHNAM **(1921) M. W. N. 821 : 70 I. C. 452 : 41 M. L.J. 512.**

—— Ss. 3 (11) and 61—*Rent—Jodi whether rent—Interest, whether can be claimed on it.*

Jodi is not rent as defined by S. 3, (11) of the Act and interest thereon cannot be claimed under S 61 of the Act. (*Spencer and Krishnan, JJ.*) SINGARAJU VENKATASUBRAMANIAM *v.* RAJAH OF VENKATAGIRI. **56 I. C. 552 : 11 L W. 523.**

——Ss. 3 (11) and 143— *Cesses—Sarasari—Payment for a long time — Presumption—Cess Temple mahimai, kanganam, Tayirmutti,—Pakkillai and Aminji—Illegality of.*

Where a tenant irrigates dry lands by water taken from the landlord's tank with his permission the Court can infer a contract that the landlord should be entitled to a reasonable compensation for the water taken. Where the water so taken is utilised for less remunerative crops such as chillies and cotton and it appeared that Sarasari had in such cases been levied in the past, the levy of Sarasari is not illegal. Payment during a course of long years, though it will not by itself give to a cess, which is purely voluntary or which is on the face of it illegal, a binding character, will be presumptive evidence that the payment had a legal origin, if the cess is of such a nature that a contract to pay it may be reasonably inferred. Meaning of Sarasari, Varapattu and Varisaipattu lands, explained. Eswaran Koil mahimai was disallowed on the ground that cesses in connection with temples are purely voluntary. Kanganam, Tayirmutti, Pakkillai and Aminji disallowed as regards Varisai pattulands. (*Phillips and Kumaraswami Sastri,JJ.*) VENKATACHALAM CHETTY *v.* AYYAMPERUMAL TEVAN.
42 Mad. 702 : 53 I. C. 33 · (1919) M. W. N. 768 : 37 M. L. J. 248.

——Ss. 3 (11), 13 (3) and 143—*Rent—Cesses—Higher rates—Long payment—Presumption of contract supported by consideration— Padda Nazzar.*

S. 13 (3) of the Madras Estates Land Act does not preclude the Court from finding from the payment by the tenant of higher rates for a long series of years prior to the passing of the Act, that an implied contract existed to pay at these rates in the future. The consideration for such an agreement may be presumed from the same facts on the agreement itself. 31 I. C. 539, doubted, Padda nazzar not being a part of rent, cannot be levied from a tenant. (*Spencer and Krishnan, JJ.*) RAMACHANDRA THEVAR *v.* VELAYUDA NADAN. **52 I. C. 951.**

MADRAS ESTATES LAND ACT, S. 3, (11).

——Ss. 3 (11) and 143— *Cesses — Legality—Tests of—Kanganam, Kulavettu, Melvaram urai, Kudivaram urai, Swatanthram Kangovi—Tiruppas—Kattalavu Vasix—Ayyanar—Nature and legality of.*

To find out whether the cess paid for a number of years is legal or not, the Court will have to see whether the cess claimed has any direct or proximate bearing on the purposes for which the land is let. If the cesses are connected with object for which the land is let they can be claimed by the landlord under a contract between him and the ryots supported by consideration or under a usage for which a legal origin is proved or presumed. Mere length of payment will not render a cess which is voluntary or on its face illegal acquire a binding character. Payment for a long series of years is presumptive evidence of a legal origin and it can be reasonably inferred. On a consideration of the evidence the following cesses were held to be legal and payable by the ryots-Kanganam, Kulavettu, Melwaram urai, Kudivaram urai, Swathanthram, and thrashing floor rent, in cases where the tenants had no thrashing floor. The following cesses were illegal Kattalavai, Kangovi, Avyanar and Tirappani. (*Phillips and Kumaraswami Sastri, JJ.*) VADAMALAI TIRUVANANTHA SAVUGA PANDIA THEVAR *v.* SANKARA MOORTHI NAIDU.
42 Mad. 197 : 25 M. L. T 248 : 1919 M. W. N. 690 : 49 I C. 688 : 9 L W. 218 : 36 M. L. J. 109.

—— S. 3, Cl. (11)— *Cesses— Swamibogam — Rent—Illegal cess.*

Swamibogam is rent within S. 3, cl. (11) of the Act and is not a cess. Where a fixed grain pattam (rent) has been agreed to, the arrangement is binding on both the parties and it is not open to the tenant to reopen the same on the ground that certain illegal cesses were included therein. (*Sadasiva Aiyar and Spencer, JJ.*) SIVANUPANDIA THEVAR *v.* ZEMINDAR OF URKAD.
41 Mad. 109 . 6 L. W. 412 : 43 I. C. 498 : 34 M. L. J. 139.

——Ss. 3 (11) and 77 *Cesses—Madras Local Boards Act, S. 73 — Payment of Road Cess—Statutory liability—Rent.*

The obligation of a tenant to pay half the road cess paid by the landlord is not a common law but a statutory liability arising under S. 73 of the Act and the payment of the same is in the nature of the rent. The tenant is bound to pay the cess along with the rent and the landlord can exercise all the provisions of the Mad. Estates Land Act in the collection thereof. (*Seshagiri Aiyar, J.*) RAJESWARA MUTHURAMALINGA SETHUPATHI *v.* MAHALINGA RAJU. **6 L. W. 277 : 22 M. L. T. 146 : 42 I C. 502 : (1917) M. W. N. 710 : 33 M. L. J. 379.**

—— S. 3 (11)— *Cesses—Water tax—Payment for water supplied—Zemindar right to—Enhancement.*

Where the Govt. have retired from the field and left the Zamindar free to make his own arrangements with his tenants, the latter are bound to pay to the Zamindar the water-tax which they used to pay to Govt. There is no question of enhancement where new circumstances have come

into existence which require new adjustment and an extra payment for additional advantage. 38 M. 524, Rel. A payment for water supplied by or taken from the *Zamindar* is rent. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) BATTINNA APPANNA *v.* YARLAGADDA VENKATRAMALINGANNA BAHADUR. **42 I. C. 464 : 6 L. W. 443 : 33 M. L. J. 355.**

——Ss. 3 (11), 4, 77 and 143—*Rent Kanganam—Meaning of.*

The contribution by the tenants to the landlord to reimburse him for the cost of supervising the harvest out of which *melvaram* is delivered to him styled Kanganam and falling under S. (11) (*a*) of the Act, is not an illegal cess under S. 143 and consequently a condition for its payment can be properly entered in the pattah. If no custom of putting ridges on land in a tank-bed *i. e., Kulam Korvai* land is proved, a landlord can prevent the tenants from putting up such ridges to shut up tanks from the benefit of rain water or can charge *sarasari* (higher rates) for the ridges and cultivation of the *Kulam Korvai.* The tenants must also pay *Sarasari*, wet rates, to raise dry crops on *Nanja* land, while they could have raised dry crops. They should pay dry rates if they raise dry crops for insufficiency of water. The Act does not hold a tenant responsible for panchammati compensation to the landlord for loss caused to the crop in any way by theft, cattle,etc. (*Kumaraswami Sastri and Phillips, JJ.*) ARUNA CHALAM CHETTIAR *v.* MANGALAM. **40 Mad. 640 : 20 M. L T. 70 : 4 L. W. 37 : 35 I. C. 329 : 31 M. L. J. 168.**

——S. 3 (11)—*Rent— Pasturage dues.*

Rent is what is payable for the use of land for purposes of agriculture and does not include pasturage dues, suits wherefor are cognizable only by Civil Courts. (*Sadasiva Aiyar and Moore, JJ.*) RAVU SESHAYYA GARU *v.* RAJAH OF PITTAPUR. **3 L. W. 485 : (1916) 1 M. W. N. 396 : 34 I. C. 730 : 31 M. L. J. 214.**

——S. 3 (11)—*Cesses*—Kanganam *or* Kulavettu—*Voluntary payments.*

Kanganam or Kulavettu is in the nature of the voluntary payments and cannot be recovered. (*Seshagiri, Aiyar and Kumaraswami Sastri, JJ.*) CHIDAMBARA CHETTY *v.* AYYAVU. **32 I.C. 919 : 29 M. L. J. 746.**

——Ss. 3 (11) 61 and 63—*Cesses—Local cess paid by land-holder if rent.*

S. 3 (11) (a) refers only to money recoverable from a ryot by the landholder and does not apply to money recoverable by any other person from any other person as if it was rent. The local cess paid by a landholder and recoverable from the intermediate landholder under S. 73 of the Mad. Local Boards Act, 1884, is neither an instalment of rent within the meaning of S. 63 nor an arrear of rent within the meaning of S. 61 of the Mad. Est. Land Act, and no interest is recoverable upon the amount of such cess. (*Sadasiva Aiyar, J.*) NARAYANASWAMI NAIDU *v.* PANALA RAMA NADAN. **32 I. C. 433 : 3 L. W. 32.**

——S. 3 (11)—*Jurisdiction—Suit for recovery of a certain sum for use and occupation.*

A suit to recover a certain sum of money for use and occupation of plff.'s lands let to deft. for building purposes is cognizable by a Civil Court as the money sought to be recovered is not "rent" under S 3 (11) of the Estates Land Act The term '*jeroyati*' does not necessarily mean land let for agricultural purposes. (*Abdur Rahim and Spencer, JJ.*) RAMACHANDRA MARDARAJA DEO *v.* DUKKO PADHANO. **31 I.C. 852 (Mad.).**

——Ss. 3 (11) and 143—*Cesses—Meras—Payment as long as purpose lasts.*

A grant of an *Agraharam*, made conditional on the payment of *Meras* and *Russums* which were to continue so long as the purpose lasts, does not entail payment after failure of the purpose; since fees payable between Zamindar and tenant are not made payable after that purpose fails. 18 I.C. 298, Foll. (*Spencer and Coutts Trotter, JJ.*) RAJAH OF KALAHASTI *v.* SWARAM KAMAKSHAMMA. **31 I. C. 214 : 29 M. L. J. 535.**

——S. 3 Cl. (11)—*Kattubadi—Suit to recover —Inamdar.*

A suit to recover kattubadi from an inamdar lies in the civil and not in the Revenue court (*Seshagiri Aiyar, J.*) MADAPATHI VENKATESWARA *v.* NANDAM RAJAGOPALAM. **30 I. C. 927.**

——S. 3 (11)—*Rent—Enhanced rent for wet crops on dry land—Legality.*

A custom to pay enhanced rent for wet crops on dry land is not illegal, provided the tenant does not get such crops solely with his own improvement. (*Oldfield and Sadasiva Aiyar, JJ.*) MUTHU CHETTIAR *v.* MUTHUSAMI PILLAI. **30 I. C. 486.**

——Ss. 3 (11) 74 and 77—*Water cess—Water coming to one's land without any application—Liability to pay.*

Water flowing over a ryot's land on account of its favourable situation without benefiting cultivation is not "water supplied or taken for the cultivation of the land" within S. 3 and no water rate is chargeable on lands cultivated with the aid of such water. (*Spencer and Tyabji, JJ.*) RAMARAJA THEVAN *v.* VELUSWAMI THEVAN. **28 I. C. 449.**

——S. 3 (11)— *Cesses—Sadelwar — Madiri kasavu—Payment for 60 years consideration.*

Sadelwar and Madiri Kasavu are part of rent and not illegal cesses. In the case of continued payment of a higher rate of rent for 60 years for crops raised with improvements effected by tenants, consideration for the agreement to pay at the higher rate should be presumed. (*Sadasiva Aiyar and Napier, JJ.*) VENKATA PERUMAL *v.* RAMUDU. **39 Mad. 84 ; 28 M. L. J. 81 : (1915) M. W. N. 132 : 27 I. C. 688 : 17 M. L. T. 129.**

——Ss. 3 (11) and 77—*Rent—Tree pattas—Vari for trees—Revenue Courts, jurisdiction of.*

Vari or tax payable for trees held on tree pattas is not rent within the meaning of S. 3 (11) of the Act and a suit to recover such *vari* is not cognisable by Revenue courts under S. 77 of the Act (*Ayling and Hannay, JJ.*) MURUGAPPA CHETTIAR *v* RAMANATHAN CHETTIAR. **26 I. C. 60 : 1 L. W. 881.**

——S. 3 (11)—*Rent—Higher rate—Landlord and Tenant—Agreement.*

An agreement of a tenant to pay a higher rate of rent before the Madras Estates Land Act is without consideration and not enforceable as a contract. (*Ayling and Napier, JJ.*) ZEMINDAR OF GURUZA *v.* KONDURI CHINNA VENKAYYA.
25 I. C. 57 : 1 L. W. 575.

——S. 3 (11)—*Cesses—Ghatti Toomulu.*

Ghatti Toomulu is a volun tary payment made by a ryot to the Zemindar for keeping a tank in repair. (*Seshagiri Aiyar, J.*) GOGINANENI VENKATA-NARASIMHARAYUDU *v.* ZEMINDAR OF NUZVID.
1 L. W. 333 : 22 I. C. 972 : (1914) M. W. N. 373.

——Ss. 3 (11) and 77—"*Rent*" *meaning of—Pasturage Rent.*

The word "Rent" in S. 77 of the Madras Estates Land Act has the same meaning as in S. 3 (11) and hence refers only to what is lawfully payable to the landlord for the use and occupation of the land for agricultural purposes. Pasturage fees are not rent and suit for arrears lies in the Civil Court. (*Sadasiva Aiyar and Tyabji, JJ.*) RAJA OF VENKATAGIRI *v.* JAYAMPU AYAPPA REDDY. **38 Mad. 738 : 14 M. L. T. 405 : 1913 M. W. N. 919 : 21 I. C. 532 : 25 M. L. J. 578.**

——S. 3 (11)—*Rent—Waram—Implied contract—Right to revert to.*

Where no express contract is proved, the court will not infer an implied contract to pay enhanced rent especially where the facts disclose absence of consideration. Where a landlord is entitled to revert to waram rate, a higher cash rate would be supported by consideration. (*Sankaran Nair and Tyabji, JJ.*) SITHARAMARAZU LINGARAZU *v.* VENKATADRI APPA ROW.
21 I. C. 36 : (1913) M. W. N 645.

——S. 3 (11)—*Rent—User for agricultural purposes.*

S. 3 (11) does not require that the *Raiyat* in possession should actually use the land for agricultural purposes. So long as his right to so use subsists, he is liable to pay, and what he is bound to pay, is rent. (*Benson and Sundara Aiyar, JJ.*) IMANDI APPALASWAMI *v.* RAJAH OF VIZIANAGRAM. **25 M. L. J. 50 : 20 I. C. 838 : (1913) M. W. N. 806.**

——S. 3 (11)—*Cesses—Water rate—Wet crop on dry lands.*

A clause in a patta that if in any year wet or paddy crops are raised on dry lands, by getting water in any way, the rate prevailing in neighbouring villages for such cultivation will be paid, is valid. The words "getting water in any way" include cultivation with rain water stocked on the land. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) RAJA OF VENKATAGIRI *v.* CHITTAMURA RAMALINGIAH. **19 I. C. 144 : (1912) M. W. N. 1116.**

——S. 3 (11)—*Cesses—Long payment as a result of judicial process—Custom—Contract consideration.*

The right of the landlord to levy cesses such as *Vattam* in addition to the rent depends on whether it is payable along with the rent as an incident of the tenure and not merely that it has been paid for a long time. No custom or implied contract can be inferred from such payment for a long time if it had been made as a result of judicial process and the object for which it was originally intended failed. Where something is claimed in addition to the rent, the question would arise if there was any consideration and from the facts of the case the Court may infer either that no consideration passed or that it has failed. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) DEWANAI *v.* RAGHUNATHA ROW.
(1913) M. W. N. 886 : 18 I. C. 298 : 13 M. L. T. 351.

——S. 3 (11)—*Rent—Jodi—Fasli Jasti—Suit for.*

A suit by a proprietor against an inamdar for jodi and fasli *Jasti* being one against a person who himself possesses an interest in the melvaram is a Small Cause Suit and not triable by the Revenue Court. (9 M. L. T. 315, Ref.) (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) VENKATAPPA NAYANIVARU *v.* RAMI REDDY. **17 I. C. 39.**

——S. 3 (11)—*Cesses—Village and local cess.*

A suit for village and local cess is a suit for rent within the meaning of the Act. (*Sundara Aiyar, J.*) BACHU *v.* BHOGI REDDI.
36 Mad. 126 : 10 M. L. T. 282 : (1911) 2 M. W. N. 251 : 12 I. C. 171.

——S. 3 (11)—*Rent—Waram—Agreement to receive at olugu rate—Reversion to waram.*

If an inam was the tirwa or the right to receive a share in the produce which the Govt would be entitled to receive, it does not necessarily follow that because the Govt. has for a long term of years commuted its right to a share in the produce for a money payment that the Inamdar must do the same. Even if the inamdars once agreed to accept the revenue at the olugu rate prevailing in the village they may revert either to a division of the produce or to commutation at a different rate. (*Collins, C. J., and Parker, J.*) SRINIVASA AIYANGAR *v.* SIVASUBRAMANYAM PILLAI. **9 M.L.T. 501 : 10 I.C. 664 : 21 M. L. J. 125.**

——S. 3 (11)—*Rent—Enhancement—Stipulation for—Cultivation of dry lands with wet crops by means of Govt. water—No consideration.*

Where a lessee agreed to cultivate the lands of the lessor and agreed to pay the latter Rs.27-4 0 per *khatt* in the event of his cultivating dry lands with wet crops by means of the Krishna water without the Zemindar's permission, he was to pay Rs. 100 per *Khatti* and the right of cultivation was to be relinquished in such a case. *Held* that the stipulations were penal and unreasonable. Subsequently the lessees executed *muchilikas* in which they agreed to Rs. 3-3-0 per acre for dry lands cultivated with wet crops. *Held*, that there was no consideration for the agreement. (*Sankaran Nair and Ayling, JJ.*) MALLIKARJUNA PRASADA NAIDU *v.* VEMULAPALLI SUBBAYYA.
36 Mad. 4 : 9 M. L. T. 443 : 10 I. C 68 : (1911) 1 M. W. N. 315.

MADRAS ESTATES LAND ACT, S. 3 (11).

——S. 3, (11)—"*Rent*"—*Kattubadi.*

A claim for rent does not include one for kattubadi against an inamdar. (*Munro, J.*) GOPISETTI NARAYANASAWMI NAIDU *v.* TALLANRAJU VENKATASUBBARAYADU. **9 M. L. T. 315 : 9 I. C. 642 : (1911) 1 M. W. N. 233.**

——Ss. 3 (11) and 24—*Rent—Crops—Right of cultivation.*

A *ryot* can cultivate paddy crops on *punja* lands without any additional payment if the Zamindar's water is not used by him under the *pattah* held by him. (*Boddam and Sankaran Nair, JJ.*) NAGU CHETTI *v.* BHASKARA SETHUPATHI.
(1911) 1 M. W. N. 6 : 9 I. C. 41 : 9 M. L. T. 191.

——S. 3 (11) (a)—*Cesses—'Mathiri Kasavu'—'Sadalwar'—Not illegal.*

'Mathiri Kasavu' and 'Sadalwar' are charges incidental to the tenure of the land and payable with the rent. Mathiri Kasavu is straw rent and Sadalwar is stationary charge. (*Sadasiva Aiyar, Spencer and Bakwell, JJ.*) PRAYAG DOSS JEE VARU *v.* VENKAMA NAIDU. **(1918) M. W. N. 346 : 44 I. C. 641 : 23 M. L. T. 137 : 7 L. W. 477.**

——Ss. 3 (15) 185—*Ryoti land—Conversion of—into homefarm or Kamatam.*

The test to decide whether lands leased are *home farm* or ryoti lands is whether the land was in actual cultivation of the Zemindar though he might let it out on lease for some reasons provided he had the ultimate intention of cultivating it. Ryoti land cannot be converted into home farm land by the Zemindar by any act of his unless it came within the special provisions laid down in this connection. He cannot, by merely treating it has home farm land absorb it into the latter. Evidence of custom showing that certain land was treated as private land would not of itself determine the character of the land. Land let out for pasturage is not *ryoti* land within S. 3 (15) of the Act. (*Abdur Rahim and Burn, JJ.*) YARLAGADDA MALLIKARJUNA PRASADA NAIDU *v.* RENDUCHINTALA SUBBIAH. **28 M. L. T. 281 : 61 I.C. 552 : 39 M. L. J. 277.**

——Ss. 3 (15) 16 (b), 45, 153, 157 and 163—*Ryoti land—Cultivable land—Ryot—Sivaijama rent—Meaning of.*

The land that is actually culivated or cultivable by a tenant without much trouble and extraordinary expenses, is a cultivable land. Sivaijama rent is a rent paid by a person entitled to be called a tenant and not mere damages agreed upon between a landowner and a trespasser. (*Oldfield and Sadasiva Aiyar, JJ.*) PRESIDENT, DIST. BOARD, TANJORE *v.* KANNUSWAMI THONDAMAN. **35 I. C. 121.**

——S. 3 (15)—*Ryot—Who is not.*

A tenant holding land merely for pasturing purposes does not become a ryot within S. 3, Cl. (15) though the use of the land solely for pasture does not deprive him of his claim to be called "ryot" provided he has the right to use it for agriculture. (*Sadasiva Aiyar and Moore, JJ.*) RAVU SESHAYYA GARU *v.* RAJA OF PITTAPUR.
3 L. W. 485 : (1916) 1 M. W. N. 396 : 34 I. C. 730 : 31 M. L. J. 214.

MADRAS ESTATES LAND ACT, S. 3 (16).

——S. 3 (15)—*Ryot-Pattas and muchilikas—Effect of, exchange of.*

Exchange of *patta* and *muchilika* may give a right to recover rent but this is not necessary to convey title. The passing of title is not stayed by reason only of the fact that there had been no change of *patta* and *muchilika.* (*White, C. J., and Sankaran Nair, J.*) CHITIBABU ADENNA *v.* GARIMALLA JAGGARAYADU.
29 I. C. 12 : 28 M. L. J. 617 :

——S. 3 (15)—*Ryot—Tenant of old waste.*

A tenant of old waste not being ryoti land is not a ryot. (*Sadasiva Aiyar and Tyabji, JJ.*) RAJA OF VENKATAGIRI *v.* JAYAMPU AYAPPA REDDY. **38 Mad. 738 : 14 M. L. T 405 : (1913) M. W. N. 919 : 21 I. C 532 : 25 M. L. J. 578.**

——S. 3 (16)—*Tank-bed—Ejectment from Jurisdiction of Civil Court.*

Land which is a tank-bed, *i.e.*, which has been continuously used for the storage of water is not ryoti and a suit to eject a tenant from such holding is cognizable by the Civil Court. S. 3 (16) of the Madras Estates Land Act suggests its application to land which had not lost its character as tank-bed when the Act came into force. If its user for the purpose of tank-bed has been abandoned and the land has lost its character as tank-bed at the date of the suit, the suit is not cognizable by the Civil Court. (*Oldfield and Krishnan, JJ.*) GOPISETTI NARAYANASWAMY *v.* CHODAVARAPU KAMANNA.
51 I. C. 318.

——Ss. 3 (16) and 20—*Tank-beds—Capable of cultivation—Right of landlord.*

"Tank-beds" in S. 3 (16) of the Mad. Estates Land Act means such class as are cultivable *i.e.*, as are capable of being cultivated when the tank has become dry or when there is no water in the tank for certain years. Where tank-beds are capable of being cultivated or used in any such manner, the rights of the landholders over them are not affected by enactment of S. 20 of the Act. (*Abdur Rahim and Bakewell, JJ.*) BOLLUSWAMY *v.* VENKATADRI APPA RAO.
47 I. C. 594

——S. 3 (16)—*Policy of—Presumption of ryoti lands.*

The whole policy of the Act is to raise the presumption that all the lands in an estate are ryoti lands. (*Oldfield and Sadasiva Aiyar, JJ.*) PRESIDENT, DIST BOARD, TANJORE *v.* KANNUSWAMI THONDAMAN. **35 I. C. 121.**

——S. 3 (16)—*Ryoti land—"Cultivable" land—What is.*

Unless the land is of such a nature that it is ordinarily cultivable or cultivable at intervals of not unusual length, it is not "cultivable land" within S. 3, Cl. 16, and therefore not "ryoti" land and therefore the tenant of such land is not a ryot. (*Sadasiva Aiar and Moore, JJ.*) RAVU SESHAYYA *v.* RAJAH OF PITTAPUR.
3 L. W. 485 : (1916) 1 M. W. N. 396 : 34 I. C. 730 : 31 M. L. J. 214.

MADRAS ESTATES LAND ACT, S. 3 (16).

——S. 3 (16)—*Waste land—Pasturage.*

If waste lands have not been cultivated for years but used for pasturing cattle the presumption is that they belong to the landlord and the onus of proving that they are cultivable or that occupancy rights have been acquired therein, lies on the party asserting it. (*Wallis, C J. and Phillips, J.*) MAHARAJA OF VENKATAGIRI *v.* VELIKANTI RAMI REDDI.

(1916) 2 M. W. N. 21 : 3 L. W 582 : 34 I. C. 607 : 31 M. L. J. 211.

——S. 3 (16)—*Ryoti land—Jeroyati—Meaning of.*

Jeroyati may mean cultivable land but is also used in this presidency as opposed to inam land. (*Abdur Rahim and Spencer, JJ.*) RAMACHANDRA MARDARAJA DEO *v.* DUKKO PODHANO.

31 I. C. 852.

——S. 3 (16)—*Land—Service tenure—Ejectment—Civil Court.*

The suit being one to eject the deft. not as ryots on any of the grounds allowed by the Mad. Est. Land Act but only by virtue of the contract subsisting between the parties, it was rightly brought in the Civil Court. Land held on service tenure is not included in the definition of "Ryoti" land in the Mad. Est. Land Act so long as the service tenure continues. 24 M L. J. 288, Foll ; 4 C. 67 ; 23 M. 318 ; 7 M. 268, (1910) M. W. N. 179; 13 M. I. A. 438, Ref. (*Spencer and Coutts Trotter, JJ.*) IDUBILLI SYYADDI *v.* SRI RAJA VISWESWARA NISSANKA.

30 I. C. 416 : 18 M. L. T 142.

——S. 3 (16)—*Waste land—Zemindari—Jungly and uncultivated land—Presumption.*

Where the land in a *Zemindari* is a waste land and uncultivated, the presumption is that the *Zemindar* is the owner of both *melvaram* and *kudivaram* rights. In such a case, the burden is on the *ryot* to show that he owns the *kudivaram* interest. (*Wallis, C. J., and Seshagiri Aiyar, J.*) ARUNACHALA AMBALAN *v.* R. G. ORR.

40 Mad. 722 : 29 I. C. 634 : 32 M. L. J. 407.

——S. 3 (16)—*Ejectment—Village site—Landlord—Right to eject tenant.*

In the case of a village which is not part of an estate within S. 3 (2) of the Mad. Est. Land Act, a landlord can evict tenants let by him into possession, even if the land is classed as "Village site". (*Ayling and Tyabji, JJ.*) CHIMAKURTI NAGANNA *v.* KAVIPURAPU RAMA ROW.

28 I. C. 836.

——Ss. 3 (16) and 153—*Old waste at the time of passing Act—Ryoti land other than waste.*

Land which was ryoti land when the Madras Estates Land Act came into force but which could not be proved to be old waste under S. 3 of the Act must be held to be ryoti other than old waste. (*Sadasiva Aiyar and Tyabji, JJ.*) BUCHI SRAVAGARUDU GARU *v.* VENKATA RAJU.

38 Mad. 459 : 21 I. C. 913 : 25 M. L. J. 617.

——S. 3 (16)—*Pasturing of cattle—'Agriculture" and "Ryoti land," meaning of.*

MADRAS ESTATES LAND ACT, S. 4.

Land fit usually for pasturing cattle and not for raising agricultural crops is not ryoti land. 'Ryoti land" means permanently cultivable for all practical purposes and not occasionally cultivated. (*Sadasiva Aiyar and Tyabji, JJ.*) RAJAH OF VENKATAGIRI *v.* JAYAMPU AYAPPA REDDY.

38 Mad. 738 : 14 M.L.T. 405 : (1913) M.W.N. 919 : 21 I. C. 532 : 25 M. L. J. 578.

——S. 3 (16)—*Poramboke—Land in Zemindari—No presumption that it is cultivable.*

There is no presumption that any proamboke land in a *Zemindari* is of such a character as would lawfully be cultivated or given out by the Zemindar for purposes of cultivation. Therefore, the Zemindar must prove that it is such as he is entitled to let out on cultivation or receive kist for, if cultivated without his permission. (*Sundara Aiyar, J.*) GOPISETTY NARAINASWAMY NAIDU GARU *v.* BONDADA CHINA NARASIGADU.

15 I. C. 359 : (1912) M. W. N. 381.

——Ss. 4, 28 and 29—*Waste land—Liability to pay rent—Waram rate—Wet crops.*

Lands left waste through tenants' default are not free from rent. Tenants are bound to pay wet rent at the highest neighbouring waram rent, even though dry crops are raised where there is sufficient water for irrigation for wet crops. (*Spencer and Ramesam, JJ.*) KOTHANDARAMA REDDIAR *v.* CHINNASWAMI REDDIAR.

64 I. C. 740 : 14 L. W. 618 : 41 M. L. J 455.

——S. 4—*Rent—Right of landlord to waste land.*

Where by the custom of a Zemindari waste lands are not chargeable to rent unless they are left waste by wilful default, the landlord must prove that they were so left by the tenants. (*Phillips and Kumaraswami Sastri, JJ.*) RAJAH OF RAMNAD *v.* MEERASA MARAKAYAR.

50 I. C. 892.

——S. 4—*Rent—Right of landlord—Waram tenure—Land left fallow.*

Where the waram system of payment of rent is in vogue and the landlord claims rent for the land left uncultivated by the tenant, the landlord is entitled to claim rent for land left uncultivated unless the tenants established (1) a contract or custom exempting them from payment of rent for lands allowed by them to be waste or (2) that the lands were so left waste without their fault. Per *Sadasiva Aiyar, J* :—A custom to let lands lie waste (without regard to reasonable land, without regard to good or bad seasons and existence or absence of facilities for irrigation for indefinite periods at the tenant's or servant's will and pleasure with absolute freedom from liability to payment of any rent, is not a reasonable custom, which can be recognised by any Court. (*Sadasiva Aiyar and Spencer, JJ.*) RAMASWAMI SERVAIGARAN *v.* ATHIVARAHA CHARIAR.

23 M. L. T. 183 : (1918) M. W. N. 340 : 44 I. C. 663 : 7 L. W. 471.

MADRAS ESTATES LAND ACT, S. 4.

——— S. 4—*Liability to pay rent—Fallow land.*

Where it is customary to charge only the cultivated extents of a ryot's holding with rent, the uncultivated portions cannot be charged with rent. The liability of a ryot for rent under S. 4 of the Act is subject to any custom or contract to the contrary if established. Under the custom of the Ramnad Zemindari lands left waste not due to the ryot's wilful default are not chargeable to rent. (*Kumaraswami Sastri and Phillips, JJ.*) ARUNACHELLAM CHETTIAR *v.* MANGALAM.

40 Mad. 640 : 20 M. L. T. 70 : 4 L. W. 37 : 35 I. C. 329 : 31 M. L. J. 168 :

[Also. (1915) M. W. N. 190 :2 L. W. 145 : 27 I. C. 872 : (1918) M.W.N. 340 : 44 I.C. 663 : 23 M.L.T. 183 :]

——— S. 4—*Rent—Exemption from—Land left fallow.*

S. 4 of the Act does not preclude a tenant from claiming that by agreement and custom he is not liable to pay rent for the portion of his holding left fallow. 26 M. L. J. 269, Foll. (*Sadasiva Aiyar and Napier, JJ.*) ARUNACHELLAM CHETTIAR, *In re.* **30 I. C. 679: 2 L. W. 828.**

——— Ss. 4 and 12—*Fallow land—Rent—Custom—Tax on trees, when payable.*

A tenant is bound to pay rent upon every portion of his holding, whether he cultivates it or not, subject to any custom to the contrary which may be proved to exist in particular localities. If a custom not to charge any rent for the lands which are allowed to lie fallow by the tenants exists, a term in a *patta* to that effect is not improper.

Prima facie, a tenant who pays rent for a land should not be taxed twice for the trees standing on the land unless he derives special benefit from them, *e. g.*, when they are tapped for toddy. (*Sankaran Nair and Seshagiri Aiyar, JJ.*) UDAYAL *v.* ARUNACHELA CHETTIAR.

(1915) M. W. N. 190 : 27 I. C. 872: 2. L. W. 145.

——— Ss. 4 and 27—*Interpretation of—Rent—Liability.*

S. 4 of the Act must be read subject to S. 27 and a custom that rent for the whole holding must be calculated only on the cultivated area is not against S. 4 of the Act. (*Ayling and Tyabji, JJ.*) ARUNACHELLAM CHETTIAR *v.* MUTHAYANAL THAVEN. **25 I. C. 675 : 26 M. L. J. 575.**

——— S. 4—*Payment of rent on all lands actually occupied, cultivated and uncultivated—General rule if can be overriden by intention of parties.*

As a general rule under S. 4 rent is payable on all lands actually occupied by the tenant—cultivated or not ; but this general rule may be displaced by the execution of a pattah stipulating payment of rent in respect only of lands actually under cultivation. An intention of the parties to

MADRAS ESTATES LAND ACT, S. 5

that effect may also override the provisions of the Act. (*White, C. J., and Tyabji, J.*) SEGU ROWTHEN *v* ALAGAPPA CHETTY.

(1914) M.W.N. 340 : 22 I.C. 834: 26 M.L.J. 269.

——— Ss. 4 and 24—*Rent—Right of tenant to leave portion of land uncultivated—Rent on such portion.*

Where, under a custom in a Zamindari the tenant is entitled to leave a portion of his holding uncultivated for a year, paying rent only for the cultivated portion, the Zemindar has no right to assign on *Dharkast* lands remaining uncultivated and raise the rent thereon as that would amount to an enhancement. (*White, C. J. and Sankaran Nair, J.*) AMIRTHA PADAYCHI *v.* KACHI YUVA RANGAPPA.

22 I. C. 572.

——— Ss. 5, 125 and 132—*First charge—Money decree for rent—Execution in Civil Court—Landholder ceasing to be such at the time of suit—Effect of.*

The first charge for rent is available only when the decree for arrears of rent is executed by the Revenue Court under S. 132 of the Estates Land Act. If a money decree passed by a Revenue Court is transferred to a Civil Court for execution under S. 201 the power to execute the decree under the provisions of Ch. VI of Madras Estates' Land Act, does not go with it to the Civil Court executing the decree. 42 M. 114 Not Foll. Per *Sadasiva Aiyar, J.*—Where a person ceases to be the proprietor of the village at the time of suing for rent the first charge ceases to exist even if the landholder gets a first charge. In such a case he can enforce it only by a separate suit under O. 34, R 14, C. P. C., 41 C. 926, Foll. (*Sadasiva Aiyar and Spencer, JJ.*) SREE RAJABOLLAPRAGADA VENKATALAKSHMAMMA GARU *v.* NENDA SEETAYYA. **43 Mad. 786 : 28 M. L. T. 44 : (1920) M W. N 294 : 11 L. W. 466 : 57 I. C. 764 : 39 M. L. J. 30.**

[*See* contra 42 Mad. 114 : 29 M. L. T. 203 (F. B)]

——— Ss. 5, 125 and 132—*Rent decree—Execution sale—Encumbrances—Extinguishment of.*

A sale in execution of decree for a rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in S. 125 of the Mad. Est. Land Act. The statutory charge for arrears of rent is not a charge under S. 100, T. P. Act. (*Phillips and Kumaraswami Sastri, JJ.*) PANANGIPALLI SURANNA *v.* KATTA VENKATA SURYANARAYANA JAGAPATTIRAJU. **42 Mad. 114 : (1919) M. W. N. 25 : 25 M. L. T. 365 : 48 I. C. 794 : 35 M. L. J. 443.**

——— S. 5 (1)—*Rent--First charge—Sankarami mamool.*

Under S. 5 (1) of the Act rent is the first charge on the holding and produce thereof, and a provision to that effect in the pattah is superfluous; but the charge does not extend, when the produce has passed into the hands of a purchaser. Sankarami Mamool is not part of rent and a provision to say it cannot be allowed. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) VADDADI JAGANNADHA BHUPATHI *v.* PADDALA APPALA SAWMY.

(1914) M. W. N. 426 : 23 I. C. 576 : 28 M. L. J. 75.

MADRAS ESTATES LAND ACT, S. 6.

——S. 6—*Permanent right of occupancy—Sub-letting—"Ijardars and farmers of rent"—Middlemen.*

The appellants were lessees of certain lanka lands under a lease made before the Act, 1908, came into operation. The lease by its terms contemplated the cultivation of the land by ryots, and did not prohibit sub-letting; it provided for the termination of the tenancy in 1910. The appellants sub-let the lands to tenants who occupied and cultivated them. *Held*, that the appellants had not a permanent right of occupancy right under S. 6, Sub-S.(1) of the Act being merely middlemen. If the "ijardars and farmers of rent" referred to in S. 6 are ryots at all they are non-occupying ryots and cannot be converted into ryots with a permanent right of occupancy. (*Lord Atkinson*) BUTCHAYYA *v.* APPA RAO.
44 Mad. 856 : 14 L. W. 168 : 48 I. A. 387 : 69 I. C. 1 : 30 M. L. T. 104 : 26 C. W. N. 785 : 41 M. L. J. 669 : 1923 P. C. 243 (P. C.)

——S. 6—*Tenant remaining in possession after sale of the holding—Status.*

Before the Act came into force, the holding of an occupancy tenant was sold. He however continued in possession. In a suit for possession against him after the Act came into force, he pleaded that he acquired permanent right in the land by virtue of S. 6 *Held* that to acquire permanent right the tenant at the commencement of the Act must at least be a tenant at will and must have continued in possession. In the present case he was a mere trespasser at the commencement of the Act. (*Abdur Rahim and Oldfield, JJ.*) VEMMANNA VENKATACHELA NAIDU *v.* ETHIRAJAMMAL.
13 L.W. 61 : 60 I. C. 192 : 44 M. 220 : (1921) M. W. N. 189 : 39 M. L. J. 597.

——S. 6—*Old waste—Occupancy right.*

Per *Wallis, C. J.*—The main principle of the Act as declared in S. 6, is that every one in occupation of ryoti land at the passing of the Act or thereafter admitted to occupation acquires an occupancy right, but this does not apply to old waste as defined in the Act. (*Wallis, C J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) SANKARA VENKATARATNAM *v.* VARADARAJA APPA RAO.
40 Mad. 529 : 3 L. W. 592 : 35 I. C. 213 : 20 M. L. T. 118 : (1916) 2 M.W.N. 7 : 31 M. L. J. 123.

——S. 6—*Ryot—Kudivaram—Sub-lessee of—Rights of.*

The sub-lessee of a Kudivaram tenant does not acquire an occupancy right in the holding even if the Zemindar gave a patta direct to him. (*Sadasiva Aiyar, J.*) *In re* KAKARA PALLI *v.* POTTURAJI.
28 I. C. 277 : 2 L. W. 270.

——Ss. 6 and 151, 152 and 153—*Occupancy rights—Right to.*

Occupancy rights conferred by S. 6 cannot be curtailed by inferences drawn from another section which deals exclusively with ejectment suits by non-occupancy royts. (*Sankaran Nair and Ayling, JJ.*) RAJAVELU KOTI MUTHUKRISHNAN *v.* RAJU CHETTY.
24 I. C. 865 : (1914) M. W. N. 496.

MADRAS ESTATES LAND ACT, S. 6.

——S. 6—"*Admitted to ryoti land"—Meaning of.*

The words "admitted by a landholder in possession of ryoti land, in S. 6 of the Act" mean acceptance by the landholder of any portion of the rent fixed for the land. (*Miller and Spencer, JJ.*) PONNUSWAMI PADAYACHI *v.* KARUPUDAYAN.
38 Mad. 843 : 1 L. W. 218 : 24 I. C. 217 : 15 M L. T. 299 : 26 M. L. J. 285.

——S. 6—*Applicability of—Pending suit—Decree in ejectment—Appeal heard after passing Act I of 1908—Occupancy rights.*

Where an appeal from a decree in ejectment against a ryot obtained under Act VIII of 1865 was heard after Act I of 1908 was passed the deft. being a ryot in possession of ryoti lands on such date, can claim a right of occupancy notwithstanding the ejectment decree. (*Benson and Ayling, JJ.*) RAJAH OF PITTAPUR *v.* ANAPPINDI SIVA RAMAYYA.
18 I. C. 534.

——S. 6—*Object of—Ryot in possession—Prior possession by another—Effect of.*

A person dispossessed of another from land of which the former was in possession for the statutory period and acquired a prescriptive right he cannot recover possession simply because he happened to be in possession at the time the Estates Land Act came into force. The object of S. 6 of the Act is only to confer on the tenants in possession as against the landlord an occupancy right and is not intended to destroy the occupancy right which vested prior to July 1908 in favour of another person wrongfully in possession in July 1908. (*Benson and Sundara Iyer, JJ.*) MAHARAJAH OF VIZIANAGARAM *v.* MAHASWARAM RAMACHANDRAYYA.
11 M. L. T 256 : 15 I. C. 397 : (1912) M. W. N. 403.

——S. 6—*Applicability—Essentials.*

Proof of possession at the date of the coming into force of the Act is necessary before applying S. 6. (*Munro and Ayling, JJ.*) RANGASWAMY IYENGAR *v.* DISTRICT BOARD, TANJORE.
9 M. L. T. 320 : 9 I. C. 730: (1911) 1 M. W. N. 135 : 21 M.L.J. 728.

——S. 6—*Applicability of—Pending suits for ejectment—Appeal*

If an ejectment suit or an appeal from i against a tenant in possession of ryoti land is pending at the time the Act I of 1908 came in force, he cannot be ejected as occupancy rights have then been acquired by him. (*Sankaran Nair and Munro, JJ.*) VATTI KUTTI RAJANNA *v.* BHUJANGA ROW.
9 I. C. 160 : 9 M. L. T. 340.

——S. 6 (1) — *Explanation — Occupancy Right — Ryoti land — Tenant holding over after expiry of lease against wishes of land holder—Effect of.*

A tenant of *Ryoti* land, not being old waste was in possession on 1st July 1908 when the Estates Land Act came into force, but he was holding over contrary to the terms of the Muchilika under which he was let into possession and the expressed wishes of the landholder. *Held*, that under S. 6 (1) Expln. of the Madras Estates'

MADRAS ESTATES LAND ACT, S. 6,

Land Act the tenant had obtained a permanent right of occupancy. *Semble* : Such right is acquired by the tenant even though a decree for ejectment had been passed against him. 20 M.L.J. 528 ; 36 M. 439, approved. (*Sir John Edge.*) RAJA YERLAGADDA MALLIKARJUNA *v.* RAJULAPATI SOMAYYA. **42 Mad 400 : 46 I. A. 44 : 17 A. L. J. 233 : 23 C. W. N. 626 : 21 Bom. L. R. 627 : 26 M. L. T. 1 : 30 C. L. J. 77 : 10 L. W. 400 : 49 I. C. 708 : (1919) M. W. N. 541 : 36 M. L. J. 257. (P. C.)**

——S. 6 (1)—*Ryots--In possession—Time-expired lease.*

Ryots in occupation at the date of the Act under Muchilika which expired even one month before the Act but for the renewal of which negotiations were going on are deemed to be in possession. Their knowledge as to who was the landlord is not necessary. (*Wallis, C. J., and Sadasiva Aiyar, J.*) LAKSHMI VENKAYAMMA RAO *v.* VENKATARATNAM. **55 I. C. 629.**

——Ss. 6 (1) and 23—*Ryoti land—Zemindari —Presumption.*

Land within the ambit of a Zemindari is presumed to be ryoti land, unless it is shown to be private. (*Seshagiri Aiyar, J.*) GOPISETTI NARAYANASWAMI *v.* GANGISETTI BANGARAYYA. **4 L. W. 371 : 37 I. C. 394 : (1916) 2 M. W. N. 240.**

——S. 6 (1)—*Right of occupancy—Relinquishment of—Muchilika.*

A *Muchilika* executed prior to the passing of the Madras Estates Land Act (I of 1908) by which a tenant gave up his right to compensation on acquisition by Govt. cannot be read as an agreement by the tenant to transfer to the landlord his right to compensation in respect of any interest in the holding which might afterwards be conferred upon him by the Legislature and consequently the tenant was entitled to a half share of the compensation. (*Wallis, C. J., and Tyabji, J.*) HOTHA VIRABHADRAYYA *v.* REVENUE DIVISIONAL OFFICER. **29 I. C. 8.**

——Ss. 6 (1) and 8—*Occupancy right—Ryot in possession after sale of holding for rent—Landlord purchasing kudivaram—Effect of.*

A *raiyat* whose holding has been sold away in a rent sale before the Estates Land Act came into force but who continues in possession of such land at the commencement of the Act, obtains a permanent right of occupancy under S. 6 (1) of the Act. The rights to the *kudivaram* interest as between the rival claimants thereto (other than the landlord who is debarred by S. 8 from claiming such interest) are not affected by S. 6 (1) (*Sadasiva Aiyar and Hannay, JJ.*) SIVAPADA MUDALI *v.* PITTY THYAGARAJA CHETTIAR. **27 I. C. 383 : 27 M. L. J. 665.**

——S. 6 (1)--*Addition by encroachment—Possession for more than 12 years before the Act commenced—Ryot--Ejectment.*

A tenant who is in possession of his holding together with the encroachments if any made by him, for more than 12 years before the Act

MADRAS ESTATES LAND ACT, S. 8.

commenced is a ryot with occupancy rights under S. 6 ; but if the possession commenced within 12 years of the suit he can be ejected. (*Wallis, C. J. and Seshagiri Aiyar, J.*) BRINDAVANA CHANDRA *v.* JAGANNATHA SINGI SANTO. **26 I. C. 888 : 2 L W. 29.**

——Ss. 6 (1) and 8—*Occupancy right—Ryoti land.*

Ryoti land brought to sale for arrears of rent by the landlord and purchased by himself at that sale before the Madras Estates Land Act did not effect a merger of the occupancy and the landlord's rights. The land remained ryoti and the tenant in possession as a ryot when the Act came into operation must be taken to have acquired occupancy right by virtue of S. 6, if he did not possess it before. (*Ayling and Seshagiri Aiyar, JJ.*) MARKAPULI REDDIAR *v.* THANDANA KONE. **25 I. C. 916 : (1914) M. W. N. 798.**

——S. 6 (4)—"*Ryot*"—*Who is not—Pasturage—Lessee.*

A lessee of waste land let out for pasturing or grazing purposes is not a "*ryot*" within the meaning of Cl. 6 (4) of the Mad. Estates' Land Act and a suit to eject him lies in the Civil court and not in the Rev. court under S. 189. (*Wallis, C. J, and Phillips, J.*) MAHARAJA OF VENKATAGIRI *v.* VELIKANTI RAMI REDDI. **3 L. W. 582 : 34 I. C. 607 : (1916) 2 M. W. N. 21 : 31 M. L. J. 211.**

——Ss. 6 (6) and 55—*Suit for patta—Izara—Lease different from jeroyati patta — Lessee whether a ryot—Ryot out of possession of the holding—Jurisdiction of Rev. and Civil Courts.*

The plffs. lessees of a lanka for 3 years sued the deft. for a patta under S. 55 on the ground that they were in possession of the land as ryots on the date on which the Act came into force though at the time of suit, they were not in possession. The lease differed much from the ordinary jeroyati patta and was often renewed. The extent as well as the rents were varying on each occasion and the lease was styled an *izara. Held*, that the plffs. were not ryots and therefore did not acquire rights of permanent occupancy. *Held*, that a ryot can sue the landlord in a Rev. Court for the grant of a patta although he is not in physical possession of his holding at the time of the suit and he need not obtain possession through a Civil Court before suing for the patta. (*Ayling and Napier, JJ.*) TALLAPRAGADA SUBBAROW *v.* GOPISETTI NARAYANASWAMI NAIDU GARU. **20 M. L. T. 36 : 36 I. C. 727 : 4 L. W. 293 : 31 M. L. J. 339.**

——Ss. 8 and 115—*Mortgage by a tenant—Surrender landlord a necessary party to a mortgage suit—'Shall hold it as landholder'—Meaning.*

In case of a mortgage suit relating to a holding which has been surrendered by the mortgagor tenant to the landlord, the landlord is a necessary party as he is entitled to redeem. Therefore a decree for sale obtained in a suit to which the landlord was not a party does not bind the zamindar and the purchaser or his assignee cannot maintain a suit for possession, against the zamindar, inasmuch as he

has not obtained the kudivaram rights by his purchase. The words "shall hold it as a land holder" do not necessarily imply a land remains *ryoti* land and the surrender is not an operation by which the entire interests become united "otherwise." (*Sadasiva Aiyar and Napier, JJ.*) VENKATA RAMIAH APPA RAO *v.* LANKA LARSHMINARAYANA.
15 L. W. 218 : 30 M. L. T. 188: 45 M. 47 : 66 I. C. 376 : (1921) M W. N. 615 : 42 M. L. J. 161.

———Ss. 8 and 6—*Merger—Inam—Union of kudivaram interest with melvaram—Effect of—Kattubadi payable to Zemindar--Occupancy right—Test of.*

Where an inamdar of a portion of the melvaram after the permanent settlement was found to own also the kudivaram interest in the land. *Held* that S. 8, Cl. 1 of the Act applied and the union resulted in the occupancy right ceasing to exist and the melvaram right only being left in the landholder. Whoever is thereafter let into the land, he comes in not as tenant of an occupancy right but as a raiyat of raiyati land under S. 6, Cl. 1. The mere fact that the inamdar has to pay kuttubadi to the Zemindar does not make his interest as landholder anything less than the entire interest within S. 8, Cl. 1 since the raiyat has to pay rent to the inamdar alone as landholder. The words "entire interest" are intended to exclude interests such as those of a mortgagee. Per *Napier, J* :—The true test of occupancy right is cultivation and where this is not shown the inamdar could not acquire occupancy rights under the Act. 38 Mad. 843 doubted. (*Abdur Rahim and Napier, JJ.*) DUDDAMPUDI VENKATRAYUDU *v.* BIKKINA SUBBARAYUDU. **24 M. L. T. 376 : 8 L. W. 599 : 49 I. C. 179 : (1918) M. W. N. 643.**

———Ss. 8 and 3 (2) (d)—*Fractional holder of melwaram—Merger of kudivaram—Suit for rent—Forum.*

A suit for rent by a fractional sharer in an nam village who has acquired the kudivaram interest in the entire village in respect of a lease of a portion of the village after such acquisition would lie in the Revenue and not in the Civil Court, the holding not having ceased to be part of the estate. The expression "inamdar" in the exception to S. 8 must be read in its strict sense as equivalent to the owner of the entire interest in the inam and the exception is applicable to sub-S. 1. (*Oldfield and Sadasiva Aiyar, JJ.*) RAJACHARI *v.* THIRUMUGOOR DEVASTANAM. **41 Mad. 724 : 7 L. W. 568 : 45 I. C 71 :(1918) M W. N. 506 : 34 M. L. J. 419.**

———S. 8— *Exception-- Jurisdiction— Civil Court.*

Where in an inam the *kudivaram* and *melvaram* interests were subsequently vested in the *inamdar* and the tenants who were admitted into possession before the passing of the Act did not acquire occupancy rights, an action to eject the tenants on the ground that the *inam* fell within the exception to S. 8 is cognizable by a Civil Court. (*Coutts Trotter and Srinivasa Iyengar, JJ.*) SAM *v.* RAMALINGA MUDALIAR. **40 Mad. 664 : 34 I. C. 803 : 30 M. L. J. 600.**

———S. 8—*Exception—Applicability.*

The exception to the S. 8 of the Madras Estates Land Act has reference only to cases in which a person already an *inamdar* acquire the *Kudivaram* rights. (*Abdur Rahim and Ayling, JJ.*) VARADARAJA APPA RAO *v.* KATSNANI KARUVANNA.
3 L. W. 196 : 32 I. C. 722 : 19 M. L. T. 159 : 30 M. L. J. 249.

———S. 8—*Exception—Surrender—Abandonment—Intention.*

A landlord cannot acquire a *kudivaram* by mere surrender under the exception to S 8. When a ryot abandons land the landlord must indicate his intention by some act to make it part of his "home farm" lands. Surrender is not a mode of acquisition and has not the same effect in conferring rights as transfer of succession. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) UPADRASTA VENKATA SASTRULU *v.* DEVI SITARAMULU.
38 Mad. 891 : 24 I. C. 224 : 26 M. L. J. 585.

———S. 8—*Exception—Surrender—Abandonment.*

"Acquired" in S. 8 exception of the Act does not exclude acquisition by surrender or abandonment. A restricted interpretation ought not to be placed upon the word. 26 M. L. J. 99 Rel. on. (*Miller and Spencer, JJ.*) PONNUSWAMY PADAYACHI *v.* KARUPUDAYAN. **38 Mad. 843 : 1 L. W. 218 : 24 I. C. 217 : 15 M. L. T. 299 : 26 M. L. J. 235.**

———S. 8—*Exception—Surrender—If a mode of acquisition.*

The word "acquired" in the exception to S. 8 of the Act, must be construed so as to include cases of surrender or abandonment but they must be read in conjunction with S. 6 Cl. (1) and S. 3 Cl. (7) so as to apply to cases where the land so acquired was in the possession of the *inamdar* for ten years, a period necessary to extinguish the right of a cultivator to claim that the land may be given to him for cultivation. (*Sadasiva Aiyar and Spencer, JJ.*) ADUSUMALLI SURYANARAYANA *v.* ACHUTTA POTANNA. **38 Mad. 608 : 22 I. C. 339 : 15 M. L. T. 268 : 26 M. L. J. 89.**

———S. 8 (1)—*Interpretation of.*

Per Napier, J.—The words 'but shall hold it as landholder' in S. 8, Cl. (1) do not necessarily imply that the land remains ryoti and surrender is not an operation by which the entire interest become united 'otherwise' within the meaning of the section. (*Sadasiva Iyer and Napier, JJ.*) SRI RAJAH VENKATA RAMAIAH *v.* LANKA LAKSHMINARAYANA. **15 L. W. 218 : 45 M. 47 : 30 M. L. T. 188 : 66 I. C. 376 : (1921) M. W. N. 615 : 42 M. L. J. 161.**

———S. 8 (1) and (2)—*Scope of.*

S. 8 is devoted to the topic of merger which is subject to qualifications in other portions of the Act and S. 8 (2) deals with the particular case of the class covered by cl. (1), namely, where one amongst several co landholders subsequently acquires the occupancy right. But where one out of several ryots becomes entitled to the rights of landholder in respect of the same land, it is the converse of S. 8 (2) and is specially provided for in S. 6, Expl. (6) which

MADRAS ESTATES LAND ACT, S. 8.

prohibits acquisition otherwise than by inheritance or devise of occupancy right by an ijardar or farmer but the explanation following it is wider and under it a right of occupancy shall not be lost in consequence not only of its owners subsequently holding the land as ijardar or farmer but also of his becoming interested in it as landholder. (*Oldfield and Sadasiva Aiyar, JJ*) MUTHU REDDI *v.* MUTTUR VENKATAPATHI REDDI. **4 L. W. 168 : 37 I C. 1 : (1916) 2 M. W. N. 180 : 31 M. L. J. 354**

——**Ss. 8 (1) and 6 (6)**—*Scope of—Interpretation.*

The general provisions of S. 8 (1) of the Madras Estates Land Act must be controlled by the special provisions of the explanation to clause (6) of S. 6 of the Act on the principal of "*generalia specialibus nonderogant.*" A Zemindar, who as a Govt. ryot, has a right of occupancy in certain lands, is allotted ryotwari lands in exchange for his own Zemindari lands acquired by the Govt. under the Land Acquisition Act, does not lose his occupancy rights therein by becoming the landholder in respect of the same lands (*Wallis, C. J. and Seshagiri Aiyar, J.*) ZEMINDAR OF SANIVARAPET *v.* ZEMINDAR OF SOUTH VALLURU. **34 I. C. 444 : 39 Mad. 944.**
[Affirmed but for other reasons by the Privy Council : 49 I. C. 818 : 42 M. 355.]

—— **S. 8, Cls. (1) and (3)**—*Merger—Effect—* Kudivaram *land—Purchased by landlord from a tenant remains ryoti.*

Where *Kudivaram* right in land is purchased from a tenant by a landlord, the land continues to be ryoti land, unless the landlord shows by strong evidence that he has converted the land into his private land. (*Sadasiva Aiyar and Napier, JJ.*) METHUKU SIVARAMAYYA *v.* MUNIREDDIGARI CHINNA MINEAPPA. **30 I. C. 812.**

——**S. 8 (1) (2) (3)**—*Merger—Occupancy right—Effect.*

Under S. 8 (3) of the Act, the merger of an occupancy right by transfer or succession under Cls. (1) and (2) does not convert *ryoti* land into private land. (*Sankaran Nair, J.*) VEERAPPA CHETTI *v.* MUDALI. **24 I. C. 375 : 26 M. L. J. 373.**

——**S. 8 (4)**—*Applicability—Tenants in possession before the Act.*

S. 8 (4) of the Act does not apply to tenants in possession before and at the time of the passing of the Act. (*Sankaran Nair, J.*) VEERAPPA CHETTY *v.* MUDALI, **24 I.C. 375 : 26 M. L. J. 373**

——**Ss. 11, 151, 187 (g)**—*Use of land—Tenant's rights—Contract—Custom.*

A tenant is not deprived by the provisions of S. 11 or 151, of his right of using a land even in a manner impairing its value for agricultural purposes if there is an agreement or usage to that effect because the Act is not against such contracts or customs being enforceable. Hence a tenant is fully authorised to erect a tannery or skin godown if he has entered into a contract or there is a custom to that effect. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MURA KASSIM ROWTHER *v.* FOULKES. **23 M. L. T. 352 : 16 I C. 220 : 37 Mad. 432 : (1913) M. W. N. 137.**

MADRAS ESTATES LAND ACT, S. 13.

——**S. 12**—*Trees—Right of, ryot to—Rent varying with the number of trees—Effect of.*

Under S. 12 of the Madras Estates Land Act, an occupancy ryot is entitled to use, enjoy and cut down trees in his holding and such right includes the right to appropriate the trees cut down. Where the land itself on which the trees stand is held on patta the fact that the rent payable for the land varies with the number of trees standing on it does take the case out of the operation of the Estates Land Act. I L. W. 881 Dist. There is no valid custom in the Ramnad Zemindari entitling the landholder to claim compensation for Palmyra Trees cut by the ryots without the permission of the landholder. (*Sadasiva Iyer and Spencer, JJ.*) RAJA OF RAMNAD *v.* KAMITH RAVUTHAN. **12 L. W. 465 : 60 I. C. 90 : (1920) M. W. N. 603.**

——**S. 12**—*Trees—Right to—Ryot admitted after the passing of the Act.*

Under S 12 of the Madras Estates Land Act, royts in occupation at the date of the passing of the Act as well as the ryots admitted subsequently are entitled to enjoy the trees on the holding. (*Wallis, C. J. and Ayling, J.*) VENKOBARAO *v.* KRISHNASWAMI NAYAKER. **55 I. C. 467.**

——**Ss 12 and 213**—*Trees—Suit for damages for cutting—Breach of provisions of Act—Jurisdiction.*

Per *Krishnan, J.*—A suit for damages for cutting trees cannot be changed into a suit for breach of the title given by the statute to the trees. S. 12 merely recognises the right of an occupancy ryot to use, enjoy and cut down trees in his holding. A suit for damages for cutting trees is not a suit for damages for breach of the provisions of the Est. Land Act, and cannot be brought within the scope of S. 213 to make it cognisable by a Rev. Court. (*Spencer and Krishnan, JJ.*) NARAYANNAPPA *v.* VENKATARAMAN. **36 I. C. 202 : 20 M. L. T. 281 : 4 L. W 245 : (1916) 2 M. W. N. 215.**

——**S. 12**—*Trees—Stipulation not to cut fruit—Bearing trees.*

A tenant is not entitled to cut fruit bearing trees if the stipulation in a pattah is to that effect. (*White, C. J. and Sankaran Nair, J.*) AMIRTHA PADAYACHI *v.* KACHI YUVA RANGAPPA. **22 I. C. 572.**

——**S. 13 (3)**—*Contract to the contrary—Implied contract—Higher rate—Garden cultivation—Improvements by tenants.*

A tenant of dry lands in Zemindari sank a well at his own expense and thereafter raised garden crops on the land Prior to the sinking of the well the tenant had paid a uniform rent of 4 *fanoms* on a dry basis; from time immemorial subsequently the landlord claimed and the tenant had for some years paid an enhanced rent of 8 *fanoms* at the garden crop rate. The tenant sued to obtain pattas at the dry rate of 4 *fanoms. Held*, that there was an implied contract to pay rent at the dry rate of 4 *fanoms*, but there was no consideration to support an implied contract to pay at the enhanced rate. To construe the original contract as a contract to pay at the dry

rate only so long as the lands remained, and a higher rate for produce raised by the labour and outlay of the tenant, would be repugnant to the Act. The fact that the Zemindar consented not to raise a hopeless and groundless dispute as the right of the tenants to hold at the 4 *fanoms* dry rate would not be a valid consideration for the tenant's promise to pay enhancedrent. The long payment of enhanced rents by the ryots in the past did not operate as an estoppel *in pais* binding the ryots to pay enhanced rents in future. (*Lord Sumner.*) JAGAVEERA RAMA *v.* ALAWARASA ASARI. **43 Mad. 174 : 48 I. C. 907 : 23 C. W. N. 225 : 17 A. L. J. 129 : (1918) M. W. N. 732 : 36 M. L. J. 49 (P. C).**

———S. 13 (3)—*Waram systems— Right of landlord to revert to—Muchilika—Construction—Enhancement of rent—Distraint—Suit to set aside—Decision as to propriety or tender of patta.*

The landholder is entitled to revert to the waram system unless the ryots establish that it has been superseded permanently by the cash system by contract, express or implied, between them and the landholder. Where there is evidence to show that the tenure was a waram tenure to start with, evidence is not necessary to prove that this is the prevailing tenure unless the presumption that the tenure is a waram tenure is rebutted by the ryot. Evidence of money payments for several years at varying rates under specific contracts in term-pattas for stated periods does not warrant the inference that waram system was permanently given up. The decision in ryot's suit to set aside a distraint that a tender of patta was not a proper tender operates as *res judicata* in a suit by the landholder under S. 77 of the Estates Land Act as regards the question of propriety of that tender *Amani* system means waram system and a provision in a muchilika by which after the expiry of the period under it the ryots undertake to cultivate the lands under "pathukattu muchilikas under the Amani rules" amounts to an agreement by the ryots to revert to the waram system after the expiry of the period fixed in the muchilika. Under the waram the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop. His claims to share in all the crops cannot be looked upon as an enhancement of rent within the meaning of S. 13 (3) of that Act. (*Spencer and Krishnan, JJ.*) VARADA REDDI *v.* SRINIVSA MUDALIAR.
18 L. W. 169 : 33 M. L. T. (H.C.) 34 : (1923) M. W. N. 357 : 45 M. L. J. 199 : 1924 M. 299.

———S. 13 (3)—*Contract before the Act to pay wet rates—Improvements made at tenant's expenses after the Act—Enforceability of the contract.*

A landholder claimed to recover rent at wet rates from his tenant for land which the latter had cultivated wet in consequence of improvements made at his own expense. The plaintiff claimed wet rates on the strength of a contract of the year 1885 before the passing of the Madras Estates Land Act. The improvements were made after the Act was passed. *Held*, in the circumstances the plaintiff was not entitled to rely on his contract with reference to S. 13 (3) of the Estates Land Act. The intention of the Legislature was to refuse to contracts made before, equally with contracts made after, the passing of the Act any effect in the relation between the ryots and the landholder. (*Schwabe, C.J., Oldfield and Coutts Trotter, JJ.*) CHOCKALINGAM CHETTIYAR *v.* PALANI AMBALAM. **46 Mad 712 : 18 L.W. 646 : (1923) M. W N. 411 : 32 M. L. T. 377 (H. C.) : 45 M L J 124 : 1923 Mad. 685.**

———S. 13 (3)—*Improvements by ryot after Act—Contract to pay higher rent prior to Act.*

S 13 (3) does not apply to a case where there is an improvement effected by a ryot after the Act and there is a contract entered into prior to the Act to pay enhanced rent for such improvements; and consequently the landlord can claim enhanced rent as per contract. In respect of a contract to pay a higher rate, the Court *may presume* from long continued payment of higher rent, an agreement as its legal origin as well as consideration therefor but the Court is not *bound to* presume an agreement for payment of higher rent by reason of mere usage established by long continued payment therefor. (*Sadasiva Aiyar and Spencer, JJ.*) RAJAH OF RAMNAD. *v.* GNANAMUTHU **(1921) M. W. N. 789 : 69 I C. 535 : 41 M. L. J. 495.**

———S. 13 (3)—*Improvements—Meaning of.*

Temporary wells for growing crops are improvements and a charge for *van payer* grown therewith is not legally leviable. "Improvements" in S. 13 *does* not mean permanent ones only but also temporary ones which enhance the value of the holding during their existence. (*Phillips and Kumaraswamy Sastri, JJ.*) RAJA OF RAMNAD *v.* MEERASH MARAKKAYAR. **50 I. C. 892.**

———S. 13 (3)—*Contract to the contrary—Increased rent—Long payment—Presumption.*

Where a tenant pays enhanced rent for a number of years in respect of garden crops raised by him, the Court may infer a contract between the landlord and tenant supported by consideration, to pay the enhanced rent. The other circumstances proved must also be given due weight in this connection. 7 M. 365; 36 M.L.J. 49 P.C.; 21 M. 136 and other cases discussed. (*Wallis, C. J., Ayling, Coutts Trotter, Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) PERIAKARUPPA MUKKANDAN *v.* RAJA RAJESWAR SETHUPATHI. **42 Mad. 75 : (1919) M.W.N. 161 : 50 I. C. 616 : 36 M. L. J. 320.**

———Ss. 13 (3) and 3 (4)—*Contract to the contrary—Well sunk by ryot—Higher rent—Long payment—Presumption.*

A landlord can charge garden rates for crops grown with the aid of water from wells sunk by a raiyat if they are based on any contract, express or implied, or on any local usage. The usage might be the result of a valid contract. Where enhanced rent has been paid for a long period of time not only can the existence of an agreement to pay at such rate but also considerations for such agreement can be presumed as a fact. S. 13 (3) of the Act is not retrospective and does not

apply to improvements made before the Act. Where wells are sunk by a raiyat in poramboke the forbearance of the landlord to charge the rent for the site occupied by the wells might amount to a consideration for a contract to pay enhanced rate. An improvement by a raiyat which prejudicially affects other lands of the landholder would not be an improvement of which the raiyat could claim to take advantage under S. 13 (3) of the Act. (*Sadasiva Aiyar, Spencer and Bakewell, JJ.*) PRAYAG DOSS JEE VARU *v.* VENKANNA NAIDU. **23 M. L. T. 137 : 7 L. W. 477 : 44 I. C. 641 : (1918) M. W. N. 346.**

——S. 13 (3)—*Improvement by tenant—Higher rent—Decision by Revenue Court under Rent Recovery Act* —Res judicata.

The decision as to terms of pattah by a Revenue Court under Madras Rent Recovery Act is not *res judicata* in a suit for rent under Madras Estates Land Act. Special rates cannot be claimed by the landlord for garden and second crops with aid of water obtained by improvements made by tenants at their own expense. Revision of rent is a matter of grace except in case of a contract to the contrary. (*Sadasiva Aiyar and Spencer, JJ.*) JAGANNADHA MUDALIAR *v.* NEERBOY AUDIAH. **42 I. C. 718 : 6 L. W 292.**

——S. 13 (3)—"*Contract to the contrary*"—*Long payment.*

A contract to pay an extra charge for *van payer* could not generally be inferred from the long continued course of payment in the absence of an independent proof of consideration for the contract 28 M.L.J. 81 Expl. 28 M 441, Considered. 35 M 134, Foll. Where rent for dry land can be claimed independently of the existence of a crop, claim for extra rent for second dry crop is not allowable. (*Ayling and Phillips, JJ*) ARUNACHELAM CHETTY *v.* SAYED AHAMED AMBALAM. **2 L. W. 1117 : 19 M. L T. 138 : 31 I.C. 539 : (1919) M. W. N 237.**

[This is no longer law. See 42 Mad. 75: 50 I. C. 616 (F. B.)]

——S. 13 (3)—*Contract to the contrary—Previous payment of rent—Effect of.*

A ryot will be disentitled to the benefit of S. 13 (3) only if he had contracted himself out of his rights by a contract actually in force. Payment of rent for seven years at an enhanced rate proves merely an agreement and not a contract which is no consideration for it. (*Sankaran Nair and Ayling, JJ*) DEVI BHUKROJI KASIDORE *v.* ALLAMADAGA NARAYAN REDDI. **28 I. C 492 : (1915) M. W. N. 209.**

——S. 13 (3)—*Not retrospective—Improvements by tenants—Land set apart by landlord for wells—Payment of enhanced rent for 40 years —Presumption.*

S. 13 Cl. (3) of the Estates Land Act has no retrospective operation. A vaild contract to pay rent at an enhanced rate can be presumed from payments at that rate for 40 years. A landlord set apart a considerable area of land for the digging of wells for irrigating the lands in respect of which enhanced rates were claimed but he charged no rent for the area so set apart. *Held* he must be deemed to have contributed to the cost of the wells dug by tenants on that area, though at their

expense. Such contribution is sufficient consideration for a contract to pay rent at enhanced rate. (*Sadasiva Aiyar and Napier, JJ.*) GOVIND DOSS *v.* GURRAM CHINNAPPA NAIDU. **27 I. C. 869 : 2 L. W. 142 : 28 M. L. J. 136.**

——S. 13 (3)—*Not retrospective—Improvement by tenant—Payment of higher rent.*

S. 13 (3) has no retrospective operation and does not exempt a tenant from liability to pay a higher rate of rent or crops raised with the help of improvements at the sole expense of the tenant where the improvements had been effected before the Act came into force and there had been a contract before the Act for the payment of such enhanced rent. An Act is always prospective in its operation and strong words are necessary to make it retrospective. (*Kumaraswami Sastri, J.*) VENKATA PERUMAL *v.* RAMUDU. **39 Mad. 84 : (1915) M. W. N. 132 : 27 I. C. 688 : 17 M. L. T. 129 : 28 M. L. J. 81.**

——S. 13 (3) — *Improvement by tenants—Higher rent—Liability.*

A landlord cannot charge a higher rate of rent for the more valuable crops grown by the tenant with the aid of wells sunk by the tenant. (*Sankaran Nair and Tyabji, JJ.*) RAGHAVA NAIDU *v.* MUTHYALU NAIDU. **26 I. C 364 : 28 M. L. J. 301.**

——S. 13 (3)—*Improvements by tenant--Higher rent.*

Where a tenant digs a well at his own cost and uses the water of the well so dug for raising either a second crop or both the first and second crop and thus increases the grain yield of the land such increase is a consequence of his improvement and under S. 13 (3) of the Act, and the tenant is not liable to pay any higher rent to the landlord for second crop. (*Sadasiva Iyer and Tyabji, JJ.*) MAHARAJA OF VENKATAGIRI *v.* MOHADEEN SAHIB. **25 I. C. 590 : 1 L. W. 592.**

——S. 20—*Tank-bed—Grant by Zemindar for cultivation.*

A grant of tank-bed by Zemindar for cultivation is not illegal (*Benson and Sundara Ayyar, JJ.*) CHITRAVELU *v.* SAMANNA IYER. **35 I. C. 108.**

——S. 25—*Admission to possession of ryoti lands—Usufructuary mortgagee continuing possession under a Kadappa—Customary right.*

Where a usufructuary mortgagee of lands in an estate was allowed to continue in possession under a Kadappa after the discharge of his mortgage, *held*, he was not admitted to possession of ryoti lands within S. 25 of the Act and he was bound by the terms of the Kadappa and cannot claim to be liable only for the customary rent. (*Abdur Rahim and Oldfield, JJ.*) SRI RAJENDRAMANI DEVI GARU *v* YELLAPPA RAMA NAIDU. **12 L. W. 600 : 60 I. C. 15 : 39 M. L. J. 565.**

——S. 26—*Payment of uniform lower rate from inception of tenancy—Right of successor to raise.*

Per *Schwabe, C.J.*—S. 26 deals with case where there has been an actual prior rent greater than

MADRAS ESTATES LAND ACT, S. 26.

the rent claimed by the tenant and does not deal with a case when a ryot is setting up that *ab initio* the rent payable was the lower rent, but to be increased to the higher rent in certain eventualities. *Per Wallace, J.*—" The lawful rent payable" in S. 26 (3) is not necessarily for invariably the faisal rate fixed by the Government but may be a contract rate on which the occupancy is based. (*Schwabe, C. J. and Wallace, J.*) PARA DEKKAN *v.* AMEERUDDIN SAHIB. **17 L. W. 169 : 1923 Mad. 306.**

———S. 26—*Settlement of rent — Successors when bound—Presumption—Onus.*

Except under the provisions of the Mad. Est. Land Act a permanent settlement of rent by a landlord is not binding on his successors and the burden is on the grantee to show that there is a grant of the kind mentioned in S. 26 of the Act. (*Seshagiri Aiyar and Napier, JJ.*) KAMULAMMAL AVERGAL *v.* SANGALI SUBBA PILLAI. **48 I. C. 615 : 35 M. L. J. 11.**

———S. 26—*Faisal rate—Propriety of—Contract to receive lower rate.*

There is a presumption that the faisal rate fixed by Government is the proper rent that can be levied on the land. A contract between a landholder and a tenant for payment of a favourable rate of rent will not, except in cases specified in S. 26 (1) of the Madras Estates Land Act, bind the successor in title of the landholder who can enforce the faisal rate or the rate in force prior to such contract (*Bakewell and Phillips, JJ.*) KARUPPA GOUNDAN *v.* NARAYANA CHETTIAR. **(1918) M W. N. 188 : 7 L. W. 376 : 45 I. C. 406 : 24 M. L. T. 35.**

———S. 26—*Consideration—General law.*

S. 26 of the Act does not exclude from its operation the general law as to consideration in the Contract Act. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) VEDACHELLA MUDALIAR *v.* SHIVA PERUMAL MUDALI. **25 I. C. 741: 16. M. L. T. 184.**

———Ss. 26 (3) and 56— *Landlord's claim—Extent of.*

Under S. 26 (3) the landlord has only the right to claim to revert to the old rate and to compel the Collector in a suit under S. 56 to decree it. A Court cannot cancel an existing rate *patta* in a rent suit. (*Ayling and Napier, JJ.*) SRINIVASA-IYANGAR *v.* ABDUR RAHIM SAHIB. **6 L. W. 108 : 40 I. C. 82 : (1917) M. W. N. 584.**

———Ss. 27 and 28—*Rent—Presumption as to amount.*

In accordance with Ss. 27 and 28 the old rent continues until reduced or enhanced by special applications under the statute. (*Viscount Cave.*) RADHA KRISHNA AIYAR *v.* SUNDARASWAMIER. **36 C. L. J 450 : 16 L. W. 18 : 31 M. L. T. 31: 45 M. 475 : 27 C. W. N. 1 : 20 A. L. : 49 I. A. 211 : 43 M. L. J. 323 : 1922 P. C. 257 (P. C.).**

———Ss. 27, 28, 5 and 56—*Rent—Rate payable—Previous payments — Inference—Reversion to Varam—Right of landlord.*

MADRAS ESTATES LAND ACT, S. 38.

An implied contract to pay money in lieu of Varam cannot be inferred from previous payments of money rent for a number of years if the rates at which money was paid were fluctuating. Proof that money payments were made at varying rates will rebut the presumption that the rent paid in the previous fasli is the rent payable in the current fasli. In the absence of proof of a completed agreement to pay rent at a fixed rate, a landlord will be entitled to revert to Varam or faisal rates, notwithstanding temporary lapses from the same. (1918 M. W. N. 188 ; 29 M. L. J. 362 ; 33 M. 177 (P. C.) Ref. (*Spencer and Krishnan, JJ.*) MUTHIAH CHETTIAR *v.* PERIYAN KONE. **(1920) M. W. N. 15 : 55 I. C. 78 : 11 L. W. 311.**

———Ss. 27 and 4—*Presumption—Rebuttal of—Custom.*

S. 4 of the Act read with S. 27 allows a custom, if proved, to be set up against that section to pay rent of the land actually cultivated. The presumption arising under S. 27 is rebuttable, (*Ayling and Napier, JJ.*) KANTHIMATHANATHA PILLAI *v.* PUGAL SUBRAMANIA NADAN. **39 I. C. 144.**

———Ss. 27 and 28—*Rent—Rate payable—Presumption — Waram — Landlord's right to revert.*

The presumption under S. 27 of the Act can be rebutted by showing that these conditions were not in accordance with the agreement ,or usage prevailing between the parties. The rule of law contained in Ss. 27 and 28 will not apply when the rent is fixed by an *ex parte* decision in which all the points on which the parties were at varriance left open. Whether the rates were high or low during the temporary arrangement, both the landlord and the tenant are at liberty to revert to their original contract or usage. Where no data are available to fix the waram rates, the proper procedure is to accept the paimash rate. (*Spencer and Coutts-Trotter, JJ.*) AIYAPERUMAL *v.* RAMASWAMI. **2 L. W 650 . 30 I. C. 983 : (1915) M. W. N. 614 : 29 M. L. J. 362.**

———S. 27—*Presumption—Applicability.*

The presumption under S. 27 of the Act does not apply when no second crop was raised for the previous faslis and no additional rent is claimed in consequence. (*Sadasiva Iyer and Tyabji, JJ.*) MAHARAJA OF VENKATAGIRI *v.* MOHADEEN SAHIB. **25 I. C. 550 : 1. L. W. 592.**

———Ss. 38 and 41—*Unnotified claim—Penalty—Cessation of interest—Prohibition of payment—Rights of secured creditors.*

Persons having pecuniary claims against a ward who failed to notify their claims will have to suffer cessation of future interest. The claimant can only prosecute his remedies for the amounts already accrued due. Secured creditors who have not notified cannot get payment from the Court of Wards out of the encumbered funds at its disposal but they can realise their security by execution through the Court even during the continuance of the superitendence of the Court of

MADRAS ESTATES LAND ACT, S. 38.

Wards. (*Wallis, C. J. Bakewell and Kumaraswami Sastri, JJ.*) SRINIVASA RANGA RAO *v.* RAJAH OF KARVETNAGAR. **41 M. 503 : 7 L. W. 206 : 44 I. C. 15 : 23 L. T. 127 : 34 M. L. J. 454.**

——S. 38—*Reduction of rent—Grounds.*

Rent will not be reduced where the tenant cannot show that the failure to supply water took place while the rent was as high as the present figure. (*Coutts-Trotter and Napier, JJ.*) NALLAYA KOUNDAR *v.* SADAYA KOUNDAR. **32 I. C. 809 : 1915 M. W. N. 791.**

——S. 38—*Remission for savi.*

Remission for *savi* is purely moral and not legal, in the absence of custom or contract. (*Kumaraswami Sastri and Phillips, JJ.*) RAM KRISHNA RAJANUGARU *v.* RANGACHARIAR. **32 I. C. 737 : 3 L. W. 300.**

——S. 40—*Commutation— Rate, determination of—Duty of Collector — Decree — When appealable.*

Where the Collector thinks that commutation should take place, he is bound to proceed to determine the money rent and the time for which the commutation should have effect. The Collector is not entitled to dismiss the suit on the ground that it is not possible to determine the rate on the evidence available. An appeal lies to the Dist. Court against the decree of the Collector under S. 40 of the Mad. Est. Land Act only where the decree determines the sum to be paid as money rent or the time for which the commutation shall take effect and not otherwise. (*Mr. Butterworth.*) PETRO KOIBOLYA PRASADA GOSWAMI *v.* ARJUNA GOW .. **43 I. C. 63 (Rev).**

——S. 40—*Commutation of rent—When allowable—Burden of proof.*

The Act is intended to protect the interests alike of the tenant and of the landlord and unless either of them suffers, because of the payment of rent in kind, interference by way of commutation will not be justified. The party who asks for commutation of rent under S. 40, must prove that he is entitled to it. (*Azizuddin, F. M.*) KARUPPAYYA THEVAN *v.* ADAIKKALAM CHETTY. **41 I. C. 511.**

——S. 40—*Commutation—Landlord, if has any option.*

S. 40 enables an occupancy tenant to sue for commutation of rent which is in the discretion of the Court to refuse or allow; the landlord has no option in the matter. (*Clegg, F. M.*) GOPAL KRISHNA AIYAR *v.* SRINIVAS RAO SAHIB. **34 I. C. 935.**

——Ss. 40 and 189 (2)—*Order under S. 40—Collector's expression of opinion—If amounts to—Appeal.*

Mere expression of opinion in a Collector's note that the question of commutation of rent

MADRAS ESTATES LAND ACT, S. 40.

need not be considered as it was already settled is not an order under S. 40 appealable under S. 189 (2). (*Clegg, F. M.*) ANDI THEVAN *v* ZEMINDARNI OF SIVAGIRI. **34 I. C 460.**

——S. 40—*Commutation—Rent—Rate payable.*

In determining the fair money rate, the Collector has to consider other things along with (*a*), (*b*), and (*c*) in S. 40. The average value is to be fixed by dividing the total rents of 10 years by 10. (*Sadasiva Aiyar and Spencer, JJ.*) VEDURUVADA VENKANNA *v.* RECEIVER, MEDUR AND NIDADAVOLE ESTATES. **24 I. C. 786 : 1 L. W. 245.**

——Ss. 40 and 30—*Commutation—Collector's powers.*

In commuting grain rent for cash the Collector need not confine himself to considerations in S. 40 (3) of the Act and the limit prescribed in S. 30 (1) (*b*) for enhancement of rent does not apply to such commutation. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) CHELLAKUTTY UDAYAM *v.* PRINCE OF ARCOT. **23 I. C. 984.**

——S. 40 — *Rent —Commutation —Special rate.*

A contract at the time of commutation inferring such contract from the facts and circumstances of the case, to pay special rates for a certain kind of crop is legal and binding. (*Abdur Rahim and Spencer, JJ.*) KADER MOHIDEEN *v.* ALAGAPPA CHETTIAR. **12 I. C. 566 : (1911) 2 M. W. N. 394.**

——S. 40 (2) and (3)—*Commutation—Basis of—Rent—Maramat charges.*

The commutation of rent referred to in S. 40 of the Madras Estate's Land Act is not commutation in the narrowest sense and covers something more than a mere arithmetical calculation of averages or application of a market price to commute grain into money. In determining the rent to be paid, the Collector cannot exclude from consideration the question whether the rents actually collected during the decennial period before suit were in excess of what was legally due to the landlord. Maramat charges are not "rent in kind or otherwise" within S. 40 of the Act and they lie outside the scope of the Collector's determination. (*Ayling and Phillips, JJ.*) PYDI APPAL SURYANARAYANA KURMADASU NAIDU *v.* INUGANTI RAJAGOPALA RAO NAIDU. **51 I. C. 131 : 35 M. L. J. 547.**

——S. 40 (3) — *Commutation — Period—Calculation of—Swamibhogam, if rent—Refusal to commute—Second appeal.*

In S. 40, Cl. (3) (*a*) of the Mad. Est. Land Act the term "preceding ten years" means the ten years preceding the year in which the Collector determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted, and year means the year of the lease, *i.e.*, the year for which the landlord is entitled either by custom or contract to claim

MADRAS ESTATES LAND ACT, S. 40.

rent and not the fasli or the calendar year. Swamibhogam is rent lawfully payable. Where the Revenue court refuses commutation, an appeal lies under Sch. A., Cl. (4), of the Act only to the District Collector and not to the District Court. No second appeal lies to the High Court from such order of refusal. (*Sadasiva Aiyar and Spencer, JJ.*) SIVANUPANDIA THEVAR *v.* ZEMINDAR OF URKAD.

6 L. W. 412 : 43 I. C. 498 : 41 Mad. 109 : 34 M. L. J. 139.

——— S. 40 (3) (*a*) *and* (*b*)—*Commutation—The principles governing.*

The principles enunciated in the section are not inflexible and conclusive. The Cl. (a) deals with how to find money value of grain rent paid for a number of years and what each tenant paid to the landlord is material. In a suit for commutation of rent payable in kind it would be an irregularity if the Courts below have in cases to which the provisions of Cl. (3) (*a*), (*b*) are applicable, ignored them. Sub-Cl. 3 is applicable only where grain rent was being paid for a series of years by the tenant and the Courts are called upon to commute such rent. Where for over thirty years a consolidated payment in money was made to the landlord. *Held*, that that was not a matter which the Courts, in a suit for commutation of rent, have to consider under Sub-Cl. (*a*). Where the suit village was surrounded on all sides by Government villages, but there were villages belonging to the estate within a radius of three miles and the Collector did not consider the rates prevailing in those villages, *Held* that under Sub-Cl. (*b*) what has to be considered is the money rent paid by occupancy ryots of adjoining lands or of lands in an adjoining village and Collector was right in not considering the rates in the villages which did not adjoin the suit village but were at a distance. (*Seshagiri Aiyar and Moore, JJ.*) MARDALA SAMIGUDU *v.* PADA SRINIVASULU REDDI.

57 I. C. 708 : 11 L. W. 620.

——— S. 40 (3) (a) (b)—*Commutation—Rate, determination of.*

A Court should not accept the list of prices prepared by the Collector without further proof, that these were the prices actually prevailing in that locality during the year in question. (*Coutts Trotter and Srinivasa Iyengar, JJ.*) SIVAJI RAJA SAHIB *v.* RECEIVER OF TANJORE PALACE.

32 I. C. 493.

——— S. 42—*Lease providing for enhancement on excess area—Order of Collector if necessary.*

It is only when the landlord enhances the rent basing his right on S. 42 (a) that the sanction of the Collector is necessary and not where the enhancement is founded on lease recognising the same in the case of an excess of the area found on measurement. (*Miller and Sadasiva Aiyar, JJ.*) SIVAGANGA ZEMINDAR *v.* CHIDAMBARAM CHETTY.

38 Mad. 524 : 14 M. L. T. 386 : 21 I. C. 556 :(1913) M. W. N. 926 : 25 M. L. J. 641.

MADRAS ESTATES LAND ACT, S. 46

——— S. 42 (2) and 77 (1)—*Area—Increase in—Discovery on resurvey—Suit for enhanced rent—Maintainability.*

Without an order under S. 42 (2) no suit for enhanced rent for increase in area discovered on resurvey can lie. (*Ayling and Napier, JJ.*) SRINIVASA AIYANGAR *v.* ABDUR RAHIM SAHIB.

6 L. W. 108 : 40 I. C. 82 : (1917) M. W. N. 584.

——— Ss. 42 (2) and 112—*Applicability—Survey and Boundaries Act*, S. 20 (3)—*Liability to contribute.*

S. 42 (2) of the Madras Estates Land Act applies to cases in which the area of a holding has been determined under the Survey and Boundaries Act and S. 112 applies to proceedings for the recovery of contribution of Survey charges apportioned under S. 20 of the Survey and Boundaries Act. (*Ayling and Tyabji, JJ.*) BANGARUSAMY REDDI *v.* KUPPANNA GOUNDAN.

29 I. C. 595 : 28 M. L. J. 377.

——— Ss. 45 and 163—*Suit for mesne profits—Procedure.*

A land holder desiring to recover mesne profits as damages from a trespasser must first apply to collector under S. 45 to get the amount of the latter determined and then sue in civil court under S. 163 (*Ayling and Odgers, JJ.*) KOTIKALAPUDI KATTAYYA *v* RANGIAH VENKATU RAMAYA APPA RAO BAHADUR. **12 L. W. 673 : 28 M. L. T 279 : 60 I. C. 32 : (1920) M.W.N. 702 : 39 M. L. J. 571.**

——— Ss. 45 and 153—*Unauthorised occupation—Mesne profits—Powers of Revenue Courts.*

Revenue courts can award mesne profits against a tenant of old waste continuing in possession after the expiry of his lease. 35 M. L. J. 11 Foll. (*Sadasiva Aiyar and Spencer, JJ.*) JAMPANA SOMADU *v.* VENKATA RAMAYYA APPA ROW.

42 Mad. 315 : 50 I. C. 946 : 36 M. L. J. 248.

——— Ss. 45, 163, (1), 153—*Unauthorised occupation—Acquiescence by landlord—Person paying under S. 45—Ryot.*

The landowner accepting rent due under S. 45 from a person occupying the old waste, must be deemed to have acquiesced in his possession of the same. S. 163 confers a right of suit in a civil court only against those liable to pay under S. 45 but did not pay ; the rest making such regular payments are treated as admitted. The persons voluntarily paying under S. 45 and having been declared by the collector as holding the land on condition of such payment, are ryots within S. 3 (15) and the suit to eject them will lie under S. 153 to the Revenue court. S. 153 is not exhaustive of all possible cases of eviction. (*Oldfield and Sadasiva Aiyar, JJ.*) PRESIDENT, DT. BOARD, TANJORE *v.* KAMUNISWAMI THONDAMAN. **35 I. C. 121.**

——— S. 46 - *Non-occupancy tenant—Whether includes a tenant holding over under an expressed lease of old waste land.*

The term "non occupancy" is sued in S. 46 of the Madras Estates Land Act in respect of land other than " old waste " and is not applicable in case of a possession of a tenant of an " old waste land," after the expiry of his lease and

MADRAS ESTATES LAND ACT, S. 46.

therefore he is not entitled to acquire occupancy rights on payment of 2½ times the rent. (*Oldfield and Tyabji, JJ.*) SANKARA VENKATRATNAM *v.* VARADARAJA APPA RAO BAHADUR. **28 I. C. 252 : (1915) M. W. N. 192 : 29 M. L. J. 184.**

——Ss. 46 (1) (3) and 189—*Dispute as to rate to rent—Jurisdiction of Collector to confer occupancy rights on one who is a non-occupancy ryot —Civil Court.*

If there is no dispute about the rate of rent under the proviso to S. 46 (1) there is nothing in S. 189 or in the schedule to the Act to confer jurisdiction on the Collector as a Revenue Court to dispose of applications for settlement of rent or to oust the jurisdiction of the Civil Court. Under S. 46 (3) the right to apply for a permanent right of occupancy is conferred on a non-occupancy ryot and the power conferred on the Collector to execute an instrument conferring it is subject to the same limitation. If he purports to confer occupancy right he acts *ultra vires* and the jurisdiction of the Civil Court is not ousted. (*Wallis, C. J. and Sadasiva Aiyar, J.*) MADURA DEVASTANAM *v.* KONDAMA NAICKEN. **47 I. C. 858 : 23 M. L. T. 352.**

——S. 46 (5)—*'Landholder'—Land in the hands of Receiver—Application to acquire occupancy rights.*

An application to acquire occupancy rights in an estate in the hands of a Receiver must be made to the owner thereof as he is the 'landholder' within S. 46 (5). (*Abdur Rahim and Odgers, JJ.*) SWAMINATHA ODAYAR *v.* SUNDARAM AIYAR. **44 Mad. 274 : 12 L. W. 565 : 28 M. L. T. 276 : 60 I. C. 18 : (1920) M.W.N. 703 : 39 M. L. J. 711.**

——S. 51—*Varam agreement—Condition to cultivate in due season—Whether reasonable—Damages.*

A condition in a *varam* agreement obliging the ryot to cultivate in the due season is not unreasonable provided it is not read as insuring rent in all seasons and the measure of damages for non observance of the condition is the average yield of neighbouring land. (*Miller, J.*) SEETHARAMA IYER *v.* ROBERT FISCHER. **26 I. C. 809 : 27 M. L. J. 415.**

——S. 51—*Pattah—Waste land cultivation of—Liability to pay* tirva.

A contract imposing liability on the tenant to pay tirva on waste land if cultivated owing to his default is reasonable and ought to be enforced. (*Abdur Rahim and Spencer, JJ.*) KADIR MOHIDEEN *v.* ALAGAPPA CHETTIAR. **12 I C. 566 : (1911) 2 M. W. N. 394.**

——S. 51—*Pattah—Terms.*

A provision that *ryot* must pay the *Tirva* if through his fault the lands are not cultivated is reasonable. So also a provision enabling the ryot to relinquish at the end of the year according to the provisions of the Rent Recovery Act ; but not a condition that the form of the lands should not be altered by the ryot without permission. (*Boddam and Sankaran Nair, JJ.*) NAGU CHETTY *v* BASKER SETHUPATHI. **9 M. L. T. 191 : 9 I. C. 41 : (1911) 1 M. W. N. 16.**

MADRAS ESTATES LAND ACT, S. 53.

——S. 52—*Scope of.*

S. 52 applies only to cases where *pattas* and *Muchilikas* have been decreed, exchanged or accepted and not to other written agreements. (*Spencer and Krishnan, JJ.*) MYGAPULA GANGANNA *v.* VENKAT VIJAYA GOPALARAJU. **20 M. L. T. 520 : 38 I. C. 26 : (1917) M. W. N. 143 : 31 M. L. J. 870.**

——S. 52—*Retrospective effect—Agreement to pay increased rent before the Act, if binding after the Act.*

An agreement by a yearly tenant entered into before the Act to pay an increased rate of rent does not bind him after the Act as his status is changed thereby. Retrospective effect cannot be given to S. 52 of the Act so as to bring within its operation *pattas and muchilikas* executed before the Act came into force. (*Seshagiri Iyer and Napier, JJ.*) RAJA OF PITHAPURAM *v* JONNALAGODDA VENKATASUBBA ROW. **18 M. L. T. 348 : 31 I. C. 93 : (1915) M. W. N. 813.**

——S. 52 (3)—*Scope.*

The scope of the general reference to Muchilikas decreed under S. 52 (3) should not be limited to those decreed by particular courts. (*Oldfield and Phillips, JJ.*) RADHAKRISHNA AIYAR *v.* SWAMINATHA AIYAR. **40 I. C. 587 : 6 L. W. 16.**

——S. 52 (3)—*Pattah— When comes into force—Old Act.*

A pattah tendered under S. 52 (3 of the Act comes into force in that fasli for which it was tendered unless a pattah previously tendered for more than one year is in force on that date so that where a previous pattah tendered under the old Act did not enure beyond the fasli for which it was tendered S. 53 of the Estates Land Act would not apply and the new pattah would become effective at once. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) VEDDADI JAGANNADHA BHUPATHI DEO GARU *v.* PADDALA APPALASWAMY. **28 M. L. J. 75: 23 I. C. 576: (1914) m. W. N. 426.**

——Ss. 53, 146, 189 and Schedule Part A Item 12—*Purchaser under rent-sale obtaining possession—Prior purchaser in execution of a mortgage decree against ryot—Suit by former to recover possession from latter—Latter cannot plead invalidity of the rent sale under S. 53—Policy of the Estates Land Act.*

The plaintiff purchased and got possession of the suit lands from one who bought them in a rent-sale under the Estates Land Act in 1914 He sued the defendants for possession and mesne profits. The defendants claimed the lands by virtue of a court auction purchase in 1911 in execution of a mortgage decree against the original ryot ; but they had not taken steps to obtain a transfer of the tenancy in their favour under S. 146 of the Madras Estates Land Act. On a plea by the defendants that the rent sale was invalid under S. 53 of the Madras Estates Land Act as no patta and muchilika had been exchanged and no permanent pattah was in force, *held* that it is not open to the defendant to raise this plea. The occasion for raising such a contention was by way of suit under S. 112 of the Act within the period prescribed therefor. S. 189 of the Madras

MADRAS ESTATES LAND ACT, S. 53.

Estates Land Act bars the jurisdiction of the Civil Court to entertain such a plea in a suit in the Civil Court. For this purpose it makes no difference that the defendants were not defaulters within the meaning of S. 112 and for this reason could not sue under part A item 12 of the schedule and S. 112 of the Act. The policy of the Estates Land Act clearly is (1) to compel any person who has acquired an interest in ryoti tenancy to follow the procedure laid down in S. 146 if he wishes to be treated as a ryot and (2) to have all disputes as to procedure in rent sales enquired into by the Revenue Courts.

To allow a person who has not taken action under S. 146 to ignore a rent-sale at the time it is held and subsequently to dispute its validity in a civil suit is to run counter to both these principles; and S. 189 does not permit such a course. (*Ayling, O. C. J. and Odgers, J.*) IRULAPPAN SERVAI *v.* VEERAPPAN.
15 L. W. 99 : 31 M. L. T. 71 : 69 I. C. 918 : (1922) M. W. N. 67 : 42 M. L. J. 113 (H.C.).

——S. 53—*Distraint for excess rent — Legality.*

In the case of a distraint for an amount in excess of the rent due, the amount in respect of which the distraint is execessive should be ascertained and the distraint should be set aside in respect of that amount only and sustained in respect of the remainder of the demand. (*Oldfield and Seshagiri Aiyar, JJ.*) RAGHUNATHA RAO *v.* VELLAMOONJI GOUNDEN. **38 M. 1140 : 16 M. L. T. 440 : 1 L. W. 934 : 25 I. C. 941 : 27 M. L. J. 597.**

——S. 53—*Rent suit -Exchange of patta and muchilikas if necessary.*

A landlord is entitled to maintain a suit for rent under the Madras Estates Land Act without tendering a patta. Even under the old Rent Recovery Act, S. 7 did not make the tender of *patta and muchilika* a condition precedent to the right to rent. (*Sundara Aiyar and Spencer, JJ.*) SATRUCHERLA VEERABHADRA RAJU GARU *v.* GANTA KUMARI. **11 M. L. T. 212 : 15 I. C. 393 : (1912) M. W. N 441 : 22 M. L. J. 451.**

——S. 53—*Retrospective effect.*

S. 53 should not be given retrospective effect. (*Abdur Rahim and Ayling, JJ.*) BOMMADEVARA VENKATA NARASIMHA *v.* SAJJA SATTYA, **35 Mad. 139 : 9 M. L. T. 231 : 9 I. C. 738 : (1911) 1 M. W. N. 139 : 21 M. L. J. 570.**

——Ss. 54 and 78—*Patta, tender of—Affixture to house – If valid tender.*

Where a patta was offered but refused and then affixed to the house of the ryot it was held there was no valid tender as required by Ss. 54 and 78 of the Madras Estates Land Act, so that an attachment by the landlord of the tenants' holding was illegal. S. 54 does not permit the landlord to select a method of tender not prescribed by the section itself. (*Miller and Spencer, JJ.*) ZEMINDAR OF SIVAGIRI *v.* MICHAEL. **38 Mad 629 : 14 M L. T. 423 : 21 I. C. 587 ; (1913) M. W. N. 965: 25 M. L J. 608.**

MADRAS ESTATES LAND ACT. S. 57.

——S. 54—*Patta—Tender of—to one of several tenants of holding.*

A landlord is not entitled to tender a *patta* to one only of several ryots jointly holding land under him or to take proceedings in ejectment against him only. The patta ought to have been tendered to all the occupants. Else the other tenants would not be bound thereby. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) NARAYANASWAMI NAIDU *v.* THIRUMALASETTI SUBBAYA. **16 I. C. 698 : (1913) M. W. N. 91 : 24 M. L. J. 79.**

——S. 54—*Tender of muchilika.*

The simultaneous tender of the pattah and muchilika is not legally necessary. (*Munro and Ayling, JJ.*) RANGASWAMI IYENGAR *v.* DISTRICT BOARD, TANJORE. **9 M. L. T. 320 : 9 I. C. 730 : (1911) 1 M. W. N. 135 : 21 M. L. J. 728.**

——Ss. 55 and 146—*Suit to obtain pattah—Duty of Revenue Court in case of conflict between transferees of original Raiyat—Non-joinder —Effect.*

A Revenue Court is bound to enquire as to whether plff., an alleged transferee of the original raiyat, has established his title as against a transferee of the raiyat recognised by the landlord and to direct the landlord to issue a pattah to the plff. on proof of his title. Non-joinder of the transferee recognised by the landlord does not justify dismissal of the suit and a Court should direct joinder of the omitted party under O. 1, R. 10 of the C P Code. The Rev. Court's power to deal with the rights of parties before it under S. 55 is not controlled by anything in S. 146 and therefore in a suit under S. 55, the Court must decide whether the plff. has a right to a *patta* or not if his right is denied. (*Ayling and Krishnan, JJ.*) RAMANATHAN *v.* ARUNACHELLAM. **44 Mad. 43 : 60 I. C. 316 : 39 M. L. J. 474.**

——Ss. 55 and 3 (16)—*Pattah—Suit for—Ryoti land.*

Only a ryot can sue for a pattah and that too for the land classified as ryoti under S. 55 of the Act. (*Wallis, C. J., and Ayling, J.*) RAMASWAMI NAYAKER *v.* VELLUCHAMI. **32 I. C. 594.**

——S. 56—*Pattah — Suit to enforce—Duty of Court.*

In a summary suit to enforce acceptances of pattah the Collector should direct not merely the acceptances of the pattah as amended by the tenants but should direct them to execute a muchilika in accordance with its terms. When an amended pattah is tendered and refused by the tenants it may be presumed that they would refuse to execute a muchilika and the landlord is not bound to tender the latter for execution. (*Munro and Ayling, JJ.*) RANGASAMI AIYANGAR *v.* DISTRICT BOARD, TANJORE. **9 M. L. T. 320 : 9 I. C. 730 : (1911) 1 M. W. N. 135 : 21 M L. J. 728.**

——S. 57—*Pattah—Fair and equitable conditions—Test of.*

Past practice has its weight as one of the elements which are considered in fixing under

MADRAS ESTATES LAND ACT, S. 59.

the Madras Estates Land Act what are the fair and equitable conditions of a particular *pattah*. Even in regard to penal provisions with a strict construction, no construction is open to a court of law which is in violation of what that court considers to be the true meaning of the provision. Where the defendants agreed in case of the provisions of a *pattah* are not complied with, to pay at an average rate of 170 *kalams* 4 *markals* per *veli* of *nanja*. *Held*, that rent of 170 *kalams* was not a penal rent but was a substituted rent. (*Viscount Cave.*) RADHA KRISHNA AIYAR *v.* SUNDERSWAMIER. **36 C. L. J. 450 : 16 L. W. 18 : 31 M. L. T. 31 : 43 M. 475 : 27 C. W. N. 1 : 20 A. L. J. 937 : 49 I. A. 211 : 43 M. L. J. 323 : 1922 P. C. 257 (P. C.).**

——**Ss. 59 and 60**—*Rent—Claim for a fasli—Limitation—Tender of patta.*

In claims for rent limitation runs not from the end of the fasli, but from the time when the rent became due according to the terms of the tenancy. Under the Estates Land Act of 1908, tender of patta is not a condition precedent to the maintainability of a suit for rent. If a document was incompetent to affect the rights of the parties at its inception an express provision of law would be required to make it valid subsequently. A suit for rent for faslis prior to the coming into force of the Act of 1908 is maintainable after the coming into force of that Act, without exchange of patta and muchilika. (*Sundara Iyer and Sadasiva Iyer, JJ.*) KANTHIMATHINATHA PILLAI *v.* MUTHUSWAMIA PILLAI. **37 Mad. 540 : 12 M. L. T. 437 : 16 I. C. 934 : (1912) M. W. N. 960.**

——**S. 73**—*Preliminary appraisement by landholder—Entering on land.*

A Zemindar or landholder cannot enter upon a holding to form preliminary estimate of the outturn, when the crops are standing on the ryots holding. (*Kumaraswamy Sastri and Phillips, JJ.*) ARUNACHELLAM CHETTIAR *v.* MANGALAM. **40 Mad. 640: 20 M. L. T. 70 : 4 L. W. 37 . 35 I. C. 329 : 31 M. L. J. 168.**

——**Ss. 74, 75, (6), 75 (7)**—*Waram—Rate of—Jurisdiction of Officer and assessors.*

A decision as to the rate of "varam" when there is a dispute is within the jurisdiction of the officer who is deputed for making appraisement under the above Act. In case of an agreement between the officer and the assessors as to appraisement but a difference as to the rate of "varam" the award is not final. The officer in such a case can record his opinion with due regard to the opinions of the assessors and after hearing their objections. (*Clegg, F M.*) VEERAPPA CHETTIAR *v.* MOOTHI KARUPAN. **37 I. C. 379.**

——**S. 75 and 205**—*Appraisement proceedings—Parties.*

All the share-holders need not be joined as parties to an appraisement proceeding under S. 75 of the Act by a co-sharer to whom another co sharer owning a third share of a village pays rent (*Clegg, F. M.*) BAVAJI PATNAIK *v.* GOVINDA PATNAIK. **37 I. C. 382.**

MADRAS ESTATES LAND ACT, S. 77.

——**Ss. 75 and 76**—*Collector's decision*—Res-Judicata.

A decision by a Collector under S. 75 of the Madras Estates' Land Act about the payment of rent by division or appraisement is not *res judicata* in a civil suit. (*Abdur Rahim and Ayling, JJ.*) TELAGAPU TAVADU *v.* ZAMINDAR OF TARLA. **32 I. C. 706.**

——**S. 75 (7)**—*Order for rent—Decree—Award—Party aggrieved by—Remedy.*

The Order by an officer having jurisdiction, fixing the rent is a decree and conclusive for that period. The party aggrieved by an order of the Revenue officer fixing the rent cannot bring a subsequent suit. He should file objections or apply for revision to the Collector or Board of Revenue. (*Spencer and Krishnan, JJ.*) RAMCHANDRA MARDA *v.* MULI PODHANO. **35 I. C 640 : 4 L. W. 278.**

——**S. 77**—*Jurisdiction — Civil and Rev. Court.*

A suit under S. 77, to recover arrears of rent by one who was landholder at the date the rent is alleged to have become due, but who has ceased to be so before the date of suit, cognizable by a Rev. Court. (*Wallis, C. J.' Oldfield and Sadasiva Aiyar, JJ.*) BOLLPRAGADA VENKATA LAKSHMANA GARU *v.* CHINTAPALLI ACHIREDDI. **44 Mad. 433 : 13 L. W. 603 : 29 M. L. T. 203 : 62 I. C. 890 : (1921) M. W. N. 198 : 40 M. L. J. 319 (F. B.)**

——**Ss. 77 and 192**—*Rent suit—Questions of title.*

Where on the allegations of the plaintiff the suit is cognisable only by the Revenue Court in which it was filed, that court is bound to decide any question necessary for the disposal of the case whether its decision on the point would finally determine the question between the parties so as to make it *Res judicata* or not. 41 Mad. 554 and 41 Mad. 121, followed. (*Spencer and Krishnan, JJ.*) VENKATAPATHI NAYANI VARU *v.* GADDAM CHOWDENNA. **54 I. C. 749 : 11 L. W. 3.**

——**S. 77**—*Rent suit—Jurisdiction.*

Revenue Courts can entertain suits for rent due to Tanjore Palace estate under S. 77. (*Wallis, C.J., Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) SUNDARAM AIYAR *v.* RAMACHANDRA AIYAR. **40 Mad. 389 : 5 L. W. 789 : 40 I. C. 975 : 1917 M. W. N. 383 : 32 M. L. J. 333 (F. B.)**

——**S. 77**—*Rent, arrears of*—Mandaikollai *or* Veetadikollai *lands—Suit—Maintainability.*

Rent on land classed *Mandaikollai or Veetadikollai* cannot be recovered by a suit under S. 77 where the *Kollai* not carved was by the tenant out of ryoti land without the landlords consent. (*Ayling and Phillips, JJ.*) ARUNACHELAM CHETTY *v.* SYYED AHMED AMBALAM. **19 M. L. T. 138 . 2 L. W. 1117 : 31 I. C. 539 : (1919) M. W. N. 237.**

——**Ss. 77 and 111**—*Distraint—Ex-landlord—Right of.*

An ex-landlord, to whom arrears of rent are due can lawfully distrain the moveable property or the trees on the holding of the defaulter under

MADRAS ESTATES LAND ACT, S 77.

S. 77, Estates Land Act. (*Spencer and Seshagiri Iyer, JJ.*) SUNDARAM IYER *v.* KULATHU IYER. **39 Mad. 1018 : 2 L. W. 867 : 18 M. L. T. 316 : 31 I. C. 81: (1915) M. W. N. 731 : 29 M. L. J. 505.**

——S. 77—*Rent suit—Tender of pattah, if necessary*

The tender of pattah is not a necessary precedent to a suit under S. 77 for arrears of rent 9 I. C. 738, Dist. (*Ayling and Tyabji, JJ.*) RAJAH OF KARVETNAGAR *v.* PANDUR GOVIND MUDALI. **14 M. L. T. 535 : 21 I. C. 858 : 27 M. L. J. 238.**

——S. 77—*Rent suit—Suit before the Act—Exchange of pattah and muchilika, if necessary.*

A suit for rent brought before the Estates Land Act came into force is not maintainable without the exchange of pattahs and muchilikas. (*Sadasiva Aiyar and Tyabji, JJ.*) MAHARAJA OF VIZIANAGARAM *v.* TIRUMALARAYA BUNCHI. **21 I. C. 58 : (1913) M. W. N. 639.**

——S. 77—*Rent suit—Tender of patta.*

A suit, after the Act for rent accrued, due before the Act came into force is maintainable without tender of a *patta.* 22 M. L. J. 451, (1912) M. W. N. 960, Foll (*Sadasiva Aiyar and Sundara Aiyar, JJ.*) MUTHIA CHETTIAR *v.* RAMASWAMY CHETTIAR. **14 M. L. T. 70 : 20 I. C. 689 : (1913) M. W. N. 618 : 25 M. L. J. 205.**

——S. 77—*Rent suit—Suit before the Act—No exchange of pattahs and Muchilikas.*

A suit instituted before the Act came into force without exchange of pattas and Muchilikas or a tender of patta, cannot be maintained though the trial is after the Act came into force. (*Sundara Iyer and Sadasiva Iyer, JJ.*) YEDDMA PUDDI LAXMI NARASIMHA ROW *v.* REPALLEE SITARAMASWAMI. **19 I. C. 440 : (1913) M. W. N. 282. 24 M. L. J. 288 :**

——S. 77—*Distraint—Intermediate tenure-holder—Right of Zamindar — Madras Local Boards Act, Ss. 73 and 74—Cess.*

S. 77 of the Estates Land Act does not authorise a Zemindar to levy distraint against an intermediate tenure holder Nor can the Zemindar levy a cess collected from him under S. 73 of the Local Boards Act by distraint against the intermediate tenure holder. (*Benson and Sundara Aiyar, JJ.*) PERI LAKSHMINARASIMHAM *v.* RAMCHANDRA. **37 Mad. 319 : 13 M. L. T. 204 : 24 M. L. J 290: 18 I. C. 308: (1913) M W. N. 280.**

——S. 77—*Distraint—Right of—If relates to procedure.*

The right of distraint, which a proprietor could exercise before the coming into force of the Estates Land Act is not affected by that Act. Such a right does not relate to procedure, but is a right vesting in the landholder himself. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) PARASURAMA GOUNDAN *v.* SOWCAR LODD GOVINDA DOSS. **16 I. C. 903.**

——S. 77 and Sch. A—"*Arrear*"—*Interest if included in.*

The word "Arrear" in S. 77 of the Act and the corresponding provision in Schedule A include also interest payable and due on the arrears of rent. (*Sundara Aiyar and Phillips, JJ.*) VEDACHELLA MUDALIAR *v.* VIJAYARAGHAVACHARIAR. **13 I.C. 71: (1912) 1 M. W. N. 523: 22 M. L. J. 219.**

MADRAS ESTATES LAND ACT, S. 112.

——S. 78—*Distraint — Affixture to land necessary.*

The tendering of a pattah to a tenant or affixing it to his house does not make a distraint under S. 78 valid, but it must also be fixed to a conspicuous part of the land. (*Ayling and Kumaraswamy Sastri, JJ.*) KOLAKUDI VEERAMA *v.* VASUDEVA REDDI. **26 I. C. 991 : 17 M.L.T. 85.**

——S. 91—*Suits under—Jurisdiction—Civil Courts.*

Obiter suits under S. 91 are exclusively within the jurisdiction of the Civil Court and do not come within the provisions of sub S. (1) of S. 213 giving the Collector jurisdiction. (*Wallis, C. J. Sadasiva Aiyar and Srinivasa Aiyangar, JJ.*) NARAYANASWAMY AIYAR *v.* VENKATARAMANA AIYAR **39 Mad. 239 : 18 M. L. T. 426 : 2 L. W. 1037 : 31 I. C. 326 : (1915) M. W. N. 921 : 29 M. L. J. 607 (F.B.)**

——S. 111—*Arrears—Prior charge—Enforcement of decree of Rev. Court—Transfer to Civil Court for execution—Power of executing Court.*

A prior charge for rent can be enforced in favour of the landlord only when the relationship of landlord and tenant is established and it continues till the time of enforcement. The charge may be enforced summarily or under S. 132 of the Act, but where the decree of a Revenue Court for arrears of rent is transferred to a Civil Court for execution under S. 201, the power to execute it under Chapter VI of the Act does not go to the executing Court. (*Sadasiva Aiyar and Spencer, JJ.*) BOLLAPRAGADA VENKATALAKSHMANA GARU *v.* NANDA SEETAYYA. **11 L. W. 466 : (1920) M.W.N. 294 : 28 M L. T. 44 :57 I. C. 764 : 39 M. L. J. 30 :**

[*See* contra **42 Mad. 114 : 29 M. L. T. 203 : 48 I. C. 794 : 43 M. 786 (F. B.)**].

——Ss. 111, 115, 159 and 213 (3)—*Sale—Suit for declaration that sale is void—Jurisdiction.*

A suit to have a sale under S. 111 of the Act declared void is triable by a Civil Court and not by a Revenue Court. (*Ayling, J.*) CHIDAMBARAM PILLAY *v.* MUTHAMMAL. **1 L. W. 414: 23 I. C. 524: 15 M. L. T. 340.**

——S. 112—*Sale of ryot's holding without notice—Suit to set aside sale—Jurisdiction of Civil courts-Estates Land Act Schedule, Part A., Art 12*

A sale of ryot's holding held under the provisions of Ch. VI of the Madras Estates Land Act without notice being given to the ryot by the landholder of his intention to sell is illegal, and a Civil Court has jurisdiction to entertain a suit by the ryot to set aside such a sale. The suit referred to in Art. 12, Part A. of the schedule to the Act is a suit by the ryot within 30 days of the service on him of the notice to contest the right of sale, and not a suit of the kind referred to. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) RAJAH OF RAMNAD *v.* MINOR VENKATARAMA IYER. **(1922) M. W. N. 501 : 31 M. L. T. 158 (H. C.) : 16 L. W. 274 : 45 M. 890 : 43 M. L. J. 264 1923 M. 6 (F. B).**

MADRAS ESTATES LAND ACT, S. 112.

——Ss. 112 and 131—*Service of notice on defendant—Proper Service.*

Where a *pattadar* has been absent from the village for a considerable time, the sale proclamation is affixed to the patta land, and to the last known place of residence of the pattadar there is good service of notice of the sale. (*Oldfield and Hughes, JJ.*) SURAYYA *v.* NARASIGADU.
29 M. L. T. 304: 14 L. W. 232.

——Ss. 112, 146—*Defaulter.*

A defaulter means a registered pattadar or his heir or one whom the landlord has become bound to recognise according to S. 146. Such a defaulter alone can sue to set aside the attachment under S. 112. (*Wallis, C.J. and Sadasiva Aiyar, J.*) MIDNAPORE ZAMINDARI CO. *v* MULLIAPPUDAYAN.
42 M. 534 : 29 M. L. T. 185: 62 I. C. 337: 13 L. W. 387: 40 M.L.J. 213.

——Ss. 112 and 26—*Right of sale—Suit to contest—Revenue Courts—Jurisdiction.*

Revenue Courts can decide the objections to the validity of a contract between landlord and tenant, in a suit by the tenant under S. 112 impeaching the landlord's right of sale. A contract for rent between landlord and tenant is valid if it is not affected by S. 26. (*Ayling and Srinivasa Iyengar, JJ.*) SETHURAMA AIYANGAR *v.* SUBBIAH PILLAI.
41 Mad. 121: 42 I. C. 951: 33 M. L. J. 599:

——Ss. 112 and 189, Sch. A—*Right of sale—Suit to contest—Dismissal--Appeal decree dismissing.*

A suit under S. 112 on the ground that deft. was not a landholder is appealable, if dismissed. (*Clegg, F. M.*) RAMALINGA AIYAR *v.* RAMANATHAN CHETTIAR.
38 I. C. 131

——S. 112—*Right to sell holding—Who can sell.*

A holding can be sold only by the landlord who has a subsisting interest in the estate. (*Spencer and Seshagiri Iyer, JJ.*) SUNDARAM IYER *v.* KULATHU IYER.
39 Mad. 1018. 2 L. W. 867: 18 M. L. T. 316 : 31 I. C. 81: (1915) M. W. N. 731: 29 M. L. J. 505.

——S. 112—*Suit under—Burden of proof—Payment of rent into Court, to avoid sale.*

In a suit under S. 112 the landlord must show that he is justified in claiming rent at an enhanced rate and the onus is not shifted on the tenant by the mere payment into Court of higher rent by the tenant to avoid the sale of his holding. (*Oldfield and Tyabji, JJ.*) RAJAH OF VIZIANAGARAM *v.* DOCARA PAIDAYYA.
26 I. C. 891.

——S. 112—*Right of sale—Suit to contest—Insufficiency of notice—Duty of Court.*

If the sale of a ryot's holding by the landholder under the Madras Estates' Land Act is contested by the ryot on the ground of non-service of notice, it is incumbent on the Court, if it finds in the ryot's favour, to direct its attention to the exact defects attaching to the service of notice and to specify the precise defect vitiating the sale. It is not enough for the Court to find in a general manner that the service was insufficient. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) ARUNACHELAM CHETTIAR *v.* KAYAMBU AMBALAM.
16 I. C. 932.

MADRAS ESTATES LAND ACT, S. 131.

——Ss. 117, 112, and 205—*Proclamation of sale—Notice of intention to sell—Effect—Sale legality of—C. P. Code, S. 151.*

Under S. 117 a sale proclamation must closely follow the notice of intention to sell served on the defaulter under S. 112. Where the sale proclamation represents a certain piece of land as lying within certain boundaries which cover a larger extent of land than that specified in the notice of the intention to sell given under S. 112, and where the sale is also of crops on the land not included either in the notice of the intention to sell under S. 112 or in the proclamation of sale under S. 117 and the land is sold for a very inadequate price, the sale is liable to be set aside under S. 205, as illegal. (*Clegg, F.M.*) VEDACHALLA DHIKSHIDAR *v.* VENKATHU SUBBARAYA REDDYAR.
32 I. C. 967.

——Ss. 128, 189 and 213—*Rent paid by another ryot—Suit for recovery—Forum—Contract Act, S. 72.*

A ryot, whose land was being sold for arrears of rent due by another ryot, and who paid the amount to avoid the sale, can recover only by a suit in damages for repayment of money paid under coercion under S. 72 of the Indian Contract Act. Such a suit is cognizable only by a Civil Court. Per *Bakewell, J, contra*: Such a suit lies only in a Revenue Court under either S. 189 and Art. 21 of Schedule A or under S. 213 of the Estates' Land Act. S. 128 which permits a third party whose property has been attached to protect that property by paying the arrears due on it applies both to derivative owners such as mortgagees and to independent owners who can institute other proceedings under Cl. (2) of the section. (*Seshagiri Iyer and Bakewell, JJ.*) RAJA OF VIZIANAGARAM *v.* POOSAPATI APPALA **3 L. W. 517: 19 M.L.T. 374: 34 I. C. 480: (1916) 1 M W.N. 391.**

——S. 131—*Sale for arrears of rent—Application to set aside—Notice to auction purchaser.*

The auction purchaser under a sale for rent, has a right to notice of an application by the ryot to set aside the sale and is entitled to be heard before any order is passed. (*Seshagiri Aiyar, J.*) VAITHIALINGA CHETTY *v.* KULLAPPA NAICKER.
59 I. C. 889: 12 L. W. 354.

——Ss. 131 and 132—*Summary sale—Material irregularity and fraud—C. P. C., O. 21, R. 90, if applicable—Suit by purchaser for setting aside the sale if maintainable.*

O. 21, R. 90, of the C. P. C. does not apply to the summary sale of a ryot's holding for arrears of rent without a decree being obtained therefor. The only way in which such a sale could be set aside is by an application under S. 131 of the Estates' Land Act. The order of the Collector setting aside the sale under O. 21, R. 90, C. P. C. and directing a re-sale was therefore *ultra vires.* The Civil Court has jurisdiction to grant a declaration declaring the invalidity of the Collector's order. 38 Mad. 1042. Ref. (*Spencer and Krishnan, JJ.*) JAGANNADHA CHARYALU *v.* BOMMADEVARA SATYANARAYANA.
11 L. W. 101: 54 I. C. 508 : (1920) M.W.N. 145 : 37 M. L. J. 706.

MADRAS ESTATES LAND ACT, S. 131.

——S. 131—*Deposit—After time allowed—Absence of presiding Officer.*

Where the deposit required by S. 131 of the Madras Estate's Land Act cannot be made on the last day of the time allowed owing to absence of of the presiding officer, a deposit made on the next day will satisfy the requirements of the section. (*Ayling and Krishnan, JJ.*) RAMASWAMI GOUNDAN *v.* KALI GOUNDAN. **42 Mad. 310: 52 I. C. 634: 36 M. L. J. 571.**

——Ss. 131, 189 and 213—*Suit to set aside sale for fraud—Jurisdiction of Civil Courts if barred.*

S. 189 of the Estates' Land Act does not take away the right to bring a suit in the Civil Court to set aside a sale on the ground of fraud and hence such a suit is maintainable in such Court. S. 189 bars only an application under S. 131. (*Sadasiva Iyer and Spencer, JJ.*) GOUSE MOIDEEN SAHIB *v.* MUTHIALU CHETTIAR. **14 M. L. T. 523: (1914) M. W. N. 55: 21 I. C. 762: 26 M. L. J. 36.**

——S. 131—*Deposit— Tender to Divisional Officer.*

A tender of deposit under S. 131 of the above Act need not be paid into the treasury but may be made to the Division Officer, who must receive the same. (*Clegg, F. M.*) POTHA VENKATASWAMI *v.* TRUSTEE OF VIJIANAGARAM ESTATE. **37 I. C. 378.**

——S. 131—*Deposit— Deficiency in amount —Effect*

Where a person required to deposit the exact amount deposited a sum approaching to it to set aside the sale under S. 131 as he could not ascertain the exact amount, *held* that an order to set aside the sale should have been passed. (*Mr. Clegg.*) PENTACOTA GAREEBU *v.* PENTAKOTA PEDDARAYUDU. **35 I. C. 153.**

——Ss. 131 and 215—*Deposit— Sub-treasury —Jurisdiction—Rev. Officer—Power of—To revise order of predecessor-in office —Application for deposit—Notice.*

A Dy. Collector cannot cancel orders passed by his predecessor-in-office. The proper procedure is to ask the Dt. Collector to revise them. A deposit in a Sub treasury is a deposit with the Collector within the meaning of S. 131. The presentation of the *Challan* containing the purpose and particulars of the deposit is a sufficient application for effecting it. An order setting aside a sale without notice to the auction-purchaser is one passed without jurisdiction. ((*Clegg, F. M.*) SUNDARARAJA IYENGAR *v.* ASIRI NAIDU. **32 I. C. 891.**

——Ss. 143 and 3 (11)—*Cess— Leviable fees —Long payment—Presumption—Kanganam fee.*

Fees which form part of the consideration for the ryot's holding but, not the fees in addition to rent payable by usage or recoverable under S. 143 S. 143 applies to cases of additions to rent. No length of time will make non-leviable fees enforceable. Cesses levied for a special purpose cannot be recovered after the purpose has ceased to exist. In case of leviable fees a presumption of implied contract will be made from length of time. The *kanganam* fee is legally leviable. 31 M. L. J. 168: 24 B. 591, Foll. (*Oldfield and Spencer, JJ.*) SUNDARAM AIYAR *v.* THETHARAPPA MUDALIAR. **40 I. C. 159.**

MADRAS ESTATES LAND ACT, S. 151.

——Ss. 143 and 144—*Cess—Levy of—Failure of original object—Effect.*

When the original object for which a cess was levied has failed, a Zemindar must prove a fresh contract with fresh consideration before the cess can be *compulsorily levied.* (*Sadasiva Iyer and Tyabji, JJ.*) RAMASWAMI AIYAR *v.* SUNDARAM AIYAR. **30 I. C. 166.**

——S. 143—*Cess—Chathu Tamulu—Supply of Govt. water—Effect on landlord's right.*

In consideration of a landlord keeping in repair a tank dug by him, the tenant undertook to pay him a cess known as Chathu Tamulu. On the digging of Govt. canal, the landlord was exempted from payment of water cess to Govt. and neglected to repair the tank, *Held*, that the tenants were not bound to pay the Chathu Tamulu cess. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) BONUNADEVARA VENKATA NARASIMHA RAO NAIDU *v.* SAMANEDAM RAMAMMA. **16 I. C. 208: (1913) M. W. N. 551.**

——S. 144—*Cess, Recovery of—Ryot, what must prove.*

A ryot can recover cesses back only when he has proved that they were "exacted" within the section. (*Sadasiva Iyer and Tyabji, JJ.*) RAMASWAMI IYER *v.* SUNDARAM AIYAR. **30 I. C. 166.**

——Ss. 146 and 147—*Scope of—Transfer before the Act—Rights of transferee.*

S. 146 of the Madras Estates Land Act was intended to lay down that the landlord is entitled to deal with the existing pattadar, until notice of transfer is given to him. S. 146 applies to transfers made before the commencement of the Act and does not determine any substantive right. S. 146 of the Act lays down simply that when there has been a transfer whether before the commencement of the Act or after it the transferee will be entitled to be impleaded in proceedings if he gives the notice which S. 146 prescribes, but until he does so the existing pattadar will still be the person with whom the landlord has to deal. (*Oldfield and Ramesam, JJ.*) SRI MAHANT PRAYAG DOSJEE VARU *v.* SARANGAPANI CHETTY. **17 L. W. 361: (1923) M. W. N. 193: 32 M. L. T. (H. C.) 251: 1923 Mad. 486.**

——Ss. 146 and 189—*Failure to take action ignoring rent sale—Civil suit claiming relief—Maintainability.*

Where there is a failure to take action by ignoring rent sale at the time it is held, a civil suit disputing its validity is not maintainable. (*Ayling, O. C. J. and Odgers, J.*) IRULAPPAN SERVAI *v.* VEERAPPAN. **15 L. W. 99: (1922) M.W.N. 67: 69 I. C. 918: 31 M. L. T. 71 : 42 M. L. J. 113.**

——Ss. 151 and 152—*Ejectment suit—Waste —Compensation.*

A Court might award compensation in all cases of waste in lieu of ejectment under S. 152 but the relationship of a landlord and tenant still subsists. Per *Seshagiri Iyer, J*:—The award of compensation

is based on the tortuous act committed by the defendant on the holding and not as if the landlord is to be purchased out of his right. There is no severance of relationship by the tortuous act of the tenant on the holding, but they continue to hold the land and the buildings thereon as tenants subject to the payment of the rent originally agreed upon, after paying compensation. (*Seshagiri Iyer and Napier, JJ.*) SANKARALINGA MOOPANAR *v.* SUBRAMANIA PILLAI. **31 I. C. 273: 29 M. L. J. 514.**

——Ss. 151 and 11—*Scope of.*

S. 151 of the Act applies only when the holding as a whole is rendered substantially unfit for agricultural purposes by the acts of the *ryot* committed on the whole or on any part of the holding. The size of the holding to the area withdrawn for cultivation, to affect such withdrawal on the holding as a whole and other circumstances must be considered in forming a conclusion as to whether the holding taken *as a whole* is so rendered unfit. 34 C. 718 P. C., Foll. No real distinction was intended to be made by the slight difference in phraseology between S. 11 and S. 151. (*Sadasiva Iyer and Napier, JJ.*) NAVANNA VENA RAMA *v.* ARUNACHELLAM. **39 Mad. 673: 18 M. L. T. 349: 31 I. C. 98: (1915) M. W. N. 801: 29 M. L. J. 724.**

——Ss. 151 and 189—*Ejectment suit—Jurisdiction—Revenue Court—Civil Court.*

Where a tenant of a part of an estate set up occupancy right as a defence in an ejectment suit, it is the Revenue Courts that have jurisdiction under S. 151 to try it. S. 179 debars Civil Courts from trying such suit. (*Wallis, O. C. J. and Seshagiri Iyer, J.*) CHIPURAPALLI APPAYYA *v.* KAKARLAPUDI RAMACHANDRA RAJU BAHADUR GARU. **16 M. L. T. 362 : 26 I. C. 732 : (1914) M. W. N. 763 : 27 M. L. J. 490.**

——S. 151—*Ejectment suit—One co-owner acquiring tenant's rights—Revenue Court—Jurisdiction.*

Where a co-owner sued to eject a tenant in a Revenue Court impleading the other co-owner to whom the tenant had transferred his rights, *held*, that the Revenue Court had no jurisdiction as the remedy of the plff. was either partition or joint possession. (*Sadasiva Iyer and Seshagiri Iyer, JJ.*) SUBRAMANIAM CHETTIAR *v.* PERIASWAMI THEWAR. **24 I. C. 726 : 26 M. L. J. 435.**

——S. 153—*Proviso—Non-occupancy tenant—Lease for more than 5 years—Ejectment—Revenue Court—Old waste.*

A landholder can eject a non-occupancy ryot holding land in his estate on a lease for more than 5 years granted before the commencement of the Act and the holding over after the expiry of the term. 38 M, 163, Not Foll. The Amending Act of 1909, S. 8, added one more independent ground in S. 153 on which the tenant is liable to be ejected. A deft. not traversing a statement in the plaint that the land from which ejectment was sought was "old waste" must be deemed to have admitted it and cannot traverse it subsequently. (*Sadasiva Iyer and Spencer, JJ.*) JAMPANA SOMADU *v.* VENKATARAMAYYA APPARAO. **42 Mad. 315 : 50 I. C. 946 : 36 M. L. J. 248.**

——S. 153—*Proviso—Scope—Non-occupancy tenant holding lease before Act—Ejectment suit—Jurisdiction.*

The proviso to S. 153 added by the Amending Act of 1909 deals with the grounds of the liability to ejectment and not with jurisdiction. A suit for ejectment of a non-occupancy tenant of waste land holding a lease from before the Act but expiring after its passing must be filed in a Revenue Court. (*Abdur Rahim and Bakewell, JJ.*) YILLIKIPALLI VENKAYYA *v.* VENKATARAMAYYA APPARAO. **43 I. C. 711 : 33 M. L. J. 757.**

——Ss. 153 and 157—*Tenant holding over under an expired lease--Rights of--Non-occupancy tenant—Cases of ryoti land and 'old waste' distinguished—Construction.*

Per *Oldfield, J.*—Retention of a "ryoti" holding by a tenant after the expiry of the lease, makes him a non-occupancy tenant inasmuch as he cannot acquire rights of an occupancy tenant by being in possession at the time when the Act came in force. But a tenant of an 'old waste' land under an expired lease is not an occupancy tenant and cannot acquire the rights of an occupancy tenant by paying 2½ times the rent. A suit for the ejectment of such tenant can be tried by a revenue court.

Per *Tyabji, J.*—A person cannot hold under an expired lease and there is no such relation as landlord and tenant between the lessor and the lessee after the expiry of the lease and therefore such a lessee is not included in any class of tenants dealt with by the Act. A suit to eject such a tenant of "old waste" land can be tried by only a Civil Court and if instituted in a revenue court it is for the latter to show that the Civil Court has no jurisdiction to try the same.

Per *Oldfield, J.*—The proviso to S. 153 while making the section inapplicable in case of 'old-waste' lands does not affect the provisions regarding the courts who can try suits in respect of such lands but relates to the reasons for ejectment of tenants.

Per *Tyabji, J.*—It is clear from the words "liability to be ejected" in the new proviso to S. 153, that it applies both to the reasons for ejectment and rights of the parties and to the provisions regarding the forums and the effect is that the jurisdiction of Revenue Courts.

Properly speaking clauses (a) to (d) apply to the rights of parties during tenancy, the clause (e) to the relation between them after the termination of tenancy. Therefore the proviso applies to all the clauses. (*Oldfield and Tyabji, JJ.*) SANKARA VENKATARATNAM *v.* VARADARAJA APPA RAO BAHADUR. **28 I. C. 252 : (1915) M.W.N. 192 : 29 M. L. J. 184.**

——Ss 153, (proviso, 157) and 163—*Non occupancy tenant—Old waste—Eviction—Civil Court.*

A tenant of old waste in a Shrotriem village holding over under an expired lease on the date of the coming into force of the Act and who is found to have no occupancy rights in the land is liable to be evicted in a Civil Court. The proviso to S. 153 of the Act has the effect of taking such a case out of the jurisdiction of the Collector's Court and S. 157 does not in any way nullify the

MADRAS ESTATES LAND ACT, S. 153.

proviso to S 153. (*Miller and Spencer, JJ.*) PONNUSWAMI PADAYACHI *v.* KARUPUDAYAN.
38 Mad. 843 : 1 L. W. 218 : 24 I. C. 217 : 15 M. L. T. 299: 26 M. L. J. 285.

——— S 153—*Proviso—Applicability.*

The clause added to S. 153 of the Estates' Land Act by the Amending Act of 1909 is applicable to non-occupancy ryots included in S. 6 (3) (4) and (5) of the Act. (*Sadasiva Iyer and Tyabji, JJ.*) BUCHI SARVAGARADU GARU *v.* VENKATA RAJU.
38 Mad. 459 : 21 I. C. 913 : 25 M. L. J. 617.

———S. 153—*Ejectment suit—Kamatam land Jurisdiction—Revenue Courts.*

If the land be Kamatam, a suit for ejectment under S. 153 would not be maintained in the Revenue Court. (*Benson and Sundara Aiyar, JJ.*) CHAGANTI ATCHAPARAJU *v.* RAJA YELUGOTI KRISHNA YACHANDRULAVARU. **38 Mad. 163 : 19 I. C. 225 : (1913) M. W. N 378 : 13 M. L. T 329 : 24 M. L. J. 402.**

———Ss. 153 and 157—*Ejectment suit—Non-occupancy tenant of a waste land—Jurisdiction.*

A suit by the landlord for ejectment of a non-occupancy tenant of waste land let in possession before the Estates Land Act came into force is not cognizable by a Civil but by a Revenue Court. (*Wallis, Sundara Aiyar and Sadasiva Aiyar, JJ.*) VUPPULURI ATCHAYYA *v.* SIR KANCHANVERTI VENKATA SEETA RAMACHANDRA RAO.
39 Mad. 195 : 18 I. C. 555 : 13 M. L. T. 60 : 24 M. L. J. 112 (F. B.).

———Ss. 155 and 192 (E)—*Arrears of rent—Tenant if can set off* manibham *due by landlord.*

When arrears of rent are due in a holding by the tenant and a sum of money is due by the landlord to the tenant for *manibham*, the tenant is not, in the absence of the landlord's consent entitled to deduct the *manibham* from the rent and pay the balance. S. 192 of the Act negatives the right of the tenant to plead any set off as a defence to a claim for rent. (*Seshagiri Aiyar and Burn, JJ.*) RAJA OF RAMNAD *v.* VENKATARAMA AIYAR. **43 Mad 69 : 10 L. W. 303 : 53 I. C. 1 : (1919) M. W. N. 793: 37 M.L.J. 270.**

———S. 163—*Suit for mesne profits against trespasser—Procedure.*

A landholder desiring to recover mesne profits as damages from a trespasser must first apply to collector under S. 45 to get the amount of the latter determined and then sue in a civil court under S 163. (*Ayling and Odgers, JJ.*) KOLIKALUPUDI KATTAYYA *v.* RANGIAH VENKATA RAMAIYA APPA ROW BAHADUR.
12 L. W. 673 : 28 M L.T. 279 : 60 I. C. 32 : (1920) M W.N. 702: 39 M. L. J 571.

———Ss 163 and 45—*Suit for rent—Against person occupying ryoti land—Estate—Jurisdiction.*

A claim for rent against persons occupying ryoti land within an estate must be instituted in the Revenue Court. (*Seshagiri Aiyar and Napier, JJ.*) KAMMULAMMAL *v.* SANGALI SUBBA PILLAI.
48 I. C. 615 : 35 M. L. J. 11.

MADRAS ESTATES LAND ACT, S. 181.

———S. 163—*Scope—Person holding over—If trespasser.*

S 163 exempts from the operation of the Act a person, not acquiring possession of ryoti land by legal transfer or by admission as a ryot by the landholder. A tenant holding ryoti land after the expiry of the lease is not a trespasser under the section. (*Abdur Rahim and Bakwell, JJ.*) YELIKIPALLI VENKAYYA *v.* VENKATARAMAYYA APPA RAO. **43 I. C 711 : 33 M. L. J. 757.**

———S. 163—*Tenant holding under time expired lease is not within the section.*

Per *Oldfield, J.*—Persons occupying holdings under time expired leases, are not persons "who occupy lands otherwise than by inheritance or by legal transfer," within the meaning of S. 163 of the Madras Estates Land Act. (*Oldfield and Tyabji, JJ.*) SANKARA VENKATARATNAM *v.* VARADARAJA APPA RAO BAHADUR.
(1915) M. W. N. 192 : 28 I. C. 252 : 29 M. L. J. 184.

———Ss. 163 and 189—*Ryoti land—Ejectment suit—Forum.*

Suits for ejectment from ryoti lands can be entertained only by Revenue Courts and only in cases provided for by the Act The provisions as to ejectment are *exhaustive.* A suit for ejectment from ryoti lands will not be in a Civil Court except under S. 163. (*Tyabji, J.*) ARDAJERI RAMA REDDI *v.* KARPI SIVAGA.
21 I. C. 916 : (1913) M. W. N. 971.

———Ss. 164 and 166— *Record of rights—Officer preparing if a Court.*

An officer preparing a record of rights under the chapter is not a court and cannot grant sanction for prosecution, for perjury for statement made before him. (*Spencer and Seshagiri, Iyer, JJ.*) *In re* ANASARALA VENKATA HANUMANTHA RAO. **39 Mad. 414 : 2 L. W. 180 : (1915) M. W. N. 177 : 28 I. C. 97 : 16 Cr. L. J. 241: 28 M. L. J. 123.**

———Ss. 181 and 185— *Home-farm land—Conversion into ryoti—Evidence of—Issue of ryoti pattas.*

There is nothing to prevent a landholder from converting his home-farm land into ryoti land and if he does so, his successor cannot, merely by a notice to quit, or alteration of entries in the registers restore the land to its original character as home farm land. *Held* ont he evidence in the case that home-farm land had been converted into *ryoti* land. (*Spencer and Devadoss, JJ.*) SARAVANAPERUMAL PILLAI *v.* SUBBAYAN.
16 L. W. 802 : 31 M. L. T. 430 (H. C.) : 1922 M. W. N. 763: 1922 M. 514.

———S. 181—*Pannai lands—Conversion into ryoti—Reconversion into pannai again—Evidence of.*

Where a landholder has converted his *pannai* lands into ryoti lands, it is not open to his successor at his will to avoid such conversion and restore the land to *pannai* by issuing a notice to quit or by an alteration in his registers. (*Spencer and Devadoss, JJ.*) MULLAI THAYAMMAL *v.* SUBBARAYAN PILLAI. **(1922) M. W. N. 763 : 31 M. L. T. 430 : 16 L. W. 802 : 1922 M. 514.**

MADRAS ESTATES LAND ACT, S. 185.

——S. 185—*Private land— Conversion of ryoti land into—Legality of.*

The test for finding whether land is private land is to see whether the Zemindar ever cultivated it as part of homefarm land ; mere treatment as *kambattam* will not displace the presumption under S. 185. (*Sir John Edge.*) RAJA YELLAGADDA MALLIKARJUNA *v.* RAJULAPATI SOMAYA. **42 Mad. 400 : 46 I. A. 44 : 17 A.L.J 233: 23 C.W.N 626 : 21 Bom L R. 627 : 26 M. L. T. 1 : 30 C. L. J 77 : (1919) M. W. N. 541: 10 L. W. 400 : 49 I. C. 708 : 36 M.L.J. 257 (P.C.). [On appeal from 27 I. C. 77 : 39 Mad. 341.]**

——S. 185—*Conversion of ryoti into* Kambattam.

Per Sadasiva Iyer, J.--No dealings by the zemindar or the tenant or both can convert ryoti lands into *Kambattam* lands except in the single instance mentioned in S. 185 proviso of the Act. (*Sadasiva Iyer and Napier, JJ.*) SRI RAJAH VENKATA *v.* LANCA LAKSHMINARAYANA. **(1921 M. W. N. 615 : 66 I. C. 376 : 45 M. 47 : 30 M. L. T. 188 : 15 L. W. 218 : 42 M. L. J. 161.**

——S. 185—*Private land—Letting as, after July* 1890—*Evidence--Presumption—Rebuttal.*

S. 185 of the Estates Land Act does not exclude any evidence of letting as private land after July 1890. It is open to the landlord to produce any other evidence which may be relevant to his purpose. (1914) M. W. N. 765, Foll. 36 Mad. 168 Diss. S.185 clearly raises a presumption in favour of the ryot but the question that has to be considered is whether the evidence which has been adduced by the landlord is sufficient to rebut it. (*Abdur Rahim and Oldfield, JJ.*) APPA ROW *v.* KAVERI. **23 M. L. T. 154 : 1918 M W N. 171 : 44 I. C. 519 : 7 L. W. 271.**

——S. 185—*Scope—Conversion into private land.*

Per Wallis, C. J.—Conversion of ryoti into private land is not retrospectively prohibited by this section. Actual conversion must be clearly and satisfactorily proved. Mere letting lands as *kambattam* to prevent assertion of occupancy rights does not amount to conversion. That he cultivates the lands himself must be strictly proved by the landlord. *Per Seshagiri Aiyar, J.*—The Act means to prevent conversion of ryoti into *kambattam* lands where the landlord has cultivated the land for 12 years preceding the Act, the proviso to S. 185 raises a presumption in favour of its being private land. (*Wallis, C.J. and Seshagiri Aiyar, J.*) ZEMINDAR OF CHELLAPALLI *v.* RAJALAPATI SOMAYYA. **39 Mad. 341 : 16 M. L. T. 576 : (1915) M. W N. 1 : 2 L. W. 117 : 27 I. C. 77 : 49 I. C. 708 : 27 M. L. J. 718 (P. C.) [Affirmed on appeal 42 M. 400.]**

——S. 185—*Private land—Test of—Onus.*

Under S. 185 of the Madras Estates Land Act the presumption is that the land is not private land and on determining the question, the Court is to have regard to the local custom and to the question whether the land was before 1st July 1898 specifically let as private land or to any other

MADRAS ESTATES LAND ACT, S. 189.

evidence adduced. Evidence of letting as private land after 1898 is not to be taken into account. (*Wallis and Ayling, JJ.*) CHINTAM REDDI SANYASI *v.* RAJASAHI APPALANARASIMHA RAJA GARU. **27 I. C. 50: (1914) M. W. N. 766.**

——S. 185—*Home-farm land--Onus of proof.*

In a suit against tenants for possession of certain lands as Home farm lands, it is for the landlord to prove that the particular lands are home-farm lands under S. 185 of the Act. (*Sadasiva Aiyar and Tyabji, JJ.*) ARTHARAMA *v.* ARTHO PADHI. **14 M. L. T. 177 : (1913) M. W. N. 687 : 20 I. C. 952 : 25 M. L. J. 248.**

——S. 185—*Letting prior to July, 1898—Evidence—Admissibility.*

Per Sundara Aiyar, J. It is the date of the contract that is material in deciding whether the evidence is admissible. The section is not exhaustive as to the various kinds of evidence that may be let in to prove that the land is private land and dealings subsequent to 1st July 1898 are not altogether excluded. (13 I.C 1 Ref.) *Per Sadasiva Aiyar, J.*—Leases granted after 1st July 1898 are shut out as evidence if they are sought to be used for the purpose of proving the character of the tenure and even if they are used merely for proving that the land was treated after 1898 just as before 1898, Leases granted before 1st July though they were to come into force only after 1st July 1898 are admissible. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MULPURA LAKSHMAYYA *v.* VARADARAJA APPARAO. **36 Mad. 168 : (1912) M. W. N. 1193 : 17 I. C. 353 : 12 M. L. T. 561 : 23 M. L. J. 624.**

——S. 186—*Collector's certificate—Dy. Collector, if can grant.*

A Dy. Collector can grant the certificate required by S. 186 to support an application to the Dt. Judge for the compulsory sale of land by a ryot to his landholder. (*Sadasiva Aiyar and Moore, JJ.*) MEENAKSHI AMMAL *v.* R. G. ORR. **32 I. C. 986 : 3 L. W. 227.**

——S. 186—*Collector's certificate—Value of.*

A Collector's certificate granted under S. 186 of the Estates Land Act is not conclusive and an order of a District Court under S. 186 based not merely upon the certificate of the Collector but also upon other materials raised on behalf of the ryot, is not illegal. (*Napier, J.*) MEENAKSHI AMMAL *v.* ORR. **29 I. C 457 : (1915) M. W. N. 421.**

——Ss. 189 and 190—*Patta proceedings—Second appeal—High Court—Madras Rent Recovery Act,* S. 9.

A second appeal lies to the High Court from an appellate decision of the District Judge in proceedings before the Collector to enforce acceptance of patta. S. 100 of the C. P. Code governs the proceeding on appeal. (*Mr. Ameer Ali.*) RAVI VEERARAGHAVULU *v.* BOMMA DEVARA VENKATA. **37 Mad. 443 : 41 I. A. 258 : 16 M. L. T. 262 : (1914) M. W. N. 695 : 1 L W. 779 : 20 C. L. J. 375 : 19 C. W. N. 97 : 25 I. C. 305 : 16 Bom. L. R. 853 : 27 M. L. J. 451 : (P. C.).**

MADRAS ESTATES LAND ACT, S. 189.

——S. 189—*Sale for arrears of rent—Setting aside—Civil Court.*

The civil court can set aside a sale for arrears of rent by a Revenue Court on the ground of fraud (*Oldfield and Hughes, JJ.*) SURAYYA *v.* NARASIGAUDA. 14 L. W. 232 : 29 M. L. T. 304.

——Ss. 189 and 192—Res judicata—*Claim for fasli based on contract.*

Where in a suit by a tenant to set aside an attachment for arrears of rent on the ground that the landlord had no right to levy *Fasli Jasthi*, the latter fails to plead a special contract to that effect, he cannot plead the same in later suits for subsequent arrears. The decision of the question as to proper terms of a *pattah* in respect of one *fasli* is *Res judicata* for subsequent *Faslis.* (*Sadasiva Aiyar and Napier, JJ.*) KUPPUSWAMI MUDALI *v.* SUBBU NAIDU.
62 I. C. 501 : 13 L. W. 307.

——Ss. 189 and 77—*Rent suit—Jurisdiction—Civil and Revenue Courts.*

A suit by a Zemindar as ryotwari owner for recovery of rent from his tenants is cognizable only by the Civil Courts. (*Sadasiva Aiyar and Napier, JJ.*) VARADARAJA APPARAO *v.* GONEPALLE PUNNAYYA.
19 M. L. T. 338 : 34 I. C. 626 : 30 M. L. J. 545.

——S. 189—*Jurisdiction—Claim for arrears of rent.*

A claim for arrears of rent is one exclusively cognizable by a Revenue Court even if it contains a *bona fide* prayer for a declaration of title and the Civil Court will grant the declaration only if the plaint is amended by striking out the prayer for rent. (*Sadasiva Aiyar and Moore, JJ.*) SUBBANNA ACHARIAR *v.* GOPAL KRISHNA ACHARIAR. 34 I. C. 354.

——Ss. 189 and 112—*Jurisdiction—Suit to contest sale—Revenue Court.*

Under S. 189 of the Estates Land Act, a Civil Court cannot take cognizance of a suit for declaration that no valid sale can be effected under the said Act whether the suit is brought before or after the sale. (*Sankaran Nair and Spencer, JJ.*) V. R. M. RAMANATHAN CHETTY *v.* U.A U.K. RAMASWAMI CHETTY.
27 I. C. 409 : 39 M. 60.

——Ss 189 and 151—*Jurisdiction—Civil or Revenue Court.*

Where a tenant of a part of an estate sets up occupancy right as a defence in an ejectment suit, it is the Revenue Courts alone that have jurisdiction under S. 151 to try it. S. 179 debars Civil Courts from trying it. (*Wallis, O. C. J. and Seshagiri Aiyar, J.*) CHIPURAPALLI APPAYYA *v* KAKARALA PUDI RAMCHANDRA RAJU BAHADUR GARU. (1914) M. W. N. 763.
16 M. L. T. 362 : 26 I. C. 732 : 27 M. L. T. 490.

——S 189—*Jurisdiction—Tenant of old waste—Ejectment.*

A suit for the ejectment of tenant of old waste land (not being ryoti lands) let for pasturing and not for agriculture and for arrears of pasturage rent and mesne profits is cognizable by a Civil Court only. (*Sadasiva Aiyar and Tyabji, JJ.*) RAJA OF VENKATAGIRI *v.* JAYAMPA AYAPPA REDDY.
38 M. 738 : 14 M. L T. 405 : (1913) M. W. N. 919 : 21 I. C. 532 : 25 M. L. J. 578.

MADRAS ESTATES LAND ACT, S. 192.

——S. 189—*Rent suit—Private land.*

The section is inapplicable to a suit for rent of private land as defined in S. 3 (10) of the Act and such a suit is cognizable by a Civil Court, (*Ayling, J.*) APPA RAO *v* NAGANNA.
19 I. C. 8 : 36 M. 7.

——Ss. 189 and 77—*Suit for rent*—Kambattam *land.*

The landowner, to recover rent in respect of his private lands designated as *Kambattam*, not ryoti, as defined in S. 3 (16), must sue his tenant in the Civil Court and not in the Revenue Court. (*Miller and Sadasiva Aiyar, JJ.*) PALIAGANI SREERAMULU *v.* VENKATA RANGAYYA APPA ROW.
12 M. L. T. 117 : 15 I. C. 124 : 23 M. L. J. 241.

——S. 189—*Jurisdiction—Suit by Zemindar for declaration as to invalidity of patta—Civil or Revenue Court.*

A suit by a Zemindar for a declaration that a patta executed by his predecessor in favour of the deft. is not binding on him is cognizable by the Civil Court. (*Sundara Aiyar and Ayling, JJ.*) MAHIPATI SURYA RAO *v.* SREERAMA CHARYULU.
12 I. C. 430 : (1911) 2 M. W. N. 307.

——S. 189—*Jurisdiction—Suit for* kist *and village cess.*

Under S. 189 a suit for *oist* and land and village cess is not cognizable by a Small Cause Court, but by the Revenue Court. (*Sundara Aiyar, J.*) BACHU *v.* BAGHI REDDI.
36 M. 126 : 10 M. L. T. 282 : 12 I. C. 171 : (1912) M. W. N. 251.

——S. 189 (3)—*Competent Court—Civil and Revenue Court.*

The decision of Rev. Court, in a suit exclusively triable by it, does not bind the Civil Court, though the subsequent suit could not be brought in the Rev. Court, as S. 189 (3) is not more comprehensive than S. 11 of the C P. Code. (*Sadasiva Aiyar and Spencer, JJ.*) SOBHANADRI APPARAO *v.* DATHADU VENKATA RAJU.
43 M 859 : (1920) M. W. N. 639 : 12 L. W. 512 : 28 M L. T. 359 : 60 I. C. 700 : 39 M, L. J. 476.

——S. 192—*Return of plaint—Appeal—Revision—C. P. C., S. 115 and O. 43, R. 1 (a).*

No second appeal lies to the High Court against an order of the District Court in appeal returning the plaint in a suit instituted in the Revenue Court for presentation to the Civil Court. O. 43, R. 1 (*a*), C. P. Code, which gives the right of appeal against orders under O. 7, R. 10 of the C. P. Code is inapplicable to suits in Revenue Courts by virtue of S. 192 of the Madras Estates Land Act. The High Court has power to treat an appeal as a petition in revision under S. 115 of the C. P. Code, especially when the question in issue is one of jurisdiction. S. 115 of the C. P. Code is not controlled by S. 192 of the

MADRAS ESTATES LAND ACT, S. 192

Madras Estates Land Act. (*Spencer and Kumaraswami Sastri, JJ.*) VENKATA RAMAYYA APPA ROW *v.* CHAKALI VEERASWAMIGADU.
41 Mad. 554 : 23 M. L. T. 251 : 7 L. W. 508 : 45 I. C. 471 : (1918) M. W. N. 327 : 34 M. L. J. 309.

——S. 192—*Plaint—Presentation of, to clerk.*

When the Head Clerk of the Collector is not authorised for that work, a plaint presented to him under the Madras Estates Land Act is not valid. (*Whyte, C. J. Miller and Sankaran Nair, JJ.*) RECEIVER OF THE N. and M. ESTATES *v.* SURAPARAZU. **29 I. C. 449 : 38 M. 295 (F. B.).**

——S. 192—*Remand—Appeal—C. P. Code. O. 43, R. I (a).*

An order of remand made in proceedings under the Madras Estates Land Act is not appealable. (*Ayling and Tyabji, JJ.*) GURUSWAMI NAIDU *v.* SUBBA NAIDU. **29 I.C. 265.**

——S. 192—*C. P. Code, S. 37—Transfer of revenue area—Jurisdiction.*

Where a revenue area is transferred from one district to another, the Court of the latter district acquires jurisdiction to try suits concerning the holding in connection with which the suit or proceedings are brought and no formal order of transfer of suits from the old to the new Courts is necessary. (*Sadasiva Aiyar and Hannay, JJ.*) KAJANA VENKOBA RAO *v.* SASTHA AIYAR.
2 L. W. 255 : 28 I. C. 269: 17 M. L. T. 190.

——S. 192 — *Review — Revenue Court — Appeal—C. P. C., O. 43, R. 1 (w), O. 47, R. 7.*

No appeal lies to the Dt. Court against the order of a Revenue Court granting a review in a summary suit. (41 C. 746 : 24 M. L. J. 93, Foll.) (*Oldfield and Tyabji, JJ.*) AIYARAPPA MUDALIAR *v.* GULAM GHOSE.
26 I. C. 831 : 2 L. W. 62.

——Ss. 192, 112 and 114—*Remand—Appeal.*

A remand order by Dt. Court in a suit under Ss. 112 and 114 of the Act is not appealable, for S. 192 of the Act does not incorporate the provisions of S. 588, C. P. C., 1882. (*Ayling and Napier, JJ.*) K. VILVANATHA MUDALIAR *v.* MANNAR NAIDU. **25 I.C. 425 : 1 L. W. 667.**

——S. 192 (1)—*Remand—Dt. Judge—Appeal—C. P. Code, O. 43—Applicability of.*

The provisions of O. 43 of the C. P. Code, do not apply to suits under S. 192 of Madras Estates Land Act and hence no appeal lies to High Court from an order of remand by the Dt. Judge. (*Abdur Rahim and Sundara Aiyar, JJ.*) KRISHNASWAMI AIYAR *v.* VAITHILINGA TAMBIRAN. **12 I. C. 146.**

——S. 192 (e)—*Set off—Plea of, if allowable.*

A plea for reduction of rent on the ground of failure of water-supply is an equitable set-off being a claim for damages in respect of contract to cultivate and cannot be allowed under S. 192 (*e*) of the Act. (*Kumaraswami Sastri and Phillips, JJ.*) VINA SUBBARAYALU NAIDU *v.* SUBBARAYALLU NAIDU. **40 I.C. 238 : 5 L. W. 708.**

MADRAS ESTATES LAND ACT, S. 205.

——S. 195—*Bar of suit, plea of—Tender of patta—Deposit.*

A plea that a suit for rent is not maintainable because no pattah was tendered, is maintainable without depositing the rent. (*Ayling and Tyabji, JJ.*) RAJA OF KARVETNAGAR *v.* PANDUR GOVINDA MUDALI. **14 M.L.T. 535 : 21 I. C. 858. 27 M. L. J. 238:**

——S. 203—*Collector entertaining appeal wrongly.*

Where the Collector wrongly entertains an appeal it is open to the Board of Revenue even in the absence of a second appeal to pass appropriate orders under S. 203 of the Act. (*Clegg, F. M.*) ANDI THEVAN *v.* ZEMINDAR OF SIVAGIRI.
34 I. C. 460. (B. R. Mad.)

——S. 205—*'Revenue Officer' does not include District Collector—Jurisdiction of Board of Revenue to revise.*

The words 'Revenue Officer' in S. 205 of the Act do not include a Dt. Collector. The Board of Revenue cannot revise the order of a Dt. Collector acting in revision under S. 205 of the Act as the section gives concurrent jurisdiction to the Dt. Collector and the Board of Revenue over orders made by a Revenue Officer (*Couchman, M. B. R.*) MADRAS ESTATES LAND ACT, 1908, S. 205 *In re.*
59 I.C. 345 : 12 L. W. 145 (Rev.).

——S. 205—*Revision—High Court—Interlocutory order.*

S. 205 of the Act relates not to incidental orders in suits the final decree in which is appealable, but to such proceedings as are specified in Part (*b*) of the schedule as not appealable. It does not affect the revisional powers of the High Courts in suits which are made appealable to the Dt. Courts. (*Ayling and Krishnan, JJ.*) PARAMASWAMI AIYANGAR *v.* ALAMU NACHIAR AMMAL.
42 Mad. 76 : 9 L. W. 26 : 49 I. C. 11 : (1918) M.W.N. 107 : 35 M. L. J. 632.

——Ss. 205 and 3 (5)—*Board of Revenue—Revisional powers of.*

The Board of Revenue, cannot revise under S. 205 an order refusing to recognise the applicant as landholder under S. 3 (5), as the revisional powers of the Board are very limited. (*Mr. Aziz-ud-din.*) SATAGOPA BHATTAR *v.* VENKU NAYUDU.
40 I. C. 1007.

——S. 205—*Revision — Review confirming previous order.*

When a review of the order of setting aside an *ex parte* decree confirms the order after hearing both the parties, no revision can be granted though the order setting aside decree was illegal for failure of notice to plff. (*Sadasiva Aiyar and Moore, JJ.*) RAMASWAMI NAICKER *v.* SUBBARAYULU NAICKER. **32 I. C. 567 : 3 L. W. 158.**

MADRAS ESTATES LAND ACT, S. 209.

——Ss. 209 and 192— *Revenue division—Transfer—Effect—Powers of Madras Govt.*

If while a case under the Estates Land Act is pending in a Revenue Divisional Court, the suit area is transferred from that division to another division, the Court of the latter division acquired jurisdiction to dispose of the case without a formal order of transfer. The Madras Government has power to alter the limits of Revenue Divisions under Act I of 1865. (*Sadasiva Aiyar and Hannay, JJ.*) KAJANA VENKOBA RAO *v.* SASTHA AIYAR. **2 L. W. 255 : 28 I. C. 269 : 17 M. L. T. 190**

——S. 210—*Suit to recover rent accruing due during minority—Suit for rents accruing due before the passing of the Act—But instituted after the passing of the Act—Limitation.*

Per Sankaran Nair, J. (Confirming the decree of the lower Court).—Even in cases of rents accruing due before the passing of the Madras Estates Land Act, a suit instituted after the passing of the Act is governed by the Act and not by the Limitation Act. Therefore a suit by a person for rents accruing due during minority, instituted within three years of his attaining majority, is barred though the above circumstances exist and S. 8 of the Limitation Act does not apply ; for the Madras Estates Land Act is complete in itself and where it provides the general rules of Limitation Act have no application.

Per Sadasiva Aiyar :—A suit instituted after the passing of the Estates Land Act for rents accruing due when the Act was not in force, is governed by Limitation Act. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) RAJAH OF PITTAPUR *v.* GANI VENKATASUBBA ROW. **14 M. L. T. 427 : 21 I. C. 595 : (1913) M. W. N. 989.**

——S 210— *Limitation — Arrears of rent accrued before the Act.*

The rule of limitation for suits for rent in the Madras Estates Land Act is not applicable to cases where the three years had expired before the Act came into force. The proper article is Art. 116 of the Limitation Act. (*Benson and Sundara Aiyar, JJ.*) RAMAKRISHNA *v.* SUBBARAYA. **38 Mad. 101 : 18 I. C. 64 : (1913) M. W. N. 303 : 24 M. L. J. 54.**

——S. 210—*Limitation—Suit for arrears of rent—Contract in writing registered—Limitation Act, Art.* 116—*Special period prescribed in the Act—Retrospective operation.*

Where in a suit for arrears of rent under a registered contract, the cause of action was more than one year old at the time the Act came into force, *Held*, per *Miller, J.* that the special period prescribed for actions for rent under the Madras Estates Land Act did not apply to claims for rent under registered *kabuliyats* and that an intention to give retrospective operation could not be inferred when there was no appreciable interval between the date of its passing and the date of its coming into force ; that S. 210 had no retrospective operation and that the suit was within time. Per *Abdur Rahim, J.* that the suit was barred by limitation and that the legislature having removed suits for rent from the cognizance of Civil Courts, the presumption against retrospective operation does not apply. (*Miller and Abdur Rahim, JJ.*) SUNDARAM AIYAR *v.* MUTHU GANAPATHIGAL. **11 M. L. T. 276 : 14 I. C. 184 : (1912) M. W. N. 652.**

MADRAS ESTATES LAND ACT, S. 213.

——S. 211—*Limitation—Exemption—Minority--Limitation Act of* 1877, *S.* 7—*Suit for arrears of rent for* faslis *prior to the Act.*

After the coming into force of the Madras Estates Land Act a landholder brought a suit for arrears of rent for *faslis* which expired more than three years before the Act but within three years of his attaining majority : *Held* per *Wallis, C J.* and *Kumaraswami Sastri, J.* (*Seshagiri Aiyar, J. contra*) that S. 211 of the Madras Estates Land Act had no retrospective operation so as to extinguish causes of action that were alive at the passing of the Act and that the suit was not barred by limitation. (*Wallis, C.J. Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) RAJAH OF PITTAPUR *v.* GANI VENKATASUBBA RAO. **39 Mad. 645 : 18 M.L.T. 67 : (1915) M W.N. 547 : 30 I. C. 94 : 2 L. W. 661 : 29 M. L. J. 1.**

[On appeal from 14 M. L.T. 427 : 21 I. C. 595 : (1913) M. W. N. 989.]

——S. 212—*Prosecution under--Decree before the Act against tenant.*

A tenant against whom a decree for ejectment was obtained by the landlord before the Act, cannot be prosecuted and convicted under S. 212 of the Act, for being in possession of the land without the landlord's consent That section applies only if the decree can be said to be passed under S. 163 of the Act. (*Sankaran Nair, J.*) PRATTI APPALA RAJU *v.* MUTHARAJU SURPA RAJU. **(1914) M. W. N. 396: 1 L. W. 338 : 25 I.C. 628 : 15 Cr. L J. 620 : 27 M. L. J. 676.**

——Ss. 212 and 73—*Penal provisions—Penal Code, if executed by.*

The penal provisions of the Madras Estates Land Act are in addition to and not substitutes for those in the Penal Code. (*Tyabji, J.*) *In re* SIVANU PANDIA THEVAN. **23 I. C. 503 : 15 Cr. L. J. 295 : 38 Mad. 793.**

——S. 213—*Sale of holding —Amount paid to avoid sale—Suit to recover—Civil Court.*

A ryot whose land has been sold for arrears of rent due by another ryot and who has paid the amount to avoid the sale can recover the same by suit both from the landlord and the defaulting ryot. The action is not one for damages for money had and received under S. 69 of the Contract Act and is cognizable only by a Civil Court. The restrictive language of S. 213 does not take away this right. S. 213 gives a summary remedy to those against whom irregularities in procedure have been committed The section does not cover cases where there is no power in the landlord to invoke the aid of the Act against an individual. (*Seshagiri Aiyar and Bakewell, JJ.*) RAJAH OF VIZIANAGARAM *v.* POOSAPATI APPALA. **3 L W. 517 : 19 M L T. 374 : 34 I. C. 480 : (1916) 1 M W. N. 391.**

MADRAS ESTATES LAND ACT, S. 213.

——— -S. 213—*Distraint—Suit for damages—Jurisdiction.*

A suit by a tenant of certain ryotwari land, against ryotwari owners to recover damages for an illegal distraint for rent is triable only by a Revenue Court under S. 213 (1) and S. 189 (2) taken together, but S 213, cl. (2) preserves the Civil Court's jurisdiction only where it is brought for an injunction declaration and possession. 27 M.483. Foll. (*Wallis, C.J. Sadasiva Aiyar and Srinivasa Aiyangar, JJ.*) NARAYANASWAMI AIYAR *v.* VENKATARAMANA AIYAR. **39 Mad. 239 : 18 M. L. T. 426 : 2 L. W. 1037 : 31 I. C. 326 : (1915) M. W. N. 921 : 29 M. L. J. 607 (F. B.)**

———S. 213—*Distraint—Suit for damages—Cause of action.*

The cause of action for a suit under S. 213 of the Act is the date of distraint and not the day the property attached is released on payment of the money due. (*Miller and Tyabji, JJ.*) VENKATARAMIYER *v.* VYTHILINGA THAMBIRAN AVERGAL. **1 L. W. 89 : 24 I. C. 754 : 38 Mad. 655.**

———Sch. A, Art. 6 (a)--*Revenue Court—Order refusing commutation—Appeal—Second appeal.*

An order of a Revenue Court refusing commutation is appeal only under cl. 6 (a) of Sch. A of the Act and hence an appeal to the Dt. Judge or a second appeal to the High Court therefrom is incompetent. (*Sadasiva Aiyar and Spencer, JJ.*) SIVANU PANDIA THEVAR *v.* ZAMINDAR OF URKUD. **6 L W. 412 : 43 I. C. 498 : 41 M. 109 : 34 M. L. J. 139.**

———Sch. A, Art. 8—*Suit for arrears of rent—Deduction of time taken in prosecution of a previous suit.*

To entitle a landlord in a suit for arrears of rent to deduct the time taken in prosecution of a previous suit between himself and the tenant, the suit must be one relating to the ascertainment of rent within the meaning of Part A, Art. 8 of the Act. An inter-pleader suit by a tenant against his landlord and Govt. to determine who is entitled to water-cess from the tenants, is not a suit for ascertainment of rent within Art 8, Part I of the Act. The landlord cannot deduct the time spent in such suit in calculating time for a suit for arrears of rent by him. (*Seshagiri Aiyar and Kumaraswami, Sastri, JJ.*) DORAISWAMI REDDI *v.* VENKATACHELLAM PILLAI. **26 I. C. 267 : 27 M. L. J. 734.**

———Sch. 1, Part A, Art. 12—*Sale of ryots holding without notice—Sale illegal—Suit to set aside sale not governed by Art. 12.*

A Civil Court has jurisdiction to entertain a suit by a raiyat to set aside a sale of his holding which was held under the provisions of Chapter VI of the Act, but without serving on him notice of the intention to sell. (*Schwabe, C. J. Oldfield and Coutts Trotter, JJ.*) RAJAH OF RAMNAD *v.* MINOR VENKATARAMA AIYAR. **16 L. W. 274 : (1922) M. W. N. 501 : 31 M.L.T. 158 : 45 M. 890 : 43 M. L. J. 264 : 1923 M. 6 (F. B.).**

MADRAS FOREST ACT (V OF 1882), S. 25

MADRAS FOREST ACT (V OF 1882)

———Ss. 6, 16 and 17- *Reserved forest—Proclamation—Notice not served on the owner of the land—Provision for service of notice mandatory—Knowledge of owner*

S. 6 of the Madras Forest Act which requires service of notice on the owner of a land proposed to be constituted a reserved forest is mandatory and not directory. Such a notice constitutes a condition precedent to the exercise of jurisdiction by the Forest Settlement Officer. Where no such notice is served on the owner, he will not be bound by the notification under S. 16 of the said Act declaring the forest reserved and his rights will not become extinguished under S. 17 of the same Act, by reason of his failure to prefer his claims before the Forest Settlement Officer. It is not competent to the Govt. in such a case, to plead that the irregularity is cured by the fact that the owner had actual knowledge of the proceedings regarding afforestation. 6 M. I. A. 134 ; (1906) A. C. 110; (1892) A. C. 498, 528, Foll. (*Wallis, C. J. and Coutts-Trotter, J.*) BALAKRISHNA RAO *v.* SECRETARY OF STATE. **39 Mad 494 : 18 M. L. T. 151 : 30 I. C. 355 : 2 L. W, 695 : 29 M. L. J. 276.**

———Ss. 10 and 16—*Forest Settlement Officer—Decision of—Second appeal—C. P. C., S. 100.*

A second appeal to the High Court is maintainable under S. 100 of the C. P. Code from the decision of a Dt Judge under S. 10 of the Forest Act on appeal from the decision of the Forest Settlement Officer. (*Lord Shaw.*) SECRETARY OF STATE *v.* CHELIKAM RAMA ROW. **39 Mad. 617 : 20 C. W. N. 1311 : (1916) 2 M. W. N. 224 : 14 A. L. J. 1114 : 20 M. L. T. 435 : 4 L. W. 486 : 18 Bom. L. R. 1007 : 25 C. L. J. 69 : 35 I. C. 902 : 43 I. A. 192 : 31 M. L. J. 324. (P C.).**

———S. 16—*Notification—Land reserved but omitted in demarcation—Private party in possession with pattah and paying assessment—Trespass—Conviction, if legal.*

Where under a notification under S. 16 a land was reserved but was omitted at the time of demarcation and the person alleging title to it was in possession of it under patta issued to him and was paying assessment, he cannot be convicted for trespass. (*Sankaran Nair and Hannay, JJ.*) ALI MAHOMED MUKRI *In re.* **2 L W. 67 : 26 I. C. 645 : 16 Cr. L. J. 53.**

———S. 21 (f)—*Quarrying in reserved forest—No dishonest motive—Sentence.*

Only nominal sentence should be passed in a case of quarrying in a reserved forest without permit but under a belief that it is legal and without a dishonest motive. (*Ayling J.*) *In re* PENCHUL REDDI KOTTUR. **9 M. L. T. 216 : 9 I. C. 567 : 12 Cr. L. J. 99.**

———S. 25—*Effect of.*

By S. 25 all forests reserved by executive order prior to the introduction of the Act are placed on the same footing as reserves subsequently constituted. The proviso to S. 25 does give a mode

MADRAS FOREST ACT (V OF 1882), S. 26.

of redress by way of further inquiry when Government deems desirable but it is purely within the discretion of the Government. 12 M. 105 : 29 M. 480, Dist. (*White, C.J. and Ayling, J.*) SUBRAMANIA PILLAI *v* SECRETARY OF STATE.
34 M. 353 : 9 M. L. T. 186 : 9 I. C. 9 : (1911) 1 M. W. N. 55 : 21 M. L. J. 132.

——S. 26—*Conviction—Existing rights of villagers—No inquiry as to—Effect.*

A conviction under S. 26 without enquiring into the existing rights of the villagers to graze their cattle and cut fuel is illegal. 22 M.L.T. 211, Foll. (*Abdur Rahim and Napier. JJ.*) THATHA PILLAI *v.* EMPEROR. **19 Cr. L. J. 600 : 45 I. C 504 : (1919) M W. N. 146.**

——S. 26—*Rules under—Rights of free grazing —Notifications under the Act, if affects.*

Under S. 26 with rules thereunder a right of free grazing vested before S. 26 applied is not affected by notifications under the Act. The second clause and the rules thereunder are valid. (*Ayling and Sadasiva Aiyar, JJ*) RANGADU *In re.* **22 M. L. T. 211 : 6 L W. 428 : (1917) M. W. N. 682 : 42 I. C. 724 : 18 Cr. L. J. 996.**

——S. 26—*Rules under Rule 8—"Forest produce" meaning of—Forest grass.*

The term "forest produce" in R. 8 of the Madras Forest Rules includes forest grass and the use of such grass by grazing cattle on lands reserved as fuel reserve, is prohibited by the said rule and a conviction will lie for such unlawful grazing. (*Sadasiva Aiyar, J.*) *In re* PERUMAL NAICK. **4 L. W. 552 : 36 I. C. 582: 17 Cr. L. J. 534.**

——S. 26—*Rules made under—Rr. 8, 9—Charge under R. 8—Omission to state that place was "reserved forest"—Material defect.*

A charge under R. 8 of S. 26 of the Madras Forest Act must clearly state that the place wherefrom the accused cut a tree was a "reserved forest". The omission to state this is a material defect and vitiates the trial. (*Sundara Aiyar, J.*) GOVINDA REDDI *v.* EMPEROR.
(1912) M. W. N. 1129 : 15 I. C. 643 : 13 Cr. L. J. 504.

——Ss. 35, 36 and 55—*Transporting timber—Expiry of time limited by license before timber reaches destination—Extension of time by another Government—Penalty—Compensation.*

The appellant imported timber from the Central Provinces into the Madras Presidency and by the time the timber arrived in Madras the time fixed in the pass expired. The time fixed in the pass was extended by the Central Provinces Government but n t by the Madras Government. At the checking station in the Madras Presidency the appellant was made to pay the penalty and the value of the timber under S.55 of the Madras Forest Act on the ground that the time fixed in the pass had expired. *Held*, that the action of the Forest officer in Madras was legal and the extension of time by the Central Provinces Government did not legalise the import into Madras Presidency. Under S. 55 of the Forest Act it is open to the Forest officer not only to collect the compensation for the offence on account of the prosecution but also to collect the value of the timber concerned which he would be entitled to detain and which would be liable to confiscation in case the prosecution succeeded. (*Oldfield and Ramesam, JJ.*) KOTI MALLIKARJUNAYYA *v.* SECRETARY OF STATE FOR INDIA. **16 L. W. 165 : (1922) M. W. N. 491 : 1922 Mad. 427.**

MADRAS HEREDITARY OFFICES REGULATION (VI OF 1831).

——Ss. 53 and 55—*Scope of.*

The words 'no further proceedings shall be taken', in S 53 of the Act mean that proceedings in progress must lapse. (*Napier, J.*) *In re* NARAYANA PADAYACHI. **37 Mad. 280 : 25 I. C. 1008 : 15 Cr. L. J. 680.**

——S. 66—*Applicability—Lease by Govt.—Resale by Govt. of its rights--Deficit—Recovery of.*

Under a lease by Govt. of the forest produce, the Govt. re-sold the right to the produce in auction and sought to recover the deficit under the Rev. Recovery Act, as if the money payable under the Act, *held* that S. 66 of the Forest Act did not apply and that the deficit could not be recovered as if it were an arrear of revenue. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SECRETARY OF STATE *v.* ABDUR RAHIMAN.
16 I. C. 6 : 24 M. L. J. 426.

MADRAS GENERAL CLAUSES ACT (I OF 1891).

—— S 8, Cl. (d)—*Limitation of suits—Retrospective operation.*

Per Wallis, C. J.—The principle which has received legislative recognition in S. 8, Cl. (*d*) of the Madras General Clauses Act is that where an Act contains provisions for the limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, then, the provisions must be considered to have been enacted subject to the implied exception that they are not to extend to such vested rights of suit which are to contiuue subject to the rules of limitation in force at the passing of the Act. (*Wallis, C.J., Seshagiri Aiyer and Kumaraswami Sastri, JJ.*) RAJAH OF PITTAPUR *v.* GANI VENKATA SUBBA RAO. **39 Mad. 645 : 18 M. L. T. 67 : (1915) M. W. N. 547 : 30 I. C. 94 : 2 L. W. 661 : 29 M. L. J. 1.**

MADRAS HEREDITARY OFFICES REGULATION (VI OF 1831.)

——*Inam—Resumption— Meaning of—Gadaba Service Inams—Applicability of Act to.*

The resumption of an inam means putting an end to the grant remitting the services and making the holders pay the full assessment. Consequently, the resumption of an inam in the possession of encumbrancers does not extinguish prior encumbrances. Gadaba bearers service is a personal service ; inams for that service do not fall under Regulation VI of 1831. Where emoluments, were originally given both for Gadaba and for Kuttakalva (repairs of channels) services but have been recently treated for Gadaba service alone the inam is outside the provisions of the Regulation. (*Abdur Rahim and Phillips, JJ.*) SREEVADHU YERRANNA *v.* PANTIVA KANNAMMA.
35 Mad. 704 : 10 M. L. T. 561 : 12 I. C. 457 : (1911) 2 M. W. N. 354: 21 M. L. J. 962.

MADRAS HEREDITARY OFFICES REGULATION (VI OF 1831).

———*Jurisdiction—Revenue Court—Suit for lands attached as emoluments.*

So long as Regulation I of 1831 was in force, only Revenue Courts could take cognizance of suit for lands attached as emoluments to an office. (*Munro and Sankaran Nair, JJ.*) SREENIVASAVARADACHARI *v.* NARASINGA PILLAI.

(1911) 1 M. W. N. 208 : 9 I. C. 796 : 9 M. L. T. 430.

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895).

——— —**Ss. 3 and 13**—*Carpenter service inam—Suit by Inam-holder for possession against--Trespasser—Civil Court—Jurisdiction.*

A suit by a carpenter service inam-holder to recover possession of the property with mesne profits from a trespasser is not a suit for emolument or for recovery of a village office, etc., and is cognizable by a Civil, and not by a Revenue Court. (*Seshagiri Aiyar, J.*) KANDUKURI KOTIAH *v.* DEVINENI REDDAMMA.

33 I. C. 658 : (1916) 1 M. W. N. 278.

———**Ss. 3 and 21**—*Village carpenter—Suit for emoluments of office of jurisdiction.*

Civil Courts have no jurisdiction to try suits for emoluments of the offices of village carpenter in a proprietary estate such offices being governed by S. 3 (4) of the Act. 5 I. C. 41, Dist. (*Sundara Aiyar and Spencer, JJ.*) MATYALA PAPAYYA *v.* KOSURI MURAMATHU. **11 M.L.T. 11 : (1912) M.W.N. 7: 13 I. C. 322 : 22 M. L. J. 156.**

———**S. 3**—*Applicability—Gadala service inam.*

Madras Act III of 1895 does not apply to a Gadala service inam. (*Benson and Sundara Aiyar JJ.*) YIWANI SITARAMA SASTRIAN *v.* RORARAMEDU.

13 I. C. 190 : (1911) 2 M. W. N. 588.

———**S. 3, Sub-Cls. (4), (5)**—*Hereditary office Emoluments.*

S.5 of the Act applies to emoluments of hereditary offices in a proprietary estate of the classes mentioned in S. 3 (4) of the Act. 33 M. 488, not Foll. 22 M. L. J. 156, Foll. (*White, C. J. Miller and Sadasiva Aiyar, JJ.*) KANDAPPA ACHARJY *v.* PATHI PATI VENGAMMA NAIDU. **37 Mad 548 : (1913) M. W. N. 600 : 25 M. L. J. 42 : 20 I. C. 634 : 14 M. L. T. 146.**

———**S. 7**--*Inquiry under, is not open to revision by High Court.*

An enquiry under S. 7 by a Revenue Divisional Officer is a departmental one and is not subject to the superintendence of the High Court. (*Ayling Offg. C.J and Odgers, J.*) PALANIKUMARA CHINNAYA GOUNDER *In re.*

14 L. W. 548 : 66 I. C. 566 : (1921) M. W. N. 757 : 41 M. L. J. 577.

———**S. 10**—*Karnam's inam—Enfranchisement—Right of divided member of the family.*

A person who belongs to a family having a hereditary interest in a Karnam's inam but becomes divided in his status from the holder of the office for the time being, cannot, if the inam is subsequently enfranchised by the Government, claim a share in the lands that formed the emoluments of the office. (*Spencer and Krishnan, JJ.*) PYRAPPA *v.* SYAMA RAO. **8 L. W. 614 : 49 I. C. 250 25 M. L. T. 177 . (1918) M.W.N. 849**

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895), S. 13.

———**S. 13**—*Suit for emoluments — Purohit service—Jurisdiction.*

S. 13 of the Act confers exclusive jurisdiction to the Revenue Courts over suits for the recovery of emoluments of hereditary offices including Purohit service. (*Spencer and Ramesam, JJ.*) VANCHINATHA AIYAR *v.* RAJAGOPALA

65 I. C. 321 : 41 M. L. J. 372.

———**Ss. 13 and 21**—*Jurisdiction—Civil Court—Appointment to an office.*

S. 21 bars the jurisdiction of the Civil Court only where jurisdiction is conferred by S. 13 on the Revenue Court. A Civil Court can therefore entertain a suit respecting the appointment to a newly created village office. The time for such suit begins to run from the date of publication of the Collector's notice. (*Ayling and Coutts-Trotter, JJ.*) TANGUTORI KODANDARAMAYYA *v.* TANGUTORI RAMALINGAYA.

(1920) M. W. N. 644 : 60 I. C. 650 : 12 L. W. 663.

——— ——**Ss. 13 and 21**—*Jurisdiction — Village office—Suit for declaration of right to—'Claim to succeed'—Suit--If includes newly-created office.*

Per Bakewell, J.—The words 'claim to succeed' in S. 21 of Madras Act (III of 1895) should not be understood in the strict sense of the acquisition of an interest upon the death of a person but mean the right to be appointed upon a vacancy in office. They include the right to be appointed to a newly-created office. A suit for a declaration that a person is or is not entitled to a village office is not cognizable by the Civil Courts. *Per Odgers, J.*—The words 'claim to succeed' in S. 21 of the Act do not include any claim to be appointed in the first instance to any of the village offices set forth in the Act. A suit merely for a declaration that a person is entitled to a village office is cognizable by the Civil Courts. (*Bakewell and Odgers, JJ.*) ALAGIASUNDARAM PILLAY *v* MIDNAPORE ZEMINDARY CO., LTD. **54 I. C. 816.**

———**Ss. 13 and 21**--*Suits for recovery of service inams—Jurisdiction of Civil and Revenue Courts.*

A suit for recovery of lands on the allegation of their being the emoluments of a service inam must be instituted only before the Collector under S. 13 of the Act, while a suit to recover on the ground of the lands being the claimant's private property, or on the ground of trespass with no question of title involved, is within the jurisdiction of the Civil Courts (*Spencer and Phillips, JJ.*) DEVINENI PATTAYYA *v.* KANDUKURI KUTIAH.

(1917) M. W. N. 7 : 37 I. C. 918 : 5 L. W. 151.

———**S. 13**—*Alienation by way of lease—Adverse possession.*

The section does not prohibit alienations of lands attached to a village office by way of a lease. The possession of the tenant cannot become adverse to the holder of the office. (*Sadasiva Aiyar and Spencer, JJ.*) KUMAR PEDA SUBBAYYA *v.* KAKERLO CHINNAPPA. **28 I. C. 842 : 28 M. L. J. 303.**

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895), S. 13.

——S. 13—*Jurisdiction—Office of village headman—Suit for declaration of right to.*

Under S. 32 of Madras Act II of 1894 the Board of Revenue (Madras) made the office of village headman a salaried one. The emoluments became attached to the office within the meaning of S. 13 of Act III of 1895 from the date of Board's order. After that date, the Civil Court has no jurisdiction to entertain a suit for a declaration of plff.'s right to the office of village headman. (*Sadasiva Aiyar and Napier, JJ.*) BHAGVATULU SESHAYYA *v.* VEDANTAM MALLESAM. **28 I. C. 88 : 2 L. W. 172.**

——S. 14—*Limitation for suits.*

S. 14 of the Act prescribes a period of three years for suits under the Act but does not extinguish the rights of persons who fail to sue in time. (*Spencer and Ramesam, JJ.*) VANCHINATHA AIYAR *v.* RAJAGOPALA. **65 I. C. 321 : 41 M. L. J. 372.**

——S. 21—*Scope of—Jurisdiction—Suit for declaration that appointment of village headman is illegal—Civil Court.*

Per Sadasiva Aiyar, J.—S. 21 of the Act does not prohibit Civil Courts from deciding any claim to be appointed in the first instance to village offices but only a claim to succeed to particular offices. A suit for a declaration that an appointment of a village headman made under S. 15 of the Madras Act II of 1884 is illegal and that plff. is legally entitled to be headman is cognizable by a Civil Court. (*Sadasiva Aiyar and Napier, JJ.*) KRISHNASWAMI NAIDU *v.* AKKULAMAL AVERGAL. **24 M. L. T. 489 : (1919) M. W. N. 29 : 50 I.C 185 : 9 L. W. 90.**

MADRAS HIGH COURT RULES OF PRACTICE (Appellate Side.)

——Rr. 1 and 76—*Presentation of appeal—Delay—Single Judge, if can excuse.*

A single Judge of the High Court sitting in an Admission Court can excuse delay in presentation of appeal from a decree on the Original Side or from the Moffusil Court. (*White, C. J. and Oldfield, J.*) T. RUTHNA GRAMANY *v.* VEERABHADRA AIYAR. **21 I. C. 96 : (1913) M. W. N. 751 : 25 M. L. J. 281.**

——R. 2, Sub-R. 2, Cl. (a)—*Applicability—Land Acquisition appeal.*

The words "decree or order" in R. 2 (2) (*a*) of the Appellate Side Rules do not preclude the application of this rule to cases of appeals under S. 54 of the Land Acqn. Act. (*Abdur Rahim, Oldfield and Seshagiri Aiyar, JJ.*) T. MANAVIKRAMAN TIRUMALPAD *v.* THE COLLECTOR OF NILGIRIS. **41 Mad 943 : 8 L. W. 261 : 24 M.L T. 155: 49 I. C. 27 : (1918) M. W. N. 540: 35 M. L. J. 110.**

——R. 4 (1) (i) (f)—*Vacation Judge—Jail Appeal—Dismissal on ground of limitation—Validity—Effect--Another appeal presented subsequently against same conviction and sentence—Maintainability—Admission of that appeal by same Judge in ignorance of his prior order—Effect—*

MADRAS H C. RULES OF PRACTICE (Appellate side, R. 23.

Criminal Procedure Code, S. 439—Revision—Review—High Court Jurisdiction—Criminal case heard and decided by one or more of its own Judges—Powers in regard to—Dismissal for default of appearance—Jurisdiction in Criminal Appeal or Revision.

The appellant presented under S. 420, Cr.P.C., a jail appeal to the High Court which was dismissed under S. 481, Cr.P. C., as out of time by a learned Judge, sitting as Vacation Judge. On the reopening of the Court the appellant presented another appeal through counsel against the same conviction and sentence, which was admitted by the same learned Judge. *Held*, that the decision on the prior appeal was a bar to the subsequent appeal being heard on the merits. Even if the subsequent appeal could be treated as an application for the revision of the previous decision, neither S. 439, Cr. P. Code, nor any other provision empowered the High Court to revise the judgment of one or more of its own Judges.

The admission of the subsequent appeal could not be treated as a setting aside by the learned Judge of this prior order and as a re-opening of the case on its merits, because the learned Judge was admittedly not at the time aware of his prior order. The Bench hearing the subsequent appeal apart from the fact that it was constituted differently, had no power to review the prior order. The Code does not confer any such power. The High Court has no inherent power of review in such cases ; and the existence of such a power cannot be inferred from the position of the High Court as a Court of Record. The dismissal of the prior appeal by the Vacation Judge could not be treated as a nullity on the strength of the notification regarding his sittings, which was to the effect that he would dispose of "urgent applications which require to be heard immediately." The notification must not be regarded as more than a general statement of the powers which the Vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which in virtue of statute and rules he possesses and of which he cannot consistently with them, be deprived. And under S.108 of the Government of India Act and High Court Appellate Side Rules No. 4 and No. 1 (i) (f), the Vacation Judge was competent to dismiss the prior appeal. *Per Devadoss, J.—Quaere.* Whether a Criminal Appeal or Revision can be dismissed for default of appearance When a criminal appeal or revision petition is dismissed without hearing there is no judgment at all and the learned Judge or the Bench which disposed of the matter for default of appearance can rehear the matter (*Oldfield and Devadoss, JJ.*) K KUNHAMAD HAJI, *In re.* **46 Mad. 382 : 24 Cr L. J. 439 : (1923) M W.N. 94: 44 M. L. J. 450: 1923 Mad. 426.**

——Rr. 23 and 24--*Vakalatnamahs—Authentication—Object.*

The object of judicial functionaries being given the powers of authentication of vakalats is only to enable Courts before whom the vakalats are produced to treat the authentication as *prima facie* evidence of the genuineness of signatures. They do not form part of the records of the Village

MADRAS H. C. RULES OF PRACTICE (Appellate side, R. 33.

Court. (*Sadasiva Aiyar, J.*) VADAKKE PEEDIYAKKAL *v.* VALLAPALLY GOVINDAN NAIR.
36 I. C. 869 : 18 Cr. L. J. 37.

——R. 33 Cl. (c)—*Fees—Appeals heard together*

If number of appeals are heard together involving the same point of law and not requiring separate argument the proper course is to fix rupees twenty for each of the first three appeals under R. 33, Cl (c) of the Rules of the Madras High Court, Appellate Side, and as regards the rest to pass an order that parties shall bear their own costs ; it is wrong to fix the fee at one rupee for each appeal. 45 Ch. D. 606 at 610, Foll (*Seshagiri Aiyar and Phillips, JJ.*) JASTI GANIRAJU *v.* DAMERA NARASIMHA. **3 L W. 249 : 33 I. C. 128 · (1916) 1 M. W. N. 194.**

——Rr. 35 and 38—*Fees—Probate proceedings.*

The subject-matter of a probate appeal is incapable of valuation and the rule applicable to the pleader's fee in such a case is R. 38 (Madras) and not R. 35 21 M. L. J. 481 Ref. (*Seshagiri Aiyar and Moore, JJ.*) KONDA SIDDHIA CHETTI *v.* VENKATAROYA CHETTI.
26 M. L. T. 440 : (1920) M. W. N 155 : 54 I. C. 292 : 10 L. W. 555 : 43 M. 282 37 M. L J. 659.

——R. 40--*Fees—Higher scale—When allowed.*

The power of the High Court to award costs on the higher scale on the special grounds as provided for in R. 40 of the High Court Fees rules is limited to cases in which special grounds are such as to affect the costs of the litigation. The mere fact that the conduct of one of the parties to the suit had been particularly reprehensible or that an unfounded charge of fraud had been made is not enough to justify a grant of costs on higher scale. (*Wallis, C. J. and Oldfield, J.*) KUPPIAH CHETTY *v.* GUNAVATHIAMMA.
44 I. C. 995 : 22 M. L. T. 541.

——R. 41—*Applicability.*

R 41 applies only to cases of exceptional difficulty and not to a case where several senior and junior counsel are retained in the same case to argue the same point though for different parties. (*Abdur Rahim and Oldfield, JJ.*) RAJAGOPALAN *v.* T. S SUBBARAMA AIYAR.
53 I. C. 354 : (1912) M. W. N. 356.

——R. 41—*Pleader's fees.*

Where an appeal involves a very heavy sum (*i.e.*, lakhs) though it did not involve any important or difficult question of law, yet the High Court allowed two sets of fees for two vakils. (*Abdur Rahim and Oldfield, JJ.*) CHALIKANI VENKATARAYANIM GARU *v.* VATSAVYA VENKATA SUBHADRAYAMMA. **(1918) M. W. N. 371 : 24 M. L. T. 56 : 45 I C. 437 : 8 L. W. 416: 34 M L. J. 488.**

——R. 42—*Non-appearance—Order* ex parte *—Reopening by respondent.*

R. 42 of the Appellate Side Rules and O. 41, R. 2, Cl. (2), C. P. Code, penalise a party for non-appearance only when the period fixed for entering appearance has expired. A party who has not been served with notice can set aside an *ex parte* order on the ground that he has not entered an appearance. (*Kumaraswami Sastri, J.*) SANTANAM AIYANGAR *v.* SRINIVASARAGHAVAN.
10 L. W. 564 : 53 I. C. 756: (1919) M. W. N. 773 : 37 M. L. J. 693.

MADRAS H. C. RULES OF PRACTICE (Civil R. 49.

——Rs. 75 and 48—*Single Judge—Dismissal of appeal.*

A single Judge sitting in the Admission Court cannot dismiss an appeal but can only post the appeal to a Bench for disposal, When he so dismisses an appeal for default of appearance of the appellant and an application to restore the appeal is also dismissed, the proper course is to appeal against the first order under Cl. 15 of the Letters Patent. (*Oldfield and Tyabji, JJ.*) SRINIVASA RANGARAO *v* RAJA OF KARVETNAGAR.
28 I. C. 64 :(1915) M. W. N. 101 : 28 M. L. J. 67.

(Civil).

——R. 14—*Applicability—Proceedings before Revenue Court.*

R. 14 of the Civil Rules of Practice does not apply to proceedings before a Revenue Court, (*White. C. J. Miller and Sankaran Nair, JJ.*) THE RECEIVER OF THE N. AND M. ESTATES *v.* SURAPARAZU, **29 I. C. 449 : 38 Mad. 295 (F. B.)**

——R. 27—*Engaging in trade—Pleader.*

A pleader engaging himself in trade without sanction of the High Court as required by R. 27 is guilty of misconduct. (*Benson, O. C. J., Sankaran Nair and Sundara Aiyar, JJ.*) MUNI REDDI *v.* K. VENKATA RAO. **37 Mad, 238 : 12 M. L, T, 615 : (1912) M. W. N. 1029 : 13 Cr. L. J. 800 : 17 I. C. 544 : 23 M. L. J 447.**

——Rr. 32 and 36—*Applicability — Stranger not party to suit.*

S. 36 of the Rules which prescribes the fee to be paid by a person who has obtained leave to inspect documents, applies as well to a party to a suit who obtains leave under S 32 as to a stranger who obtains leave under Rr. 33 to 35. (*Coleridge, J.*) SRI RAJA SOBHANADRI APPA RAO *v.* GOVERNMENT PLEADER. **45 M. L. J. 721 : 1924 M. 242.**

——R. 49—*Printed judgment—Not filed with appeal memorandum — Appeal whether time-barred.*

An appeal presented in time does not become time-barred merely because a printed copy of the judgment is not filed along with the memorandum of appeal as required by R. 49 of the Civil Rules of Practice. *Obiter per, Sadasiva Aiyar, J.*—"R. 49 of the Civil Rules of Practice seems to enact by implication that the production of a printed copy along with the memorandum of appeal is compulsory where the length of the judgment or order exceeds 700 words and is *ultra vires.*" *Per Napier, J.*—R. 49 of the Civil Rules of Practice does not have the effect of making the presentation of a printed copy of a judgment compulsory when it is over 700 words. (*Sadasiva Aiyar and Napier, JJ.*) RAMAKRISHNA PILLAI *v.* MUTHUPERUMAL PILLAI.
31 I. C. 924: 29 M. L. J. 663.

MADRAS H. C. RULES OF PRACTICE (Civil), R. 131.

——Rr. 131 and 133—*Delay in payment—Excuse.*

Where to deposit money in court, the chalan is taken out, but the actual payment is not made that day because of circumstances beyond the control of the depositor, *c. g.*, by the act of court or of its officers, the payment is in time. (*Kumarasamy Sastri, J.*) GOPALAKRISHNA PILLAI *v.* KUNCHITAPATHAM PILLAI. **18 L. W 844 : 33 M. L. T. 106 (H. C.) : (1923) M. W. N. 811 : 45 M. L. J. 819 : 1924 Mad. 324.**

——Rr. 154 and 157—*Poundage—What is.*

Poundage is the fee levied in England by the sheriff as remuneration for his service. In India Officers of Court drawing a fixed salary conduct the sale and a certain percentage of the purchase-money is taken by the Court for purchasing stamps. In effect it is a charge paid by the decree-holder for the services he obtains from Court. 17 M. 228 ; 23 M. L. J. 487, Ref. (*Spencer and Seshagiri Iyer, JJ.*) PARVATHI AMMAL *v.* GOVINDASWAMI PILLAI. **39 Mad. 803 : (1915) M. W. N. 797 : 2 L. W. 861 : 30 I. C. 827 : 29 M. L. J. 467.**

——R. 161-A—*Transfer for execution—Non-execution within six months—Effect.*

R. 161-A, though not an adjunct to C. P. C., is a rule of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute their decrees. The analogy of S. 148, C. P. C., may be utilised for the purpose of showing that the legislature regards such provisions as directory in their value and not mandatory. Therefore, an omission to take within 6 months steps to execute a transmitted decree does not render the proceedings taken after 6 months void *ab initio*. Time in such cases is not the essence. (*Seshagiri Aiyar and Napier, JJ.*, VELLIAPPA *v.* SUBRAMANIAM. **39 Mad. 485 : 29 I C. 119 : 29 M. L. J. 172.**

——R. 167—*Scope of.*

R. 167 contemplates final orders being passed by the Court on a petition for execution after the sale has been confirmed. (*Seshagiri Aiyar and Kumaraswamy Sastri, JJ.*) VENKATAPERUMAL *v.* VENKATA REDDI. **39 Mad. 570 : (1915) M. W. N. 334 : 17 M L. T. 427 : 29 I. C. 231 : 29 M. L. J. 96.**

——Rr. 179 and 180—Ultra vires.

Rr. 179 and 180 of the Civil Rules of Practice, Madras, are *ultra vires.* (*Wallis, C. J., Ayling, Sadasiva Iyer, Napier and Krishnan, JJ.*) **28 M. L. T. 412 : (1921) M. W. N. 14 : 12 L. W. 744 : 60 I. C. 302 : 39 M. L. J. 608 (F. B.).**

——R. 277—*Any matter connected there-with—Scope of.*

A pleader cannot appear in a subsequent suit, if it is connected with the earlier one and such two suits will be considered as connected if they have a common issue or determination of question of fact or a mixed question of law and fact. *Per Spencer, J.*—It is not proper for a legal adviser to use knowledge obtained in one case to the prejudice of his client in another case. (*Spencer and Ramesam, JJ.*) RAMAKRISHNA PILLAI *v.* BALAKRISHNA AIYAR. **(1921) M. W. N. 646 : 13 L. W. 541 : 62 I. C. 712 : 41 M. L. J. 60.**

MADRAS H. C. RULES OF PRACTICE (Civil), R. 279.

——R. 277—*Pleader—Engagement.*

Under proviso to Rule 277 the onus is thrown on the client if he engages another pleader and the engagement of another pleader raises the presumption that the original pleader's services are not required and that he is free to appear for the opposite side (*Kumaraswamy Sastri, J.*) ACHUTARAMIAH *v.* SECRETARY OF STATE. **16 M. L. T. 349 : 25 I. C. 712 : (1914) M. W. N. 785.**

——R. 277—*Pleader—Appearance in Civil Case for opposite party having appeared in Criminal Case for one party—Misconduct.*

Where a pleader appears in a Civil Suit for the opposite party having appeared for one party in connected proceedings under S. 145, Cr. P. Code, the Court can refuse him audience as his appearance amounts to misconduct. (*Miller, J.*) SRINIVASA RAO *v.* PICHAI PILLAI. **38 Mad. 650 : 21 I. C. 629 : 25 M. L. J. 567.**

——Rr. 279 and 278—*Pleader's fees—"Withdrawn"—"After contest"—Interpretation of.*

A plff. withdrawing his suit against some deft. after evidence is adduced by both parties on the preliminary issue does it "after contest" under R. 278 of the Civil Rules of Practice. Cls. (*a*) and (*b*) of R. 279 apply equally to 'withdrawn' and 'compromised'. (*Napier J.*) INDOOR SUBRAMANI REDDI *v.* NELATUR SUNDARARAJA AIYANGAR. **18 M. L. T. 460 : 31 I. C. 312 : (1915) M. W. N. 1021.**

——R. 279, Cl. (6)—*Pleader's fees—Execution—No process issued—Money paid into Court by judgment debtor—Whether money realised by application, S. 295, C. P. C., 1882.*

Payment into Court by a judgment-debtor of the decree amount without any process having been issued on the execution petition is money "realised by application" though not coming within S. 295, C P. Code of 1882. (28 Mad. 380, Dist.) (*Sadasiva Iyer and Spencer, JJ.*) UNTHAMI CHETTIAR *v.* JUTT NAGASAWMI IYER. **23 I. C. 241 : (1914) M. W. N. 309.**

——R. 279 (6)—*Pleader's fee—C. P. C., S. 73 'Realised'—Meaning of.*

Where, on the passing of an order to arrest the judgment-debtor in execution, the latter paid the amount expressly to the credit of the decree-holder's application for arrest, *held* that the amount was clearly realised by decree-holder in execution and that he was entitled to pleader's fees on the amount. The interpretation of S 73, C. P. C. does not apply in this case. (*Benson and Sundara Aiyar, JJ.*) KANAPPA CHETTY *v.* ANNAMALAI. **20 I. C. 919 : (1913) M. W. N. 649**

MADRAS H. C. RULES OF PRACTICE (Criminal) S, 161.

(Criminal).

——R. 161—*Vakalat not necessary.*

A vakalat need not be filed in a Criminal appeal for a proper presentation of a memorandum of appearance is sufficient. (*Wallace, J.*) *In re*, MANIKONDA LINGAYYA.

18 L. W. 960 : 33 M. L. T. (H. C.) 224 : (1924) M. W. N. 51 (1) : 25 Cr. L. J. 73 : 45 M. L. J. 683 : 1924 Mad. 192.

——R. 188—*Tahsildar-Magistrate—Conviction by—Application for copy of judgment—Fees.*

Under R. 188 of the Criminal Rules of Practice (Madras) a person convicted of an offence by a Tahsildar-Magistrate and applying for a copy of the judgment, is not bound to pay a fee of eight annas along with the application. (*Sadasiva Aiyar and Napier, JJ.*) AMBALAM IBRAHIM *v.* EMPEROR.

8 L. W. 558 : 19 Cr. L. J. 973 : 47 I. C. 873 : 35 M. L. J. 401.

(Original Side).

——R. 17—*Provisions to be strictly followed—Order under R. 17 how and when to be made.*

R. 17 is a highly penal provision and should be strictly followed ; an order under that rule can be made only on a summons in chambers or on the hearing of an application by the defaulting party and not at the final hearing. (*Wallis, C. J., and Seshagiri Iyer, J.*) MURUGESA CHETTY *v.* ARUMUGA CHETTI.

2 L. W. 1205 : 31 I. C. 923 : 18 M. L. T. 601.

——R. 48—*Filing of written statement beyond time given by Court—Validity.*

R. 48 of the Original Side Rules clearly implies that until the leave of the Court obtained, a deft. is not entitled to put in a statement of his defence after the date fixed in the summons served on him to file such a statement. But the Judge has a discretion to grant or refuse leave to file thereafter. If an extension of time to file a written statement is applied for and obtained afterwards, the pleading already put in might be looked into and need not be treated as a nullity and a fresh statement called for. 25 Ch. D. 707 ; 26 Ch. D. 66, Not. Foll. (*Sadasiva Iyer and Napier, JJ.*) ARUNACHELAM *v.* KOTHANDAPANI.

27 I. C. 789 : 2 L. W. 1.

——R. 48—*Vakil fees, non-payment of—Duty of Vakil to take necessary steps in the suit—Written statement not filed in time—Delay in filing written statement, whether excusable.*

A vakil engaged in a suit on the Original Side of the High Court is not entitled to refuse to take a necessary step in the suit, on the ground that his own fees had not been paid and at the same time refuse his consent to a change of vakalat to another vakil. Delay in filing a written statement within the time fixed by the rules of the High Court caused by such refusal on the part of the vakil on the record was excused. (*Wallis, C. J, and Krishnan, J.*) MUTHU KRISHNA YACHENDRA *v.* NURSE.

44 Mad 978 : 41 M. L. J. 213 : 14 L. W. 154 : 69 I. C. 695 : (1921) M. W. N. 562.

MADRAS H. C. RULES OF PRACTICE (Original Side), Appx, II.

——R 63-A—*Applicability—Shah Jog Hundi—Document on the face of it acknowledging indebtedness and promising to pay interest—If a negotiable instrument.*

R. 63-A of the Original Side Rules was intended to cover all documents in the nature of negotiable instruments, specifically described in the Rule as "Bills of Exchange, Hundis or promissory-notes" irrespective of the question how far a particular bill of exchange might be negotiable or what the restrictions might be on its negotiability. Shah Jog Hundis sued upon held to be negotiable instruments within the definition in S. 13 (2) of the Neg. Ins. Act, 1881, as amended by the Neg. Ins. Act 1914, as being payable in the alternative to one of several payees. (*Schwabe, C. J. and Coutts-Trotter, J.*) KANNAYYA LAL BHOYA *v.* BALARAM PARAMSUKHDAS.

16 L. W. 608 : 31 M. L. T. 284 (H. C.) : 43 M. L. J. 480 : 1923 M 44.

——R. 119—*Official reference—Disobedience of order—Commitment for contempt.*

A Judge of the High Court sitting on the Original Side can commit a person for contempt for disobeying the order of the Official Referee to produce certain documents which are alleged to be in his possession. (*Wallis, C. J., and Napier, J.*) ORIGANTI VENKATARAMAN *v.* DESIKACHARI.

(1919) M W. N. 368 : 52 I. C. 448: 36 M. L. J. 461.

——R. 205—*Order under—Nature of--Ministerial—Not appealable.*

The nature of order under R. 205 is ministerial and hence not applicable. (*Schwabe, C. J. and Krishnan, J.*) TAWKER & SONS *v.* HARSOOKDOSS CHONGHMULL.

45 M. L. J. 611 : 1924 M. 386.

——Rr. 247.162 and 264—*Garnishee proceedings—Debts due to judgment-debtor and others—Right of persons entitled to recover.*

Debts owing to the judgment-debtor and another are not the proper subjects of garnishee proceedings much less debts due to the estate of a deceased person of whom the judgment-debtor is merely a co-heir. A garnishee order improperly made may be set aside and a refund ordered at the instance of other parties interested in the debt. (1905) 1 Ch. 432 ; (1894) 11 T. L. R. 36, Rel. (*Wallis, C. J. and Krishnan, J*) HAJI ABDULLA SAHIB *v.* ALANJI ABDUL LATHIF SAHIR.

26 M. L. T. 34 : 57 I. C. 854 :12 L. W. 70 : 39 M. L. J. 91.

——R. 356—*Presentation of appeal—Delay in—Single Judge—Power to excuse.*

A single Judge of the High Court sitting in the admission Court can excuse delay in presentation of an appeal from the Original Side of the High Court. (*White, C. J.*) RUTHNA GRAMANY *v.* N. VEERABADRA AIYAR.

25 M. L. J. 281 : 21 I. C. 96 : (1913) M. W. N 751.

——Appx. II, Nos. 35 and 36—*Contentious probate suit—Decision on—Appeal—Court-fee.*

The decision of a Judge sitting on the Original Side in a contentious probate suit is a final judgment and a memorandum of appeal from it falls

MADRAS H. C. RULES OF PRACTICE (Original Side), Appx. II

under Serial No. 35 of Appendix II of the Original Side Rules and not under Serial No. 36. (*Schwabe, C. J.*) PERUMAL CHETTY *v.* KANDASAMY CHETTY. **46 Mad. 592 : 44 M. L. J. 146 : 17 L. W. 238 : 32 M L. T. (H. C.) 122 : (1923) M. W. N. 160 : 1923 Mad. 362.**

——App. II, Art. 36—*Decision of Judge on guardianship petition—Appeal—Court-fee payable.*

Under Arts. 35 and 36 of Appendix 11 of the Madras Original Side Rules an appeal against a final judgment should be taxed with a fee of Rs. 150 and an appeal against an interlocutory judgment or an order whether interlocutary or final should be taxed with a fee of Rs. 200. (*Coutts-Trotter, J.*) ISHAIK *v.* MAHOMAD MOHIDIN. **16 L. W. 210 : 43 M L. J. 436 : 45 M. 849 : (1922) M. W. N. 511 : 1922 M. 421.**

MADRAS HINDU TRANSFERS AND BEQUESTS ACT (I OF 1914).

——*Act*, ultra vires—*Succession Act*, Ss. 101, 111—*Majority Act*, S. 3—*Will executed by a Hindu in Madras Town.*

A Will by a Hindu in Madras Town ran thus: —'The residuary trust funds are vested in the trustees to apportion into as many equal parts as there are daughters of mine living at my death or who having predeceased have left an issue surviving and to pay the shares to the daughters for their life and after their demise to hold them in trust for their children who shall attain twenty-one years. If any daughter die without issue, her share should go to others or their issues as tenants-in-common in equal shares *per stripes*, etc.' The will was opposed on the ground that the provisions were opposed to Hindu Law in spite of Act I of 1914, and that the Act I of 1914 was *ultra vires* so far as it applied to the town of Madras as the rules of Hindu Law as to succession and inheritance were made applicable to the town by Supreme Court Charter which could only be modified by Legislative authority of the Governor General in Council. *Held* that the Will infringed the rules of Hindu Law as to gift to unborn persons and was ineffective as regards all the beneficiaries born after the death of the testator, that it contravened S. 101 of the Succession Act, that S. 3 of the Majority Act does not re-enact a fresh age of majority for S. 101, that there was an intention to confer absolute estate upon daughters and that Act I of 1914 so far as it purported to affect the Presidency Town of Madras, was *ultra vires*. (*Wallis, C. J. and Ramesam, J.*) SOUNDARARAJAN *v.* NATARAJAN. **44 Mad. 446 : 40 M. L. J. 354 : 29 M. L. T. 210 : 13 L. W. 662 : 62 I. C. 987 : (1921) M. W. N. 210.**

——S. 2—"*At a time...date*"—*Construction of.*

The expression "at a time which is subsequent to such date" in S. 2, Cl. (2) of the Act does not refer to any fixed period and if the final vesting is to take place after the passing of the Act, the Act would validate such disposition. (*Seshagiri Aiyar and Phillips, JJ.*) SHANMUGA DEVAR *v.* SHANMUGA DEVAR. **53 I C. 203.**

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1.

MADRAS IMPARTIBLE ESTATES ACT (II OF 1904).

——S. 4—*Interpretation—Effect of.*

The Act is intended to be preventive of transfers of impartible property and is founded on public policy. A mortgage created on an impartible estate without necessity cannot be validated by the mortgagors or others confessing judgment in a case, for the policy of the Act cannot be defeated by a consent decree. Consequently it is open to the sons of the mortgagor to object to a final decree in the suit being passed. (*Abdur Rahim and Oldfield, JJ.*) RAMACHANDRA SURU *v.* AKELA VENKATALAKSHMI NARAYANA. **37 M. L. J. 65 : 50 I. C. 577 : (1919) M. W. N. 332.**

MADRAS INAMS ACT (VIII OF 1869).

——*Title deeds granted by Inam Commissioner—Grant, Construction.*

Title-deeds issued by the *Inam* Commissioner does not vest in the *inamdar* a subject matter not already belonging to him. The fact that the Madras Government at one time disclaimed the mineral rights in enfranchised *inam* lands does not preclude the Secretary of State from claiming those rights. (*Sir Lawrence Jenkins.*) SECRETARY OF STATE *v.* SRINIVASA CHARIAR. **44 Mad. 421 : 48 I. A 56 : 29 M L. T 181 : 19 A. L. J 201 : 25 C. W N. 818 · 33 C. L J. 280 : 13 L W 592 : 3 U. P. L R. (P. C.) 43 : 60 I. C. 230 : (1921) M W. N. 111: 40 M. L. J 262 (P. C.).**

[On Appeal from 39 I. C. 337 : 40 Mad. 268.]

——*Inam title deeds—If confer title.*

Inam title deeds do not confer title if none such existed before. (*Spencer and Ramesam, JJ.*) TADIKONDA LAKSHMINARASIMHAM *v.* VENKATARATNAYAMA. **30 M. L. T. 384 (H. C.)**

——*Inam—Enfranchisement—Effect—Burden of proof.*

An inam title-deed, whether issued before or after the Act, will not affect the interest of any person other than the inam-holder named in it. The issue of the *inam* title-deed, at most imposes on the persons claiming against the inam holder the burden of proving their title against him. Enfranchisement neither grants nor creates a fresh title but only confirms the existing one freed from the duty of service. (*Ayling and Oldfield, JJ.*) POLAKI LATCHMANA NAIDU *v.* DOLA GEDDANNA NAIDU. **24 I. C. 377 ; 1 L. W. 329.**

[Also (1921) M.W.N. 111 : 40 M. L. J. 262.] (P C)

MADRAS IRRIGATION CESS ACT (VII OF 1865.)

——S 1—*Scope of—Preamble.*

S. 1 of the Act makes operative provisions somewhat in excess of the apparent ambit of the preamble. If so, the section must govern. 44 I. A. 166, Ref. Where the Crown takes an estate on forfeiture for rebellion it takes it *tantum et tale* as it stood in the subject against whom the forfeiture is exercised ; it takes it subject to all existing easements. For more than a century the lands of a village belonging to the respondent Zemindar were being irrigated by water flowing through an artificial channel passing through the estate of a nighbouring Zemindar

and no pecuniary return was made therefor The latter estate was forfeited to the Crown in 1833 and the same state of affairs continued till 1907 when the Government imposed water cess on the respondent Zemindar *Held*, that there was to be inferred from these circumstances an 'engagement' with the Government within the meaning of the proviso to S. 1 of the Madras Irrigation Cess Act and that the respondent was therefore not liable to pay cess. (*Lord Shaw.*) SECRETARY OF STATE *v.* MAHARAJA OF BOBBILI. **46 I A. 302 : (1919) M. W. N. 775 : 18 A. L. J. 1 : 11 L. W. 204 : 2 U. P L. R. P. C. 33 : 54 I. C. 154 : 24 C. W. N. 446 : 37 M. L. J. 724 (P. C.) :**

[On appeal from 19 M. L. T. 6 : 3 L. W. 119 32 I. C. 279 : 30 M. L. J. 163.]

——S. 1—*Scope of—Preamble.*

The enacting portion of S 1 of Madras Act VII of 1865 is wider than the preamble and the Government might in a case coming under the section levy a cess though it had not incurred any expense in the repairs or construction of the irrigation channels. The expression "river beloging to the Government" in an English statute would connote a Govt. ownership of the bed or banks of the river. But the law of the Madras Presidency differs in some respects from the English Law and it is quite possible that the former recognises some proprietary right on the part of Government, in the water flowing in rivers and streams apart from the right to the bed. On a claim by the Government under Madras Act VII of 1865 amended by Act V of 1900 to levy water cess on permanently settled lands both *Zeraiti* and Inam within the Zemindari limits in so far as the user of water for irrigation exceeded the user at the time of the permanent settlement whether in respect of the area irrigated or in respect of a double crop on the mamul lands. *Held*, assuming that the river which was the original source of supply belonged to the Government (1) that the permanent settlement with the zemindar was in engagement with the Government within the proviso to S. 1 of the Act VII of 1865 ; (2) that the effect of the permanent settlement and the sanads issued therefor was to vest in the then existing irrigation channels in the Zemindars in whose estate they were situate; (3) that under the sanads the zemindars in whose estate the sluices of the channels were situate acquired the right to take from the river for irrigation an amount of water limited only by the seize of the channels and sluices as they then stood but not limited by the irrigation then customary ; (4) that once the water got into the channels, the Government had no rights in respect of the same as owners of lands irrigated thereby ; (5) that the rights of owners *interse* in the water flowing in the channels, were analogous to those of riparian proprietors in a natural stream ; and (6) that the object of the permanent settlement and the sanads thereunder being to extend the cultivation in the zemindaris with the help of the irrigation sources conveyed by the sanads the zemindar was not liable to pay the cess merely because more lands were cultivated or more crops were raised with the use of water but only if he took more water than he was

justified by the sanads in taking. (*Lord Parker of Waddington.*) KANDUKURRI BALASURYA PRASAD RAO *v* SECRETARY OF STATE.

40 Mad. 886 : 44 I. A. 166 : 22 M L. T 76 : 15 A. L. J. 697 : 21 C. W. N. 1089 : (1917) M. W. N. 536 : 19 Bom. L R. 751 : 6 L. W 340 : 2 Pat. L. W. 260 : 41 I. C. 98 : 26 C. L. J. 290 : 33 M. L. J. 144 (P C.).

[Reversing on appeal 8 I. C 67 : 34 Mad. 295.]

——S. 1—*River belonging to Government—Ownership—Madras Land Encroachment Act, III of* 1905, S. 2—*Scope and effect of.*

If the Govt. is not the owner of the bed and the banks of a river at the place where water is taken by a Zemindari ryot the river in question could not be said to be a river belonging to the Govt. for the purpose of Act VII of 1865 and the Govt. could not levy the cess. The effect and scope of S. 2 of the Madras Land Encroachment Act III of 1905 considered, 34 M. 295, Diss. (*Abdur Rahim, Ayling, Oldfield, Sadasiva Aiyar and Coutts Trotter, JJ.*) CHINNAPPA CHETTY *v.* THE SECRETARY OF STATE FOR INDIA.

42 Mad. 239 : 25 M. L. T. 121 : (1919) M. W. N. 120 : 49 I. C. 673 : 9 L. W. 289 : 36 M. L. J. 124 (F. B.)

——S. 1—*Water cess — Riparian rights—Right of Government—Exemption—Engagement.*

Lands which are not on the banks of natural tream, *e. g.*, which are more than half a mile distant from it, are not riparian lands. A person who is not a riparian owner is liable to pay water cess to the Government for irrigating his lands with water of a stream or river. The Government have no right to levy assessment under the Act from a person exercising riparian rights whether the bed of the stream whose water is used by an inamdar or zemindar to irrigate his riparian lands bordering on a natural stream belongs wholly to the Government or partly to the Government and partly to the inamdar or wholly to the inamdar and the zemindar. Per *Phillips, J.*—Where lands were, at the time of the inam settlement, irrigated by a tank and wells unconnected with a river and irrigation sources were taken into account for the purposes of entranchisement and there was no agreement between the owner of the land and the Inam Commissioner for freedom from water tax, the owner cannot claim the use of the river by virtue of an implied agreement but is liable for water cess for its use. 33 M. L. J 144 ; 40 Mad. 886, Ref. (*Sadasiva Aiyar and Phillips, JJ.*) EMANI LAKSHMINARASU *v.* SECRETARY OF STATE FOR INDIA. **23 M. L. T. 235 : 43 I. C 113 : 7 L. W. 1 : 34 M. L. J. 223.**

——S. 1—*Irrigation—Beneficial nature of—If to be declared before levy of cess.*

The Collector need not declare that irrigation is beneficial before proceeding to levy cess and it is a judicial discretion of the Collector to determine whether the irrigation is beneficial or not. (*Abdur Rahim, O. C. J., Seshagiri Aiyar and Phillips, JJ.*) SECRETARY OF STATE FOR INDIA *v.* MAHADEV SASTRIGAL. **40 Mad. 58 : (1917) M. W. N. 376 : 21 M L. T. 337 : 39 I. C. 193: 5 L. W. 817 : 32 M. L. J. 411. (F. B.)**

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1.

——S. 1—*Applicability—Inam—Levy of cess—Engagement.*

The Act applies to a ryotwari as well as to Zemindari and inam villages. Where the inamdars of a village used the waters of a river flowing through a Zemindari village but the upper reaches of which fell in Govt. land; *Held* that the Government was entitled to levy water-cess on the inamdars. The onus is on the person claiming exemption from Madras Act VII of 1865 to show that the water is not that of the Govt. but of a Zemindar or inamdar. Scope of the section discussed by *Sadasiva Aiyar, J.* (*Oldfield, Sadasiva Aiyar and Bakewell, JJ.*) SECRETARY OF STATE *v.* KANNEPALLI JANAKIRAMAYYA.

2 L. W. 763 : 18 M. L. T 277 : (1915) M. W. N. 671 : 30 I. C. 609 : 29 M. L. J. 389 (F. B.)

——S 1—*Free irrigation—Claim to—Larger area than in Inam—Separate engagement necessity for.*

Where an inamdar claims to irrigate free of charge a larger area than that mentioned in the inam, he can be allowed to do so only when he has entered into any engagement other than the Inam title deed. (*Wallis, C. J. and Srinivasa Iyengar, J.*) SECRETARY OF STATE *v.* PERARULALA RAMANUJA JEER SWAMIGAL.

30 I. C. 605 : (1915) M. W. N. 636.

——S. 1—*Grant by Govt. — Definite Quantity of water—Presumption.*

Where Govt. makes a grant of any particular quantity of water or of a definite fraction of a tank water with or without consideration, the presumption is that the grant is free of any payment. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) VENKATASUBBIAH *v.* SECRETARY OF STATE.

30 I. C. 425 : 38 Mad. 424.

——S. 1—*Engagement—Presumption—Land Encroachment Act III of* 1905) *Rev. Recovery Act, S.* 59—*Payment of cess under threat of attachment—Suit to recover—Limitation.*

The engagement referred to in the proviso to S. 1 of Act VII of 1865 need not be contemporaneous with the Inam Settlement but may be prior, as well as subsequent to the settlement. A riparian proprietor is not the owner of the water in the river, his right is only one of user. Where a right to take water is made out, though no express agreement on behalf of Govt. not to levy any charge is proved, an engagement under Act VII of 1865 will be inferred. Act III of 1905 has not taken away any right which existed at the time the Act was passed and the Govt. cannot, by reason of that Act coupled with Act VII of 1865 impose a cess upon those landholders, who were before that Act not liable to pay cess for using water. A suit for the refund of water cess paid under threat of attachment instituted more than 6 months after the payment is barred by S. 59 Rev. Recovery Act (1864). (*Sankaran Nair and Spencer, JJ.*) SECY. OF STATE *v.* SIMHADRI JAGAPATHI RAJU.

39 Mad. 67 : 17 M. L. T. 29 : 2 L. W. 31 : 26 I. C. 692 : 28 M. L. J. 51.

——S. 1—*Engagement implied—Presumption—Anicut irrigation—Right of owners of land to receive supply—Liability of Govt*

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1.

Owners of lands whose supply of water had been cut off by the introduction of a new anicut system and who took the water free from the Govt. without entering into litigation with the Govt. for interfering with the old sources of supply must be taken to have accepted the offer of Govt. in satisfaction of their claims and where the Govt. supplied water for 37 years a presumption arises that there was an engagement to supply water and the owners have a cause of action if the supply is interfered with. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) ZEMINDAR OF KAPILESWARAPURAM *v.* SECRETARY OF STATE.

26 I. C. 590 . 37 Mad. 355 Note.

——S. 1—*Engagement—Implied—Grant of land—Presumption—Supply of water—Measure of—Inam.*

A grant of land by the Government implies an undertaking on its part to supply water free of charge to the extent of the accumulated flow at the time of the grant, and in the absence of it the area irrigated will be presumed as the measure of the quantity of water at the time of grant. Kassur means water rate. An enjoyment free of water cess for forty years after the grant of inam does not debar Govt. from levying the cess. An inam title-deed is not conclusive on the question of an engagement to exempt the land from the cess and evidence *aliunde* is admissible to prove that the enjoyment contended for was either anterior or subsequent to inam settlement. The commissioner's decision will bind the Government unless it is shown that he was not authorised to deal with the question. (*Wallis, O.C.J. and Seshagiri Aiyar, J.*) PAPA SETHUMATHAVACHARIAR *v.* SECRETARY OF STATE FOR INDIA.

26 I. C. 187 : 1 L. W. 941.

——S. 1—*Engagement—Classification of permanent settlement—Powers of Govt.*

A classification of land as wet at the permanent settlement amounts to an engagement and the proprietor is exempted from water-cess for such land. The Govt. by their anicut system cannot cut off the present sources and then supply their water for a charge. Under S. 1, the Government can make rules having the force of law for water-cess rates and their collection only. They cannot decide the question of an engagement exempting the landholder from tax. It can be done by Civil Courts only. (*Ayling and Seshagiri Aiyar, JJ.*) ZEMINDARI OF VEGAYAMMAPETA *v.* SECY. OF STATE.

24 I. C. 741 : 28 M. L. J. 297.

——S. 1—*Rules under R.* 5—*Construction—Water taken through unauthorised source—Penal rate—Mere use of water enough to be charged with liability.*

Under the rules no distinction as to liability to penal water rate is drawn between a person who receives an augmentation of water-supply without his knowledge and even against his wish and one who has taken active steps to get the water. (*Ayling and Tyabji, JJ.*) KOPALLI KRISHNA RAO GARU *v.* COLLECTOR OF KRISHNA.

1 L.W. 191: 22 I. C. 692: 26 M. L. J. 210.

——S. 1—*Engagement—Meaning of.*

The word engagement in S. 1 is not restricted to an engagement made at the time of the permanent settlement but extends to an undertaking express or implied at any subsequent period. (*Ayling and Sadasiva Aiyar, JJ.*) KANDALAM RAJAGOPALA CHARULU *v.* SECY. OF STATE.

38 Mad. 997 : 14 M. L. T. 454 : 22 I. C. 107 : (1913) M. W.N. 937.

——S. 1—*Object of—Engagement—Implied.*

The cess imposed under the Act was intended to compensate the Govt. for the use of water belonging to it or conserved by works constructed by it by empowering them to levy remuneration from those using the water for irrigation. Where such remuneration is otherwise paid by the landholder, that is sufficient to establish an engagement of the kind referred to in S. 1 proviso of the Act. Where plff.'s right to a fourth share of the water of a tank was established in a prior litigation against Government, he is entitled to exemption from water cess in respect thereof. A legal origin could be presumed from the immemorial use of water. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KESARI VENKATA SUBBIAH *v.* SECRETARY OF STATE. **20 I. C. 804 : 14 M. L. T. 131.**

——S. 1—*Engagement—Proof—Long course of conduct.*

An agreement between a Collector and a private party will not bind the Government. But an implied engagement may be proved by the course of conduct followed for a long time by the officers of Government and by such person. In some cases the Govt. is bound to regulate Govt. supply of water ; an express contract is not necessary. (*Sadasiva Aiyar and Tyabji, JJ.*) KATRA GADDA RADHA KRISHNAYYA NAIDU *v.* SECRETARY OF STATE. **(1913) M. W. N. 427 : 13 M. L. T. 466: 19 I. C. 846 : 24 M. L. J. 678.**

——S. 1—*Engagement—Express or implied —Government intercepting natural flow and granting other water tax—Liability to.*

The 'engagement' in S. 1 might be express or implied. The rules framed under the Act show that cess is not leviable on water taken for lands which, owing to the construction of the several anicut channels and other works connected therewith, were found to have lost their pre-existing water-supply wholly or partially. Where Govt. intercepted the natural flow of water to a Zemindar's tank by constructing a channel, and granted him other water instead, freely for a number of years, there is a presumption of an implied engagement for a free supply. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) SRIRAJA VENKATA RANGAYYA APPA RAO BAHADUR *v.* SECRETARY OF STATE. **13 M. L. T. 330 : (1913) M. W. N. 417: 19 I. C. 227 : 24 M. L. J. 680.**

——S. 1—*Amendment—Water-cess—Inamdars—Wet crops.*

An Inamdar is entitled to use the water of a stream flowing through his village to raise wet crops on lands on which it was customary to raise dry crops. He is not therefore liable to cess. (*Sankaran Nair and Abdur Rahim, JJ.*) SECRETARY OF STATE *v.* AMBALAVANA PANDARASANNADHI. **18 I. C. 294 : 37 Mad. 369 Note.**

——S. 1—*River belonging to Govt.—Lands irrigated by natural stream, if—Beds and banks belonging to Inamdar.*

A natural stream, of which the beds and banks belonging to the Inamdar, is not a stream belonging to the Govt. and the Govt. has no right to levy water-cess on lands irrigated by such stream. Where the channels or the tanks in a village grant had no connection with a Govt. source of irrigation and are not controlled by the Govt. an inam grant besides poramboke includes the channels also. (*Benson and Sundara Aiyar, JJ.*) SECRETARY OF STATE FOR INDIA *v.* VEKATARATNAMMA. **37 Mad. 364 Note : (1912) M W. N. 771 : 15 I. C. 594 : 23 M. L. J. 109.**

——Ss. 1 and 2—*Water-cess—Retrospective levy.*

The Govt. is not entitled to levy cess retrospectively from before the date of levy. "Arrears" means payments due and unpaid after the levy was made (Per *Sankaran Nair, J.*) The liability to pay water-cess does not attach the moment that Govt. water is used. The Govt. can impose the cess only within fasli, *i.e.*, before the crop is harvested and not at pleasure. (*White, C. J., Munro and Sankaran Nair, JJ.*) ZEMINDAR OF NUZVID *v.* SECRETARY OF STATE. **35 Mad. 197 : 10 M. L. T. 5 : (1911) 2 M. W. N, 359 : 10 I. C. 633 : 21 M. L. J. 678.**

——S. 2—*Liability to cess—Stream or channel belonging to Government.*

The liability to pay cess under S. 2 arises only when irrigation is carried on at least to a substantial extent with water from a stream or channel belonging to Govt. 37 M. 322 ; 30 M.L.J. 163, Foll. Unless it is expressly provided to the contrary the Zemindar or Inamdar can increase the cultivation without any further liability for payment provided he uses no more water than lying within the adjacent land has a right to the usufruct of the stream. Mention of quantity of wet lands does not disentitle him to increase the cultivation. S. 2 of the Madras Land Encroachment Act deals with unappropriated properties and not things. The Govt. is not owner of the water in which the Zemindar or other adjacent owner has riparian rights. The extent of these riparian rights depends on the capacity of the stream and the extent of land of other people with riparian rights. In case of small stream the words "Besides poramboke" in an inam title-deed would give rise to a presumption in favour of inclusion of river beds. Even where a stream belongs to Govt. it must show that the Inamdar is storing more water than he is entitled to under the engagement with the Govt. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) SECRETARY OF STATE *v.* AMBALAVANA PANDARA SANNADHI. **22 M. L. T. 151 : (1917) M. W. N. 729 : 42 I. C. 697 : 33 M. L. J. 415.**

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 2.

——S. 2—*Water-cess—Recovery of—Sale—Title.*

A sale for arrears of water cess payable under Act VII of 1865 would convey a title to the purchaser free of encumbrances. (*Benson and Sundara Iyer, JJ.*) VEEKANAN AMBALAM *v.* KARUPPAYA PILLAI. **37 Mad. 49 : 19 I. C. 386 : 24 M. L. J. 511.**

MADRAS LAND ENCROACHMENT ACT (III OF 1905).

——*Penal assessment for period prior to Act cannot be imposed.*

Government cannot impose, under the Act, penal assessment in respect of the period of occupation before the Act came into force. (*Ayling and Seshagiri Aiyar, JJ.*) FOWLER, J. C. H. *v.* SECRETARY OF STATE FOR INDIA. **61 I. C. 852 : 13 L. W. 230.**

——S. 1—*Applicability—Riparian and pre-existing rights.*

The Madras Land Encroachment Act (III of 1905) does not affect pre-existing rights and does not supersede the rights of riparian proprietors. (*Spencer and Krishnan, JJ.*) OLLAPPAMANANNA NANAKAL NEELAKANTAN *v.* SECRETARY OF STATE FOR INDIA. **55 I. C. 770.**

——S. 1—*Applicability—Pre-existing rights.*

S. 1 of the Act does not affect the pre-existing rights of grantees of land bounded by a non-navigable river to the bed of the river *admedium filum acquae.* (*Wallis, C. J., Oldfield, Sadasiva Aiyar, Spencer and Bakewell JJ.*) VASIREDDI VENKATA LAKSHMI NARASAMMA *v.* THE SECRETARY OF STATE. **41 Mad. 840 : (1918) M. W. N. 632 : 47 I. C. 606 : 35 M. L. J. 159.**

——S. 1—*Rivers — Waters of—Vested in Govt.*

Waters in rivers are presumably vested in Govt. (*Benson, Sundara Iyer and Miller, JJ.*) *In re* CHOKKALINGAM PILLAY. **13 Cr. L. J. 131 : 11 M. L. T. 162 : 13 I. C. 819 : (1912) M. W. N. 119.**

——S. 2—*Applicability--Streams in Malabar.*

Per Sankaran Nair, J. (*Sadasiva Iyer dissenting.*) The presumption in S. 2 of the Act does not apply to beds of streams in Malabar which are private property. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) MUKKASSA NAIR VEETIL *v.* SECRETARY OF STATE. **1 L. W. 307 : 15 M. L. T. 247 : (1914) M. W. N. 521 : 24 I. C. 547 : 26 M. L. J. 385.**

——S. 2—*Scope and effect of.*

S. 2 was not intended to confiscate existing private rights. Nor does it confer on the Govt a special right of property in the water of a natural stream, different in its nature from what the law recognises as incidental to private proprietorship. Cases reviewed. (*Abdur Rahim, Ayling, Oldfield, Sadasiva Aiyar and Coutts Trotter, JJ.*) CHINNAPPAN CHETTY *v.* SECRETARY OF STATE FOR INDIA. **42 Mad. 239 : 25 M. L. T. 121 : (1919) M. W. N. 120 : 9 L. W. 289 : 49 I. C. 673 : 36 M. L. J. 124 (F. B.). [Also 42 I.C. 697 : 33 M. L. J. 415.]**

MADRAS LAND ENCROACHMENT ACT (III OF 1905), S. 5.

——S. 2 (1)—*Flowing water--Right of Government—English law.*

The law of the Madras Presideney applicable to rivers and streams differs in some respects from the English law and it is quite possible that the former law recognises some proprietary right of the Govt. in water flowing in them. 32 M. 141. Ref. (*Lord Parker.*) KANDUKURI BALASURYA PRASADHA RAO *v.* SECRETARY OF STATE FOR INDIA. **40 Mad. 886 : 44 I. A. 166 : 22 M. L. T. 76 : 15 A. L. J. 697 : 21 C. W. N. 1089 : (1917) M. W. N. 536 : 19 Bom. L. R 751 : 6 L. W. 340 : 2 Pat. L. W. 260: 26 C.L.J. 290 : 41 I. C. 98 : 33 M. L. J. 144 (P. C.) [On appeal from 8 I C. 67 : 34 Mad. 295.]**

——Ss. 3, 7 and 14—*Penal assessment—Collection of—Suit for declaration of title—Limitation—"Levied" in S. 14, meaning of.*

The word "levied" in S. 14 of the Act means "collected" and the period of limitation in S. 14 must be calculated from the date when the assessment or penalty is actually collected and not when it is merely imposed. 39 Mad. 727 ; 30 M.L. J. 255, Ref. (*Coutts-Trotter and Kumaraswamy Sastri, JJ.*) AIYLAM KESAVA CHETTY *v.* THE SECRETARY OF STATE FOR INDIA. **42 Mad 451 : 51 I. C. 46 : 36 M. L. J. 222.**

——S. 3—*Penal assessment — Pathway — Obstruction.*

The Govt have no right to levy penal assessment on an owner of land who obstructs a pathway over the land to which the public have acquired a right by user. (*Benson and Sundara Aiyar, JJ.*) ALAUDIN SAHEB *v.* THE SECRETARY OF STATE FOR INDIA. **45 I. C. 30 : 6 L. W. 436.**

——S. 3—*Penal assessment— Secretary of State—Communal land.*

No penal assessment can be levied by the Secy. of State unless the land is communal land. (*Miller and Abdur Rahim, JJ.*) AYYAPARAJU *v.* SECRETARY OF STATE. **25 I. C. 894 : 37 Mad. 298.**

——Ss. 5, 6 and 7—*Notice—If gives rise to a causes of action.*

Mere notice under S. 7 of the Act to show cause does not give rise to a cause of action for a suit. Where penal assessment is levied, a suit brought for declaration of title to the disputed land is governed by the six months' limitation prescribed by S. 14 commencing from the date of the levy of the penal assessment (*Wallis, C. J., Abdur Rahim and Seshagiri Aiyar, JJ.*) SECRETARY OF STATE FOR INDIA *v.* ILLIKKAH ASSAN. **39 Mad. 727 : 19 M. L. T. 157 : (1916) 1 M. W. N. 167: 3 L. W. 228 : 32 I. C. 755: 30 M L. J. 255.**

——Ss. 5 and 14—*Notice to quit by Govt.—Declaratory suit—Limitation.*

Where the plff. brought a suit for declaration of title 6 months after the levy of penal assessment and service of notice to quit, the suit was barred by S. 14 of the Madras Land Encroachment Act as the penalty and service of notice were proceedings under the Act. (*Sankaran Nair and Bakewell JJ.*) DEVAGUPTA BHASKURUDHU *v.* PANARATHI SUBBARAYADU. **38 Mad. 674 : 14 M. L. T. 572 : (1914) M. W. N. 53: 21 I. C 840 : 26 M. L. J. 60.**

MADRAS LAND ENCROACHMENT ACT (III OF 1905), S. 6.

——Ss. 6, 7 and 14—*Notice claiming penal assessment — Subsequent notice of eviction — Cause of action—Limitation.*

A suit under S. 14 of Madras Act (III of 1905) for an injunction restraining the Govt. from interfering with plff.'s possession and enjoyment of land from which it is sought to evict him can be brought within six months of the notice of the eviction. *Per Sadasiva Aiyar, J.*—A suit for declaration of title must be brought within six months from the date when the plff.'s title is first definitely and finally denied to his knowledge, *e. g.*, by the actual levy of penal assessment. *Per Spencer, J.* A notice of eviction under the Act may properly be treated as a fresh cause of action for a declaration of title. The prayer for a declaration is incidental to the prayer for an injunction as the plff.'s right to obtain an injunction could not be determined without first determining and coming to a conclusion on the question of title. (*Sadasiva Aiyar and Spencer, JJ.*) SULTAN MOHIDEEN SAHIB *v.* THE SECRETARY OF STATE FOR INDIA. (1919) M. W. N, 688: 25 M. L. T. 227 : 49 I. C. 404 : 9 L. W. 265 : 37 M. L. J. 213.

——Ss. 6 and 7—*Eviction by Collector—Notice of—Cause of action—Limitation.*

Though a notice under S. 7 of the Madras Land Encroachment Act does not give a cause of action, a notice under S. 6 gives rise to a cause of action under S.14 of the Act. 39 Mad. 727 Dist. The plffs. could sue for an injunction under S. 54 of the Specific Relief Act. Where an appeal was filed before the Collector against the Sub-Collector's order directing notice under S. 6 and the order was varied in appeal, time runs from the date of the appellate order. (*Spencer and Krishnan, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* RAMANUJAM CHETTY. 49 I. C. 364: (1919) M. W. N. 21.

——Ss. 6 and 14—*Eviction by Collector—Suit to recover land—Limitation.*

S. 14 of the Act gives an aggrieved party a right to sue for damages in respect of unlawful proceedings under the Act and also a right to sue for declaration of his right to property or for recovery thereof. An occupant of land evicted by the Collector under S. 6 of the Act can sue to recover the land and the period of limitation applicable is the shorter period provided by the Act. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) KOLIA GANGAMMA NAIDU *v.* SECRETARY OF STATE FOR INDIA. 3 L. W. 315: 33 I. C. 665: (1916) 2 M. W. N. 82.

——S. 14—*Suit for recovery of penal assessment—Cause of action—Bar.*

The cause of action for the recovery of a penal assessment alleged to be wrongly levied arises, under S. 14 Expln. of Madras Act III of 1905, on the date on which such assessment or penalty is levied. Consequently the omission to object to the penal assessment in a previous fasli does not bar a suit for the recovery of penal assessment levied in a subsequent fasli. 25 M. L. T. 227; 1914 M. W. N. 197 Ref. (*Oldfield and Venkatasubba Rao, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* HUSSAIN SHERIFF SAHIB. 16 L. W. 197: (1922) M. W. N. 330 : 31 M. L. T. 49 (H. C.) : 1922 Mad. 232.

MADRAS LAND REVENUE ASSESSMENT ACT (I OF 1876), S. 2.

——S. 14—*Person aggrieved — Eviction—Suit for possession—Limitation.*

S. 14 of the Act substitutes a period of six months for the periods provided in the Limitation Act for suits coming within the purview of the first part of the section. A landlord whose tenant is evicted in proceedings under the Act is an aggrieved person who must sue within six months after the eviction. Recovery of possession is one of the ways of redress for a wrongful eviction and S. 14 applies to the suit. Though a man may not be a party to the proceedings resulting in the order of eviction he may be aggrieved by the actual eviction. (*Spencer and Krishnan, JJ.*) SECRETARY OF STATE *v.* SAMI CHETTIAR. 8 L. W. 432: (1918) M. W. N. 675: 49 I. C. 130 : 24 M L. T. 358 : 35 M. L. J. 410

——S. 14—"*Person aggrieved*" — *Meaning of.*

Under S. 14 the cause of action arises on the date of the levy of penalty or assessment or forfeiture or eviction. A mere notice given by the Govt. preliminary to the exercise of the powers under the Act is not a proceeding by which a person is 'aggrieved' and is not a grievance and cannot be taken as the starting point of limitation. A Court deciding the fact of possession for a period should find that the subsequent holder was in the possession before that period also. (*Sadasiva Iyer and Ayling, JJ.*) NARAYAN PILLAI *v.* SECRETARY OF STATE. 12 M. L T. 165: (1912) M. W. N. 703 : 15 I. C. 257 : 2 M. L. J. 162.

MADRAS LAND REVENUE ASSESSMENT ACT (I OF 1876).

——Ss. 1 and 6—*Alienation—Acquisition by prescription—Application for separate registry—Aggrieved party—Remedy of.*

Acquisitions by prescriptions are not excluded from the description "alienated by sale or otherwise" in the preamble of the Madras Land Revenue Assessment Act, 1876. Notwithstanding the absence of concurrence of both alienor and alienee in the application for separate registration and assessment, the aggrieved party's remedy is only by a suit under S. 6 of the Act. (*Oldfield and Krishnan, JJ.*) PUSARLA PEDA BRAHMAJ *v.* KRISHNAMACHARIAR. 55 I. C. 703: 11 L. W. 389.

——Ss. 2 and 6—*Permanently-settled estate.—Suit for separate registry—Refusal—Grounds for.*

Lands in a permanently-settled estate had been granted by the then Zemindar to the predecessor in title of the defendants on a small kattubadi and subsequently even the kattubadi was remitted for ever. The present Zemindar on the refusal of the Collector to order separate registry, instituted a suit against defendants for the said relief. The Court below dismissed the suit holding that the effect of the apportionment would be to impose a new burden on the defendants not imposed by the original grantor. *Held*, on appeal, that the circumstance relied on was no ground for refusing relief to the plaintiff. If there was any under-

MADRAS LAND REVENUE ASSESSMENT ACT (I OF 1876), S. 8.

standing that the grantor should himself pay the assessment imposed on lands after separate registration that would be a matter of contract between the grantor and the grantee and by paying the assessment the grantee would be able to recover the amount from the grantor. (*Krishnan and Ramesam, JJ.*) SRI RAJAH INUGANTI RAJAGOPALA RAO BAHADUR *v.* CHELIKANI VENKATA SURYA RAO GARU. **44 M. L. J. 64 : 17 L. W. 6: 1923 Mad. 368.**

——S. 8—*Regulation XV of 1802—Applicability—Transfer by Zemindar.*

The regulation does not affect the validity of transfers by *Zemindars* but only saves the right of Govt. A permanent lease of a *zemindari* is not a transfer of proprietary rights within S. 8 of the regulation A permanent grant at a favourable rent of the nature of kattubadi is not a transfer of ownership and the lands of the grantees cannot be separately registered andassessed under the Land Revenue Assessment Act. (*Wallis, C. J. and Kumaraswami Sastri, J.*) RAJAH OF VIZIANAGARAM *v.* COLLECTOR OF VIZAGAPATAM. **38 Mad. 1128: 1 L. W. 635 : (1914) M. W. N. 610 : 25 I. C. 780: 27 M. L. J. 278.**

MADRAS LOCAL BOARDS ACT (V OF 1884).

——*Rules ousting jurisdiction of Civil Courts are ultra vires—Election to Taluq Board—Suit to declare election invalid.*

Per *Sadasiva Iyer, J.* (*Spencer, J., contra*) :—The Governor in Council has no power under the Act to make rules ousting the jurisdiction of Civil Courts in the matter of inquiring into the validity of elections and relegating those matters to a special tribunal. A person residing and owning property within the area of a Taluq Board has a substantial interest, sufficient to give him a right to sue for a declaration that the election of a member of the Board is invalid. (*Sadasiva Iyer and Spencer, JJ.*) LAKSHMINARASIMHA *v.* RAMALINGAM PILLAI. **12 L. W. 202 : (1920) M. W. N. 519 : 59 I. C. 245 : 28 M. L. T. 205 : 39 M. L. J. 319.**

——*Road cess—Right of landlord.*

The landlord, even in the absence of a provision in the lease, is entitled to recover half the road cess from tenants under Mad. Act V of 1884. (*Spencer and Kumaraswami Sastri, JJ.*) MAILTHI HENGSU *v.* SOMA. **29 M. L. J. 452 : 30 I. C. 484 : (1915) M. W. N. 639.**

——**Ss. 16, 144 and 162**—*Election of member—Right to declaration of invalidity of—Jurisdiction of Civil Courts—Enactment of new rules—Effect of.*

A person owning properties and residing within the administration area of a Taluq Board has sufficient interest to entitle him to sue for a declaration of the invalidity of an election of a member to that Board. The granting of such a declaration however is entirely in the discretion of the court and the plff. cannot claim as of right. The rules framed by the Governor-in Council under the Local Boards Act, dated 6th June 1917, have the effect of excluding the jurisdiction of Civil Courts to entertain objections to the validity of elections even when those objections were

MADRAS LOCAL BOARDS ACT (V OF 1884), S. 73.

based on the ground that there was no valid electoral register. *Sadasiva Aiyar, J.* (*Spencer, J., contra.*) Under Ss. 16 and 144 of the Local Boards Act, the Governor-in-Council has no power to make rules ousting jurisdiction of Civil Courts in the matter of enquiry and validity of elections. The supersession of old rules by new ones do not have the effect of superseding the old electoral register or of invalidating acts done under the old rules. (*Sadasiva Aiyar and Spencer, JJ.*) LAKSHMINARASIMHA SOMAYAJIYAR *v.* RAMALINGAM PILLAI. **39 M. L. J. 319 : 12 L. W. 202 : 28 M. L. T. 205 : 59 I. C. 245 : (1920) M. W. N. 519.**

——S. 51—*Trust properties—Suit for recovery of—Local body—Board of Revenue.*

The local body to which the powers of the Board of Revenue are transferred under S. 51 of the Madras Local Boards Act 1884, is invested with the rights of management as well as superintendence and that the former include the right to sue for the recovery of trust property. (*Ayling and Tyabji, JJ.*) BHIMAVARAPU BUCHI REDDI *v.* PRESIDENT, TALUK BOARD, GUNTUR. **27 I. C. 1001 : 27 M. L. J. 284.**

——**Ss. 59 and 76**—*Arrears of tax—Mode of recovery—Mdras Revenue Recovery Act, Ss. 32 and 42.*

Ss. 3 (10), 64 (2), 66 and 73 of the Local Boards Act make the inamdar liable for the road cess and not the tenant. The procedure laid down for sales under this Act is the same as that under the Revenue Recovery Act by virtue of S 76 of the Local Boards Act. But the provisions of the Revenue Recovery Act (Ss. 32 and 42) that a sale for arrears of land revenue frees the land from all encumbrances and from all favourable rented leases, do not apply to a sale under the Local Boards Act. (*Miller and Sadasiva Aiyar, JJ.*) MUTHUSWAMIER *v.* SREE METHAMITHI SAMIER AVERGAL. **38 Mad. 356 : 13 M. L. T. 498 : (1913) M.W.N. 581 : 19 I. C. 694 : 25 M. L. J. 393.**

——**Ss. 60, 73 and 76**—*Summary procedure—When justified—Recovery of cess.*

The summary procedure under S. 76 can only be resorted to, after the issue of a notification under S. 73 of the Act fixing the date from which the cess should be paid. The issue of general notification making certain lands liable to cess does not justify such a procedure. (*Abdur Rahim and Odgers, JJ.*) SECRETARY OF STATE *v.* NARAYANAN CHETTIAR. **40 M.L.J. 111 : 13 L. W. 196 : 62 I. C. 251 : (1921) M. W. N. 85.**

——S. 73—*Land-cess—Landlord and tenant—Liability to pay—Limitation.*

A landlord is primarily liable to the Govt. for the cess under S. 73 and a tenant is liable only to the landlord if and when he has actually paid the cess. A suit by the landlord to recover cess from the tenant is governed by Art. 120. (*Oldfield and Sadasiva Iyer, JJ.*) RAJESWARA MUTHURAMALINGA *v* MAHALINGA RAJU. **9 L. W. 287 : 52 I. C. 468 : (1919) M. W. N. 365.**

——S. 73—*Land-cess—Mortgagee with possession—Payment of cess by tenants.*

MADRAS LOCAL BOARDS ACT (V OF 1884), S. 73.

A mortgagee with possession is an intermediate landholder within S. 73 of the Local Boards Act. The tenants' right to pay the cess to him, recognised in that section cannot be abrogated by a contract to which they were not parties. The question whether the intermediate landholder is bound to reimburse the landlord or not is immaterial (*Oldfield and Tyabji, JJ.*) PUCHAKAYALA JAGANNAYAKALU *v.* THE MANAGER OF NANDIGAM ESTATE. **39 Mad. 269: (1914) M. W. N. 939 : 27 I. C. 122 : 28 M. L. J. 154.**

——S. 73—*Land-cess—Landlord's share.*

Under S. 73 of the Act a landlord can claim only half of the land-cess and therefore a provision to pay full cess cannot be inserted in the pattah. (*Sadasiva Iyer and Seshagiri Iyer, JJ.*) VEDDADIJAGANNADHA BHUPATHI *v.* PADDALA APPALASWAMI. **28 M. L. J. 75 : 23 I. C. 576 : (1914) M. W. N. 426.**

——S. 95 (ii)—*Planting of trees—Damages—Public body—Liability.*

Where a Taluk Board in the discharge of its statutory obligation to plant and preserve trees on public roads planted trees which owing to their shade caused damages to the fields of the plff. adjoining the road. *Held*, the plff. cannot sue the Board for injunction or damages. The damage is one impliedly authorised by the statute. A public body is not liable for mere non-feasance in the absence of negligence or carelessness in the discharge of their duties. (*Seshagiri Iyer and Phillips, JJ.*) KRISHNAMURTHI AIYAR *v.* TALUK BOARD OF MAYAVARAM. **42 Mad. 331 : 9 L. W. 353 : 50 I. C. 809 : 36 M. L. J. 372.**

——S. 98 (1) and (2)—*Construction of—Section.*

The words "other person duly authorised as aforesaid" in S. 98 (2) do not refer only to "some person duly authorised by him in that behalf" in S. 98 (1). There must be separate authorisation under each clause of the section. The words "as aforesaid" in S. 98 (2) mean "by him in that behalf" in S. 98 (1). (*Phillips and Napier, JJ.*) PUBLIC PROSECUTOR *v.* SANKARALINGA MOOPAN. **42 Mad. 787 : 20 Cr. L. J. 395 : 37 M. L. J. 92 : 50 I. C. 1003 : 10 L. W. 345.**

——S. 100—*Orders under—Civil Court—When can interfere.*

A Civil Court cannot interfere with a decision arrived at upon evidence, by a Taluk Board purporting to act under S. 100 of the Act, unless the Board uses its powers for any indirect purpose or exercises its powers in a capricious, wanton, arbitrary or unreasonable manner. (*Abdur Rahim and Oldfield, JJ.*) TALUK BOARD, BANDAR *v.* YARLAGADDA MALLIKARJUNA PRASADA NAIDU. **44 Mad. 156 : 12 L. W. 585 : (1920) M. W. N 748 : 28 M. L. T. 440 : 61 I. C. 497 : 40 M. L. J. 91.**

——S. 117-E—*Markets—License, grant of, for continuing new private market—Fee, levy of, every year—Legality.*

The section deals with markets in existence when the Act came into force and those opened afterwards. Sub.-Cl. 1 read with Cls. 3 and 5 of S. 117-E authorises the levy of fees for the continuance of new private markets after the Act

MADRAS LOCAL BOARDS ACT (XIV OF 1920), S. 10.

came into force; the grant of license being annual, the Taluk Board can demand a fee every year for the license. (*Seshagiri Iyer, J.*) TALUK BOARD, KOVILPATTI *v.* JANAKIAMMAL. **(1916) 2 M. W. N. 253 : 36 I. C. 384 : 4 L. W. 336.**

——Ss. 144 to 147—*Negotiable instrument—Power of Board to issue—Lodging money with treasury—Issue of cheque—Treasury if a banker.*

The Govt. Treasury which receives money from the Dt. Board and respects orders issued to it for payment is not a bank and a cheque cannot be issued on it. Though the Local Boards Act does not expressly authorise the drawing and issuing of negotiable instruments by the Boards, Ss. 144 to 147 of the Act and R. 549 of the Local Fund Code and the Form at page 379 of the Code impliedly authorise the Board to make, endorse, or accept negotiable instruments. (*Oldfield and Seshagiri Aiyar, JJ.*) RANGASWAMY PILLAI *v.* SANKARALINGAM IYER. **43 Mad. 816: (1920) M. W. N. 428 : 12 L. W. 367: 58 I. C. 893 : 39 M. L. J. 377.**

——S. 162 (c)—*Wrongful conversion of trees.*

S. 162 (c) does not provide for punishment for the wrongful conversion of trees felled with the permission of the Chairman on the public road. (*Wallis, J.*) EMPEROR *v.* ADAM KHAN. **12 Cr. L. J. 281 : 10 I. C. 577 : 9 M. L. T. 458.**

——S. 162-B (2)—*Prosecution under—Main question.*

In a prosecution under S. 162-B (2) the material question is whether the erection is on a public road or not. (*Wallis, J.*) CHANDRA MUDLIAH *v.* EMPEROR. **(1911) 1 M. W. N. 78 : 9 I. C. 329 : 12 Cr. L. J. 63 : 9 M. L. T. 219.**

MADRAS LOCAL BOARDS ACT (XIV OF 1920).

——S. 10—*Creation of Taluq Board with twenty members—Only 19 members appointed—Election of President—Validity.*

When the Local Boards Act, 1920, came into force it was decided to bifurcate the existing Taluq Board at Negapatam and to provide a Taluq Board for each Revenue Taluq under S. 6 of the Act which requires that there should be a Taluq Board constituted for each Taluq, the Government having the power under S. 4 to declare by a notification any part of a District to be a Taluq. It was consequently decided to have one Taluq Board for the Revenue Taluq of Negapatam (and another for Nannilam). In order to effect this bifurcation the necessary notifications were published in the *Fort. St. George Gazette*. The District Board of Tanjore resolved that the Negapatam Taluq Board to be twenty. The Government by notification appointed 19 persons to be members of the Taluq Board, Negapatam. While a twentieth member had not been appointed, the nineteen members elected a President on the 21st August 1922. The Subordinate Judge having held that the election of the President was invalid for the reason that there were only 19 members in the re-constituted Taluq Board of Negapatam at the time of election, *held*, in revision that the High Court has power to revise the order of the Subordinate Judge notwithstanding that R. 12, cl. 3 of the rules to the conduct of enquiries and the decision

MADRAS LOCAL BOARDS ACT (XIV OF 1920). S. 55.

of disputes relating to election declared to be final. 44 M. L. J. 1 followed. 16 L. W. 827 dissented from : *held*, also that the order of the Subordinate Judge was erroneous. It is the Local Boards Act and the notifications of Government that constitute the Taluq Board and not the appointment of members. It is not necessary that every seat should be filled at the first constitution of the Board in order to make it a legally constituted body. Although there is a vacancy among its members a corporation is not incompetent to do its business. (*Spencer and Vankatasubba Rao, JJ.*) VENKATARAMA AIYAR *v.* JANAB HAMID SULTAN MARACAYAR.

32 M. L. T. (H. C.) 114 : 17 L. W. 656 : (1923) M.W.N. 78 : 44 M. L. J. 161 : 1923 Mad. 360.

——— **Ss. 55, 57, 199 and 238**—*Rules framed under—Taluk Board—Election of President—Transitory Rules, R.* 10 (1) *and* (2)—*Interpretation of.*

Under R. 10 (1) and (2) of the transitory provisions of the Madras Local Boards Act the term of office of all the members of the Taluk Board as members expire on the date fixed by the notification made under the Act by the Local Government. But for the purpose of carrying on the executive functions of the Taluk Board, the President of the old Taluk Board continues in office as President until a President for the newly constituted Taluk Board is elected. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* MUTHUVELAPPA GOUNDAN.

46 Mad. 536 : 44 M. L. J. 1 : (1923) M. W. N. 133 : 16 L. W. 848 : 1923 Mad. 192.

——— **S. 57**—*Filing a petition under—Member of Taluq Board.*

Filing a petition under S. 57 of the Madras Local Boards Act is not one of the ordinary functions or duties of a member of a TalukBoard. A member of a Taluq Board who has not taken his seat is a fit person to file a petition under S. 57. (*Ramesam, J.*) AKULA SUDARSANA RAO *v.* CHRISTIAN PILLAI. **45 M.L.J. 798: 1924 Mad. 396.**

——— **S. 129**—*Allowing sewage water to flow across road—Offence.*

It is an offence under S. 129 of the Madras Local Boards Act to allow sewage water to flow across a road to the opposite side. Where the authorities have not constructed a culvert through which sewage water might flow across does not make it any the less an offence. (*Krishnan, J.*) THE PUBLIC PROSECUTOR *v.* PACHIAPPA MUDALI.

18 L. W. 694 : 33 M. L. T. (H. C.) 166 : 25 Cr. L. J. 56 : 1924 Mad. 397

——— **S. 221**—*Court exercising power—Criminal Court.*

The Magistrate in acting under S. 221 of the Act is acting as a criminal court, and his orders are subject to the revisional jurisdiction of the High Court. In imposing a fine in addition to the recovery of the fees due, the Magistrate is acting beyond the jurisdiction conferred on him by S. 221 of the Local Boards Act. (*Wallace, J.*) PUNIYA SYAMALO *v.* EMPEROR.

17 L. W. 155 ; 24 Cr. L. J. 464 : 1923 Mad. 275.

MADRAS PERMANENT SETTLEMENT REGULATION (XXV OF 1802).

——— *Rule* 4, *Sub-Rr.* (1), (2) *and* (3)—*Election to Taluk Board—Objection petition—Deposit not made in time—Court cannot excuse delay.*

The provisions of R. 4 of the Rules framed under the Madras Local Boards Act (XIV of 1920) are mandatory and where owing to the neglect of the party the deposit of 200 rupees required under R. 4 sub-R (1) is not made within the time prescribed. The Court has no jurisdiction to enquire into the petition. There is no question of the Courts excusing the delay in such a case and a deposit in time is a condition precedent to the enquiry. 13 C. L. J. 467 : 37 All 592 ; 52 I. C. 161. Diss. (*Krishnan, J.*) KRISHNAJI REDDIAR *v.* MUTHUVEERA REDDIAR. **44 M. L. J. 344 : (1923) M. W. N. 199 : 18 L W. 299 : 1923 Mad. 490.**

MADRAS MOTOR VEHICLES ACT (XI OF 1890).

——— **S. 6 (1)**—*Prosecution under.*

There is nothing in S. 6 (1) of the Act restricting the prosecution of either the coachman or the owner and so both or one after another can be prosecuted. The conviction of one is no bar to the trial of another. (*Sadasiva Iyer, J.*) EMPEROR *v.* RICE. **26 I. C. 143 : 15 Cr. L. J. 695.**

——— **(I OF 1907).**

——— *Motor rules, R.* 9—*Horn—Failure to sound—offence.*

Under R. 9 of the Act the failure to sound horn by a motor car driver when going from right to the wrong side to turn it, constitutes an offence (*Wallis, J.*) RATHANAM *v.* EMPEROR.

13 Cr. L. J. 487 : 15 I. C. 487 : (1912) M.W.N. 539.

MADRAS MUNICIPAL ELECTION RULES.

——— **R. 14 (1)**—*Effect of infringement.*

R. 14 (1) of the Madras Municipal Election Rules is not mandatory and its infringement does not necessarily render the vote invalid. If nothing more appears than the infringement of that rule as regards certain votes those votes should be rejected but if it is proved that they were given by duly qualified voters they cannot be rejected. The mere fact it did not bear the following officer's initials, when in other respects it is quite valid, does not vitiate it. Scope of rules 13 to 15 considered. (*Krishnan, J.*) KANNIAPPA MUDALIAR *v.* CHINNASWAMY CHETTIAR. **45 M. L. J. 329 : 18 L. W. 160 : (1923) M. W. N. 447 : 33 M. L. T. (H. C.) 37 : 1924 Mad. 38.**

MADRAS PERMANENT SETTLEMENT REGULATION (XXV OF 1802).

——— *Scope of.*

The Regulation neither takes nor gives to the former owners of lands not permanently settled, any rights which they then had. (*Sir John Edge.*) MALAYANDI APPAYASAMI NAICKER *v.* MIDNAPORE ZEMINDARI CO. **40 M. L. J. 537 : 34 C. L. J. 9 : (1921) M. W. N. 352 : 60 I. C 953 : 26 C. W. N. 106 (P. C.)**

[On appeal from 47 I. C. 733 : 47 Mad 749.]

——— *Operation of—Date of commencement.*

Regulation XXV of 1802, which purports to have been passed on 13th July, 1802, must be taken to

MADRAS PERMANENT SETTLEMENT REGULATION (XXV OF 1802), S. 2.

have come into operation from the date of passing. (*Wallis, C. J. and Phillips, J*) SECRETARY OF STATE *v.* MAHARAJA OF VENKATAGIRI.
31 M. L. J. 97 : 20 M. L. T. 284 : (1916) 2 M. W. N. 96 : 35 I. C. 266 : 4 L. W. 133.

——S. 2—*Zamindar—Right of, to all the lands within Zamindari limits—Assessment—Principle of.*

The permanent settlement in Madras as in Bengal proceeded on the footing that, whatever may have been the interest of the Zemindars and other landholders prior to the British occupation the Govt. would grant them and their heirs "permanent property in their land" subject to a fixed Jamma. Property taken into account in arriving at the Jamma payable to Govt. is not the same as the property granted to the Zemindar and upon which the Jamma is chargeable. Otherwise many things of great importance to the enjoyment of a Zemindari, *e.g.*, waste land, farm buildings, tanks, irrigation channels, etc., would not pass by a Zemindari grant. (*Lord Parker*) KANDUKURI BALASURYA PRASHAD RAO *v.* SECRETARY OF STATE. **40 Mad. 886 : 44 I. A. 166 : 15 A. L. J. 697 : 41 I. C. 98 : 22 M. L. T. 76 : 21 C. W. N. 1089 : 1917 M. W. N. 536 : 19 Bom. L. R. 751 : 6 L. W. 340 : 2 P. L. W. 260 : 26 C. L. J. 290 : 33 M. L. J. 144 (P. C.)**

——Ss. 3 and 4 — *Sanad— Construction of sanad—Right of Government to resume Inam lands.*

A sanad issued by the Government on 24-8-1802 to a Zemindar in the Presidency of Madras (Arcot) stated that in consideration of the relief which the Zemindar's finances would derive from the relinquishment of his military sevices and of the Government charging itself with the duty of protecting his territories, "The British Government has fixed your annual contribution, including equivalent for military service and the established peishkush for every year, at the sum of star pagodas 111,058 which said amount shall never be liable to changes under any circumstances", Cl. (5) reserved to the Government the revenue derived from salt and saltpetre, and certain other subjects, witnout making any mention of lakhiraj or inam lands. It appeared that the assessment had been fixed on the whole zemindari, irrespective of the assets derived from each particular unit of property within it. Madras Regulation XXV of 1802 which was passed on July 13, 1802 provided by S. 3 that in all cases of disputed assessment reference was to be had to the sanads and kabuliyats executed; and by S. 4 that the Government having reserved to itself certain articles of revenue including "lakhiraj lands (or lands exempt from the payment of Government revenue) and of all other lands paying only favourable quit-rents, the permanent assessment of the land tax shall be made exclusively of the said articles now recited." At the time of issue of the sanad there were in the zemindari certain religious and charitable inams and lakhiraj lands granted by the Zemindar or his predecessors. *Held* that having regard to the terms of the sanad and the circumstances in which it was issued the Government was not entitled to resume them or assess them to the public revenue. (*Mr. Ameer Ali*) SECRETARY OF STATE FOR INDIA *v.* RAJAH OF VENKATAGIRI. **44 Mad. 864: 48 I. A. 415 41 M. L. J. 624 : 1923 Mad. 585.**

MADRAS PERMANENT SETTLEMENT REGULATION (XXV OF 1802), S. 4.

——S. 4—*Construction—Lands granted by Zemindar prior to Permanent Settlement.*

Both the Madras Regulation XXV of 1802 and the sanads issued under it speak from their dates so that all grants of Inam made by Zemindars prior to 1802 are *prima facie* excluded from the Permanent Settlement. (*Oldfield and Ramesam JJ*) KUPU REDDI NOOKAYYA *v.* MANDALUKA BHEEMANNA. **17 L. W. 712 : (1923) M.W.N. 176 : 45 M.L.J. 91 : 1923 Mad. 454.**

——S. 4—*Scope of.*

S. 4 does not restrict the power of Govt. to alienate all classes of land revenue. It is largely declaratory and explanatory of the position which the *Zemindars* were to occupy under the *sanads* granted to them. (*Wallis, C. J. and Phillips, J.*) SECRETARY OF STATE *v.* MAHARAJA OF VENKATAGIRI **20 M. L T. 284 : (1916) 2 M. W. N. 96 : 35 I. C. 266 : 4 L. W 133 : 31 M. L. J. 97.**

——S. 4—*Inam—Jodi— Liability to pay—Resumption—Effect.*

Under S. 4 what was excluded from consideration in fixing the permanent assessment payable by a *Zemindar* is not *Jodi* payable by an *Inamdar*, to a *Zemindar* but a difference between the *Jodi* and the proper assessment claimable from the lands if they had not been granted in *Inam*. The Govt. reserved its powers to deal with the difference only and not with the *Jodi* itself. The resumption of a service *Inam* and the levy of full assessment by Govt. thereon does not therefore, take away the liability of the *Inamdar* to pay *Jodi* to *Zemindar*. (*Sadasiva Iyer, J*) ADAPAKA BAPANA *v.* RAJAGOPALA RAO BAHADUR. **31 I. C. 813 : 2 L. W. 1212.**

——S. 4—*Small quit-rent—Meaning.*

The words 'small quit-rent' in the Sanad granted to the Zemindar meant a favourable rent. 'Alienated' included only permanent grants and not temporary leases. The clause prohibited enhancement by the Zemindar and not an enhancement consented to by the lessee. (*Sankaran Nair and Oldfield, JJ.*) MAHARAJA OF JEYPORE *v.* RUKMINI PATTAMAHADEVI. **2 L. W. 483 : 29 I. C. 365 : (1915) M. W. N. 346.**

——S. 4—*Inam—Service inam—Assessment on land—Right of Govt.—Limitation.*

There is no period of limitation for the exercise by the Govt. of its right to impose assessment on *lakhiraj* lands granted before the permanent settlement and not confirmed under Regn. XXXI of 1802. (*Wallis, C. J. and Coutts-Trotter J.*) SUBRAMANIAM CHETTIAR *v.* THE SECRETARY OF STATE. **28 M. L. J. 392 : (1915) M. W.N. 276 : 28 I. C. 639 : 2 L. W. 353.**

——Ss. 4 and 12—*Gatthi Toomula—If a revenue—Legality—Effect of enfranchisement.*

MADRAS PERMANENT SETTLEMENT REGULATION (XXV OF 1802), S. 4.

Gatthi Toomula is a voluntary payment made to a Zemindar under a contract to keep a tank in repair ; such a cess is not revenue within Ss. 4 and 12 of Regn.XXV of 1802 and is not an illegal levy. The right of the Zemindar is not affected by enfranchisement where the cess was legally payable before. (*Seshagiri Aiyar, J.*) GOGINANENI VENKATANARSIMHARADU *v.* ZEMINDAR OF NUZVID. **1 L.W. 333: 22 I.C. 972 : (1914) M.W.N. 373.**

——**S. 4**—*Inam—Pre-settlement—Resumption—Right of Govt. or Zemindar.*

Lands held on condition of personal services to the Zemindar and in which the Govt. is not interested (*e. g.*) Police or Magisterial duties could be included in fixing the peishcush of the Zemindari for they are not "lands paying only favourable quit-rents" under Regn. XXV of 1802. The Govt. is therefore not entitled to resume such pre-settlement inams unless they prove they were excluded in fixing the peishcush. (*Sankaran Nair and Tyabji, JJ.*) SRI RAJA PARTHASARATHY APPA RAO *v.* SECRETARY OF STATE.

38 Mad. 620 : (1913) M. W. N. 959 : 14 M. L. T. 514 : 21 I. C. 871 : 26 M L. J. 39.

——**S. 4**—*Inam—Resumption—Liabilities to tax.*

There is no presumption that a Zemindar is in possession of all lands within his estate. Where a pre-settlement "Nattam Inam" is enfranchised but not localised, the Zemindar cannot be liable for assessment from the mere fact that it is within his Zemindari. (*Benson and Sundara Aiyar, JJ.*) N. RAMA ROW *v.* SECRETARY OF STATE.

21 I. C. 49 : (1913) M W. N. 639.

——**Ss. 4 and 5**—*Inam—Service inam—Registration in proprietor's names—Liability disputed—Right of suit.*

The registration of service inams in a *Zemindari* in the names of its proprietors showing the full assessment against each, means liability to pay to Government the whole or some part of the assessment. Where any person disputes his liability to such payment he may bring a suit. Unless it is shown that lands are in the possession of a proprietor either directly or through tenants, they cannot be registered in his name when he is against it. (*Sundara Iyer and Ayling, JJ.*) RAMA RAO *v.* THE SECRETARY OF STATE.

16 I. C. 103: (1912) M. W. N. 542.

——**Ss. 5 and 8**—*Service tenure—Enfranchisement—Sannad not issued—Effect of.*

Where lands originally held on condition of rendering military or police service and on that ground inalienable or freed from the service owing to their abolition by the Government, the lands become alienable and heritable like ordinary property. The omission to issue a sannad under Regn.XXV of 1802 finally settling the peishcush payable by the holder, will not affect the alienability of such lands after the abolition of the services. (*Wallis, C. J. and Spencer, J.*) THE MIDNAPUR ZEMINDARI COMPANY, LTD. *v.* MALAYANDI APPAYASAMI NAICKER.

41 Mad. 749: 8 L. W. 382: 34 M. L. J. 563 : 47 I. C. 733: 24 M. L. T. 1.

[Affirmed on appeal by the Privy Council : 40 M. L. J. 537.]

MADRAS PLANTER'S LABOUR ACT (I OF 1903), S. 35.

——**S. 5**—*Inam—Lakiraj—Presumption.*

When the nature of the services to be performed by an Inamdar are only personal or private to the Zemindar, the burden of proving that the income therefrom was not included when fixing the jamma at the permanent settlement is on the person who sets up the Government right to resume the inam and in the absence of proof to the contrary it must be held that the inam lands were not lakiraj. (*Sadasiva Aiyar and Napier, JJ.*) VARADARAJA APPARAO *v.* GONEPALLY PUNNAYYA.

30 M. L. J. 545: 34 I. C. 626: 19 M. L. T. 338.

——**Ss. 12 and 13**—*Operation of—Inams reserved to Government.*

Ss. 12 and 13 prohibiting the Zemindar from resuming or fixing a new assessment on certain classes of inams without the consent of the Government and providing for the imposition of a fresh assessment on the Zemindar where such assent was granted,are confined to cases in which these inams had been reserved to Govt., according to S. 4. 9 M. 14, (F.B.), Dist. (*Wallis, C, J. and Phillips, J.*) SECRETARY OF STATE *v.* MAHARAJA OF VENKATAGIRI.

31 M. L. J. 97: 20 M. L. T. 284: (1916) 2 M. W. N. 96: 35 I. C. 266: 4 L. W. 133.

MADRAS PLANTER'S LABOUR ACT (I of 1903).

——**Ss. 24, 35**—*Contract, breach of—Prosecution—If puts an end to.*

S. 35 does not limit the number of directions to fulfil the contract that can be made or to the number of prosecutions following on default but the action taken under the section does not put an end to the contract, the offender remaining liable for fresh breaches under S. 35 so long as contract remains in force. 36 M. 497 Diss. The words "Fails to account for the money advanced to him" mean failure either to supply labour equivalent to the advance received or to refund the balance for which he is unable to supply labour or failure to show legitimate expendtiure. (*Ayling and Phillips, JJ.*) N. C. WHITTON *v.* MUHAMMAD MAISTRI.

39 Mad. 889: 2 L. W. 1069: 18 M. L. T. 611: 31 I. C. 377: 16 Cr. L. J. 777: (1916) 1 M. W. N. 2.

——**S 35**—*Contract, breach of—Prosecution if puts an end to—Contract—Power to give direction after second punishment—Refusal to obey direction.*

S. 35 (1) of the Act merely means that the civil contractual obligation does not cease by the Criminal Court's punishment for breach of the contract and not that *a maistry* could be punished indefinitely. A Magistrate can give only one direction to perform the contract after release of the maistry from the first punishment. The refusal to obey it is a final refusal and after second punishment for such refusal, the Magistrate cannot give any further direction. (*Sadasiva Aiyar, J.*) PONGA MAISTRY *v.* EMPEROR.

36 Mad. 497: 18 I.C. 415 : 14 Cr. L. J. 79: 24 M. L. J. 186.

[See Contra 31 I.C. 377 : 39 Mad. 889.]

MADRAS PRESIDENCY SMALL CAUSE COURT RULES.

——O. 37, R. 1 and form 13—*If* ultra vires.

Where in a summary suit on a pro-note the defendant was served with the notice as prescribed in Form No. 13 of Appendix I which compels him to obtain leave of court to defend not less than 3 days before the day of hearing, the rule is without jurisdiction as regards limitation of time. (*Devadoss, J.*) KANNISA *v.* DEVICHAND.
46 Mad. 847 : 45 M. L. J. 699 : 18 L. W. 414 : (1923) M. W. N. 750 : 1924 Mad. 46.

——R. 102—Ex parte *decree—Setting aside—Sufficient cause—Illness of deft.*

Under R. 102 of the Rules, to set aside *ex parte* decree it must be proved that the deft. was prevented by sufficient cause from attending at the trial. An application to set aside an *exiparte* decree was based on the ground of the deft.'s. illness on the day of hearing and the Judge passed the following order "No grounds, dismissed with costs". *Held*, that the order did not mean that the deft.'s illness and his inability to appear on account of such illness were not grounds for setting aside the *ex parte* decree but that the Judge was not satisfied that the deft. was prevented by illness from appearing and therefore the High Court could not interfere in the revision. (*Sundara Iyer, J.*) DAVOOD MOHIDIN, *In re* **11 I. C. 992.**

MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II of 1894).

——*Enfranchisement of service inam—Effect.*

The effect of enfranchisement of service inam, is that Government, merely gives up the right of resumption and that the title rests where it was before. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SESHAGIRI AIYAR *v.* TIRUMALAI AMBALAM.
17 I. C. 481.

——Ss. 4 and 15—"*Proprietor*"— *Receiver—General powers of management given to—Receiver—If can appoint karnams.*

The powers of a Receiver appointed by a Civil Court under O. 40, R. 1, C. P.C., are entirely conditioned by the terms of his appointment, subject to any subsequent notification by the Court under which he holds the appointment. Where an appointment order confers on a Receiver general powers of management authorising him to do such acts as may be necessary for the efficient administration of the property subject to the control of the court, he has all the powers of a proprietor within S. 4 and is entitled to nominate persons to *karnamships* under S. 15. (*Ayling and Phillips, JJ.*) THE SECRETARY OF STATE *v.* KOMARGI JANARDHANA RAO. **32 I. C. 207: 30 M. L. J. 456.**

——Ss. 10, 11 and 15—*Appointment by proprietor—Power of Divisional Officer to question—Suit for declaration of invalidity of appointment—Civil Court.*

A person appointed according to S. 15 and not disqualified under any of the items under S. 10 (*a*) to (*e*) and whose appointment has been duly reported to the Divisional Officer, cannot be ousted under S. 11 by the Divisional Officer. Neither the Collector nor the Board of Revenue can interfere with the order of appointment by the Divisional Officer under S. 15 (3). A suit for declaration that an appointment of a village headman under S. 15 of the Act is illegal and that plff. is the legally entitled headman, is cognizable by the Civil Court. (*Sadasiva Iyer and Naiper, JJ.*) KRISHNASWAMI NAIDU *v.* AKKUMAL AVERGAL.
24 M. L. T. 489 : (1919) M. W. N. 29 : 50 I. C. 185: 9 L. W. 90.

——Ss. 15 (1) and 3—*Appointment—Delegation of power to—Anticipation of creation of new office—Withdrawal of nomination.*

In the case of the creation of a new office under S. 15, Cl. (1) the starting point for the six weekr allowed for the proprietor to submit the report is the day on which all the requisite steps have been completed under S. 6 of the Act or in other words, the day on which the last step was completed. The power of the choice of a new offices given to the proprietor cannot be delegated by him. But where the choice has been made by the proprietor himself an agent can act for the proprietor informally embodying the nomination in the form prescribed for it and signing it for him and submitting it. A proprietor may submit his nomination in advance in anticipation of a new office being created. Such a submission will take effect when the office is created if not rejected previously. The proprietor may withdraw a nomination made prematurely and substitute a new nominee till the nominee is accepted and appointed by the Divisional Officer. (*Spencer and Krishnan, JJ.*) TANGUTUR NARASIMHAM *v.* SINGARAJU RAMIAH. **(1920) M. W. N. 233 : 54 I. C. 728 : 38 M. L. J. 126.**

——S. 17—*Service inam—Enfranchisement—Land excluded from assets at the time of the sanad—Continuance of the grants.*

Lands which at the time of the granting of the sanad under Regn. 25 of 1802 were service inam lands, are excluded from the assets of the Zamindari and the right of resumption and regrant, inhere in the Government lands which at the inception were service inam lands and which at the time of taking an account of the properties in the Zamindari in 1854 were not denied by the persons in possession to be service inam lands must be deemed to be inam lands continued by the Government within S. 17, Madras Act II of 1894 and the Government were entitled to enfranchise the inam. (*Seshagiri Aiyar and Moore, JJ.*) BASAVARAJU PITCHAYYA *v.* THE SECRETARY OF STATE. **58 I. C. 713 : 11 L. W. 186.**

——S. 17—*Post settlement inams—Enfranchisement—Proceedings by Inam Commissioner*—Ultra vires.

The Government has no right to resume inams included in the assets of a Zamindari at the time of the permanent settlement. If the Inam Commissioner with the knowledge that the lands were post-settlement inams passed enfranchisement proceedings in regard thereto, he would be acting *ultra vires* and such proceedings need

MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), S. 17.

not be set aside. (*Seshagiri Iyer and Burn, JJ.*) MANNA SULTAN *v.* THE SECRETARY OF STATE FOR INDIA. **26 M. L. T. 265 : 10 L W. 372 : 53 I. C. 332 : 37 M. L. J. 661.**

——S 17—'*Granted or continued*'—*Mere sufferance.*

In order to have the right of resumption the right must either have been granted by the Government or the continuance must have been due to an act of Government. Mere sufferance or forbearance to take steps which the Government might have taken will not amount to continuance nor collateral expressions of opinion which were not intended to be a recognition or confirmation. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SECRETARY OF STATE *v.* CHINNAPRAGADA BHANUMURTY.
17 I. C. 373 : 24 M. L. J. 538.

——S. 17—*Service Inam — Zamindari—Enfranchisement—Resumption*

A service inam enfranchised by the inam Commissioner in 1895 and converted into a free-hold in favour of the proprietor, cannot be dealt with again under S. 17 of Act II of 1894. The right of Government to resume such an inam is put an end to. The registration of service inams in a Zamindari in the names of its proprietors, showing full assessment against each, implies liability to pay the Government the whole or any part of the assessment for the inams. (*Sundara Aiyar and Ayling, JJ.*) RAMRAO *v.* SECRETARY OF STATE. **16 I. C. 103 : (1912) M. W. N. 542.**

——S. 18—*Rate of interest.*

Rate of interest on arrears of *Kattubadi* amounts is only 6 p. c. and not 12 p. c. The section excludes the procedure of S 37 of the Madras Rent Recovery Act to proceedings for recovery of arrears only and not the rate of interest. In construing S. 18 of Rent Recovery Act reference must be made under General Clauses Act to Ss. 18 to 61 of Madras Estates Land Act. A custom cannot be proved by a single witness nor can S. 73 of the Contract Act be applied to the case. (*Sadasiva Aiyar, J.*) NARAYANASWAMI NAIDU *v.* BALIJEPALLI SUNDARARAMIAH.
27 I. C. 937 : 2 L. W. 194.

——S. 22—*Fixation of rent—By whom to be made.*

Fixation of rent must be made by Revenue Officers in charge of a division ; a fixation by his subordinate is not sufficient. (*Wallis, C. J. and Ayling, J.*) SECRETARY OF STATE *v.* RAJA OF RAMNAD. **9 L. W. 474 : 50 I. C. 613 : 36 M. L. J. 436.**

——S. 27 (1) and (4)—*Extension of the Act to a Zamindary under lease—Lessee bound to pay* manibhums and swatantrams *to village officers—Release of payment Zamindar if entitled to recover the amount from the lessee of a lease.*

Where during the currency of the melwaram by a Zamindar to a farmer of rent under which the latter was to pay the *manibhums and Swatantrams* to the village officers, the Madras Proprietary Estates Village Service Act of 1894 was extended to the Zamindary under lease and the peishcush due from the Zamindar was increased

MADRAS REGULATION (XXXI OF 1802).

under S. 27 (1) of the Act. *Held*, Per *Sadasiva Aiyar, J.* (*Sir John Wallis C. J.* dissenting) (1) that the Zamindar was entitled to recover the money value of the *manibhums* and *swatantrams*, (ii) that the remedy given by Sub-Sec. 4 of S. 27 of the Act was not the sole but only a cumulative remedy. Per *Sir John Wallis, C. J.* :—(1) The Zamindar was not entitled to recover anything from the lessee in addition to the rent stipulated. 31 All. 583 Referred to. (2) The landlord has no remedy in such cases independently of Sub-Sec. 4 of S 27 of the Act. (*Sir John Wallis, C. J. and Sadasiva Aiyar, J.*) MUTHAN SERVAI *alias* TIRUNEELAKANTAN SERVAI *v.* RAJA RAJESWARA SETHUPATHI *alias* MUTHURAMALINGA.
64 I. C. 312 : 13 L. W. 646.

——S. 27 (4)—*Tenant—Meaning of—Abolition of cess—Payment of village officers directly by Government—Rights of Zamindar against cowledar.*

Under a cowle granted by a Zamindar the cowledar paid certain fixed rates of the rent to the village officers of the Zamindari. Subsequently the Government extended Madras Act II of 1894 to the Zamindari, paid the village officers directly and enhanced the peishcush payable by the Zamindar who thereupon sued the cowledar to account for the amounts paid by him to the village officers which had been abolished by the Government. *Held*, by *Schwabe, C.J. and Coutts Trotter, J.* (*Kumaraswami Sastri, J. dissenting*): —(1) that there was no implied term in the cowle making the cowledar accountable to the Zamindar if at any time the whole or part of the amount fixed was not required for the payment of the village officers and (2) that the remedy of the Zamindar was not under the terms of the cowle but by an application to the collector for increase of rent under S. 27 (4) of Madras Act II of 1894. The expression 'a tenant' in S. 27 (4) of Madras Act II of 1894 includes a cowledar from a Zamindar. (*Schwabe, C. J., Coutts Trotter and Kumaraswami Sastry, JJ.*) TIRUNEELAKANTAN SERVAI *v.* RAJA OF RAMNAD.
15 L. W. 556 : 30 M. L. T. 317 : 46 M. 177 : 43 M. L. J. 158 : 1922 Mad. 263.

MADRAS PROVINCIAL INSOLVENCY RULES, R. 12—*If* ultra vires.

Per *Venkatasubba Rao, J.*:—If R. 12 of the Provincial Insolvency Rules negatives the power of the court to remove an Official Receiver from his office, the rule is *ultra vires.* (*Spencer and Venkatasubba Rao, JJ.*) OFFICIAL RECEIVER, TANJORE *v.* NATARAJA SASTRIGAL.
(1923) M. W. N. 212 : 46 Mad. 405 : 44 M. L. J. 251 : 1923 Mad. 355.

MADRAS REGULATION (XXXI OF 1802).

——*Crown—Right of Inam— Grant of—Rights of grantee.*

There is no room for the assumption that the ownership of soil as distinct from the right to revenue, did not vest in the sovereign in India. Accordingly there is no presumption that the grant of an inam by the sovereign could only have

MADRAS REGULATION (XXXI OF 1802), S. 2.

been of the melvaram or right to revenue. (*Sir John Edge.*) SURYA NARAYANA *v.* PATANNA.
41 Mad 1012 : 25 M. L. T. 30 : 1918 M. W. N. 859 : 23 C. W.N 273 · 9 L.W. 126 : 29 C. L. J. 153 : 1 U. P. L. R. 11 : 36 M. L. J. 585 : 21 Bom. L. R. 547 : (1919) M. W. N. 463 : 45 I. A. 209 : 48 I. C. 689 : (P. C.) [Also 43 Mad. 166 : 51 I. C. 304 (P. C.) Also 40 M. L. J 429 : 13 L. W. 483 (F.B.).]

——S. 2—*Objection when to be taken.*

In a suit for recovery of an inam alleged to have been unlawfully resumed by Government a plea that the grant fell under S 2 of Regn. 31 of 1802 and that the Government were under no circumstances entitled to resume it cannot be allowed to be raised for the first time in appeal. 6 L. W 402 Foll. (*Abdur Rahim and Spencer, JJ.*) SECRETARY OF STATE FOR INDIA *v.* GULAM MAHBOOB KHAN.
42 Mad. 673 : 1919 M. W. N. 736 : 9 L. W. 587 : 51 I. C. 366 : 37 M. L. J. 71.

——S. 2—*Lakhiraj grant—Right to impose assessment—Limitation.*

Lakhiraj grants made before the permanent settlement and confirmed under Regn. XXXI of 1802 are liable to assessment at the option of Government and there is no period of limitation for the exercise by Government of its right to impose such assessment (*Wallis, C. J. and Coutts-Trotter, J.*) SUBRAMANIAM CHETTIAR *v.* SECRETARY OF STATE.
2 L. W. 353 : 1915 M. W. N, 276 : 28 I. C. 639 : 28 M. L. J. 392.

——(V OF 1804) COURT OF WARDS.

——S. 25—*Hindu law— Adoption— Ward under Court of Wards—Consent in writing of Court of Wards—Necessity—Ward over 18 but under 21 years of age.*

An adoption made by a person, who was at the time of the adoption over 18 but under 21 and a ward under the Court of Wards, is not invalid for want of the previous consent in writing of the Court of Wards as required by S. 25 of Regulation V of 1804. (*Spencer and Ramesam, JJ.*) ARULANANDA MUTHU *v.* PONNUSAMI.
15 L W. 237 : (1922) M. W. N. 93 : 66 I. C. 265 : 42 M. L. J. 129 : (1922) Mad. 1.

——(II OF 1816.)

——S. 10—*Confinement in front of a village temple.*

Confinement of a person in front of a temple is illegal as the village magistrate can under S. 10 confine an accused only in the village choultry. (*Abdur Rahim, J.*) PONNUSAMI PILLAI *In re*
44 Mad 113 : 12 L. W. 638 (1920) M. W. N. 786 : 22 Cr. L. J. 208 : 60 I. C. 64 : 39 M. L. J. 709.

——(II OF 1819.)

——S 2—*Judicial proceedings—Effect of—Reasons of policy—If open to attack.*

The starting of a Judicial proceeding against an individual does not deprive the Governor in-Council of the power of taking proceedings against him under the Regulation. The reasons for the State policy for action cannot be questioned in a

MADRAS RENT RECOVERY ACT (VIII OF 1865), S. 11.

court of law. (*Ramesam and Wallace, JJ.*) ETAKANDAN KUNHOKKAR, *In re.* 18 L W. 517 : (1923) M. W. N. 741 : 33 M. L. T. 17 (H. C.) : 25 Cr. L. J. 123 : 45 M. L. J. 473 : 1924 M. 372.

MADRAS RENT RECOVERY ACT (VIII OF 1865).

——Ss. 1 and 79—*Landholder—Transfer of registry.*

A mere transfer of registry in the Governments Revenue Accounts cannot confer proprietary right on the transferee and make him a landholder within S. 1. He cannot therefore take any proceedings under the Act such as tendering pattas and suing for rents due. The transfer does not make the transferee an agent of the transferor under S. 79. (*Seshagiri Aiyar and Srinivasa Aiyangar, JJ.*) PARTHASARATHI AIYANGAR *v.* RANGASWAMY AIYANGAR. 38 I.C. 645: 4 L.W. 654.

——S. 3—*Landholder—Registration, necessity for—Joint landlords—Right to tender patta.*

To make a person a landholder within S. 3, no registration is required. When there are several persons jointly entitled to the melvaram, the right to tender patta vests in altogether and a patta tendered by one is not valid. (*Sundara Aiyar and Phillips, JJ.*) VENUGOPALA RAO GARU *v.* NEKKALAPUDI VENKATARAYADU.
12 I. C. 715 : 10 M. L. T. 450.

——S. 7—*Exchange of patta and muchilika.*

The Act does not require a second exchange of patta and muchilika between the farmer of land under the Zamindar and the raiyat, when for the same fasli, a patta and a muchilika have been exchanged between the raiyat and the Zamindar. (*Miller and Sadasiva Aiyar, JJ.*) DUVVADA CHINNA JAGANNA *v* PROBHA NARASIMHAM.
20 I. C. 832 : 25 M. L. J. 15.

——S. 7—*Tender of Patta—Improper patta—Refusal to accept—Distraint—Validity.*

S. 7 is conclusive that no proceedings could be taken in the absence of proper patta being tendered. If distraint proceedings are taken on refusal to accept improper patta, the distraint cannot be upheld even to the extent of the amount actually due and can be resisted by the tenant who need not be driven to a separate suit. 10 M. 229 Dist. (*Abdur Rahim and Ayling, JJ.*) BOMMADEVARA VENKATA NARASIMHA *v.* SEJJA SATTYA.
35 Mad. 139 : (1911) 1 M. W. N. 139 : 9 M. L. T. 231 : 9 I. C. 738 : 21 M. L. J. 570.

——Ss. 10 and 12—*Wrongful ejectment—Suit for damages.*

A ryot ejected from land by an alleged illegal order of the Revenue Court under S. 10 can maintain a suit for damages under S. 12 but not for possession. (*Benson and Sundara Aiyar, JJ.*) POLINA ACHANNA *v.* MADIPATTI VENKATARAMANA.
(1911) 2 M. W. N. 585 : 10 M. L. T. 542 : 13 I. C. 175 : 22 M. L. J. 127.

——S. 11—*Proviso— Applicability — Grant by Zamindar to Mission—Suit for rent and share of crop—Civil Court.*

The proviso applies to a land granted by a Zamindar to a missionary society on favourable terms. It is not a grant of an estate, but simply

MADRAS RENT RECOVERY ACT (VIII OF 1865). S. 11.

a grant of land to a tenant on favourable terms. A Civil Court can entertain a suit against a tenant for a share of the crop and for rent in respect of such land. (*Munro, J.*) BAPTIST MISSIONARY SOCIETY *v.* RATNAKARO PATRO.
12 I. C. 777 : (1911) 2 M. W. N. 517.

——S. 11—*Enhancement of rent—Improvement by tenant.*

A tenant is not bound to pay higher rent under S. 11 for improvement effected by him at his own expense. Rent higher than that agreed in the muchilika is an enhancement even though it be payable under sharing system. (*Sankaran Nair and Ayling, JJ.*) MALLIKARJUNA PRASAD *v.* VEMULA PATHI. 36 Mad. 4 : (1911) 1 M.W.N. 315 : 10 I. C. 68 : 9 M. L. T. 443

——S. 11 (i) and (iii)—*Shrotriemdar—Right of.*

If the occupancy right is in the Mirasidars, the Shrotriemdars can charge rent only; and the rate of rent is governed by S. 11 Cls. (1) and (3), (*Benson Offg. C. J. and Wallis, J.*) SUBBARAYA REDDI *v.* THIAGARAJA CHETTI.
10 I. C. 669 : 9 M. L T. 293.

——S. 11 (iii)—*Not retrospective.*

S. 11 (iii) of the Madras Rent Recovery Act or its corresponding provision of the Madras Estates Land Act, is not retrospective. (*Oldfield and Tyabji, JJ.*) ZAMINDAR OF PAMUR TALUK *v.* MALAKONDAYYA NAIDU. 29 I. C. 601.

——S. 11 (iv)—*Enhancement of rent—Sanction of Collector.*

The Zamindar, wishing to enhance the rent for any increase in the produce caused by water supplied from Government source, must previously obtain the sanction of the Collector under the Rent Recovery Act. (*Sankaran Nair and Abdur Rahim, JJ.*) BATCHU RAJU *v.* VENKATAKUMARA MAHIPATI. (1911) 2 M. W. N. 552 : 12 I. C. 712 : 10 M. L. T. 452 : 21 M. L. J. 1031.

——S. 11 (iv)—*Enhancement of rent—Collector's sanction—Implied contract — Question of fact.*

The rule as to collector's sanction for enhancement of rent is inapplicable where the landlord merely claims to revert to varam in absence of a contract. The question of implied contract under S. 11 is one of fact. (*Krishnaswami Iyer and Ayling, JJ.*) MALLIKARJUNA PRASAD *v.* VENKATA VASUDEVA. 9 M. L. T. 329 : 9 I. C. 169 : 21 M. L. J. 156.

——S. 12—*Year to year tenancy—Notice to quit—Oral—Ejectment—Damages.*

A notice of ejectment under the Madras Rent Recovery Act (VIII of 1865) must be in writing. If a tenant from year to year is wrongfully dispossessed on an oral notice to quit he is entitled to be in possession for a year after the period when he was ejected and to one year's mesne profits as damages in lieu of possession. (*Sankaran Nair and Tyabji, JJ.*) GOTTIMUKKALA CHINA *v.* SRIMAT SURANGAM NALLANI.
29 I. C. 574.

MADRAS RENT RECOVERY ACT (VIII OF 1865). S. 39.

——Ss. 18 and 49—*Distraint—Unauthorised person—Suit to set aside distraint—Jurisdiction of Civil or Revenue Court.*

A suit by a person not against his landlord but against a third person claiming that the crops distrained belonged to his tenants, is not maintainable in Revenue Court under the Act. S. 49 must be read together with S. 18 and other sections which lay down remedies under the Act. (*Sundara Aiyar and Ayling, JJ.*) KARKUTHAMMAL *v.* SELLAPPA GOUNDAN 10 M L T. 327 : 12 I. C. 422 : (1911) 2 M. W. N. 424.

——S. 37—*Arrears of* Kattubadi—*Interest—Suit before Madras Est. Land Act.*

S. 37 which provides for interest at 12 per cent. per annum being claimable on arrears of rent due is applicable to claims for rent of the nature of *Kattubadi.* In a suit for *Kattubadi* brought before the Madras Est. Land Act came into force the relation between the parties was governed by the Madras Rent Recovery Act and the landlord was entitled to interest on arrears at 12 per cent. per annum till the date of suit. The decree should provide for subsequent interest at 6 per cent. per annum. (*Sadasiva Iyer and Burn, JJ.*) PENUMETSA BAPIRAJU *v.* GOPISETTI NARAYANASWAMY NAIDU. 40 I C. 590.

——S. 37—*Applicability—Claim for* Kattubadi.

A claim for *kattubadi* is governed by S. 37, (*Munro, J.*) GOPISETTI NARAYANASWAMI NAIDU *v.* TALANRAJU VENKATA SUBBARAYADU
9 M. L. T. 315 : 9 I. C. 642 : (1911) 1 M. W. N. 235.

——S. 38—*Sale for arrears of rent—Suit for possession by auction purchaser—Irregularity in sale, whether a ground of defence.*

In a suit for possession by an auction purchaser at a rent sale against a defaulter in possession after the sale, the deft. can plead the illegality of the sale as a defence, though he may have taken no steps to set aside the sale ; but the irregularity should however be a material one depending on the circumstances of each particular case. An adjourning of the sale by the selling officer from the date fixed by the Court for want of time, the sale of items of property in a different order from what was advertised in the sale proclamation, the inclusion of the property of many defaulters in one sale notice, are not grave or material irregularities to bar a suit for possession, unless substantial injury has been caused thereby. (*Ayling and Spencer, JJ.*) PITTY THEYAGARAYA CHETTIAR *v.* SIVAPADA MUDALI.
10 M. L. T. 267 : (1911) 2 M. W. N. 275 : 12 I. C. 137 : 21 M. L. J. 1008.

——Ss. 38 and 39—Melwaram *right.*

A landlord can under Ss 38 and 39 proceed against a middleman by whom a lease of the *Melwaram* has been taken. 29 M. 79 Ref. (*Benson and Munro, JJ.*) CHITHAMBARAM *v.* SOMASUNDARAM. 9 I. C. 261 : 9 M. L. T. 354.

——S. 39—*Revenue sale—Suit to set aside—Person at whose instance sale was brought about if a necessary party.*

MADRAS RENT RECOVERY ACT (VIII OF 1865), S. 39.

Though in a suit to set aside a rent sale under S. 39, the person at whose instance the sale was brought about is not a necessary party yet to a sale held in execution proceedings a decree holder is a necessary party (*Sadasiva Iyer and Spencer, JJ.*) ANNAMALAI VELAN *v* MURUGAPPA VELAN. **38 Mad. 837 : 1 L. W. 212 : (1914) M. W. N. 236 : 22 I. C. 826 : 26 M. L. J. 239**

——S. 39—*Notice of sale—Service of notice of demand.*

Under S. 39 service by affixing the notice to the plff.'s home is not valid. The failure to serve the demand on the plff. renders the sale illegal. (*Benson and Sundara Aiyar, JJ.*) CHIDAMBARAM CHETTI *v.* MEENAKSHI SUNDARA NACHIAR. **9 M. L. T. 447 : 10 I. C. 118 : (1911) 1 M. W. N. 354.**

——S. 49—"*Proceedings*"—*Meaning of.*

The word "proceedings" in S. 49 of the Act is not restricted to proceedings taken by a Public Officer or Court. (*Benson and Sundara Aiyar, JJ.*) POLINA ACHANNA *v.* MADIPATI VENKATARAMANA. **(1911) 2 M. W N. 585 : 10 M. L. T. 542 : 13 I. C. 175 : 22 M. L. J. 127.**

MADRAS REVENUE RECOVERY ACT (II OF 1864).

——*Land Revenue— Nature of— Suit for refund of.*

Land Revenue is a tax imposed on lands by virtue of the prerogative of the estate. The liability to pay Land Revenue does not rest on contract or a relation resembling contract. It is entirely a matter for the Government to decide what amount of revenue should be levied on any land and civil courts have no jurisdiction to try any question relating to it. A suit for refund of land Revenue on the ground that as the government failed to supply water for raising wet crops, it was not entitled to levy the revenue assessed on the land, is outside the jurisdiction of a civil court and cannot be tried by it (*Benson and Sundara Aiyar, JJ.*) SECRETARY OF STATE *v.* RAJU. **(1912) M. W. N. 1242 : 17 I. C. 953 : 23 M. L. J. 746.**

——*Applicability — 'Proceeding' — Mere demand—Suit for refund of* Tiruvajasti *under the Irrigation Cess Act—Madras Irrigation Cess Act (VII of* 1865)—*Limitation Act (XV of* 1877), *Sch. II, Art.* 16.

A mere demand by Government under the Madras Revenue Recovery Act does not amount to a proceeding under it and thence S. 59 has no application. A suit to claim refund of *Tiruvajasti* under the Irrigation Cess Act is governed not by S. 59 of the Madras Revenue Recovery Act but by Art. 16, Sch. II, of the Lim Act. (*Abdur Rahim and Sundara Iyer, JJ.*) RAVALA VENGU REDDI *v.* SECRETARY OF STATE. **15 I. C. 328.**

——*Illegal sale.*

Although an owner or proprietor of land, that has been sold under S. 44 of the Madras Revenue Recovery Act illegally, has failed to take steps for setting aside the sale under S. 38 of the Act, he is not debarred from pleading such illegality as a bar to an ejectment suit by the purchaser. (*Wallis and Ayling, JJ.*) SENATHIYARUDAYAN *v.* KARUPPUDAYAN. **14 I. C. 70.**

——*Cess—Liability of land to pay.*

It is the land which is, under the Act, liable to pay cess to Government. (*Wallis, J.*) NARAYANASWAMI NAIDU *v.* ARETI TIRUPATIRAIDU. **10 I. C. 676 : 9 M. L. T. 310.**

——S. 3— *Payment of Revenue — Person liable.*

The proprietor is the person bound to pay revenue to Government to prevent sale of the land. 8 M. L. T. 186 Diss. 33 M. 41 ; 20 M. L. J. 640 F. 7 ; M. 405 ; 13 M. 89 Ref. (*Benson and Sankaran Nair, JJ.*) ZAMINDAR OF URKAD *v.* SAHASRANAMA IYER. **34 Mad. 520 : (1911) 1 M. W. N. 257 : 9 M. L. T. 367 : 9 I. C. 643 : 21 M. L. J. 662.**

——S. 5—"*Defaulter*"—*Transferee of land—Arrears due.*

A transferee from a landowner is "defaulter" within the meaning of the Act, with respect to arrears due before the transfer. (*Benson and Sundara Aiyar, JJ.*) KOTTA SUBBIAH *v.* SECRETARY OF STATE. **35 Mad. 555 : (1911) 1 M. W. N. 182 : 9 M.L.T. 348 :9 I. C. 761 : 21 M. L. J. 656.**

——S. 6—*Scope—Regn.* (*XV of* 1802) *S.* 7.

S. 6 is exhaustive. The plff. must show that he can claim the benefit of sanad apart from S. 7 of Reg. (XXV of 1802). To get the benefit of S. 6, the defaulter must prove that he holds a sanad. (*White, C. J. and Tyabji, J.*) VENKANNA IYER *v.* SECRETARY OF STATE. **19 I. C. 732 : 1913 M. W. N. 494.**

——S. 8—*Distraint—Production of warrant —Whether necessary—Meaning of "produced" explained.*

The word "produced" in S. 8 of the Act only means that the distrainer should have the warrant in his possession at the time of distraint and should show it as his authority to any one interested in the property if present there. It is not necessary to show the warrant unless it is asked for. (*Ayling and Napier, JJ.*) PUBLIC PROSECUTOR *v.* KAYAMIYAL KUNHAMAD. **18 Cr. L. J. 622 : 5 L. W. 537 : 39 I. C. 990 ; (1917) M. W. N. 413.**

——S. 25 —"*Defaulter*" —*Owner allowing patta to stand in another's name—Notice of demand.*

The ostensible registered proprietor alone is the defaulter in S. 25 who is entitled to notice of demand before attachment. A person owning land but allowing the patta to stand in another person's name cannot complain of want of service of notice, if the latter has been served. (*Abdur Rahim and Oldfield, JJ.*) MANAKARI VENKAPPA CHARI *v.* HOLAGUNEL POMPANA GOWD. **(1918) M. W. N. 191 : 7 L. W. 372 45 I. C. 474 : 23 M. L. T. 297.**

——Ss. 25, 26 and 27—*Notice to defaulter—Procedure.*

Per *White, C.J.*—Service of demand notice and attachment of notices on a defaulter under the

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 37.

Act can be effected in any of the ways mentioned in Ss. 25, 26 and 27. The sections provide for independent method of service. (*White, C. J. and Tyabji, J.*) VENKANNA IYER *v.* SECRETARY OF STATE. **19 I. C. 732 : (1913) M. W. N. 494.**

——Ss. 37, 38 (1)—*Proviso, and 59—Revenue sale -Confirmation by Deputy Collector--Approved by Collector—Collection of sale by Collector on the direction of the Board of Revenue—Suit to set aside order—Limitation.*

The power of general superintendence over Collectors given to the Board of Revenue by Regs. I and II of 1803, did not authorise the latter to direct the Collector to pass a special order contrary to what he had already done and to cancel a revenue sale which he had confirmed. The order under S. 38 (3) of the Revenue Recovery Act, having been passed by the Deputy Collector within S. 38 (3) neither he nor the Collector had power under the Act to pass any further order. The proviso to S. 38 does not give power to set aside a sale after it had been confirmed under the first part of the section. The order setting aside the sale was, in effect, a review of the previous order confirming the sale and passed wholly without jurisdiction and not under any power confirmed by the Act. Consequently a suit to set aside the order need not be brought within the period prescribed by S. 59 of the Act II of 1864). (*Phillips and Krishnan, JJ.*) SUNDARAM IYENGAR *v.* RAMASWAMY IYENGAR. **41 Mad. 955 : 35 M. L. J. 177 : 8 L.W. 289 : 47 I. C. 692 : 24 M. L. T. 207.**

——S. 38 — *Revenue sale—Irregularity — Collusion.*

In case of a revenue sale, the Collector has the right to set it aside on the ground of any irregularity in the conduct of the sale. But for a Civil Court to interfere with the validity of a Revenue sale there must be sufficient ground. Omission to distrain moveables or thecrops or an agreement between the purchaser and the mortgagee of the property, acollusive agreement among bidders not to bid against each other, these do not constitute sufficient grounds for the Civil Court to set aside a Revenue sale. (*Abdur Rahim and Oldfield, JJ.*) MANAKARI VENKAPPA CHARI *v.* HOLAGUMEL POMPANA GOWD. **(1918) M. W. N. 191 : 7 L. W. 372 : 45 I. C. 474 : 23 M. L. T. 297.**

——Ss. 38 and 44—*Illegal sale—Omission to set aside—Effect.*

Although an owner or proprietor of land, that has been sold under S. 44 of the Madras Revenue Recovery Act illegally, has failed to take steps under S. 36 of the Act, he is not debarred from pleading such illegality as a bar to an ejectment suit by the purchaser. **14 I. C. 703.**

——Ss. 38 and 39 --*Revenue sale—Demand of and payment towards a later instalment—Sale, validity of.*

Where a property is sold for default of the occupiers to pay a particular instalment but a demand was made for and payment was made towards a subsequent instalment exceeding that due for the earlier instalment for non payment of which the property was sold, the payment should

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 42.

be credited towards the earlier instalment and the sale is liable to be set aside. (*Sundara Aiyar and Phillips, JJ.*) SECRETARY OF STATE FOR INDIA *v.* VENKATASUBBIAH AIYAR. **12 I. C. 627.**

——S. 38—*Revenue sale—Purchase benami.*

In the case of a revenue sale the real purchaser can prove his title and that the purchase was benami for him. 29 M 473 Foll. (*Krishnaswami Aiyar and Ayling, JJ.*) SULAIMAN *v.* PATTUNA BIVI. **9 I. C. 136 : 9 M. L. T. 294.**

——Ss. 39 and 42—*Revenue sale— What passes under—Alienee from Hindu widow—Rights of Purchaser.*

In a revenue sale what is sold is the proprietary interest in the land and not merely the interest which the registered pattadar actually had. Where the registered pattadar of land paying revenue to the Government is a Hindu widow who succeeded to the land as heir to her husband or an alienee from her, a sale of the land for arrears of revenue passes to the purchaser not merely the widow's interest but the full proprietary interest in the land. 13 Mad. 89 Dist. (*Abdur Rahim and Oldfield, JJ.*) GOVINDA MAZHAVARAYAN *v.* VELU MAZHAVARAYAN. **(1920) M. W. N. 701 : 59 I. C. 307 : 12 L. W. 530.**

——S. 42 —*Revenue sale—Free of encumbrances—Meaning of—Land Improvement Loans Act—Proviso.*

The effect of S. 42 of the Act (II of 1864) is not only to discharge pre-existing encumbrances on the property on which the arrear is due but also upon every property which is brought to sale for arrears of revenue due from the defaulter, 34 Mad. 493 Ref. The provisions of S. 42 of the Madras Revenue Recovery Act apply to a sale under S. 7 (1) (*c*) of the Land Improvement Loans Act. A sale of land uuder the provisions of the latter enactment is free from prior incumbrances 7 Mad. 431 ; 25 Mad. 572 ; 34 Mad 493 Foll. The words of a proviso cannot be used to extend the operation of the section to which it is attached. But where there is doubt as to the true meaning of the substantive part of the section, it is legitimate to look to the words of a proviso, in order to determine the proper interpretation of the section. (1917) A. C. 68 Rel. (*Ayling and Seshagiri Aiyar, JJ.*) SANKARAN NAMBUDHRIPAD *v.* RAMASWAMY AIYAR. **41 Mad. 691 : 23 M. L. T. 346 : 8 L. W. 12 : 47 I C. 301 : 34 M. L. J. 446.**

——S. 42—*Govt. revenue—Right of Govt. to recover—Nature of*—Jodi *assignment—Assignee if entitled to a first charge.*

Per *Wallis, C. J.*—The statutory charge for rent possessed by land-holders and certain *Inamdars* is a creation of the Madras Est. Land Act. Prior to that it was well settled that where the Government assigned its right to revenue to the *Inamdar* subject to the payment of a *jodi* the *Inamdar* did not acquire a charge upon the land but was left to recover his rent from the occupiers under the provisions of the Madras Rent Recovery Act. Where the *jodi* payable by an *Inamdar*

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 42.

to the Govt. has not been assigned, it is recoverable by the Govt. like *Peishkush*, by sale of the *Inamdar's* interest under the Rev Recovery Act. Where the right to collect the *jodi* has been transferred to a *Zamindar* or *Mittadar*, in consideration of his undertaking to pay a fixed *Peishkukh*, the *Zamindar* or *Mittadar* has no charge upon the lands therefor and he can only recover arrears of *jodi* in a suit for rent. The right of Govt. as regards Govt. Revenue is only a right to a charge on the land and a right to forfeit, in due course of law the title of the person holding land who does not pay the charge. 6 M. 303 ; 13 M. 89, Foll. Per *Seshagiri, Iyer, J.*—The Govt. has a first charge for *jodi* which is directly payable to it. The terms *jodi* or quit rent is applied indiscriminately in several decisions to what is recoverable by a proprietor from his under-tenure holders as well as to payments due to Govt. by way of assessment. According to S. 141 of the Contract Act, an assignee of Govt. Revenue is entitled to the security but not all the statutory remedies of his assignor and consequently an assignee of *jodi* as such will have a first charge therefor. (*Wallis, C. J. and Seshgiri Iyer, J.*) SUBBARAYA GOUNDAN *v.* RANGANATHA MUDALIAR.

40 Mad. 93 : (1916) 1 M. W. N 216 : 3 L W. 273 : 32 I. C. 971 : 30 M. L. J. 387.

——S. 42—*Revenue sale—Irrigation cess, if land revenue—Madras Irrigation Cess Act, S. 2—Scope of.*

Irrigation and other cesses charged upon the land are part of the land revenue itself and S. 42 of Act II of 1864 applies to sales for recovery of these cesses. S. 2 of the Irrigation Cess Act does not restrict S. 42 of Act II of 1864 as regards sale for arrears of irrigation cesses. (*Sadasiva Aiyar and Napier, JJ.*) GUNNAM DORAYYA *v.* VADAPALLI AYYAMACHARYALU.

16 M. L T. 226 : (1914) M. W. N. 648 : 25 I. C. 797 : 27 M. L. J. 295.

——Ss. 42 and 2—*Revenue sale—Arrears of Water cess—Sale free of encumbrances.*

A sale for arrears of water cess payable under Act VII of 1865 would convey a title to the purchaser free of encumbrances. (*Benson and Sundara Iyer, JJ.*) VEERANAN AMBALAM *v.* KARUPPAYA PILLAY.

37 Mad. 49 : 19 I. C. 386 : 24 M. L. J. 511.

——Ss, 44, 59 and 63—*Sale of minor's property—Arrears of revenue—Regulation X of 1831, S. 2—Effect of—Registry in mother's name.*

A sale of a minor's property under the Revenue RecoveryAct is not a proceeding to which S. 59 of the Act is applicable so as to compel the aggrieved parties to sue within six months of the sale. S. 59, is inapplicable to cases protected by Regulation X of 1831. Regulation X of 1831 does not apply to such estates of minors as are ordinarily taken charge of by the Court of Wards ; ryotwari lands owned by minors also come within the protection of the Regulation. 10 M. 44 Dist. Where the patta erroneously stands in the name of the minor's mother the fact does not preclude the minor from invoking the aid of the regulation.

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 59.

33 M. 41 Dist. (*Wallis, C. J., Sadasiva Aiyar and Spencer, JJ.*) SAMINATHA AIYAR *v* GOVINDASAMI PADAYACHI.

41 Mad. 733 : (1918) M. W. N. 409 : 8 L. W. 37 : 45 I. C. 595 : 34 M. L. J. 536 (F. B.)

——S. 44—*Proviso—Applicability.*

The proviso to S. 44 applies only when land, more than sufficient to discharge the arrears, is sold. S. 44 is only a permissive section. (*White, C. J. and Tyabji, J.*) VENKANNA IYER *v.* SECRETARY OF STATE.

19 I. C. 782 : (1913) M. W. N. 494.

——S. 58—Peishcush—*Fixing of—Civil Court—Jurisdiction.*

A Civil Court has no jurisdiction to fix the proportionate *peishcush* by a mittadar to Govt. S. 58 of the Act 11 of 1864 is a bar to such a suit, and its provision is of general application and not restricted to questions arising in proceedings under that Act. *Tybji, J.*, contra. (*White, C.J. and Tyabji, J.*) MUTHAMMAL *v.* SECRETARY OF STATE.

13 M. L. T. 293 : (1913) M. W. N. 307 : 19 I C. 68 : 24 M. L J. 405.

[The decision ultimately turned on another point on appeal. **16 M. L. T. 432 : 26 I. C. 817 : 27 M. L. J. 529.**]

——S. 59—*Water-cess—Suit for recovery of water cess paid under protest.*

A suit for recovery of water cess paid under protest is governed by Art. 16 of the Lim. Act and not by S. 59 of the Madras Revenue Recovery Act. (*Schwabe, C. J.*) SECY. OF STATE FOR INDIA *v.* CHELLASAMI VENKATARATNAM.

46 M. 488 : 17 L. W. 683 : 32 M. L. T. 236 (H. C) : 1923 M. W. N 258 : 45 M. L. J. 12 : 1923 M. 652.

——S. 59—*Proceedings under—Notice of demand—Suit for recovery of water-cess paid under protest not governed by section.*

Where there was only a demand by the Government for water-cess and the plaintiff paid it under protest and there were no proceedings as contemplated by the Act such as attachment of any moveable or immoveable property or arrest of the plaintiff, a suit by the plaintiff for recovery of the water cess is not governed by S 59 of the Act but by art. 16 of the Lim. Act. (*Abdur Rahim and Sundara Aiyar, JJ.*) PANCHALAPALLI PICHI REDDI *v.* SECY. OF STATE FOR INDIA.

70 I. C. 884.

——S. 59—*Fraud or irregularity—Suit to set aside—Limitation.*

A suit under S. 59 must be brought within 6 months after the plff has knowledge of fraud or irregularities in the conduct of sale for arrears of revenue, and time runs from the date of discovery of fraud and not from the date of sale. Per *Ramesam, J.* 'Cause of action' in S. 59 means not only the transaction by which the plff. is aggrieved but also the discovery of fraud by which the transaction was brought about. (*Spencer and Ramesam, JJ.*) MUTHIA CHETTIAR *v.* KARUTHAMEDA PILLAI.

13 L. W. 598 : 63 I. C. 135 : 41 M. L. J. 92.

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 59.

——S. 59—*Suit by aggrieved person—Revenue sale—Illegality—Suit to set aside—Limitation.*

A suit to set aside a sale under S. 59 of the Madras Revenue Recovery Act by an officer competent to conduct under the authority of the Act must be instituted within six months from the date of the sale. The onus is on plff. to prove that the provisions of the Act could not be legally applied and that his case is out of the scope of S. 59. (*Wallis, C. J. and Spencer, J.*) BHANIREDDI VENKAN DORAGARU *v.* SECRETARY OF STATE FOR INDIA. **48 I. C. 844.**

——S. 59—*Suit by aggrieved person—Revenue sale—Omission to serve notice—Effect.*

Omission to serve notice of demand is an illegality or irregularity by the Collector and would vitiate his proceedings but this is not enough for the aggrieved party to enable him to obtain a declaration that the sale is invalid if he does not sue within the period prescribed by S. 59 of the Act. He cannot ignore and sue for possession or declaration. 34 C. 811; 44 C. 328 (P. C.) Dist. (*Seshagiri Iyer and Napier, JJ.*) VADUR CHINNA NAGI REDDI *v.* DEVINENI VENKATARAMANIAH. **23 M. L. T. 231 : 7 L W. 468 : 45 I. C. 653 : (1918) M. W. N. 224.**

——S. 59— *Applicability of— Purchase by mortgagor—Benami.*

S. 59 of the Act does not apply to a case where the mortgagor purchases the mortgaged property at a revenue sale due to his own default, benami in another's name, the revenue sale need not be set aside by the mortgagee before suing on the mortgage. (*Sadasiva Aiyar and Napier, JJ.*) NUKALAPATI RAMI REDDI *v.* VAVILLA VENKATESAM. **27 I. C. 274: (1914) M. W. N. 916**

——S. 59—*Suit by aggrieved person—Limitation—Construction of statutes— Lim. Act, Ss. 15 (2) and 29—Applicability.*

Whether the provision of the Lim. Act applies to cases under special or local Acts providing for limitation, depends on whether the special Act enacts a complete body of provisions as to the limitation of suits under the Act. S. 59 of the Madras Revenue Recovery Act is subject to the general law of limitation for the time being in force, and a suit to set aside a sale for fraud is subject to S. 15 (2) of the Lim. Act notwithstanding S. 29 of the Act. 34 M. 505, Dist. 12 M. 168; 3 M. L J 255, Rel. (*Benson and Sundara Aiyar, JJ.*) SRINIVASA AIYANGAR *v.* SECRETARY OF STATE. **38 Mad. 92: 18 I. C. 617: 24 M L. J. 41.**

MADRAS SALT ACT (IV OF 1889.)

——S 11—*License—Mortgage of—Not valid.*

S. 11 of the Madras Salt Act is not confined in its operation to the absolute transfers of the entire interest of the licensee but applies to transfers by way of mortgage. Consequently a mortgage of a salt pan without leave of the Commissioner is of no effect against him. (*Kumaraswami Sastri and Deva Doss, JJ.*) GUJJU NAGAMMA *v.* SECRETARY OF STATE FOR INDIA. **42 M. L. J. 318 : (1922) M. W. N. 166: 66 I. C. 356: 31 M L. T. 61 (H C.) : 16 L. W. 295: 1922 Mad. 106.**

MADRAS SALT ACT (IV OF 1889), S. 12.

——XXVIII OF 1860.

——S. 25—*Decision of dispute between owners of two villages is final.*

If a Survey Officer acting under the Act, decides a boundary dispute between owners of two villages, the decision becomes final, under S. 25, if no suit is filed in a Civil Court within two months. (*Sadasiva Aiyar and Spencer, JJ.*) NACHIYAPPAN *v.* ALAGAPPA CHETTY. **62 I. C. 87: 13 L. W. 172.**

——Ss. 11 12 and 13—*Order of Survey Officer—On what point final.*

The order of a Survey Officer in a boundary case under S. 12 (3) of the Act is final only with regard to the dispute about the boundary to go into the Survey. But it does not preclude the parties to dispute the correctness of the boundary in a court of law. (*Wallis, C J. and Sadasiva Aiyar, J.*) CHINNAVENKATRAYADU *v* RAMAMURTI **44 M. 340: 40 M. L. J. 149: (1921) M. W. N. 117: 61 I. C. 986: 13 L. W. 451.**

——S. 11—*Order under—Finality of.*

An order of Survey Officer under S. 11, if not reviewed by the appellate authority or questioned in suit as provided in the section is conclusive and operates as *res judicata* in a subsequent suit to oust the unsuccessful party who continued in possession. (*Wallis, C J. Ayling and Kumaraswamy Sastri, JJ.*) MUTHIRULANDI POOSARI *v.* SETHU RAMA AIYAR. **42 Mad. 425: 9 L. W. 323 : 25 M. L. T 293 : 50 I. C. 43: (1919) M. W. N. 226 : 36 M L. J. 356 (F. B.).**

——S. 11—*Order under—Suit to set aside—Limitation.*

A Survey Officer's orders, if wrong, should be annulled in a suit brought within the time, fixed by the Surveys and Boundaries Act. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) GOPALASWAMI CHETTY *v.* SECRETARY OF STATE. **16 I. C. 955.**

——Ss. 12 and 13—*Suit to establish right—Limitation for—Starting point—Party to dispute before survey officer—Party to appeal—Who is.*

A statement in the judgment of the appellate Survey Officer that a party to the appeal had notice of the appeal is not conclusive of the fact of service of the notice where the Civil Court finds that neither party to the appeal in the Survey proceedings had notice of the appeal. In such a cause the jurisdiction of the civil court is not ousted. The first defendant and plaintiff had been given rough pattas at the survey for the lands found to be in their possession. The first defendant presented to the superior Survey Officer a petition in which he stated that his patta included too little and the plaintiff's too much and asked for correction of each. He did not formally set out the plaintiff as respondent to his appeal though he desired relief against her by way of appeal. Notice of the appeal was issued to the plaintiff but was not duly served on her before the date fixed for the hearing, but the superior Survey Officer nevertheless declared her *ex parte* and allowed the appeal. In a suit by plaintiff for a declaration of title to the land in dispute. *Held,*

MADRAS SURVEYS AND BOUNDARIES ACT (IV OF 1897,) S. 13.

that S. 13 of Act (IV of 1897) had no application to the case and that the suit was not barred though brought more than a year after plaintiff had notice of the survey appellate decision because (1) plaintiff was not party to any boundary dispute before the inferior Survey Officer (2) She was not a party to an appeal preferred under S. 12 of the Act and (3) she was not a person to whom notice of such appeal was given (*Oldfield and Ramesam, JJ.*) SUBRAMANIA MUDALY *v.* MEENAKSHI AMMAL. **43 M. L. J. 194: 16 L. W. 149: 31 M. L. T. 145. (H C.) 1922 Mad. 392.**

——S. 13—*Decision of Survey Officer—Question of possession—Decision on—Omission to sue—Effect of.*

In proceedings before a Survey Officer the plaintiff was declared to be in possession and entitled to certain property. The defendant who as a matter of fact was in possession did not sue to set aside the decision within one year. In a suit by plaintiff for possession: *Held*, that though defendant had been in possession for 12 years beginning from a date prior to the decision of the survey officer, still his omission to sue within one year of the decision barred his right and plaintiff was entitled to a decree for possession. 42 M. 425; 38 M. 1202 Ref. (*Coutts Trotter and Ramesam, JJ.*) KUPPUSWAMI IYER *v.* VENKATASWAMI. **31 M. L. T. 62 (H. C.): 16 L. W. 99: 1923 M. 29.**

——S. 13—*Adverse decision—Limitation—Starting point.*

Where an original order of a Survey Officer, adverse to the plaintiff passed on 31-10-08 but cross-appeals by both parties were heard together and disposed off by a single order on 18-1-1909, the date of the latter order is the starting point of limitation for the plaintiff's suit for possession. (*Ayling and Tyabji, JJ.*) VEERARAGHAVA CHARIAR *v.* KRISHNAMA CHARIAR. **29 I. C. 907.**

——S. 17 (a)—*Resistance to Survey Officer—Good faith—Lawful authority—Colour of office—Meaning of.*

A Surveyor put up boundary marks *bona fide* on land not included in notification. Accused removed the marks. Accused was convicted under S. 434. The section does not make distinction between marks fixed correctly and those fixed incorrectly and there is no reference to the propriety of the exercise of authority. An offence under S. 186 is established if surveyor *bona fide* believed he was discharging public functions though he was acting illegally. 'Under colour of office' in S. 99 simply mean that the public servant must be acting in good faith that is, with due care and caution. (*Oldfield and Sadasiva Iyer, JJ.*) PUBLIC PROSECUTOR *v.* MADHANA BHONJO SANTS. **(1916) 2 M.W.N. 183: 4 L. W. 377: 36 I. C. 161: 17 Cr. L. J. 481: 31 M. L. J. 305.**

——S. 20 (3)—*'Tenant' does not include the holder of a rent free in Zamindari.*

MADRAS TOWNS NUISANCES ACT (III OF 1889), S. 6.

The word 'tenant' in S. 20 Cl. 3 of the Survey and Boundaries Act does not include the grantee of a rent free inam in a Zamindari. (*Ayling, O.C. J., Kumaraswami Sastri and Odgers, JJ.*) RAJAH OF VENKATAGIRI *v.* SUBBIAH. **14 L. W. 589: (1921) M. W N. 783 : 30 M. L. T. 532 : 45 M. 1 : 41 M. L. J. 530 : 1922 M. 137.**

——S. 24—*Decision of Survey Officer how far conclusive.*

A decision of the Boundary Settlement Officer that certain lands did not form part of a Zamindari, if not contested by a suit, as well as the grounds of that decision, *viz.*, that the lands never had formed part of the *mitta* are *res judicata* between the parties in any subsequent suit for those lands. (*Wallis, C. J., Ayling and Seshagiri Iyer, JJ.*) MUTHAMMAL *v.* SECRETARY OF STATE. **27 M. L. J. 529: 26 I. C. 817: 16 M. L. T. 432.**

[But see (1921) M. W. N. 117.]

MADRAS TOWNS NUISANCES ACT (III OF 1889.)

——S. 3—*Confiscation—Money found on person of gambler.*

Money or coins can be said to be used for the purpose of gaming under S. 3 of the Act only when they are actually staked. To justify their confiscation it is not enough that they are found on the person of the gambler. (*Ayling and Phillips, JJ.*) APPAJI AIYAR *v.* EMPEROR. **41 Mad. 644 : 7 L. W. 528 : 44 I. C. 205: 19 Cr. L. J. 301 : 34 M.L.J. 253.**

——S. 3—*Nuisance—Gambling.*

A conviction for committing a public nuisance will be justified if the accused caused annoyance and obstruction to the public by gambling on a thoroughfare. (*Spencer, J.*) *In re* JUTURI VENKATTAPPA. **28 I. C. 110 : 16 Cr. L. J. 254.**

——S. 3 (12)—*Offence under — Bench of Magistrates can try.*

It is competent to a Bench of Magistrates to try an offence under S. 3 (12) of the Mad. Towns Nuisance Act. 13 M. 142 foll. (*Krishnan, J.*) RAMASAMI CHETTY *v.* MUTHUVELU MUDALI. **16 L. W. 562 : 31 M L. T. 420 (H. C.) : 45 M. 843 : 24 Cr. L. J. 110 : 1923 M. W. N. 57 : 1923 M. 191.**

——Ss. 6 and 7—*Appeal from conviction under—No proof of—Common gaming house—Retrial when can be ordered.*

Where, on appeal preferred by accused convicted of the offence of gambling in a common gaming house, the Sub-divisional Magistrate finds that there was evidence that the house was a common gaming house, he should not order a retrial in the absence of an assurance by the prosecution that evidence would be forthcoming that the house was a common gaming house. (*Sadasiva Iyer, J.*) *In re* MOGAMBARA PATHAN. **34 I. C. 305 : 17 Cr. L. J. 193 : 28 M. L. J. 379.**

MOTOR VEHICLES ACT (VIII OF 1914), S. 8.

MOTOR VEHICLES ACT (VIII OF 1914.)

——— S. 8—*Licensee—Driving without license —Offence.*

If "upon demand" by a Police Officer a person driving a motor vehicle could not produce his driving license then and there he is guilty under S 8 of the Motor Vehicles Act, 1914. *Tudball, J.*) MADAN MOHAN NATH RAINA *v.* EMPEROR.
43 All. 123 : 18 A. L. J 933 : 58 I. C 148 : 21 Cr. L. J. 724 : 2 U P. L. R. (A) 227.

———S. 11—*Rules framed by U. P. Govt. under* R. 12, *Cl.* (a)—*Front portion of vehicle—Meaning of.*

R. 12 framed by the U. P. Govt. under S 11 of the Act only requires that on such side of the front portion of the vehicle a lamp showing a white light in joint should be affixed. 'Front portion' in Cl. (*a*) must read as contradistinguished from the rear and back of the vehicle in Cl (*b*). 'Front portion' does not mean the extreme end of the bonnet or of the front portion but the portion which is outside the seats and the sheering wheel. (*Banerjee, J.*) MUHAMMAD SAID *v.* EMPEROR. **16 A. L. J. 623 : 46 I. C. 1004 : 19 Cr. L. J. 860.**

———S. 18 (2)—*Order of suspension of license—Appeal.*

An order of suspension of license under section 18 (2) of the Motor Vehicles Act is appealable under section 407 of Criminal Procedure Code (*Hallifax, A. J. C.*) DHEKLIA KUMBI *v.* EMPEROR. **23 Cr. L. J. 73 : 1922 Nag. 71.**

MADRAS VILLAGE COURTS ACT (I OF 1889).

———S. 18—*Suit on contract—Voluntary subscription for village festival—Right to recover.*

A suit by the plaintiff for recovery of a sum of money alleged to have been agreed to be paid by the defendant towards the expenses of a village festival, is not a suit on contract and is not cognizable by the Village Munsif. (*Wallace, J.*) KOSALI RAMU PILLAI *v.* PULASTHIAN PILLAI **17 L. W. 321 : (1923) M W. N. 86 : 1923 Mad. 330.**

———S. 24—*Pleader—Right to appear in Village Court.*

A vakalatnamah from the party entitles the holder to appear and plead in a Village Court under S. 24 of the Mad. Village Courts Act and no provision in the Act debars any one from this privilege. (*Ayling and Tyabji, JJ.*) MUCHIRAZU RAMACHANDRA ROW *v.* SECRETARY OF STATE. **31 I. C. 310 : 39 Mad. 808.**

———Ss. 66 and 67—*Decree of Village Munsif withdrawn to District Munsif Court for execution—District Munsif cannot transfer decree for execution to another court.*

A District munsif receiving by transfer a decree of a Village Court under S. 66 of the Madras Village Courts Act or withdrawing execution of a decree to his own file under S. 67 of the Act has no jurisdiction to transfer it for execution to another District Munsif under S. 39 of the C. P. C. (*Oldfield and Devadoss, JJ.*) KANDATH SANKARAN NAIR *v.* KARAY KUZHAKIPROTH. **18 L. W. 19 : 32 M. L. T. 403 ; (1923) M. W. N. 353 : 44 M.L.J. 643 : 1923 M. 651.**

MAHOMEDAN LAW—Applicability.

——— S. 73—*Order under—Revision.*

Revision from an order passed by a Dt. Munsif under S. 73 lies only under S. 15 of the Charter Act, *Semble* : It may be revised also under S. 115 of the C.P.C (*Sadasiva Aiyar and Moore, JJ.*) PARAMASIVAM PILLAI *v.* YANAYAGATH. **34 I C. 503.**
[On appeal from 32 I. C. 527.

———S. 73—*Order under —Review —Dt. Munsif, power of.*

A Dt. Munsif can review a judgment which he, acting under S. 73, set aside by mistake though that Act contemplates no such review. (*Kumaraswami Sastri, J.*) PARAMASIVAM PILLAI *v.* PERIYANAYAGATHAMMAL. **32 I. C. 527 : [Doubted on appeal 34 I. C. 503.]**

MAHANT.

See HINDU LAW—RELIGIOUS ENDOWMENT.

MAHOMEDAN LAW.

Applicability.
Conversion.
Custom.
Divorce.
Dower.
Family arrangement.
Gift.
Guardianship.
Interest, law as to.
Joint family.
Legitimacy
Maintenance.
Marriage.
Partition.
Religious office.
Succession.
Texts.
Waqf.
Will

——— **Acknowledgment, doctrine of.**

See MAH. LAW—LEGITIMACY.

———**Advancement.**

See TRUSTS ACT, SS. 81 AND 82.

Applicability.

——— *Applicability—Halai Memons of Porebunder.*

The Halai memons in Porebunder are governed by the Hindus with regard to the succession of females. (*Lord Dunedin.*) KHATUBAI *v.* MAHOMED HAJI ABU. **27 C. L J. 131 : 25 Bom. L. R. 127 : 17 L. W. 208 : 32 M. L. T. 45 : 47 B. 146 : 50 I. A. 108 : 27 C. W. N. 774 : 72 I. C. 202 : 44 M. L. J. 35 : 1922 P. C. 414.**

——— *Applicability—Presumption as to death —Evidence Act, S 2 (1).*

The presumption under the Muhammadan Law of inheritance that a person missing, must be presumed to have died on the date of disappearance cannot be availed of by reason of S. 2 (1) of the Evidence Act. (*Lindsay and Kanhaiyalal, JJ.*) MAIRAJ *v.* ABDUL. **63 I. C 286 : 19 A. L. J. 713.**

———*Applicability of—Halai Memons—Bombay.*

The Halai Memons of Bombay are governed by Mahomedan Law in matters of succession,

MAHOMEDAN LAW—Applicability.

21 Bom L. R. 85 foll. (*Marten and Fawcett, JJ.*) SIR MAHOMED YUSUF *v.* HARGOVINDAS JEVAN.
24 Bom. L. R. 753 : 47 B. 231 : 1922 Bom. 392.

———*Applicability—Joint family—Acquisition—Presumption.*

Under Mahomedan Law there is no such thing as a joint family as under Hindu Law and there is no presumption that acquisitions of several members living in commensality are made for the benefit of the family jointly. (*Mookerjee and Buckland, JJ.*) KRISHNA JIBAN *v.* MUHAMMAD.
63 I. C. 244 : 33 C. L. J. 369.

———*Applicability — Hindus—Agreement by Hindu to dedicate to mosque—Legality.*

An agreement by a Hindu to dedicate to a mosque is illegal under Mahomedan Law and cannot be enforced. (*Holmwood and D. Chatterjee, JJ.*) FAZLE RAHMAN *v.* ANATH BANDHU.
11 I. C. 436: 16 C. W. N. 114.

———*Applicability—Pathans of Ludhiana District.*

Where there are Pathans and non-agriculturists in Punjab Mahomedan Law prevails in matters of inheritance. The Pathan residents of Ludhiana city are therefore governed by Mahomedan Law and a special family custom regarding inheritance must be strictly proved. Disregard of the rights of the females in the family to a large extent is not sufficient to prove general or special custom. (*Shadi Lal, C.J. and Wilberforce, J.*) NATHU *v.* MURAD BIBI. **2 Lah. L. J. 450.**

———*Applicability—Evidence and procedure—Rules of—How far applicable.*

The rules of procedure and evidence to be followed in deciding disputes as to dower between husband and wife, which are at variance with the statute law, cannot be followed by Courts in British India (*Chevis and Shadi Lal, JJ.*) FAZL KHAN *v.* KARAM BEGAM. **105 P. R. 1914 : 27 I. C. 113 : 241 P. L. R. 1915.**

———*Applicability of—Hijraz.*

The Hijraz are all Mahomedans and Hindus who join the fraternity, become Mahomedans to the extent of professing that religion but they are not permitted to serve in Mosques in the Punjab. Since inheritance in Mahomedan law is essentially based on ties of blood the burden of proving its application in cases in which such ties do not exist rests on the persons affirming the proposition. (*Kensington, J.*) MUSSAMMAT MAHFUSAN *v.* MUNIRAM. **80 P. W. R. 1913 : 90 P.L.R. 1913 : 18 I. C 323 : 67 P. R. 1913.**

———*Applicability—Ahamadiyas are governed by Mahomedan law.*

The sect known as Ahamadiyas are Mahomedans though differing on important matters of doctrine from orthodox Mahomedan faith and they are governed by Mahomedan Law. (*Oldfield and Krishnan, JJ.*) NARANTAKATH AVULLAH *v.* PARAKKAL MAMMU. **16 L. W. 626 : 45 Mad. 986 : 1922 M.W.N. 662 : 24 Cr.L.J. 17 : 43 M. L. J. 663 : 1923 Mad. 171.**

———*Applicability of—Navayat Community Usages.*

MAHOMEDAN LAW—Conversion.

Where two brothers of a Mahomedan *Navayat* community lived and traded together for a long time and the trade was continued by their successors, in common till 1910, and they also lived in common earning and spending indiscriminately, *held*, in a suit for partition instituted in 1910 by the members of the family of the younger brother against the family of the elder brother. (*Per Tyabji, J.*) that the younger family was entitled to the share agreed between the two brothers who commenced business in common and that the principles of Hindu Law joint family on trading partnership did not apply but only S. 241, I. C. A. applied. (*Per Sadasiva Iyer, J.*)—That all the properties ought to be equally divided between the two branches of the family and many of the incidents of the joint Hindu family system obtained by custom among the Navayats. Difference between Hindu trading firm and Mahomedan trading firm pointed out. (*Sadasiva Iyer and Tyabji, JJ.*) HUSAIN SAIB *v.* HASSAIN SAIB. **2 L. W. 1140 : 31 I. C. 927 : (1915) M. W. N. 880.**

[**Judgment of** *Sadasiva Iyer, J.* **upheld on appeal** *See* **41 I. C. 184 : 6 L. W. 835.**]

———*Applicability—Conversion from one religion to another.*

The personal law applies wherever a person may be living. (*Sadasiva Iyer and Spencer, JJ.*) BADANSA RAVUTHER *v.* FALENA BEO.
15 M. L. T. 107 : (1914) M. W. N. 278 : 22 I. C. 697 : 26 M. L. J. 260.

———*Applicability—Ahamadiyas.*

Members of the Ahamadiya sect known as Ahmadis or Qadianis are Mahomedans and governed by Mahomedan Law. (*Chamier, C. J. and Roe, J.*) KHALIL AHMAD *v.* ISRAFIL.
2 Pat. L. J. 108 : 1 Pat. L. W. 284 : 37 I.C. 302 : 1917 Pat. 73.

———**Bequest.**

See MAHOMEDAN LAW—WILL.

———**Conjugal rights**

See MAHOMEDAN LAW—MARRIAGE.

Conversion.

———*Conversion—Law applicable—Power of disposition by will—Trust and creation of life Estates—Creation of.*

Converts to Mahomedanism must be deemed to have substituted the religion of Mahomed for the previous religion with so much of the personal law as necessarily flows from that religion. Mahomedans must be presumed to be governed by Mah. Law in the first instance. The power of disposition by will can have no logical connection with the Hindu Law of joint family. (*Beaman, J.*) ADVOCATE GENERAL *v.* JIMBABAI. **41 Bom. 181 : 31 I. C. 106 : 17 Bom. L. R. 799.**

———*Conversion—Hindus—Custom—Presumption.*

The presumption is that as a necessary consequence of conversion of a Hindu to Mahomedanism, he has renounced the Hindu law and usage. (*Chandavarker and Heaton, JJ.*) BAI MACHH BAI *v.* HIR BAI.
35 Bom. 264 : 10 I. C. 816 : 13 Bom. L. R. 251.

MAHOMEDAN LAW—Conversion.

——*Conversion—Succession — Instances of following Hindu law.*

Instances showing that converts to Mahomedanism had departed from strict Mohomedan Law in other matters could not be regarded as raising any presumption that Mahomedan Law had been abrogated by custom in matters of succession. But instances are relevant, and of importance, *not to prove the special custom set up* but to show that in spite of the fact that the parties are converts to Islam from Hindu Khatris. Strict Mahomedan Law has not been invariably followed and thus to weaken the presumption referred to in 20 Bom. 53, and 45 Mad. 308. (*Broadway and Campbell, JJ.*) NAJIM-UD-DIN *v.* ABDUL HAMID. **1923 Lah. 175.**

——*Conversion—Converts—Law applicable*

In the case of a conflict between two persons belonging to different religions, the courts must apply the rule of justice, equity and good conscience. 23 M. 181 Ref. (*Sadasiva Iyer and Spencer, JJ.*) BADANSA ROWTHER *v.* FATAMA RUE. **15 M. L. T. 107 : (1914) M. W. N. 278 : 22 I. C. 697 : 26 M. L. J. 260.**

——*Conversion—Succession—Burmese Buddhist relations of—Convert to Islam.*

Under Mahomedan law only Mahomedans can inherit from a Mahomedan. The Burmese Buddhist relations of a Burmese Buddhist who had adopted Mahomedanism cannot succeed to his estate on his death. (*Rigg, J.*) ASHA BIBI *v.* MA KYA YIN. **13 Bur. L. T. 217 : 64 I. C. 514 : 1922 L. B. 15.**

——**Co-owner.**

See MAHOMEDAN LAW PRE-EMPTION.

Custom.

——*Custom—Exclusion of daughters—Onus of proof—Presumption—Bom. Regn. IV of 1872, S. 26.*

When either party to a suit sets up custom as a rule of decision the onus lies on him to prove the custom. No presumption in favour of custom is created by S. 26 of Bom. Regn. IV of 1872. It is only when custom is proved that it is made the rule of decision. Where instances are adduced in proof of a custom of exclusion of daughters from the inheritance in a Mahomedan family the position and relationship of the different members of the family must be considered in determining whether claims were not met because the rights to which they relate did not exist or whether they were put on one side because in the circumstances, there was no need for asserting them. (*Lord Buckmaster.*) ABDUL HUSSAIN KHAN *v.* BIBI SONA DERO. **45 Cal. 450 : 45 I. A. 10 : 16 A. L. J. 17 : 4 Pat. L. W. 27 : 22 C. W. N. 353: 23 M. L. T 117: 27 C. L J. 240 : 1 P L. R. 1918 : 20 Bom. L. R. 528 : 43 I. C. 306 : 12 S. L. R 104 : 34 M. L. J. 48 (P. C).**

[On appeal from 6 S. L. R. 1 : 16 I. C. 641 : which is itself an appeal from 4 S. L. R. 88 : 8 I. C. 897.]

——*Custom — Joint family — Hindu Law if applicable*

A Mahomedan family, governed by Mahommedan law adopted the Hindu religion in matters of worship but there was no evidence of any custom in the family by which the Mahomedan law in respect of descent of property had been altered or varied. *Held*, that the family did not cease to be governed by Mahomedan law in matters of succession and that the females succeeded to propriety interest in accordance with that law. (*Lord Macnaghten.*) AZIMA BIBI *v.* MUNSHI SHAMALANAND **40 Cal. 378 : 17 C.W.N. 121 : 13 M. L. T. 159 : (1913) M. W. N. 125 : 11 A: L. J. 169 : 17 C. L. J. 303 : 15 Bom. L. R. 423 : 17 I. C. 758 : 25 M L. J. 55 (P. C.)**

MAHOMEDAN LAW—Custom.

——*Custom—Adoption.*

Under the general Mahomedan Law an adoption cannot be made. An adoption if made in fact by a Mahomedan could carry with it no right of inheritance. (*Sir John Edge.*) MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZUDDIN **39 Cal. 418 : 6 P. W R. 1912: (1912) M W. N. 77: 11 M L. T. 76 : 9 A. L. J. 137 : 15 C. L J. 172 : 12 P L. R. 1912 : 22 M. L J. 240 : 14 Bom. L. R. 182 : 16 C. W N. 458 : 126 P. R. 1912 : 13 I. C. 344 : 39 I. A 19 (P. C.)**

[On appeal from 1 P. R. 1907.]

——*Custom — Adoption— Among Mahomedans.*

Adoption is not recognised by the Mahomedan Law but a local custom of adoption is fully recognised by the village community of Ramsar. (*Colvin, J. C.*) ABDULLA KHAN *v.* SUNDA. **11 I. C. 670.**

——*Custom—Proof—Mahomedans of Palwal, Gurgaon District.*

A custom contrary to Mahomedan Law may be set up but it must be proved to be an ancient, invariable family custom. In Palwal, Gurgaon District, daughters are not excluded from inheritance unless custom is set up to the contrary. (*Banerjee and Piggott, JJ.*) ALI ASGHAR *v.* COLLECTOR OF BULANDSHAHR. **39 All. 574 : 40 I. C. 753 : 15 A. L. J 597.**

——*Custom— Rajput Musalmans—Widow of.*

Among Rajput Musalmans the rule that the widow of a childless person takes a life-estate in the property of her deceased husband is not established by custom. (*Tudball, Rafique and Walsh, JJ.*) RAJA *v.* ALLAHDIYA. **33 I. C. 114.**

——*Custom— Customary right — Recital of prayers on another's land.*

Recital of prayers on another's land without his consent is forbidden by the Mahomedan Law and custom cannot earn a right to such recital. (*Karamat Husain, J.*) NIADAR *v.* TIKA. **9 I. C. 45.**

——*Custom—Widow—Life—Estate— Power of a Mahomedan widow to alienate for spiritual benefit of husband.*

Mahomedan widow who is a life tenant by custom cannot alienate to secure a spiritual benefit to her husband as a Hindu widow can. (*Macleod, C. J, and Heaton, J.*) AHMED ASMAL MINE *v.* BAI BIBI. **22 Bom. L. R. 826 : 57 I. C. 553 : 44 Bom. 727.**

MAHOMEDAN LAW—Custom.

———*Custom—Onus.*

The invariable and general presumption is that Mahomedans are governed by the Mahomedan Law and usage. The party setting up a custom to the contrary must prove the same. (*Beaman, J.*) JAN MAHOMED *v.* DATU JAFFAR.
38 Bom. 449 : 22 I. C. 195 : 15 Bom. L. R. 1044.

———*Custom— Adoption — Conversion from Hinduism.*

A Hindu convert to Mahomedanism cannot after conversion follow the Hindu law of adoption and if he relies on it as usage or custom he must prove it, for the Mahomedan Law recognises no adoption and it is presumed that as a necessary consequence of conversion the law of adoption has been abandoned by the convert. Adoption is not necessarily inheritance or succession though it leads to inheritance or succession. (*Chandavarkar and Heaton, JJ.*) BAI MACHUBAI *v.* BAI HIRA BAI. **35 Bom. 264 : 10 I. C. 816 : 13 Bom. L. R. 251.**

———*Custom—Succession--Qurashis of Multan —Special custom of the family in contravention of the Islami Law—Proof.*

Plaintiffs asserted a special custom according to which daughters in the family of the parties did not, in the presence of the sons succeed to the agricultural land although as regards urban immoveable property they took their share according to Mahomedan Law. The evidence on record did not show that a daughter or widow claimed her share but was refused, *held*, that the special custom was not proved. (*Le Rossignal and Zafar Ali, JJ.*) MT. HAJRA BIBI *v.* MT. JANAT BIBI.
4 Lah. 85 : 1923 Lah. 184.

———*Custom—Qurashi—Whether governed by Mahomedan Law—Applicability.*

The qurashis of village Hardosheikh is not governed by Mahomedan Law but by custom. (*Rattigan and Shah Din, JJ.*) BARKAT ALI *v.* SULTAN BIBI. **19 P. R. 1916 : 33 I. C. 787 : 82 P. W. R. 1916.**

———*Custom—Hijras—Disciples--Inheritance —Onus.*

According to the Hijra custom the heirs to a deceased Hijra must also be Hijras. The onus of proving the applicability of Mahomedan Law is on the person who affirms it. (*Kensington, J.*) MUSSAMMAT MAHFUSAN *v.* MUNIRAN.
90 P. L. R. 1913 : 80 P. W. R. 1913 : 18 I. C. 323 : 67 P. R. 1913.

———*Custom--Peshawar Dt.—N. W. Provinces.*

Bara Mahomedans of Khamkani Village in the Peshawar Dt. inherit according to custom and not Muhammadan Law. (*Barton, J. C.*) SHAKURULLAH KHAN *v.* ABDULLAH KHAN. **15 I. C. 939 : 241 P. L. R. 1912.**

———*Custom — Labbais of Coimbatore— Succesion.*

The Labbais of Coimbatore (Tamil speaking converts to Mahomedanism) adhere to the Hindu Law in matters of succession and partition and have the same restriction on female succession as the Hindus. 8 M. 464; 1 C. 186 : 27 M, L. J. 156

MAHOMEDAN LAW—Divorce.

15 M. 281 ; 9 M, L. T. 92. Foll. *Wallis C, J. and Srinivasa Iyengar, J.*) IBRAHIM ROWTHER *v.* MUHAMAD IBRAHIM ROWTHER **39 Mad. 664 : 29 M. L J. 763 : 1915 M. W. N. 866 : 30 I. C. 806.**

———*Custom—Succession—Females — Exclusion.*

Females are not excluded from inheriting to their paternal relations ; such a custom of exclusion may be proved and if proved it will override and set aside the Mahomedan Law of inheritance. (*Pratt, J. C., and Crouch, A. J. C.*) BIBI SONA *v.* MIR ABDUL HUSSAIN KHAN. **16 I.C. 641: 6 S.L.R. 1.**

[On appeal 43 I. C. 306 : 45 Cal 450 (P.C]

Divorce.

———*Divorce — Grounds — Impotency of husband.*

A Mahomedan wife can claim a divorce on the ground of impotency of her husband. She will have to establish that she did not know of it at the time of marriage, that he still remains impotent and for that purpose a certain period will be allowed and if the impotency is proved even after the expiry of the period, divorce will be granted, (*Kanhaiya Lal, J.*) ALTAFAN *v* IBRAHIM.
21 A. L. J. 811 : L. R. 4 A. 561 : 1924 A. 116.

———*Divorce—Grounds for—False charge of adultery.*

A Mahomedan wife can sue for divorce against her husband and obtain a decree for dissolution of marriage on the ground that the latter falsely charged her with adultery. The doctrine of loan is not obsolete in Anglo-Mahomedan Law. 3 W. R. 93. Doubted. (*Knox and Bannerjee, JJ.*) ZAFFAR HUSSAIN *v.* UMMATUR RAHMAN.
41 All. 278 : 1 U.P.L.R. (H.C.) 33 : 49 I. C. 256 : 17 A. L. J. 78.

———*Divorce— Revocation of—Divorce pronounced thrice at the same time.*

Revocation of a divorce is not permissible except when the divorce, is *rajai* (revocable.) Where a husband pronounces a divorce to the wife at the same time in three separate sentences the divorce is in the form of bain and he has no right to revoke it. (*Rafique and Piggott, JJ.*) AMIRUDDIN *v.* KHATUN BIBI.
39 All. 371 : 39 I. C. 513 : 15 A. L. J. 272.

———*Divorce—Forms of — Hanafi form — Burden of proof.*

Under Hanafi law no special form of divorce is prescribed: only the word should show a clear intention to dissolve the marriage tie. Where two witnesses testify to a divorce in Hanafi form (which prescribes no special mode of pronouncement) the party alleging invalidity of such divorce must show that the words used were insufficient and incomplete to effect a divorce. (*Rafique and Piggott, JJ.*) WAHID KHAN *v.* ZAINAB.
36 A. 458 : 25 I. C. 387 : 12 A.L.J. 707.

———*Divorce — Grounds for — Right of husband.*

Plff. a husband could not cancel the marriage on the ground of concealment of pregnancy

when he has a remedy by divorce. (*Macleod, C. J., and Heaton, J.*) KULSAMBI *v.* ABDUL KADIR. **22 Bom. L. R. 1142 : 59 I. C. 433 : 45. B. 151.**

———*Divorce—Validity of—Talaknamah not made in the presence of Kazi or wife—Registration—Communication.*

A Talaknama made in the presence of witnesses and duly registered is valid in law, though not made either in the presence of a Kazi or the wife, and not communicated to the latter immediately on its execution, if it comes to her knowledge within a reasonable time from the date of its execution. (*Shah and Hayward, JJ.*) *In re* : RAJA SAHEB RASUL SAHEB. **44 Bom. 44 : 21 Bom. L. R. 1085 : 54. I. C. 573.**

———*Divorce—Iddat—Period of—Forms of divorce.*

A divorce in the case of *talaki-i-bain* or irrevocable talak takes effect from the date of the writing and not from the date of its receipt by the wife, unless there are words in the instrument which show a different intention.

The option to revoke in the case of talakahsan continues till the expiration of the period of iddat and in the case of talak-hasan till the third pronouncement. (*Mookerjee and Panton, JJ.*) MOHON MOLLA *v.* BARU BIBI. **64 I. C. 704 : 34 C.L.J. 524.**

———*—Divorce—Post-nuptial agreement—Delegation to wife of power of divorce—Suit for restitution of conjugal rights—Divorce given by wife after suit.*

A post-nuptial delegation of the power of divorce is valid under the Mahomedan Law. By a Kobinnamah executed after the marriage, the husband undertook not to take a second wife without the first wife's permission and delegated to her the power of divorce in case of violation of the said amongst other conditions, "whenever she chose." The husband afterwards having taken a second wife without the first wife's permission sued the latter for restitution of conjugal rights, whereupon she divorced according to the Mahomedan Law *Held*, that the authority to divorce was validly given and the suit must fail. (*Fletcher and Huda, JJ.*) SAINUDDIN *v.* SM LATI FANNESSA BIBI. **46 Cal. 141 : 48 I. C. 609 : 22 C. W. N 924.**

———*Divorce—Delegation of power to wife—Validity—Contract Act, IX of* 1872, *S.* 26.

A Mahomedan husband can delegate to his wife power to divorce herself on certain conditions, *e. g.*, on the husband marrying a second wife. Such act is not void under S. 26 of the Contract Act. (*Mookerjee and Beachcroft, JJ.*) BADU MIA *v.* BADRANESSA. **40 I. C. 803 : 29 C. L. J. 230.**

———*Divorce—Condition as regards divorce.*

The condition in *Kabinnama*, that a wife is entitled to a divorce if her husband does not allow her to reside with her father, is void. (*Chatterjee and Newbould, JJ.*) IMAMALI PATDARI *v.* ARFATUNNESSA. **32 I. C. 707.**

———*Divorce—Condition that the wife will continue to live in her father's house.*

A condition that the wife will continue to live in her father's house entered into at the time of marriage is illegal and hence the wife is not entitled to use it for supporting her claim to divoce and consequently to the deferred dower. (*Stephen and Mullick, JJ.*) IMAM ALI PATWARI *v.* ARFATUNNESSA. **21 I.C. 87 : 18 C.W.N. 693.**

———*Divorce—Deed — Non-payment of consideration.*

A khulanama executed by the husband constitutes a valid pronouncement of divorce even though the making over the document was dependant on the payment of consideration by her. The mere non-payment of the consideration does not vitiate the deed. (*Scott-Smith, J.*) MUSSAMMAT SASDAN *v.* FAIZ BAKHSH. **55 I. C. 184.**

———*Divorce*—Iddat—*Virgin, who is.*

Iddat is the waiting for a period which is incumbent on a woman after the dissolution of a rightful marriage which has been confirmed by consummation or by death of her husband. Where there has been no consummation or where the marriage is not dissolved by death of the husband *iddat* is not necessary. A virgin is either a woman who has never been married or whose marriage has never been consummated. If the father, mother or brother consent to the marriage and she remains silent, it is tantamount to consent by her. (*Chevis, J.*) JAINAN *v.* RULIA. **50 P. W. R. 1914 : 25 I. C. 43 : 145 P. L. R. 1914.**

———*Divorce—Grounds— Ante-nuptial agreement—Breach of.*

A wife is entitled to divorce her husband under an agreement providing for divorce in the event of the husband taking another wife or she can obtain a decree of Court for divorce on the ground of habitual cruelty or failure to perform the marital duties and obligation or to fulfil engagements voluntarily entered into at the time of marriage. (*Robinson, J.*) KHALILAL RAHMAN *v.* MARAIN BIBI. **13 Bur. L. T. 89 : 59 I. C. 804: 10 L. B. R. 194.**

———*Divorce—Concession of right to wife—Right of wife to maintenance.*

The fact that a Mahomedan husband allows his wife to divorce him or appoints her as agent for the purpose does not divest the husband of the right of pronouncing a divorce. A Mahomedan wife divorced by her husband is entitled to maintenance during the period of her *iddat*. (*Saunders, J. C*) NGA KYAW *v.* MI HLA. **49 I. C. 97: 20 Cr. L. J. 113 : (1918) 3 U. B. R. 99**

———*Divorce—Right to—Contract.*

Except possibly under a contract entered into at the time of marriage a wife has no power to prevent her husband from pronouncing the Talak divorce. (*Saunders, A. J. C*) HASAN CHANEA *v.* MI SIN. **29 I. C. 659 : 16 Cr. L. J. 531 : (1915) II U. B. R. 53.**

———*Divorce — Forms of—Khula divorce—What is.*

A Khula divorce is one when the wife alone desires the dissolution of marriage and in such a

divorce the wife may reserve an option to revoke it. (*Parlett and Twomey, JJ.*) ABDUL RAHMAN KHAN LAUDIL *v.* MA KYE.
26 I. C. 102: 8 Bur. L. T. 87.

——*Divorce—Breach of condition of marriage—Option—Exercise of.*

Where a Mahomedan contracted a marriage with a girl aged 15 years agreeing (1) that for 3 years from date of marriage he would live in her father's house with her, (2) that he would not assault or ill-treat her and that in case he committed a breach of the two conditions she would be entitled to divorce him, the conditions are reasonable and enforceable (1 L. B R. 351 R.). An option given to a wife to divorce her husband for ill-treatment need not be exercised at once or within a specified time and does not lapse by her putting with the ill-treatment for sometime. (*Parlett, J.*) MI NAFI-ZUNISSA *v.* BODI RAHIMAN.
7 L. B. R 48: 20 I. C. 642: 6 Bur. L. T. 125:

——*Divorce—Forms of—Talak-ahsan—How effected.*

To accomplish a Talak ashan a single pronouncement during the tahr of the wife followed by abstention from sexual intercourse for three tahrs is necessary. (*Twomey, J.*) MUNG BA SHWE *v.* MA NYUN. 4 Bur. L. T. 13: 9 I. C. 457: 12 Cr. L. J. 82.

——*Divorce—Conditional—Legality.*

A conditional divorce is not recognised in Mahomedan Law and is illegal. (8 A. 149 F.) (*Hayward, A. J. C.*) MAHOMED DAD MAHOMED *v.* FATIMA.
24 I. C. 881: 7 S. L. R. 138.

Dower.

——*Dower—Lien—Right to interest on unpaid dower—Mesne profits.*

Dower is an essential incident under the Mussalman law to the status of marriage; and even if it is not specified at the time of marriage, the law will adjudge it on definite principles. The dower ranks as a debt and the widow's right is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom she is entitled to retain such possession as against the heirs until it is satisfied. This is called the widow's lien for dower and the only creditor's lien of Mahomedan Law judicially recognised. The widow lawfully in possession of her husband's estate in lieu of her dower cannot, in the absence of an agreement to that effect, be made to account for the profits of the estate without being allowed reasonable compensation for forbearing to enforce her right to the dower debt; and this compensation is best calculated on the basis of an equitable rate of interest on the dower debt. If the annual profits are less than 6 per cent. interest on the dower debt the widow need not be made to account at all and the heirs might be given a decree for possession of their respective shares on payment of a quota of the dower proportionate to

those shares. 9 W. R. 318. Rel. (*Lord Parker.*) HAMIRA BIBI *v.* ZUBAIDA BIBI.
38 All. 581: 14 A. L. J. 1055: 21 C. W. N. 1: 18 Bom. L. R. 999: 20 M L. T. 505: 4 L. W. 602: (1916) 2 M. W. N. 551: 1 Pat. L. W. 57: 25 C. L. J. 517: 43 I. A. 294: 36 I. C. 87: 31 M. L. J. 799 (P. C.).

——*Dower—Lien—Widow's right in husband's property.*

Under the Shiah Law, a widow who had not borne to her deceased husband a child who survived him takes no interest in the immoveable property of the husband and her right to dower does not confer upon her a saleable interest in the estate. (*Sir John Edge.*) PARBATI *v.* MUHAMMAD MUZAFFAR ALI KHAN.
34 All. 289: 11 M. L. T. 316: 9 A. L. J. 450: 15 C. L. J. 468: (1912) M W. N. 417 14 Bom. L. R. 460: 15 I. C. 196: 16 C. W. N. 913: 23 M. L J. 11 (P C.).

——*Dower—Nature of right—Widow's lien.*

A dower debt due to a Mahomedan lady is not a secured debt but a simple debt ranking equally with other debts due from the estate The widow's lien for dower is the right which she has where she has taken peaceable possession of her husband's estate to hold that estate as against the heirs of her husband until they satisfy her claim to dower It has no application to the share which she holds in her own right as heir of her husband still less can it give her right to prevent another creditor against her husband's estate from recovering the amount which is due to him. (*Ryves and Daniels, JJ.*) KANIZ FATIMA BEGAM *v.* RAM NANDAN DHAR DUBE.
45 A. 384: 21 A. L. J. 269: L. R. 4 A 181: 1923 A. 331.

——*Dower — Relinquishment—Burden of proof—Death illness—Pregnant woman.*

It is not the Mahomedan Law that a woman who is pregnant is considered to be suffering from a mortal disease but the Law is that the danger does not begin until the pains of labour appear. Consequently to vitiate a remission of dower by a Mahomedan lady on the ground of its having been made during her mortal illness it must be shown that it was made after the pains of labour has commenced. The burden of proving that there has been a valid relinquishment of her dower by a Mahomedan lady is on those who assert it. (*Stuart, J.*) SHAMSHUL HASAN *v.* SYED HASAN.
1923 A. 173.

——*Dower—Non-payment of—Is no bar to suit for restitution of conjugal rights.*

Non-payment of prompt dower cannot have the effect of dismising a suit by a Mahomedan husband for restitution of conjugal rights. (*Walsh and Wallach, JJ.*) HIJABAN *v.* ALI SHER KHAN.
64 I. C. 117: 19 A. L. J. 880,

——*Dower—Widow in possession—Transfer—Lien.*

Where a Muhammadan widow in possession of her husband's estate in lieu of her dower debt transfers the estate by sale, the transfer does not imply the transfer of her lien so as to enable the vendee to claim contribution of the dower debt from the heirs. (*Tudball and Sulaiman, JJ.*) BINDESHRI *v.* AFZAL KHAN. 63 I. C. 344: 19 A. L. J. 706.

MAHOMEDAN LAW—Dower.

——— *Dower—Lien—Transferability.*

The right of a widow under Mahomedan Law to take and keep possession of husband's estate so long as she is not paid her dower is transferable; and a transferee of such right steps into the widow's shoes and acquires the mortgagee's possession. (*Ryves and Gokul Prasad, JJ.*) ABDULLAH *v.* SHAMSUL HAQ. **43 All. 127 : 18 A. L. J. 969: 58 I. C. 833: 2 U. P. L. R. (All) 329**

——— *Dower—Lien—Widow in possession—Suit by heirs—Conditional decree—Transfer of property by widow—Effect of.*

The only right which a Mahomedan widow in possession of her husband's property has is that of retaining possession in lieu of dower: she has no right to transfer the property itself. A Mahomedan widow in possession of her husband's estate in lieu of unsatisfied dower cannot alienate the estate though she may transfer her dower debt or right to possession of the estate. The transfer of the property gives the heirs a new cause of action to sue for possession Where a Mahomedan widow makes a gift of the husband's property and not a gift of the dower debt the donee cannot resist the suit of the heirs for possession or claim payment of the dower debt. 12 A. L. J. 1141, Foll. (*Rafique and Lindsay, JJ.*) MAINA BI BI *v.* WASI AHMAD. **41 All. 538: 17 A. L. J. 629: 51 I. C 242: 1 U. P. L. R. (H. C.) 106.**

——— *Dower—Prompt—Deferred—Agreement*—Sunnis.

When dower is not expressly declared as prompt a reasonable amount is considered prompt What is reasonable depends on the circumstances. (*Richards, C. J., and Banerjee, J.*) MUHAMMAD SUBBHAMULLAH *v.* SAGHIRUNNISA BIBI. **17 A. L. J. 625: 50 I. C. 740: 1 U. P. L. R. (H. C.) 10.**

——— *Dower—Lien—Wife in possession of husband's property—Transfer of such possession when valid.*

The right of a Mahomedan widow to remain in possession of her husband's estate in lieu of the dower debt is of a peculiar nature and could only be transferred along with the dower debt. (*Piggott, J.*) MOHAMMAD HUSAIN *v.* BASHIRAN. **26 I. C. 109: 12 A. L. J. 1141.**

——— *Dower—Lien—Right of widow and heirs.*

A Mahomedan widow's lien on her husband's estate in her hands for her dower is heritable; but if she never got possession such a right cannot accrue to the heirs, her right being not to take possession but to remain in possession once she got it, till dower was paid. 36 A. 551; 24 I. C. 938. (*Richards, C. J., and Banerjee, J.*) TAHIRUNNISA *v.* NAWAB HASAN. **36 All. 558 : 24 I. C. 938: 12 A. L. J. 906.**

——— *Dower—Lien—Widow in possession.*

Where a Mahomedan widow obtains possession of her husband's property peacefully and quietly, she is entitled to retain such possession until her dower debt is paid. 32 A. 551; 32 A. 583, Ref. (*Chamier, J.*) MUMTAZ-UD-DIN *v.* SAIDUNNISSA. **15 I. C. 687.**

MAHOMEDAN LAW—Dower.

——— *Dower—Dispute as to—Award effecting conveyance—Shia Law—Validity of transfer.*

A Mahomedan and his wife belonging to the Shia sect, referred their disputes as to dower to arbitrators, who under a registered award, transferred the absolute ownership of the husband's property *in praesenti* to the wife, reserving possession of it to the husband for his life and giving him control over its income with the proviso that, if the wife died before the husband, the possession over the entire property should continue for his life and that no lawful heir would have any right to sue for the property and its profits ; that if the husband died before the wife, the wife should be owner of the property and its mesne profits and that the heirs of the husband could not interfere. Mutation of names was effected in favour of the wife and she executed a general power-of-attorney in favour of her husband for the management of the property which she got under the award: *Held*, that the fact that possession was reserved for the husband, in no way shows that the ownership of the property did not pass, the award was sufficient to transfer ownership to the wife *in praesenti*, 26 All. 266, Ref. (*Karamat Hussain and Chamier, JJ.*) MUHAMMAD TALIB HUSSAIN *v.* INAYAT JAN. **33 All. 683 : 11 I. C. 762 : 8 A. L. J. 746.**

——— *Dower—Grant of property—Agreement to discharge—Interpretation.*

Where a Mahomedan transferred certain of his property to his wife in lieu of her dower dues stipulating that she should enjoy possession and profits during her life time, that the property should revert to him in case she predeceased him the dower debt being deemed to have been discharged and that if he predeceased her the property should be hers absolutely. *Held*, that the transaction was neither a mortgage by conditional sale nor a *mahabat* but the wife obtained a right to enjoy the usufruct during her husband's life time with the possibility of such interest devoloping into full ownership if the husband predeceased the wife. (14 M. I. A. 377 R.) 33 A. 421. (*Stanley, C. J. and Banerjee, J.*) MUBARAK-UNNISSA *v.* MAHOMED MUNSAB HASAN KHAN. **33 All. 421 : 10 I. C. 727 : 8 A. L. J. 206.**

——— *Dower—Prompt and deferred.*

In the absence of a stipulation at the time of the marriage as to whether the dower is to be prompt or deferred a portion must be considered prompt and such portion is to be determined with reference to custom and in the absence of custom, with reference to the status of the wife and the amount of the dower. (1 A. 483 : 1 A. 506, F. 19 W. R. 315 ; 23 M. 371, Dist.) (*Stanley, C. J. and Banerjee, J.*) UMDA BEGAM *v.* MUHAMMADDI BEGUM. **33 All. 291 : 9 I. C. 200 : 8 A. L. J. 27.**

——— *Dower—Husband's liability to pay.*

Where, 5 months after marriage the plaintiff gave birth to a fully devoloped child and the husband turned her out but did not divorce her, and thereupon the plff. sued her husband for the prompt dower which he had agreed to pay at

the time of the marriage. *Held* that the suit was maintainble. (*Macleod, C. J. and Heaton, J.*) KULSAMBI *v.* ABDUL KADIR. **45 Bom. 151 : 59 I. C. 433 : 22 Bom. L. R. 1142.**

———*Dower—Lien—Widow taking possession of her husband's property—Right heritable.*

The right which a Mahomedan widow having a claim to dower acquires on obtaining possession of her husband's property, is a heritable right and if she is wrongfully dispossessed she can maintain a suit to recover the possession. (*Scott C. J and Shah, J.*) MAJIDMIAN *v.* BIBI SAHEB JAN. **40 Bom. 34 : 30 I. C. 870 : 17 Bom. L. R. 770.**

——— *Dower--Right to--Prompt dower—Prompt and deferred—Consummation if a condition precedent—Restitution of conjugal rights, right to, when arises.*

Prompt dower is payable on demand and a consummation of marriage is not a necessary condition for claiming it. A right to restitution of conjugal rights arises only after dower has been paid. Where no portion of a dower is declared to be prompt and no custom exists as to the practice the court has power to hold, on evidence that the whole is prompt. (*Chandavarkar, and Heaton, JJ.*) HUSAIN KHAN *v.* GULABKHATAM. **35 Bom. 386 : 11 I. C. 558 : 13 Bom. L. R. 511.**

———*Dower— Widow's lien—Possession obtained—Nature of.*

A Mahomedan widow can retain possession of her husband's estate in lieu of her dower debt, only if she got such possession lawfully with the consent whether express or implied of her husband or his heirs. (*Rankin and B. B. Ghose, JJ.*) SAHU BIBI *v.* ISMAIL SHEIK. **27 C. W. N. 1013 : 51 Cal. 124 : 1924 C. 508.**

——— ——*Dower— Nature of—Relinquishment—Essentials.*

Under Mahomedan Law, the dower is a debt and the moment it is settled, it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may therefore, deal with or dispose of it before taking its possession. The woman is entitled to give it up or relinquish it in continuance of the contract. Such relinquishment need not take place immediately after the husband's death. She can relinquish at any time. It can be remitted in favour of the heir after the husband's death. No consideration is needed for such relinquishment, but free assent must be established. As the debt is enforceable under the Contract Act, it can also be released under S. 63. It is doubtful however, whether a dower debt could be discharged by verbal relinquishment. (*Chaudhury and Cuming, JJ.*) NURUNNESSA KHANUM *v.* KAJE MAHOMED SAKRU. **47 Cal. 537 : 24 C. W. N. 335 : 56 I. C. 8 : 31 C. L. J 14.**

———*Dower--Possession in lieu of--Accounting.*

Where a piece of land is in the possession of a widow for the dower debt due to her and its income does not exceed the amount due for interest on the amount of arrears of dower, she cannot be directed to account for the profits she received from the land. (*Fletcher and Cuming, JJ.*) ALIJAN BIBI *v.* SAFIA BIBI. **51 I. C. 623.**

———*Dower—Divorce in pursuance of terms of Kabinnamah.*

When under a Kabinnamah executed before the marriage the wife is given the power to divorce herself if the husband fails to fulfil any of the terms contained in the Kabinnamah, and the wife exercises that power on the husband's failure to observe those terms the divorce is valid and entitles the wife to sue for her dower. (*N. R. Chatterjee and Richardson, JJ.*) SULTAN AHMED *v.* SAFRA KHATUN. **43 I. C. 17.**

———*Dower—Lien—Widow in possession of estate—Decree for dower—Court in possession of assets—Procedure—Administration suit.*

Under the Mahomedan Law, when a widow is in possession of the property of her husband, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid, provided that her possession was obtained lawfully and without force or fraud. The widow, in such a case, may be required to account for the profits received by her, deducting the amount she might have made if the dower had been paid to her immediately on her husband's death. Dower is a debt due from the entire estate, her share in the inheritance also being liable to contribute proportionately. Where the widow is in possession of the entire estate, she cannot sue for dower, unless, by an administration suit, in which she will have to place the property in the hands of the Court. If she is in possession of only a portion, she can recover her dower debt by an administration suit or by a suit against the other heirs, provided she offers to surrender the possession of the property in her hands. in which case the litigation assumes the character of an administation suit. If she is in possession of no property, she can sue the persons in possession, and realise the amount out of the assets of the deceased. (*Mookerjee and Beachcroft, JJ.*) MIRZA MAHOMED SHARAFAT BAHADUR *v.* SHAZADI WAHIDA SULTAN BEGUM. **19 C. W. N. 502 : 28 I. C. 191 : 21 C. L. J. 319.**

———*Dower—Sale, conditional—Validity.*

Where a Mahomedan honestly sold certain property to his wife in lieu of her dower stipulating at the same time that the property sold should be in his *Khas* possession till his death and that the wife will not be entitled to alienate the property, *Held* that the sale was not invalid though the stipulation itself was invalid. (*Coxe, J.*) MOULA BUX *v.* AJAHAR MOLLA. **13 I. C. 689.**

———*Dower—Lien—Right to.*

A Mahomedan widow in possession of the undistributed property of her husband is entitled to retain it till her dower debt is paid but she is liable to account for the profits. She need not have obtained possession by agreement but it must be without fraud. (*Mookerjee and Teunon, JJ.*) SABJAN BEWA *v.* ANSAR-UD-DIN. **38 Cal. 475 : 9 I. C. 1031 : 13 C. L. J. 427.**

———*Dower—Lien of widow—Possessory lien.*

When a Mahomedan widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud and her dower or any part of it is due and unpaid she is entitled against the other heirs of her husband to retain such possession until her dower debt is paid. 17 A. 77 ; 38 A 581 ; 17 A. 93 ; 32 A 563 Ref. (*Campbell, J.*) MALAWA RAM *v.* SUMARAN. **1924 Lah 402.**

———*Dower—Prompt and deferred—When payable.*

Mahomedan Law enjoins payment of prompt dower at any time before or after consummation of marriage and no condition whatsoever can be lawfully attached to the payment of prompt dower. As regards the deferred portion ordinarily it is supposed to be payable on dissolution of marriage, but, as observed by Mr. Amir Ali in his Mahomedan Law, Vol. 2, page 503, 4th Edn. "There is no rule by which it necessarily follows that postponed or deferred dower becomes realisable on the death of the husband or if he happened to divorce the wife, on such divorce". (*Abdul Quadir, J.*) MUSAMMAT NAWAB BEGUM *v.* ALLAH RAKHA. **1922 Lah. 172.**

———*Dower — Fixing of — Presumption — Transfer of property—Gift.*

That dower was fixed must be presumed, and its amount is immaterial because the husband can increase it. A transfer in lieu of dower is not a gift. (*Abdur Raoof and Bevan Petman, JJ.*) MUSSAMMAT UMRAO BIBI *v.* MUHAMMAD BAKHSH. **55 I. C. 236.**

———*Dower—Right to—Prompt dower.*

A wife is entitled to prompt dower and she can claim it at any time after the marriage. Payment of it is not conditional on her living with her husband. In a suit by the wife for prompt dower and a cross suit by the husband for restitution of conjugal rights the enforcement of the decree in the suit should not be made conditional on the enforcement of the decree in the other suit. (*Scott Smith, J.*) NAWAB BIBI *v.* MUHAMMAD DIN. **28 P. L. R 1918 : 45 I. C. 893 : 100 P. W. R. 1918**

——— ———*Dower—Fixed—Variation of.*

Where a dower amount is fixed by agreement, a court cannot go behind it to find out whether it was a proper amount but a verbal contract for a larger amount can be established only by most clear and satisfactory evidence ; where plaintiff fails to prove the amount alleged courts can only allow the amount admitted by the defendant (*Chevis and Shadi Lal, JJ.*) FAZL KHAN *v.* KARAM BEGAM. **105 P. R. 1914 : 27 I. C. 113 : 241 P. L. R. 1915.**

———*Dower—Amount—Reduction of amount on ground of husband's poverty.*

Where a sum has been promised as dower and the parties really intended it to be paid on occasion arising, the Courts will not reduce *ad miseri cordiam.* or because the husband is poor, but that where no sum is ascertained or where a sum named was merely nominal, the promise will not be enforceable. (*Reid, C. J. and Johnstone, J.*) RAHMAT ALI KHAN *v.* BUB ZUHRA. **14 P. R. 1912 : 157 P. L. R. 1912 : 14 I. C. 486 : 96 P. W. R. 1912.**

———*Dower—Proper dower—What is.*

The criteria for determining "proper dower" are the social position of the woman's family, wealth of the husband, the wife's personal qualifications, the circumstances of time and condition of society and the husband's status; where an excessive dower is promised but proved to be only "for show" or where no dower is proved to have been raised at marriage, 'proper dower' should be paid. Where a dower excessive in respect of the means of the husband is promised in earnest. the court cannot reduce it to a 'reasonable figure" except on proof of a custom to the contrary (*Johnstone and Shah Din, JJ.*) SHADI KHAN *v.* UMDAN BEGAM. **34 P. W. R. 1912 : 13 I. C. 73 : 52 P. L. R. 1912.**

———*Dower—Suit for—Widow in possession of estate.*

A, a Muhammadan, died leaving behind a widow B and a minor daughter C by another wife. A's land was, after his death, half owned by B and half by C, B sued C for the recovery of Rs. 1,000 as her dower afterwards. The suit was not maintainable against C, in whatever capacity C held one half of the family land. If the land passed absolutely to B and C. then B, was more than sufficiently paid for dower. She was given more than her legal share and could not claim her dower as well. (*Kensington, J.*) GHULAM FATIMA *v.* GANTAN BIBI **5 P. L. R. 1912 : 12 I. C. 625: 225 P. W. R. 1911.**

———*Dower—Lien in properties of husband.*

Under the Mahomedan Law the wife is no entitled to any lien in respect of her *mahr* on the properties before dissolution of marriage. 41 M. 1026. dist. (*Oldfield and Ramesam, JJ.*) NARAYAN IYER *v.* BIYARI BIVI. **14 L. W. 524 : (1921) M. W. N. 808 : 68 I. C. 673 : 41 M L. J. 557.**

———*Dower—Lien—Widow in possession of husband's estate—Lien—Consent of other heirs —Widow's right if transferable — Rights of transferee.*

A Mahomedan widow who is lawfully and without force or fraud in possession of her husband's property is entitled to retain possession of such property as against his other heirs until her dower is satisfied, even though such possession was not obtained with the consent (express or implied) of or under an agreement with her husband or his other heirs, and such property could not be divided among the heirs until the dower debt is satisfied. The widow, however, has no power to make a valid sale of the property in her possession so as to bind her husband's heirs. The purchaser, to the extent of the widow's dower, is entitled to retain possession of the property sold to him, as against the heirs until the dower debt is satisfied. Case Law

reviewed. 38 A. 581 P, C. Dist. (*Abdur Rahim, O. C. J., Oldfield and Seshagiri Aiyar, JJ.*) BEEJU BEE *v.* MOORTHUJA SAHIB.

43 Mad. 214 : 26 M. L. T. 419 : 53 I. C. 905 : 11 L. W. 150 : 37 M. L. J. 627 (F.B.).

———*Dower—Claim for—Nature of obligation—Rights of wife.*

Dower is a sum of money to which the wife becomes entitled by marriage. It is not a consideration proceeding from the husband for the contract of marriage but is an obligation imposed by the law as a mark of respect for his wife. The character of the obligation to pay the dower is a debt. The moment the dower is settled, it becomes a recoverable debt and the wife has a lien over the property of her husband in her possession for unpaid dower, *pari passu* with other creditors. 11 W. R, 212 : 2 N. W. P. H. C. R. 327. Ref. (*Seshagiri Aiyar and Napier, JJ.*) ABI DHUNIMSA BIBI AMMAL *v.* MUHAMMAD FATTU UDDIN SAHIB. **41 Mad. 1026 : 23 M. L.T. 78 : (1918) M. W. N. 246 : 44 I. C. 293 : 35 M. L. J. 468.**

———*Dower—Minor— Liability for dower—Majority Act (IX of 1875), S. 2—Applicability of —Liability of father.*

Minority of a Musalman at time of his marriage does not absolve him from liability to pay the dower to his wife, since S. 2 (*a*) of the Majoriy Act provides that nothing in that Act shall affect the capacity of any person to act in the matter of dower. A father is not liable to pay the dower debt of his son, if the son was not a minor under the Mahomedan Law at the time of marriage in the absence of a contract of guarantee. That the son has no property is no ground for making the father liable. (*Miller and Sadasiva Aiyar, JJ.*) SAYABKHAN SANDOJAI *v.* BEEBEE KHATHOO. **29. I. C. 587.**

———*Dower—Liability of heirs to pay—Extent of.*

The heir who sues the widow for possession of his share is only liable to pay the proportionate part of the dower debt (33 A. 182 F B Foll) and not the whole of the dower. Where funeral expenses are paid out of the estate by the heir in possession, he is not entitled to contribution from other heirs for a proportionate share of the expenses. (*Baker, O. J. C.*) RAHMAT BI *v.* BHURI BI. **6 N. L. J. 161 : 1923 Nag. 307.**

———*Dower—Transfer in lieu of—Registration—T.P. Act—Ss. 54, 129.*

A transfer of immoveable property in lieu of dower amounts to a sale and can only be effected by a registered document as required by S. 54 of the T. P. Act. When a party desires to get out of the application of a general rule like S. 54 by virtue of the exception created by S. 129, he must allege and prove clearly that the transaction was intended and purported to be under the Mahomedan law. (*Kotwal, A. J. C.*) FAHMIDUN NISSA *v.* HIRALAL. **64 I. C. 126 : 17 N. L. R. 103.**

———*Dower—Charge—Widow in possession.*

If a Mahomedan widow has obtained possession of her husband's property lawfully and peacefully, without force or fraud she is entitled to a lien thereon for dower ; it is not necessary that her possession should be the result of agreement or consent of her husband or his heirs. (*Daniels, J. C. and Dalal, A. J. C.*) HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **66 I. C. 24 : 24 O. C. 374.**

———*Dower—Cause of action—C. P. C. S. 11, Expl. IV—Cause of action for dower distinct from that for share in inheritances—Oudh Laws Act, S. 5.*

The cause of action for a claim for dower is distinct from the cause of action for a share in the inheritance. Where a Mahomedan husband sued for the recovery of his share out of the property left by his wife on her death in possession of her mother and the mother did not plead as a defence, the non-receipt of the share out of the dower which fell due on her daughter's death *held*, that it did not bar as *res judicata* a subsequent claim by the mother for her share in her daughter's dower money. In fixing the amount of dower under S. 59 of thd Oudh Laws Act, the Court is not to take into consideration the means of the husband at the time he entered into the contract of dower, but his means at the time it is sought to enforce the contract. (*Muhamed Ali, A. J. C*) AMIR KHAN *v.* MT. SIKANDAR BEGAM. **19 O C. 171 : 36 I. C. 49 : 3 O. L. J. 298.**

———*Dower—Decree—Against assets of husband.*

In a Mahomedan widow's claim for dower the decree ought to be passed against the assets left by her husband and not against the person personally into whose hands those assets fall. (*Lindsay, J C.*) ALI MUHAMMAD KHAN *v.* SAJYADI BEGAM. **33 I. C. 516.**

———*Dower—Decree for—Rights subsequent.*

Where a decree is passed according to the claim for dower and is satisfied no suit lies for the recovery of balance nor can the widow retain possession of the deceased husband's property. 17 I. C. 81, Dist. (*Lindsay, J. C.*) INAYAT ALI *v.* JAITUN BIBI. **2 O. L. J, 579 : 32 I. C. 362 : 18 O. C. 263.**

———*Dower—Lien—When arises—Transfer of property.*

A Muhammadan widow's lien for dower arises only where she gets actual and lawful possession. *Quaere.*— A transfer of the property in the hands of a Mahomedan widow with a lien for her dower, does not affect her lien, whether the lien itself is transferable. (*Lindsay, J.C.*) AZIZ-UL-HAK *v.* MARIYAM BIBI. **17 O. C. 157 : 24 I. C. 45 : 1 O. L. J. 225.**

———*Dower—Amount of—Discretion of Court to reduce it—S. 5, Oudh Laws Act—Shiah and Hanafi law.*

In exercising the discretion vested in it by S. 5 of the Oudh Laws Act (XVIII of 1876) the Court may reduce the amount of dower though fixed by contract. The Court considers the status of the lady and the assets of the husband's estate irrespective of the liabilities incurred by the husband before his death. Under *Shiah* Law, consummation is not the only means of establishing

dower : under Hanafi Law, the right is founded on consummation and the physical act of consummation is presumed, whereas in the former case it has to be proved. Under the shiah law, the wife's right to dower vests in her when the marriage is consummated. When she or her husband dies before consummation and during the subsistance of the contract it is doubtful whether the wife is to have her dower in full or only half of it. The Court may accept the more equitable doctrine which secures to, the wife a right to dower in full. Till the contrary is proved it should be assumed that a husband lived in good terms with his wife and that he had no desire to deprive her of the full rights accruing to her under the nuptial contract. (*Lindsay, and Sobonadiere, A. J. C.*) BISMIALLAH BEGAM *v.* SHAHR BANO BEGAM. **1 O. L. J. 1 : 22 I. C. 529 :16 O. C. 325**

———*Dower—Lien—Property in possession of widow.*

Where the widow is proved to have obtained peaceable possession of her husband's property after his death without fraud and force, she is entitled to retain it until her dower debt is satisfied. 32 A. 563, 1 O.C. Sup. Vol Page 6 Foll. (*Piggot, J. C.*) HASAM RAZA *v.* BASTI BEEGAM. **17 I. C. 81 : 15 O. C. 257.**

———*Dower—Prompt dower—Non-payment—Wife's right under Sunni Law — Decree for prompt dower passed by a competent Court—Oudh Laws Act (XVIII of* 1876), S. 5.

The Sunni Law gives a wife the right to refuse to surrender her person to her husband, till the payment of prompt dower even if consummation of marriage has taken place. In case of a decree fixing the amount of prompt dower passed by a competent Court in Oudh : it was *held*, that the question could not be reopened by the Oudh Courts and S. 5 of the Oudh Laws Act, did not apply to the case, as the matter had passed out of the stage of contract and dower had become a debt of record, (*Lindsay, J.C. and Rafique, A J. C.*) WAJID ALIKHAN *v.* SAKHAWAB ALI KHAN. **15 I. C. 747 : 15 O. C. 127**

———*Dower — Amount of—Minimum and Maximum.*

In the case of *Sunnis* the minimum amount of dower is 10 *dirams* (which is something between Rs. 3 and 4); and in the case of shiahs, there is no fixed legal minimum. (*Evans, J. C. and Lindsay, A. J. C.*) MAHOMED HASHIM ALI KHAN *v.* SADIQ HUSAIN KHAN. **13 I. C. 882 : 14 O. C. 356.**

———*Dower—Widow in possession of property in lieu of it—Alienation—Rights of transferee.*

Under Mahomedan law, a widow who is in possession of her husband's property in lieu of dower is competent to alienate the same. But the alienation gives the transferee only the right to remain in possession till she dies or her dower debt is satisfied. (*Coutts and Das, JJ.*) SHEIKH NABIJAN *v.* MT. SAHIFAN.

4 P. L. T. 278 : 1923 P. 153 (2).

———*Dower—Lien in favour of widow—Transfer of debt and the property—Transfer of the property without the debts—Rights of transferee—Death of widow—Effect of merger.*

Where a Mahomedan widow in possession of her husband's property "in lieu of dower" transfers the security, either with or without the dower debt, the transferee is entitled to retain possession of the property until the dower debt is paid, though, where the transfer is without the privity of the persons bound to discharge the dower debt, the transferee takes the security subject to the state of account between the widow and the persons bound to discharge the dower debt at the date of the transfer and any payment made by these persons to the widow after, but without notice of the transfer must, in the absence of collusion, be allowed to those persons as against the transferee.

But the case is different where there is a sale of the property and not an assignment of the security. The right to hold the property as security for the dower debt, and to continue in possession thereof until the dower debt is satisfied is property, and is both heritable and transferable. 43 A. 127 : 32 *A*. 551 ; 43 M. 214 Ref.

But the widow has no proprietary title in the property except to the extent of her share therein ; and where she purports to sell the property and not the security only, the sale is utterly ineffectual so as to confer any title on the vendee. But though the vendee takes no title to the property by virtue, of the sale, he is entitled to retain possession of the property, if he is put in possession thereof, not indeed by virtue of the deed of sale but because, so long as the debt remains unsatisfied, the heirs at law could not claim to be put in possession of the property, and the widow herself would be bound to make good her representation to the vendee to the extent of such interest as she could lawfully transfer. The widow is entitled to retain possession of the property so long as her claim is not satisfied. There is nothing to prevent her from putting some one else in possession of the property, and conferring on him the same right which she could exercise over the property. Having done so, she could not maintain ejectment against him, if she has received consideration for the transaction ; and it follows that, though the sale does not operate to confer any title on the vendee, he is still entitled to retain possession of the property as against the widow and all persons claiming through the widow. so long as there is a debt due to the widow. He is also entitled to maintain his possession of the property as against the heirs at law so long as they do not discharge the dower debt.

Where therefore a Mahomedan widow in possession of her husband's property as a security for her dower debt, purports to sell the property and puts the vendee in possession of the property the vendee is entitled to retain possession of the property so long as her claim to the dower remains unsatisfied. But the moment the dower debt is satisfied either by payment to the widow or to her heirs the heirs of the husband are entitled to recover possession of the property from the transferee; and the same result follows where the heirs of the widow happen to be heirs of her husband, for in such an event, the right to receive the dower debt and the liability to pay the dower debt unite inthe same persons and there is consequently

MAHOMEDAN LAW—Dower.

an extinction of both the debt and security and therefore of the right to retain possession of the property as a security for the debt. (*Coutts and Das, JJ.*) BIBI MAKBUB-UN-NISSA *v.* BIBI UMAT-UN NISSA.

2 P. 84 : 4 P. L. T. 272 1922 P. 348 : 1923 P. 33.

———*Dower—Widow's lien in respect of—Transfer of lien—Rights of transferee.*

The lien on the property of her husband given by the Mahomedan law to a widow in respect of her dower is a right to possession until the debt is discharged. It is not an interest in property which can be severed from the right to dower and transferred as a separate interest. It is a right to the possession of the property by the person entitled to be paid the dower as long as the debt is not discharged either by the income from the property or by payment by the heirs or others interested in discharging the debt. It gives the widow the right to possession and so long as she does not transfer her dower debt and that debt remains undischarged, she may transfer, for her life-time possession of the property the proceeds of which belong to her until the debt is paid off. The position of the transferee in such a case might be regarded as constructively her possession and in this sense it would not be severed from the dower debt. Just as she could dispose of the proceeds in any way she chose during her life-time and until the debt was discharged so also she could transfer possession of the property in the same circumstances, the transferee being entitled to the usufruct. But if she should transfer the dower-debt or if she should die and her estate devolve upon her heirs or assignees, the transferee's rights to possession would be extinguished as the debt and the security cannot be severed, thereby converting the security into a separate interest in the property. (*Miller, C. J. and Mullick, J.*) ABDUR RAHMAN *v.* MAHOMED.

2 P. 75 : 4 P. L. T. 267 : 1922 Pat. 313 : 1922 P. 72.

———*Dower—Transfer of dower debt—Express words—Necessity.*

In proving a transfer of a widow's dower debt with security it is necessary to show that words were used to the effect. *Quaere* If express words are sufficient to prove a transfer of a dower debt with security why should not a covenant clearly implied in a document, have the same effect, when a document executed by a Muhamadan widow purported to sell willingly and vend absolutely the whole of her estate for a consideration of a monthly allowance till the widow's death and it was expressly stated in the document that the widow reserved no right of cancellation of the document and that the proprietary interests, title and rights which she had, were all transferred to the persons in whose favour the document was executed and that on her death her heirs would have no right of interference or claim to the said rights in the properties. *Held* that the instrument showed an out and out sale of the whole estate but it had not the effect of transferring the dower debt or its security, and that even though the transferee was put in possession by the widow it was not adverse possession against her heirs inasmuch as it was only the widow's possession and the cause of action arose only after her death. (*Bucknill, J.*) ABDUL RAHMAN *v.* WALI MUHAMMED.

65 I. C. 224 (b) (Pat.)

———*Dower—Gift in lieu of—Widow in possession—Presumption.*

It cannot be presumed that a gift made by a Muhammedan husband to his wife in lieu of dower is an absolute gift or that the wife is only to satisfy herself out of the proceeds for arrears of the dower. In the latter case her position is that of an usufructuary mortgagee and she cannot acquire any title by adverse possession against those entitled to the equity of redemption. (*Miller, C. J. and Ross, J.*) HIRA SING *v.* SHEIK MOSAHAB.

2 Pat. L. T. 207 : 59 I. C. 865 : 1921 Pat. 147.

———*Dower—Administration suit.*

In a suit by a Muhammadan widow against her husband's heirs for her dower debt, plff. should bring into hotchpot all the properties of her husband of which she was in possession and an account should be taken as in an administration suit. (*Mullick and Sultan Ahmed, JJ.*) AZIZ FATIMA *v.* SAH KHAIRAT AHMAD.

2 U. P. L. R (Pat.) 48 : 58 I. C. 444 : 1920 Pat. 222.

———*Dower—Dissolution of marriage at the instance of wife—Divorce, effect of — Dower amount if can be reduced.*

Per Sharfuddin, J.—A Court of law has no power to raise or lower the contracted amount of dower. Where there has been divorce, whether the dower was prompt or deferred is immaterial, since the dower, if not already paid becomes due at once. (*Per Roe, J.*) Under the Mahomadan Law when discords originate between married parties of whom the wife herself is anxious to obtain a divorce without any justifiable cause she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage. (*Sharfuddin and Roe, JJ.*) BIBI SOGRA *v.* MAHOMED SAYEED.

40 I. C. 672.

MAHOMEDAN LAW—Endowment.

See MAHOMEDAN LAW—WAKF.

Family Arrangement

———*Family arrangement — Maintenance charged as income—Validity of.*

In a suit relating to 'wakf' properties the parties entered into a compromise as a result of which the claim to the properties was given up and a family arrangement was made pursuant to the deed of wakf to the effect that certain maintenance allowances were to be paid regularly to the parties and their heirs, and the mutawalli afterwards failed to pay the allowances to the heirs on the ground that the original wakf itself

was invalid so far as the provision for the heirs was concerned.

Held, even though the family arrangement purported to confirm the wakfnamas, which were invalid, maintenance had thereby become a charge on the properties and the agreement having become a contract for valuable consideration, was quite valid and enforceable. (*Viscount Cave*) KHAJEH SOLEHMAN QUADIR *v.* NAWAB SIR SALIMULLAH BAHADUR.

49 I. A. 153 : 49 Cal 820 : 31 M. L. T. 79 : 4 U. P L. R. 70 : L. R. 3 P. C. 189 : 27 C. W. N. 101 : 24 Bom. L. R 1257 : 21 A. L. J. 1 : 37 C. L.J. 56 : 43 M L.J, 385. 922 P. C. 107 (P. C.)

———*Family arrangement — Compromise — When Courts interfere with.*

The proposition, that a compromise should be judged not by what the Court concludes to be the rights of the parties but by what was regarded as just and proper by the contracting parties, is subject to the proviso that although mistakes in valuation or in ascertainment of rights might exist if the transaction should have been entered into honestly and with a view to secure full justice to the various parties without undue advantage being taken by one of the members of the family so that litigation may be avoided and family peace restored it is binding. (*Wallis, C. J. and Seshagiri Aiyar, J.*) ABDUL HUSAIN *v.* MAHOMAD IBRAHIM.

8 L. W. 379 : 35 I. C. 243 : 19 M. L. T 346.

———Gift.
Conditional gift.
Consideration.
Construction.
Death illness.
Delivery of Possession.
Revocation.
Undivided share.
Validity of.

Gift—Conditional Gift.

———*Gift—Conditional gift—Construction.*

According to Hanafi Law, any derogation from the completeness of a gift is null; in conditional gifts, if the intention to give to the donee the entire subject-matter be clear, the gift is valid but the condition void Where A, gifts property to B, stipulating that B should pay a certain part of the usufruct periodically to C both the gift and the condition would be valid and an alienee of this property from B would take it subject to this condition.(11 M. I. A. 517. F.) (*Richards, C. J. and Banerjee, J.*) LALIGAN *v.* MUHAMMAD SAFIKHAN. **34 All. 478 : 16 I. C. 105 : 9 A. L. J. 798.**

———*Gift— Conditional gift—Donee's power restricted for the life-time of a third person — Effect.*

Where a gift is made with a condition restraining alienation, the gift itself is valid but the condition is not. But a condition directing the enjoyment of the *usufruct* of the gifted property

by a third person for life is valid. 1 W. R. 25 (P. C.) Ref to. (*Chamier, J.*) MUHAMMAD SHAFI KHAN *v.* LALIJAN. **11 I. C. 702.**

———*Gift—Conditional gifts—Validity under Hanafi Law—Gift to wife—Presumption as to possession*

Under Hanafi Law where a gift is made to a wife with a condition attached, the gift is valid but the condition is void, in such cases there is no presumption as to possession though in the converse case of a gift by a wife to the husband there is that presumption of possession in the husband's favour. (*Karamat Husain, J.*) NEAZ BEGAM *v.* MANZOR AHMAD KHAN.

11 I. C. 534 : 8 A. L. J. 580.

———*Gift — Conditional gift — Derogating from grant—Effect of—Musha.*

If a gift is made subject to a condition derogating from the grant the condition is void and the gift takes effect as if no condition is attached to it. But a condition in the nature of a trust to maintain the donor during her life does not make the gift inoperative. A deed of gift giving one half of certain plots of land is not within the mischief of the rule of musha. (*Chaudhuri and Cuming, JJ.*) JAGIR PRAMANIK *v.* SUBID MOLLA. **54 I. C. 378.**

———*Gift—Conditional gift--Reverter to donor.*

Under the Muhammadan Law, a gift by a husband to his wife with the condition that she is to have only a life-interest and that after her death the property should revert to his sons, is valid but the condition is void. (*Agnew and Shadi Lal, JJ.*) NATHU *v.* RAFIQ MAHUMMAD.

270 P. L. R. 1913 : 20 I. C. 207 : 171 P. W. R. 1913.

———*Gift—Conditional gift —Contingent and Conditional—Validity.*

A gift of a house subject to a condition that the donor should reside in it, is valid. 30 M. 305-Foll. Contingent gifts are generally considered invalid while conditional gifts can be enforced as absolute gifts, although the condition may be bad. 19 M. 343, Dist.: 13 B. 264, Ref. (*Sadasiva Iyer and Spencer, JJ.*) ALLAPICHAI THARAGANAR *v.* MAHOMED MOIDEEN.

23 I. C. 520 : 15 M. L. T. 216.

———*Gift—Conditional gift--Life-estate.*

A deed of settlement executed by a Sunni Muhammadan of Rangoon is to be construed according to principles of Muhammadan Law. The creation of a life-estate is inconsistent with the rules of Muhammadan Law and where a life-estate is sought to be created the donee takes an absolute estate. (*Hartnoll, Offg. C.J. and Young, J.*) ANNAMALAY CHETTY *v.* MAHOMED ISMAIL.

7 Bur. L. T. 75 : 23 I. C. 903 : 7 L. B. R. 123.

Gift—Consideration.

———*Gift — Consideration — Hiba-bil-ewaz— Essentials of.*

For a valid Hiba-bil-ewaz, actual payment of consideration must be proved and also a *bona fide* intention of the donor to divest himself *in praesenti* of the property and to confer it on the

donee. Where therefore there was no relinquishment or surrender of any rights, or any consideration for the transaction, the hiba-bil ewaz is invalid. (*Piggott and Walsh, JJ.*) MOHAN LAL *v.* MAHMUD HUSAIN. 44 A. 580 : 4 U. P. L. R. (A) 158 : 20 A. L. J. 434 : 1922 All. 347.

——— *Gift — Consideration*—Hiba-bil-ewaz—*Absence of consideration—If takes effect as simple Hiba—Possesssion—Delivery of.*

A document failing as a Hiba-bil-ewaz could take effect as a Hiba if the Court is satisfied about the conditions of the gift. Where the minor donee is living under the guardianship of the donor no delivery of possession is necessary, a declaration of the intention to give being sufficient. (*Chatterjee and Panton, JJ.*) SERAJUDDIN *v.* ISAH HALDAR. 25 C. W. N. 833 : 49 C. 161 : 1922 C. 258.

———*Gift—Consideration*—Hiba-bil-ewaz.

A *hiba-bil-ewaz* is a gift for consideration and has incidents very different from those of a simple gift (*hiba*). A party claiming under a deed of *hiba-bil-ewaz* must prove the passing of consideration for *hiba* otherwise it will be treated as invalid. It will not be treated as a simple gift without consideration and accompanied by possession. (*Walmsley and Huda, JJ.*) JIDDA JAN BIBI *v.* BAKTAR. 53 I. C. 420.

———*Gift — Consideration*—Hiba-bil-ewaz — *Inadequacy of consideration—Effect.*

The release of a dower debt is a sufficient consideration for a deed of conveyance by the husband to the wife. Inadequacy of the consideration does not affect such deed. (*Fletcher and Huda, JJ.*) ABDUL MAJID *v.* KHALIL RAHMAN. 46 I. C. 355.

——— *Gift — Consideration*— Hiba-bil-ewaz—*Invalid condition—Effect of.*

Where the conditions in a *hiba-bil-ewaz* regarding the enjoyment of the property are invalid, then the gift is absolute and unqualified. (*Fletcher and Shamsul Huda, JJ.*) NEAMAT-UN-NISSA BIBI *v.* GOLAM PANCHATON KAZI. 22 C. W. N. 512 : 45 I. C. 601 : 27 C. L. J. 502.

———*Gift— Consideration*—Hiba-bil-ewaz — *Burden of proof.*

The person in whose favour a *hiba-bil-ewaz* is executed must show that the consideration as described in the instrument was paid. (*Sanderson, C. J., and Mookerjee, J.*) SHAIK NAWAB JAM *v* SAFIUR RAHMAN. 38 I. C. 882: 25 C. L. J. 286.

———*Gift—Consideration*—Hiba-bil-ewaz.

The burden of proving the payment of consideration for a *hiba-bil-ewaz* is upon the person who relies upon it as the foundation of his title. 2 C. 184, Rel. (*Mookerjee and Carnduff, JJ.*) RAHIM JAN *v.* IMAM JAN BIBI. 15 I. C. 698 : 17 C. L. J. 173.

———*Gift—Consideration — Dower—Gift of property worth more than Rs.* 100—*Registration.*

A gift by a Mahomedan husband of property to his wife in lieu of dower is tantamount to a sale, and where the dower is below Rs. 100 the deed does not require registration although the value of the property transferred exceeds that amount. (*Kensington, C. J., and Shah Din, J.*) NUR MAHOMED *v.* ALLAH WASAI. 5 P. W. R. 1915: 27 I. C. 562 : 35 P. L. R 1915.

———*Gift—Consideration*— Hiba-bil-ewaz — *Explained.*

Hiba-bil ewaz is a completed gift for which an ewaz or return has been accepted and which consists of two gifts (1) original gift and (2) reciprocal gift, both of which being subject to the law of gift, pure and simple. (*Sankaran Nair and Tyabji, JJ.*) RASOOL BEE *v* GULAM KASIM. 23 I. C. 802 : 1 L. W. 505.

——— *Gift — Consideration — Husband and wife—Proof as to voluntary nature.*

A gift by a wife to husband does not require strict proof of its being of a voluntary nature. (*Miller and Sadasiva Iyer, JJ.*) ABDUL RAHIMAN *v.* MUHAMMAD NURDIN. 23 I. C. 547.

———*Gift—Consideration— Dower.*

A transfer of property to a Mahomedan lady for a term by her husband in consideration of dower must be regarded as a sale and not a gift. There is nothing in the Mahomedan law against the legality of such a transfer. 33 All. 421, fol. (*Sunaara Aiyar and Phillips, JJ.*) KHAMRUNNISSA *v.* SHAH HAZARATH. (1911) 2 M. W. N 412 : 12 I. C. 457 : 21 M.L.J. 958.

———*Gift—Consideration—Transfer of property to wife in lieu of dower—Sale on*— Hiba-bil-ewaz.

The transfer of property by a Mahomedan to his wife in lieu of her dower is not sale but is *hiba-bil-ewaz.* (*Stuart, A. J. C.*) RAM PRASAD *v.* RAHAT BIBI. 33 I. C. 622 : 18 O. C. 367.

——— *Gift — Consideration*— Hiba-bil-ewaz—*Adequacy of consideration—Transfer in lieu of dower.*

Where a lady suffering from dropsy and other complicated diseases, was unable to rise and say her prayers and used to say that she would not live, and subsequently died of the disease. *Held,* that the disease from which she died was what is technically known as Marz-ul-Maut. Where the donor was suffering at the time of the gift from a disease which was the immediate cause of his death and which caused the belief that death would be caused thereby and the illness was such as to incapacitate him from the pursuit of his ordinary avocation or standing up for prayer the inference is that it was death-illness. 3 C. W. N. 57 ; 30 B. 537 ; 31 B. 264 ; 36 A. 289 ; 12 A. L. J. 132 ; 35 C 1. Foll. A disposition made at a time when the disposer is suffering from death-illness stands on the same footing as a testamentary disposition. When a bequest is made to any one of several heirs it is not valid without the consent of the others. A deed executed in consideration of a valuable ring and a volume of the Holy Quaran is a *hiba-bil-ewaz.* Delivery of possession is not necessary for its validity nor need there be adequacy of consideration. But there must be an intention on the part of the donor to divest himself *in praesenti* of the property and confer it on the donee. 2 C. 184 : 11 M. I. A. 517. Foll. Mahomedan Law divides gift into three

MAHOMEDAN LAW—Gift—Consideration.

classes :—(1) a gift, pure and simple, (2) a *hiba-bil-ewaz* or a gift for consideration or a return, (3) a *hiba-ba-shart-ul-ewaz*, *i.e.*, gift conditioned upon a consideration to be paid in future in return for the gift. In a *hiba-bil-ewaz* the consideration need not be adequate whereas in a sale the consideration must be sufficient and adequate. *Marz-ul-maut* as affecting the validity of a hiba applies both to a hiba pure and simple and to a *hiba-bil-ewaz*. 36 A. 289, Fol. Mahabat is buying an article at an over-value or selling it at an under value done with a view to induce the party to engage in some other transaction of a more advantageous nature. A Mahabat executed in death-bed is valid as a bequest of property to any amount not exceeding one-third of the testator's estate. *Quaere* :—Whether a gift made during Marz-ul-maut in lieu of a dower-debt is valid. A transfer to a wife in lieu of an existing dower-debt amounts to a sale and not to a *hiba-bil-ewaz* in as much as dower debt is a debt already incurred which the husband is bound to pay, which had priority over other debts and legacies and if put into possession of her husband's estate she is entitled to retain such possession until the dower-debt is satisfied. 14 M. I. A. 398 : 17 All. 73 : 17 A. 77, Ref. It is essential for a valid gift in the Mahomedan Law that the donor should be subject to no undue influence, coercion or duress in the execution of the deed of gift. A document which does not give effect to the intention of the executant is not valid under Mahomedan Law (*Chamier, C J. and Jwala Prasad, J.*) SHEIKH FAZLUR RAHMAN *v.* SYED MUHAMMAD UMAR.

43 I. C. 196 : 3 Pat. L. W. 232.

Gift—Construction.

———*Gift—Construction—Named Donees--Use of the word 'Waqf.'*

Under a deed executed by a Mahomedan certain named persons were to take the property becoming owners thereof immediately and they and their descendants after them were to enjoy the property without any power to alienate. The word "Waqf" was used in more than one place by the executant in describing the document. *Held* that there was nothing in the deed which could possibly be stretched so as to constitute a transfer of ownership in favour of the deity and that it was expressly and in terms a gift to three specified persons. The use of the word 'Waqf' did not override all other terms in the document and did not necessarily involve a transfer of ownership in favour of the deity such as is required to constitute a valid dedication under Mahomedan Law. (*Mears, C. J. and Piggott, J.*) MAHOMED AFZAL *v.* MUHAMMAD MAHMOOD,

21 A. L. J. 595 : L. R. 4 A. 314 : 1924 A. 28.

———*Gift—Construction—Gift of a portion of property by life-tenant—Waste*

A gift of a portion of property by a life-tenant constitutes waste unless some necessity is set up by the donor. (*Macleod, C. J. and Heaton, J.*) AHMED ASMAD MUSE *v.* BAI BIBI.

22 Bom. L. R. 826 ; 57 I. C. 553 : 44 Bom. 727.

———*Gift — Construction—Trust and life estates.*

MAHOMEDAN LAW—Gift—Death-illness.

Trusts and the power of creating a succession of life-estates are unknown to Muhammaden Law. (*Beaman, J.*) ADVOCATE-GENERAL *v.* JIMBABAI. **17 Bom. L. R. 799 : 31 I. C. 106 : 41 Bom. 101.**

———*Gift—Construction—No transfer—Donor a trustee—Account-book one and the same for his own and trust property.*

Where the donor is himself one of the trustees and therefore continues to be in possession of the trust property even after the settlement and the account relating to such property is kept by him in the same book as the one used for his own property, he cannot be said to have transferred the possession to the trustees as required by the Mahomedan Law (*Beaman, J.*) PEERBHOY *v.* EBRAHIM. **13 Bom. L. R. 717 : 12 I C 225 : 36 B. 214.**

———*Gift—Construction—Gift of* corpus *reserving life-estate—Validity.*

The validity of a gift has to be considered under two aspects, *viz.*, whether the transaction is permissible under the Muhammadan Law and if so whether the requirements of the law for giving effect to it have been fulfilled ; mode of transference of possession depends upon nature of the property gifted ; there is a nothing inherently impossible in possession being transferred of the *corpus* of the subject of the gift though there is a stipulation that the donee will give to the donor the income of the subject of the gift. (*White, C. J. and Tyabji, J.*) RAHIMAN BI *v.* MUHAMMAD FATIMA BIBI. **23 I. C. 651 : 15 M. L. T. 345.**

———*Gift —Construction* —Hiba-bil-ewaz — *Gift for dower.*

A gift in lieu of dower is a *hiba-bil-ewaz* and delivery of possession is not essential. It is sufficient if there is some consideration and an intention to divest one self in *presaenti* of all interest in the property. (*Stuart and Kanhaiyalal, A. J. Cs.*) RHASIM ALI KHAN *v.* AHMAD SHAH.

32 I. C. 516 : 2 O. L. J. 758.

———*Gift—Construction—Deed of settlement —To be construed according to Muhammadan Law—Life-estate—Donee takes absolute estate.*

A deed of settlement executed by a Sunni Muhammaden should be construed according to Mahomedan Law, so that where a life-estate which is inconsistent with that law is attempted to be created the donee takes an absolute estate. (*Hartnoll. Offg C. J., and Young, J.*) ANNAMALEY CHETTY *v.* MAHOMED ISMAIL. **7 Bur. L T, 75 : 23 I. C. 903 : 7 L. B. R. 123.**

Gift—Death illness.

———*Gift —Death illness—Pregnancy—Marz-ul-maut—Meaning of.*

It is not the Mahomedan Law that a woman who is pregnant is considered to be suffering from a mortal disease and on the face of it, it would be an absurdity to support such a doctrine. The Muhammadan Law takes the common sense view that the danger does not begin until the pains begin. (*Stuart, J.*) SYED SHUMSUL HASAN *v.* SYED HASAN.

1923 A. 173 (2).

MAHOMEDAN LAW—Gift—Death illness.

——*Gift—Death illness—Marz-ul-maut—Consumption—Gift to heir—Waqf.*

A Mahomedan who had been suffering from consumption for more than a year, made a gift of certain property in favour of his mother. There had been a rapid increase in the disease about the time when the gift was made and the deceased was under apprehension of the near approach of death. *Held*, that the rule of *marz ul-maut* applied to the case and the gift, being in favour of an heir of the deceased, was altogether void. The doctrine of *marz-ul-maut* does not apply to a sale. A waqf created during marz-ul-maut is valid only to the extent of one-third, of the entire estate of the deceased. (*Richards, C. J. and Banerjee, J.*) FAZAL AHMED *v.* RAHIM BIBI.

40 All. 238 : 51 I. C. 638 : 16 A. L. J. 158.

——*Gift—Death illness—Waqf—Marz-ul-maut—Shiah Law.*

According to Shiah Law, a *waqf* made during *marz-ul-maut* is valid only to the extent of one-third in the absence of a consent of the heirs, even though possession may have been delivered under the *waqf*. 8 A. L. J. 1154; 25 A. 236 : 30 I. A. 94 ; 12 A. 229; (1890) A. W. N. 93 Ref. (*Richards, C. J. and Banerjee, J.*) ALI HUSSAIN *v.* FAZAL HUSSAIN KHAN.

36 All. 431 : 23 I. C. 291 : 12 A. L. J. 868.

——*Gift—Death illness—Shiah Law—Possession delivered to donee before death—Extent of validity:*

Under Shiah Law a gift in marz-ul-maut holds good only to the extent of one-third, in spite of delivery of possession prior to the donor's death. Where a gift by a Shiah Musalman is impugned as having been made in death illness the onus of proving the nature of the disease lies upon him who contests the gift. A disease of more than a year's duration of which a person dies is not death illness, unless the illness increases to such an extent as to give or another supervenes which gives the donor, an apprehension of death. (*Tudball and Rafique, JJ.*) KHURSHED HUSSAIN *v.* FAIYAZ HUSSAIN. **36 All. 289 : 23 I. C. 293: 12 A. L. J. 417.**

——*Gift—Death illness—Marz-ul-maut—Validity.*

A gift made by a Mahomedan during his death illness is void according to Mahomedan Law. In the circumstances of the case, *held*, that the donor was suffering from a death illness at the time he made the gift to one of his heirs and that it was void. (31 C. 319. R.) (*Richards, C. J. and Banerjee, J.*) SHEIKH MUHAMMAD *v.* KHUDIJA BIBI. **22 I. C. 807 : 12 A. L. J. 132.**

——*Gift—Death illness.*

A gift deed recited that the donee has given possession and that the donor would get the deed registered and obtain mutation of names in the Revenue papers ; the donor got the deed registered but died before obtaining mutation of names. *Held* that the gift was complete and the fact that the donor died 4 or 5 days after registration does not warrant a finding that she was suffering from a mortal complaint at the time. (*Lyle, J.*) NAMDAR *v.* MUHAMMAD SADDIQ.

20 I. C. 900 : 11 A. L. J. 726.

MAHOMEDAN LAW—Gift—Delivery of possession

——*Gift—Death illness—Testamentary disposition.*

Under the Mahomedan Law a gift made by a person suffering from illness of which he eventually died is invalid as it is made under pressure of the sense of the imminence of death. Whether the donor was or was not seeking to defeat the legitimate heirs by means of a deposition of his property which though nominally a gift, was really of a testamentary nature was the real question inasmuch as the donor was suffering at the moment from a fatal illness, and had no expectation of recovery. Such an alienation of his property would affect his own personal interest no more than a testamentary bequest. The essential ground of impeaching a death bed gift under the principle of marz-ul-maut is that a conveyance of gift is being used to effect what is really a testamentary disposition. The fact that the deed itself contains expressions more suitable to a will than to a deed of gift should not be regarded as wholly without significance. (*Piggott, J.*) NAZAR HUSSAIN *v.* RAFEEQ HUSSAIN.

12 I. C. 730 : 8 A. L. J. 1154.

——*Gift—Death illness—Nature of.*

Gifts by a Mahomedan during marz-ul-maut cannot take effect beyond a third of the surplus of his estate, unless the heirs consent after the donor's death to the excess taking effect. Nor can such gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death. The same rule applies to a waqf created during death illness. 35 Cal. 1 ; 2 Cal. 184, 30 Cal 683, 36 All. 431 foll. Whether or not a particular illness constitutes a marz-ul-maut is a mixed question of law and fact. To establish it it must be proved that the illness was the preponderent cause of the apprehension of death and there must also be some external indicia, such as inability to attend to ordinary avocations. In the absence of direct evidence of the state of health of the settler, evidence of antecedent and subsequent conditions of the settler should convert to that point of time. (*Mookerjee and Buckland, JJ.*) BIBI JINJORA KHATUN *v.* FAKIRULLA.

34 C. L. J. 444 : 1922 C. 429.

——*Gift—Death illness—Marz-ul-maut—Application.*

The doctrine of *marz-ul-maut* applies when the gift is made during illness. (*Richardson and Walmsley, JJ.*) SULTAN AHMED *v.* ABDUL GANI.

45 I. C. 581.

——*Gift—Death illness—Consideration—Dower—Gift in lieu of—Marz-ul-maut.*

The provisions of the Mahomedan Law applicable to gifts made by persons labouring under a fatal disease, do not apply to a gift made in lieu of a dower debt, which is really of the nature of a sale. (*Fletcher and Richarason, JJ.*) ESHAQ CHOWDHURY *v.* ABADENNISSA BIBI.

42 Cal. 361 : 28 I. C. 692 : 19 C. W. N. 325.

Gift—Delivery of possession.

——*Gift—Delivery of possession of portion not taken—Life interest of donor in usufruct of part—Validity.*

A Mahomedan made a gift of a zemindari estate reserving to herself usufruct of a portion for her

MAHOMEDAN LAW—Gift—Delivery of possession.

life; in pursunce of the gift the donee took possession of the whole estate with the exception of the portion reserved:

Held, the reservation of the usufruct did not by itself make the gift void, 11 M. I. A. 517 foll.; and the Zemindari estate being one property the taking possession of any part of it amounted to constructively taking possession of the whole, and hence the gift was valid. Distinction between *hiba* and *wasiat* was pointed out. (*Sir John Edge.*) MOHAMMAD ABDUL GHANI *v.* FAKHR JAHAN BEGAM. **49 I. A. 195 : 44 All. 301: 20 A. L. J. 994 : 31 M. L. T. 21 : 25 O. C. 95: 27 C. W. N. 53: 9 O. L. J 369: L. R. 3 P. C. 198 : 24 Bom. L. R. 1268 : 43 M. L. J. 453 : 1922 P. C. 281 (P. C.).**

———*Gift—Delivery of possession—Consideration*—Hiba-bil-ewaz—*What is—Necessity for—Registration of deed—Not enough—T. P. Act, Ss.* 122 *and* 123—*Trusts Act, S.* 55.

According to the Mahomedan Law a voluntary gift is invalid unless it is accompanied by delivery of the thing given so far as it is capable of delivery; if it is an undivided share of immoveable property, physical possession is impossible and the receipt of the appropriate portion of the rent or income issuing out of or derived from it is the only form the necessary possession could assume. The necessity for delivery of possession exists even though the gift is made by a registered trust deed. In this respect the Mahomedan Law is not affected by the T. P. Act or the Trusts Act, 1882. In the case of a gift for consideration, delivery of possession is not necessary but actual payment of consideration and a *bona fide* intention on the part of the donor to divest himself *in praesenti* of the property and to confer it on the donee must be proved. Where a Mahomedan makes a gift of property in consideration of a previous arrangement regarding his wife's claim for dower, and the arrangement is found to be false, then the gift is without consideration. The fact that the wife might subsequently elect to accept the arrangement does not make the gift one for consideration. (*Lord Atkinson.*) SADIK HUSAIN KHAN *v.* HASSIM ALI KHAN. **38 All. 627: 14 A. L. J. 1248: 19 O. C. 192: 18 Bom. L. R. 1037: 21 C. W. N. 130 : (1916) 2 M. W. N. 577 : 21 M. L. T. 40: 1 Pat. L. W. 157: 4 O. L J. 22: 25 C L. J. 363: 6 L W. 378 : 10 Bur L. T. 140 : 43 I. A. 212 : 36 I. C. 104 : 31 M. L. J. 607 (P. C.).**

———*Gift—Delivery of possession.*

Where A executed a gift deed in respect of certain lands in his actual possession and certain lands in the possession of a mortgagee, and perfected the deed by transfer of possession of the former property, *held*, that the court was bound to look at the gift as a whole and could not split it up and consider the gift in respect of the portion of the property of which possession could be given, as valid, and in respect of the other portion invalid. Looking at the gift as a whole the principles of the Mahomedan Law had been complied with and is sufficient to support a claim by the donee to redeem the properties in the possession of the mortgagee. (*Macleod, C. J. and Shah, J.*) CHAND SAHEB KASHIM SAHEB PIRZADE *v.* GANGABAI. **45 Bom. 1296: 64 I. C. 21: 23 Bom. L. R. 563.**

———*Gift—Delivery of possession.*

Under Mahomedan Law, there must be a delivery of possession to validate a gift. Where the donor and the donee both are present on the premises gifted away, an appropriate intention may be gathered to put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow necessarily that in every case where the two are present, the possession must be deemed to have been transferred. (*Shah and Crump, JJ.*) ABDUL MAJID KHAN *v.* HUSSAINBU. **55 I. C. 952 : 22 Bom. L. R. 229:**

———*Gift—Delivery of possession—Gifts in futuro.*

No gift *in futuro* can be made by a Mahomedan inter vivos. To validate such a gift there must be an actual delivery of seisin to the donee; there must be a transfer of possession and that transfer of possession must be from donor to the donee. A contingent gift cannot, by any stretch of ingenuity or language, be brought within the contemplation of the Mahomedan law as a valid gift. No gift made contingent upon the happening of uncertain future events is valid. (*Beaman, J.*) PEERBHOY *v.* EBRAHIM. **13 Bom. L. R. 717 : 12 I. C. 225 : 36 B. 214.**

———*Gift—Delivery of possession—Property mortgaged.*

According to modern conditions and conceptions of legal rights, an equity of redemption, as distinguished from the property itself can be the subject of a valid gift. A gift is valid even if the donee obtains possession subsequent to the gift. Property in possession of mortgagee can be the subject of gift if the mortgagor-donor can divest himself of the whole of what he can. Gift being a contract under Mahomedan Law, and a voluntary contract without consideration, it is not enforceable unless accompanied by possession. By possession in the law of gift is meant such possession as the nature of the subject of gift is capable of. As, property in possession of a tenant or lessee is considered to be in the constructive possession of the landlord or lessor, so, property in possession of the mortgagee may be considered, for the sake of making a gift, to be in the constructive possession of the mortgagor. 15 Cal. 684 (P.C.) Foll. 35 Mad. 120 ; 28 All. 439 (P. C.) and 23 Bom. 682 ; 10 Cal. 1112 Rel. on. (*N. R. Chatterjee and Suhrawardy, JJ.*) TARA PRASANNA *v.* SHAUDI BIBI. **62 I. C. 481 : 25 C. W. N. 761.**

———*Gift—Delivery of possession.*

A gift deed is invalid under Mahomedan law if it is not perfected by possession as that law requires that the donor should be in actual or at least in constructive possession and that he should giveactual or constructive possession to the donee. Where he is neitherh mself in possession, actual

MAHOMEDAN LAW—Gift—Delivery of possession.

or constructive, he cannot convey an enforceable title. (*Mookerjee, Ag. C. J. and Fletcher, J.*) SAMSUL NEHAR *v* MOHIUDDIN AHMAD. **59 I. C. 355 : 25 C. W. N. 310.**

———*Gift—Delivery of possession.*

Where the donor and the donee reside on the property, a gift of the property under the Mahomedan Law may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of gift. (*Newbould, J.*) SHER AHMED *v.* IBRAHIM. **52 I. C. 314.**

———*Gift—Delivery of possession—Undivided share—Musha—Gift to two brothers—Adult and minor—Possession taken by the adult brother—Effect of.*

Mookerjee, J.—In a case of gift by a Mahomedan when it is alleged that the transaction was fictitious the Court has to rely upon the surrounding circumstances contemporaneous with the gift and the subsequent conduct of the parties concerned. If on a gift of a house by a Mahomedan donor to two of his sons, one of whom is an adult and the other is a minor, the adult son takes possession of it, is absolutely void. Under the Mahomedan Law as administered by British Indian Courts where the subject of the gift is incorporial property not susceptible of physical possession, a gift thereof may be appropriated and possible in the circumstances. The doctrine relating to the invalidity of gifts of musha though not favoured, cannot altogether be ignored or repudiated. *Sanderson, C. J.*—A gift to two donees one of whom is an adult and the other a minor but not in the guardianship of the donor at the time of the gift, is valid. Where the adult son accepts the gift for himself and his minor brother at one and the same time and thereby places himself in the position of a trustee or guardian for his brother, and consequently the donor will not take seisin of the property for his minor son and no "confusion" will arise. According to Mahomedan Law, seisin or actual possession is not necessary. To complete the *hiba*, donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee by placing the latter in a position to enjoy it beneficially, or to make use of it consistently with its purpose, and in considering this question the relationship of the parties must be kept in view. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) MARAM BIBEE *v.* SHAIKH MAHOMED IBRAHIM **48 I. C. 561 : 28 C. L. J. 306.**

———*Gift—Delivery of possession—Undivided share—Musha—Possession, change of—Natural guardian, if can divest his guardianship in favour of another—Hiba-bil-ewaz—Consideration—Onus.*

Where a gift was made of immoveable property in favour of an adult and an infant son, who was in the donor's guardianship, possession was delivered to the adult donee and the donor assumed to take seisin of the minor's share, the gift is not invalid on the ground of *Musha*. 11 A. 460, Rel. Per *Mookerjee, J.*—In the case of a gift by a father to his infant son, no change of possession is necessary, the declaration of gift changes the

MAHOMEDAN LAW—Gift—Delivery of possession.

possession by the father on his own behalf into possession as guardian on his son's behalf and the law is the same in every other case where the donee is a minor in lawful custody of the donor. (*Sanderson, C. J. and Mookerjee, J.*) SHAIK NAWAB JAM *v.* SAFIUR RAHMAN. **38 I. C. 882 : 25 C. L. J. 286.**

———*Gift—Delivery of possession—T. P. Act, S. 123.*

A registration of a deed or gift in accordance with S. 123 of the T. P. Act cannot make up for the want of delivery of possession required by the rules of Mahomedan Law. (*Mookerjee and Beachcroft, JJ.*) RAHIM BAKSH MANDAL *v.* SAJJAD AHMAD CHOWDHARY. **26 I. C. 466 : 19 C. W. N. 1311.**

———*Gift—Delivery of possession—Registration.*

Mere registration of a deed of gift by a Mahomedan is not equivalent to possession. It is essential that the donor should give either actual or constructive possession of the property to the donees. 28 B. 682, Rel. (*Mookerjee and Carnduff, JJ.*) RAHIMAN BIBI *v.* IMAM JAN BIBI. **15 I. C. 698 : 17 C. L. J. 173.**

———*Gift—Delivery of possession.*

Where of two distinct properties gifted, one only is perfected by delivery, the gift is not entirely void but is valid so far as regards the property which has been delivered. (*Mookerjee and Carnduff, JJ.*) MUHAMMAD FARID *v.* MUHAMMAD ABDUL GAFUR. **13 I. C. 434 : 15 C. L. J. 14.**

———*Gift—Delivery of possession—Not made—Effect.*

The gift by a Mahomedan of the equity of redemption in a property is bad without possession. As such a gift does not take effect, the grantor continues to be the owner of the land and can effect a valid sale in respect thereof. 61 P. R. 1871 followed. (*Abdul Raoof and Harrison, JJ.*) SHARIF HUSSAIN *v.* RUKAN DIN. **1922 Lah. 40.**

———*Gift—Delivery of possession—Necessity for.*

The three essentials of gift under the Mahomedan law or offer by the donor, acceptance by or on behalf of the donee and seisin. The possession required to be given is such possession as the nature of the property admits. If the donor has done all that he could do to perfect the contemplated gift which is attended with complete publicity, the mere fact that possession was obtained by the donee sometime after does not invalidate the gift. The possession of the property in the occupation of a tenant can be delivered by allowing the donee to collect rents and profits or by requesting the tenant to attorn to the donee. 10 C. 1112, Foll. A vacant plot of land being included in a registered deed, recital of delivery is sufficient delivery. (*Scott-Smith and Shadi Lal, JJ.*) MAHOMED HAMID ULLAH KHAN *v.* MUHAMMAD MAJID ULLAH KHAN. **40 I. C. 374 : 92 P. R. 1917.**

———*Gift—Delivery of possession — Endorsement on registration deed.*

MAHOMEDAN LAW—Gift—Delivery of possession.

Where there is a deed of gift and before its registration, an endorsement is made therein that possession is delivered to the donee and the deed is subsequently registered, the burden of proving that possession was not given and therefore the gift is invalid is on those asserting its invalidity. Where there are tenants on the property, their attornment to the donee is sufficient delivery of possession. (*Schwabe, C. J. and Wallace, J.*) FATIMA BIBI *v.* KHAIRUM BIBI.
16 L. W. 894 : 1923 Mad. 52.

———*Gift—Delivery of possession — Possession of licensee— Effect.*

Possession of licensee is virtually possession of the owner. A gift of property in possession of the licensee is valid. 35 M. 120, Foll. Authorization by the donor to the donee to take possession from licensee is sufficient delivery. (*Seshagiri Iyer and Phillips, JJ.*) PATHUMMA UMMA *v.* THITTU UMMA. **50 I. C. 855 : 36 M. L. J. 159.**

———*Gift — Delivery of possession—Gift by grandfather to grandson—Transfer of possession to grandson—Onus.*

Though the ordinary rule of Mahomedan Law is that a gift is not valid till it is completed by the delivery of the property as given, so far as it is capable of such delivery, no transfer of possession is necessary in the case of a gift by a father to his infant son, the declaration of the gift being considerd to change the possession of father on his own account, into possession as guardian on his son's account. The law is the same in every case where the donee is a minor in the lawful custody of the donor. If the minor is living with the grandfather under his care and in his custody, no express acceptance or transfer of possession is needed to complete the gift, though the minor's father is alive. The presumption is that the donor subsequenty holds possession and collects the income on the minor's behalf. The burden of proof is not in the first instance on the minor or on any one who seeks to support the gift to show that the income of the property was spent for the minor's benefit. On the other hand the person seeking to invalidate the gift must show that in spite of the gift the donor continued to deal with the property as if it was his own. 29 M.L.J. 733 ; 15 M.L.T. 345, Dist. (*Spencer and Krishnan, JJ.*) SUBRAMANI IYER *v.* MULLA VEETAL ANNAN KEYA.
3 L. W. 559 : 24 M. L. T. 351 : (1918) M. W. N. 742 : 49 I. C. 204 : 35 M.L.J. 541.

———*Gift—Delivery of possession— Incorporeal right—Hanafi Law.*

Under the Hanafi Law the gift of an incorporeal right is valid and complete if the donor has done all he could to put the donee in a position to get the benefit of the right gifted and also divested himself of all the signs of title to the subject-matter of the gift. Where the question is whether the donor had done all the acts necessary to divest himself and invest the donee with the *indicia* of title, the fact that the gift deed contains an invalid condition is irrelevant. The assignment of monies due under a policy or under promissory notes is an assignment of an incorporeal right and therefore the technical rules of Mahomedan Law as to gifts do not apply to it even where both the parties are Mahomedans. (*Sadasiva Iyer and Napier, JJ.*) SYED YAKOOB SAHIB *v.* PACHA BIBI.
38 I. C. 248 : 4 L. W. 339.

———*Gift—Delivery of possession— Essentials —Registration—If effective in transferring possession.*

The donor should do everything in his power to transfer possession and the donee must be placed in such a position that without any further act on the part of the donor or his representatives or the Court, the donee can have the benefit of that which he claims ; the essential condition of a valid gift being transfer of possession, mere registration of the property in the name of the donee does not amount to a transfer of possession. If a donor executes a deed of gift but reserves to his own use the rent and pronts of the property given, the gift is not complete. There must be delivery of possession. (*Ayling and Tyabji, JJ.*) RAHAMAN BI *v.* FATIMA BIBI.
31 I. C. 545 : (1915) M. W. N. 430.

———*Gift—Delivery of possession— Necessity.*

Delivery of possession is necessary in a gift under the Mahomedan Law ; hence a donor who makes a gift by a change of names in the Collector's certificate, but retains the benefit of the property gifted for himself after the gift-deed is executed and continues to treat his possession not as a trustee or agent of the donee, but on his own behalf and lives there, makes no delivery to constitute a valid gift. 30 M. 519 ; 28 A. 439 ; P. C. Foll. (*Sadasiva Iyer and Napier, JJ.*) SULFALLA SAHIB *v.* VAJIHUDDIN SAHIB.
2 L. W. 1018 : 31 I. C. 281 : (1915) M. W. N. 876.

———*Gift—Delivery of possession — Validity of*

Delivery of possession is essential for the validity of gift under Mahomedan Law whether it is *Hibu-bil-ewaz* or *Hiba-ba-shart-ul-ewaz* (2 Cal. 184, Distinguished.) (*Sankaran Nair and Tyabji, JJ.*) RASOOL BEE *v.* GULAM KASIM.
23 I. C. 802 : 1 L. W. 505.

———*Gift—Delivery of possession—Possession of father on behalf of son—When valid.*

A father made a gift of the house to his minor son by a registered deed, reserving in himself a right to take the rent for his livelihood and there was nothing to show that anything was at all done beyond the execution of the registered deed ; *held*, that the gift cannot be said to be valid without a consideration of the question whether possession of the property was transferred and in what manner. The presumption that after the gift by a father to his minor son, possession by a father must be deemed to be on behalf of his son, cannot be extended to cases where the property is of such a nature that a mere physical control over it is not the only indication as to the ownership of the property. (*White, C. J., and Tyabji, J.*) RAHMAN BI *v.* MAHOMED FATIMA BIBI. **23 I. C. 651 : 15 M. L. T. 345.**

MAHOMEDAN LAW—Gift—Delivery of possession.

———*Gift—Delivery of possession—Remainder—Validity.*

A gift of a remainder interest or interest in future is invalid. Where a life estate is gifted with remainder to another person, the donee of the life estate takes the property absolutely. (*Benson and Sundara Iyer, JJ.*) MEERANGANI ROWTHER *v.* KARUPATKI NAGUR MEERA.
(1913) M. W. N. 371 : 13 M. L. T. 91 : 18 I. C. 185 : 24 M. L. J. 258.

———*Gift—Delivery of possession— Transmutation of possession—Donor living in house.*

The Mahomedan Law insists upon that there should be complete delivery of seisin for a *hiba* to be valid. The Mahomedan Law does not contemplate any particular mode of delivery of possession. The question whether there has been a complete delivery or not in a particular case is a question of fact, to be determined with regard to the intention and conduct of the parties and the nature of the property concerned in each case. It is not necessary in every case that the donor should formally depart from the premises and there should be a formal entry on the part of the donee. 9 B. 146 ; 29 B. 468 ; 16 M. 43 ; 30 M. 305 ; 28 A. 147 Rel. 19 M. 343 Expl. (*Abdur Rahim and Ayling, JJ*) MANDI ABDUL RAHMAN SAHEB *v.* HUSSAIN SAHEB. **12 M L. T. 305 : 16 I. C. 616 : 23 M. L. J. 734.**

———*Gift—Delivery of possession.*

A gift can be made orally and need not be made by a registered instrument but there must be evidence from which a declaration by the donor, acceptance by the donee and transfer of possession can be proved. (*Ashworth, J. C.*) KHALIL ULLAH SHAH *v.* EWAZ ALI.
26 O. C. 128 : 1923 Oudh 214.

———*Gift—Delivery of possession— Absence of intention—Effect of.*

The mere absence of an intention on the part of the donor to make the gift effectual is not sufficient to invalidate the gift. Once it is found that the donee meant to take under the gift and he accordingly took possession of the property that will complete the gift. (*Ashworth and Simpson, A. J. Cs.*) SHARFRUZZAMAN *v.* SIR HENRY STANYAN. **25 O. C. 291 : 1923 Oudh 80.**

———*Gift—Delivery of possession.*

Delivery is not absolutely essential where donor is guardian of his minor children who are the donees. An unequivocal declaration of cessation of donor's ownership is quite sufficient. (*Daniels and Dalal, A. J. Cs.*) HAFI-ZUN NISA *v.* JAWAHIR SINGH. **66 I. C. 24 : 24 O. C. 374.**

———*Gift—Delivery of possession—Reservation of usufruct—Hanafi Law.*

A Mahomedan lady subject to the Hanafi Law executed a deed of gift and excepted some of the property, retaining possession over it free of rent and revenue, and stated that after her death the donee would be its proprietor and that the donor would have no power to transfer it by mortgage, sale or gift. *Held*, that even in respect of the excepted property the deed was a valid gift, inasmuch as the donor transferred the corpus of the property to the donee, reserving for herself the usufruct for life, which was permitted under the Hanafi Law. The stipulation not to transfer her interests in the property during her life time satisfied the conditions of the Hanafi law with regard to the delivery of possession. (*Stuart and Kanhaiya Lal, A. J. Cs.*) FAKIR JAHAN BEGAM *v.* MUHAMMAD ABDUL GHANI KHAN.
45 I. C. 307 : 5 O. L. J. 49.

———*Gift— Delivery of possession— When complete.*

A gift of two distinct properties perfected with regard to only one of which there was delivery of possession is not void in its entirety but takes effect with regard to that duly delivered. A gift under Mahomedan Law is not valid without seisin and does not become complete until possession of the thing is taken ; but if the property is incapable of physical possession, such possession, actual or constructive as it is capable of, is sufficient, provided however, the donor himself is out of possession. A gift of a house therefore conveys no title unless accompanied by delivery of possession or followed by taking possession with the permission of the donor. (*Kanhaiya Lal, A. J. C.*) MUNIFA BIBI *v.* FATEH ALI. **17 O. C. 60 : 23 I. C. 453 : 1 O. L. J 133.**

———*Gift— Delivery of possession— Gift of property not in possession—Validity of.*

Under the Mahomedan Law, a gift of properties which are not capable of physical possession or of which the donor is only in constructive possession is valid if the donor delivers to the donee all such rights as he possesses over the property given. But where the donor is neither in actual nor constructive possession and is not in a position to give delivery of any kind, a gift by him cannot be enforced. 11 A. 1; 18 B. 156; 35 M. 120; 28 A. 439 Ref. (*Kanhaiya Lal, A. J. C.*) SHAHDA BIBI *v.* ASHRAF HUSSAIN. **20 I. C. 286.**

———*Gift—Delivery of possession—Necessity for—Donor and donee being relations.*

A temporary abandonment of possession of a house by the donor would be sufficient to show delivery of possession in order to complete a gift under the Mahomedan Law. For the completion of the gift, abandonment even for a short time by the donor would be necessary. For the purpose of completing a gift of immoveable property by delivery and possession no formal entry or actual physical departureis necessary; it is sufficient that the donor and the donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested. 9 B. 146 ; 29 B. 468 ; 19 M. 343. referred to. (*Adami, J.*) DALPHEROO MIAN *v.* BANGALI MALI.
4 Pat. L. T. 397 : 1923 P. 481.

———*Gift—Delivery of possession—Essential.*

A deed of trust or gift under the Mahomedan Law requires that possession should forthwith be delivered to the donee or trustee. 11 M. I. A. 517 ; 11 A. 1 Foll. Where a deed of trust is divisible and possession has been taken of some of the property comprised in the deed, the deed is operative only to the extent to which possession has been taken. (*Sharfuddin and Roe, JJ.*) THE OFFICIAL TRUSTEE OF BENGAL *v.* NIMCHAND MARWARI. **40 I. C. 856.**

MAHOMEDAN LAW—Gift—Delivery of possession.

——*Gift—Delivery of possession—Essentials—Registration—Effect of.*

If a gift is to be valid the donor must do every thing to put the donee into possession divesting himself of his rights of ownership. Where property gifted is in the hands of a third person, the donor must give notice to that third person to deliver the property to the donee. The gift must be intended to take effect *in praesenti.* If a gift is invalid under the Mahomedan Law registration could not make it valid and such an invalid gift is revocable. (*Ormand and Parlett, JJ.*) AHMED GHULAM MUHAMMAD SADIO *v.* MAHOMED CASSIM MAKOLA.
24 I. C. 704 : 7 Bur. L. T. 142.

Gift—Revocation.

——*Gift—Revocation—Improvement of the property by donee.*

If after delivery, the donee or his transferee make an addition to the property, increasing its value the gift is irrevocable. (*Rafique and Lindsay, JJ.*) WATI BANDIBI *v.* TABAYA BIBI.
50 I. C. 919: 17 A. L. J. 569.

——*Gift—Revocation—When valid— Rights of donor.*

A donor has a right to revoke the gift except in cases amongst others, where the subject-matter of the gift has altered in substance in the hands of the donee. A mere partition into small plots of the property gifted is not such a substantial alteration as to debar the rights of the donor. Where a Mahomedan lady gives away her entire properties living herself completely at the mercy of the donee it must be proved that the lady understood the nature of the transaction and its effect upon her interests. (*Richards, C. J. and Banerjee, J.*) MAQBUL HUSSAIN *v.* GHAFUR-UN-NISSA.
36 All. 333 : 24 I. C. 34 : 12 A. L. J. 452.

——*Gift—Revocation—Gift subject to condition—Maintenance.*

An absolute deed of gift imposing an obligation on the donee to maintain the donor without making it a condition precedent, cannot be resumed by the donor on the failure of the donee to maintain the donor. In such a case the obligation imposed on the donee makes the gift a *hiba-bil-ewaz.* (*Fletcher and Cuming, JJ.*) ABIRJAN BEWA *v.* SHEIKH KABIL. **54 I. C. 542.**

——*Gift — Revocation — Hiba-ba-sharat-ul-ewaz—Legal incidents of—Revocation.*

A hiba-ba-sharat-ul-ewaz is a gift, the legal incident of which is that the two parties agree to exchange properties forming the subject of the two gifts and after the taking of mutual possession, neither party can revoke. (*Sankaran Nair and Tyabji, JJ.*) RASOOL BEE *v.* GULAM KASIM.
23 I. C. 802 : 1 L. W. 505.

——*Gift—Revocation — Hiba-bil-ewaz—Gift in consideration of useful services and natural love and affection.*

Under the *Hanafi* Law revocation of a gift cannot be permitted if the donor does not make out a good case and if the revocation is the result of a mere whim or loss of temper. A deed of gift in consideration of useful services rendered by the donee to the donor in the past and natural love and affection creates a binding *hiba-bil-ewaz.* (*Stuart, J. C.*) MUSAMMAT LAL BIBI *v.* MASUM-ALI KHAN. **38 I. C. 794 : 20 O. C. 41.**

MAHOMEDAN LAW—Gift—Undivided share.

Gift—Undivided share.

——*Gift—Undivided share—Mushaa, meaning of.*

Where certain property was described as certain area situated in a certain village and entered in the khewat in the name of a female who made a gift of it in favour of her brother, *Held* that the property is not the property known as mushaa. Consequently under Mahomedan Law a gift of the property followed by mutation of names was valid. (*Knox and Piggott, JJ.*) ENAYAT KHAN *v.* ABDUL RAHIM. **11 I. C. 979 : 8 A. L. J. 824.**

——*Gift—Undivided share—Mushaa.*

In cases where the share of each of the donees can be ascertained the doctrine of Mushaa does not apply. (*Chaudhuri, J.*) GOHARADDI *v.* HASAIN KARIKAR. **52 I C. 1.**

——*Gift—Undivided Share—Mushaa—Gift of a share*

Where the plff. who had been given a 4-*anna* share by a deed of gift, was in joint possession with the donor it was held the doctrine of *mushaa* did not apply. The doctrine of *mushaa* is unsuited to a progressive society. 11 A 460, Foll.(*Chitty and Chatterjee, JJ.*) ABDUL AZIZ *v.* FATEH MAHOMED. **38 Cal 518 : 15 C.W.N. 541 : 9 I. C. 635 : 13 C. L. J. 492.**

——*Gift—Undivided share--Gift of a portion.*

A gift of a defined portion of property is valid. (*Sadasiva Aiyar and Napier, JJ.*) YACOOB SAHIB *v.* PACHA BIBI. **38 I. C. 248 : 4 L. W. 339.**

——*Gift—Undivided share—Validity.*

A gift of an undivided share in immoveable property is invalid as such share is not capable of actual physical possession. 35 M. 120 Foll. (*Miller and Sadasiva Iyer, JJ.*) ABDUL RAHAMAN NECHIYAL *v.* MIRATHAYAR AMMAL.
24. I. C. 10 : 1. L. W. 451.

——*Gift—Undivided share—Mushaa—Registration—Effect.*

A gift of an undivided share in property capable of division is valid if the donor is in possession of the undivided share and transfers such possession to the donee. A mere registered deed without transfer of such possession is not valid. 30 M. 519 ; 30 M. 305 : 24 M. 513 ; 6 Bom. L. R. 1043 : 11 C. W. N. 973 ; 15 C. W. N. 328 ; 38 C 518 ; 17 C. L. J 173 Ref. (*Miller and Sadasiva, Iyer, JJ.*) ABDUL RAHMAN *v.* MUHAMMAD NURDIN.
23 I. C. 547.

——*Gift— Undivided share—Possession of donor and donee—Minor donee—Donor not in possession—Validity of gift.*

For the validity of gift, the donee must be put in possession. If the donor himself is not in possession at the time of the gift, the gift would be invalid. If the donee is a minor and the donor, who is a relation of the donee, remains in possession as guardian of the minor, the gift would be

MAHOMEDAN LAW—Gift—Undivided share.

valid. The owner of the property if not in possession, cannot make a valid gift of it, or rather a gift made by him will not pass the ownership of the property to the donor until the donee takes possession with the donor's consent, unless the subject-matter of the gift is in the possession of a trustee or agent of the donor. In India, a gift of an undivided share in property capable of division is not invalid. (*Munro and Abdur Rahim, JJ.*) NYNAR MAHOMED ROWTHER *v.* KANDASWAMI KULATHU VANDAN.

14 I. C. 993 : 35 Mad. 120.

———*Gift—Undivided share—Gift of a portion of a house by father to son—House in actual possession of another son.*

A gift of a share in property is not invalid on the ground of mushaa if the defect has been cured by subsequent possession. Where a father gifts a portion of a house to his son B but that part is actually occupied by another son C, it is sufficient for the father to direct B to take possession of it. Even if C be regarded as being in adverse possession, the father having done all that he could possibly have done under the circumstances the transaction was complete and gave the donee or transferee a complete title to recover possession inasmuch as to allow a person claiming adversely to the true owner to set up the invalidity of the gift would be to put a premium on acts of violence. (*Mullick, J.*) BASIRUL HAQ *v.* MOHAMMED AJIMUDDIN. **43 I. C. 857 : 3 Pat. L. W. 213.**

———*Gift—Undivided share—*'Mushaa' *doctrine—Mahomedans living in Burma.*

The doctrine of *mushaa* does not apply to gifts where possession is given. 2 I. A. 87; 11 All. 460, Ref ; 38 Cal. 518. Rel. Such a doctrine should not be applied to Mahomedans who have resided for a number of years in Burma and have adopted Burmese ideas. (*Rigg, J.*) ESSOOF MAHOMED BARCOOHA *v.* HAYA TOONISA.

38 I. C. 203 : 11 Bur. L. T. 6.

Gift—Validity of.

———*Gift—Validity of — Restraint against alienation—Estate taken—T. P. Act, if applies.*

The Transfer of Property Act does not apply to a gift made between Mahomedans and the provisions thereof do not control such a transaction. A condition in a gift deed restraining the donee from transferring, is invalid under Mahomedan Law and the donee takes an absolute estate. (*Piggott and Walsh, JJ.*) BABU LAL *v.* GHANSHAM DAS. **44 A. 633 : 20 A.L J. 466 : L. R. 3 A. 313 : 1922 All. 205.**

———*Gift—Validity of—Registered deed—Possession with donee—Mutation not effected—Effect of.*

If a Mahomedan executed a deed of gift and got it registered, the donee being already in possession of the property, the gift is complete though the donee did not get his name mutated. (*Richards, C. J. and Rafique, J.*) MUHAMMAD YAKUB KHAN *v.* MUSSAMMAT NAZIRAN. **36 I. C. 200.**

———*Gift—Validity of—Gift of a right to share in offerings to a* shrine—*Validity.*

MAHOMEDAN LAW—Gift—Validity of.

A right to receive a share in the offerings made to a certain shrine by pilgrims can be validly gifted under Mahomedan Law. 22 B. 489, Dist. (*Banerjee and Piggott, JJ.*) AHMAD UDDIN *v.* ILAHI BAKSH. **34 All. 465: 14 I. C. 587: 9 A. L. J. 555.**

———*Gift—Validity of—Gift to private persons—To the donor for life and then to other persons not valid.*

A gift to the donor himself for life and then over to others is not in accordance with the principles of Mahomedan Law and is bad *ab initio* as far as the remoter donees are concerned. While the Mahomedan Law insists that a gift to private persons should be free of all pious and religious purposes, it does not necessarily prohibit the making of the gift to *wakf* which may be contained in a deed which makes other gifts at the same time to private persons. If the two gifts can be completely separated, then the gifts to private persons are not necessarily invalid because there is a separate gift made at the same time in the *waqf*. The expression "within the prohibited degrees of consanguinity" includes the case of a father and son. A *waqf* of four-tenths of a property settled by way of gift, is bad and void. (*Beaman, J.*) PEERBHOY *v.* EBRAHIM. **13 Bom. L. R. 717: 12 I. C. 225 : 36 B. 214.**

———*Gift—Validity of—Hibanama of property title to which acquired later.*

Where a Mahomedan executed a Hibanama of property of which he acquired title after the execution of the Hibanama in favour of his wife in satisfaction of dower debt. *Held* the widow acquired title to the whole property. (*Ghose and Panton, J.*) RUSTAM ALI MIA *v.* ABDUL JABBAR. **1923 Cal. 535.**

———*Gift—Validity of—Acceptance.*

A gift not accepted by the donee at the time of the execution or registration of the deed is not invalid. It is not necessary for the validity of gift that it must be accepted at any particular moment of the transaction. A declaration by the donor in the deed of gift giving possession binds the heirs of the donor and possession once taken is not invalidated by any subsequent change of possession. Possession given and taken effectually transfers undivided property. A gift by a person by a registered deed, in favour of his sons, wives and grandson, in joint possession with the donor and making over entire possession to the donees is valid under the Mahomedan Law (*Reid, C. J. and Robertson, J.*) NUR MUHAMMAD *v.* BHAGWAN DAS. **106 P. R. 1912: 31 P. L. R. 1913: 17 I. C. 857: 61 P. W. R. 1913.**

———*Gift—Validity of—*Mushaa—*Scope of.*

The doctrine of mushaa which invalidates gifts under the Mahomedan Law should be confined to the narrowest limits. (*Daniels and Dalal, A. J. Cs.*) HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **66 I. C. 24 : 24 O. C. 374.**

———*Gift—Validity of — Remainder—Shiah law.*

Under the Shiah law the creation of a life-interest and a gift of the deferred estate, which

MAHOMEDAN LAW—Gift—Validity of.

would amount to a vested remainder in English law is valid. (*Wazir Hassan, A. J. C.*) SIRAJ HUSAIN *v.* MUSHAF HUSAIN. **65 I C. 132. 24 O. C. 321.**

——*Gift—Validity of—Hanafi School.*

Under the Hanafi Law, present ownership of the donor is an essential condition precedent to the validity of a gift. No valid gift can be made of a right in abeyance at the time of the gift. (*Piggott, J. C. and Lindsay, A. J. C.*) NAZIR AHMAD *v.* RAGHUBAR DAYAL. **13 I. C. 986: 15 O. C. 7.**

——Guardianship.
Age of Majority.
De facto guardian, powers.
Guardian for marriage.
Right to.

Guardianship—Age of majority.

——*Guardianship—Age of majority—Girl—Onus of proof.*

According to Mahomedan Law, a girl becomes a major on the happening of either of two events; first, the completion of her fifteenth year and, second on her attainment of a state of puberty at an earlier period. The burden of proving that a girl in either of the above two ways reached her majority rests upon those who allege it and rely upon it. (*Lord Atkinson.*) ATKIA BEGAM *v.* MUHAMMAD IBRAHIM. **6 L. W. 26: 21 C. W. N. 345: (1917) M. W. N. 261: 36 I. C. 20: 10 Bur. L. T. 79 (P. C.).**

——*Guardianship—Age of majority.*

Age of majority is 15 years under Mahomedan Law so far as capacity for giving is concerned. (*Martineau, J.*) YUSHAF *v.* ZAINAB. **1923 Lah. 102.**

——*Guardianship — Age of majority—Age limit for woman.*

Under Mahomedan Law a girl of fifteen years should be, in default of other evidence presumed, to be an adult. (*Scott-Smith, J.*) KHAIR DIN *v.* HAKIM BIBI. **29 P. W R. 1915 : 28 I. C. 421 : 97 P. L. R. 1915.**

——*Guardianship—Age of majority — Minority—Puberty.*

According to Mahomedan Law the attainment of puberty determines the minority of a girl and the mother's right to the custody of the girl. (*Oldfield, J.*) *In re* MUTHU IBRAHI. **16 Cr. L. J. 169 : 27 I. C. 553 : 37 Mad. 567.**

Guardianship—De facto guardian.

——*Guardianship*—De facto *guardian — Alienation by mother—Immoveable property — Alienation void—Powers of guardian.*

Under the Mahomedan Law a mother has no power as *de facto* guardian of her infant children to alienate or charge their immoveable property. During a father's life he is the legal guardian of his minor children, though the mother has rights as to their custody ; after his death, his executor (in Sunni law) is their legal guardian or if there is no executor, their grand-father, or if he be dead, his executor. In the absence of any legal guardian the duty of appointing one devolves upon the Judge as representing the Sovereign. If the mother is the father's executor, or has been ap-

MAHOMEDAN LAW—Guardianship—De facto Guardian.

pointed, she has the powers of a legal guardian, but those powers are subject to strict conditions as to immoveable property. If there is no legal guardian the person in charge of a minor (such as the mother) has power as *de facto* guardian to incur debts, or to pledge the minor's goods and chattels, for the minor's imperative necessities (such as food, clothing or nursing) but has no power to deal with the immoveable property of the minor. If the *de facto* guardian purports to sell the land of the minor, the alienation is wholly void. 39 I. A. 49 : Ref. 37 Mad, 514. Dis appr. (*Mr. Ameer Ali.*) IMAMBANDI *v.* MUTSADDI. **45 Cal. 878 : 45 I. A. 73 : 9 L. W. 518 : 16 A L. J. 800 : 24 M L. T. 330 : 28 C. L. J. 409 : 23 C. W. N. 50 : 5 Pat. L. W. 276 : 20 Bom. L. R. 1022 : (1919) M.W.N. 91: 47 I.C. 513: 36 M.L.J. 422 (P.C.)**

——*Guardianship—De facto guardian — Power of disposal.*

A de facto guardian under the Mahomedan Law can deal with a minor's property only at his risk. He can incur liability but not impose any obligation on the infant. Even in cases arising out of wants of the infant, such a person can only deal with the moveables and not the immoveables. 45 Cal. 878 (P. C.) foll. (*Ryves, J.*) ABDULLAH KHAN *v.* MAHBUB ULLAH KHAN. **1923 All. 485.**

——*Guardianship* — De facto *guardian—Mother.*

The mother of a Mahomedan minor through his *de facto* guardian has no authority to transfer or deal with the property of minors and cannot give a valid discharge for any payment made to the minors. (*Piggott and Walsh, JJ.*) AMINA BIBI *v.* RAM SHANKER MISAR. **41 All. 473 : 50 I C. 730 : 17 A.L.J. 582.**

——*Guardianship* — De facto *guardian — Mortgage by—Binding on minor.*

Under the Mahomedan Law, a mortgage made for the benefit of the minor and for necessity by *de facto* guardian binds the minor. (*Banerjee and Walsh, JJ.*) ABID ALI *v.* IMAM ALI. **38 All. 92 : 32 I. C. 177 : 14 A. L. J. 18.**

——*Guardianship*— De facto *guardian — Alienation by—No necessity for sale—Purchaser having notice of minor's claim—Sale if can be set aside.*

In Mahomedan Law a sale by a guardian of property belonging to the minor will be set aside at the instance of the minor where there is no necessity for the sale and the purchaser has notice of the minor's claim. (*Robertson, J.*) FAKRUDDIN *v.* ABDUL HUSSEIN. **35 Bom. 217 : 11 I. C. 352 : 13 Bom. L. R. 326.**

——*Guardianship — De facto guardian — Minor girl.*

The husband of a Mahomedan girl, who has not attained puberty is not the lawful guardian of her person under the Mahomedan Law. Her lawful guardian is ordinarily her mother and in case she is dead, then her mother. (*Newbould and Suhrawardy, JJ.*) DARAJUDDIN AKANDA *v.* EMPEROR. **24 Cr. L. J. 712 : 27 C. W. N. 531 : 1923 Cal. 672.**

MAHOMEDAN LAW—Guardianship — De facto guardian.

———*Guardianship* — De facto *guardian—Rights of transferee from—Ejectment*

A transfer of the minor's property by the *de-facto* guardian of a Mahomedan minor is void and the transferee cannot maintain a suit in ejectment against a trespasser on the property. 45 C. 878 foll. (*Richardson and Suhrawardy, JJ.*) MONMOHINI DAS GUPTA *v.* BASANTA KUMAR DAS GUPTA.

36 C. L. J. 190 : 1922 Cal. 458.

——— *Guardianship* — De facto *guardian — Powers of.*

It is not competent to the *de facto* guardian of a Mahomedan minor to bind his estate or to affect his interest by statements or admissions. Such statements however are admissible in evidence (*Chatterjee and Panton, JJ.*) BASARAT SARKAR *v.* HIRU PRAMANIK. **1922 Cal. 287.**

———*Guardianship* — De facto *guardian — Power to bind minor son's interest by reference to arbitration—C. P. Code, Sch. II para,* 17—*Subsequent assent by* de jure *guardian.*

A Mahomedan mother on behalf of her minor children entered into an agreement with some others to refer to arbitrators a dispute about some properties and they all made an application to Court under Sch. II, para. 17 C. P. Code. The guardian of the minors' properties appointed by the District Judge subsequently gave his assent to the agreement to refer and participate in the said application under para 17. The Court thereupon acted upon the agreement and referred the dispute to arbitration : *Held*, that the mother was not competent to bind the infants by the agreement to refer to arbitration. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The natural guardian can perform acts which are purely advantageous to the infant, but can impose no obligation on the infant. 45 Cal. 878 foll. A party who entered into the agreement to refer under a misconception as to the legal authority of the mother, may afterwards withdraw therefrom. The legal guardian's assent subsequently given to the agreement to refer and his participation in an assent to the application under para. 17 cannot validate the agreement which was the basis of that application.

Per *Beachcroft, J.*—The fact that the Subordinate Judge subsequently found the mother fit to act for the minors would not validate an arrangement which in its inception was invalid, there being no appointment of the mother to act for the infant in the partition proceedings by the District Judge who takes the place of the Kazi in Mahomedan Law. (*Teunon and Beachcroft, JJ.*) MOHSINUDDIN AHMED *v.* KHABIRUDDIN AHMED. **57 I. C. 945 : 47 Cal. 713 : 26 C.W.N. 246**

———*Guardianship* — De facto *guardian — Mother—Power to alienate—Lim. Act. Art.* 44.

An alienation by a Mahomedan mother of immoveable property of her children as their *De facto* guardian is not as guardian but as unauthorised person and so the infant can sue for

MAHOMEDAN LAW—Guardianship — De facto guardian.

possession of the alienated property within 12 years of the date of sale or 3 years of his attaining majority whichever is a later date. (*Mookerjee, A C. J. and Fletcher, J.*) LALOO KARIKAR *v.* JAGAT CHANDRA.

25 C. W. N. 258 : 62 I. C. 428 : 33 C. L. J. 256

———*Guardianship* — De facto *guardian cannot alienate property of minor.*

A mother as *defacto* guardian of her daughter cannot alientate her property. (*N. R. Chatterjee and Panton, JJ.*) ASHIRUDDIN MOHAMMED *v.* TAHER MOHAMMED. **59 I. C. 306 (Cal).**

——— *Guardianship* — De facto *guardian—Power to transfer minor's property—Ejectment by the minor.*

A person who has the charge of the person or property of a minor without being his legal guardian and who is a *de facto* guardian has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant.—Nor can such transferee let into possession of the property under an unauthorised transfer resist an action in ejectment on behalf of the infant as a trespasser. (*Chatterjee and Panton, JJ.*) SUNDER KHAN *v.* MEA JAN CHAPRASHI. **55 I. C. 234.**

———*Guardianship*—De facto *guardian—Sale by—Minor's right.*

An alienation by a minor's *de facto* guardian being void the alienee cannot resist an action of ejectment on behalf of the minor as a trespasser. Such person cannot seek to recover property purchased by him from the *de facto* guardian in the possession of another equally without title. 45 C. 870, Rel. (*Chaudhuri, J.*) DOOD MEHAR BIBI *v.* ASRUB ALI. **52 I. C. 871.**

——— *Guardianship* — De facto *guardian — Powers of—Lease.*

A guardian *de facto* of a minor can grant a valid lease of the minor's property if it is for the minor's benefit, although the guardian *de facto* is a person who could not be a guardian *de jure.* 31 C. 36; 34 C. 65, F; 34 A. 213, R. (*Stephen and Mullick, JJ.*) MAKLESUR RAHMAN *v.* PILLARAM. **21 I. C. 128.**

——— *Guardianship — De facto guardian — Mother—Sale of immoveable property.*

A Mahomedan mother not being the legal guardian of her minor children has no power to sell their immoveable property and make it binding on them. (*Abdul Raoof and Fford, JJ.*) MAHAMMED SHAFI *v.* KAISUM BI. **4 Lah. 467. 1924 L. 200.**

———*Guardianship—De facto guardian — Power of alienation.*

A natural guardian under the Mahomedan Law has no power to deal with the property of the minors and an alienation made by him or her

MAHOMEDAN LAW—Guardianship — De facto guardian.

would be altogether null and void. (*Moti Sagar, J.*) MT TAHAN *v.* SHADI. **1923 Lah. 601 (1).**

———*Guardianship* — De facto *guardian* — *Alienation by—Necessity.*

A sale by a *de facto* Mahomedan guardian if effected for imperative necessity or for a purpose which is found to be beneficial to the minor, must be upheld. (*Wilberforce and Martineau, JJ.*) MAHAND *v.* MT. BHOLI. **64 I. C. 51.**

[*This view of the law is wrong and is opposed to* 45 *Cal.* 878 (*P. C.*) *which is not referred to in the judgment. Ed.*]

———*Guardianship* — De facto *guardian* — *Mother.*

Though the mother is not a natural guardian under the Mahomedan Law, her action when the natural guardian is in existence, is binding on the minor if it is desirable and manifestly for his benefit. (*Le Rossignol and Martineau, JJ.*) MUHAMMAD RAMZAN KHAN *v.* SARDAR BEGAM. **71 P. R. 1919 : 52 I. C. 847.**

[Cf. 13 I. C. 331 : 39 Cal. 232 (P. C.)]

———*Guardianship*—De facto *guardian*—*Powers of alienation.*

If the acts of a mother in dealing with her minor son's estate as *de facto* guardian are either to the manifest advantage of the minor or for urgent and imperative necessity, the Court should uphold them. (*Le Rossignol and Wilberforce, JJ.*) KAPURA *v.* SHANKAR DAS MULCHAND. **48 I. C. 306 : 108 P. R. 1918.**

———*Guardianship* — De facto *guardian*—*Alienation of minor's property—Suit to set aside —Duty to restore benefit.*

An alienee of the property of a Mahomedan minor from his *de facto* guardian cannot enforce the alienation against the minor. But if the minor comes into Court to challenge the alienation he must before re-entry restore to the alienee all the benefits he derived from the alienation. (*Le Rossignol, J.*) SARDARA *v.* KAURA RAM. **36 P. R. 1918 : 7 P. W. R. 1918 : 152 P. L. R. 1917 : 44 I. C. 219.**

———*Guardianship* — De facto *guardian*—*Mother of a lunatic.*

Mother of a lunatic Mahomedan is not his legal guardian (*Shahdin, J.*) MEHR BIBI *v.* CHANAN DIN. **59 P.R. 1917 : 100 P.W.R. 1917: 41 I. C. 932.**

———*Guardianship* — De facto *guardian*—*Alienation—Validity of.*

A person who is neither a natural guardian by Mahomedan law nor by appointment by Court cannot bind a minor's property by his acts of alienation. (*Shahdin and Scott-Smith, JJ.*) UTTAMSINGH *v.* BARKAT ALI. **15 P R. 1918 : 19 I. C. 235 : 202 P. L. R. 1918.**

———*Guardianship* — De facto *guardian*—*Alienation—Rights of alienee.*

An alienee of a minor's property from the *de facto* guardian is not entitled to sue the minor

MAHOMEDAN LAW—Guardianship — De facto guardian.

for the property on his attaining majority ; nor is he entitled to an equitable restoration of the benefit received by the minor except where the minor or the minor's guardian is plff. in the case (144 P. R. 1883 ; 58 P. R. 1891 ; 52 P. R. 1904 . 85 P. L. R. 1904 ; 91 P. R. 1907 ; 191 P. L. R. 1908 R.) (*Johnstone, J.*) RAMJAWAYA SHAH *v.* NATHA. **33 P. R. 1912 : 14 I. C. 787 : 295 P. W. R. 1912.**

———*Guardianship* — De facto *guardian*—*Guardians' powers—Mortgage by him—Validity.*

Where one of the Mahomedan brothers who was a major mortgaged about half the patrimony for the marriage expenses of their sister ; *Held*, in a suit by the other brothers who were minors at the time of the mortgage to recover their shares on the ground that their mortgage was not valid and binding on them, (1) that the mortgage not being for the benefit of the plffs. could not bind them, (2) that in any event a mortgage of about half the patrimony were unjustifiable and (3) that the mortgagee was not estopped from contending that other persons were also interested in the mortgaged property. (20 B. 116, Foll.) (*Rattigan, J.*) GHULAM MUHAMAD *v.* LATIF AHMED KHAN. **17 P. R. 1912 : 56 P. W. R. 1912 : 14 I. C. 495 : 38 P. L. R. 1912.**

———*Guardianship*—De facto *Guardian*—*Alienation by.*

A conveyance by a *defacto* guardian of a Mahomedan minor need not be set aside by the latter after attaining majority if the document is not binding on him and a transaction will not be upheld against a minor unless it is found to be to his manifest advantage or for necessity. 13. I. C. 976. Foll. Under the Mahomedan Law a mother is not the *de jure* guardian of a minor and as a *de facto* guardian the powers of binding her son's interests are very limited. A release deed executed by a Mahomedan mother as the *defacto* guardian of her minor son will not be upheld unless it is shown to have been beneficial to the minor so as to justify the mother in entering into it as the *de facto* guardian. (*Wallis, C. J. and Seshagiri Iyre, J.*) ABDUL HUSSAIN *v.* MAHOMED IBRAHIM. **3 L. W. 379 : 35 I. C. 243 : 19 M. L. T. 346.**

———*Guardianship*—De facto *guardian*—*Charging existing property of minor—Liability.*

A father-in-law is not the legal guardian of his minor daughter-in-law under the Mahomedan Law. A *de facto* guardian of a minor is not entitled to mortgage the minor's properties for purchasing other properties for her, though the same may be beneficial to her. The mortgage may be avoided by the minor but only on her giving up all rights to the property purchased. (*Sankaran Nair and Tyabji, JJ.*) RABIA BI *v.* ANGAPPAN. **28 I. C. 714 : 2 L. W. 369.**

———*Guardianship*—De facto *guardian*—*Powers of alienation.*

A *de facto* guardian can in view of least substantial difference between the powers of a legal guardian and a *de facto* one, alienate any moveable or immoveable property of a minor for

MAHOMEDAN LAW—Guardianship—De facto guardian.

urgent and necessary purposes and do such acts as are beneficial to the minor's interest, though in some cases none else can competently exercise a legal guardian's powers: The general principle of Mahomedan Law is that the sale of minor's property by an unauthorised person even without necessity or benefit to the minor's property, is neither void nor voidabe in the ordinary sense; because an alienation of his property without any justifying necessity is taken to be as *maugut i. e.*, its validity depends upon the adoption of the transaction by the minor on attaining majority The transaction remains in suspense without becoming inoperative till its avoidance or valid unless or until its ratification. Its validity or invalidity is determined on the adoption or refusal of the minor after his attaining majority. If adopted it will be valid from its inception; and if refused, it is void and ineffective from the very beginning. A sale by a mother of the minor's property for the sister's marriage or discharge of family debts or family purposes not being for a justifying cause, is invalid. (*Abdur Rahim and Ayling, JJ.*) THANDAN VADAPPIL EASUF *v.* KOTUSERI VALAPPIL KOYA.

37 Mad. 514 : 12 M. L. T. 147 : 15 I. C. 576 : (1912) M. W. N. 889 : 23 M. L. J. 244: [Disapproved by the Privy Council in 47 I. C. 513 : 45 Cal. 878 (P. C.).

——*Guardianship*—De facto *Guardian--Alienation of minor's property*

Under the Mahomedan Law it is not open to a person not being the executor of a deceased Musalman to alienate his property which has been inherited by his minor son. The brother of the deceased is otherwise in the same position as a stranger and cannot alienate the minor's property even for his benefit, or necessaries. (*Batten, J C. and Halifax, A. J. C.*) MT. BHURIBAI *v.* ISHAK HUSSAIN.

1923 Nag. 83.

——*Guardianship*—De facto *guardian—Power of alienation—Right of transferee.*

Under the Mahomedan Law a person who has charge of the person and property of a minor without being his legal guardian and who may be called a *de facto* guardian has no power to convey to another any right or interests in immoveable property belonging to the minor which the transferee can enforce against the minor or can such transferee, if left into possession of property under such authorised transfer, resist an action in ejectment on behalf of the minor. (*Prideaux, A. J. C*) AMEER BI *v.* SHEKH KHAJA.

52 I. C. 933 : 15 N. L. R. 164.

——*Guardianship*—De facto *guardian—Alienation by—Validity.*

Under the Mahomedan Law, the *de facto* guardian of a minor has no power to alienate any interest in the immoveable property of the ward. (*Kanhaiya Lal, J. C, and Daniels, A. J. C.*) KANHAIYA LAL *v.* MOHAMMAD MAHMUD ALAM.

63 I. C. 525 : 8 O. L. J. 324.

——*Guardianship*—De facto *guardian—Alienation—Nature of.*

An alienation of minor's property by his unauthorized guardian is neither void nor voidable.

MAHOMEDAN LAW—Guardianship — Guardian for marriage.

It becomes valid or void if it is affirmed or disaffirmed by the minor on his attaining majority whose decision then dates back to the date of the transaction. Generally dealings of a *de facto* guardian with the minor's property do not bind the minor but there might be exceptional cases of urgent and imperative necessity which would bind the minor. In the case of a continuing obligation, an absence of repudiation or acceptance of service with full knowledge of the facts implies an undertaking to adhere to the obligation. An alienation of the minor's property without justifying cause by a guardian must be regarded as manqif or dependent, its validity depending on the minor's accepting the transaction after majority. 34 A. 213, P. C. Dist. A guardian *de facto* of a minor could bind the minor in cases of urgent and imperative necessity by entering into transaction for the benefit of the minor as for his maintenance or for performance of funeral ceremonies or the discharge of other obligations binding on the minors. (*Stuart and Kanhiaya, Lal, A. J.Cs.*) HUSAIN ALI MIRZA *v.* MUHAMMAD AZIM KHAN.

31 I. C. 728 : 18 O. C. 168.

——*Guardianship*—De facto *guardian—Mother—Sale of minor's property void.*

A Mahomedan mother is not the guardian of her minor daughter and has no authority either express or qualified to convert property belonging to her minor daughter. (*Das and Adami, JJ.*) SHEIKH FAKHRUDDIN *v.* SHAIKH FAKHRUDDIN.

51 I. C. 796.

——*Guardianship*—De facto *guardian—Mother—Alienation.*

An alienation by the mother of a Mahomedan minor son is void in the absence of an order of Court appointing her guardian. (*Chapman and Atkinson, JJ.*) KAJAB ALI *v.* WAZIRALLI S. C.

34 I. C 85 : 1 Pat. L. J. 188.

——*Guardianship*—De facto *guardian—Mother—Powers of.*

A Mahomedan mother cannot as a *de facto* guardian make an alienation of immoveable property binding on the minors. An alienation even by a *de jure* guardian to be binding must be for an absolute necessity, or for the benefit of the minor. (*Pratt, J. C.. Hayward and Crouch, A. J. C.*) NARAYANDAS *v.* MUSAMMAT OBHAI.

19 I. C. 911 : 6 S. L. R. 268. (F. B).

Guardianship—Guardian for marriage.

——*Guardianship—Guardian for marriage.*

Under the Mahomedan Law the guardian for marriage of a minor is different from the guardian of the property of the minor and from the guardian of the person of the minor; and though a guardian is necessary for the validity of the marriage of a minor, it is not obligatory on the guardian for marriage or the guardian of the person to provide a suitable marriage for the ward. The Mahomedan law of guardianship of marriage has not been abrogated by implication by S. 24 of the Guardian and Wards Act. (*Mookerjee and Beachcroft, JJ.*) MONIJAN BIBI *v.* DT. JUDGE, BIRBHOON **20 C. L. J. 91 : 25 I. C. 229 : 19 C. W. N. 290.**

MAHOMEDAN LAW—Guardianship — Guardian for marriage.

———*Guardianship—Guardian for marriage —Person not related to the minor within prohibited degrees, a disqualification for guardianship.*

Under Mahomedan Law a woman otherwise entitled to the custody of a minor girl is disqualified by being married to a person not related to the minor within the prohibited degrees. (*Piggott, A. J. C.*) KANIZ JAFAR *v.* TAQIA BEGAM. **11 I. C. 340 : 14 O. C. 103.**

———*Guardianship—Guardian for marriage —Father.*

A person (even father) who is profligate when he brings about the contract of marriage in question, is unfit to act as guardian for marriage. (*Pratt, J. C. and Crouch, A. J. C.*) SHAHUL *v.* ALLAH BACHAYO. **34 I. C. 504 : 9 S. L. R. 196.**

Guardinaship—Right to.

———*Guardianship—Right to—Minor girl—Husband.*

As regards the guardianship of the person of a minor Mahomedan girl, in the absence of the mother, the mother's mother is the lawful guardian of a minor girl who has not attained puberty and the husband is not the lawful guardian of her person. (*Newbould and Suhrawardy, JJ.*) DARAJUDDIN AKANDA *v* EMPEROR **37 C. L. J. 329 : 27 C. W. N. 531 : 24 Cr. L. J. 712: 1923 Cal. 672.**

———*Guardianship—Right to—Elder brother, not a guardian—Alienation by* de facto *guardian void.*

Under the Mahomedan Law, in the absence of duly appointed testamentary guardians, the care of a minor's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian rests with the ruling power. A brother of the minor would therefore have no right to act as guardian except under the authority of an appointment by the court. A person who has without authority been acting as the *de facto* guardian of a minor may by his *de facto* guardianship assume important responsibilities in relation to the minor's property but he cannot thereby clothe himself with legal power to sell it. (*Lord Robson,*) NATADIN *v.* AHMADASHI. **34 All. 213 : 16 C. W N. 338 : 11 M. L. T. 145 : (1912) M. W. N. 183 : 9 A. L. J. 215 : 15 C. L. J. 270 : 14 Bom. L. R. 192 : 15 O. C. 49 : 39 I. A. 49 : 13 I. C. 976 : 23 M. L. J. 6 (P. C.).**

———*Guardianship—Right to—Shiah School.*

Under the *Shiah* Law, in the absence of the mother, the right of guardianship of minor passes to the father and failing him to the grand-parents and other ascendents. The maternal grand mother has no right to claim as guardian. (*Rafique and Piggott, JJ.*) DAYADAT HUSSAIN *v.* SALIMUNNISSA. **36 All. 466 : 24 I. C. 632 : 12 A. L. J. 772.**

———*Guardianship—Right to—Sister's husband, if proper guardian.*

The husband of a minor girl's sister is not a fit person to be appointed guardian of the person or property of the minor. (*Rafique and Piggott, JJ.*) ASGHAR ALI *v.* AMINA BEGAM. **36 All. 280 : 24 I. C. 59: 12 A. L. 392.**

[also 27 I. C. 74 : 18 C. W N. 853.]

MAHOMEDAN LAW—Guardianship—Right to.

———*Guardianship — Right to — Mother — Appointment of guardian by Court—Court's power.*

Where a Judge in appointing the mother as sole guardian of her two minor daughters laid down the condition that she should not contract the marriage of the girls against the wishes of their brother and should also get the permission of the court before their marriage with any one ; *held*, the Judge's action was right. (*Tudball and Rafique, JJ.*) AFTAF BEGAM *v.* SAIYED UZAFAR KHAN. **20 I. C. 873.**

———*Guardianship—Right to—Husband not guardian of infant wife.*

Under the Mahomedan Law, the husband is not the guardian of either the person or the property of wife who is a minor. (*Mookerjee, A. C. J and Fletcher, J.*) BEPIN BEHARI SAHA *v.* CHARU CHANDRA GHOSE. **35 C. L. J. 192.**

———*Guardianship—Right to—Father—Appointment by.*

The father is the natural guardian of the minor son but where the father was advanced in years and did not expect to live long and desiring to prevent ill-feeling and disputes amongst his children and wives, the father might divest himself of the right and duty of guardianship over his minor son and appoint any other person as guardian. (*Sanderson, C. J. and Mookerjee, J.*) SHAIK NAWAB JAN *v.* SAFUR RAHMAN. **38 I. C. 882 : 25 C. L. J. 286.**

———*Guardianship—Right to—Preference—Father.*

Though the Court may under the Guardian and Wards Act appoint anybody as guardian, S. 17 (2) lays down rules which bring the provisions of the Act into harmony with those of Mahomedan Law. Under Mahomedan Law the father has a preferential claim to be the guardian of his minor daughter's property. The rules as to the guardianship for marriage of a Mahomedan minor are governed solely by Mahomedan Law and an order made under the Guardian and Wards Act does not affect them. (*Chatterjee and Newbould, JJ.*) HADISH BAPARI *v.* BOGMULLA SHEIK. **38 I. C. 787 . 25 C L. J. 551**

———*Guardianship—Right to—Female infant —Preferential right.*

No male has a right to the custody of a Mussalman female child unless he is a *Mahram*, (*i. e.*,) stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her. Under the Mahomedan law the sister's husband of a girl is not entitled to be appointed as guardian in preference to the maternal uncle of the minor. (*Chaudhuri, J*) *In the matter of* HARUNNESSA BIBI. **27 I. C. 74 : 18 C. W. N. 853.**

———*Guardianship—Right to—Mother.*

Under strict Mahomedan Law the mother's right to the guardianship of her children can

MAHOMEDAN LAW—Guardianship—Right to.

only be defeated on proof of "gross and open immorality." Where the mother was divorced by her husband but after divorce she led a respectable life she was held entitled to the custody of her children, the boy until he was 7 years of age and the girl till she attained puberty though she used to neglect children before divorce. (*Holmwood and Teunon, JJ.*) JANNATUNNESSA BIBI *v.* HAFIZ-UD-DIN. **10 I. C. 904.**

——*Guardianship—Right to--Paternal uncle and mother—Virgin niece—Property of.*

The paternal uncle has no legal right under the Mahomedan Law to the guardianship of the property of the virgin niece, who has attained the age of puberty, superior to that of her mother. The mother is a preferential guardian over a paternal uncle of a boy under seven years of age. 29 A. 10; 32 C. 444, Foll. (*Batten, A. J. C.*) MAHAMADKHAN *v.* SULTAN BEGAM.

43 I. C. 849.

——*Guardianship—Right to—Mother's right to custody of minor children.*

Under the Mahomedan Law a mother's right to the custody of her children ceases on their completing the seventh year but she still has a right of access to her children, but there is no right of suit to enforce such access under the Guardian and Wards Act (*Rigg, J.*) HAZARA BIBI *v.* SULAIMAN HAJI MAHOMED.

59 I. C 562 : 13 Bur. L. T. 86.

——*Guardianship—Right to—Mother's right —Effect of marriage with stranger.*

Under Mahomedan Law the custody of a boy until at least the age of 7 years belongs to the mother. The right is forfeited by the mother's subsequent marriage to a stranger. (*Kincaid, J. C.*) BIBI FATIMA *v.* BAKARSHAH.

66 I. C. 888 : 15 S. L. R. 175.

——*Guardianship — Right to—Father—Abuse of authority.*

When a Mahomedan father married his daughter aged 10 years to an infant of 12 months, the Court has power to control such an abuse of parental authority and declare the marriage invalid. (*Pratt, J. C. and Crouch, A. J. C.*) SHAIJUL *v.* ALLAH BACHAYO. **34 I. C. 504 : 9 S. L. R. 196.**

——**Heir.**

See MAH. LAW—SUCCESSION.

——**Husband and Wife.**

See MAH. LAW—MARRIAGE.

——**Iddat.**

See MAH. LAW—MARRIAGE.

——**Illegitimacy.**

See MAH. LAW—LEGITIMACY.

——**Inheritance.**

See MAH. LAW—SUCCESSION.

——**Increase, doctrine of.**

See MAH. LAW—SUCCESSION.

Interest, law as to.

——*Interest—Usury—Law, if repealed by Act XXVIII of* 1855.

MAHOMEDAN LAW—Joint family.

Quaere.—Whether the Mahomedan Law relating to usury has been abrogated by Act XXVIII of 1855. 3 B. L. R. 130 and 5 B. L. R. 500, Ref. (*Lord Parker.*) HAMIRA BIBI *v.* ZUBAIDA BIBI.

38 All. 581 : 14 A. L J. 1055 : 21 C W. N. 1 : 18 Bom. L. R. 999 : 20 M. L. T. 505 : 4 L. W 602 : (1916) 2 M. W. N. 551 : 1 Pat. L. W. 57 : 25 C. L. J. 517 : 43 I. A. 294 : 36 I. C. 87 : 31 M. L. J. 799 (P. C.).

Joint Family.

——*Joint family—Co-sharers' position.*

Co-heirs of a deceased Mahomedan do not form a joint family as in Hindu law. They are tenants in-common and the possession of each is rightful and not adverse to the other sharers. A suit for possession by a transferee from co-heirs not in possession against transferee from co-heirs in possession must be brought within 12 years from the transfer to defts. (*Rafique, J.*) RAM PARSON UPADHIA *v.* KALAB HUSAIN.

36 I. C. 100.

——*Joint family—Administration — Representation by one heir.*

There is no principle in Mahomedan Law as in Hindu Law, whereby the others heirs are bound by acts of one heir in possession. (*Walmsly and Suhrawardy, JJ.*) SUKUR MAHOMED *v.* ASMOT MANDAL. **50 Cal. 978 : 1924 C. 384.**

——*Joint family—Members living together—Purchase by one in his own name—Presumption.*

Where the uncle and nephew lived together and land is purchased by the uncle in his name the presumption is that the purchase was made by him exclusively and the burden lies on the nephew to show that he supplied a part of the purchase money The presumption of Hindu Law that the money came from the joint funds is not applicable to Mahomedans. (*Walmsley and Ghose, JJ.*) MOHABBAT ALI *v.* TOFAR ALI.

1923 Cal. 369.

——*Joint family.*

The joint family is not an institution under Mahomedan law. Each of the heirs of the deceased has rights to share property. Limitation begins to run against each other under S. 144 of the Limitation Act. (*Scott Smith and Fforde, JJ.*) ZAINAB *v.* GHULAM RASUL.

1923 Lah. 519.

——*Joint family—Presumption.*

There is no presumption as to jointness of funds in a Mahomedan joint family. (*Johnstone and Scott-Smith, JJ.*) IMAM DIN *v.* DULO.

25 I C. 278 : 239 P. L. R. 1914 : 144 P. W. R. 1914.

——*Joint family—Joint business by two brothers—Death of one—Properties acquired out of profits of joint business—Suit by heirs of the deceased for their share—Nature of suit.*

Under the Mah. Law there is no such thing as joint family property. If the members of a Mahomedan family succeed to property on the death of a relation each of them takes a share of each item of the property and a suit by such a

member for a share is governed by Art. 123 and not by Art. 127 of the Lim. Act. 16 M. 61, Dist. (*Bakewell, J.*) MOHIDDIN-BEE *v.* SYED MEER SAHEB 32 I. C. 1002 : 38 Mad. 1099.

——— *Joint family—Principle not applicable —Commensality—And common business.*

Though Mahomedan brothers living in common mess, do business together, share the same premises, divide up expenses, and enjoy profits in common they do not form a joint family. No presumption can be drawn that a particular transaction conducted by one of them was carried out with the help of family funds and was conducted for the benefit of all. (*Stuart, J. C.*) MUHAMMAD RAMSAN ALIKHAN *v.* MUHAMMAD NASIR KHAN. 3. O L. J. 447 : 36 I. C. 774 : 19 O. C. 347.

Legitimacy.

——— *Legitimacy — Legitimation, difference between fact of marriage disproved.*

There is no legitimation under Mahomedan Law It means a proceeding which creates a status which did not exist before while legitimacy means a status which results from certain facts. The presumption of marriage arising from acknowledgment of legitimacy, is liable to be contradicted by proper proof, and once the fact of " no marriage " is established, the acknowledgment of legitimacy has no effect. (*Lord Dunedin.*) HIBUBUR RAHMAN *v.* ALTAF ALI. 48 I A. 114 19 A. L. J. 414 : 33 C. L. J. 479 : 23 Bom. L R. 636 : 14 L W. 175 : 29 M. L. T. 354 : 26 C. W N. 81 : 60 I. C. 837 : (1921 M W. N 366 : 40 M.L.J. 510 (P. C.)

[On Appeal from 46 I. C. 545 : 46 Cal. 259.]

——— *Legitimacy — Acknowledgment — Presumption.*

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother. 10 C. L. R. 296. Ref. (*Mr. Ameer Ali.*) IMAMBANDI *v.* MUTSADDI. 45 Cal. 878: 16 A. L. J. 800: 24 M. L. T. 330: 28 C. L. J 409: 23 C. W. N. 50: 5 Pat. L W. 276: 20 Bom. L. R. 1022: (1919 M. W N. 91: 9 L. W. 518: 45 I. A. 73· 47 I. C. 513: 35 M. L. J. 422. (P. C.).

——— *Legitimacy—Proof.*

Where one A, the plaintiff, gave evidence that he was the legitimate son of one M. but the defts. adduced evidence that he was the son of another man also named M and the High Court decreed in favour of the defendant on the ground that deft's case was quite possible and laid stress on the fact that A was supported in money by a co-plaintiff in whose favour A had executed a sale deed of a part of the property: *Held*, the decision was unsound. (*Sir John Edge.*) MAHOMED ABDUL AZIZ *v.* MIR TOSADDYO HUSSAIN.
21 C. W. N 873: 1917 M. W. N. 529: 42 I. C. 3: 7 L. W 66 (P. C.)

——— *Legitimacy—Proof of—Acknowledgment —Statement of members of family.*

An admission by one man that another (proved to be illegitimate) is his son cannot make that other legitimate. Such a statement or acknowledgment is substantive evidence that the person acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible. Statements of members of the family touching the sonship and heirship of the person are also good evidence of the family repute concerning them. (*Lord Atkinson.*) SADIK HUSAIN KHAN *v.* HASHIM ALI KHAN.
38 All. 627: 43 I. A. 212: 14 A. L. J. 1248: 192 O. C. 192: 18 Bom L. R. 1037: 21 C. W.N. 130: (1916) 2 M. W. N. 577: 21 M. L. T. 40: 1 Pat. L W 157: 4 O. L J. 22: 25 C. L. J. 363: 6 L. W. 378: 10 Bur. L. T 140: 36 I. C. 104 31 M. L. J. 607 (P. C.)

——— *Legitimacy—Presumption as to—Rules if superseded by the Evidence Act, S. 111.*

The presumption raised by Mahomedan Law that a child born within 2 years (in some schools) of the termination of a lawful marriage, marriage is legitimate, is a matter relating to the law of evidence and must not be deemed to be governed by S. 112, Evidence Act. (*Daniels, J.*) MT. HAJIRA KHATUN *v.* MT. AMINA KHATUN. 1923 A. 570.

——— *Legitimacy—Presumption rebuttable.*

Where it was found that the plaintiff was born 31 days or eleven full months after his alleged father's death and that his mother had been living for the last few years in illicit connection with another person: *Held*, that the plaintiff appellant was not the legitimate son of the alleged father. (*Daniels, J.*) FATTEH DIN *v.* UMRAO 1923 A. 440.

——— *Legitimacy—Acknowledgment.*

A Mahomedan cannot legally acknowledge as his son a person who is shown to be a son of another man An acknowledgment must be not merely of sonship but of legitimate sonship, but the fact that the acknowledgment was of legitimacy as of sonship may be inferred from circumstances justifying that inference. (*Batchelor and Hayward, JJ.*) USMANMIYA *v* VALLI MAHOMED.
40 Bom. 28: 30 I. C. 904: 17 Bom. L. R. 693.

——— *Legitimacy— Acknowledgment — Marriage—Semblance of marriage— Concubinage— Acknowledgment for collateral object— Repudiation of acknowledgment.*

Under Mahomedan law, acknowledgment cannot establish the legitimacy of a child proved to be illegitimate. It is only when it is uncertain whether there was a marriage or not or legitimacy or not that acknowledgments are effectual to establish legitimacy. Disproof of both a marriage and a semblance of marriage is necessary to invalidate an acknowledgment valid in other respects. *Per Woodroffe, J.*—If mere concubinage is established there is neither marriage nor semblance of marriage which, a proved concubinage excludes. Mere acknowledgment as son for the purpose of getting him admitted into certain educational institutions and procuring his marriage with a ward of the Court of Wards are not acknowledgments with the intention of conferring legitimacy. *Per Woodroffe and Chitty, JJ.*

MAHOMEDAN LAW—Legitimacy.

—An acknowledgment once made and proved cannot be rebutted. It cannot even be repudiated by the man who made it. (*Sanderson, C. J., Woodroffe and Chitty, JJ.*) HABIBUR RAHAMAN CHAUDHURY *v.* ALTAF ALI CHAUDHURI.
46 Cal. 259: 23 C. W. N. 1: 49 I. C. 545: 29 C. L. J. 601.

———*Legitimacy—Rules governing— Burden of proof.*

The question whether the rule of Mahomedan law as to the maximum period of gestation is a rule of evidence or a rule of substantive law, is a highly debatable question. The modern view of Mahomedan jurists limits the period of gestation to 10 months. Hence it is for the person who alleges there were abnormal circumstances attending his birth to show that they existed. (*Shadi Lal C. J. and Abdul Quadir, J.*) UMAR HAYAT *v.* MISRI KHAN. **1924 Lah. 177.**

———*Legitimacy—Acknowledgment of—When applies.*

The Mahomedan law principle of acknowledgment of legitimacy applies only when the alleged marriage is not proved. It has no application when it is found as a fact that alleged marriage did not take place. (*Le Rossignol and Harrison, JJ.*) HUSSAIN BAKSH *v.* JHANDA SINGH.
1922 Lah. 706.

———*Legitimacy—Acknowledgment—Effect of Presumption.*

Acknowledgment by a Mahomedan father creates a presumption of legitimacy but an acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. Where however there is clear evidence that no marriage ever took place, the presumption has no place, 10 A. 289. 11 M. I. A 94; 21 C. 966 Rel. (*Broadway, J.*) ABDUL AZIZ *v.* MT. AMEER BEGAM.
66 I. C. 404.

———*Legitimacy—Acknowledgment of sonship —Effect of.*

The result of an acknowledgment is to invest the son with a legitimate status with all the consequences which that imports 38 A. 627 (P. C.) Ref. The law refuses to declare a man a bastard except on the clearest and most positive proof of his illegitimacy, and there must be positive evidence that the marriage did not take place before it can be disproved. An acknowledgment by the master that he had a son from the slave girl who had married and that the son is entitled to succeed him, gives the son all the rights of a legitimate son. In the absence of positive evidence that marriage did not take place, the son will not be regarded a bastard and disentitled to succeed. (*Shadi Lal and Le Rossignol, JJ.*) IBRAHIM ALI KHAN *v.* MUBARAK BEGUM. **1 Lah. 229: 2 Lah L. J. 112: 20 P. W. R. 1920: 56 I. C. 923: 82 P. L. R. 1920.**

———*Legitimacy— Acknowledgment— Essentials—Recognition.*

Acknowledgment cannot make the offspring of *Zina* (adultery) legitimate. Recognition of paternity is not equivalent to recognition of legitimacy. (*Sadasiva Iyer and Spencer, JJ.*) BUDAN SA ROWTHER *v.* FATIMA BIA. **15 M. L. T. 107: (1914) M. W. N. 278: 22 I. C. 697: 26 M. L. J. 260.**

———*Legitimacy — Presumption — Long co-habitation—Acknowledgment by father—Rebuttal —Non-Muslim wife—Adoption—Child begotten by zina, if legitimate—Evidence Act, S. 112.*

Wherever marriage may be presumed from co-habitation combined with the other circumstances for the purpose of conferring upon a woman the status of a wife, it may also be presumed for the purpose of establishing paternity and legitimacy. Paternity is established in the person said to be the father by proof of legal presumption that the child was begotten by him on a woman who was at the time of conception his lawful wife or was in good faith or reasonably believed by him to be such or whose marriage though irregular (*fasid*) was not at that time been terminated by actual separation. Paternity and legitimacy may also be presumed by acknowledgment by the putative father, where it is humanly and legally possible that he might have been the father in fact and there might have been a valid marriage between him and the mother of the acknowledged child. Where a child has been acknowledged by a Mahomedan father, the burden of disproving the paternity and legitimacy of such child lies heavily on the person who denies them. The evidence necessary to disprove the paternity and legitimacy must be extremely cogent to displace the presumption of legitimacy which is not an ordinary presumption of evidence but a strong rule of the Mahomedan Law. Neither paternity nor legitimacy can be obtained by adoption. A child begotten by *Zina* cannot be made legitimate by the subsequent marriage of its parents before its birth, S. 112 of the Evidence Act being inapplicable to Mahomedans. The marriage of a Mahomedan with a Non-Muslim woman who is not the lawful wife of another man, is merely irregular (*fasid*) and not altogether void (*batil*) and the children of such a union are legitimate. (*Stanyon, A. J. C.*) ZAKIRALI *v.* SEGRABI.
43 I. C. 883: 15 N. L. R. 1.

———*Legitimacy—Presumption as to.*

The Mahomedan Law raises a strong presumption in favour of legitimacy where a child was born under a man's roof and continued to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring. (*Simpson, J. C. and Dalal, A. J. C.*) GALSTAUN *v.* MIRZA ABID HUSSAIN. **10 O. L. J. 263: 9 O. & A. L. R. 282: 1924 Oudh 19.**

———*Legitimacy —Marriage possible —Husband acknowledging the wife's status.*

Acknowledgment by a Mahomedan that a certain woman is his married wife, invests the woman with the status of married wife and makes her children legitimate unless the marriage between the parties is legally impossible. (*Stuart and Pandit Kanhaiyalal, A. J. Cs.*) MUHAMMAD ALI KHAN *v.* GHAZAUFOR ALI KHAN.
60 I. C. 147: 7 O. L. J. 474.

MAHOMEDAN LAW—Legitimacy.

———*Legitimacy — Acknowledgment of parentage.*

A Mahomedan may legitimatise an illegitimate child by acknowledgment of his paternity but to establish such legitimation it is necessary to prove an intention evidenced by a formal and deliberate act. 3 M. I. A 295 ; 8 M. I. A. 136 ; 11 M. I. A. 94: 11 M. I. A. 177: 8 C. 422 . 10 C. 663 ; 21 C. 666: 32 A. 345 Cons. (*Stuart and Mahamad Ali, A J. Cs.*) ZAHIDA BIBI *v* WALI MAHAMMAD. **37 I. C. 926 : 3 O. L. J. 654.**

———*Legitimacy—Presumption of—Rebuttal.*

Where the legitimacy of a person is disputed and it is shown that a lawful union between his parents was impossible, but at the same time there is evidence as to the treatement of that person as a legitimate son, the presumption arising from the course of treatment of this kind must yield to proof of circumstances which, when established preclude all possibility of a lawful union between his parents. (*Lindsay, J. C.*) ABDUL KARIM *v.* ABDUL RAZZAK. **28 I. C. 201 : 2 O. L. J. 101.**

——*Legitimacy—Proof of.*

Legitimacy may be proved without direct proof either of marriage or formal act of legitimation by circumstantial evidence, such as a statement by the deceased father in a prior litigation, treatment of the boy as a son in the family, being brought up and educated in the house, marriage into the same family, introduction by the father into society as his son, etc. When this is proved the burden is on the persons who deny the status of the wife to prove it conclusively. The allegation by the mother who was a co-deft, in the case along with the son, throwing doubt on the validity of marriage is immaterial. Under Shiah Law, connection by fosterage is a ground of prohibition for marriage. Facts constituting by fosterage laid down 3 M. I A. 295; 8 M. I. A. 136 Ref. to. (*Lindsay, J. C. and Kanhaiya Lal, A.J.C.*) IRURAIYA QADR *v.* QUDSIA BEGAM. **24 I. C. 643 : 1 O. L. J 281.**

——*Legitimacy —Acknowledgment — When possible.*

Unless there is an absolute bar or impediment to a valid marriage acknowledgment has the effect of legitimation according to Mahomedan Law where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. Where there could not have been a valid marriage between the parents the question of acknowledgment does not at all arise. 9 C W. N. 352: 48 C. 856: 10 A. 289 : 15 A 386 referred to. (*Ross, J.*) MAN MOHAN SAW *v.* MUAHAMMAD HUSAN KHAN. **1 Pat. L. R. 328 : 1924 P. 191.**

Maintenance.

———*Maintenance—Right to—Civil and Criminal Courts.*

The rights of maintenance are enforceable in a Civil Court under Anglo-Mahomedan Law and is unaffected by the fact that there is a concurrent permission for their enforcement in Criminal courts under S. 488 of the Cr. P. Code. A minor son can sue his father for maintenance even when the custody of the minor is withheld

MAHOMEDAN LAW—Maintenance.

from the father and the minor is in the lawful custody of his mother. 6 Bom. L.R 536 Rel. The maintenance of a minor son cannot be charged on the father's property. (*Hayward, J.*) MAHOMMED JUSAB *v.* HAJI ADAM. **37 Bom. 71 : 15 I. C. 520: 14 Bom. L. R. 336.**

——*Maintenance—Right of wife to.*

Where a marriage is invalid the wife is not entitled to maintenance out of estate of the deceased husband. (*Kensington and Shah Din, JJ.*) ABDUL HAMID KHAN *v.* MEHR JAN. **49 P. R. 1913 : 19 I. C. 937 : 139 P. L. R 1913.**

———*Maintenance—Right to—Wife—Shafis.*

According to the Shafi school of law, maintenance due to a wife is a debt and the wife can recover arrears of maintenence from the date when the husband wrongfully refused or neglected to maintain her though it may not be due under a decree of Court or an agreement. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) MAHOMED HAJI *v.* MOIDEEN BEETHIE, KALLIMARI. **41 Mad. 211 : 42 I. C. 517 . 6 L. W. 288.**

———*Maintenance—Moplah woman.*

Under the *Marumkkathayam* Law it is the custom for a Moplah's wife to live in her own tarwad house but as her right to maintenance is derived by her by the Mahomedan Law, she must take it subject to the obligation under that law to live with the husband in his own house if he required her to do so. (*Benson and Sundara Iyer, JJ.*) VELU VENKANDI KUNHI PATHUMAVA *v.* PONNANKI MOOSSAN MAMMAD. **13 I. C. 300 : (1912) M W. N. 11.**

——*Maintenance—Wife—Duty to maintain.*

A girl on marriage passes over to her husband's family and there is no obligation on the members of her natural family to maintain her even if she is divorced. Rules of Shridhana gift applicable as between parties governed by the Marumakkathayam Law are not applicable to parties governed by the Mahomedan Law. (*Benson and Sundara Iyer, JJ.*) PERINCHARI KOVUMMAL PACKRICHI *v.* PERINCHERI KOVUMMAL KEENHACHA. **36 Mad. 385 : (1911) 2 M. W. N. 538 : 13 I. C. 236 : 22 M. L. J. 122.**

———*Maintenance—Child—Mother.*

The mother is the natural guardian of her daughter and is bound to provide for her from the income of her husband's estate. (*Lindsay, J. C.*) SADRUNISSA *v.* RAMA BHAROSE. **55 I. C. 873 : 7 O. L. J. 78.**

——*Maintenance—Grant—Duration.*

When lands are granted in lieu of maintenance the grant is presumed to be made for the life-time of the grantee. (*Lindsay, J. C.*) BUNIYAD HUSAIN *v.* HAZIR-UN-NISA. **35 I. C. 764 : 3 O. L. J. 354.**

———**Marriage.**

Anti-nuptial agreement.
Apostacy of parties.
Breach of promise.
Consent of bride
Consent of guardian.
Eligibility.
Forms of.

MAHOMEDAN LAW— Marriage — Ante-nuptial Agreement

Formalities.
Fosterage.
Incidents.
Presumption of.
Remarriage.
Repudiation.
Validity.

Marriage—Ante-nuptial agreement.

———*Marriage —Ante-nuptial agreement — Agreement that wife may live with parents, if valid.*

There is nothing in Mahomedan law opposed to an agreement entered into at the time of marriage which does not allow the wife to deny her husband conjugal rights but permits her, on certain contingencies arising to leave her husband's house and to insist on the conjugal rights being exercised at her parents' residence. Conditions entered into at the time of marriage and contained in a *Kobinamah* are enforceable although the *Kobinamah* is executed subsequent to the marriage. (*Newbould and Duval, JJ.*) SABED KHAN *v.* BITATUNNESSA BIBI.
52 I. C. 322 : 30 C. L. J. 510.

———*Marriage — Ante-nuptial agreement —* Kobinamah—*Illegal.*

A *Kobinamah* or an agreement whereby the wife is given a right to ask her husband to live with her in her father's house is illegal as the agreement implies that the wife will continue to live in her father's house. The wife is not entitled to use this agreement for supporting her claims to divorce her husband and consequently the right to her deferred dower. (*Stephen and Mullick, JJ.*) IMAM ALI PATWARI *v.* ARPATUNNISSA. **21 I. C. 87 : 18 C. W. N 693.**

———*Marriage — Ante-nuptial agreement — Agreement to stay with the girl's parents—Breach —Effect.*

An agreement by the husband to live with his wife in her parents' house is invalid and the wife cannot put it as a defence in a suit by the husband for restitution of conjugal right and if she is proved to have left her father's house and went to live with the husband, she is deemed to have waived the right if any under such agreement. (*Broadway and Abdul Raoof, JJ.*) FATIMA BIBI *v.* NUR MAHOMED. **60 I. C. 88 : 1 Lah. 597.**

———*Marriage—Ante-nuptial agreements.*

As regards ante-nuptial stipulations, when a marriage contract is entered into subject to a reasonable or essential condition, not opposed to the Mahomedan Law, the Court may set aside the marriage on the breach of that condition unless there is waiver or acquiescence. (*Johnstone, C.J. and Shadi Lal, J.*) JAMAIT ALI SHAH *v.* MIR MUHAMMUD. **38 I. C. 10 : 119 P. R. 1916.**

———*Marriage — Ante-nuptial agreement — Dissolution—Divorce—Conditions.*

An agreement that the wife should be entitled to get a divorce pronounced on the breach of a certain condition of the marriage contract by her husband, is not void as being opposed to the principles or policy of the Mahomedan Law, as it treats marriage as a purely civil contract (*Hallifax, A J. C.*) FIDA ALI *v.* SANAI
6 N. L. J. 166 : 1923 Nag. 262.

MAHOMEDAN LAW—Marriage—Breach of promise.

———*Marriage—Ante-nuptial agreement.*

An ante nuptial agreement by husband that he would live with his wife at her father's house virtually amounts to providing for a future separation on a certain contingency and as such is unenforceable as contrary to public policy. (*Pratt, J. C., and Boyd, A. J. C*) CHUTO *v.* KHUDAR BUX. **34 I.C. 470 : 9 S. L. R. 199.**

Marriage—Apostacy of Parties.

———*Marriage—Apostacy of parties*

By the apostacy of either the husband or the wife a Mahomedan marriage is dissolved. 132 P. R. 1884 ; 61 P. R. 1899 : 33 A 90 ; 39 C. 409 Ref. The test is whether the parties have renounced the Mahomedan religion. (*Scott-Smith, J.*) MT. BAKHO *v.* LAL. **1924 L. 397.**

———*Marriage—Apostacy.*

Under Mahomedan Law proved apostacy of either party *ipso facto* dissolves the marriage whatever the underlying motive may be. (*Shadi Lal and Le Rossignol, JJ.*) GHAUS *v.* FAGGI.
29 I. C. 857 : 123 P. W. R. 1915.

———*Marriage—Apostacy of parties—Bigamy —Ahamadiyans*

The Ahamadiya faith is within the pale of Mahomedanism and a Mussalman who embraces the Ahamadiya faith does not become an apostate. Where a Mahomedan husband becomes an Ahamadiya and thereafter the wife treating him as an apostate marries another, she is guilty of bigamy. There is no question of the application of *Mensrea* in the case of offence under S 494, I. P. C. (*Oldfield and Krishnan, JJ.*) NARANTA KATH AVULLAH *v.* PARAKKAL MAMMU.
24 Cr. L. J. 17 : 45 M. 986 : 1922 M W. N. 662 : 43 M. L. J. 663 : 1923 Mad. 171.

———*Marriage—Apostacy of wife.*

The apostacy of a Mahomedan wife *ipso facto* dissolves the marriage. (29. I. C. 857, Foll. (*Pratt, J.*) SONA-ULLAH *v.* MA KIN
9 L. B. R. 206 : 46 I. C. 719 : 19 Cr. L. J. 799 : 12 Bur. L. T. 60.

Marriage—Breach of Promise.

———*Marriage—Breach of promise—Suit for damages not maintainable.*

Under Mahomedan Law no suit lies to recover damages for breach of promise of marriage. (*Kemp J.*) ABDUL RAZAK *v.* MAHOMED HUSSEIN.
42 Bom. 499 : 38 I. C 771 : 19 Bom. L. R. 164.

———*Marriage—Breach of promise—Damage.*

Under the Mahomedan Law in a suit by a plaintiff for damages for breach by the defendant to give his daughter in marriage to the plaintiff, the latter would be entitled only to receive compensation under S. 73 of the Contract Act for any loss or damage caused to him by the breach which he parties knew would be likely to result from the breach of it. (*Campbell, J.*) GHULAM MAHOMED *v.* MEHRAJ DIN. **1923 Lah. 679.**

MAHOMEDAN LAW—Marriage—Breach of promise.

———*Marriage—Breach of promise—Liability of guardian.*

Since a Mahomedan girl is at liberty on her attaining majority to choose her husband, the breach by her of a betrothal arranged by any of her guardians does not make the guardian liable for any damages at instance of the injured party. (7 P. R. 1880: 197 P. R. 1882. Dist.). (*Shadi Lal J.*) IMAM DIN *v.* KAMAL. **82 P. W R. 1915 · 29 I C. 750 : 168 P. L. R. 1915.**

Marriage—Consent of Bride.

———*Marriage—Consent of Bride.*

The fact that a Mulla who performed the ceremony did not hear the bride's consent to the marriage was sufficient to declare it not legal though the other essentials of a marriage were duly observed. (*Chitty and Chatterjee, JJ.*) SHAHEBI BIBI *v.* KAMARUDDIN. **11 I. C 215 : 15 C. W. N. 991.**

Marriage—Consent of Guardian.

———*Marriage—Consent of guardian—Minor girl—Essentials for validity of—Right to give girl in marriage.*

A ceremony of marriage performed between a Mahomedan adult and a minor Mahomedan girl would, however regular in other respects, be ineffectual to create a valid marriage unless the guardian of the minor had previously consented to the marriage, such consent being essential. When the marriage of a Mahomedan girl alleged to be a minor with a Mahomedan adult is questioned on the former's behalf, it is incumbent on the latter to establish by legal evidence either that the marriage was contracted with the consent of the girl's lawful guardian or that the girl having reached her majority herself consented to the same. Neither under the Mahomedan Law nor under any statutory enactment has the maternal grandmother of a Mahomedan minor, any preferential right to take charge of the minor as against the minor's paternal uncle. Under the Mahomedan Law, after the death of the father, the daughter can be given in marriage by the paternal uncle only and when there is a paternal uncle, the maternal grandmother cannot give the daughter in marriage even if authorised by the paternal uncle, or by the terms of a nuncupative will of the father. (*Lord Atkinson*). ATKIA BEGAM *v.* MUHAMMAD IBRAHIM. **6 L. W 26 : 21 C. W. N. 345 : 10 Bur. L. T. 79 : 36 I. C. 20 : (1917) M. W. N. 261 (P. C.).**

———*Marriage — Consent of guardian — Puberty.*

The marriage of a minor girl without the consent of her guardian is void. If in a suit for restitution of conjugal rights, it is shown that the girl was 15 years of age at the time of the marriage, puberty would be presumed. But if she was not, the plaintiff is bound to show that she had arrived at the age of puberty. (*Richards, C. J., and Tudball, J.*) MUHAMMAD IBRAHIM RASHID *v.* ATKIA BEGAM. **16 I. C 597.**

———*Marriage—Consent of guardian—Effect.*

Where the father of a minor Mahomedan girl is present and consents to the contract of her marriage by another person, it is equivalent to a contract entered into by himself In such cases there is no option of puberty. (*Scott-Smith, J.*) CHIRAJ BIBI *v.* GHULAM SARWAR. **60 I. C. 453.**

MAHOMEDAN LAW—Marriage—Forms of.

Marriage—Eligibility for.

———*Marriage — Eligibility for — Marriage with wife's sister during the lifetime of the first wife.*

The marriage by a Mahomedan with his wife's sister during the lifetime of the first wife is invalid (*fasid*) but not void (*batil*) and the issue of such marriage is legitimate. 23 Cal. 130 Diss. (*Scott, C. J. and Beaman, J.*) TAJBI ABALAL DESAI *v.* MOWLAKHAN ALIKHAN DESAI. **41 Bom. 485 : 39 I. C. 608 : 19 Bom. L. R. 300.**

———*Marriage—Eligibility — Prohibition by fosterage* Factum valet.

The prohibition by fosterage of a marriage between a woman's natural son and her foster daughter is an absolute one and it will not be rendered good under the principle of *factum valet* *Factum valet* does not render good in law a marriage which ought never to have taken place. (22 M. 398. F.) (*Walmsley, J.*) JANAB ALI MIA *v.* NAZAMADDIN PRADHANIA. **29 I. C 871 : 19 C. W. N. 897.**

———*Marriage — Eligibility for—Whether marriage with mother of previous wife valid.*

Where a marriage has been contracted with a woman, her mother and grandmother, how high-so-ever become forbidden to the man even though consummation did not take place. (*Shadi Lal, J.*) KARIM BAKHSH *v.* MUKABAR. **39 I. C 657 : 16 P. R. 1917.**

———*Marriage — Eligibility for — Married woman.*

Marriage with the wife of another is void 15 A. 396 Ref. (*Sadasiva Iyer and Spencer, JJ.*) BUDANSA ROWTHER *v.* FATIMA BI. **15 M. L. T 107 : (1914) M W. N. 278 : 22 I. C. 697 : 26 M. L. J. 260.**

Marriage—Forms of.

———*Marriage — Forms of — Shiah School—* Muta *and* Nikha *Marriages—Incidents.*

A *Muta* marriage is a temporary marriage fixed by agreement between the parties. This confers no right of inheritance on the wife, though the children born of this union are legitimate. A *Nikha* marriage is a marriage performed with due religious ceremonies and confers on the woman the full status of a wife with rights of succession, etc. Where co-habitation originates in a *Muta* marriage and it is continued for a long time there being no evidence as to the term, the presumption is that it was continued by agreement during the whole period of co-habitation. Where a Mahomedan marries a woman in the *Muta* form and had two daughters by this marriage and afterwards married her in the *Nikha* form and a daughter was born by this marriage. *Held*, on a claim by her third daughter for a 7/8th share of her father's estate, that she was entitled to only ⅛ of 7/8 inasmuch as according to the *Shiah* law, the two daughters born during the continuance of the *Muta* were also legitimate and entitled to an equal share with her. Where there is a co-habitation

after period of *Muta* is over, there is a presumption in favour of its continuance and the continuation does not as such confer on the wife any rights of inheritance to her husband Where the claims of some of the heirs are barred the benefit of the same goes to the party in possession and not to the other co-heirs. (*Lord Parker.*) SHOHARAT SINGH *v.* JAFARI BIBI. **1 L. W. 965 : 16 M. L. T. 517 : 18 C. W. N 225 : 21 C. L.J. 4 : 17 Bom. L. R. 13 : 13 A. L. J 113 : (1915) M. W. N. 389 : 24 I. C 499 : 27 M. L. J. 89 (P. C.)**

———*Marriage—Forms of*—Muta *form—Essentials—Legitimacy.*

The essentials of a *muta* form of marriage are :—(1) there must be a definite period for the marriage to last, (2) a sum of money should be paid to the bride as dower. Mere proof of cohabitation and parentage is not sufficient under Mahomadan Law to establish legitimacy, there must be an acknowledgment express or implied as son by the reputed father. (3 M I. A. 295 ; 11 M. I A. 94 ; 2 I. C. 184 Foll.) (*Coutts Trotter and Srinivasa Iyengar, JJ.*) AKBAR HUSSAIN SAHIB *v* SHUKHAH BEGAM SAHEBA. **2 L. W. 1191 : 31 I. C. 657 : 18 M. L. T. 525.**

———*Marriage—Forms of*—Muta *marriage*—Nikah *marriage during subsistence of* muta, *validity.*

If a husband and wife during the subsistence of a *muta* marriage enter into a *nikah* marriage but before doing so the husband surrendered the unexpired portion of the *muta* period, *Held*, that the second *nikah* marriage is valid. (*Lindsay and Kendall, A. J. Cs.*) BAQAR MIRZA *v.* MEHDI HASAN. **37 I. C. 203 : 19 O. C. 246.**

Marriage—Formalities.

———*Marriage— Formalities — Ceremonies—Absence—Effect of.*

Under the Shia law the presence of witnesses is not necessary in any matter regarding marriage, and if a marriage were contracted by the spouses themselves or their guardians in private, it would be valid; even if there were an injunction to secrecy that would not invalidate it. There is nothing in the Mahomedan Law which countenances the doctrine that a marriage which is a valid marriage can be invalidated by the desire of the parties to have a more elaborate ceremony performed later. There is no provision for a ceremony which would create a marriage if afterwards ratified by a subsequent ceremony. If there had been a stipulation after the marriage had taken place to the effect that it would not be consummated until the lapse of a specified period, such a stipulation is valid. The law appoints no specific ceremony for the performance of a *nikha* marriage and no religious rites are necessary for contracting a valid marriage. Where the essentials are present, *viz.*, the declaration and the acceptance expressed in such a manner as to demonstrate an intention to give away without any ambiguity, presence or the absence of religious ceremonials is immaterial and in no way affects the validity of the marriage.

There is nothing in the Shia law to justify the imposition in the matter of marriage of conditions

which have been imposed upon persons dealing with pardanashin women in business matters. The Shia law lays down that, if a woman is adult and sane, she is competent to enter into a matrimonial engagement without advice or consent from anybody (*Stuart, J.*) MT. NAFIS UNNISSA *v.* MIRZA MUMTAZ HUSAIN. **4 U. P. L. R 17 (A) : 1922 All. 363.**

———*Marriage—Formalities of—Witnesses—Absence of.*

No particular type of class of witnesses is necessary for a marriage under the Mahomedan Law. Only some witnesses must be present. Marriage contracted without witnesses is not illegal but merely irregular. Irregularity caused by absence of witnesses to the contract of marriage, can be cured by consummation. (*Banerjee, J.*) BASHIRUNNISA *v* BUNYAD ALI. **50 I. C 677.**

———*Marriage—Formalities—Agent for minor—Marriage if valid.*

For a Mahomedan marriage all that is necessary is a proposal and acceptance in the presence of witnesses. The fact that the vakil who acted for the girl at the marriage, was a minor would not affect the validity of the marriage inasmuch as under S. 184 of the Contract Act a minor can act as agent between the principal and a third person (*Beachcroft, J.*) ERFANDDIN MOLLA *v.* BADAN SHEIKH. **51 I. C. 583.**

——— *Marriage—Formalities necessary for.*

The Mahomedan law appoints no specific ceremony for the contractual performance of a marriage but according to recognised custom marriages among all the sects are solemnized by a person conversant with the requirements of the law (*i.e.*) the Kazi while two other persons are appointed for the purpose of acting on behalf of the contracting parties with a certain number of witnesses. (*Broadway, J.*) ABDUL AZIZ *v.* MT AMEER BEGAM. **66 I. C. 404.**

Marriage—Fosterage.

———*Marriage—Fosterage — Prohibited degrees of marriage*—Factum valet.

Under Mahomedan Law the prohibition regarding marriage attaching to a woman's natural son and foster-daughter is absolute and not conditional upon the birth of the one and the suckling of the other occurring within any limited period. The principle of *factum valet* does not render good in law a marriage which ought not in law to have been celebrated. (*Walmsley, J.*) JANAB ALI MIA *v.* NAZAMADDIN PRADHANIA. **29 I. C. 871 : 19 C. W N 897.**

Marriage—Incidents.

———*Marriage — Incidents — Dissolution—Death or divorce Remarriage.*

Under the Mahomedan Law death or divorce dissolves the tie between the husband and wife. On the happening of either event the relationship between the parties ceases. Much more would it be so in the case of a woman who after the death of her first husband marries into another

family. (*Rafique and Piggott, JJ.*) JAHANGIR KHAN *v.* SYED ABDHUR RAHMAN.
20 A. L. J. 56 : L. R. 3 A. 23 : 1923 A. 128.

——*Marriage — Incidents — Restitution of conjugal rights—Discretion of court.*

Where there is a valid marriage under the Mahomedan Law, a Court has not very great discretion in granting or refusing restitution of conjugal rights but in a case where the wife is anxious to go to her husband but is being restrained by her relatives, there is every reason why the relief should be granted. 11 M. I. A. 551 ref. (*Stuart, J*) MT. NAFIS-UN-NISSA *v.* MIRZA MUMTAZ HUSAIN. 4 U. P. L. R. 17 (A.) : 1922 All. 363.

——*Marriage—Incidents—Change of status.*

Marriage under Mahomedan Law, though spoken of as a contract involves a change of status. The contract is merged in the new status acquired by the parties and as long as that status continues so long do the rights and liabilities of the parties under the contract continue. (*Macleod, C. J. and Heaton, J.*) KULSAMBI *v.* ABDUL KADIR. 45 Bom. 151 : 59 I. C. 433 : 22 Bom. L. R. 1142.

——*Marriage—Incidents — Puberty — Presumption—Husband neglecting her even after puberty—Effect.*

Where a Mahomedan girl was married when she was 3 years old as an exchange for her father marrying the sister of the husband, and from that time until 2 years after she attained puberty the husband neglected her he is not entitled to restitution of conjugal rights. The age of puberty is generally fixed at 14 in the case of males and 12 in the case of females but according to Mahomedan Law a girl must be presumed to have reached puberty on completing her 15th year. (*Shadi Lal, C. J. and Zafar Ali, J.*) MT. NAWAB BIBI *v.* ALLAH DITTA.
5 L. L. J. 505 : 1924 Lah 188. (2).

——*Marriage—Incidents — Agreement for future separation—Legality of.*

An agreement for future separation between a Mahomedan husband and wife is void. 7 Bom. L. R. 602 Ref. Similarly an agreement which leaves the wife absolutely free to separate herself from her husband without reason. Where however an agreement provides for wife leaving her husband in case of ill-treatment and the husband agrees to pay the wife a monthly sum in consideration of the wife giving up her defences in a suit for restitution by the husband the agreement is valid and enforceable. (*Simpson, A. J. C.*) BANNEY SAHEB *v.* ABDA BEGAM. 25 O. C. 157 : 10 O. L. J. 13 : 1922 Oudh 251.

Marriage—Presumption.

——*Marriage—Presumption — Long cohabitation—Dancing girl.*

Where a dancing girl of questionable antecedents, whose connection with her employer was illegitimate from its inception, sets up a valid marriage at a particular time and place and fails to prove it, such marriage cannot be

inferred from mere circumstantial evidence, nor from evidence of long continued and exclusive cohabitation on the ostensible footing of lawful wife. (*Piggott and Walsh, JJ.*) MUSSAMMAT SHABBAN BIBI *v.* KHALIQ SHAH. 51. I. C. 624 : 16 A. L. J. 754.

——*Marriage—Presumption.*

Where a Mahomedan woman is proved to have lived with a Sikh for a number of years as his wife, there is a strong presumption of marriage between them. (*Wilberforce and Le Rossignol, JJ.*) SULKAHAN *v.* SANTASING. 60 I. C. 375.

——*Marriage—Presumption—Cohabitation.*

It is not mere cohabitation and birth of a child but cohabitation and birth with treatment amounting to acknowledgment of marriage and legitimacy of the child that will suffice to establish the marriage of the parents 7 W. R. P. C. 1, Rel. on. (*Brockman, J.C.*) MOHAMED ALI KHAN *v.* SHUJAT ALI KHAN 46 I. C. 913.

Marriage—Remarriage.

——*Marriage—Remarriage—*Iddat *period of —Pregnancy, effect of.*

The duration of the period of the *Iddat* and the period prescribed for the *Idaat* of a widow on the death of a regularly married husband, if not pregnant is 4 months and 10 days or until delivery, whichever is longest. The period fixed is not curtailed if the delivery takes place before the expiry of the period of four months and ten days. (*Broadway and Moti Sagar, JJ.*) JHANDU *v.* MT. HUSAIN BIBI. 4 Lah. 192 : 5 Lah. L. J. 401 : 1923 Lah. 499.

Marriage—Repudiation.

——*Marriage — Repudiation — Option of puberty.*

A girl can exercise the option of repudiation of marriage under the Mahomedan Law only after she attains puberty and not before. A denial of the *factum* of marriage by the girl when examined as a witness in a criminal case where her mother was charged with bigamy does not amount to the exercise of the option of repudiation of marriage on puberty. (*Daniels, J*) HUB ALI *v.* EMPEROR. L. R 4 A. 73 (Cr.): 21 A. L.J. 787 : 4 L. R. A. (Cr.) 73 : 1923 A. 329.

Marriage—Repudiation—Option of puberty—Knowledge of right.

Under the Mahomedan Law, a minor woman's right of option of puberty, in the absence of consummation, is prolonged until she becomes aware that she has such a right. (*Tudball and Lindsay, JJ.*) BISMILLAH BEGAM *v.* NUR MOHAMMAD. 19 A. L. J. 845 : 63 I. C. 702 : 3 U. P. L. R. (A) 186.

——*Marriage — Repudiation — Option of puberty—When to be exercised.*

Where a Mahomedan girl who has been married when she was a minor wants to exercise her option of puberty, the repudiation should be made immediately she perceives signs of the menstrual flow. The principle underlying is that there must be no acquiescence in the marriage after that event. (*Le Rossignol, J.*) HUSSAINA *v.* MT. JIWANI. 1924 Lah. 385.

MAHOMEDAN LAW—Marriage—Repudiation.

——— *Marriage—Repudiation—Option of puberty—When to be exercised—Guardian for marriage.*

The right to repudiate a marriage has to be exercised as soon as the minor attains puberty. Where the right had not been exercised for fully a year after the plaintiff had reached the age of puberty. *Held*, that she had lost the option given to her. Where the mother and the brothers of the minor bride were alive, a marriage contracted by the uncle by marriage, whether he be the husband of the father's sister or mother's sister is void. (*Broadway, J.*) MT. GHULAM FATIMA *v.* KHAIRA. **1923 Lah. 674.**

——— *Marriage—Repudiation by girl unaware of marriage on obtaining knowledge.*

A girl who is unaware of her marriage at the time when she attains puberty retains her option of repudiation until she becomes aware of it. (*Martineau and Zafar Ali, JJ*) SULTAN *v.* WARYAM. **1923 Lah. 502 (1).**

——— *Marriage—Repudiation—Delegation of power—Divorce—Ill-treatment.*

Where a husband at the time of his marriage executed an agreement and delegating the power of repudiation to his wife she can obtain a divorce on the ground of contravention of the terms of the agreement and ill-treatment on several occasions by the deft. (*Moti Sagar. J.*) SAHRA JAN *v.* SARDAR ABDUL RAOOF. **3 Lah. L. J. 519**

——— *Marriage—Repudiation—Option of puberty.*

A minor girl, given in marriage by a person other than the father or grandfather, can repudiate the marriage on attaining puberty. It is out of question whether the exercise of the option would be beneficial to the girl; the only question to be seen is whether the girl desires the marriage to be dissolved. (*Martineau, J.*) GHULAM FATIMA *v.* RAHMAN. **50 I. C. 270 : 127 P. R 1919.**

——— *Marriage — Repudiation — Consent of grandfather.*

According to Mahomeden Law the marriage of a minor girl, with the consent of her grandfather and with his ratification is valid. She has no option of repudiation. 175 P.R. 1879, Foll. A Mahomedan girl over 15 years of age is to be presumed adult in default of any other evidence to the contrary. (*Scott-Smith, J.*) KHAIR DIN *v.* HAKIM BIBI.
97 P. L. R. 1915 : 28 I. C. 421 : 29 P. W. R. 1915.

——— *Marriage—Repudiation — Minor—Husband taking second wife—Repudiating marriage—Restitution of conjugal rights.*

A minor Mahomedan girl was given in marriage at the age of 6 by a person about whom there were doubts as to his competency to give her in marriage. When the girl was about to attain puberty the husband took a second wife. Thereupon she eloped with another person, took her abode with him and finally married him. *Held* that this was a case in which the discretionary power of the Court should be exercised and the husband should not be granted the custody of the girl and that the girl should not be allowed her costs but the parties should be left to bear their own costs. (*Chevis, J.*) SAHIB JAN *v.* GHULAM HAIDAR.
15 I. C. 560 : 111 P. W. R. 1912.

MAHOMEDAN LAW—Marriage—Validity.

Marriage—Validity.

——— *Marriage—Validity—Apostacy of husband*—Iddat.

The marriage of a Mahomedan woman after the apostacy of her first husband but before the expiry of *iddat* is invalid on that account under Mahomedan Law and not by reason of its taking place during the lifetime of her first husband and therefore she is not guilty of bigamy. (*Holmwood and Sharfuddin, JJ.*) ABDUL GANI *v.* AZIZUL HAQ. **39 Cal. 409 : 15 C. L. J. 263 : 14 I. C. 641 : 13 Cr. L. J. 257 : 16 C. W. N. 451.**

——— *Marriage—Validity— Nikah denied by the wife—Repudiation.*

Where in a suit for restitution of conjugal rights, the defendant denied the *factum* of marriage and it was found that if a *nikah* was read at all, it was read without the defendant's consent and in her absence. *Held*, the *nikah* if any, was invalid, and that the denial of *nikah* was a denial of the *factum* of *nikah* as well as a repudiation of the marriage ceremony that may have been performed. (*Chevis, J.*) BEGAN *v.* FAIZA BAKSHA. **60 I. C. 734 : 3 U.P.L.R. (Lah) 31.**

——— *Marriage—Validity of— Inequality in family—Whether invalid among Sunnis or Shias—Ante-nuptial stipulation and its breach.*

Though equality in family or descent is one of the requisites of Hanafi School it is a moot point of the *Sunni* law whether a marriage of adult woman, otherwise lawful, can be or must be set aside by a British Court at the instance of the guardians, that is the relatives who would be guardians, if the woman had been a minor, if they prove such social inequality on the part of the bridegroom, as would injuriously affect the family credit or interest. The doctrine of Shia Law is clear that the social inferiority of the husband is no ground for the cancellation of the marriage. In the absence of fraud a minor girl given in marriage by her father, cannot avoid the marriage merely on the ground of the husband's social inequality. Nor can the Court dissolve the nuptial tie. (*Johnstone, C.J. and Shadi Lal, J.*) JAMIT ALI SHAH *v.* MIR MUHAMMAD.
38 I. C. 10 : 119 P. R. 1916.

——— *Marriage—Validity—Iddat not expired—Validity.*

The marriage of a Mahomedan before the expiry of *iddat* is void. (*Chevis, J.*) ISA *v.* RANON. **1 P. W. R. 1912 (Cr) : 83 P. L. R. 1912 : 13 I. C 824 : 13 Cr. L. J. 136.**

——— *Marriage—Validity of—Conflict between persons of different religions—Rules to be applied.*

In the case of a conflict between persons belonging to different religions, the Courts must

MAHOMEDAN LAW—Marriage—Validity.

apply the rules of justice equity, and good conscience. (*Sadasiva Aiyar and Spencer, JJ.*) BUDANSA ROWTHAR *v.* FATIMA BI.
15 M. L. T. 107 : (1914) M. W. N. 278 : 22 I. C. 697 : 26 M. L. J. 260.

———*Marriage—Validity of—Marriage by a Mareez (sick man)—Dower—Rights of wife.*

A marriage contracted by a sick man (*mareez*) who dies of that illness before consummation is void and the wife has no claim to dower. (*Lindsay and Sabonadiere, A. J. C.*) BISMILLAH BEGAM *v.* SHAHR BANO BEGAM. **16 O. C. 325 : 22 I.C. 529 : 1 O. L. J. 1.**

———*Marriage—Validity of— Shafi school — Sayeeba—Consent of girl's father.*

Where a *shafi* girl was clandestinely married to a Hanafi boy without the consent of the girl's father and the *mulla* was made to believe that the girl had become a convert to the *Hanafi* sect the usual presumption as to the validity of a marriage could not be made and it was invalid for want of consent of the girl's father. Under Shafi Law, a woman who under any circumstances had connection with a man became "Sayeeba" (*Parlett, J.*) RAHIMA BI *v.* MAHAMED SALEH.
29 I. C. 866 : 8 L. B. R 54.

———**Mosque.**

See MAH. LAW—WAKF.

———**Mutawali.**

See MAH. LAW—WAKF.

Partition.

———*Partition—Administration—Suit for, by heirs—Maintainability.*

Any one interested in the estate of a deceased Mahomedan, may bring a suit for administration thereof without suing for partition even though no Letters of Administration need be taken under the Mahomedan law. (*Macleod, C. J. and Heaton, J.*) ESUPALLI ALIBHAI *v.* ABDEALLI GULAM HUSSAIN. **45 Bom. 75 : 59 I. C. 396 : 22 Bom. L. R. 1117.**

———*Partition—Partial partition.*

The rule against a partial partition does not apply in the case of Mahomedan co-heirs as rigidly as in the case of Hindu co parceners and partial partition may be allowed, if no great inconvenience is thereby suffered by the defendants and if the plaintiff has no other remedy. (*Spencer and Odgers, JJ.*) MOIDIN KUTTI *v.* MARIAN UMMA. **14 L. W. 502 : 70 I. C. 113 : 41 M.L.J. 457.**

———*Partition — Division per stirpes or by tavazies—Minor members — Right to impeach partition.*

Under the Malabar Law a partition can only be effected by and with the consent of all the adult members of the tarwad.

Where adult members of a Malabar tarwad make a partition per stirpes or by tavazies the partition cannot be questioned by the minor members on their attaining majority. 21 C. W. N. 553 Rel. on. (*Wallis, C. J. and Spencer, J.*) NANI KUTTI *v.* ACHUTAN KUTTI. **42 Mad. 293 : 25 M. L. T. 83 : 51 I. C. 10 : 36 M. L. J. 529.**

MAHOMEDAN LAW—Religious Office.

———*Partition—Decree—Sale.*

The Court being competent to pass orders to sell a property if found inconvenient to divide into an exact number of shares, can direct the division without the order of sale. (*Abdur Rahim and Ayling, JJ.*) THONDAN VALAPPIL ISAUF *v.* KOTUSERI VALAPPIL KOYA.
37 Mad. 514 : 12 M. L. T. 147 : (1912) M. W. N. 889 : 15 I. C. 576 : 23 M. L. J. 244.

———*Partition—Partial partition — Law of administration.*

Mahomedans under their own law are never joint in estate but only tenants in common whether they live together or whether they do not. Tenants in common are not obliged when anxious to distribute a particular property, to sue for a partition of all other properties in which they are interested. There is nothing to preclude one of the joint owners of several items of property from seeking a partition of one of such items of property. Under Mahomedan Law, the estate of a deceased person devolves on his death on his heirs and each of the heirs becomes entitled to his definite fraction of every part of the estate. It is therefore futile to describe a suit, in which one heir claims to receive his share of the property of the deceased from another heir, as a suit for partial partition and to say that therefore the suit is not maintainable. Both the terminology and the principles of Hindu Law are in such case inapplicable. 28 All 39 ; 6 B. L. R. 140 foll. 38 Mad. 684 Referred to. (*Kinkaid, J. C. Raymond and Kennedy, A. J. C.*) VAZIR *v.* D. W. ORAMAL. **16 S. L. R. 133 : 1922 S. 41.**

———**Religious Endowment.**

See MAH. LAW—WAKF.

Religious office.

———*Religious Office—Endowment--Khankah, meaning of—Succession of eldest son is not by right.*

A Khankah is a monastery or religious institution where dervishes and other seekers after truth congregate for religious instruction and devotional exercises. It has generally been founded by a dervish or a sufi professing esoteric beliefs, whose teaching and personal sanctity have attracted disciples whom he initiates into his doctrines. After his death he is often revered as a saint, and his humble takia (or abode) grows into a khankah and his durgah (or tomb) into a rauzah (or shrine). The khankah is usually under the governance of a sajjadanashin (the one seated on the prayer mat) who not only acts as mutwali (or manager) of the institution and of the adjoining mosque, but also is the spiritual preceptor of the adherents. The founder is generally the first sajjadanashin and after his death the spiritual line (silsilla) is extended by a succession of sajjadanashins, generally members of his family chosen by him or according to directions given by him in his lifetime, or selected by the fakirs and muries, and formally installed ; and the income of the institution is usually received and expended by them. On the death of a sajjadanashin, his eldest son is not entitled as of

right to succeed him; but the eldest son, if qualified is the natural successor of his father, and, where the evidence is clear that he was formally recognised and installed by the pirs with the express consent and assistance of the opponent it is not open to the opponent to question his position as sajjadanashin or his right to manage the mosque and the property attached to the khankah. Dedication may be inferred although the word wakf is not shown to have been used Where the serais and langars were used for the accommodation of the pilgrims, but were never appropriated to the religious purposes of the khankah; and were not erected out of the offerings at the shrine and where the Tumandars and the arbitrators all of them skilled in Mahomedan Law treated these houses as private property and partible, and the parties to the dispute accepted this view and agreed to a partition *Held* they must not be treated as wakf. Ordinarily speaking, the sajjadanashin has a larger right in the surplus income than a mutwalli for so long as he does not spend it in wicked living or in objects wholly alien to his office he, like the mahant of a Hindu math has full power of disposition over it. But this does not mean that in every case the whole income from a khankah is at the disposal of the sajjadanashin; and it is plain from the authorities that at certain shrines the members of the founder's family other than the sajjadanashin are treated as entitled to share in the surplus offerings which remain after payment of expenses. (*Viscount Cave.*) KHWAJA MUHAMMAD HAMID *v.* MIAN MAHMUD. **32 M. L. T. 52 : 4 L. 15 : 50 I. A. 92 : 27 C. W. N. 701 : 25 B. L. R. 660 : 1 P W. R. 1923 : 38 C. L. J. 261 : 44 M. L. J 149 : 1922 P. C. 384 (P. C.).**

———*Religious office—Females—Waqf—Mutwalli—Right to succeed—Sajjadanashin.*

A religious office can be held by a woman under the Mahomedan law, unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion. 41 Mad. 1033, Rel. The doctrine is based on the fundamental distinction between the temporal affairs of a mosque and the spiritual function connected with it. *Quaere.*—Whether the uniformity which characterizes the successive appointments for nearly a century may not improbably indicate that the practice had a lawful origin in the direction given for appointments of successor to the office of mutwalli by the original founder, though they can no longer be traced with certainty owing to the lapse of time. A Sajjadanashin maintains the unbroken spiritual line from the original preceptor. The office of Sajjadanashin can exist only by virtue of the direction of the spiritual founder or by a valid custom. (*Mookerjee, A. C. J. and Fletcher, J.*) KASIM HASSAIN *v.* HAZRA BEGAM. **60 I. C. 165 : 32 C. L. J. 151.**

———*Religious Office—Mutwalli—Agreement to appoint—Committee of mutwallis—Previous accounts.*

Clause 14 of the agreement which dealt with the dismissal of a mutwalli was in the following terms :—

"Should a mutwalli in the opinion of six mutwallis at least be found dishonest or negligent or should the existence of a mutwalli be not useful for the management of the mosque or should he make unnecessary interference in the management of the mosque he shall lose his rights, and another man of his caste shall be appointed in his place in accordance with the above rules." Two-thirds majority of the mutwallis on whom very wide powers were conferred by the resolution having concurred in passing the resolution removing the plaintiff from the committee of the management of the institution plaintiff was legally removed. The new trustees were bound to take steps to acquaint themselves with the state of the trust property and to get in the trust estate including any funds belonging to the institution. In order to discharge this duty, which the law casts upon the trustees, they were entitled to call upon the dismissed trustee to produce the previous accounts and he is not justified in ignoring the demand (*Shadi Lal, C. J. and Fforde, J.*) KHUDA BAKSH *v.* NUR MUHAMMAD. **1923 Lah. 379.**

———*Religious Office—Females—Right of—Mujawar.*

Under Mahomedan Law it is not competent for a woman to be the head mujawar of an *asiana.* *Per Abdur Rahim, J.*—Excepting for local usages and customs to the contrary, a religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy, the burden of establishing which is on those who plead the exclusion, and, in the absence of anything in the rules by the founder, the usage of the institution governs the case. Wherever there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions that women are competent to inherit these offices and to perform the duties appertaining to them. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MUNNAVARU BEGAM SAHIBU *v.* MIR MAHAPALLI SAHIB. **51 I. C. 489 : 41 Mad. 1033.**

———*Religious office—Mujawar— Females—Right to hold.*

An office can be held by a woman under Mahomedan Law unless there are duties of a religious nature which she cannot perform in person or by deputy and the burden of proving that a woman is precluded from holding a particular office is on those who pleaded the exclusion and the case is governed in the absence of anything in the rules by the founder, by the usages of the institution A woman is not precluded from holding the office of Muzawar in a mosque as the religious duties attached to the office could be performed by the deputy. (*Spencer and Phillips, JJ.*) IMAM BEE *v.* MOOLA KHASIM SAHIB. **37 I. C. 889 : 5 L. W. 226.**

———*Religious office—Kazi— Inam for his services and his right considered.*

MAHOMEDAN LAW—Religious Office.

The grant of *inam* to the *kazi* for the performance of his services entitles him to enjoy the *inam*, but he cannot insist on being employed though he is bound to comply when asked. (*Macnair, A. J. C.*) WAJIRUDDIN *v.* SHABUDDIN. **57 I. C. 618.**

——*Religious office*—Kazi *office*—*If hereditary.*

The office of *kazi* is not hereditary. (*Stanyon, A. J C.*) MOHAMMAD JAFAR ALI *v.* MAHOMED TURAB ALI **46 I. C. 853.**

——**Restitution of conjugal rights.**

See MAH. LAW—MARRIAGE.

——**Return doctrine of.**

See MAH. LAW—SUCCESSION.

—— **Succession.**

Co-heirs.
Daughter.
Daughter's son.
Debts.
Doctrine of.
Eldest son.
Impartibility.
Relinquishment.
Self-acquisition.
Sharers.
Sister and Nephew.
Step son.
Vesting of property.
Widow.

Succession—Co-heirs.

——*Succession — Co-heirs —Alienation by some of them.*

A Mahomedan purchased certain property in the name of his wife who on his death leaving another co-widow, two sisters and a brother as his heirs, granted a mokrari to two of the heirs who in their turn mortgaged the mokrari. The mortgagee sued on his mortgage, got a decree, bought the property himself and sued for possession. *Held*, the mokrari grant by the widow was effective only to the extent of her share and also the mortgages by the heirs were effective to the extent of their shares. (*Viscount Cave.*) BASER KHAN *v.* LEAKAT HUSSAIN. **50 I. C. 678 : 23 C. W. N. 841.**

——*Succession —Co-heirs — Possession not adverse.*

In a Mahomedan family the possession of a brother should be deemed to be the possession of his sisters also, unless the brother repudiates the claim of the sisters and asserts an exclusive right in himself. (*Banerjee, J.*) HYDAR KHAN *v.* CHANDA KHAN. **50 I. C. 691.**

——*Succession—Co-heirs—Liability for debts of ancestor—Execution sale.*

Under the Mahomedan Law, the heirs of a deceased person would not be bound by the decree in a suit to which they were not parties but some other heirs had been made parties. Nor would their interest in the estate of the deceased pass by the sale in execution of that decree. 43 B. 412 foll. (*Macleod, C. J. and Crump, J.*) LALAMIYA SHAIKH *v.* MANUBIBI. **47 Bom. 712 : 25 Bom. L. R. 408 : 1923 Bom. 411.**

MAHOMEDAN LAW—Succession—Co-heir.

——*Succession—Co-heirs—Suit against some —Administration suit—Decree—Sale in execution.*

A money decree was obtained against the estate of a deceased Mahomedan, represented by his widow and his step-mother but his daughter was not made a party. In execution of the decree, the whole estate was sold inclusive of the interests of the daughter. *Held*, that the Court sale did not pass the interest of the daughter as she was not a party to the suit. A suit by a creditor to establish a single debt against the estate of the deceased cannot be treated as an administration suit. (*Heaton and Hayward, JJ.*) MIRKHA *v.* BHAGIRATHI. **43 Bom. 412 : 51 I. C. 18 : 21 Bom. L. R. 329.**

——*Succession—Co-heirs— Mortgage— Liability of estate.*

Where a mortgage was executed by a Muhammadan and a suit thereon was brought after his death against his minor son without adding other heirs as parties ; *Held*, that it was a specific charge on the whole property which could be enforced by sale, against any heir of the mortgagor subsequent to mortgage. (*Scott, C.J. and Shah, J.*) VIRCHAND VEJEKARAN SHET *v.* KONDU KASAM ATAR. **39 Bom. 729 : 31 I. C. 180 : 17 Bom. L. R. 685.**

——*Succession—Co-heirs — Adverse possession.*

Heirs, under Mahomedan Law, take as tenants in common and the possession of heir is not adverse to the others unless and until the other heirs set up an adverse right to the knowledge of that heir. 34 M, 511 : 20 M. L. J. 288 : 29 I. C. 275 F. (*Broadway, J.*) MURAD BIBI *v.* RAHIM BAKHSH. **20 P. L. R. 1921 : 59 I. C. 346 : 13 P. W. R. 1921.**

——*Succession— Co-heirs —Tenants-in-common.*

Under Mahomedan Law, the co-heirs are only tenants-in-common there being no joint family in the Hindu Law sense of the term. (*Spencer and Odgers, JJ.*) MOIDIN KUTTI *v.* MARIUMMA. **41 M. L. J. 457 : 70 I. C. 113 : 14 L. W. 502.**

——*Succession — Co-heirs— Tenants-in-common.*

In a Mahomedan family the heirs are entitled to definite shares as tenants-in-common and the cause of action of such heirs cannot be said to be a joint one for the purpose of limitation. 25 Mad. 26. Cons. (*Ayling and Seshagiri Aiyar, JJ.*) ALLA PICHAI ROWTHAN *v.* PAPATHIAMMAL **51 I. C. 748: 36 M. L. J. 184.**

——*Succession — Co-heirs—One of them in possession of the estate—Sale for discharging debts of deceased owner if binding on other co-heirs or creditors of deceased.*

A sale by one of the co-heirs of a deceased Mahomedan, in possession of the estate of the deceased or of any part of it in his possession for discharging the debts of the deceased is not binding on the other co-heirs or creditors. On the death of a Mahomedan the inheritance vests in his heirs according to their respective shares

who thus become tenants in-common, although in the administration of the estate the funeral expenses debts and legacies must be paid first. (*Abdur Rahim, Spencer and Srinivasa Iyengar, JJ.*) ABDUL MAJEETH KHAN SAHIB *v.* KRISHNAMA CHARIAR. 40 Mad. 243: (1917) M. W. N 346: 5 L. W. 767 : 40 I. C. 210 : 32 M. L. J. 195 (F. B.).

———*Succession—Co-heirs—Nature of interest.*

The rights of the members of the Mahomedan family in an intestate's estate are those of tenants in common. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) AHMED SAHIB SHILTERI *v.* MAGNISITE SYNDICATE, LTD. 32 I. C. 512 : 39 Mad. 1049.

———*Succession—Co-heirs—Suit by one heir against another—Administration suit.*

Under Mahomedan Law the estate of a deceased person devolves on his death on his heirs and each of them becomes entitled to his definite fraction of every part of the estate. A suit by a Mahomedan to recover his share, is not bad as being one for a partial partition. In the case of Mussalmans, what would be a partition suit, if the parties were Hindus, ought often to take the form of a suit for the administration of the estate of a deceased person. (*Ayling and Tyabji, JJ.*) MOIDEENSA ROWTHER *v.* MAHOMED KASIM ROWTHER. 28 I. C. 895.

———*Succession—Co-heirs—Status.*

On the death of a Mahomedan all his legal heirs become tenants-in-common and each of them has a definite share in the property and is entitled to an undivided share in every bigha of land until there is a proper division by metes and bounds. (*Lindsay, J.*) MAHOMED AHMAD *v.* ANSAR MOHAMMAD. 7 O. L. J. 158 : 56 I. C. 304 : 23 O. C. 62.

———*Succession —Co-heirs—Alienation for debts of deceased—Other heirs not bound—Suit for possession.*

A voluntary alienation by some of the heirs of a deceased Mahomedan in possession of the estate for the purpose of paying the debts of the deceased, is not binding upon the co-heirs who do not join in making the alienation. The payment of debts take a precedence over the inheritance and such an alienation can only be set aside on condition of the claimants paying their share of the debt due by the person through whom they claim title which has been discharged by the sale. (*Kanhaiya Lal, J. C.*) AHMAD SHAH *v.* ABDUL SAMAD. 53 I. C. 721: 6 O. L. J. 463.

Succession—Daughter.

———*Succession—Daughter—Shiahs—Daughter's children and descendents—Direct heir disqualified—Succession by next heir.*

Under the Shiah Law daughter's children and descendents are not excluded from inheritance in favour of agnatic collaterals, nor does a disqualifying cause which excludes the direct heir from taking the inheritance from a bar, under the Mahommedan Law, to the succession of the next heir, the heir presumptive. The grand-daughter is thus as much a "legal heir" under the Shiah Law as the daughter (*Mr. Ameer Ali.*) AKHTARI BEGAM *v.* DILJAN ALI. 45 M. L. J. 359: 18 L. W 193: (1923) M. W. N. 793: 32 M L. T (P. C.) 181: L. R. 4 P. C. 90: 1923 P. C. 11.

———*Succession—Daughters—Nika and Muta marriages*

Among Mahomedans of the *Shiah* School daughters who are the offspring of *muta* union and *nikah* union are co-heirs, entitled to succeed to the inheritance equally. (*Lord Parker.*) SHOH ARAT SINGH *v.* JAFRI BIBI. 1 L. W. 965 : 16 M. L. T. 517 : 18 C. W. N. 225 : 21 C. L. J. 4 : 17 Bom. L. R. 13 : 13 A. L. J. 113 : (1915) M. W. N. 389: 24 I. C. 499: 27 M. L. J. 89, (P. C.).

———*Succession—Daughters—Reversioners.*

The plaintiffs' case was at the Settlement in 1878 a life interest only was conferred on their mother Kallu Bi and her step-mother Raj Bi so that they have no power of alienation and now that they were dead the property reverts to them. *Held* even if the grant were limited to a life interest as they alleged it was nowhere stated that the heirs of Kallu Bi or those of her father Sheikh Baktawar to be the reversioners. *Held* further that the grant to Kallu Bi were for her life only then unless it is otherwise stated, on her death the estate reverts to the grantor, that is the Government, and not to her heirs nor to those of her father. (*Hallifax, J. C.*) RAHIM BAKSH *v.* SHEOCHARAN. 1923 Nag. 132.

Succession—Daughter's son.

———*Succession—Daughter's son—If preferable to descendant of great grand father.*

Under the Mahomedan law the descendent of great grandfather's great grandfather being an agnate and residuary is entitled to succeed to a hereditary religious office in preference to a cognate like a daughter's son, 1 M. H. C. R 92, ref. The word "grandfather" used in Mahomedan Law texts indicates an ancestor in the paternal line however remote. (*Sadasiva Aiyvr and Napier, JJ.*) ABDUR SAMID SAHIB *v.* CHINNATHAMBI SAHIB. (1919) M. W. N. 710: 53 I. C. 873: 37 M. L. J. 509.

Succession—Debts.

———*Succession—Debts—First charge on the estate—Sale to pay debt, if can be disputed.*

Under the Mahomedan Law, the debts of a deceased are a first charge against his estate and the heirs can only divide what remains after payment of debts. A sale by some heirs of a portion, to pay off debts cannot be disputed by the other heirs. (*Banerji and Tudball, JJ.*) MUHAMMAD JUNAID *v.* AULIA BIBI. 42 All. 497 : 61 I. C. 947: 18 A. L. J. 613

———*Succession —Debts—Creditor's rights against alienee from heir.*

A creditor of a deceased Mahomedan cannot follow his estate in the hands of a *bona fide* tran-

MAHOMEDAN LAW—Succession—Debts.

sferee for value from the heir-at-law. (*Piggott, J.*) KAZMI JAN *v.* SHIB CHARAN. **29 I. C. 757.**

——*Succession —Debts —Testamentary expenses —Funeral expenses —Scale of.*

Funeral ceremonies of a Mahomedan should be performed in a suitable manner and what is reasonable amount in a particular case depends on the position in life of the deceased and the social position of the class to which he belonged. (*Scott-Smith and Shadi Lal, JJ.*) MAHOMED HAMID ULLAH KHAN *v.* MUHAMED MASJID ULLAH KHAN. **40 I. C. 374: 92 P. R. 1917.**

——*Succession — Debts—Debts of deceased before rights of heirs.*

Under the Mahomedan Law the debts and funeral expenses of the deceased must be paid before his estate can be partitioned by the heirs. Where a Mahomedan bequeathed by will certain properties for payment of *mehr* and dower debts, it is open to a court in a suit for partition by the heirs to ascertain at the time of the final decree the debts of the deceased and to provide for their payments before the partition is actually effected (*Spencer and Phillips, JJ.*) MAHAMAD MEHRAN BIBI *v.* MAHOMED ROWTHER. **37 I. C 879 : (1917) M. W. N. 98.**

——*Succession—Debts—Liability of estate of deceased Mahomedan donor.*

Under Mahomedan Law, the estate of the deceased is before its distribution among the heirs liable for the debts due by the deceased at the time of his death. The claim of the wife for dower is a debt which is chargeable against the general estate of the deceased husband where the claim is made after his death. (*Lindsay and Kendall, A. J. Cs.*) BAQAR MIRZA *v.* MEHDI HASAN. **37 I. C. 203 : 19 O. C. 246.**

Succession—Doctrine of.

——*Succession—Doctrine of—Return.*

If a Mahomedan dies leaving behind only his widow but no sharers residuaries and distant kindred, she takes one-fourth of his estate as a sharer and the remaining three-fourths by return. (*Macleod, C. J. and Heaton, J.*) ISUB MIE INUS MALDIKAR *v.* ISUB. **22 Bom. L. R. 942 : 58 I. C. 48 : 44 B. 947.**

Succession—Eldest son.

——*Succession—Eldest son*—Habua—*Meaning of.*

Habua is the collective name given to certain articles of property to the deceased, *e.g.*, qudran, sword, ring, body clothes, which the eldest male child is entitled to receive under the *Shia* Law as a special mark of favour and the eldest surviving son at the death of his father is entitled to the *Habua.* (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) SURAIJA QADR *v.* QUDSIA BEGAM. **24 I. C. 643 : 1 O. L. J. 281.**

Succession—Impartibility.

——*Succession—Impartibility.*

Impartibility of tenure is not an incident of Mahomedan Law, in the absence of a local or

MAHOMEDAN LAW—Succession—Step-son.

family custom. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MALIYA KALAKATH BAVA *v* PATHUMA **16 I. C. 689 : (1912) M. W. N. 932.**

Succession—Relinquishment.

——*Succession— Relinquishment— Right to —Invalid.*

Under the Mahomedan Law the right to succeed cannot be renounced or transferred before it vests. It is only a mere expectancy and is not transferable, 17 W. R. 108, explained ; 19 M. 176 ; 27 I. C. 701, Not Foll. (*Wallis, C. J., Bakewell and Kumaraswami Sastri, JJ.*) ASHA BEEVI *v.* CARUPPAN CHETTY. **41 Mad. 365 : 7 L.W. 215 : 45 I. C. 35 : 34 M. L. J. 460.**

Succession—Self-acquisitions.

——*Succession—Self-acquisitions by member of family—No presumption as to joint funds.*

The succession to a Mahomedan being an individual succession there is no presumption in the case of a Mahomedan such as exists in the case of a Hindu joint family that property purchased in the name of a member of the family was purchased out of joint undivided property. *Prima facie* therefore the property bought in the name of the deceased brother was with his money and the statement in the award established that it was. (*Lord Dunedin, J.*) MAHOMED WALI KHAN *v.* MUHAMMAD MOHI-UD-DIN KHAN. **24 C. W. N. 321 : 11 L. W. 421 ; 2 U. P. L. R. (P. C.) 48 : 58 I. C. 843 : 27 M. L. T. 204 : (1920) M. W. N. 189 (P. C.)**

Succession—Sharers.

——*Succession—Sharers—Sister and Collaterals—Rights of.*

Under Mahomedan Law a sister becomes a residuary only if she has a brother or brothers or if there are daughters or son's daughters of the deceased. She becomes a sharer by reason of there being no child or son's child or brother of the deceased. Where the only claimants are, a sister and some collaterals of the 4th degree, the sister as sharer takes one half and the rest will go to the collaterals who as descendants in the male line of the deceased's great grandfather were distant kindred. (*Abdul Rao of and Campbell, JJ.*) MT. GHULAM ZOHRA *v.* NUR HASAN. **3 Lah. 278 : 1922 Lah. 406.**

Succession—Sister and Nephew.

——*Succession—Sister and nephew—Who is preferable heir.*

Under Mahomedan Law, sisters inherit in preference to nephews. (*Ormond, J.*) MA NAM THE *v.* MI HME MA YE. **27 I. C. 621.**

Succession—Step-son.

——*Succession—Step-son—Step-mother's property.*

A step-son is not the heir to the property of his step-mother. (*Johnstone, C. J. and Shah Din, J.*) MUSSAMMAT BEGAM *v.* JALAL DIN. **50 P. R. 1917 : 41 I. C. 963 : 116 P. W. R 1917.**

MAHOMEDAN LAW—Succession— Vesting of property.

Succession—Vesting of property

———*Succession—Vesting of property—Heirs—Right of representation—Death of heir before representation.*

Under the Mahomedan Law, a vested inheritance is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death. The shares have to be determined on the occasion of each death. (*Scott Smith and Harrison, JJ.*) MT. JAWAI *v.* HUSSAIN BAKHSH. **3 Lah. 80 : 1922 Lah. 298.**

———*Succession—Vesting of property in deceased's heirs—Distribution of assets.*

Where a Mahomedan dies intestate the estate vests in his heirs and no one is charged with its distribution. 34 M. 511 Foll. (*Lindsay, J. C*) AZIZ UL HAK *v.* MARIYAM BIBI. **1 O. L. J 225 : 24 I. C. 45 : 17 O. C. 157.**

———*Succession— Vesting of property—Administration suit.*

On death of a Mahomedan his heirs take an immediate estate ; hence one heir in possession of more than his share cannot alienate the excess portion. Rules of Mahomedan Law once supposed to lay down a univeral succession are now superseded by the Civil Procedure Code and a suit by a creditor against a single heir is in no way similar to an administration suit. (*Pratt, J. C., Hayward and Crouch, A.J.Cs.*) NARAYAN DAS *v.* MUSSAMMAT OBHAI.
19 I. C. 911 : 6 S. L. R. 268.

Succession—Widow.

———*Succession—Widow—Childless woman—* Wajib-ul- arz.

A *Wajib-ul-arz* purporting to record a family custom of the proprietors of a particular village expressly provided that a childless widow can hold the property of her husband for her life to the exclusion of the heirs of her husband who should get it after her death. *Held*, that the widow took only a life estate merely and had no power of alienation. (*Kanhaiya Lal, A. J. C.*) HAFIZUDDIN *v.* MUBARAK ALI.
56 I. C. 699 : 7 A. L. J. 242.

———*Succession—Widow— Childless— Shiah Law.*

According to the Shiah Law of inheritance a childless widow takes no share in her husband's land but is only entitled to one-fourth of the value of the buildings erected thereon. The widow has a lien on the building until, she is paid her share of the value but she cannot sell to any one ownership of the building, 21 M. 27 ; 25 C. 9; 1 C.W.N. 449. (*Chevis, O. C. J.*) SHAUKAT ALI *v.* ANWAR UL-HAQ. **55 I. C. 745 : 2 U. P. L. R. (Lah.) 85.**

———*Succession—Widow—Shiah Law—Rent charge—Right to.*

A childless Shiah widow is not entitled to any share in the landed property of her deceased husband, but where the property consists of a right to receive a fixed annual sum of money in the nature of a rent charge, the widow is not excluded from participation in the property of this description. (*Lindsay and Kendall, A. J. Cs.*) BAQAR MIRZA *v.* MEHDI HASAN
37 I. C. 203 : 19 O. C. 246.

———*Succession — Widow —Childless —Shiah School.*

The childles widow of a *Shiah*, has no right of inheritance to the immoveable property of her deceased husband. (*Twomey, J.*) MURDIN *v.* ASHA BI. **20 I. C. 660 : 6 Bur. L. T. 135.**

Texts.

———*Texts—Fatwas and texts of Karan, Value of.*

Fatwas are opinions of jurists. In this case the value of Fatwas was discussed and the distinction between the authority of Fatwas and that of texts of the Koran or precepts of the Prophet also pointed out. (*Abdur Rahim and Ayling, JJ.*) MANDI ABDUL RAHMAN SAHEB *v.* HUSSAIN SAHEB.
23 M L. J. 734 : 16 I. C. 616 : 12 M. L. T. 305.

———**Waqf.**

Alienation.
Construction.
Creation.
Management.
Mosque.
Mutwalli.
Object of.
Offerings.
Sadagah, distinction.
Sajjadanashin.
Takia.
Validity.

Waqf—Alienation.

———*Waqf —Alienation — Trustee —Fakir — Power of alienation.*

Lands held by a fakir, to support services attached to a makan, cannot be transferred by him permanently, he may alienate for his lifetime or a shorter period. An alienation by him does not bind his successor. (*Scott, C. J. and Beman, J.*) MAHAMAD GAUS *v.* RAJ BAX ROSHAN BAX.
37 Bom. 224 : 19 I. C. 558 : 15 Bom L. R. 266

———*Waqf—Alienation of property—Suit by worshippers to set aside.*

A Mahomedan worshipper is entitled to enforce his individual right in respect of a mosque and the trusts relating thereto. A suit by two worshippers on behalf of the entire body to set aside an alienation of mosque properties by the mutwalli is maintainable without sanction under S 92 of the C. P. Code or leave under S. 14 of the Rel. End. Act. (*Chatterjee and Huda, JJ.*) ASHRAF ALI *v.* MUHAMMAD NURAJJAMA.
49 I. C. 355 : 23 C. W. N. 115.

———*Waqf—Alienation of property—Charge on—Kazi's permission—Effect.*

A charge created on Waqf property with the sanction of the Kazi obtained prior or subsequent to such creation is binding on the Waqf

and the court may validate the charge by holding that the required necessity existed, 37 C. 179, Rel. on. (*D. Chatterjee and Walmsley, JJ.*) LATIF-UN-NISSA BIBI *v.* MAJID-UN-NISSA BIBI.
26 I. C 358.

——*Waqf—Alienation of property—Right of worshippers to sue to set aside alienation of waqf property by trustee.*

Any person interested in a waqf can sue to protect waqf property against strangers. 5 All. 497 and 7 All. 178, Ref. Where waqf property is mortgaged by the manager, any person interested in the waqf can sue to have the alienation set aside and the property restored to the trust. (*Dundas, J.*) MUSSAMMAT AFIMAN *v.* HAMID UD-DIN.
51 I. C. 799 : 58 P. W. R. 1919.

——*Waqf—Alienation—User—Grave-yard.*

Land which has been turned into grave-yard can become waqf by user without express dedication. Though the son inherits it from the father, it is not necessarily alienable. (*Scott-Smith, J.*) NABI BAKHSI *v.* JANGI.
50 I. C. 116 : 41 P. W. R 1919.

——*Waqf—Alienation of property—Suit to recover.*

Wakf property cannot be charged with any debts either by the mutwalli or by any one else without the previous sanction of the Kazi. It cannot be sold at the will of the trustee or in execution of a decree not binding on the waqf. A suit for possession of the the waqf property within 12 years from the date of the confirmation of sale in execution of a decree not binding on the waqf is within time. (*Lindsay and Kanhaiyalal, A. J. Cs.*) HAMID-UD-DIN ALI SHAH *v.* COURT OF WARDS, NANPARA. **18 I. C. 319 : 16 O. C. 109.**

——*Waqf—Alienation of property—Powers of Trustee—*De facto *trustee.*

Turstees of a Waqf have no power to alienate the Waqf property, by taking a loan except for unavoidable necessity , heir powers being like those of a manager of an infant heir. There is no presumption that the loan is for the benefit of the trust. A self-constituted trustee professing to maintain the waqf and act as trustee is a trespasser and he can create no valid charge on the waqf property. (*Lindsay, J. C. and Rafique, A. J. C.*) RAGHUNATH DASS *v.* DY. COMMISSIONER. PARTABGARH. **18 I. C. 11.**

Waqf—Construction.

——*Waqf—Construction.*

A wakf provided :—"In the event of slackness, negligence or discovery of misappropriation on their part, I or my heirs shall be at liberty to dispense with the services of the said *mutwalli*, and in case of death or dismissal of any *mutwalli*, if any heir belonging to the *Imamia* sect and competent enough to administer the wakf property be not left to the *mutwalli*, *the naib-mutwalli* shall succeed him as *mutwalli* and a *naib-mutwalli* shall be appointed from his (*naib-mutwalli's*) heirs. In the event of no heir of the *mutwallis* and the *naib-mutwallis* being found fit to manage the waqf property, selection shall be made

of a competent person from among the heirs of me, the executant. If, God forbid, no heir of mine near or remote be found, the authorities for the time being shall be competent to appoint a suitable person belonging to the *Imamia* sect to administer the waqf property mentioned above. But so long as the *mutwallis* and the *naib-mutwalli* aforesaid shall manage the affairs of the waqf estate faithfully and efficiently, no one shall question (the tenure of the offices by the mutwallis or be competent to complain urge their dismissal nor shall they be dismissed) unless the complaint is substantiated before the authorities for the time being."

Held, it is only in the event of no heir of the *mutwalli* and the *naib-mutwalli* being found fit to manage waqf property, that selection is to be made of a competent person from among the heirs to the wakf. (*Mr. Ameer Ali*) AKHTARI BEGAM *v.* DILJAN ALI.
18 L. W 193 : (1923) M. W. N. 793 : 32 M. L. T. (P. C.) 181 : L. R. 4 (P. C.) 80 : 45 M. L. J. 359 : 1923 P. C. 11 (P.C.).

——*Waqf—Construction of—User as burial ground—Entry in Record-of-rights — Punjab Land Revenue Act*, S. 44

The P. C. affirming the judgment of the Chief Court held that the lands in suit formed part of a graveyard set apart for the Mussalman community and that by user, if not by dedication, the land was waqf. The entry in the record-of-rights that the whole of the land in question was "unculturable land forming portion of a grave-yard" was conclusive on the point. (*Lord Macnaughten.*) COURT OF WARDS *v* ILAHI BAKSHAH.
40 Cal 297 : 40 I. A. 18 : 1 P. W. R. 1913 : 11 A. L. J. 265 : 13 M. L. T. 318 : (1913) M. W. N. 270 : 17 C. L. J. 360 : 27 P. R. 1913 : 83 P L R. 1913 : 15 Bom. L. R. 436 : 17 I. C. 744 : 25 M. L. J 61 (P C.).

——*Waqf— Construction—Sale-proceeds of property to be devoted in erecting Mosque.*

A widow directed in her will that a portion of her property be sold and the proceeds employed to erect a mosque and that if her heirs desired to retain the property they should devote the value thereof to the purpose. *Held*, that the waqf was of the value of the property and not of the property itself, a purchase of which by a stranger was not therefore affected by the waqf. (*Mears, C. J. and Bannerji, J.*) MAHOMED ISMAIL *v.* MAHOMED ISHAQ.
43 All 508 : 19 A. L. J. 452 : 62 I. C. 904 : 3 U. P. L. R. (A) 157.

——*Waqf—Construction—Limited grant.*

Under the Mahomedan Law there may be limited dedications. It is competent to a person to dedicate his land as private grave-yard of a section of the community reserving to himself the usufruct of the land. The Civil Court in administering Mahomedan Law are not bound to hold as a matter of law that a man has dedicated something more than the evidence shows that he intended to dedicate. (*Walsh, J.*) FAKHURUDDIN *v.* MAHOMAD RAFIQ. **33 I. C. 91.**

MAHOMEDAN LAW—Waqf—Construction.

———*Waqf—Construction of deed.*

A partition deed, directed the income of certain property to be spent on the tomb for the *fateh* and *urs* ceremonies of a certain deceased person and for payment of the salary of Hafiz, who would read the *Quran* at the tomb. There was nothing to show that the income of the property was ever so appropriated. *Held*, that the property did not form part of the subject of a valid waqf under the Mahomedan Law, 7 A. L. J, 1095, Ref. (*Piggott, J.*) GHULAM HAZARAT *v.* GULZARI LAL. **15 I. C. 42**

———*Waqf—Construction of deed.*

A deed of waqf must be construed strictly, as it deflects the ordinary course of succession. (*Rampini and Caspersz, JJ.*) MOSALAT HUSSAIN KHAN *v.* BEHARY LAL. **11 I. C. 904 : 14 C.L.J. 175.**

———*Waqf—Construction—Cypres doctrine—Scheme.*

The doctrine of cypres is in harmony with the Mahomedan Law and the Court may direct a *cypres* application of the income of the waqf if it is no longer possible beneficially to apply the property in the exact way directed by the founder. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) SUJJADA SHAH *v.* SHAW HABIT.
53 I. C. 677 : (1919) M. W. N. 662.

———*Waqf—Construction of Karar—Allotment for maintenance—Partition.*

By a Karar, between members of a Mahomedan family, certain properties which had to be constituted waqf property were, after providing for expenses of the waqf, set apart for the maintenance of the various branches of the family and the property was to be inalienable It was held that a partition of the property could be made between the branches (*Benson and Sundara Aiyar, JJ.*) CHERIA IMBICHI BEEBI *v.* SYED ALI. **13 I. C. 791 : (1912) M. W. N. 45.**

———*Waqf—Construction to take effect after the testator.*

Where in a waqf which apparently was an immediate disposition but really was intended to take effect after the death of the testator operates as *Wasiat*, not as *waqf*. (*Stuart and Kanhaiya Lal, A. J. Cs.*) **32 I. C. 516 : 2 O. L. J. 758.**

Waqf—Creation of.

———*Waqf — Creation of—Validity — Reservation of life interest—Appointment of trustee.*

Under a deed of waqf a Mahomedan appointed himself as first mutwalli and expressly declared that he was holding the property henceforth as mutwalli and not as a owner. *Held*, that this according to the accepted rule of Mahomedan Law, was sufficient to constitute a valid dedication to waqf. The mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after the lapse will leave the whole property in fact for the original purposes for which the endowment was made does not render the endowment invalid under the Mahomedan Law. Where there was admittedly an ultimate dedication of the entire property to religious and

MAHOMEDAN LAW—Waqf—Creation of.

charitable uses, the weight of authority is entirely in favour of the validity of the *waqf*. (*Ryves and Daniels, JJ.*) MD ZAIN KHAN *v.* NURUL HASAN KHAN. **45 A 682 : L. R. 4 A. 320 : 21 A. L. J. 650 : 1924 A. 113.**

———*Waqf — Creation of — Delivery of possession—Registration of waqf deed.*

Mere execution and registration of a waqf deed without delivery of possession of the waqf property is not sufficient to create waqf, under Hanafi Law. There must be divesting of the property by the waqf, 15 All. 321., Foll. (*Rafique and Stuart, JJ.*) MAHOMED YUNIS *v.* MAHOMED ISHAQ KHAN. **43 All. 487 : 19 A. L. J. 380 : 62 I. C. 896 : 3 U. P. L. R. (A.) 155**

———*Waqf—Creation of.*

The proprietor of property may dedicate either by express grant or by implication without a formal grant or transfer to a trustee, and in the latter case the dedication can be proved by long use (*Walsh, J.*) FAKHURUDDIN *v.* MAHOMED RAFIQ. **33 I. C. 91.**

———*Waqf—Creation—Permissive occupation—Tazia placed at a place by mutual consent.*

Where a tazia was placed on a particular land with the mutual consent of the Hindu and Mahomedan population of the locality, no absolute right was thereby created to put the tazia on that land. (*Richards, C. J. and Banerjee, J.*) **28 I. C. 622: 13 A. L. J. 209.**

———*Waqf—Creation of—Mutwalli—Creator of waqf appointing herself mutwalli--Declaration.*

Where a Mahomedan lady covenanted by a deed to spend one-fourth of the property, which was surrendered to her by all heirs of a deceased relation of hers in charity and for the spiritual benefit of the deceased and constituted and declared herself a trustee of the one-fourth for the said purpose. *Held*, that a valid waqf was created and she was competent to create a waqf over the property. (*Pratt, J.*) HUSSEINBHAI CASSIM BHAI *v.* THE ADVOCATE-GENERAL OF BOMBAY. **57 I. C. 991 : 22 Bom. L. R. 846.**

———*Waqf—Creation of—Property subject to a charge—Settlor constituting himself mutwalli.*

Under the Hanafi law a valid waqf, is created by a declaration of endowment by the owner and delivery of possession is not material. Nor is the appoinment of a mutwalli essential to the validity of the waqf. The existence of a mortgage at the time of the creation of the endowment on the property endowed does not render the endowment invalid. 12 W. R 498; 18 I. C. 240, Foll A mere intention to set apart property for charitable purposes is not sufficient to create a valid waqf. If the settlor appoints himself as mutwalli, no formal delivery of possession is necessary. Where a declaration of waqf is not acted upon by the settlor and his objects are not given effect to there is a presumption that the waqf was not forfeited or there was no *bona fide* intention to create a waqf. (*Mookerjee and Buckland, JJ.*) BIBI JINJIRA KHATUN *v.* MAHOMED FAKIRULLA MEA. **34 C. L. J. 444 : 1922 Cal 429.**

MAHOMEDAN LAW—Waqf—Creation of.

Waqf—Creation of—Tomb—Dedication.

In the absence of proof of dedication, a tomb by itself does not become waqf For this purpose there is no distinction in Mahomedan Law between the tomb of an ordinary Mahomedan and that of a saint. (*Martineau, J.*) ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN.

1924 L. 382.

—Waqf—Creation of —Inference from repute.

A Court can infer dedication of land to waqf from user or reputation. But there were no circumstances in the case from which such an inference could be made. (*Le Rossignol and Broadway, JJ.*) UMAR DIN *v.* AISHAN. **4 Lah. L. J. 528.**

Waqf—Creation of—Mutation of names not essential.

Those who assert that a land has been dedicated to waqf have to prove it. The burden of proving that a land has been dedicated to waqf is on those asserting it. A Court can infer a dedication from repute, 33 P R. 1917; 8 I. C. 578, Rel The mere omission to have mutation of names effected does not affect the character of the property as waqf. (*Broadway and Martineau, JJ.*) RAHIM BAKHSH *v.* CHANNAN DIN. **4 Lah. L. J. 511.**

Waqf— Creation of—Dedication—Urs, whether proof of.

No particular ceremony is necessary to make a dedication as *waqf* complete, but there must be clear proof that a declaration of *waqf* has been made. In the absence of such proof, the existence of a *waqf* may be established by proof that it was so treated for a number of years. But the mere fact of holding an *Urs* is not sufficient to warrant an assumption that a dedication had been made. (*Leslie Jones and Broadway, JJ.*) PRITAM SINGH *v.* DHARM KUAR. **61 I. C. 609.**

Waqf—Creation of—Onus—Dedication.

In a suit for declaration that certain property is waqf plff. has to prove that the property has been dedicated as waqf, 33 P. R, 1917, Foll. Oral dedication may inferred from repute, 7 A. L. J. 1095, Foll. (*Broadway and Martineau, JJ.*) RAHIM BAKHSH *v.* CHANNAN DIN. **55 I. C. 210.**

Waqf—Creation of—Essentials of.

Under the Mahomedan Law no formality is required for the purpose of creating a valid waqf. If the donor declares that he constitutes a property waqf or has constituted it waqf a valid waqf is created. (*Scott-Smith and Shadi Lal, JJ.*) MAHOMMAD HAMID ULLAH KHAN *v.* MAHAMED MAJID ULLAH KHAN. **40 I. C. 374: 92 P. R. 1917.**

Waqf—Creation of—Writing.

The Trusts Act does not affect the rules of Mahomedan Law as to waqf No writing is necessary to create a valid waqf. (*Reid, C J. and Robertson, J.*) NUR MAHOMED *v.* BHAGWANDAS. **106 P. R 1912 : 31 P. L. R. 1913 : 17 I. C 857 : 61 P. W R. 1913.**

Waqf—Creation of—Dedication—Evidence of—User.

Where the origin of an endowment is unknown reference may be made to user as evidence of dedication. But user cannot be substituted for

MAHOMEDAN LAW—Waqf—Management.

the purpose of finding out the origin of the endowment. It is essential to the validity of a waqf that the author of the trust should have divested himself of his proprietary interest in the subject of the waqf. In cases of partial dedication, the property descends beneficially to heirs of the founder subject to the trust or charge, 2 Cal. 341; 16 O. C. 76; 33 P. R 1917; 7 A. L J. 1095; 23 Cal. 129; 40 Mad. 116; 40 Cal. 297, Ref. (*Kanhaiya Lal J. C. and Daniels, A. J. C.*) SADIQ HUSAIN *v.* KHAN BAHADUR HAKIM MIRZA NAZIR HUSAIN KHAN. **9 O. L. J. 111 : 4 U. P. L. R. (O. C.) 25 : 1922 Oudh 1.**

Waqf—Creation by will.

By the law of Shiah as well as Sunni Mahomedans, a waqf created by will is valid, 25 A. 236, Ref. (*Stuart and Kanhaiya Lal. A. J. Cs.*) ISZAT UNNISSA BEGAM *v.* KANIZ FATIMA BEGAM. **3 O. L. J. 677 : 36 I. C. 643 : 19 O. C. 69.**

Waqf—Creation of—Essentials—Mushaa, doctrine of—Possession, delivery of, if necessary.

The doctrine of Mushaa is not applicable to freehold properties in a commercial town. A *waqf* can validly be made of an undivided share in property even when the property is capable of division. A Sunni Mahomedan, however, making a *waqf* must actually divest himself of possession of the *waqf* property. (*Rigg, J.*) KHATIZA BIBI *v.* HAJEE AHMED. **61 I. C. 689 : 13 Bur. L T. 127.**

Waqf—Management.

Waqf—Management— Right to— Beneficiaries.

Where the lands on which a mosque was built was obtained on trust for building a mosque for the benefit of all persons belonging to the *Sunni* sect all Sunnies are entitled to a voice in the management and control of the mosque. (*Fox, C. J. and Hartnoll, J.*) HAJI AHMAD MOOLA DAWOOD *v* M. I. ARIFF. **18 I. C. 105 : 5 Bur. L. T. 221.**

[See on appeal 20 C. W. N 1118 : 24 C. L J. 198 : 18 Bom. L. R 611 : 43 I. A. 127 : 35 I. C. 30 : 31 M. L. J. 290 (P C.).]

Waqf—Management—Public and private trusts—Court's powers of interference

The Mahomedan Law like the English draws a wide distinction between public and private trusts. In the case of a waqf created for the benefit of specific individuals, the express intentions of the founder have to be given effect to in carrying out the trust. With respect however to public religious trusts, the Kazi's (now represented by the Civil Court) discretion is wide. He may not depart from the intentions of the founder or from any rules fixed by him as to the objects of benefaction, but as regards management, which must be governed by circumstances, he has complete discretion. (*Mr. Ameer Ali.*) MAHOMED ISMAIL ARIFF *v.* AHMED MOOLA DAWOOD. **43 Cal. 1085 : 14 A. L. J. 741 : (1916) 1 M W. N. 460 : 20 C W. N. 1118 : 20 M. L. T. 110 : 18 Bom. L. R. 611 : 24 C. L. J. 198 : 4 L W. 269 : 9 Bur L. T. 141 : 8 L. B. R. 517 : 43 I. A. 127 : 35 I. C. 30 : 31 M. L. J. 290 (P C.).**

[On appeal from 5 Bur. L. T. 221 : 18 I. C 1067.]

MAHOMEDAN LAW—Waqf—Management.

———*Waqf—Management—Devolution—Trust Act (Mahomedan Law)—Committee.*

A will embodying waqf of a property dedicated to some charitable and private specified objects with directions for its application creates a good trust in spite of its vagueness because of vesting all sorts of powers in the managing committee. A committee appointed to manage a trust created by will has no sufficient number of persons than a Court has power to add strangers to serve on it, even against the directions of the testator, of appointing only his descendants, when none or sufficient number of them is available. (*Rafique and Piggott, JJ.*) JAI NARAIN *v.* BAKEY LAL.
58 I. C. 566 : 17 A. L. J. 957.

———*Waqf—Management—Kanjahs attached to Dargahs—Right of management — Usage—Females—Office of Manager.*

The right of management as regards institutions such as Kanjahs attached to Dargahs in India, is determined by usage and it must be looked into even where appointments have been made, 8 M. H. C. R. 63 and 13 B. 555, Rel. on. Females are not entitled to succession to that office. Females are not entitled to manage where the office of manager of a religious institution includes both temporal and spiritual duties and the spiritual duties are of such nature as cannot be performed by a woman. (*Scott, C. J. and Batchelor, J.*) ISMAILMIYA *v.* WAHADANI BEGAM.
36 Bom. 308 : 14 I. C. 469 : 14 Bom. L. R. 120.

———*Waqf—Management.*

Unless the mutwalli is displaced from his position as such no one has any right to interfere with the management of the trust property (*Suhrawardy and Walmsley, JJ.*) HAJI MOHAMMAD ISMAIL *v.* MUNSHI BARKAT ALI.
26 C. W. N. 904 : 24 Cr. L. J. 154 : 1922 C 483.

———*Waqf—Management—Receiver—Hindu Receiver.*

The receiver of the waqf properties need not perform religious ceremonies which can be performed only by a person duly qualified ; therefore a Hindu may be appointed a receiver of waqf property. (*Mookerjee and Beachcroft, JJ.*) SYED ASAD RAZA *v* WAHIDUNNESSA BEGAM.
57 I. C. 70 : 30 C. L. J. 231.

———*Waqf — Management — Succession — Durga—Joint trustees.*

Where the trusteeship was vested in two persons it was held the office together with the right to emoluments devolved on their heirs according to Mahomedan Law *per stirpes* and not *per capita.* (*Benson, O. C. J. and Sankaran Nair, J.*) GAFUR SAHEB *v.* MOOSA SAHEB. **17 I. C. 124.**

———*Waqf — Management — Succession — Special custom—Proof.*

Dedication of property in waqf may be proved by actual long user of the property for waqf purposes. The onus of establishing a special custom governing succession to waqf property lies heavily on those setting it up. Such a custom should be construed strictly and must be shown to have been ancient, invariable, certain, reasonable, continuous and established by clear evidence (*Hayward, A. J. C.*) MUKHI GAZI *v.* MUSTANHAH.
36 I. C 951 : 10 S. L. R. 126.

MAHOMEDAN LAW—Waqf—Mosque.

Waqf—Mosque.

———*Waqf—Mosque—Right to sue—C. P. C. O. 1, R. 8—Declaratory decree.*

Every Mahomedan having a right to use a mosque for devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against any one interfering therewith. Such a suit need not necessarily be brought under O. 1, R. 8, C. P. C : though on objection before the First Court, the Court might in its discretion well refuse to give a declaratory relief unless so brought. (*Griffin and Chamier, JJ.*) RAMACHANDAR *v.* ALIMUHAMMAD. **35 All. 197 : 18 I. C. 797 : 11 A. L. J. 233.**

———*Waqf — Mosque, private or public — Evidence.*

The question whether a particular building is a public mosque or not is a question of fact, and while the existence of a *mihrab* and *mimbar* may be evidence to be considered along with the other facts in the case in deciding that question of fact it is not possible to lay down that as a matter of law the District Judge is bound to accept the existence of such structures as practically conclusive proof of the fact that the building in question was a mosque by which it means a public mosque. (*Shah and Crump, JJ.*) SHEIKH HASAN SAB *v.* MOHIDIN SAB WALAD. **1923 Bom. 42 (2).**

———*Waqf — Mosque — Charitable objects—Mode of dedication—Tomb of a saint—Cutchi Memons—Position of the High Priest.*

Under Mahomedan Law, a gift for charity may take two forms, *viz*, either by way of waqf signifying an endowment or else by way of Sadakah, which signifies a donation. In the Mussalman Waqf Validating Act, 1918, a waqf is defined as the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable. Though the Act is not retrospective, the definition contains a statement of the Mohomedan Law on the point. All works of religious charity or public utility not condemned by the Mahomedan religion are objects of waqf. But the particular objects intended must be indicated with a reasonable degree of precision in order that the Courts of British India may apply to the endowment. A gift by way of sadakah indicates the special motive of the gift is to acquire religious merit or nearness to God, but it does not follow that because such a gift is made it is a charity in the eye of law. Where the distribution of a gift is to be made by persons in succession as holders of a particular religious or charitable office that goes far to establish—and it may be, goes sufficiently far to establish—that the whole gift is charitable. But the mere fact that the donee holds a religious office is not by itself enough, and if

MAHOMEDAN LAW—Waqf—Mosque.

trusts are added which are not at all charitable, the whole gift fails. Although a gift for public purposes generally is void as being so general and undefined that it cannot be executed by the Court, yet a gift for public purposes in a specified locality is a valid charitable gift. In a suit for a a scheme against the High Priest of the Dawoodi Borah community on a declaration that a mosque named after one Chandaboy who was regarded as a saint by the Dawoodi Borah community and that the tomb of Chandaboy and the offerings placed in an offertory box and a building partly acquired out of such funds were annexed to a public trust, the defence was Chandaboy was not a saint and the mosque was not named after him, that the offerings belonged to the High priest by virtue of his office and that there was no public religious or charitable trust. It was found on the evidence (1) that the mosque was regarded as God's house and held by the High Priest and passed to his successor on the gadi and not to his heirs ; (2) that the High Priest could not alienate or sell the mosque ; (3) that he could not close it except for some temporary and necessary purpose, such as repairs or sanitation ; (4) that it was a mosque for the use of Dawoodi Borah community although others were occasionally permitted to use it ; and (5) that it could not be used for any other purpose than a mosque. It was also proved that the site had been used for a mosque for over 100 years : *Held*, that there was a public trust of a charitable or religious nature and that the High Priest was the trustee thereof, though the sole right of management vested in him and his successors in office. Consequently the defendant was accountable as a trustee though he had wide powers of management and also a wide discretionary power as the particular purposes for the benefit of the community on which the surplus should be expended. There was no necessity for framing a scheme and disturbing the possession of the High Priest (*Martin, J*) THE ADVOCATE GENERAL OF BOMBAY *v.* YUSUFALLI EBRAHIM **24 Bom L. R 1060.**

——*Waqf—Mosque — Worshippers in the vicinity—Rights of.*

The worshippers in the vicinity of a mosque have rights to it over and above those possessed by the Mahomedan public and have a more direct interest in its maintenance and in the proper administration of the properties endowed for its benefit. (*Chatterjea and Huda, JJ.*) ASHRAF ALI *v.* MAHAMMAD NUROJJAMA. **49 I C 355 : 23 C. W N. 115.**

——*Waqf—Mosque—Essentials of.*

It is not necessary that a mosque should have a minaret. Any place dedicated for prayer is a mosque. A mosque dedicated to God cannot be appropriated by any particular sect of Sunnis. It is not necessary that a mosque should be a dedication with reservation, that it should be used only by persons holding particular views of the ritual. Every Mahomedan had a right to enter mosque and perform his prayers according to his conscience. If a mosque is reserved for the use of a particular sect the dedication is valid But the reservation is not. (*Abdur Raoof, J.*) MAULA BAKHSH *v.* AMIRUDDIN. **57 I C. 1000 : 1 Lah. 317.**

MAHOMEDAN LAW—Waqf—Mutwalli.

——*Waqf—Mosque—Management—Right of—Descendants of founder—Appointment of one as Kazi—Effect of.*

Where a mosque and Idga were founded by the common ancestors of the plff. and deft. and continued in the possession of their family ever since, the appointment of the deft. as Kazi by the Govt. does not give him an exclusive right to the possession of the institutions and their endowments. (*Kumaraswami Sastri and Devadoss, JJ.*) KAJI AMIR SAHIB *v.* KAJIR MAHOMED OLI AHMAD SAHIB. **15 L. W. 430 : 66 I C. 237 : (1922) M. W. N 439.**

——*Waqf—Mosque—Suit for possession by worshippers for recovery of property.*

A suit by worshippers for possession of mosque property is not maintainable, 16 M. 31 ; 23 M. 99; 33 A. 660, Foll. (*Sadasiva Aiyar and Napier, JJ.*) NOOR MOHAMMAD SAIB *v.* KARIMMA BIBI AMMAL. **16 M. L. T. 165 : 25 I. C. 559 : 27 M. L J 270.**

——*Waqf—Mosque—Nature of—Proprietary rights—Exclusion from worship.*

The conception of a *waqf* according to the Sunni Schools of the Mahomedan Law comprising the followers of both Abu Hanifa and Imam Shafie, involves the extinguishment of all proprietary rights of men in the dedicated property which from the time of dedication vests in God No Mahomedan wishing to say his prayers, can be excluded from the mosque by the managers thereof except for misbehaviour. (*Abdur Rahim and Ayling, JJ.*) KUTTAYAN *v.* MAMMANNA ROWTHAN. **18 I. C. 195 : 35 Mad. 681.**

——*Waqf — Mosque—Right to worship — Offer prayers and recite* Koran.

Every Mahomedan worshipper has the right to offer prayers and to recite the *Koran* as part of his right of worship. No worshipper can however claim to use the mosque as of right for the purpose of receiving or distributing sweetmeats. (*Sundara Aiyar and Sadasiva Aiyar. JJ.*) MUTHALA KANDI *v.* PALLI VEETIL ABU BAKER. **17 I. C. 386 : (1912) M. W. N. 1059.**

——*Waqf—Mosque—Right of every Mahomedan to enter and pray.*

Every mosque is dedicated to the worship of God and is open to any Mahomedan to whatever sect he may belong, who chooses to pray in it. But members of any and every sect of Mahomedans are not entitled to pray in every mosque as a separate congregation, with an Imam elected by themselves. If persons deliberately come late to prayers, they cannot claim to have a second service for themselves. (*Chamier, C. J. and Roe, J.*) KHALIAL AHMAD *v.* ISRAFIL. **2 Pat. L. J 108 : 1 Pat L. W. 284 : 1917 Pat. 73.**

Waqf—Mutwalli.

——*Waqf—Mutwalli* de facto—*Right to collect money due.*

A *de facto* mutwalli is entitled to collect money due to the trust, provided he agrees to credit

MAHOMEDAN LAW—Waqf—Mutwalli.

the same and duly account therefor to the legal owners (*Walsh and Kanhaiya Lall, JJ.*) SHEIKH MUIZUDDIN *v.* MOHAMMAD IKHLAQ.
21 A. L. J. 516 : L. R. 4 A. 503 : 1924 A. 59.

———*Waqf—Mutwalli, appointment of.*
By the rules of Mahomedan Law if no rules of succession to the *towliat* are made by the creator of the endowment the right of appointing a mutwalli vests first in the founder, after his death in the executor and in case of failure of the above two, in the Qazi or the officer of the Civil Court. (*Gokul Prasad, J.*) RAZA ALI *v.* MOAZZAM ALI.
1923 All. 12

———*Waqf—Mutwalli—Powers of leasing—Ejectment of tenant—Notice.*
The rule of Mahomedan Law is that with regard to house property a Mutwalli should not in general be authorised to make a lease of such property for a period longer than one year but there is this qualification attached to it, namely, that in all cases the Qazi might empower the mutwalli to grant leases for longer periods if he thought that such a grant was for the benefit of the trust estate; consequently a lease of a shop by the trustees of the Islamia College for five years is valid and entitles the lessee to eject a previous tenant whose lease has expired. (*Lindsay and Kanhaiya Lal, JJ.*) BAIJ NATH *v* MAHOMED ISMAIL.
44 A. 677 : 20 A. L J. 697 : L. R 3 A 418 : 1922 All. 417

———*Waqf—Mutwalli--Succession--Rules as to.*
In every case the succession to the office of *Mutwalli* is determined by the terms of the trust, which must be referred to, to discover the rules relating thereto. Where a *de facto Mutwalli* complains of some infringement of the rules of a mosque, the person guilty of the breach, cannot put the *Mutwalli* to proof to establish his title to the office. He must prove that the *Mutwalli* has no title. (*Stuart, J.*) BANARSI *v.* ALTAF HUSSAIN.
63 I. C. 171.

———*Waqf—Mutwalli—Delivery of possession.*
Where the *waqf* is himself *mutwalli* there is no need of formal transfer of possession; otherwise a *waqf* is complete, when (1) there is an intention to create one, (2) when it is declared, (3) when a *mutwalli* is appointed and (4) when possession is transferred to him. (*Mears, C. J. and Knox, J.*) MAHOMED ABDUL JALIL KHAN *v.* MAHOMED UBEDULLAH KHAN
19 A L. J 227 : 62 I. C. 725 : 43 All. 416.

———*Waqf--Mutwalli—Delegation of functions.*
Where the mutwalli of waqf property appoints another mutwalli, his responsibility remains unimpaired unless such appointment or transfer of the trust is confirmed by authority. Being so responsible he is entitled to restrain his co-trustee from alienating or wasting any part of the waqf property. (*Banerjee and Piggott, JJ.*) ALI HUSSAIN *v.* MOHAMED HUSSAIN.
52 I. C. 628.

———*Waqf—Mutwalli— Succession to office.*
A Mahomedan created a waqf of certain properties by registered deed appointing his nephews mutwallis after his death from generation to generation. *Held*, that there was nothing in the deed by which any preference was to be given among such descendants nor was any limit placed on the number of mutwallis from among them. (*Rafique and Lindsay, JJ.*) ALI MUQTADI KHAN *v.* ABDUL HAMID KHAN.
41 All. 412: 49 I. C. 878 : 17 A. L. J. 620.

———*Waqf—Mutwalli—Uncertain and fluctuating body of persons—Person appointed by such body—Valid appointment.*
A Mahomedan made a waqf and provided that after the death of himself and his wife, the pious residents of the town should look after the waqf. After his wife's death, the plff. alleging to have been elected as a mutwalli by them brought a declaratory suit. *Held*, that the suit was not maintainable as the plff. had not been validly appointed, the persons who appointed him being an undefined, uncertain and fluctuating body about whom it cannot be said that they had the qualifications required of them by the waqf. (*Walsh and Sunderlal, JJ.*) MUHAMAD SHAFI *v.* DOST MUHAMMED.
36 I. C. 204 : 14 A. L. J. 895.

———*Waqf—Mutwalli—Waqf, if can be.*
A waqf can appoint himself a mutwalli of the waqf property. (*Banerjee and Tudball, JJ.*) RUSTAM ALI KHAN *v.* MUSHTAQ HUSAIN.
35 I. C. 718 : 14 A. L. J. 554.

———*Waqf—Mutwalli—Appropriator constituting himself first* Mutwalli—*Retention and disregard of trust deed by settlors—Effect.*
A *Waqf* under which the appropriator constitutes himself the first *Mutwalli* is valid. 15 A 321 diss. 22 C. 619 P.C.; 23 A. 233 P.C. Foll. The retention and disregard of the trust deed by the settlors cannot defeat the claims of the beneficiaries under it (*Scott, C. J. and Batchelor, J.*) ABDUL RAJAK *v.* BAI JEM BABAI.
14 I C. 988 : 14 Bom. L. R. 295.

———*Waqf—Mutwalli —Lease of property—Permission—In whom power lies.*
The kaze under Mahomedan Law had the power of granting permission to a *mutwalli* to grant leases of wakf property ; now an application for permission must be made to the District Court in the mofussil and to the High Court in the Presidency towns. It is not necessary to file a suit for that purpose. (*Mookerjee and Panton, JJ.*) HABIBAR RAHAMAN *v.* SAIDANNESSA BIBI.
38 C. L. J. 365 : 1924 Cal. 473.

———*Waqf — Mutwalli — Appointment by District judge—Selection and nomination.*
Where a deed of waqf provided that on a vacancy occurring in the office of *Mutwalli*, it should be filled by a pious Mahomedan, appointed by a competent Court on the nomination of five respectable and pious Mahomedans of the village, and five respectable and pious Mahomedans nominated one candidate and five other respectable and pious Mahomedans nominated another candidate, whereupon the District Judge held that both these candidates were duly qualified as pious Mahomedans to hold the office, and after fully considering their respective claims, he appointed one of them as *Mutwalli*, *Held*, that the appointment was valid

and proper. (*Sanderson, C. J. and Richardson, J.*) MOHIUDDIN CHOWDHURY *v.* AMINUDDIN CHOWDHURY. **1924 Cal. 441**

——— *Waqf—Mutwalli—Powers of leasing.*

A mutwalli should not lease waqf property, if it be agricultural, for a term more than three years, and, if non-agricultural, for a term exceeding one year unless he is expressly authorised by the deed of waqf to do so, or where he has no such authority unless he has obtained the leave of the court to do so. (*Mookerjee and Cuming, JJ.*) GAJENDRA NATH DEY *v.* MOULVI ASARAF HOSSAIN.
27 C. W. N. 159 : 36 C. L. J. 48 : 1923 Cal. 130.

——— *Waqf— Mutwallis — Suit and decree against one--Not binding on waqf or other mutwalli.*

A suit for rent and a decree therein against one of two mutwallis of a waqf is not binding on the other mutwalli or on the waqf in the absence of proof that the person sued represented the other mutwalli or the waqf in the landlord's sherista. (*Suhrawardy and Cuming, JJ.*) ABDUL GANI *v.* NABENDRA KISHORE ROY. **65 I. C. 592.**

——— *Waqf — Mutwalli— Powers to grant lease.*

A *mutwalli* cannot grant a valid permanent lease, unless the lessee can show that the lease came within the scope and spirit of the endowment. *Per Richardson, J.*—A permanent lease granted by a *mutwalli* apart from express authority is void. (*Sanderson, C. J. and Richardson, J.*) AKSHOY KUMAR SAHA *v.* BROJENDRA CHANDRA DUTTA. **62 I. C. 674.**

——— *Waqf — Mutwalli — Minor female—Whether her husband a Mutwalli—Receiver.*

Where the *Mutwalli* is a minor female and application is made to a Dt. Judge to appoint a temporary *Mutwalli*, he must make proper arrangements and may appoint a Receiver and may grant lease of the property. The husband of the minor cannot act as *Mutwalli* and a lease granted by him is void and not voidable. (*Mookerji, A. C. J. and Fletcher, J.*) BEPIN BEHARI SAHA *v.* CHARUCHANDRA GHOSH.
60 I. C. 753.

——— *Waqf — Mutwalli — Competency — Woman.*

A woman is not disqualified from holding the office of Mutwalli, provided she can perform religious duties attached to the office, either herself or by deputy. The burden of proving that she is incompetent lies on the person desiring to exclude her. (*Mookerji, C. J, and Fletcher, J.*) KASIM HASSAN *v.* HAZRA BEGUM,
60 I. C. 165 : 32 C. L. J. 151.

——— *Waqf—Mutwalli—Appointment by Dt. Judge—Limitation Act (IX of 1908), Art. 134.*

A District Judge, as a kazi, has the discretion to appoint a mutwalli. If after due publication of the call for nomination to the office, he appoints a mutwalli, he acts in his jurisdiction even if the person be a stranger to the family of the founder and not in the line of succession designated by him. The mutwalli of a waqf estate is not ostensible owner of the estate but a mere manager and in the case of a public charitable endowment the legal ownership is in the Divine Being or in the Charity created in His name. A transfer by a mutwalli who assumes to deal with the trust property as if he were the true owner in breach of duty and in fraud of the trust reposed in him is *ultra vires* and may be avoided by timely proceedings properly taken for the purpose. The transferee cannot be protected even if he takes without notice. The vice in the transferee's title where he takes without notice of the trust can only be cured by lapse of time. (*Richardson and Shamsul Huda, JJ.*) NARAIN DAS *v.* KAZI ABDUR RAHIM. **47 Cal. 866 : 58 I. C. 705 : 24 C. W. N. 690.**

——— *Waqf—Mutwalli—Lease of immoveable property—Application to Dt. Judge—C. P. Code, S. 92.*

The sanction given by the Dt. Judge on an application by the mutwalli may be sufficient authority for the mutwalli for letting out the *Waqf* property for more than three years ; it is not necessary to bring a suit under S. 92, C. P. C., for obtaining such sanction. (*Chatterjee and Panton, JJ.*) FAKIRUNNESSA BEGUM *v.* THE DT. JUDGE OF 24 PERGUNNAHS.
47 Cal. 592 : 56 I. C. 475 : 24 C. W. N. 339.

——— *Waqf—Mutwalli — Power of District Judge to appoint.*

Although a Dt. Judge has the powers of a Kazi under the Mahomedan Law to deal with an application for appointment of a mutwalli he may relegate the petitioner to a suit under S. 92 of the C. P. Code 37 Cal. 870, 43 Cal. 467 and 43 Cal. 1085 ref (*Richardson and Walmsley, JJ.*) JAMILA KHATUN *v.* ABDUL JALIL MEAH. **49 I. C. 799: 23 C. W N. 138.**

——— *Waqf—Mutwalli--Mortgage of the rights of.*

An alienation of a religious office of *Khadim or Mutwalli* is opposed not only to the Mahomedan religion but also to public policy. (*Fletcher and Huda, JJ.*) MUNSHI SAHED BUKSH *v.* GULAM NABI KHANDKAR. **47 I. C. 117 22 C. W. N. 996 :**

——— *Waqf—Mutwalli— Successor— Appointment by will.*

The appointment of a *Mutwalli* by a Tauliatnama will by one holding the office of *Mutwalli* at a time when he is of sound disposing state of mind is valid provided the *Mutwalli* has a right to appoint his successor in office. (*Richardson and Walmsley, JJ.*) SULTAN AHMED *v.* ABDUL GANI. **45 I. C. 581.**

——— *Waqf—Mutwalli—Powers of—Permanent lease—Consideration—Refund.*

A *mokurari maurasi* lease of waqf property by a mutwalli is void if there is no urgent necessity for granting it but the lessee is entitled to a refund of the amount of *Salami* paid by him which would be a charge upon the waqf property but he has no personal claim against the mutawalli. 6 W. R. P. C. 3. (*Walmsley and Greaves, JJ.*) BADLAL MIRZA *v.* TINKORI KOLAY.
41 I. C. 736 : 26 C. L. J. 263.

——— *Waqf— Mutawalli—Incapacity— Meaning of.*

MAHOMEDAN LAW—Waqf—Mutwalli.

A waqfnamah provided that on the executant, a mutwalli, becoming incapable the person in whose favour the deed was executed should be the mutwalli. The executant absconded for fear of arrest by Police. *Held*, that the executant was not so incapable as to give room for his nominee. The incapacity of a trustee is mental or physical incapacity and absconding for fear of arrest, is not such incapacity. (*Fletcher and Newbould, JJ.*) BIBIJAN BIBI *v.* ABDUL JABBAR DAFTARY.
36 I. C. 919.

——*Waqf — Mutwalli—Powers of leasing—Sanction of Kazi*—Factum valet, *doctrine of, if applicable to lease of Waqf property.*

Equity would insist upon the *Mutwalli* doing all that is necessary to give a good title even to a person who with full knowledge enters into a bargain for the lease of a *waqf* house property with a *Mutwalli*. A sanction of a *Kazi* is necessary to validate a lease of *Waqf* house property for more than a year. *Semble* :—When such a lease has been made improperly and many years afterwards, it is impugned before a Court, the lease may be held valid on the doctrine of *factum valet* and on the principle that the Court should not disturb the arrangement in the ordinary course of management of an estate for the benefit of the beneficiaries. 37 C. 179 ref. (*Holmwood and Mullick, JJ.*) GOLAM MUHAMMAD *v.* AKHOY KUMAR LAHA.
32 I. C. 205.

——*Waqf —Mutwalli — Succession — Death without appointing successor—Descendant of founder, rights of—Jurisdiction of Dt. Court and Subordinate Courts.*

Under S. 15 of the Reg. IV of 1793, Mahomedan law and usage applied to matters concerning religious institutions and a Subordinate Judge not expressly authorised by Govt. to exercise functions in connection with administration of *waqfs* cannot act on that behalf. A descendant of the founder of a *waqf* does not become by operation of law, the *Mutwalli*, on the death of the last *Mutwalli* without appointing a successor : but he has a preferential claim to the office and has to be appointed to it by the *quadi* who however may supersede him if he is not qualified. The *quadi* alone was competent to exercise authority in respect of *waqfs*. The supreme authority in the state by whom the *quadi* is appointed need not be a Mahomedan. In respect of the *waqfs* coming under S. 92 (1) of the C. P. Code, the Dt. Judge may be assumed to have been authorised to discharge the functions of a *quadi*. 13 B. 555 ; 13 W. R. 21 F. B. Foll. (*Mookerji and Richardson, JJ.*) AFIMANNESSA BIBI *v.* ABDUL SOBAN.
43 C. 467 : 22 C L. J. 577 : 32 I. C. 21 : 20 C. W. N. 113.

——*Waqf—Mutwalli—Appointment of.*

A manager of the mosque is not necessarily the mutwalli thereof. The waqf in the first place has the power of appointment to the office of mutwalli ; on his death it lies with his executors and failing them it rests solely with the *Kazi* or under the present system with the District Judge. *Quere*:--If devotees or the congregation of a mass can validly appoint a mutwalli. *Semble* : Where the waqf is in favour of an ascertainable body the beneficiaries may elect a manager and not a mutwalli. The appointment of mutwalli is not essential for the validity of an appropriation. A manager who collects subscription and defrays expenses is not necessarily the mutwalli of the mosque. (*Holmwood and Chapman, JJ.*) RAMZAN MISTRI *v.* ZAHUR HOSSAIN.
18 I. C. 241.

——*Waqf—Mutwalli—Removal of—Ground for dismissal.*

Where the Mutwalli was blind and the income being very small was swallowed up by the current expenses, *Held*, that failure to keep accounts was no ground for dismissal of a Mutwalli. Though a public mosque was used by both the Hanantes and Raja-Yadins but was appropriated for the use of the latter community, the fact that the mutwalli had become a Hanafite does not discharge him from Mutwallship. (*Brett and Sharfuddin, JJ.*) RAHIM BUKSH *v.* HAZI AHMAD.
16 I. C. 9.

——*Waqf—Mutwalli—Powers of leasing.*

According to Mahomedan Law, the trustee of a religious endowment cannot grant a lease of agricultural land for a period of more than three years and of other property exceeding one year. 5 W. R. 115 Foll (*Shadi Lal and Le Rossignol, JJ.*) ZAFAR ALI *v.* KISHEN CHAND.
51 I. C. 795 : 99 P. R. 1919.

——*Waqf—Mutwalli— Powers of—Permanent encumbrance not binding.*

A Mutwalli has no right to create a permanent encumbrance on the *waqf* property. The alienation is not binding on the successor. Where a document executed by the *Mutwalli* of a mosque recited that the office of a *Charkban* had been filled by a certain person and the word *Alalduam* was found in the end of the document. *Held*, (1) that since the words following the words *Alalduam* related to the duties of the grantee and not to the privileges this could not be taken as intended to create a permanent and for all time irrevocable alienation of rights in waqf property; (2) that the post was not to be held, in the incumbent's family for ever and that the *charkban* could be dismissed like another servant of the mosque. (*Chevis and Leslie Jones, JJ.*) FAZIL ILAHI *v.* ZAFAR ALI.
32 I. C. 558 : 36 P. W. R. 1916.

——*Waqf — Mutwalli — Powers of— Pre-emption.*

The *mutwalli* of a mosque can claim pre-emption on behalf and for the benefit of the mosque. 153 P. R. 1884 Foll. C.A. No. 1525 of 1882 overruled. (*Johnstone and Shah Din, JJ.*) JINDU RAM *v.* HUSSAIN BAKHSH.
52 P. W. R. 1914 : 147 P. L. R. 1914 : 24 I C. 100 : 59 P. R. 1914.

——*Waqf—Mutwalli—Minor.*

Under the Mahomedan law a minor cannot be appointed *mutwalli* of a mosque. (*Ayling and Seshagiri Aiyar, JJ.*) SYED HASAN RAJA *v.* MIRHASAN ALI.
40 Mad. 941 : 33 M. L. J. 348 : (1917) M. W. N 389 : 38 I. C. 528 : 5 L. W. 419.

———*Waqf—Mutwalli—Leases—Powers of.*

A Mutwalli of a waqf has in the absence of a special prohibition in the deed of endowment, the right to lease the waqf property for 3 years and with the consent of the *kazi* for a longer period. A lease for a period greater than 3 years is voidable and not void. The mutwalli may sue to set aside such lease. (*Srinivasa Iyengar, J.*) BALU MUDALI *v* DURVASALU PILLAI.

4 L. W. 74 : 34 I. C. 570 : (1916) 2 M. W. N. 276.

———*Waqf— Mutwalli— Powers of—Alienation of property—Suit to set aside—Power of Court to appoint mutwalli.*

There is no power in the *Mutwalli* of a mosque to effect a partition of the land belonging to a mosque. Where there is an alienation of the *Waqf* property anybody interested in its due administration may question it, though he is not the *Mutwalli* and not entitled to be put into possession of the property. The texts of Mahomedan Law ordinarily contemplate only one *Mutwalli* but when two are more persons are appointed by a waqf their position would be similar to co-trustees. A "partition" between them would not affect their legal possession or joint responsibility. If there is a vacancy in the office of mutwalli the Court can designate a person who, in accordance with the terms of the dedication, is entitled to act as *Mutwalli* or if there is no *waqfnamah* it can appoint somebody as Mutwalli. The Court can also remove a mutwalli for misconduct under S. 92, C. P. C. (*Oldfield and Tyabji, JJ.*) MUHAMMAD GHOUSE *v.* MOIDEEN SIDDIKH.

29 I. C. 849 : 18 M. L. T. 48.

———*Waqf — Mutwalli— Removal of—Issue of inam title deeds in the name of Mutwalli—Mutwalli subject to waqf and liable to removal by him—Mosque—Object of—Succession — Principle of—Kazi—Office involving performance of religious duties—Majority of holder.*

Certain villages granted by the Mahomedan rulers as *inam* for carrying religious worship in a mosque, were resumed by the British Govt. and given back to the grantors. The inam title-deeds were issued in the name of the Mutwalli for the time being to be nominated by the grantors. *Held*, that the intention was to make a grant of the villages an inam to the original waqf or founder of the endowment and not to that Mutwalli himself personally. Where the Mutwalli of a mosque has according to precedent, to be recognised and appointed at each succession by the waqf, the former cannot claim a hereditary right in such office. Nor can a bequest of the Mutwalliship by the predecessor-in-office in favour of his son, be of any effect. A Mutwalli of a mosque is subject to the control of the waqf and is removeable by him for proper reasons. Defiance of the authority of the waqf and failure to submit accounts on being required to do are sufficient reasons for dismissing a Mutwalli. Per *Sadasiva Aiyar, J.*—All mosques should be treated being intended for the use of the Mussalman public without distinction. 7 A. 461, Ref. The determination of the question of succession to an office in a mosque depends not on the general law of property but upon the rules which the founder of the endowment has established or in the absence of such rule on custom. Under the Mahomedan Law the power of removing the Mutwalli is ordinarily vested in the Kazi but if under the scheme settled by the waqif, the grantor reserves to himself and his heirs the power of removing the Mutwalli and of making nominations from time to time such a power would not be illegal, provided it is not detrimental to the interests of the mosque. 11 C. L. J. 304, Ref *Semble* :—In the case of an office involving religious or spiritual rites, the holder of the office need not be a major under the Majority Act. (*Sadasiva Aiyar and Napier, JJ*) MAHOMED KADIR *v.* GHULAM MAHOMED ALI.

28 I. C. 934.

———*Waqf—Mutwalli—Right of succession to office—Hereditary right.*

A female claiming the office of mutwalli as her hereditary right on the ground that there have been three successive mutwallis from the family, must adduce evidence to prove that the hereditary right was intended or recognised in the original dedication. (*Sadasiva Iyer and Tyabji, JJ.*) PHATMABI *v.* ABDULLA MUSA SAIT.

38 Mad. 491 : 14 M. L. T. 568 : (1914) M. W. N. 75 : 21 I. C. 964 : 26 M. L. J. 115.

———*Waqf—Mutwalli— Minority no bar to appointment of.*

A minor who has attained puberty and has understanding can be validily appointed a mutwalli of a wakf property under Mahomedan Law and one who has completed his fifteenth year is presumed to have attained both under Mahomedan Law and S. 14, Evidence Act. (*Halifax, A. J. C.*) HANSKUARBAI *v.* IMAM ALI.

59 I. C. 717 : 17 N. L. R 126.

———*Waqf — Mutwalli — Appointment of founder —Validity.*

A waqf nama appointing the dedicator a mutwalli also providing that the next mutwalli would be his successor, cannot be invalid for want of the word mutwalli in it. (*Stuart, A. J. C.*) MAHOMED HAMID *v.* SITARAM.

35 I. C. 732 : 3 O. L. J. 377.

———*Waqf — Mutwalli—Minority of office-holder.*

Where the office of *Mutwalli* devolves upon a minor by virtue of the provisions of the trust deed, in such a case the appointment will remain in abeyance until the majority is attained. (*Miller, C. J. and Kulwant Sahay, J*) BIBI KANIZ ZOHRA *v.* SAIYED MUZTABA HUSAIN

2 P. 819 : (1923) Pat. 241 : 4 P. L. T. 613 : 1923 P. 576.

———*Wakf — Mutwalli—Alienation—Suit to set aside—Estoppel.*

The Courts have paid more regard to the protection of the trust than to the protection of the alienee and it is now settled that even if the grantor has himself been implicated in the abuse of the trust the Courts will interfere at his instance to prevent a repetition of the abuse though his previous conduct might be a reason for excluding him from the administration of the trust

property. (*Mullick and Ross, JJ.*) MAULAVI MAHOMED FAHIMUL HUG *v* JAGAT BALLAV GHOSH.
2 P. 391 : 4 P. L. T. 675 : 1923 P. 475.

——*Waqf — Mutwalli — Power to appoint successor.*

A *Mutwalli*, who is not the founder of *waqf*, has no power to appoint a successor or to draw up a scheme of succession whatever his powers may be while in his death illness. (*Adami and Bucknill, JJ.*) AZIZUNNISSA *v.* GHOWSAN KESAB.
63 I. C. 136.

——*Waqf—Mutwalli—Remuneration.*

As regards the remuneration of a *Mutwalli* the Court should see whether the *Waqf* deed enables the *Mutwalli*, without committing breach of trust, to take anything he likes out of the endowed property. If it does, *e. g.*, where the deed provides first for his remuneration at whatever rate he pleases and then for the object of endowment, the transaction is void. A case on similar facts. (*Das and Ross, JJ.*) ISMAIL ALI KHAN *v.* HAMIDI BEGAM
6 P. L. J. 218 : 62 I. C. 455 : 2 P. L. T. 658.

Waqf—Objects of.

——*Waqf—Objects of—Provisions contained in waqfnama—Validity.*

Where the provision intended to benefit the family of the settlor was not the preponderating feature of the settlement, nor was the provision made for the prepetuation of religious ceremonies and charitable gifts by any means illusory or unsubstantial but were equally undoubtedly, the two provisions—that for the upkeep of the mosque and celebration of worship there on the one hand and that for the benefit of the settlor's family on the other—are, as a matter of drafting separate and severable dispositions, there is a valid creation of a waqf. If the effect of the deed is to give the property in substance to charitable uses, it is valid waqf, but not if the effect is to give the property in substance to the testator's family. When once it is declared that a particular property is waqf or any such expression is used as implies waqf, the right of the waqf is extinguished and the ownership is transferred to the Almighty. Neither the *sajjadanashin* nor the *mutwalli* has any right in the property belonging to the waqf : the property is not vested in him, and he is not trustee in the technical sense. The *waqfnama* does not transfer the property to trustee. Such property as is held in waqf is inalienable, except for the purposes of the waqf. Where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the waqf, which is therefore as such unsustainable, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges one declared for pious uses on one part of the property, and another separate charge declared on another part for the use of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the

rents and profits of the whole. (*Lord Sumner.*) HAJI ABDUR RAHIM *v.* NARAYAN DAS AURORA.
50 Cal. 329 : 32 M. L T. (P. C) 153 : 17 L.W. 509 : 25 Bom. L. R. 670 : 38 C L. J. 242 : (1923) M. W. N. 441 : 28 C. W. N. 121 : 50 I. A. 84 : 44 M. L. J. 624 : 1923 P. C. 44 (2) (P. C.)

——*Waqf—Objects of—Dedication for charitable purposes.*

A dedication by the owner of landed property of a portion thereof for the purposes of charity, including maintenance of his relatives and descendants and for the reading of the *fateha* for the salvation of his soul, constitutes a valid waqf under the Mahomedan Law. (*Rafiq and Stuart, JJ.*) MUKARRAM ALI KHAN *v.* ANJUMAN-UN NISSA BIBI.
69 I. C. 836 : 20 A. L. J. 924

——*Waqf—Objects of—Void.*

Where a will created a waqf and gave the committee of management all sorts of powers regarding the management of the said properties but no power to divert the use of the property from the objects of trust, the will creates a valid trust which is not void for vagueness. (*Rafique and Piggott, JJ.*) JAI NARAYAN *v.* BANKEY LAL.
58 I. C. 566 : 17 A. L. J. 957.

——*Waqf—Object of — Secular— Religious difference—Distinction.*

There is no difference between an express dedication limited to special uses for secular purposes and one similarly limited for religious purposes. (*Walsh, J.*) FAKURUDDIN *v.* MAHAMMAD RAFIQUE.
33 I. C. 91.

——*Waqf—Objects of—Distribution of food to the poor*—Urs *and* fateha—*Valid charitable object.*

The distribution of food to the poor and the like on the occasion of *urs* and *fateha* is a valid religious charitable object. (*Chamier and Figgott, JJ.*) ABDUR RAFEY KHAN *v.* BANNI BEGAM
15 I. C. 36.

——*Waqf — Object of—Improper objects—Effect*

The general dedication of property in the name of God will not render the waqf valid in respect of so much of the property as has been dedicated expressly for specific objects which are not proper. *Per Banerjee, J.*—There should be substantial dedication to religious charitable uses at some time or other. *Per Stanley, C J.*, (*Banerjee, J., Contra.*) Expenses of lighting a mosque are valid objects but expenses of *fatiha* ceremonies and the salary of a Hafiz and readers of the quran are not proper objects. (*Stanley, C. J. and Banerjee, J.*) MAZHAR HUSSAIN KHAN *v.* ABDUL HADI KHAN.
33 All. 400 : 9 I. C. 753 : 8 A. L J. 162.

——*Waqf—Objects of—Feasts at Mecca.*

A bequest for giving "*Gadiulkhum* feast at Mecca" and for giving "*Gadi* feast at Remanpura in Surat" is a valid *Waqf*, as the bequest is to celebrate the appointment of Ali as successor of the prophet. All works of religion, chartiy or public utility, not condemned by Mahomedan Religion, are proper objects of *Waqf*. Whether a bequest for *Fateha* dinner for the testator and

his wife is a valid *Waqf* is doubtful. 18 M. 201; 31 A. 136 ; 6 Bom. L. R. 1058. Ref. (*Beaman and Haywara, JJ.*) ABDUL KADER *v.* BAI SAFIABU.
36 Bom. 111 : 12 I. C. 702 : 13 Bom. L. R 1025.

———*Waqf—Objects of—Charitable and religious purposes—Non-specification of proportions in which income is to be appropriated for several objects.*

If a sanad provides for the maintenance of a mosque and for khairat feeding of travellers, etc., and the public offer of prayers at the mosque the trust is a religious, charitable and public trust. A waqf not specifying the proportion of the income to be appropriated for the several objects is not invalid. (*N. R. Chatterjea and Richardson, JJ.*) RAHMAN *v.* FAIZUR RAHMAN CHOWDHURY.
35 I. C. 880.

———*Waqf—Objects of—Moharrum—Employment of trustees—Gift through trustees—English Law.*

A Mahomedan dedicated immoveable property to the service of Imam Hossein and for religious purposes and conveyed the same to his granddaughter and her brother and their heirs, "to have and to hold" on trust, that they shall apply the surplus of rents and profits, after some expenses of repair and other incidental charges, "to the due and proper observance of the annual Mahomedan festival of the *Moharrum*," with a condition that the property should not be sold or mortgaged. *Held*, that the dedication amounted to a valid *Waqf* and that the employment of trustees for the purposes of carrying it into effect did not in any way prejudice the dedication. 15 C. 329, Ref ; 15 B. L. R. 167. (*Jenkins, C. J. and Woodroffe, J*) RAM CHARAN LAW *v.* SHAHEBZADEE FATMA BEGUM. **42 Cal. 933 : 19 C. W. N. 1061 : 30 I. C. 686.**

[Affirming 27 I. C. 442 : 19 C. W. N. 33]

———*Waqf—Objects of—Charitable purpose—Teaching of girls, preaching of sermons.*

The question whether a property has been dedicated to public, religious or charitable uses is a question of fact to be decided according to the feeling and sentiments of the religious community to which the parties belong and not in accordance with the principles laid down in English authorities. The teaching of girls, the preaching of sermons and the occasional entertainment of holy men are a valid charitable object (*Rattigan J.*) SANT DAS *v.* RAM BAI.
38 P. R. 1913 : 264 P. L R. 1913 : 20 I. C. 295 : 184 P. W. R. 1913.

———*Waqf—Objects of—Validity.*

Where it is found that the suit building was used as a *Dharamsalah*, that all persons had a right to perform pujah in it and that the *Baradri* used it on marriage occasions and for meeting, *Held* that the property was waqf and no question of imperfect trust arose. (*Rattigan and Chevis, JJ.*) RAM DAS *v.* DAULAT RAM.
114 P. W. R. 1913 : 18 I. C. 807 : 225 P. L. R. 1913.

———*Waqf—Object of—Urs and Fatehas.*

The performance of Urs and Fatehas is invalid according to Mahomedan law if these rites involve

the distribution of food to the poor. (*Abdur Rahim and Seshagiri Aiyar, JJ*) SUJJADA MAHOMED *v.* PEER JADA KHAJA SYED SHAH HABI.
53 I. C. 677 : (1919) M. W. N. 662.

———*Waqf—Objects of—Change of object.*

If a piece of land is dedicated to one purpose it cannot, contrary to the terms of the dedication, except in cases which fall under the *cypres doctrine* (or its equivalent in Mahomedan law) be utilised for any other purpose. (*Ayling and Tyabji, JJ.*) GRAMANI ADAM SAHIB *v.* HAJI ABDULLA SAHIB. **29 I. C. 575.**

———*Waqf—Objects of—Private mosque.*

Where a Mahomedan testator transferred property in full proprietary rights to a legatee and his representative in perpetuity with a direction to continue a certain religious celebration in connection therewith, *held*, there was no dedication to a waqf so as to render the property inalienable. The mere construction of a mosque in a private house for the worship of the members of the family is not a waqf. (*Kanhaiya Lal and Daniels, A. J. Cs.*) KANIZ MEHDI BEGAM *v.* RASUL BEG.
48 I. C. 39 : 5 O. L. J. 551.

———*Waqf—Objects of—Profits of land only.*

There is no valid waqf of the profits only apart from the land. (*Stuart and Kanhaya Lal, A.J.C.*) QUASSIM ALI KHAN *v.* AHMAD SHAH.
32 I. C. 516 : 2 O. L. J. 758.

———*Waqf—Objects of — Public purpose — Hujra—Upkeep of.*

The upkeep of a *hujra* may to a certain extent benefit the public, but it is an obivious straining of the language to call a *hujra* an institution which advances religion commerce, health or safety, or is otherwise beneficial to mankind. A *hujra* is a private guest-house in which a leading man entertains his guests. The extent to which he throws it open to all and sundry depends entirely on his personal idiosyncrasies. It is not a public institution in any sense of the word. (*Pipon, J. C.*) YUSAF KHAN *v.* MISALKHAN.
73 I. C. 99.

Waqf—Offerings.

———*Waqf—Offerings—To whom belongs.*

The offerings made at a Mausoleum of a religious Mahomedan, the founder of a new sect, to his memory and not to the sect of the deceased, belonged to his heirs and not to his followers. (*Stuart and Kanhaiya Lal, A.J.Cs.*) SHARFUDDIN *v.* MAQBULUNNISA. **40 I. C. 101 : 4 O. L. J. 174.**

Waqf—Sajjadanashin.

———*Waqf— Sajjadanashin— Appointment.*

The office of a sajjadanashin implies the existence of a religious institution the holder of the office being the person in charge of the spiritual affairs of the institution. He is the curator of the *Dargah* and is supposed to continue the spiritual line. (*Martineau, J.*) ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN. **1924 Lah. 382.**

———*Waqf—Sajjadanashin—Tomb of Mahomedan saint.*

The burden of proving a valid dedication to public religious uses of certain property is on

MAHOMEDAN LAW—Waqf—Sajjadanashin.

those who assert it. A dedication could not be presumed merely from the facts that a saint was buried at a particular place and that *urs* had been held at the tomb on his death anniversary. There cannot be a *Sajjadanashin* in the absence of a waqf and if a person is so called without any connection with a waqf it is a mere courtesy title. (*Shadi Lal, C. J and Fford, J.*) ALI MAHOMED KHAN *v.* ALI AKBAR KHAN.

4 Lah. 133 : 1924 Lah. 58.

———*Waqf—Sajjadanashin— Property held by owner of Mahomedan shrine—Inheritance.*

A Mahomedan who made his living by *piri Muridi* owned the tomb of his ancestor and executed a will in favour of his wife of his whole property. He also appointed K. manager of the estate after his death and also his representative for the continuation of the *urs* and for the carrying out the duties and receiving the offerings connected with the *piri Muridi. Held,* that the K was never *Sajjadanashin* in the usual acceptance of the term that the property was never dedicated to the upkeep of the shrine but was held by the testator in proprietary right and not as a keeper of the shrine. (*Shah Din, C. J. and Le Rossignoll, J.*) ZINAT BIBI *v.* EMNA.

92 P. W. R. 1917 : 111 P.L. R. 1917 : 40 I. C. 240 : 107 P. R. 1917 (P. C.).

———*Waqf— Sajjadanashin — Succession — Primogeniture—Custom.*

The rule of primogeniture is contrary to Mahomedan Law. Where past practice shows a rule of specific nomination by the incumbent of his successor, the Court will not find in favour of any rule of primogeniture solely from the circumstance that the persons appointed were usually eldest sons. (*Johnstone, C J. and Leslie Jones, J.*) MAHMUD *v.* MUHAMMAD HAMID.

33 P R. 1917 : 38 I. C. 387 : 11 P. W. R. 1917.

———*Waqf—Sajjadanashin — Law applicable to—Removal by Court—Grounds for.*

A sajjadanashin can be removed by the Court for misconduct, and the ordinary Mahomedan Law of *Waqf* must apply to him with such modifications as may be required by the practice of the institution concerned or of similar institutions. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) SUJJADA SAHA MAHOMED *v.* PEERJAD KAJAH.

53 I. C. 677 : (1919) M. W. N. 662.

Waqf—Takia.

———*Waqf—Takia—Nature of—Gaddinashin —Trustee.*

The Takia of Rasul Shahi fakiyars in Lahore is a religious institution and waqf property. The mere fact that a trespasser claims repeatedly describing himself as trustee does not alter his real profession. The person in possession of property belonging to a religious institution cannot divest himself of his fiduciary position by merely asserting his title thereto. (*Shadilal and Chevis, JJ.*) ABDUL KADIR *v.* HUSSAIN BIBI.

44 I. C. 879 : 11 P. W. R. 1918.

MAHOMEDAN LAW—Waqf—Validity.

———*Waqf— Takia — Grant to—Private or public trust.*

It cannot be necessarily implied that a grant to a *takia* is really intended for the benefit of the holder of the Office or the head of the institution. The character of a takia must depend upon the nature of the grant in each case, and it would be misleading to proceed upon the analogy of usage of other institutions. According to Mahomedan Law the intentions of the donor govern entirely the application and destination of endowed property. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) DOST MAHOMED KHAN *v.* NAZIR ALI SAHIB.

42 I C. 474 : 6 L. W. 134.

Waqf—Validity.

———*Waqf—Validity—Gift for perpetual succession—Aggrandisement of family—Use of word "Waqf"—Effect.*

A deed purporting to create by gift a perpetual succession of interests for the aggrandisement of the family of the donors is invalid according to Mahomedan Law and is not validated by the use of the term 'Waqf' or by the insertion of a remote trust for the poor, (*Viscount Cave.*) KHAJEH SOLEHMAN QUADIR *v.* NAWAB SIR SALIMULLAH BAHADUR.

49 I. A. 153 : 49 Cal. 820 : 31 M. L. T. (P. C.) 79 : 4 U. P. L. R. 70 : L. R. 3 P. C. 189 : 24 Bom. L. R. 1257 : 27 C. W. N. 101 : 21 A. L. J. 1 : 37 C. L. J. 56 : 43 M. L. J. 385 : 1922 P. C. 407 (P. C.)

———*Waqf—Validity—Substantial dedication.*

A substantial dedication of property to charitable and religious purposes is in the absence of any legal objection, valid under the Mahomedan law. (*Viscount Cave.*) ABDUL HAFIZ *v.* ABDUL ALIM.

24 C. W. N. 494 : 28 M. L. T. 135 : 12 L. W. 497 : 32 C. L. J. 447 : 59 I. C. 1: (1920) M. W. N. 324 (P. C.)

———*Waqf—Validity— Substantial gift to charity —Benefit to donor's family—Effect of— Mussalman Waqf Validating Act, VI of 1913.*

In cases not governed by Act VI of 1913 where the effect of a deed is to give the property in substance to charitable uses, it is a valid waqf. It would be otherwise where the effect is to give the property in substance to the donor's family. 17 I. A. 28; 22 I. A. 76; 28 I. A. 23 Ref. To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor the amount of the property the nature of the deeds, of the charity, the settled fund and the like. Where the paramount purpose of the donors appeared to be to provide for the needs of certain charities up to the income derivable from the endowed land and these deeds were made the first burden on that income, and the residue which might be a dwindling sum was given to the family, *Held,* that merely because at present the income going to the family was larger than that going to the charities, the effect of the deed was not to give the

MAHOMEDAN LAW—Waqf—Validity.

property in substance to the family. (*Lord Atkinson.*) RAMANADHAN CHETTIAR *v.* VADA LEVVAI MARAKAYAR. 40 Mad. 116: 5 L W. 293 : 32 M. L. J 101: 15 A. L J. 139: (1917) M. W N. 180: 39 I C. 235: 25 C. L. J. 224 21 M. L. T. 215: 21 C. W. N. 521: 1 Pat. L. W. 394: 19 Bom L. R. 401 : 44 I. A. 21 (P C) [Affirming on appeal 34 Mad. 12: 6 I. C. 1 : (1910) M. W. N. 180]

———*Waqf—Validity — Power of sale saved to donor.*

The reservation of a power to sell and transfer the property during her life-time by the dedicator derogates from the nature of the grant. Such a condition is inconsistent with a valid waqf which must be certain as to the property appropriated and at the same time unconditional, and not subject to an option. There might be a reservation of the annual profit of the donor for her life, but a provision empowering the donor to sell and appropriate the proceeds thereof for his own or other's benefit, would make the settlement invalid. 6 B. 42; 16 A. L. J. 841 Ref (*Gokul Prasad and Kanhaiya Lal, JJ.*) AMIRUDDIN *v.* MUZAFFAR-UL-HASAN. 45 All. 107: 20 A. L. J. 897. 1923 All 55.

———*Waqf—Validity—Waqf appointing himself Mutwalli—Effect.*

Where the owner of property has declared it to be *Waqf* and has appointed himself as *mutwalli* there is no need for any further formal transfer of possession, neither will the conduct of a subsequent *Mutwalli* accepting his appointment under the terms of the *Waqfnamah* invalidate the *Waqf*. (*Mears, C. J., and Knox, J.*) ABDUL JALIL KHAN *v.* OHED-ULLAH. 43 A. 416: 62 I. C. 725 : 19 A. L. J 227.

———*Waqf—Validity — Trust deed—Ownership in property not divested.*

Where a Mahomedan and his wife, Shias in pursuasion, purported to create a waqf by means of a trust deed, but the deed did not divest the ownership of the executants from the date of the execution, the waqf is invalid. (*Piggott and Walsh, JJ.*) SYED ALI RAZA *v.* SANWAL DAS. 41 All. 34: 48 I. C. 212: 16 A. L. J. 875.

———*Waqf—Validity — Colorable dedication.*

Where a Mahomedan prior to 1913 made a colorable dedication of his property the religious or charitable purpose being so unsubstantial as to give to the settlement merely a colour of piety, the real object of the settlor being to create a settlement in perpetuity, *Held*, that having regard to the course of the rulings of the Privy Council and of High Courts prior to the passing of Act No VI of 1913 no valid waqf was created. (*Piggott and Walsh, JJ.*) NAIMUL HAQ *v.* MAHAMMAD SUBHAN ULLAH. 41 All. 1: 48 I. C. 94: 16 A. L. J. 841.

———*Waqf—Validity.*

A waqf of land subjects to a mortgage is valid and a provision to pay the mortgage debt does not postpone the waqf for indefinite time. (*Banerjee and Tudball, JJ.*) MUHAMMAD RUSTAM ALI KHAN *v.* MAHOMED MUSHTAQ HUSAIN. 35 I. C. 718: 14 A. L. J. 554.

———*Waqf—Validity—Dedication of property not owned is invalid.*

A *wakf* of property by a person who is not the owner of such property at the time of dedication and which is not ratified by the true owner is not valid. (*Griffin and Chamier, JJ.*) NASIR-UD-DIN *v.* BALLABH DAS. 10 A. L. J. 501: 17 I. C. 471 : 35 A. 68

———*Waqf — Validity — Charity illusory—Perpetual family settlement— Life-estate.*

Whether the rule of the Mahomedan Law that a life estate is bad and would resolve itself into an absolute estate can be maintained in the case of *Shaffies* is doubtful. A trust for the granddaughter of the settlor for life and thereafter on her descendants from generation to generation and in default thereof on the settlor's husband's relatives from generation to generation in perpetuity and in default within an ultimate trust for the education and instruction of Mahomedan youths, is void as being an attempt to create a perpetuity in the nature of a family settlement under the guise of a *waqf*. (*Scott, C. J. and Chandavarkar, J.*) MAHOMED IBRAHIM *v.* ABDUL LATIF. 37 Bom. 447: 17 I. C. 689: 14 Bom. L. R. 987.

———*Waqf—Validity—Provision for settlor's descendants.*

Where the income of the settled properties are partly for charitable purposes but mainly for the benefit of the settlor's descendants, the trust for charitable purposes is valid but the trust in favour of the settlor's descendants is void. (*Scott, C. J. and Batchelor, J.*) ABDUL RAJAK *v.* BAI JIMBABAI. 14 I. C. 988 : 14 Bom L. R. 295.

———*Waqf—Validity —Reservation of life interest.*

A donor can give his property in *waqf* ; that is to say appropriate and dedicate the corpus to the service of God while reserving for himself life-interest in the usufruct. But in case of private persons Mahomeden Law does not allow merely a contingent gift in *waqf*.

This necessarily flows from the jural conception of a *waqf* which is the immediate appropriation and consecration of specified property to the service of God and the reservation of the donor's life-interest in that property does not in any way clash with that conception, for the corpus is there and then definitely and finally appropriated to its intended purpose. But it is plainly otherwise, while the gift is conditioned upon the happening of some future uncertain events. There can on such circumstances be no appropriation synchronizing with the declaration, because should the future events happen, it is neither the donor's intention then nor after the happening or that event that the property should ever be appropriated to the service of the God. (*Beaman, J.*) PEERBHAY *v.* EBRAHIM 13 Bom. L. R. 717 : 12 I. C. 225 : 36 B. 214.

MAHOMEDAN LAW—Waqf—Validity.

———*Waqf—Validity—Substantial.*

Where there is a substantial dedication of the corpus and income to charitable uses within the test laid down by the Privy Council, the waqf is not invalid as being illusory. The deed containing a substantial dedication of corpus and income for charitable purposes creates a valid waqf. A founder depriving himself of the disposing power of the corpus makes a substantial dedication when he excutes a deed of endowment with a reservation of the power to himself of the disposal of the income in his life time, but not so to his successors and directing the employers of the income to distribute half of the balance after defraying all the necessary costs of rent, and repairs, to his heirs according to the share of each and half to the declared charitable and religious purposes. (*Richardson and Huda, JJ.*) NARAIN DAS *v.* ABDUR RAHIM.
47 Cal 866 : 58 I. C. 705 : 24 C. W. N 690.

———*Waqf—Validity of—Mussalman Waqf Validating Act.*

A waqf in favour of the grantor's family and descendants without an ultimate dedication to charity and created before the Act is invalid. (*Teunon and Newbould, JJ.*) ABDUL FOATIM MAHOMED *v* IJJATANESSA KHATUN. **57 I C. 782.**

———*Waqf—Validity—Substantial benefit to donor's family—Muttawalli —Parties agreed about existence of waqf—Court if can question its legality.*

A deed of waqf is valid if its effect is to give the property in substance to charitable uses ; it is not as if the effect is to give the property in substance to the testator's family. When a deed of waqf is found to be invalid, though the parties do not plead the illegality and do not wish to raise that objection, a court cannot with propriety declare on the invitation of the plff's, that one of them is the muttawalli in respect of the waqf and is entitled to invoke the assistance of the Court to place him in possession of properties for the furtherance of the objects of the waqf (*Mookerjee and Panton JJ.*) NAWAZADA KHAJAH ATIKULLA *v*, NAWAB KHAJAH HABIBULLAH. **24 C. W. N. 306 : 53 I. C. 773 : 30 C. L. J. 241.**

———*Waqf—Validity of—Invalid in its inception—Mussalman Waqf Validating Act (IV of 1913) —Effect of—Maintenance allowance—Creation of in favour of unborn persons.*

If there is a substantial dedication of property to charitable uses at some period of time or other the waqf is valid. 17 Cal. 498 Ref. The Mussalman Waqf Validating Act is not retrospective and a Waqf which is invalid in its inception, is not validated by operation of the Act. An instrument is to be construed without reference to the rule against perpetuities and then the validity of the disposition is to be settled by the application of the rule. The assertion of the parties or their representatives cannot validate illegal ways Whenever a waqf is created, the ownership of the appropriator in the thing dedicated is extinguished, and there is a detention of the thing in the implied ownership of the God in such a manner that its profits may

MAHOMEDAN LAW—Waqf—Validity.

revert to or may be applied for the benefit of mankind. The creation of a succession of family allowances from generation to generation of unborn persons, apart from a scheme of valid waqf, is not recognized by Mahomedan Law. Cases reviewed. (*Mookerjee and Walmsley, JJ*) NAWAB KHAJAH HABI BULLAH SAHEB *v.* KHAJAN SOLOMAN QUADAR. **24 C. W. N. 18 : 53 I. C. 764 : 30 C. L. J. 102.**

———*Waqf — Validity of — Religious and charitable purpose—Intention of settler—Admissibility of.*

Where a waqf created by a duly registered document establishes in terms certain religious and charitable trusts, evidence is not admissible to show that the settler had no intention to give effect to the trust or that the trusts were not in fact given effect to. (*Chaudhuri and Newbould, JJ.*) MAHOMED NAGOR *v* ABDUL JALIL.
53 I. C. 597 : 30 C. L. J. 67.

———*Waqf—Validity—Reservation of small fraction of income for religious purpose—Effect of.*

Where the annual value of the property dedicated by way of waqf was about a thousand rupees but the expenditure needed to carry out the stated charitable and religious purposes amounted to only a small fraction of the annual income and was in fact so insignificant or so remote as to be illusory : *Held*, applying the test laid down in 23 All. 233 that the document was an invalid waqf. (*Chitty and Walmsley, JJ.*) MAKRAM ALI KHAN *v.* NAJABAT ALI.
23 C W. N. 903.

———*Waqf—Validity.*

The circumstances at the date of execution of waqf-deed, determine its validity. The existence of some charitable or religious object is the true test. But where the true object of the settler is to provide for his daughter and his heirs, and a portion only was to go for charity, the waqf is not valid but the charitable trust has a charge on the property, (*Fletcher and Richardson, JJ.*) SHRIMATI KARIMUNNESSA *v* SHRIMATI EKINA.
37 I. C. 904 : 22 C. W. N. 568.

———*Waqf — Validity of— Provision not carried out by Waqif's heirs—Effect.*

The fact that the heirs of the waqif have not carried out the provisions of the *Waqfnama* but have treated the property as their own, does not in any way affect the validity of the waqf. (*Chatterjee and Sharfuddin, JJ.*) ASNA BIBI *v.* JAIGUNNISSA BIBI. **44 Cal. 698 : 37 I. C. 887 : 21 C. W. N. 222.**

———*Waqf — Validity — Gift in favour of grand-daughters—Mohurrum.*

A conveyance by a Sunni of his immoveable properties to his grand-daughter under a deed of waqf for certain religious purposes with a direction to apply the rents and profits " to the due and proper observance of the annual Mohurrum " is a valid dedication operating as a waqf and as such it is inalienable by sale or mortgage. (*Imam, J.*) RAMCHURU LAW *v.* FATIMA BEGUM. **27 I. C. 442 : 19 C. W. N. 33.**

MAHOMEDAN LAW—Waqf—Validity.

——— *Waqf—Validity of—Gift to relations—Waqf Validating Act VI of 1913—Applicability.*

Where a Hanafi made a waqf providing for expenses of a mosque and for regular monthly maintenance of the members of his family *Held*, the dedication for the mosque was valid but not the provision for payment of maintenance to the family members, the Waqf Validating Act having no retrospective effect. (*Chaudhuri, J.*) RAHIMUNNISA BIBI *v.* MANICK JAN.

27 I. C. 96 : 19 C. W. N. 76.

——— *Waqf—Validity.*

A Waqf will be valid if the effect is to give the property in substance to charitable uses and invalid if the substance goes to the settler's family. Waqf giving one third to charity is valid (*Chatterjee and Walmsley, JJ.*) BAZLUL GHANI MIA *v.* ADAK PATRI.

19 I. C. 896 : 17 C. W. N. 1018.

——— *Waqf—Validity of—Direction to executors—Mutwallis.*

A Mahomedan testator dedicated a certain house of his to God and directed his executors to take possession of it and realise the rent and spend it on good work "as they might think best" *Held* that the dedication did not constitute a private waqf. (*Scott-Smith and Leslie Jones, JJ.*) MUHAMMAD WAZIR *v.* ALI HUSSAIN.

43 I. C. 749 : 26 P. W. R 1918.

——— *Waqf—Validity—Essentials of.*

There must be an unambiguous expression that a waqf is created. A declaration of waqf in casual talk without conduct does not create waqf. There must be delivery of possession of property to the muttawalli. Mere poetical engravings on the walls of a building does not mean that the place is dedicated. Offerings made to a saint cannot be Waqf. Tomb is not always a religious institution or waqf. (*Johnstone, C J. and Jones, J.*) MAHMUD *v.* MUHAMMAD HAMID.

11 P. W. R. 1917 : 38 I. C 387 : 33 P. R. 1917.

——— *Waqf—Validity of—Right of resumption—Mosque—Gift—Inam.*

A mosque which has been always opened for the public for worship, must be presumed to be a public one whether it is a Juma Masjid or not. In the case of a grant by the ruling power, the condition of the power of resumption in case the trust is not carried out does not impair the character of the public trust. (*Ayling, Kumaraswami Sastri and Krishnan, JJ*) MAHOMED ESUF SAHIB *v.* MOULVI ABDUL SATHAR SAHIB. **42 Mad. 161 : 25 M. L T. 141 : (1919) M W. N. 228 : 49. I. C. 821 : 36 M L. J. 262.**

——— *Waqf—Validity—Fraud of creditor.*

A heavily indebted Mahomedan trader executed and got registered a deed of waqf comprising all his immoveable properties reserving to himself the use of the entire income of the properties for his life time and appointing his son as manager after his death. The property was treated as his own by himself and by his sons. Under the circumstances, the so called *waqf* was held to be voluntary settlement and therefore void as against the creditors of the settler. *Semble.*—A dedication of property reserving a life estate in the income to the grantor himself, as a beneficiary, may be valid under the Mahomedan Law. (*Ayling and Srinivasa Aiyengar, JJ.*) MULLA VEETTIL USSAIN *v.* SUBRAMANIA IYER. **35 I. C. 877: 31 M. L. J. 431.**

——— *Waqf Validity—Dedication of—Moveable property—Government Promissory Notes.*

Where a Mahomedan Settler appropriated a sum of money for waqf and appointed himself *mutwalli* and the possession of the property continued with him as before. *Held*, that this declaration in the deed in the preamble that he had created a *waqf* and that he shall in his lifetime perform every waqf duty and not incur such expenses or such private transfers for household purposes in respect of the waqf property as might tend to a reduction in the waqf property was sufficient to prove a change in the nature of his possession. There is a conflict of opinion among different High Courts in India whether the *waqf* of cash is valid or not. *Held*, however such a waqf was valid according to the Mahomedan law. (*Daniels and Dalal, A.J.Cs.*) MIRZA YAQUB BEG *v.* MIRZA RASUL BEG. **10 O. L. J. 86 : 1923 Oudh 254.**

——— *Waqf—Validity.*

A waqf of property by a person to whom it does not belong at the time of dedication and not subsequently ratified by the true owner is invalid. (*Stuart, J. C.*) RAGHURAJ SINGH *v.* SAHIBDIN. **15 O. C. 319 : 17 I. C. 470.**

——— *Waqf—Validity — Essentials of—Shiah law—Completion of the trust—English law.*

There are four essential requisites on which depends the validity of the *waqf*: (1) that it must be perpetual. (2) it must not be contingent, (3) that possession must be given of the thing dedicated, or more properly, the properties should cease to be the properties of the donor, and (4) that the right of the donor should be entirely divested therefrom. It is, however, recognised in Shiah Law that it is lawful for the *waqif* to constitute himself or herself the *muttwalli*, and that, in such a case, a formal change of possession is out of the question, and that all that is required is, not actual delivery of possession, but a change in the character of possession. The Shia Law differs from the English Law on the question of the completion of the trust, though they agree in this that where the trust was in the first instance created, the Court will enforce it and will not enter into the question whether the trust was acted upon. In England transmutation of possession is not, whereas in Shia Law it is, an essential apre-requisite to the creation of the trust. In England' if the settler purposes to convert himself into a trustee, then the trust is perfectly created as soon as the settler has executed an express declaration of the trust intended to be final or binding on him. In Shia Law, the *waqif* must still show that he has changed the character of his possession, (*Das and Adami, JJ*) MT. BIBI KANIZ ZAINAB *v.* SYED MOBARAK HOSSAIN. **1924 P. 284**

MAHOMEDAN LAW—Will.

Will.

———*Will—Legacy to heir—Burden of proof of consent.*

The Mahomedan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and the burden of proving the consent of a particular heir is upon the legatee. (*Lord Phillimore,*) SALAHJEE *v.* FATIMA BIBI. **44 M. L. J. 332 : 2 Bur. L J. 1 : 32 M. L. T. 96 : 25 Bom L. R. 301 : 37 C. L. J. 302 : 18 L. W. 44 : 1923 M. W. N. 522 : 1 Rang. 60 : 1922 P. C. 391.**

———*Will—Legacy of one-third of estate means estate as it is with acquisitions made out of it at date of suit and not as it was at date of death.*

One Y made a will by which he left one-third of the portion of the property, of which he was competent to dispose, to be dealt with for charitable purpose. His executor bought out of the estate certain property known as the Puzandaung property and he then sold all the remaining assets of the estate, except the Puzandaung property for a sum one third of which represented Rs. 1,64,600. In a suit for a declaration that the gift to the charity was bad and that a partition of the estate should take place, the court of first instance decided that the gift to the charity was good and directed that the charity should be entitled to one third of the estate of the testator as it existed at the date of his death. In other words it assumed that the effect of the will was to give to the charity, not one third part of the estate, but a sum that would be measured by ascertaining what one third part of the estate would be at the date when he died. *Held* the will is incapable of bearing any such interpretation and that the charity is entitled to one-third of the whole of the estate, *viz*,, one third of the Puzandaung property and Rs. 1,64,600 representing one third of the proceeds of the property which was realised together with interest on that sum at 6 per cent, from that date. (*Lord Buchmaster,*) MIRZA MAHOMED *v.* THE OFFICIAL ASSIGNEE. **18 L. W. 277 : 33 M. L. T. 370 : 1923 P. C. 146(P. C.).**

———*Will —Consent of heirs—Express —Implied.*

When a Mahomedan by his will bequeathes more than a third of his whole property to a stranger, the consent of his heirs to such bequest, express or implied will validate it. 2 M. H. C. R. 350, 26 Bom. 497 appr. (*Lord Shaw,*) MUHAMMAD MAHBUB ALIKHAN *v.* BHARAT INDU. **(1919) M. W. N. 507 : 53 I. C. 54 : 23 C. W. N. 321. (P. C.)**

———*Will—Shia Law—Will of life estate in entire property is equivalent to will of entire property.*

A testator provided that his wife should be in possession of the whole of the estate for her life time, and that after her death his daughter's daugoter would be the owner (Malik) of the property : and after her, her male issue and failing male issue, female issue, would get the property, and failing these, the grandson of the sister would get it. *Held* that the will must be deemed to be a will of the entire property to the exclusion of daughter's daughter and unless she can be held to have assented to the will it would not be valid even as regards one-third. 30 All. 153 Foll. (*Banerjee, Ag. C. J. and Piggott, J.*) MT. AMRIT BIBI *v.* MUSTAFA HUSSAIN. **21 A. L. J. 750: L. R. 4 A. (Civ.) 496 : 1924 All. 20.**

———*Will—Validity — Life estate to wife if husband died childless—Reversion to a stranger.*

If the wife survived the husband but bore no children, under the terms of the will, wife was to succeed to a life estate and a stranger was to obtain the residue. *Held*, the terms of the will are unenforceable. The wife was an heir but the heirs did not consent to the will and the will purports to create a life-estate and a reversionary interest, both of which are unknown to the Mahomedan Law. The bequest would not be good in respect to one-third of the property, because the will shows a distinct intention that he should take nothing until after the death of the wife. (*Stuart, J.*) ALLAH DIA *v* ABDUL GAFUR. **1922 All. 283.**

———*Will — Bequest to heir and stranger—Validity of.*

Under the Mahomedan Law, in a bequest made to an heir and a stranger, the portion of the bequest with respect to the heirs is not valid without the consent of the other heirs, and that with respect to the strangers it is valid without such consent, if it does not exceed one third of the estate ; otherwise the consent of the heirs is requisite to the validity of the bequest. (*Banerji and Tuball, JJ.*) MUHAMMAD JUNAID *v.* AULIA BIBI. **42 All. 497: 61 I. C. 947 : 18 A. L. J. 613.**

———*Will—Consent of insolvent heir validates bequest.*

When the consent of the heirs of a Mahomedan is signified to a bequest in a will in favour of an heir, the legatee takes from the testator. The consent does not operate as a transfer by the heirs signifying their consent. Where the consenting heirs are insolvents their consent is equally effective in validating the bequest and the property vests in the legatee and not in the Receiver (*Piggott and Walsh, JJ.*) AZIZ-UN-NISSA BIBI *v.* O M. CHIENE. **42 All. 593 : 18 A. L. J. 745 : 59 I. C. 296 : 2 U. P. L. R. (All.) 251.**

———*Will—Executor — Powers of—Sale of estate.*

It is competent to the executors of the will of a deceased Mahomedan to sell his property without taking probate or obtaining the consent of his heirs. The property of the testator vests in the executor under the will of which the probate is only the authenticated evidence. 8 B. 244 ; 37 C. 839; 32 I.A. 244 foll. (*Martineau and Fawcett, JJ.*) SIR MAHOMED YUSUF *v.* HAR GOVANDAS JIVAN. **24 Bom. L R. 753 : 47 B. 231 : 1922 Bom. 392.**

———*Will—Bequest—Validity of—Devise of—* Bhagdari *lands—Exclusion of daughters from inheritance by male agnates—Custom.*

MAHOMEDAN LAW—Will.

A Mahomeden *bhagdar* disposed of by will certain bhag property in favour of his widow with a remainder to his daughter and her issue if she survived the widow. The widow gave a portion of the property to a Masjid and transferred the rest to the name of her daughter. The plff. the nearest agnate of the testator and a residuary of his, sued for declaration that he was entitled to the property after the widow's death. *Held.* that the will was invalid under the Mahomedan Law and that the plff was the presumptive reversioner under the Bhagdari custom. (*Scott, C. J. and Heaton, J*) AHMAD ASMAL *v.* BAI BIBI.
41 Bom. 377 : 39 I. C. 83 : 19 Bom. L. R. 141.

——— *Will—Bequeathable third—Local usage cannot over-ride Law.*

The rule of Mahomeden Law regarding the bequeathable third cannot be superseded by the local usage of the khoja community (*Beaman, J.*, PEERBHOY *v.* EBRAHIM
13 Bom. L. R. 717 : 12 I. C. 225 : 36 B. 214.

——— *Will—Consent of heirs—Testator cannot make gift over after absolute estate.*

A testator has no power under the Mahomedan Law to make a gift over after a vested bequest of an absolute estate. Where a Will made by a Mahomedan is assented to by his heirs after his death, the assent merely validates the document, which must, however be construed according to the ordinary rules of Mahomedan Law governing Wills. 28 All. 312 foll 20 P.L R. 1901 : 12 I. C. 140 dist. (*Shadi Lal and Broadway, JJ.*) NASIR ALI SHAH *v.* MUSAMMAT SUGHRA BIBI. **54 I. C. 863 : 67 P. W. R. 1921.**

——— *Will— Revocation — Bequest— Has revoked.*

A bequest under Mahomedan Law is capable of revocation by an oral or written express declaration. hence when a testator makes a statement in court which amounts to a declaration of his intention to revoke his will, his will is revoked though he did not destroy it or did not make subsequently another will. (*Rattigan and Shadi Lal, JJ.*) MIRAN BAKHSH *v.* MEHR BIBI.
6 P. W. R. 1916 : 31 I. C. 693 : 41 P. L. R. 1916.

——— *Will— Consent of heirs— Implied by conduct.*

The consent or acquiescence, express or implied, of the heirs of a Mahomedan to a Will by him in excess of two-thirds of his property is treated as a ratification by conduct. Such consent may be express or may be implied from unequivocal conduct. (*Stuart and Kanhaiya Lal, A. J. C.s*) MUSAMMAT FAKHR JAHAN *v.* MUHAMMAD ABDUL GHANI KHAN. **45 I. C 307 : 5 O. L. J. 49.**

——— *Will—Consent of heir—Acceptance of—estoppel.*

Where the heir of a deceased Mahomedan accepts and derives benefit under a will of the

MAHOMEDAN LAW—Will.

deceased he will be estopped from subsequently reprobating it and claiming the Mahomedan Law of succession. (*Stuart and Syed Mahomed, A. J. Cs.*) WALI MAHOMED *v.* DAWLAT UNNISSA.
37 I. C. 921 : 3 O. L. J. 647.

——— *Will—Bequest—Conditional.*

According to the law governing Sunni Mahomedans the effect of a conditional disposition by will, is to confer complete proprietary title as if no condition is attached. (*Stuart, J. C.*) BAKHTAWAR KHAN *v.* FAROOQ AHMAL.
3 O. L. J 639: 37 I. C. 423 : 19 O. C. 319.

——— *Will—Validity of—Shiah Law.*

A bequest under *Shiah Law* may take effect in favour of some of the heirs without the consent of their heirs, if it does not affect more than one-third, or if it is made for the performance of such religious duties as are incumbent upon the testator. (*Stuart and Kanhaiya Lal, A. J. Cs.*) QASIM ALI KHAN *v.* AHMAD SHAH.
32 I. C. 516 : 2 O. L. J. 758.

——— *Will—Consent of heir—Bequest to heir.*

A bequest to an heir is void unless the other heirs give their consent to it after the death of the testator. Consent during the life time of the testator is not enough. (*Chamier, J. C.*) MUHAMMAD ADIL KHA *v.* BUTUL BIBI.
9 I. C. 748 : 14 O. C. 49.

——— *Will—Devise in favour of non-heirs—Pious and charitable purposes.*

A devise made in favour of non-heirs or for pious and charitable purposes is valid and operative in respect of one third with their consent. (*Chamier, C. J., and Jwala Prasad, J*) SHEIKH FAZLUR RAHMAN *v.* SYED MUHAMMAD UMAR.
43 I. C. 196 : 3 Pat. L. W. 232.

——— *Will—Consent of heirs—Extent of power—Probate—Oral will*

A Mahomedan can dispose of one-third of his estate. Any bequest in excess of one-third requires the consent of heirs. A bequest to an heir is void unless consented to by the other heirs after the testator's death. It is not necessary for the executor of a deceased Mahomedan to take out Probate. A Mahomedan can make on oral will. (*Hartnoll, O. C. J, and Ormond, J.*) MAUNG LU MAUNG *v.* MAUNG PE.
17 I. C. 868 : 5 Bur. L. T. 255.

——— *Will—Consent of heirs—Bequest—Consent, what constitutes.*

A Mahomedan cannot bequeath more than one-third of his property to a stranger or a portion to any one of his several heirs unless his will is expressly or impliedly assented to by his heirs after his death. Voluntary assent given by the heirs during the life time of the testator though in his last illness cannot by itself validate the will. Where there is a direct evidence of the refusal to consent to a will a court ought not to infer from indirect evidence that consent was given. (*Hayward, J. C., and Waley Cohen, A. J. C.*) GHULAM KHADIR *v.* SARDOZI.
9 I. C. 721 : 4 S. L. R. 216

MAINTENANCE.

MAINTENANCE.

See (1) C. P. CODE, S. 60.
(2) HINDU LAW - MAINTENANCE.
(3) MAHOMEDAN LAW—MAINTENANCE.

MAINTENANCE—GRANT.

See GRANT—MAINTENANCE.

MAJORITY.

See (1) HINDU LAW—MINORITY AND GUARDIANSHIP.
(2) MAHOMEDAN LAW—GUARDIANSHIP.
(3) MAJORITY ACT.
(4) MINOR.

MAJORITY ACT (IX OF 1875).

——*Applicability of—Hindus.*

The Majority Act applies to Hindus also. (*Stanley, C.J., and Banerji, J.*) HARDUARI LAL *v.* GOMI. **33 All. 525 : 9 I C. 1017 : 8 A. L. J. 385.**

——*Majority under Mahomedan Law.*

A Mussalman boy is under the Indian Majority Act bound to remain in the custody of his guardian till he attains 18, notwithstanding that under his personal law, his emancipation would have taken place earlier. (*Sadasiva Aiyar and Napier, JJ.*) MOHIDEEN IBRAHIM NACHI *v.* MOHAMMED IBRAHIM SAHIB. **39 Mad. 608 : 33 I. C. 894 : 30 M. L. J. 21.**

——*Will—Hindu, power to make.*

A Hindu can make a will only when he is major under the Act. (*White, C. J. and Tyabji, J.*) KRISHNAMA CHARIAR *v.* VEERAVELLI KRISHNAMA CHARIAR. **38 Mad. 166 : 13 M. L. T. 385 : 19 I. C. 452 : (1913 M. W. N. 355 : 24 M. L. J. 517.**

——*Applicability—Gift by a minor—Matter of dower.*

In order that the reservations of the Indian Majority Act should be applicable to a case, relating to dower, it is essential that the minor should have made the gift, at the time of or by reason of or in consideration of the marriage (*Miller and Abdur Rahim, JJ.*) SUBRAMANIAM CHETTI *v.* DORAISINGH TEVAR. **(1913) M. W N. 365 : 16 I C. 943 : 24 M. L. J. 49.**

——*'Court of Justice'—Meaning.*

The words "Court of justice" in the Act means a court of justice which has jurisdiction to do an act. (*Batten, Offg. J. C.*) VISHWANATH *v.* SITAPAM. **26 I. C 708 : 10 N. L. R. 159.**

——S. 2 — *Mahomedans — Guardian for marriage.*

In considering the age of majority for purposes of exercising the right of guardianship for marriage in the case of a Mahomedan, reference should be made to the provisions of Mahomedan Law, as S. 2 of the Majority Act makes the Act inapplicable to such a case. The age of majority under that law is 15. (*Martineau, J.*) YUSUF *v.* MT. ZAINAB. **1923 Lah. 102.**

——S. 2—*Adoption—Minority—Effect of.*

By S. 2 of the Act, the capacity of minors is, as regards questions of marriage, adoption, etc., is

MAJORITY ACT (IX OF 1875), S. 3.

the same as if the said Act had not been passed. (*Spencer and Ramesam, JJ.*) ARULANANDA MUTHU *v.* PONNUSWAMI. **15 L. W. 237 : (1922) M. W. N 93 : 42 M. L. J. 129 : 1922 Mad. 1.**

——S. 2—*Relinquishment of claim to dower—Mahomedan lady of 15 years of age—Age of majority.*

A Mahomedan lady of 15 years of age relinquished her right of dower when her husband was dying and subsequently sued to recover it, *held*, that she was not acting "in the matter of dower" when she gave up her right to it. The ordinary law of the land regarding age of majority applies to renunciation of dower. The exception mentioned in S. 2 of the Indian Majority Act does not apply in such a case, and the relinquishment by her before she attained age of majority according to the Indian Majority Act does not bind her. (*Seshagiri Aiyar and Napier, JJ.*) ABIDUNNISSA MAHTON AMMAL *v.* MUHAMMAD FATHI UDHI SAHIB. **41 Mad. 1026 : 23 M. L. T. 78 : 44 I. C. 293 : 1918 M. W N. 246 : 35 M. L J. 468.**

——S. 2—*Minor—Contract of marriage.*

A breach of promise of marriage is a matter of marriage within S. 2 of the Majority Act. Nothing contained in that Act shall affect the capacity of any person to act in matters of marriage. (*Heald, A. J. C.*) MAUNG NYEIN *v.* MA MYIN. **46 I. C 421 : 3 U B. R. (1918) 75.**

——S. 2 (*a*)—*Age of majority—Adoption.*

A Hindu widow of age of 15 might validly adopt if she had attained sufficient maturity of understanding to comprehend the nature of the Act. (*Scott and Shah, JJ.*) BASAPPA *v.* SHIDRAMAPPA. **43 Bom. 481 : 50 I. C. 736 : 21 Bom. L. R. 217.**

——S. 2 (*b*)—*Religious Office—Right to.*

The Act does not affect the religion or religious rites or usages of any class. The age of majority fixed by the Act does not apply to offices which involve the performance of religious duties. (*Sadasiva Iyer and Napier, JJ.*) ALI MAHOMED KADIR *v.* GHULAM MUHAMMAD. **28 I. C. 934.**

——S. 3—*Minor—Joint Hindu family—Appointment of mother.*

Where the mother has been appointed guardian of her two minor sons forming a joint Hindu family, the age of majority for the latter is 21 years. (*Griffin and Chamier, JJ.*) SHAMINATH *v.* LALJI. **35 All. 150 : 18 I. C. 251 : 11 A. L. J. 107.**

——S. 3—*Effect—Hindu Law — Will by minor.*

The Majority Act has modified the Hindu Law on the question of minority except in respect of marriage and adoption A Hindu who has not attained the age of majority cannot make a will. (*Chandavarkar, A. J. C. and Batchelor, J.*) BAI GOLAB *v.* THAKORLAL. **36 Bom. 622 ; 17 I. C. 86 ; 14 Bom. L. R. 748.**

——S. 3— *Guardian appointed — Age of majority is 21.*

MAJORITY ACT (IX OF 1875), S. 3.

Where once a guardian has been appointed under the Guardians and Wards Act (VIII of 1890), however that guardianship may terminate, the minor cannot attain majority until the age of 21. (*Harrison, J.*) MT. DURGA DEVI *v.* GUR NARAIN. **1924 Lah. 127.**

——S. 3—*Appointment of guardian—Effect of—Age of Majority.*

Per Spencer, J.—Once a guardian of a minor is validly appointed by a Court, the minor's age becomes fixed by law at 21 and nothing which may subsequently transpire can have the effect of reducing it again to 18. (*Spencer and Bakewell, JJ.*) JAMBAGATHACHI *v.* RAJAMANNARSWAMI NADALWAR. **57 I. C. 678 : 11 L. W. 596.**

——S. 3—*Minor — Grant of Letters of administration, if amounts to appointment of guardian—Extension of minority—Probate and Administration Act,* S. 33.

The grant of letters of administration under S. 33 of Act V of 1881 does not amount to the appointment of a guardian of the property of the minor concerned so as to extend the period of minority under S. 3 of the Majority Act. (*Miller and Abdur Rahim, JJ.*) LAKSHMI AMMAL *v.* THYAGARAJA MUDALIAR. **18 I. C. 378 : 24 M. L. J. 450.**

——S. 3—*Release from guardianship.*

Release of the minor from the guardianship of the appointed guardian does not make him a major so as to affect limitation. Such a minor becomes major after the age of 21 years (*Hallifax, A. J. C.*) BALAWANT SINGH *v.* NARAYANA. **58 I. C. 196.**

——S. 3—*Appointment of guardian cancelled on appeal—Effect of, on age of Majority.*

Where an appointment of guardian to a minor is cancelled by an appellate Court, there is in fact no valid appointment at all and the age of majority in such cases is 18 and not 21. 31 B. 590, Foll, 21 B. 281 ; 29 A. 672 and 11 O. C. 159, Ref. to. (*Lindsay, A. J C.*) BISHUN SAH *v.* LALJI. **14 I. C. 301 : 15 O. C. 158.**

——S. 3—*Guardian—Appointment—Cancellation of, does not affect age of majority.*

Once a guardian is appointed, the age of the majority of the minor is 21 years and the mere fact that the certificate of guardianship is subsequently cancelled makes no difference. (*Das and Ross, JJ.*) ABDUL RAHIM *v.* BARIRA. **2 Pat. L. T. 556 . 61 I. C. 807 : 6 P. L. J. 273.**

——S. 3—*Age of majority—Evidence of age—Guardian.*

Once a guardian is appointed a minor does not attain majority till the completion of 21 years, even if the guardian is discharged before the minor is 18 years of age. Per *Das, J.*—An order appointing a guardian is no evidence of his age. (*Miller, C. J. and Das, J.*) HARIHAR PRASAD SINGH *v.* EDUL SINGH. **5 Pat. L. J. 460 : 57 I. C. 333 : 2 P. L. T. 11 : 1921 Pat. 100.**

MALABAR COMPENSATION FOR TEN. IMP. ACT (I OF 1900), S. 3.

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (I OF 1900.)

——*Object and Scope of.*

Wallis, C. J.—The Act aims at securing the interests of improvements to the tenants. *Abdur Rahim, J.*—The Act does not interfere with the rights of proprietors to contract with tenants for payment of rent. *Phillips, J.*—In Malabar, improvement can hardly mean cutting down valuable trees like teak, jack or rosewood. (*Wallis, C. J. Abdur Rahim, Oldfield, Srinivasa Aiyangar and Phillips, JJ.*) RAJA OF COCHIN *v.* KIZHAYIL KOTHANATH. **40 Mad. 603 : (1917) M. W. N. 249 : 5 L. W. 550 : 38 I. C. 503 : 21 M. L. T. 282 : 32 M. L. J. 295 (F. B.).**

——Ss. 3, 5 and 19 — *Improvements—Increased income—Compensation—Re-valuation—Reclamation land with waters of Jenmi—Admissions—Commissioner's report.*

Under S. 5 of the Act the burden is on the tenant to prove that he or the predecessors in interest have made improvements by some work which has added to the value of the holding and that the said work is suitable and that it is also consistent with the object with which the *kanom* was given. If there were improvements on the land the tenant in possession is not entitled to their value at the time of ejectment if any person other than the landlord had made the improvements. He is entitled to the benefit of the improvements made by himself or by his predecessors in interest. There is no irrebuttable presumption that a tenant has improved the land if the income therefrom has increased. S. 7 of the Act of 1887 deals only with contracts which limit the right of the tenant to make improvements after the date of the contract and does not take away the effect of the settlement as to compensation for improvements effected before the date of the contract. An order for appointing a second commissioner to assess the compensation is not a direction for re-valuation within S. 6 (2) of the Act. Consequently, the second commissioner could only take into account the value prevalent when the first commissioner made his report. Where a tenant, under a contract by the jenmi to supply water at a fixed rate, reclaims the land and raises a second crop on the land, his improvement causes an increase in the value of the net produce of the holdings within the meaning of S. 9 (1) of the Act, though the charge for water must be deducted as a part of the cost of cultivation, in estimating the net income. (*Seshagiri Aiyar and Bakewell, JJ.*) KUNNATH MADAMPIL KUNJUNI *v.* MANNAKGHAT RAMINUNNI. **(1918) M. W. N. 666: 48 I. C. 925 : 35 M. L. J. 219.**

——Ss. 3, 5—*Improvements—Shop erected by tenant on holding—Compensation.*

Under the Act, a tenant cannot claim compensation for a shop erected by him on the holding where it is inconsistent with the purpose of the lease. (*Sadasiva Iyer and Napier, JJ.*) THEKKA THOHUM MUKKATH RARAN *v.* NATURKANDY CHAKKUTI. **25 I. C. 623.**

MALABAR COMPENSATION FOR TEN. IMP. ACT (I OF 1900), S. 3.

——— **Ss. 3 and 5**—*Tenant—Land leased after mortgage—Improvements by tenant—Compensation.*

Where after mortgage of his land, the mortgagor leased it out to a tenant who in the *bona fide* belief that he is in possession as a tenant effects improvements he is a tenant under S. 3 of the Act and is entitled to compensation therefor on eviction even against the purchaser in a mortgage decree. (*White, C. J., Sankaran Nair and Oldfield, JJ.*) CHURIYAYI KANARAN *v.* THATTARAI CHIRUTHA.

38 Mad. 954: 26 M L. J. 183: 15 M. L. T. 149: (1914) M. W. N. 221: 23 I. C. 321: 1 L. W. 160 (F. B.)

——— **Ss. 3 (3) 4, 9, 10 and 19**—*Improvements—Net annual value of land- Increase in—Compensation.*

Where the net annual value of mortgaged land has increased after the mortgagee's coming into possession, it may be presumed that it is due to such works as are referred to in Ss. 3 (3) and 4 of the Act. To entitle a person to compensation under S. 9 of the Act, he must show that either he or his predecessor in title effected the improvements. (*Spencer and Tyabji, JJ.*) THIRUVATIYIL VATTATH *v.* VISHNU BAKSTHIKAL. **28 I. C. 389.**

——— **Ss. 4. 5, 10 and 19**—*Trees of spontaneous growth—Compensation to tenant for—Right of Jenmi to value of—Agreement enabling Jenmi to cut and remove.*

Rights of landlord and tenant to trees of spontaneous growth are not dealt with by the Act. The Act is confined to the question of compensation payable to the tenant mortgagee in respect of improvements existing at the time of eviction or redemption. The Act awards compensation to the tenant in respect of all spontaneously grown timber left on the holding on ejectment which came into existence either during the term of the tenant or that of his predecessor, if no compensation has already been paid for it. A contract entered into after 1886 which allows the landlord to come on the land and cut and remove spontaneously grown trees is void as it is against the Act. During the tenancy, the tenant is entitled to cut down trees in the ordinary course of prudent forestry though they may belong to the landlord. *Quaere*: Whether trees of spontaneous growth in Malabar before the passing of Act I of 1900 belong to the *jenmi* or to the tenant. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) NARAYANI AMMA *v.* KUNCHU KUTTI AMMA. **32 M L. J. 541: 21 M. L T. 271: 40 I. C. 247: (1917) M. W. N. 309**

——— **S. 5**—*Improvements—Changes in the property altering its condition—Injunction by Civil Court—Revision—C. P. Code, S. 115.*

There is nothing in S. 5 of the Malabar Compensation for Tenants Improvements Act which ousts the jurisdiction of a Civil Court in a suit between landlord and tenant to grant a temporary injunction restraining the tenant from making changes in the property, changes not made *bona fide* for purposes of agriculture but to harass the plaintiff. Consequently the High Court would not interfere under S. 115, C. P. Code with the grant

MALABAR COMPENSATION FOR TRN. IMP. ACT (I OF 1900), S. 5.

of such an injunction. (*Kumaraswami Sastri, J.*) KADAN KULATHIL SAIDALI KUTTI *v.* C M. GODAN NAMBUDRI. **(1922) M. W. N. 303: 16 L. W. 238: 1922 Mad. 172.**

——— **Ss. 5 and 6 (3)**—*Decree for ejectment—Value for improvements ascertained and specified in the decree—Improvements effected subsequent to decree not ascertained—Application for execution by ejectment is maintainable.*

Where a landlord in Malabar obtained a decree for ejectment of his tenant for payment by him of an ascertained amount for compensation for value of improvements, applied for the execution of the decree by ejectment of the tenant after depositing into the Court the amount specified in the decree for the value of improvements, *held* that the landlord was entitled to an order for execution in ejectment of the tenant from all the lands specified in the decree even though the value of the improvements effected by the tenant on some of the lands subsequent to the decree had not been ascertained under S. 6 (3) of the Act. (*Spencer and Ramesam, JJ.*) SANKARAN NAMBUDRIPAD *v.* SANKARAN NAIR. **44 Mad. 960: 66 I. C. 129 : (1921) M. W. N. 470.**

——— **S. 5**—*Decree for ejectment—Mesne profits.*

Where a decree in ejectment has been passed against a tenant under S. 5, he is not entitled to continue in possession, and when he is awarded compensation under the Act, he cannot claim mesne profits, from the person to whom possession has been given for the period between the date of that person taking possession and the date of payment by him of the compensation awarded to the tenant. (*Abdur Rahim and Odgers, JJ.*) MANIAN *v.* KUTHIRUVATTATH KOTTAYIL RAMAN. **13 L. W. 449: 62 I. C. 724: 41 M. L. J. 15.**

——— **S. 5**—*Improvements—Arrears of rent—Set off, Right to.*

A landlord can set off arrears of rent though time barred against a tenant's claim for improvements Tenant's failure to claim immediate restitution where possession passes to the landlord in a decree which is reversed, leads to the presumption that the tenant has impliedly surrendered the land to avoid a suit by the landlord for possession and the tenant is estopped from claiming profits for the period he was out of possession. (*Oldfield and Seshagiri Iyer, JJ.*) PUDI KAYILAKATH KUNNI *v.* THAYYIL KUNNI AMMA.

57 I. C. 674: 13 L. W. 32.

——— **S. 5**—*Scope of—Malabar mortgage—Improvements—Money due to mortgagee—Tender.*

A mortgagee in Malabar has a right to remain in possession till he is actually paid or till he is ejected by decree of Court and hence he is not accountable for mesne profits till either of those events happen. 33 M. L. J. 591, Foll. *Per Napier, J.*—S. 5 of the Act applies to all tenants except such as have been paid If payment has been made and the term is determined or the mortgage has been discharged, the section has no application. According to the policy of the Act, the compensation is to be ascertained by the Court. If a tenant

accepts payment he waives his right; but if he claims assessment by the Court, there is nothing to deprive him of his statutory right under S. 5, even if the amount tendered is found to be sufficient. (*Sadasiva Aiyar and Napier, JJ.*) MOORIATH VARIATH *v.* MALEDATH KUNJI NAUGAYARAMMA **37 M. L. J. 206 : 10 L. W. 300 : 52 I. C. 834: 26 M. L. T. 329.**

——— **Ss. 5 and 6**—*Ejectment, partial—Assignee of reversion in part of demised premises—Right to eject lessee from part of the premises—Improvements.*

Where several items of property are comprised in a lease, the lessor is not entitled to eject the tenant from a part only of the holding, but the assignee of the reversion in part of the demised premises can eject for due cause from such part on payment of the value of improvements to that part. This is applicable to tenancies in Malabar. *Per Seshagiri Aiyar, J.* (*dissenting*).—Under the Malabar Compensation for Tenants Improvements Act there can be no partial eviction until payment of compensation in respect of the holding as a whole. Neither under S. 109 of the T. P Act nor under the general law of the land can an assignee of part of the demised premises eject the tenant from that portion compulsorily during that period of the tenancy. (*Wallis, C. J., Oldfield, Sadasiva Aiyar, Coutts-Trotter and Seshagiri Aiyar, JJ.*) PUTHIAPURAYIL KANNYAN BADUVAN *v.* CHENNYANTEAKATH PUTHIAPURAYIL ALIKUTTI. **42 Mad. 603: 37 M. L J. 47: 10 L. W. 95: 51 I. C. 286 : (1919) M. W. N. 401 (F. B.)**

——— **Ss. 5 and 6**—*Decree in ejectment—Provision for payment of compensation—Subsequent suit—Barred.*

A landlord who obtains a decree in ejectment against his tenants subject to payment of compensation cannot, when the decree becomes barred by limitation sue on the same cause of action (*Wallis, C. J., and Sadasiva Aiyar, J.*) NYNAM VITIL MAYAN KUTTI *v.* VALAPAPILAKATHA KUNHAMMAD. **41 Mad. 641: 7 L W. 143 : 34 M L.J 167 : 23 M. L. T. 156 : 44 I. C. 110: (1918) M. W. N. 205.**

——— **Ss. 5 and 6**—*Tender of mortgage amount—Position of tenant after—Sufficient to cover compensation for improvement.*

A mortgagee tenant to whom the Malabar Compensation for Tenants Improvements Act applies is not bound to pay mesne profits from the date of tender of the amount due under the mortgage into Court even when it was found that the money so tendered sufficiently covered the compensation for improvement. Till eviction in execution of a decree or actual payment, the mortgagee remains a tenant and not a trespasser. (*Sadasiva Aiyar and Phillips, JJ.*) PARAMESWARA AYYAN *v.* KITTUNNI VALIA MANNADIAR. **43 I. C. 173 : 33 M. L. J. 591**

——— **Ss. 5 and 6**—*Object of—'Any sum of money.....of the tenancy.''*

Per *Spencer, J.*—The object of Ss. 5 and 6 of the Act is that there should be complete and final settlement between the lessor or mortgagor and his lessee or mortgagee of all that is due from the former to the latter and from the latter to the former up to the date when the transfer of possession takes place and that the subsequent reopening of accounts between parties whose relationship has ceased, should be avoided. The words "any sum of money accruing due for rent or otherwise in respect of the tenancy" in S 6 of the Act are wide enough to include damages for injury done by the tenants to his mortgagors or lessor's property even though the money may not strictly be said to accrue due until the value of the damages has been ascertained (*Sadasiva Aiyar and Spencer, JJ.*) ABDULLA KOYA *v.* KALLUMPORATH KANARAN. **6 L. W. 696 : (1917) M. W. N. 822 : 43 I. C. 6 : 33 M. L J 463.**

——— **Ss. 5, 6 and 19**—*Contract before 1886—Rate of compensation—Provision for—Effect of the Act.*

A contract between a Malabar tenant and his landlord before 1st January 1886, according to which compensation is payable at certain rates specified therein is valid and binding whether the rates are more or less favourable to either party than those prescribed by Act I of 1900. When the question of the rate of compensation is opened at a date after the introduction of the Act, no party to a contract entered into before 1st January 1886, can elect to have the rates fixed according to the Act in preference to the rates mentioned in the contract (*Wallis, C. J., Abdur Rahim, Oldfield, Srinivasa Aiyangar and Phillips, JJ.*) KUNHALOOR PUTHIA VEETIL RAYARAPPA ATIOTI *v.* VATHUKOLATH PARKUM PUNISSEAI KELAPPA KURUP. **40 Mad 594 : 21 M. L. T. 245 : (1917) M. W. N. 195 : 5 L. W. 617 : 39 I. C 741 : 32 M. L. J. 110 (F. B.)**

——— **Ss. 5 and 6**—*Lease by mortgagee—Redemption—Effect.*

In a suit to recover possession from lessee, under the Malabar Law where the lease was executed by the mortgagee of the land, the deft. contended that the suit was barred by limitation alleging the loan to be determined on the redemption of the mortgage to his lessor more than 12 years before suit and the tenancy had been terminated. *Held*, that lease was not determined by the redemption of the lessor's mortgage. (*Oldfield and Sadasiva Aiyar, JJ.*) EROMA MENON *v.* SUNKUNNI MENON. **38 I. C. 651 : (1916) 2 M. W. N. 324.**

——— **S. 5**—*Tender—Value of improvements in Court—Deft liable for mesne profits.*

On tender by landlord of that which the court has subsequently found to be the true account due in respect of the improvements, if the tenant chooses to hold over, he can do so only at his peril and on condition of paying the mesne profits on the land. *Per Seshagiri Aiyar, J.*—The value of improvements is not 'amount due on the mortgage' in S. 83 of T. P. Act. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) CHAMI *v.* ANU PATTA. **(1916) 1 M. W. N. 160 : 32 I. C. 861 : 3 L. W. 246.**

——— **S. 5**—*Holding over—Effect.*

A tenant until compensation is made for his improvements retains his former status. Continuance of the tenant on the land after the compensation is credited for the arrears due to him

MALABAR COMPENSATION FOR TEN. IMP. ACT (I OF 1900), S. 5.

does not alter his position as a tenant, to claim compensation for improvements subsequent to the decree. (*Oldfield and Tyabji, JJ.*) CHOWAKKARAN KELOTH *v.* KARUVALOTE PARKUM. **29 I. C. 559.**

——— **S. 5**—*Improvements — Compensation—Tenant's rights.*

The Kanomdar is entitled to claim compensation for improvements under the Act notwithstanding the provision of the agreement. (*Sadasiva Aiyar and Napier, JJ.*) ABDULLAH ROWTHAN *v.* VASUDEVA KAVI VARMA. **29 I. C. 286 : 29 M. L. J. 316.**

——— **Ss. 5, 6 and 19**—*Contract before* 1886 *If binding on tenant.*

A contract made before 1st January 1886 regulating the rates of compensation for improvements by the tenant and providing for the method of fixing the compensation but not referring expressly to the tenant's right to make improvements, is not binding on the tenant if it is less favourable to him than Ss. 5 and 6 of the Act. He can repudiate the contract and claim compensation under the Act, and S. 19 does not deprive him of such right. 32 M. 1; 34 M. 61; 22 M. L. J. 221, considered. (*White, C. J. Sankaran Nair and Oldfield, JJ.*) KOCHU RABIA *v.* ABDUR RAHMAN. **38 Mad. 589 . 1 L. W. 433 : 15 M. L. T. 356 : 24 I. C. 106 : 26 M. L. J. 523.**

——— **S. 5**— *Improvements— Third party—Compensation.*

In order to entitle the tenant to compensation it is sufficient that at the time of ejectment the improvements are on the land though made by the previous tenant. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) THUPARAN *v.* MAMOD KASIM SAIT. **17 I. C 433.**

——— **Ss. 5 (ii) and 10** — *Kanom—Trees of spontaneous growth—Redemption.*

The deft. kanomdar is entitled to compensation for improvements under Ss. 5 (ii) and 10 of the Malabar Tenants Improvements Act. The compensation due to the defendant's predecessor in the *kanom* right now vested in and was claimable by, him irrespective of the fact that under the old law no compensation was payable for trees of spontaneous growth and the deft. was not obliged to pay anything to the prior *Kanomdars* for those trees. (*Sadasiva Aiyar and Hannay, JJ.*) THEKKEMANNENGATH RAMAN *v.* KAKKESSERI POZHIYOT MANAKKAL. **2 L. W. 433 : 27 I. C. 989 : 28 M. L. J. 184.**

——— **Ss. 6 (3) and 4**—*Redemption suit—Decree in—Nature of—C. P. C., O. 34, Rr. 7 and 8, if affect the Act.*

S. 6, cl. (1) of the Act, treats a suit in redemption as one in ejectment, and provides only for one decree, *viz.*, a decree in ejectment, and makes some special departures from the T. P. Act and the C. P. Code. The new C. P. Code, O. 34, Rr. 7 and 8, do not affect the Malabar Compensation Act and there could only be one decree passed in suits against the mortgagees in Malabar under

MALABAR COMPENSATION FOR TEN. IMP. ACT (I OF 1900), S. 15.

S. 6, Cl. (1) of the Act. (*Oldfield and Sadasiva Aiyar, JJ.*) K. NANU NAIR *v.* KUNDAN ASHTAMOORTHI NAMBUDRIPAD. **(1918) M. W. N 551 : 47 I. C. 914 : 8 L. W. 275.**

——— **Ss. 9, 11 and 12**—*Applicability—Valuation — Improvement — Forest converted into paddy field—Digging of channels—Compensation —Trees of spontaneous growth.*

S. 9 of the Act applies to cases where the court has to give the entire valuation under the Act ignoring the contracts, if any, between the parties. There cannot be first a valuation under the contract and then under S. 9. S. 9 deals with cases where at the time of the demise the land was of some value and an additional value has been imparted to it by the labour of the tenants. Where a forest was reclaimed into paddy fields by means of tanks and channels dug by the tenants, the tenants cannot claim compensation for the tanks and wells under S. 9 but only under S. 11. The tenant is not entitled to the value of timber cut from the landlord's forest and utilised for constructing farm houses and granaries. (*Seshagiri Aiyar and Napier, JJ.*) SAMU MENON *v.* VALIA NAMBIDI. **(1918) M. W. N. 141 : 44 I C. 242 : 7 L. W. 287.**

——— **S. 9**—*Improvements—Valuation, not to be arbitrary.*

Where it is not possible to calculate the exact cost of improvements, the Court should follow the principles of S. 9 of the Act and should provide for an alternative method of calculation on the increase in the annual produce of the land. (*Ayling and Tyabji, JJ.*) PARAMESWARAM MUNPU *v.* KRISHNA KAYIL. **28 I. C. 850.**

——— **S. 10**—*Scope of—"Plants sown or planted."*

"Plants sown or planted" in this section include paddy and paddy so raised are improvements within S. 10 A mortgagee-lessee therefore whose period of lease is rendered uncertain by decree of Court can cut and carry away the crops raised by him within the year. (*Sadasiva Aiyar and Spencer, JJ.*) NARAYANAN NAMBUDRIPAD *v.* KRISHNA PATTAR. **(1914) M. W. N. 160 : 15 M. L. T. 160 : 22 I. C 515 : 26 M. L. J. 348.**

——— **S. 15, 6 (3)**—*Revaluation of improvements.*

Neither Sec. 15 nor Sec. 6 (3) of the Malabar Tenants Improvements Act allows a re-valuation of improvements unless there have been additional improvements effected after the first valuation or there has been a change in the condition of the improvements. (*Sadasiva Aiyar and Napier, JJ.*) KUNHAMMAD KUTTI *v.* PANCHARA ALLEEMA. **33 I. C. 746 (1) : 30 M. L. J. 203.**

——— **S. 15**—*Object of.*

The preparation of tables under S. 15 is not intended to create any fresh right in favour of the tenant or of the landlord. Tables prepared under S. 15 are admissible in evidence to prove the compensation to which the tenant is entitled and are presumptive evidence of the proper amount of compensation which however is determined by the market value. So when tables are prepared pending appeal, the appellate Court should not remand the suit for re-valuation according to the tables though if such re-valuation

MALABAR COMPENSATION FOR TEN. IMP. ACT (I OF 1900), S. 19.

became neces ary in execution or otherwise the tables might be received in evidence. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) VALUTHEMANA *v.* PATHUMA. **17 I. C. 131**

——— S. 19—*Limitation—Tenant's right to make improvements—Provision for payment of fee in respect of trees cut.*

The imposition of a small *kutti kanom* (stump-fee) does not contravene the provisions of S 19 of the Mal. Compensation Act. If on the other hand the fee imposed is the full value of the trees, it does contravene the provisions of S. 19 of the Act. An agreement to pay some fee on each tree cut during the duration of the lease does not limit the right to claim compensation for improvements. If the trees are in existence at the end of the tenancy the tenant is entitled to compensation but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises. 40. M. 603 F. B; 24 M. 47 ; 32 M L. J. 541 Ref. (*Ramesam, J.*) KELU NAIR *v.* VIYATHEN MAHADEVI. **16 L. W. 310 : (1922) M W. N. 563 : 31 M. L. J. 309 : 1923 M. 238**

——— S. 19—*Contract—Variance with the Act—Value of improvements—Calculation of.*

A tenant is entitled to contract himself out of the Malabar Tenants Improvements Act if the terms of the contract are more favourable to him than the provisions of the Act. 32 Mad, 1 Dist. The calculation of the value of improvements should be made at the rate prevailing at the time of ejectment and not at the time of the creation of the tenancy (*Sadasiva Aiyar and Spencer, JJ.*) PALLEELATATHIL KUNKAN NAMBIAR *v.* RAMAN NAYAR. **43 Mad 722 : 28 M. L. T. 42: 11 L. W. 559 : 55 I. C. 940 : 39 M. L. J. 63.**

——— S. 19—*Land in Malabar—Grant by Crown—Contract—Stipulation against improvements.*

A stipulation in a lease granted by the Crown of lands in Malabar, that the lessee should not erect buildings thereon is valid under S. 3 of the Crown Grants Act. (*Seshagiri Aiyar and Bakewell, JJ.*) HALLINGAL MOSSA *v.* SECRETARY OF STATE FOR INDIA. **43 Mad. 65 : 53 I. C 345 : 37 M. L. J. 332.**

——— S. 19—*Contract—Provision for payment of* Kuttikanom *to landlord on trees cut by tenant.*

A stipulation in a Malabar lease for payment to the landlord of *Kuttikanom* (stump fee) at the rate of eight annas per tree cut is not contrary to the provisions of S. 19. 24 M. 47, Ref. (*Wallis, C. J. Abdur Rahim Oldfield, Srinivasa Iyengar and Phillips, JJ.*) RAJA OF COCHIN *v.* KIZHAVIL KOTHANATH. **40 Mad. 603 : (1917) M. W. N. 249 : 21 M. L. T. 282 : 5 L. W. 550 : 38 I. C. 503 : 32 M. L. J. 295 (F.B.).**

——— S. 19—*Contract—Tenant's right to compensation—Restriction on—If binding on tenant.*

A contract, restricting the right of the tenant to compensation for improvements under the

MALABAR LAW—Adoption.

provisions of the Act, is not binding upon him. 36 M. 410, Foll. (*Sankaran Nair and Ayling, JJ.*) NACHIKUTTI AMMA *v.* BEERANKUTTI. **28 I. C. 679.**

——— S 19—*Right of tenant to improvements.*

Under the Act, a tenant can have the full value of his improvements according to the rates provided in Ss. 9 to 18 ; S. 19 does not cut down his right under Ss. 5 and 6 to the value of his improvements even where a contract limiting his right to compensation claimable by him was entered into before 1st January 1886. A contract entered into before 1st Jan. 1886 restricting not the Kanomdar's right to compensation but the Kanomdar's right to erect buildings worth more than Rs. 25 is not rendered invalid by S. 19. (*Benson and Sundara Aiyar, JJ.*) NEECHOOLI *v* CHATH NANDATH. **36 Mad 410 . 11 M. L. T. 30 : (1911) 2 M. W. N 513 : 12 I. C. 765 : 22 M. L. J. 221 :**

MALABAR LAW.

Adoption.
Ahasanthana.
Alluvion and Diluvion.
Anandravan.
Applicability.
Custom of impartibility.
Devaswom.
Gift.
Kanom.
Karnavan.
Landlord and tenant.
Land tenure.
Maintenance.
Mortgage.
Mutt.
Nambudiris.
Partition.
Pre-emption.
Stanom.
Tarwad.
Tavazhi.

Adoption.

——— *Adoption—Appointment of heir—*Ananthara avakasham*—Natural relations—Rights of.*

Under the customary law of Malabar, where a person is appointed as *Ananthara Avakasham* (heir) the natural relations of the appointed heir are entitled to succeed to the appointee's properties as *attalalakam* heir. (*Seshagiri Aiyar and Moore, JJ.*) SEKHARA VARIER *v.* KOTAKOT. **54 I. C. 389 : (1920) M. W. N. 9.**

——— *Adoption—Mahomedans.*

Where the suit properties were enjoyed by Mahomedans, two sisters and their children as tarwad property, the custom of affiliation proved to exist must be upheld as among the Hindus following the *Marumakkatayam Law.* (*Wallis, C. J. and Seshagiri Iyer, J.*) MAMMU *v.* MUHAMMAD KUTTI. **31 I. C. 385.**

——— *Adoption—Affiliated heir—Status.*

Where by a *karar* entered into by all the members of a tarwad, the *karnavan* is authorised to appoint an heir and he appoints one, such appointment is no more than an affiliation of a stranger

into the *tarwad* and does not mean an alienation of the property by will or gift to take effect after death of all existing members. No suit in ejectment will be at the instance of such person. 11 M. 157 F. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) MUTHUVANA CHIVITHA *v.* MUTHUVANA VELAN. 24 I. C. 703

Aliasanthana.

——*Aliasanthana—Abandonment of functions by* de jure Ejman—*Effect of.*

Where the *de jure Ejman* of an Aliasantana family abandons his position as such, the junior members can assume management and in such capacity execute a mortgage of the family properties. Such an abandonment need not be in any formal manner (*Oldfield and Hughes, JJ.*) KUNHANNA RAI *v.* MANKU CHETTY. 63 I.C. 365.

Alluvion and Diluvion.

——*Alluvion and diluvion—Accretions—Rights of riparian proprietors and Crown—Palghat taluk.*

There is no special custom having the force of law in the Palghat taluk by which all river accretions and river-beds are vested in the Crown. The accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords. (*Spencer and Krishnan, JJ.*) OLAPPAMANANNA NANAKAL NEELAKANTAM *v.* SECRETARY OF STATE FOR INDIA. 55 I. C. 770.

Anandravan.

——*Anandravan—Right to sue Kanomdar for redemption.*

Only under special circumstances could the anandravans of a Malabar Tarwad maintain a suit for redemption of a Kanom granted by their Karnavan, as such a suit would amount to an act of interference in the karnavan's management of the tarwad. Collusion between the Karnavan and the Kanomdar or prejudice to the tarwad interest by the continuance of the Kanom would be sufficient to entitle the anandravan to redeem. 43 M. 393 Ref. (*Ayling and Odgers, JJ.*) KANNATHAYAPARKUM PUTHULATH AMINA UMMA *v.* ANANDRAVAN CHERIYA RAYARAPPAN NAMBIAR. (1923) M. W. N. 518 : 1923 Mad. 706

——*Anandravan—Karar—Binding nature of—Dissentient members.*

A family karar when not assented to by an individual member of the tarwad though assented to by a majority, is powerless to interfere with his personal birthright to succeed to all the powers of a Karnavan in due course of succession. 41 M. 577 ; 32 M. L. J. 323 Ref. (*Sadasiva Aiyar and Napier, JJ.*) MUKKIL MARUTHUR SANKARA MENON *v.* GOPALA MENON. 65 I. C. 805.

——*Anandravan—If can acknowledge mortgage by karnavan—Limitation.*

An *anandravan* is not a person claiming under a *karnavan* and cannot make an acknowledgment of a mortgage by a *karnavan*, so as to save limitation. 17 B. 173 ; 19 M.L.J. 288 ; 5 M. L. T. 261. Foll. (*Wallis, O. C. J. and Seshagiri Aiyar, J.*) MUHAMMAD *v.* MAYI KUNHI HAJI. 26 I. C. 127.

——*Anandravan — Property acquired by—Presumption.*

The usual presumption is that property acquired in the name of an anandravan would ordinarily be acquired by tarwad funds unless he was in possession of separate funds of his own. (*Benson and Sundara Aiyar, JJ.*) GOVINDA PANIKKER *v.* T. P. V. NANI. 21 I C. 211 : 36 Mad. 304.

Applicability.

——*Applicability—Mahomedans—Custom.*

A custom that the *Marumakkattayam* Law governs a family otherwise governed by Mahomedan Law is neither immoral nor opposed to public policy. (*Oldfield and Ramesam, JJ.*) VATTELI KALANDAR *v.* VATTOLI RUTHOORAN. 14 L W. 702 : (1921) M W. N. 754 : 69 I. C. 510 : 41 M. L. J. 437.

——*Applicability—Custom—A married woman to stay in her father's house.*

There is no custom among *Tiyas* of South Malabar, by which a married woman is entitled as of right to stay in her parent's family house. (*Sadasiva Aiyar and Spencer, JJ.*) THAIKANDI POKAMCHIRI *v.* ILLIVATUKAL ACCHUTTAN. 13 L. W. 101 : 60 I. C. 209 : 39 M. L. J. 427.

——*Applicability—Chetties.*

The Malabar Law is not applicable to Chetties, residing in Malabar, unless there is a special pleading and proof of it. (*Oldfield and Tyabji, JJ.*) AZHIMANILA VEETTIL KANNU PILLAI *v.* KAYINARI GOPALAN NAIR. 26 I. C. 337 : (1914) M. W. N. 883.

——*Applicability—Mappilas.*

The question whether party is governed by Marumakkattayam Law or Malabar Law is a question of fact. (Essentials of a valid custom laid down). A previous decision on the enforceability of custom may be binding on the Court considering the same question subsequently, that question being whether it can be enforced at all. It is always a question of law but the question whether a particular party has adopted the custom is a question of fact. Where the fact of the existence of a custom amongst a particular class of people has been repeatedly proved in the Court, the Courts have the power to take a judicial notice of it. 22 M. 494 ; 27 M. 77 ; 28 M. 1. Foll. (*Tyabji and Spencer, JJ.*) KUNHAMBI *v.* KALANATHAR. 38 Mad. 1052 : 16 M. L. T. 17 : 24 I. C. 528 : 27 M. L. J. 156.

——*Applicability of—Moplah of tarwad living in Rangoon.*

The mere fact that a *moplah* member of a tarwad governed by the Marumakkattayam Law had lived for a short period in Rangoon will make no difference in the law applicable to him. The self-acquired property of a member of a tarwad governed by that law devolves upon the tarwad on his death. (*Twomey, C. J., and Ormond, J.*) SALIKA UMMA *v.* MOOPANNATA GATH AMU. 46 I. C. 791 : 12 Bur. L. T. 100.

MALABAR LAW—Custom of impartibility.

Custom of impartibility.

———*Custom of impartibility—Thattans in North Malabar following Makhathayam Law—Presumption—Onus of proof—Veetukutti—Right to share in joint family property—Basis of—Presumption.*

In the case of the Thattan caste in North Malabar, which caste follows Makhathayam Law, the ordinary Hindu Law has in the first instance to be applied, unless and until proof of custom to the contrary is established. Under Makhathayam Law, as under the ordinary Hindu Law, partibility is the rule, and impartibility is the exception *Held*, therefore that in a suit for partition by a member of the Thattan caste in North Malabar, there was no presumption of law in favour of impartibility, and the onus of proving the same lay on the defendant. Evidence of witnesses to the effect that they had never known a case of partition does not afford in law sufficient proof of a valid custom of impartibility. The mere fact that the plaintiff in such a suit is what is known as a Veetukutti or the son of a Sambhandam wife, does not disentitle him to a share in the joint family property. Assuming he is illegitimate, he may claim to be a Sudra for the purposes of Hindu Law, and to be entitled to a share as in the case of an illegitimate son of Sudra under the ordinary Hindu Law ; or he may rest his claim on the ground that his caste follows Sudra custom in the matter of the inheritance of an illegitimate child. If the Hindu Law for Sudras is to be applied to the plaintiff's caste, he will, *prima facie* even if illegitimate, be entitled to a share without further proof or disproof of that custom, while if the case is to rest on proof of a custom by which Sudra's custom is applied to his caste or on proof of independent custom altogether then such custom will have to be proved (*Schwabe, C. J. and Wallace, J.*) VAZHAYIL PARKUM THATTAM KUNHI KUTTY *v* RAMAN. **46 Mad. 597 : (1923) M. W. N. 173 : 18 L. W. 525 : 44 M. L. J. 274: 1923 Mad. 452.**

———*Custom of impartibility—Moplahs.*

For want of a local or family custom, impartibility of tenure is not an incident of Mahomedan Law or of the *Marumakkattayam* Law of Malabar which governs some Mahomedan families of Malabar. (*Sundara Iyer, and Sadasiva Iyer, JJ.*) MALIYA KALAKATH BANA *v.* PATHUMAR. **16 I. C. 689 : (1912) M. W. N. 932.**

Devaswom.

———*Devaswom--Uralans--Renewal of kanom by one of the co-uralans—Binding nature of—Minor—Competency to sue.*

Where there are several Uralans of a Malabar devaswom a renewal of a kanom granted by one of the Uralans without consulting the others, is invalid and not binding on the devaswom. A minor can be the uralan of a devaswom and a suit by his next friend would be maintainable on behalf of the devaswom. (*Spencer and Krishnan, JJ.*) KOTASSERI E. V. SANKARAN NAMBI *v.* KAN HOLI I. D. ANTHERJENAM. **(1922) M. W. N. 428 : 16 L. W. 26 : 43 M. L. J. 572 : 1922 Mad. 259.**

MALABAR LAW—Devaswom.

———*Devaswom—Lease of Trust property by majority of uralars not valid.*

A lease by the majority of uralars is invalid though persons not consulted are interested in the lease. (*Oldfield and Ramesam, JJ.*) MATUMULLA MANIKOTT PATTAN CHANDU *v.* KUTTIYIL RAYIRU. **15 L. W. 264 : (1922) M. W. N 172 : 66 I. C. 396 : 42 M. L. J. 280.**

———*Devaswom— Trustees — Karnavans of several Tarwads—Anandravans—Rights of.*

Where the *Karnavans* of several *Tarwads* are the trustees of a *Devaswom* they constitute a corporation. The *Anandravans* of these *Tarwads* have no right to interfere with the management of the trust. Nor are they liable for breaches of trust committed by the *Karnavans* in the discharge of their duties as trustees. (*Wallis, C. J., and Ramesam, J.*) MUTTUVAYA *v.* CHALORA ILLATH SANKARAN. **63 I. C. 931 : 13 L. W. 369.**

———*Devaswom — Uralan —Samudayi —Injunction.*

In a suit by the Uralan of a Malabar devaswom for an injunction to restrain a *samudayi* appointed by them for managing the devaswom and its property, the plaintiff must allege and prove a valid dismissal before suit for that is the cause of action for an injunction. 33 Mad. 162 Dist. (*Oldfield and Seshagiri Aiyar, JJ.*) DAMODARAN NAMBOODRI *v.* GOVINDAN NAIR. **53 I. C. 229 : 37 M. L. J. 307.**

———*Devaswom--Grant of perpetual kanom—Position of kanomdar—Adverse possession.*

The grant of a perpetual kanom by the trustee of a devaswom is not binding on the devaswom. 40 M. 709, foll. A kanom deed after reciting that the kanomdars were to hold the properties "for ever and ever" stipulated for payment of a fixed renewal fee at the end of twelve years to be paid along with the rent. This document was in a renewal of a prior simple kanom under which the mortgagee took possession, *Held*, that the document should be treated as if it was a perpetual kanom ; and that the kanomdars could not set up an adverse title as they held possession under the earlier simple kanom. (*Seshagiri Aiyar and Phillips, JJ.*) KUTTIPURATH KUNHUNNI PANIKKAR *v.* RAMAN. **26 M. L. T 332 : 10 L. W. 427 : 52 I. C. 675 : (1919) M. W. N. 742.**

———*Devaswom—Uralan— Trustee's powers —Melcharth.*

The grant of a *melcharth* by the *uralan* of a *devaswom* is an ordinary incident of its management, the propriety of which the *melkanomdar* is not bound to scrutinise. He is not bound to enquire into the existence of any necessity for funds by the Devaswom or into the application of such funds by the trustees. A *melcharth* executed by the agent of a *devaswom* is not unenforceable merely because the executant describes the nature of his control over the *devaswom*. (*Oldfield and Sadasiva Aiyar, JJ.*) VYTHINATHIEN *v.* PADMANABHA PATTAR. **45 I. C. 659.**

———*Devaswom—Uralan and Samudayi — Relationship between.*

MALABAR LAW—Devaswom.

The relation between a hereditary Uralan and a hereditary Samudayi is not governed by the ordinary principles of an agency. The latter could by open and notorious repudiation of the Uralan's right of management acquire rights including the right to sue in his own name and even against the Uralan. (*Seshagiri Aiyar and Napier, JJ.*) RAMAN SOMAYAIJPAD *v.* KANNU KUTTI KOVILAMMA

(1918) M. W. N. 179 : 7 L. W. 490 : 44 I. C. 630 : 23 M. L. T. 187 : 34 M. L. J. 344

——*Devaswom—Stani—Position of—Alienation—Limitation.*

The position of a Malabar stani approximates more to that of an owner of an impartible estate before the Impartible Estates Act than to that of a Hindu widow. He holds the property for life. 3 M 384 (F. C.), Dist. 28 M. L J. 669 Ref. An alienation by a Malabar stani of the absolute right of management of the trust properties is governed by Art. 124, the time running from the date when the alienee got possession. (*Wallis and Seshagiri Aiyar, JJ.*) RAJAH OF PALGHAT *v* KAMNANPRA VEETIL.

41 Mad. 4 : 6 L. W. 195 : 33 M. L. J. 26 : 42 I. C. 22 : (1917) M. W. N. 552.

——*Devaswom—Uralan—Powers of to create a melcharth.*

A document executed in the name of the six *uralars* of a *Devaswom* but signed by only five of them, is not a sufficient authority to empower a particular uralar to create a *melcharth* on behalf of the *devaswom*. 26 M. L. J. 257, R. (*Sadasiva Iyer and Seshagiri Iyer, JJ.*) CHAKTYIK VATAKATHRE ICHIKUTTI *v.* THIRUMANDHANKUNNU DEVASWOM URALARS. 24 I. C. 939

——*Devaswom—Uralans—Alienations by—Custom—Discretion of Court.*

A custom allowing the delegation or alienation of the powers and duties of Uralan may be recognised but must be confined to its narrowest limits. (*Sadasiva Aiyar and Spencer, JJ.*) MANNIAN NAMBUDRIPAD *v.* AGNIHARMAN NAMBUDRIPAD. (1914) M. W. N 251 : 23 I. C 141 : 15 M L. T. 276.

——*Devaswom—Uralan—Powers of—Grant of Saswatham by devaswom to tarwad whose karnavan is a uralan.*

The grant of saswatham is an improper act and where it purports to be granted by a devaswom to a tarwad whose karnavan is a uralan of the devaswom it should not ordinarily be enforced by the Court. (*Sundara Iyer and Sadasiva Iyer, JJ.*) NEELAKANTAN NAMBUDRI *v.* NARAYAN NAMBUDRI. 17 I. C. 128.

——*Devaswom—Management—Renunciation of karnavanship by karnavan—Effect on devaswom.*

When a person renounces his karnavanship of a family, he ceases to be the *uralan* of a devaswom of which the *karnavan* was always the trustee. The *uraimaship* is incident to *karnavanship* and unless the *uraimaship* is expressly reserved in such cases, it passes to the next *karnavan*. The renewal of a lease of a *devaswom* is not binding

MALABAR LAW—Gift.

on it, unless it is done *bona fide* in the course of management. (*Benson and Sankaran Nair, JJ.*) KARIPALLA *v.* UCHAI MANAKAL SANKARAN.

10 M. L. T. 526 : 13 I. C. 233 : 22 M. L. J. 126

——*Devaswom—Uraima right.*

Under the Malabar Law and custom, a widow cannot exercise the *uraima* right in a *devaswom*. The possession of a joint *uralar* is not that of a mere tenant-in-common but of a joint tenant. Exclusive enjoyment by one of the *uraima* rights for over 12 years coupled with a denial of title of the others, is sufficient to deprive the latter of their rights. (*Krishnaswami Aiyar and Ayling, JJ.*) ABBI KESAVA VANTHIR *v.* KESAVAN NAMBUDRI. 9 M. L. T. 457 : 9 I. C. 156 : 21 M L. J 178 : [See also 9 I. C. 155 : 21 M L. J. 175].

——*Devaswom—Uraima right — Right of widow.*

According to Malabar Law and usage, a widow cannot exercise the *uraima* right of temples. (*Krishnaswami Iyer and Ayling, JJ.*) PALLITHARA VAYIL *v.* ABBIKESAVA VAUDHYAR.

9 M. L. T. 261 : 9 I. C. 155 : 21 M. L. J. 175.

Gift.

——*Gift— Tarwad — Tavazhi — Separate branch—Grant by husband to Malabar woman—Children of another husband if take any benefit.*

The tavazhi of the same woman may consist of many branches, each branch made up of children by one of her husbands and each such branch may own separate properties obtained from its father. 39 Mad. 317 Rel. If the second husband of a Malabar woman who had some children by her first husband gave property to her and his own children by her without expressly mentioning whom he intended to benefit, it must be presumed that the grantor intended to benefit only the woman and his children by her and not her children by her first husband The woman and her children by the grantor held it with all incidents of tarwad tenure to the exclusion of her children by any other husband. 16 Mad 201 Ref. (*Bakewell and Phillips, JJ.*) IMBICHI BEEVI UMMA *v.* RAMAN NAIR. 42 Mad. 869 : 26 M L. T. 119 : (1919, M W. N. 538 : 10 L. W 118 : 53 I. C. 249 : 37 M L. J. 220.

——*Gift—Construction— Express powers of alienation*—Tavazhi.

A devise by a Malabar testator giving property to his wife and children who are governed by the *Marumakkattayam* Law is presumed to give it to them as a *tavazhi* to be held with the incidents of *tarwad* property. But this presumption is based on the principle of construing the terms of a will in the light of surrounding circumstances and must not be used for the purpose of controlling and modifying the express words of a Will. 16 M. 201; 29 M. L. J 481 (F.B.); 38 M. 79; 22 M L. J. 23; 6 M. I. A. 526 : 2 I.A. 7; 25 M. L. J. 637 Exp. and Dist. (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) PARU AMMA *v.* ITTECHERRI AMMA. 32 I. C. 459.

——*Gift—Construction— Tarwad incidents.*

Where a *Marumakkattayam* donor gives properties to the childern of the same mother or to a

member of a *tavazhi* and there is no express indication that an absolute alienable estate is granted, the presumption is that the donor intends to confer only an estate with all the incidents of the *tarwad* property. *Per Coutts-Trotter, J (dissenting)*--The mere statement of donor that he has a right to sell the property and that the donees should have all his rights does not confer upon them any higher estate. The donees are to take the property as tenants-in-common and not under ordinary *Marumakkattayam* Law unless expressly stated. 29 M. L. J. 481; 16 M. 201. Foll. If the expressions used indicate that the donees take an absolute heritable and alienable estate there is no reason to treate the clauses as repugnant and unenforceable simply because the gift is to the donee and his or her children or heirs. (*Coutts-Trotter, and Kumaraswami Sastri JJ.*) KAYYATUL KUNDAN KUTTI *v.* VAYALPATH PARKUM. **32 I. C. 107.**

———*Gift—Wife—Whether absolute.*

A gift to a wife creates an absolute estate when there are no words conveying the estate to the children though they are alive at the execution of the deed. 25 M L. J. 637 Foll; 29 M. L. J. 481: 16 M 201 Not Foll. (*Ayling and Seshagiri Iyer, JJ.*) DUJA BHANDARI *v.* VENKU BHANDARI. **31 I. C. 854.**

———*Gift—By mother at marriage of daughter —Nature of.*

Among Moplahs governed by *Marumakkattayam* Law, in the absence of any proof or special custom, a gift by a mother to her daughters at the time of marriage is a life gift for donees and their descendants. Such a gift is just like tarwad property. (*Ayling and Tyabji, JJ*) THAYOTH PUTHIA PURAYIL SEETHI *v.* MANGOTHIL RYRATTI UMMAYYA. **2 L. W. 969 : 18 M. L. T. 389 : 30 I. C. 977 : (1915) M. W. N. 805.**

———*Gift—Putravakasam property—Tarwad incidents—Subsequently born persons—Rights—Rule of perpetuity.*

Where properties are given by a person to his wife and children or children alone, following the *Marumakkattayam Law*, it must be presumed that the donees take the property with the incidents of *Tarwad* property. Persons subsequently born into the *Tavazhi* are entitled to be maintained but not to claim partition and an individual member cannot alienate his or her share nor can it be attached and sold in execution of a personal decree against the member. Per *Wallis, C. J.*—*Quaere.* Whether a gift with the incidents of *Tarwad* property could be made to the mother and some of her issues only, *viz.*, those by a particular husband, Per *Sadasiva Iyer, J.*:—The rule against perpetuities cannot be applied so as to invalidate gifts made to all the persons who can naturally form a joint Hindu family the gifted property being held as joint family property, or to the whole of a group of persons following the natural law of *Marumakkattayam* forming a natural *Tavazhi* group. Per *Srinivasa Iyengar, J.*:—It is not the giving of properties by a person to his wife and children, that constitutes them a *Tavazhi* but that properties are given to a wife and children, following *Marumakkatayam* Law, they as a *Tavazhi*, hold these properties with the incidents of the *Tarwad* property and the right of management of the properties belongs to the senior male member of that *Tavazhi*. The gift is made to the entity which is called *Tarwad* or *Tavazhi* and the law governing the parties regulates the mode of succession and enjoyment. Cases on the point considered. (*Wallis, C. J., Sadasiva Iyer and Srinivasa Iyengar, JJ.*) CHAKKARA KANNAN *v.* KUNHI POKKAR. **39 Mad. 317: 18 M.L.T. 255 : (1915) M. W. N. 740: 30 I. C. 755 : 29 M. L. J. 481 (F. B.)**

———*Gift—Delivery of possession — Minor donee—Formalities for*

It is essential for the validity of a gift that there should be a transfer both of ownership and of possession ; where the donor is the *de facto* guardian of the minor donee, a declaration of intention to hold the property on behalf of the minor is sufficient to transfer possession ; the declaration would be of no effect if the person in whose possession the property is, is not in a position to act on behalf of the owner, for a gift in favour of a minor to be valid, possession need not necessarily be given to his guardian and it is sufficient if there is a trustee who can act in his behalf. Where property gifted is land, possession will be deemed to be in the minor only when it is shown that he was in receipt and enjoyment of its produce. Where the donor himself is in possession of the property gifted, there must be some act of his which must show that he intended to hold the property on behalf of the minor ; where there is no such act, the presumption is that he never intended to make any gift (*Ayling and Tyabji, JJ.*) ALAMANAYA YAKUNI NABI SAB *v.* MURUKUTI PAPAIAH. **29 I. C. 439: 29 M.L.J. 733.**

———*Gift— Moplahs — Gift on marriage— Marumakkattayam Law.*

Among the Moplahs following the *Marumakkattayam* law, gifts are made to the husband of a girl at the time of the marriage apparently as a contribution to the maintenance of the girl and her children. Such a gift becomes void on the death or divorce of the girl. The *tarwad* is bound to maintain a woman of the *tarwad* even after her marriage and if property is given to the husband for the support of the wife, it is only reasonable that he should give back the property when he divorces her. (*Benson and Sundara Iyer, JJ.*) KOVUMMAL PACKIRICHI *v.* KOVUMMAL KEENACHA. **36 Mad. 385 : (1911) 2 M. W. N. 538: 13 I. C. 236: 22 M. L. J 122.**

———*Gift—Female donee.*

A gift of property to a female member of a Malabar Tarwad to be enjoyed by her and her descendants, is subject to the incidents of a Malabar tarwad property. 6 M. I. A. 526; 2 I. A. 7. Ref. 20 M. L. J. 134; 32 M. 315. Ref. (*Abdur Rahim and Sundara Iyer, JJ.*) KALIANI AMMA *v.* GOVINDA MENON. **35 Mad. 648 : 10 M. L. T. 399 : (1911) 2 M W. N. 487 : 12 I. C. 492 : 22 M. L. J. 23.**

———*Gift—Tarwad—Gift to children, whether effects a separate tarwad.*

Under Malabar Law, a gift to children does not by itself constitute them into a separate

tarwad by themselves. When a gift is to children and the donees do not form an independent *Tavazhi*, there arises no presumption of law that the property acquired by the senior most male member in his own name is the property also of his brothers and sisters and the descendants of the latter. (*Miller and Abdur Rahim, JJ.*) CHATHUKUTTI NAMBIAR *v.* RAMAN NAMBIAR.
12 I. C. 120 : 10 M. L. T. 130

Kanom.

———*Kanom—Renewal during the currency of a prior Kanom*—Bona fide *settlement of disputes—Karnavan misappropriating benefit—Liability of Kanomdar.*

A renewal of a Kanom by a Karnavan before the expiry of its period, when such renewal is to take effect from the date of expiry, is not valid, unless it is shown to be for necessity or the benefit of the tarwad Where the renewal is given consequent on a *bona fide* settlement of disputes among the parties is for the benefit of the tarwad that fact that the Karnavan spent the moneys received for the renewal on himself and not for the tarwad's benefit, does not vitiate the renewal. (*Phillips and Devadoss, JJ.*) KENATH ACHAN *v.* KALLIANI AMMA. **45 M. L. J. 258 : 18 L. W. 203 : (1923) M. W. N. 807: 1923 Mad. 700.**

———*Kanom— Neerozikkha Otti kanom—Redemption.*

The Malabar law shows that the tenure in question "Neerozikkha Otti Kanom" is irredeemable. (*Krishnan and Ramesam, JJ.*) K.N. RYRU NAMBIAR *v.* KAPPALLI KANARAKURUP.
42 M.L.J. 350 : (1923) M W. N. 76 : 16 L. W. 930 : 1922 M. 185.

———*Kanom—Melcharthdar—Suing to redeem prior* Kanom—Kanomdar *repudiating contract for renewal—If plff. a trustee for the Kanomdar.*

Where a Melcharthdar of 1913 sued to redeem a kanom of 1889 and the *Kanomdar* repudiated in the written statement the contract for renewal no question of the plff being a *quasi* trustee under S. 91 of the Trusts Act would arise though he took with notice of the agreement for renewal (*Ayling, O C. J. and Krishnasami Rao, J.*) AMMA NEITHIAR *v.* SUBRAMANYAN
14 L. W. 620 : 68 I. C. 469 : (1921) M. W. N. 843.

———*Kanom—Nature of—T. P. Act, Ss* 59 *and* 98.

A *Kanom* is similar to a usufructuary mortgage and a lease and is thus an anomalous mortgage within S. 98 however small the amount may be. *Kanom, Melkanom* and a *Melcharth* deeds require attestation as mortgage deeds under S. 59 (*Sadasiva Aiyar and Napier, JJ.*) KANDIYIL PARKER *v* THOTTOLI KOTTARATHIL.
44 Mad. 344 : (1921) M. W. N. 239 : 62 I. C. 386 : 14 L. W. 69 : 40 M. L. J. 282.

———*Kanom — Redemption — Kanomdar estopped from denying title of jenmi.*

A Malabar kanom is an anomalous mortgage and the kanomdar is estopped from denying the title of the jenmi if he has acknowledged his

title as owner. (*Seshagiri Aivar and Napier, JJ*). GOVINDA MENON *v.* KUPPAN NAMBUDRIPAD.
37 M. L. J. 617 : 24 M. L T. 472 : 49 I. C. 312 : 1919 M. W N. 20.

———*Kanom—Demise in perpetuity with covenant for renewal every* 12 *years—Validity of covenant—Clog on equity of redemption.*

Per Bakewell, J.—Where a kanom deed demises the land in perpetuity and contains a covenant for renewal every 12 years, it amounts to a mortgage with covenant by the mortgagor to postpone redemption for a further period of 12 years on default of redemption on the expiry of the first (or previous) period, and on payment to him of a certain sum. Such a covenant is sanctioned by usage and is valid. *Per Phillips, J.*—A kanom is an anomalous mortgage within the meaning of S. 98 of the T. P. Act as to which conditions even though they constitute a clog on redemption can be enforced. A provision for the perpetual renewal is therefore not invalid. 30 Mad. 61 ; 30 Mad. 300 Ref. (*Bakewell and Phillips, JJ.*) KUTTIKAT *v.* KUNHIKAMMA.
23 M. L. T. 67 : 7 L. W. 119 : 43 I. C 989 : (1918) M. W. N. 235.

———*Kanom—Melcharth—Rights of jenmi to recover rent.*

Where the plff. granted a kanom in favour of the 2nd deft. and subsequently created a melcharth in favour of the 1st deft on terms that the 1st deft. should redeem the kanom by setting off the arrears of rent due by the 2nd deft. against the kanom amount and to pay such arrears to the plff. The 1st deft assigned over the melcharth to the 2nd deft. on terms that the 2nd deft. should himself pay the amount of arrears to the plff in a suit by the plff. on the 2nd deft's. failure to pay him the arrears of rent impleading the 1st deft. also. *Held* the plff could not sue on the contracts between the defts. 1 and 2 as he was no party to it. The 2nd deft. by reason of the assignment became bound to redeem the kanom and to hold the desired lands for a further term, and the plff. became entitled to treat the arrears of money as had and received to the plff.'s use and that the plff. must be taken to have exercised the right when he demanded payment from 2nd deft. *Per Bakewell. J.*—As a suit for arrears of rent, the suit is barred by limitation. The plff. is not entitled to sue on the agreement between the 1st and 2nd defts. Nor can the arrears be said to be money had and received by the 2nd deft. to plff.'s use. (*Wallis, C.J., Bakewell and Kumaraswami Sastri, JJ.*) MAUNATH VEETTIL ITTI PANKU MENON *v.* DHARMAN ACHAN **41 Mad. 488 : 22 M L.T 543 : (1918) M W. N. 98 : 8 L. W. 118 : 43 I C. 625 : 34 M L. J. 193 F.B..)**

———*Kanom—Melcharth—Deposit by holder —Cessation of interest.*

A melcharthdar depositing money into Court is entitled to cessation of interest on the kanom from the date of notice of deposit to the kanomdar. (*Abdur Rahim and Phillips, JJ.*) GOVINDAN NAIR *v* CHERUVANNA.
(1917) M. W. N. 853 : 7 L. W. 81 : 43 I C 126 : 35 M. L. J. 313.

MALABAR LAW—Kanom.

———*Kanom—Melkanom deed— Nature of.*

The *melkanom* deed is a "deed of mortgage" within the meaning of S. 59 of the T. P. Act and therefore is invalid for want of attestation. It cannot be relied on as a lease. (*Spencer and Krishnan, JJ.*) KUPPUNNI *v.* PORASU PATTAR.
39 I. C. 167 : (1917) M. W. N. 3

———*Kanom — Nature of transaction— Redemption—Set off.*

In construing whether a kanom and lease form part of the same transaction, the intention of the parties must be gathered from facts of each case. In the circumstances of the case, where a lease was executed on the same day as the mortgage and the arrears of rent was added as a fresh sum in the second mortgage it was held that the mortgage and lease formed but one transaction. In a suit for redemption by the mortgagor, the mortgagee is entitled to set off all arrears of rent, barred or not, against the value of improvements payable by him to the lessees (mortgagees). It is well settled that when redeeming a Kanom, the jenmi is entitled to set off any arrears of rent without regard to limitation against the Kanom amount and the value of improvements. (7 M 545; 8 M. 381 and 415 F.) A mortgagor is ordinarily entitled to his costs in a redemption suit unless by laches he forfeits his rights thereto. Though in Malabar the question of compensation complicates redemption suits, yet where the mortgagor fails to deposit even the mortgage amount in full, the mortgagee must be given his costs. (*Oldfield and Phillips, JJ.*) HARIHAR MANGALATH *v.* KATAPRATHA KATH.
38 I. C. 655: (1917) M. W. N. 275.

———*Kanom — Redemption — Melkanomdar and Jenmi—Whether jenmi should pay for repairs before a redemption—Kanom deed.*

Where a melkanomdar sued the jenmi for recovery of costs of repair incurred, as the kanomdar had not done them as the deed provided. *Held* that the suit was premature (*Spencer and Krishnan. JJ.*) ARAKKALAKATH KOYATTI *v.* PANIGALATT KUNHAMMAD. **37 I. C. 664 : (1916) 2 M. W. N. 358.**

———*Kanom—Incidents—Distinguished from lease.*

The ordinary legal incidents of a lease do not attach to a Kanom tenure, where an account for the whole period of the Kanomdar's occupation is to be taken. (*Oldfield and Sadasiva Iyer, JJ.*) AMMOTTI *v.* SANKARAN ADIODI **37 I. C. 83 : (1916) 2 M. W N. 117**

———*Kanom—Holding on*

A tenant whose kanom has expired is not entitled to plead that he should hold on even after expiry. (*Seshagiri Aiyar and Bakewell. JJ.*) PILLAKANTAN CHETTIOTAN *v* VAZHAKA IMBATH MOIDEEN. **3 L. W. 467 : 34 I. C 755 : (1916) 2 M W. N. 350.**

———*Kanom—Covenant for perpetual renewal*

It is not invalid as being as a clog on the equity of redemption if a *Kanom* mortgage is made with a covenant for perpetual renewal, it being a perpetual *Kanom*. (*Sadasiva Iyer and Phillips, JJ.*) KOLANGORATH RAMAN NAYAR. *v* KANNOTH.
2 L. W. 941 : 31 I. C. 184 : (1915) M. W. N. 793.

———*Kanom — Kanomdar's right—Improvements—Rights to compensation—Madras Act, I of 1900.*

A *Kanomdar* is entitled to compensation for the conversion of jungle lands into *Parambas*, in spite of any provisions to the contrary in the mortgage-deed 32 M. 1; 26 M.L.J. 523; 34 M. 61; 36 M. 410 R. A tenant is entitled to claim compensation for improvements according to the Malabar Compensation for Tenants Improvements Act if the terms of the mortgage agreement are less favourable to him than the provisions of the Act. (*Sadasiva Aiyar and Napier, JJ.*) ABDULLAH ROWTHEN *v.* VASUDEVA RAVI VARMA.
29 I. C. 286 : 29 M. L. J. 316.

———*Kanom—Construction.*

Where a *kanomdar* agrees to pay the *jenmi* a certain fixed rent after deducting the interest on the *kanom* amount and the Government revenue payable and the Government revenue was increased, *Held*, that the *kanomdar* must pay the increased assessment himself as the *kanom* deed also gave him a right to the increase in the income of the property. 17 M. L. J. 517 Ref. 16 I.C. 184 Foll. (*Bakewell and Spencer, JJ.*) CHEMPATHOOR RAMAN NAMBUDRI *v.* NAGALASERI.
24 I. C. 870.

———*Kanom Assignment—Privity of estate.*

The Jenmi's rights against the *kanomdar's* assignee are based on privity of estate created by the assignment. The non-payment of the rent reserved under the original kanom is not a breach by the assignee of any contract to the *Jenmi*. 21 M. 8 Dist 30 M 410 ; 17 M. 296 Foll. (*Miller, J.*) NADUVIL EDOM KELU ACHAN *v.* AYYA PATTAR'S SON VARADHARAJA IYER. **24 I. C 481 : 26 M. L. J. 283.**

——— —*Kanom—Rights of mortgagee—Lessee.*

Where by decree of Court a *kanom* lease became a lease for an uncertain period the mortgagee lessee can cut and carry away the crops raised by him within the year. The principle of S. 108 (2) of the T. P. Act is applicable to agricultural leases S. A. 786 of 1912 : 24 M. 47 R. "Plants sown or planted" in S. 10 of the Mal. Ten. Imp. Act include paddy also and paddy so raised is improvement within the meaning of this section. (*Sadasiva Iyer and Spencer, JJ.*) NARAYAN NAMBUDRIPAD *v* KRISHNA PATTAR.
(1914) M. W. N. 160 15 M. L. T 160 ; 22 I. C. 515 : 26 M. L. J. 348.

———*Kanom—Redemption—Grant by members of Tarwad to Tavazhi—Execution—Granting of melcharth to third parties—Forfeiture.*

Held that the kanom, being an ordinary one for a period of twelve years, was redeemable, though the object of the grant was the maintenance of the tavazhi. It is the duty of the Court not to look at the object of the parties, except in so far as it is carried out in the words of the document. Melcharath cannot be said to be invalid because, it might place the tavazhi in

MALABAR LAW—Kanom.

a more difficult position as regards its maintenance. To sustain a melcharath, it is enough that the karnavan executing it has the legal capacity to execute it. It is not necessary that he should further be able to perceive that he was inflicting a serious hardship on the original Kanomdars. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SANKARANUNNI *v.* APPAVU PILLAI. **16 I. C. 571 : 12 M. L. T. 556.**

———*Kanom—Improvements — Compensation for.*

Where a Kanomdar claims compensation for reclamation, he must prove that he reclaimed the particular lands for which he claims compensation. In a decree for redemption, the account should be carried forward up to the date when possession is given (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) THIRUMA THUR *v.* SWAMINATHA PATTAR KRUAKAR. **16 I. C. 184.**

——— ———**Karnavan.**

Acquisition.
Alienation
Anandravan, Rights of.
Debts.
Decree against.
Delegation of management.
Position of.
Powers of.
Removal of.
Rights of Junior members.

Karnavan—Acquisition.

———*Karnavan—Acquisition—Presumption—Onus of proof.*

Where a karnavan sets up a title in himself to buildings erected by him on *tarwad* property during his *karnavanship* the onus is on him to show that the structure was made out of his own private property and not out of the Tarwad property. 3 M. 141 ; 5 M. 1 Foll. (*Ayling and Tyabji, JJ.*) GOVINDAN NAMBIAR *v.* KANAM NAMBIAR. **25. I. C. 775.**

———*Karnavan—Acquisitions — Self-acquisitions—Devolution—Survivorship.*

Self-acquisitions of a *karnavan* lapse to the tarwad. (*Sankaran Nair, J.*) ABDULLA *v.* MIRTHUR. **12 M L. T 497 : 17 I. C. 429: (1912) M. W. N. 1164 : 23 M. L J. 537**

Karnavan—Alienation.

———*Karnavan—Alienation—Sale by Karnavan and other members—Necessity for major portion of consideration—Decree.*

Where the major portion of the consideration for a sale by the *Karnavan* and some other members of the *tarwad*, is for necessity the court must uphold the whole transaction. Further the plffs. are not entitled to obtain the difference between the wholesale price and the amount actually proved as necessary as the purchasers cannot be compelled to account for the application of the sale-proceeds or to pay any part of it twice over. (*Spencer and Ramesam, JJ.*) PAYYANATTAN KRISHNAN *v.* INKIRIAS GOVINDAN. **14 L. W. 589 : (1921) M. W. N. 715 : 69 I. C. 302 : 41 M L. J. 381.**

MALABAR LAW—Karnavan—Anandravan, Rights of.

——— ———*Karnavan—Alienation — Attaladakam heir, right to impeach.*

An attaladakam heir succeeding to the property of Tawazi only when there are no members left and to the property not alienated by the last members cannot impeach an alienation by Karnavan not impeached by the Tawazhi members. (*Abdur Rahim and Oldfield, JJ.*) KATTAPRATH KALTAKKE *v.* VALUVAKAT KISHUKKE **44 Mad. 140 : 12 L. W. 634 : (1920) M W. N. 768 : 60 I.C. 118: 29 M. L. T. 45: 39 M. L. J. 702.**

———*Karnavan—Alienation—Moveable property.*

A karnavan has absolute power to sell and convert into money, all moveable tarwad property including decrees and debts. The alienee need not see to the application of the money nor need he enquire as to the existence of necessity. (Per *Sadasiva Aiyar, J.*) There is no presumption that a decree or bond standing in the name of a junior member belongs to the *Tarwad*. 2 M. 328, foll. (*Sadasiva Aiyar and Spencer, JJ.*) SUBRAMANIA PATTAR *v.* KRISHNA EMBRANDRI. **12 L. W 361 : 60 I. C. 77 : 39 M. L. J. 580.**

———*Karnavan—Alienation of lands—Subject to lease in favour of anandravan Suit by members of the tarwad to recover possession—Maintainability of.*

Where the karnavan of a Malabar tarwad alienates tarwad properties in favour of the anandravan for purposes not binding on the tarwad and the anandravan was in receipt of the rents from the tenants in possession, suit by the members of the tarwad against the karnavan and anandravan for possession. *Held*, that the fact that the anandravan was in possession of the property was no bar to a suit for possession by members of the tarwad on behalf of the tarwad and that their remedy was not a suit for mere declaration. 17 Mad. 232 and 6 M. L. T. 175, Ref. and Dist. Possession of rents is a possession known to and respected by law. (*Oldfield and Seshagiri Aiyar, JJ.*) CHERIA KUNHI POCKER *v.* MALIKAIAMMALVALIA BAPPOLTY. **26 M.L.1. 359 : (1919) M. W. N. 815 : 10 L. W 496 : 53 I. C 771 : 37 M. L J. 544.**

———*Karnavan—Alienation by karnavan and two senior anandravans—Binding nature.*

Where an alienation is made by a *karnavan* and two senior *anandravans*, there is sufficient evidence of the assent of the family. Such a document is not vitiated by the fact that the senior female member did not join, the law applicable being *marumakkathayam* and not *Aliyasanthana*. (*Ayling and Spencer, JJ.*) MELOTH KANNAN NAIR *v.* KODATHA KUMARAN NAIR. **(1914) M. W. N. 231 : 22 I. C. 609 :,1 L. W. 102.**

Karnavan—Anandravan, Rights of.

———*Karnavan— Anandravan —Powers and rights of—Karar.*

An *anandravan* has ordinarily no right of suit against the *karnavan* or his agent for an account of the latter's management. (28 M. 182 : 20 M. 129 F.) Where a *karnavan* and some members

MALABAR LAW—Karnavan—Anandravan, Rights of.

executed a *karar* by which the management of *tarwad* property was left in the hands of a stranger for the purpose of clearing certain *tarwad* title, the stranger does not thereby become the agent of the *anandravans* and not liable to account for receipts. He is only an agent of the *karnavan* signing of the other members in executing the *karar* only shows their assent to it and no more. When a *karnavan's* authority is restricted by a familiar *karar* the restriction should be construed strictly and he must be deemed to retain all powers not expressly taken away (S. A. 1384 of 1914, R.) It is however different if the *karnavan* colludes with the stranger to defraud the *tarwad*, in which case an *anandravan* can sue for the *karnavan's* removal and for accounts from the stranger on behalf of the *tarwad*. (*Odfield and Phillips, JJ.*) KARUNAKARA MENON *v.* KUTI KRISHNA MENON. **5 L. W. 511 : 38 I. C. 666 : (1917) M. W. N. 342.**

———*Karnavan—Anandravan—Powers and rights of.*

A *tarwad* is not a public or religious charitable trust or company and as such no suit lies for settling schemes for a *tarwad*. To remove a *de jure karnavan* court must be satisfied that the interests of the *tarwad* have been or would be seriously jeopardised by his continuance. Mere carelessness to observe the strict terms of a *karar* is no ground for removal and Courts have no power to impose conditions on a *de jure karnavan* without his consent. Since the members have no general right to partition on good cause shown, the Courts will permit suits for removal of a *de jure karnavan*. Family *Karars* entered into by a majority of the members with the consent of the *de jure guardian* seem to have been upheld, as binding on the whole *tarwad*. An *anandravan* cannot sue on behalf of the tarwad for relief claimable by the *tarwad* nor can he be allowed to sue for a mandatory injunction requiring the *karnavan* to act in a particular way for this will be asking the Court to substitutes its discretion for the *karnavan's*. In removing a *karnavan* the Court must not overlook the next *anandravan* or appoint managers in violation of the *anandravan's* natural rights. (*Sadasiva Aiyar and Napier, JJ.*) CHARIA PANGI ACHAN *v* UNNALA CHAN. **(1917) M. W. N. 185 : 5 L. W. 392 : 21 M. L. T. 329 : 38 I. C. 513 : 32 M. L. J. 323.**

Karnavan—Debts

———*Karnavan—Debts—Pro-note—Execution by manager of tavazhi—Suit by creditor—Decree against junior members—Provident Funds Act, S. 4.*

In a suit brought by a creditor against the manager and other members of the tavazhi on a pronote executed by the manager, the plaint alleging that the money was borrowed for tavazhi necessity. *Held*, a decree could be given against the junior members to the extent of their interest in the tavazhi properties. 27 M. L. J. 595 Dist ; 3 L. W. 463 ; and 32 M. L. J. 354 Foll. (*Sadasiva Aiyar and Spencer, JJ.*) THANKAMMAL VAYAMKAR AMMA *v.* KUNHAMMA. **53 I. C. 878 : 37 M. L. J. 369.**

MALABAR LAW—Karnavan—Decree against.

———*Karnavan—Debts—Injunction restraining him from contracting loans—Family purposes—Binding against tarwad—Effect of injunction.*

In the course of the suit by the junior members of the Malabar tarwad against their karnavan for removing him from office, an injunction was issued restraining the karnavan from contracting loans, but during the pendency of the injunction order the karnavan nevertheless borrowed money for the necessary purposes of the family and utilised it for such purposes. *Held* in a suit brought to recover the amount so lent that notwithstanding the injunction order the debt was binding on the tarwad 9 All. 407 ; 25 All. 431, Foll. (*Abdur Rahim and Oldfield, JJ.*) PUZHAKAL EDOM *v.* MAHADEVA PATTAR. **47 I. C. 778 : 35 M. L. J. 96.**

———*Karnavan—Debts—Tarwad property—Liability for karnavan's debts.*

A personal decree against a karnavan of a tarwad cannot be executed against the tarwad property unless the decree-holder can show that the decree was obtained against the karnavan in his representative capacity or was as a matter of fact obtained against the tarwad for tarwad necessity. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) KUTTAN *v.* KALLIANI AMMA. **40 I. C. 449 : 6 L. W. 25.**

———*Karnavan—Debts—Power to raise funds for defence of members in riot case.*

A karnavan has power to raise money on the security of the family property if money cannot be otherwise got for defending the family members in an action at law. (*Miller and Abdur Rahim, JJ.*) SABHU SHETTETHI *v.* KRISHNAMACHARIYA. **9 M. L. T. 449 : 11 I. C. 23 : 21 M. L. J. 159.**

Karnavan—Decree against.

———*Karnavan—Decree against—Right of anandravan to appeal—Collusion.*

Where the karnavan who brought a suit for the recovery of certain properties on behalf of the tarwad died after decree and the karnavan who succeeded him was not interested in filing an appeal as he sided with the deft. the next senior member could continue the proceedings joining the karnavan for the time being as a party respondent. 29 M. L. J. 632 Foll. (*Bakewell and Phillips' JJ.*) KALLIANI AMMA *v* SANKARAN NAIR **52 I. C. 688 : 10 L. W. 220.**

———*Karnavan—Decree against—Liability of tarwad property.*

Where a decree is in effect against a *tarwad* the fact that the *karnavan* was not specially impleaded in his representative capacity will not make it the less a decree against the *tarwad*. A suit is to be judged not by its form but by its substance, *i.e.*, whether the person suing or sued conducted the suit for his own benefit or representing the family of which he was the head. (*Ayling and Sebhagiri Aiyar, JJ.*) KARAKKATTITATHIL RAYARAPPA *v.* KOYATAN CHABLE VEETIL. **24 M. L. T. 28 : 8 L. W. 154 : 45 I. C. 489 : 35 M. L. J. 51.**

Karnavan—Delegation of Management.

——— *Karnavan—Delegation of management—Melcharath granted before expiry of the term under which land is held—Rights of grantee—Successor if bound.*

A karnavan of a tarwad allowing another member to discharge the duties of karnavan, can resume management at any time. If a karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of tarwad this would be a ground for removing him from his office but a particular lease granted by a karnavan cannot be declared to be void as against the lessee merely because it is not proved to be beneficial to the tarwad A melcharath granted by a karnavan before the expiry of the previous term is not *ab initio* void but the succeeding karnavan will not be bound by the transaction. 27 M L.J. 691 Dist. (*Oldfield and Phillips, JJ.*) ABDULLA KOYA *v.* EACHRARAN NAIR.

47 I. C. 945 : 35 M. L. J. 405.

Karnavan—Position of.

——— *Karnavan—Status of.*

A *Karnavan* of a Malabar *tarwad* has two capacities—a temporal and spiritual. In the former he is the manager of the family properties, maintains the junior members, represents the *tarwad* in transactions with strangers, etc. In his latter capacity he presides at the ceremonies and performs all the religious duties incumbent on him. A stranger cannot supplant him in his latter office ; but may take his duties as manager. (*Seshagiri Aiyar and Napier, JJ.*) KRISHNA KIDAYU *v.* RAMAN. **38 I.C. 638 : 39 Mad. 918.**

——— *Karnavan—Position of.*

The ownership of the *tarwad* property vests in all the members and the *karnavan's* position is similar to that of a manager of a joint family except that it is not open to the other members of the *tarwad* to enforce partition as against him To this extent his position is more valuable and his authority is permanent owing to the absence of any right in any of the members to enforce partition. (*Abdur Rahim and Sundara Aiyar, JJ.*) KUNHICHEKKAN *v.* LYDIA ARUKENDAN.
11 M.L.T. 232 . 14 I. C. 480 : (1912 M.W.N. 386.

——— *Karnavan—Position of—His rights and duties,*

A member of a family governed by *Aliya santhana Law* is not entitled to enforce a partition of the property against the manager who is the only one entitled to administer the property and maintain the other members though the income of the property belongs to all and the property cannot be sold without their consent, except for necessity. 5 M. 71 : 7 M. 233, Relied on. The managing member has got right of management of the family property, of exercising disciplinary power of allotting residences inside and outside the family house and he has duties also, *e.g* of maintaining the members according to the means of the family and he cannot allow the interests in the other members to be prejudiced in any way. 4 M. 171. Rel. (*Sundara Aiyar and Spencer, JJ.*) MARAVADI *v.* PAMAKKAR.

36 Mad. 203: 11 M. L. T. 112 : (1912) M.W.N. 109 : 14 I. C. 383 : 22 M. L. J. 309.

Karnavan—Powers of.

——— *Karnavan—Powers of.*

The Karnavan of a Malabar Tarwad is not a mere trustee. His position is that of the manager of an undivided Hindu family. (*Oldfield and Devadoss, JJ.*) MEENAKSHI NETHIAR AMMA *v.* CHERIYA PARVATHI NETHIAR.

(1923) M. W. N. 657 : 1924 M. 174.

——— *Karnavan—Powers of leasing—Kanom—Renewal.*

The position of the Karnavan of a Malabar tarwad is higher than that of a Hindu widow and he has in fact greater powers than the manager of a joint Hindu family. 3 M. 169 Ref. He has full powers of management of the family property and is even allowed to give Kanoms of the tarwad property without necessity, though the Kanom amounts to an alienation of the family property. The reason for holding that necessity must be proved in order to validate a renewal executed before the expiry of the subsisting Kanom is that it is impossible to predicate some years in advance what the state of affairs will be when the original Kanom expires. (*Phillips and Devadoss, JJ.*) KENATH ACHAN *v.* KALLIANI AMMA.

18 L. W. 203 : (1923) M. W. N. 807 : 1923 Mad. 700 : 45 M. L. J. 258.

——— *Karnavan—Powers of — Compromise—Burden of proof.*

It is not obligatory on a limited owner like a Karnavan to contest a hopeless case ; but if he chooses to enter into a compromise, he and his alienee must prove that the compromise was entered into honestly and for the benefit of the estate (*Oldfield and Ramesam, JJ.*) SUBRAMANIYAM PATTAR *v* KIZHAKKARA UTHENANTHIL.

16 L. W. 620: 31 M L. T. 454 : 44 M. L. J. 596. : 1922 M. 519 (H. C.).

——— *Karnavan—Powers of and liabilities.*

In a suit for redemption of a *melharath* granted by *Karnavan*, the *Tarwad* was fully represented and the *Karnavan* contended that the *melcharath* was not binding on the *Tarwad*. The case was decided against him. The decision is *res judicata* against the *Tarwad*. A *Karnavan* can grant a *melcharath* binding on the *Tarwad* if a family *Karar* does not deprive him of his power as such. Mere non payment of *manusam* or *Sanjanyam* promised does not render a valid *melharath* invalid. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA MENON *v.* KRISHNAN NAIR **13 L. W. 584: 29 M. L T. 340: 62 I. C. 598: 40 M L. J. 338.**

——— *Karnavan— Powers of—Kanom—Grant before expiry of lease—Successor when bound.*

In the absence of evidence proving necessity or benefit to the tarwad a second lease given by a karnavan before the expiry of the prior lease will not bind the succeeding karnavan whether the grantor was or was not alive at the time, the prior

lease expired. (*Sadasiva Aiyar and Spencer, JJ.*) KUNHAMMAD *v.* KUNHUNNI. **38 M. L J. 461 : (1920) M. W. N. 335 : 57 I. C. 424 : 11 L. W. 532 : 43 M. 715**

——*Karnavan—Powers of—Trade—Power to carry on—Debts—Liability of junior members*

The pursuit of trade is not one of the ordinary powers of a Malabar karnavan. The tarwad is not liable for debts contracted by a karnavan in the course of a trade carried on by him unless the business or trade was family or tarwad business or the members of the tarwad consented to the trade being carried on behalf of and for the tarwad *Quaere Abdur Rahim,J.*—Where there are minor members in a tarwad, the consent of the adult members would be sufficient. *Held*, that the trade in question was not a tarwad trade and that the debts were not binding on the tarwad and its members as such. (*Abdur Rahim and Spencer, JJ.*) **42 Mad. 761 : 26 M.L.T. 195: 1919 M. W. N. 600 : 53 I. C. 262 : 10 L. W. 204 : 37 M L. J. 316.**

——*Karnavan — Powers of — Renewal of kanom before expiry of term.*

A melcharath granted by a Karnavan before the expiry of the term of the Kanom will be binding on the tarwad only on proof of necessity or benefit to the tarwad. 27 M. L. J. 175 ; 27 M. L J. 690; 27 M. L. J. 691 Foll The same principle applies to the grant of a renewal of a Kanom before the expiry of the original term. It is not enough for the alienee to show that he made e quiries of the Karnavan and was satisfied with the statements made by him as to the existence of a necessity for the renewal. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) VATAVATTA RAMAN NAIR *v.* KENATH PUTHEN VITTAL KUPPASSAN MENON **51 I. C 740 : 36 M. L. J 630.**

——*Karnavan—Powers of—Revival of barred debt.*

The powers of a karnavan of a Malabar tarwad are more like those of a manager of a Hindu family than those of Hindu father. The karnavan has no power to revive a barred debt against the tarwad. A mortgage by a karnavan in payment of a barred decree is not binding on the junior members of the tarwad. (*Seshagiri Aiyar and Napier, JJ.*) MANKOOTIL CHATHUKOTTI NAIR *v.* KOMAPPAN NAIR. **(1918) M. W. N. 144 : 44 I. C. 572 : 35 M. L. J. 380.**

——*Karnavan—Powers of—Melcharath before expiry of kanom—Justsfication—Family necessity or advantage.*

A *karnavan* of a Malabar tarwad has not an uncontrolled authority in the renewal of kanoms or in the grant of melcharaths prior to the expiry of the former, but must justify his grants by family necessity. 16 I. C. 391 Foll. (*Sadasiva Aiyar and Moore, JJ.*) VENKITAMMAL *v.* ALANGAT RAMAN NAIR. **34 I C. 931.**

——*Karnavan—Powers of—Melkanom grant of—When a kanom is subsisting.*

A melkanom granted during the continuance of a previous kanom is not altogether void but is only voidable at the instance of the members of the *tarwad* who were not parties thereto. (*Seshagiri Aiyar and Bakewell, JJ.*) PILAKANTAN CHETTIOTAN *v.* VAZHAKARABATH MOIDEEN. **3 L. W 467 : 34 I. C. 755 : (1916) 2 M. W. N. 350.**

——*Karnavan—Powers of—Power to limit* karnavan *powers—Family karar—Abstention of one member*—Karar *whether revocable—Power of* karnavan *to create* melcharath

A famtly *karar* among members of a *tarwad* restricting the ordinary powers of a *karnavan* with a view to settle family disputes or to provid against mismanagement is not merely a delegation of the powers of the *karnavan* to other members of the family revocable at the will of the *karnavan.* A *karnavan* with powers thus limited cannot grant a *melcharath* without the consent of other members of the *tarwad.* A *tarwad* can restrict the ordinary powers of *karnavan* by means of a family *karar*, which the *karnavan* cannot set aside of his own authority 8 M.381: 11 M. 134, Foll. Where a *karnavan* is a consenting party to a family *karar*, he is bound by its terms unless the other contracting parties are willing to release him from his obligations or he can show that the *karar* is no longer beneficial to the interest of the *tarwad.* Abstention from personal reasons of one member of the family canno affect the binding character of the *karar* on those who are parties to it. (*Kumaraswami Sastri and Phillips, JJ.*) PANGI ACHAN *v.* BHEEMAN ACHAN. **32 I. C. 501.**

——*Karnavan—Powers of—Status of—Alienation by karnavan.*

Per *Seshagiri Iyer, J.*—Though a karnavan is the absolute manager, yet he holds for himself and for the benefit of all other members of the tarwad and he being in a fiduciary position the members next in seniority could not only sue for his removal but also could contest his alienation. A karnavan has larger power than the manager of a Hindu family in the management of tarwad property The relationship of *karnavan* towards the Junior members is more like that of trustee and *cestui-que-trust* or of guardian and ward. (*Wallis, C. J., and Seshagiri Aiyar, J.*) RAJAH OF ARAKAL *v.* CHURYA KUNHI KANNAN. **31 I. C. 482 : 29 M. L. J. 632.**

——*Karnavan—Powers of*—Melcharath *grant of before expiry of prior lease—Validity.*

A *melcharath* granted by a *karnavan* in the absence of necessity before the expiry of the prior lease, will not be binding on his successor, whether the grantor was or was not alive at the time of expiry of the prior lease. (*Ayling and Hannay, JJ.*) CHAMBOZIL MOIDIN KUTTI *v.* ACHUTAMBAL KUNTI KOYAN MUTH. **27 I. C. 1007 : 27 M L. J. 691.**

——*Karnavan—Powers of—Grant of* melcharath.

A *karnavan* has no right to grant a *melcharath* during the currency of an existing *kanom* granted by his predecessor, unless for necessity or for benefit of the *tarwad.* The burden of proving

necessity lies on the alienee. (12 M. L. T. 600, F.) *Sadasiva Aiyar and Tyabji, JJ.*) PULINHOLIYIL MURIKOLI RAMAN NAMBIAR *v.* PUTHALATH KAKOTTAN RAMAN NAMBIAR. 1 L W. 540 : 25 I. C. 578 : 27 M. L. J. 175.

———*Karnavan—Powers of—Karar.*

The property of a Malabar *tarwad* is not the individual property of the *karnavan* who cannot delegate his rights with respect to that *tarwad* property. The manager's power can be modified by a karar entered into by the other members of the property. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) GOVINDAN NAIR *v.* NARAYANAN NAIR. 23 M. L. J. 706: 12 M. L. T. 585 : 17 I. C. 473: (1913) M. W. N. 79.

———*Karnavan—Powers of—Grant of* melcharath—*Pending prior lease.*

Where a karnavan of a Moplah tarwad, two years in advance of the prior leases, executed a melcharath in plff 's favour for 5 years commencing after the expiration of the said lease, without any necessity or benefit. *Held*, it was not binding on the tarwad. A *karnavan* for the time being cannot tie down the discretion of those that are to succeed him in the management by granting leases of family lands, when there is no reason absolutely for doing so and the lands are being held by tenants on leases which are still in force.(*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KARYAN KANDY PATTUPURAIL *v.* AYILLIATH KUSHITATH KRISHNAN NAMBIAR. 27 M. L. J. 690 : 16 I. C. 391: 12 M. L. T. 600.

———*Karnavan—Powers of—Demise of jenmi right—Presumption.*

Where a karnavan demises property stating that he has Jenmi right over it, the presumption is that it was executed in the capacity as joint holder with the other members. (*Abdur Rahim and Sundara Aiyar, JJ.*)KUNHICHEKKAN *v.* LYDYA ARUCANDEN. 11 M. L. T 232: 14 I. C. 480 : (1912) M. W. N. 386.

———*Karnavan—Powers of—Lease for* 60 *years.*

The creation of a kanom by the karnavan of a Malabar tarwad for sixty years is illegal and cannot be recognised even for the usual term of 12 years. The person in possession under such a kanom, even though a junior member of the tarwad cannot erect a structure on the land demised and will not get compensation on eviction. (*Abdur Rahim and Sundara Aiyar,JJ.*) KALLIANI AMMA *v.* GOVINDA MENON. 35 Mad. 648: 22 M. L. J. 23 : 10 M. L. T. 399 : 12 I. C. 492 : (1911) 2 M. W. N. 487.

———*Karnavan—Powers—Payment out of money in deposit in Court—Karnavan—Whether should be required to give security.*

Money in deposit in Court and due to the members of a Malabar tarwad should be directed to be paid to the karnavan and no security need be furnished by him. (*Abdur Rahim and Sundara Aiyar, JJ.*) KONTHI MENON *v.* CHENNI VEETIL. 12 I. C. 77 : 10 M.L.T. 190.

Karnavan—Removal of.

———*Karnavan—Removal— Declaration of unfitness of anandravan—Grounds for exclusion —Management entrusted to junior member—Power of Courts.*

In a suit for removal of the eman of an aliasanthana family the Court has power not only to remove the eman but also to declare the unfitness of the senior anandravan to succeed to the management of the family and put his junior in management The forfeiture of the office on gross misconduct rendering eman unfit for it is the basis of the power. Moral unfitness is also an equally good reason for expulsion.(*Spencer and Krishnan, JJ.*) NEMMANNA KUDRE *v.* LACHMI HENGASU. 37 M L. J. 539 : 11 L. W. 49 : (1920) M. W. N. 117: 27 M. L. T. 88 : 53 I. C. 855 : 43 M. 319.

———*Karnavan—Removal—Suit for removal of* karnavan.

A suit lies for the removal of a *karnavan* recognised as such by a family karar on the ground of gross misconduct. Whereby a karar, the members removed a *karnavan* for the time being granting him however his right to manage a temple and utilize the surplus income from it for his maintenance and constituted the senior *anandravan* as the *karnavan held* in a suit to remove the newly made *karnavan* that the *karar* had the effect of completely putting an end to the status and tenure of the old *karnavan* and appointing the new *karnavan* and that the newly-appointed *karnavan* became *de jure karnavan* who could not be removed by suit except for gross misconduct. (32 M. L. J, 323, Dist.) The removal of a *karnavan* by a family *karar* though with his consent is an act done by the whole tarwad and not a mere renunciation of his rights—an unilateral act. 41 M. 577. (*Wallis, C. J., Sadasiva Aiyar and Spencer, JJ.*) PAZHAVATHIL MAVILAPUTHIA *v.* KUNHI RAMAN. 41 Mad. 577 : 34 M L. J. 400 : (1918) M. W. N. 283 : 23 M. L. T. 316 : 45 I. C. 26 : 7 L. W. 543 (F.B.).

———*Karnavan—Removal--Lunacy—Effect of.*

Lunacy of a *karnavan* is a conclusive ground for an application by the next anandravan for his removal. Per *Sundara Aiyar, J. Quaere*—Whether the lunacy of a *karnavan* would automatically work a forfeiture of his right of management or whether it would be necessary to have him removed by order of Court. (*Sundara Aiyar and Seshagiri Aiyar, JJ*) GOVINDAN NAIR *v.* NARAYANANNAIR. 12 M. L. T. 585 : (1913) M. W. N. 79 : 17 I. C 473 : 23 M. L. J. 706.

———*Karnavan—Removal — Anandravan—Suit to set aside alienation by* karnavan.

An anandravan or junior member of a Malabar tarwad can maintain a suit for the removal of a *karnavan* from his office and to set aside alienations made by the latter. A senior anandravan can sue for the recovery of the properties alienated by the karnavan without consulting the other members especially when, on the allegation that they are acting in collusion with the karnavan, he has included them as defts. (*Sankaran Nair, J.*) MANGALSHERI ILLATH KRISHNAN NAMBUDIRI *v.* KESHAVAN NAMBUDIRI. 16 I.C. 612: (1913) M. W. N. 38.

MALABAR LAW—Karnavan—Rights of junior members.

Karnavan—Rights of junior members.

——Karnavan—*Right of junior members—Arrangement with—Binding.*

Unless the tarwad is proved to have suffered some detriment by an arrangement entered into by a *karnavan*, the fact that a junior member was not consulted, does not invalidate the agreement. (*Sadasiva Aiyar and Burn, JJ.*) VENGANAT RAJA VASUDEVA RAVI VARMA RAJA *v.* NAITHILATH MATATHEL. **56 I. C. 199 : 27 M. L. T. 54.**

——Karnavan—*Right of junior members to sue for redemption.*

Unless the *karnavan* is proved to be guilty of gross misconduct and collusion it is not competent to the junior members of a tarwad to sue for redemption of a kanom granted by their *karnavan*. 20 M. 129. Foll. (*Spencer and Bakewell, JJ.*) OTTAPARAKKAL THAZHATH SOOPI *v.* CHARICHAI PALLIKKAL MARIYAMMA.
43 Mad. 393 : 11 L. W. 200 : 27 M. L. T. 169 : (1920) M. W. N. 279 : 55 I. C. 760 : 38 M. L. J. 207.

——Karnavan—*Rights of—Karar.*

Where after the *karnavan* of a *tarwad* become a *stani*, the succeeding *karnavan* being incapable of managing the *tarwad* agreed with the senior female member to vest the management of the *tarwad* in the latter, *Held* on a construction of the *karar*, that the *karnavan* could obtain a renewal of an *otti* deed which would have become barred if not renewed. (*Seshagiri Aiyar and Napier, JJ.*) KRISHNA KIDAYU *v.* RAMAN.
38 I. C. 638 : 39 Mad. 918.

——Karnavan—*Rights of—Suit to recover lands in possession of junior members in lieu of maintenance.*

Where by arrangement with a former *karnavan* the junior members are in possession of certain lands in lieu of their maintenance, a succeeding *karnavan* cannot recover possession of such lands from them, unless he sets aside the prior arrangement for some good cause and offers to make some other suitable arrangement for their maintenance. 33 M 436 F. ; S. A. 563-05 R. 33 M 436 (*Abdur Rahim, C. J. and Spencer, J.*) RAMASWAMI PATTAR *v.* GOPALAN.
37 I. C. 659 : 32 M. L. J. 97.

——Karnavan—*Rights of—Right to give discharge*—Kanomdar—*Plea of payment to tarwad—Onus.*

Where the manager of a family is in possession as *kanomdar*, and is himself the owner of the equity of redemption and where he pleads that he has discharged his liability to the family by payment to two of its members, there is a heavy burden on him to prove satisfactorily that he did, as a matter of fact, make the payment. As manager he is bound to deal with the money for the benefit of the family and to account for its application. (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) PARU AMMA *v.* ITTECHERRI AMMAH.
32 I. C. 459.

Landlord and Tenant.

——*Landlord and tenant—Presumption that tenancy is from year to year.*

MALABAR LAW—Landlord and Tenant.

If the nature of agricultural tenancy is not proved, then even as regards agricultural leases in Malabar, the presumption is that the tenancy is from year to year, if the tenants have no additional mortgage-rights as in *kanom* tenures. (*Sadasiva Aiyar and Napier, JJ.*) ITTINAN *v.* GOVINDAN NAMBUDRI. **62 I. C. 390: 13 L. W. 397.**

——*Landlord and tenant—Covenant for renewal of lease—Binding effect.*

A lease granted by the stanomdar provided:—"I shall well improve this *Paramba* and plant. . . etc. When the improvements have survived the period of decay and the cocoanut trees begin to bear their first fruits I shall take a Taraga after fixing the rent in accordance with the local custom on an inspection of the Kuzhikanoms." *Held*, that this clause was not optional but binding on the landlord to renew the lease on the conditions contained therein and that the rent was to be revised in view of any larger yield from the land that might accrue and also according to the custom of the country in respect of such leases. (*Abdul Rahim and Odgers JJ.*) KAITHAL KUTTIAN *v* KUZHATTE PUTHEN VEETIL THIRUMANGALATH KAHARATAN UMMAMA.
44 Mad. 509 : 13 L. W. 208 : 29 M. L. T 17 : (1921) M. W. N. 169 : 62 I C. 62 : 41 M. L. J. 202.

——*Landlord and tenant—Kuzhikanom lease—Expiry of term—Position of lessee—Suit to recover possession—Notice to quit—Decree—Form of—South Canara.*

Under the Customary Law a kuzhikanom lessee is entitled to remain in possession of holding until he has been paid the value of the improvements. He does not become a trespasser on the expiry of the period However he ceases to be a tenant unless the landlord subsequently assents to his holding over, and is not entitled to any notice before he is sought to be evicted. A suit to recover possession from a kuzhikanom lessee after the expiry of the period of his lease must be regarded as practically a suit for redemption. The Court should on ascertaining the value of the improvements fix a time within which the compensation will have to be paid and pass a decree directing surrender on the expiry of that period. (*Seshagiri Aiyar and Bakewell, JJ.*) THEMAN *v.* KUNHI PATHUMMA. **41 Mad. 118 : (1917) M. W. N 784 : 6 L. W. 570 : 43 I. C. 757 : 34 M. L. J. 128.**

——*Landlord and tenant*—Verumpattam *lease—Nature of—Notice—Required to be reasonable and not 6 months.*

In the absence of an express contract to the contrary a *Verumpattam* lease must be treated as a lease from year to year, and the ordinary presumption about twelve years in case of a kanom, is not applicable to a *Verumpattam* lease.

In case of a *Verumpattam* lease, only a reasonable notice to the lessee and not a six months' notice is necessary. The question of what amounts to a reasonable notice is one of facts and is to be determined according to the particular circumstances, and local customs regarding harvesting and letting of lands. The exact synchronizing of the date fixed in the notice of relinquishment with

the termination of the lease period is only of importance in so far as it prevents difficulty in apportionment. (*Ayling and Napier, JJ.*) GANGADHARAN PATTAR *v* CHARIA KUNJUN NI RAJAH.
8 L. W. 491 : 42 I. C. 268 : 33 M. L. J. 512.

———*Landlord and tenant—Rent—Set-off—Improvements.*

Under Malabar Law a landlord may set off all arrears of rent for whatever period due against the value of improvements payable by him. (*Oldfield and Phillips, JJ.*) HARI HARA MANGALATH *v.* IBRAYAN KUTTI.
38 I. C. 655 :
(1917) M. W. N. 275

———*Landlord and tenant* — Khuzikanom *lease—Incidents.*

Where *khuzhikanom* tenants cut trees wrongfully from the land during their 12 years term the landlord is, under the Malabar common law, entitled to set off their value against the value of the improvements payable by him to the tenants. (*Sadasiva Aiyar and Napier, JJ.*) PUMPALIYA VENGALIYA *v.* KUNHAMINA.
25 I C. 7

———*Landlord and Tenant—Improvements—Compensation for—Rights of purchaser of lessee's interest.*

When a subsequent lessee purchases the household interest of a prior lessee, he is entitled to compensation from the lessor not only for the improvements made by himself but also for the improvements made by his predecessor-in-title The tenant should be allowed to remove the buildings, etc., within a reasonable time and on his failure to do so, he is entitled to a compensation on a reasonable scale. (*Tyabji and Spencer, JJ.*) PATTUNGAL MOIDIN KUTTI *v.* C P. UMANAYYA UMMA.
24 I. C. 849.

Land Tenure.

———*Land tenures*—Melcharath—*Grant of—Kanom if terminated.*

When a *melcharath* is granted, that does not *ipso facto* put an end to the interest of the *Kanomdar.* The latter has his full rights till he is fully redeemed. A melcharath granted without authority can be satisfied by the person who has authority. (*Oldfield and Ramesam, JJ.*) KOZHIKOT PATINHARE KOVILAGATH THAMBATTI THAMBURATHI *v.* SANKARA MENON.
1924 M. 245.

———*Land Tenures—Alienation—Forfeiture.*

Inalienability and forfeitability of land tenures of Karamakari and Adimayavana are not allowed. (*Ayling and Krishnan, JJ.*) ZAMORIN RAJA AVERGAL OF CALICUT *v.* UNIKAT KARNAVAN SAMU NAIR.
15 L. W. 164 : 1922 M. 290.

———*Land tenure—Service tenure—Santhathi Brahmaswom—Adimayavana—Alienability—Liability to resumption.*

Assuming without deciding that service tenures like Santhathi Brahmaswom and Adimayavana are inalienable, it is not part of the customary law of Malabar that on such alienation the grantor is entitled to resume the grant and re-enter on the lands granted. Cases and text-books

considered. (*Schwabe, C. J., Oldfield, Phillips, Devadoss and Venkatasubba Rao, JJ.*) AYYAKUTTI *v.* KRISHNA PATTAR.
45 Mad. 394 : (1922) M. W. N. 192 :
31 M L. T. 1 : 15 L. W. 650
43 M. L. J. 1 : 1922 Mad. 274.

———*Land tenure* —Anubhavam *tenure—Forfeiture.*

Quaere. — Whether an *anubhavam* tenure in Malabar can be forfeited for denial of landlord's title. (*Napier and Odgers, JJ.*) SREDHARAM VALIA RAJAH *v.* NARAYANA.
(1921) M. W. N. 639 : 41 L. J. 525.

———*Land tenure*— Kudima *and* adima *tenures—Resumption of grants.*

Kudima and *adima* tenures (grants for past services) cannot be resumed. A *Kudima* tenure granted for future services will be forfeited if the tenant refuses to perform such services. A denial of landlord's title amounts to a refusal to render the necessary services. (*Oldfield and Seshagiri Aiyar, JJ.*) KOLENGERETH RAMAN NAIR *v.* MARRI YAMMO.
43 Mad. 480 : (1920) M. W. N. 332 :
56 I. C. 13 : 11 L. W. 513.

———*Land tenure—Karamakari—Adimayavana—Inalienability, forfeiture—Waiver.*

Karamakari and Adimayavana tenures are alienable by custom in South Malabar. The jenmi is not entitled to forfeit them on alienation. The onus of proving a custom of inalienability of such tenures is on the person setting it up. Evidence as to grant for the perfomance of future services is inadmissible in considering the question as the resumption of such *grants* arises under the general law itself and not from any special custom (*Ayling and Krishnan, JJ.*) ZAMORIN OF CALICUT *v.* UNIKAT KARNAVAN SAMU NAIR.
38 M. L. J. 275 : 27 M. L. T. 111.

———*Land tenure — Anubhavam tenure—Kanom—Redemption.*

"Anubhavam" may be used with reference to the tenure of land and it will *prima facie* import an irredeemable tenure or it may be used with reference to specified money or grain rent charged on the land and in that case it will not imply any tenure in favour of the grantee. Where the remuneration mentioned in the deed is a definite quantity of grain out of the produce of the lands the presumption is that only a rent charge was granted. 30 M. 203; 29 M. 501 Foll. If the grantor reserves to himself a definite quantity of the produce as rent and the whole of the produce of the lands subject only to the payment of that small rent is to be enjoyed by grantee the presumption is that the land itself is held under the service tenure. 27 Mad. 202 Foll. (*Oldfield and Spencer, JJ.*) PUTHUR TARWAD KARNAVAN *v.* MUTHIYALUR KUMARAN RAICHAN.
43 I. C. 379.

———*Land tenure—Adima and anubhavam—Nature of.*

Adima and anubhavam indicate the same kind of tenure. Inalienability is a characteristic of

this tenure. (1917) M. W. N. 419 ; 40 I. C. 769. (*Ayling and Napier, JJ.*) VENKATAGIRI PATTAR *v.* MANAVIKRAMA
(1917) M. W. N. 419 : 40 I. C. 769 : 6 L. W. 114.

———*Land tenure—Anubhavam.*

The term "anubhavam" confers a permanent tenure when used in a grant of land (*Bakewell and Napier, JJ.*) KRISHNA AIYAR *v.* MURINGA MALLIAL. 32 I. C. 982.

———*Land tenure — Anubhavam tenure—Forfeiture of tenancy by denial of title.*

Where land is held on *anubhavam* tenure, the denial of the landlord's title not directly made to the landlord does not work a forfeiture of the tenancy. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) SANKARAN NAIR *v.* KOCHAPPU MENON. 28 I. C. 427.

———*Land tenure—Villakhu money—What is.*

"Villakhu money" customarily paid by house-holders in Malabar to the temples on whose land they are living, is in the nature of quit-rent, and a grant of the said sites to the house-holders by the Rajahs, though it confers a permanent tenure on the grantees, is subject to the payment of the quit rent. (*Wallis, C. J. and Hannay, J.*) CHERIA PANGY ACHAN *v.* KRISHNA PATAI.
28 I. C. 8 : 1 L. W. 767.

———*Land Tenure—Kudima tenure—Forfeiture.*

A landlord's power to recover the land and to oust the tenant in *Kudima jenmam* demises is limited to cases where the tenant omits to perform the services for the performance of which the grant was made. A denial of title is not enough. (*Spencer and Napier, JJ.*) THIKKILLATH TARWAD KAPANAVAN *v.* VADAKKA CHATHIBIKATH MANCHU NAIR. 27 I. C. 863 : 2 L. W. 102

———*Land tenure—"Anubhavam" tenure—Alienation of.*

Alienation of lands held on *anubhavam* tenure to a stranger puts an end to the tenure and the lands revert to the grantor even without any express clause, in the grant providing for a re-entry. 27 M. 202. F : 36 M. 380 Dist. (*Sadasiva Aiyar and Hannay, JJ.*) UKKANDTH *v* PULIYAKOT KUNHI KUTTAN. 27 I. C. 10

———*Land Tenure—Karamakari tenure.*

"Karamakari tenure" is non-transferable in Malabar and its holder has a permanent right of occupany confined to cultivation only, without any right of alienation. Therefore, such a tenant's alienation *ipso facto* extinguishes the tenure. The absence of express provision for re-entry is immaterial. (*Benson and Sundara Aiyar, JJ.*) ACHUTHA MENON *v.* SHANKARAN NAIR
36 Mad. 380 : (1911) 2 M. W. N. 529 : 22 M. L. J. 118 : 12 I. C. 1007 : 10 M. L. T. 521.

Maintenance.

———*Maintenance—Junior members—Separate maintenance—Right to—Decrees against karnavan—Form of.*

The junior members of a Malabar Tarwad are entitled to receive maintenance out of the Tarwad house when there is no room for them in the house. If the karnavan makes an insufficient allowance, they can apply to court to rectify the same.

Prima facie the junior members living out of the Tarwad should be treated equally, but the circumstances of each may be looked into in fixing the amount. It is for the karnavan to judge what each should get. Such considerations as health, need for education, earning capacity, prior maintenance grants, can be taken into consideration. What is reasonable maintenance is a question of fact, and a Court will not lightly interfere with the decision of a karnavan as regards the rate he fixes. When a decree for maintenance or arrears is passed against the karnavan of a Malabar Tarwad the proper form is not to make it personally against him but against him as karnavan and against the income of the tarwad properties and the properties of the tarwad. (*Schwabe, C. J. and Wallace, J.*) KOTTAL KUNHALIKUTTY HAJI *v.* KUNHAMAYAN.
46 Mad. 567 : 44 M. L. J. 212 : 17 L. W. 536 : 32 M. L. T. 366 : 1923 M. W. N. 247 (H. C.) : 1923 Mad. 280.

———*Maintenance — Menchilavu — Right of Anandravan and his wife.*

An anandravan is not entitled to claim against the karnavan of his tarwad *Menchilavu* to his wife who belongs to another tarwad (*Phillips and Napier, JJ.*) RAVUNNI ACHAN *v.* KIZHAKA NADUVATH. 42 Mad. 789: 10 L. W. 142.
(1919) M W.N. 571 : 52 I. C. 918: 37 M L.J. 157.

———*Maintenance — Male member leaving tarwad to live in wife's tarwad—Menchilavu.*

A male member of a Malabar tarwad house soley for the purpose of living with his wife is entitled to separate maintenance and *menchilavu.* 36 Mad. 203; 36 Mad. 591; 36 Mad. 593 Foll. *Per Seshagiri Aiyar, J.*—The Customary Law of Malabar is that ordinarily every member of a tarwad house should be maintained by the karnavan. The onus of proving that his departure from the tarwad is for proper cause is on the member leaving the tarwad house and it is not for the karnavan to show that it was improper. 35 M. L.J. 565, Diss. *Menchilavu* is part of maintenance and does not stand on a higher footing. (*Oldfield and Seshagiri Aiyar, JJ.*) KALAVOOR GOVINDAN NAIR *v.* KUNJA NAYAR. 42 Mad. 686 : (1919) M.W.N. 302 : 26 M. L. T. 189 : 51 I. C. 326 : 36 M. L. J. 565.

———*Maintenance — Claimant living away from tarwad house and maintained by husband—Effect—Custom against right to sepaarte maintenance in such cases—Proof—Onus—Quantum.*

A junior member of a Malabar tarwad who lived away from the tarwad house, but under the portection of her husband is entitled to maintenance from the tarwad and her right thereto is not conditional upon her husband being unable to maintain her. Per *Sadsaiva Aiyar, J.*—As a general rule, the desirability of living with her husband is a good ground for a Nair lady living away from the tarwad house. The onus of proving a custom that a junior member of a Malabar

tarwad forfeits her claim to separate maintenance by living away from the tarwad house for the purpose of living with her husband is on the party setting up such a custom. (*Ayling and Sadasiva Aiyar, JJ.*) KUNHI KRISHNA MENON *v.* KUNHI KASAMMA 24 M. L. T. 448 : (1918) M. W. N. 761: 49 I. C. 471: 35 M. L. J. 565.

———*Maintenance—Allowances—Nature of—Female member married under Malabar Marriage Act—Claim for maintenance for period during which she was living with her husband.*

In a suit for arrears of maintenance brought against a malabar tarwad by a female member thereof, whose marriage had been registered under the Malabar Marriage Act, on her own behalf and on behalf of her childern, maintenance could not be denied to plffs unless circumstances showed that the tarwad was not in a position to give separate maintenance. The right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and is not founded upon moral or quasi legal obligations or inability to maintain himself or herself. (*Seshagiri Aiyar and Bakewell, JJ.*) MANIKATH AMMINI AMMAL *v.* MANIKKATH PADMANABHA MENON. 41 Mad. 1075: 24 M. L. T. 498 : 48 I. C. 104 : 35 M. L. J. 509

———*Maintenance—Right to—Cr. P. Code, S. 488.*

A child possessing a legally enforceable right to maintenance from its mother's tarwad and being actually maintained by that *Tarwad* cannot obtain an order for maintenance against its father under S 488. (*Abdur Rahim and Ayling. JJ.*) CHANTON *v.* CHAKKPAYAN MATHU. 39 Mad. 957 : (1916) 1 M. W. N. 111 : 17 Cr. L. J. 16 : 19 M. L. T. 23 : 32 I. C. 144.

———*Maintenance — Karar — Tavazhi — Members subsequently born — Karar between karnavan and members of tavazhi—Members born subsequent to karar entitled to claim maintenance*

Where a *karar* between a *karnavan* of a Malabar *tarwad* and the head of *tavazhi* provides for the maintenance of the then existing members of the *tavazhi*, members born in the tavazhi subsequent to such karar are entitled to similar maintenance and the *karar* does not bar their claim and in a suit for maintenance of the minor members it is not necessary to make a prayer to set aside the *karar* as they were not parties to it. (*Sankaran Nair and Oldfield, JJ.*) PATTU NEITHIER AMMA *v.* THAZATHA DHARMAM ACHAN. 21 I. C. 755

———*Maintenance—Menchilavu—Meaning — Right of members of tarwads, and tavazis—Karar fixing Menchilavu—If binds members not parties to its.*

Menchilavu means an allowance required for purposes other than mere food and clothing. It includes sums required for keeping up a respectable appearance consistent with the position and dignity of the family to which a person belongs. Members of Malabar tarwads and Tavazis are entitled by usage to this allowance. A karar fixing the Menchilavu will not bind the members, not parties to it. The award of Menchilavu even if fixed by karar is subject to fluctuations under the altered circumstances of the tarwad. (*Sadasiva Aiyar and Sundara Aiyar, JJ.*) KELU ACHAN *v.* LAKSMI NAITHYAR AMMAL. 18 I C. 234: (1913) M. W. N. 379.

———*Maintenance—Tavazhi members—Right of.*

A Tavazhi member is entitled to maintenance from the Tavazhi properties especially when the *Tarwad* is unable to maintain him and he has no private property sufficient for his maintenance. *Per Abdur Rahim, J.*—He will be so entitled even apart from the fact whether the *Tarwad* is able to maintain him or not as all members have an interest in *Tavazhi* property. (*Miller and Abdur Rahim, JJ.*) NAKU AMMA *v.* RAGHAVA MENON. 18 I. C. 1: 38 Mad. 79.

———*Maintenance—Female member of tarwad living separately with her husband, whether entitled to claim.*

A member of a tarwad who leaves the tarwad housd for a justifiable or proper purpose would be entitled to enforce his or her right to share in the tarwad by receiving maintenance out of it. Separate residence is no ground for refusal A waiver of the right to maintenance may be inferred by the court where the wife lives separately with her husband, a rich man, without making any demand for maintenance. The desirability of living with one's husband is a good or justifiable course for a lady to live away from the tarwad house, though custom is against it. Some social customs may change without affecting legal rights. (*Sundara Iyer and Sadasiva Iyer, JJ.*) PAYYAM VELLATHUMKARA MUTHU AMMA *v.* PAYYAM VELLATHUMKARA GOPALAN. 36 Mad. 593 : 23 M. L. J. 496: 16 I. C. 895 : 13 M. L. J 120.

———*Maintenance—Separate maintenance—Grounds—Discomfort in dwelling in family house.*

It is not open to a junior member of a Malabar tarwad to leave the tarwad house and claim separate maintenance, simply because he or she does not feel comfortable there, but such maintenance should be allowed when the discord between the claimant and the other members of the tarwad is so great as to make it impossible for her to live in the family house. In each case the Court should decide whether the discomfort is so serious as to justify the award of separate maintenance and whether the plff. himself or herself was not greatly responsible for the discomfort A junior female member of a Malabar tarwad left the family house and three years afterwards claimed separate maintenance on the ground that after she returned from a pilgrimage, there was friction between her and the other members because she refused to ratify a *karar* executed by them in her absence. *Held*, that she has not established her right to separate maintenance. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KUNHI AMMA *v.* AMMU AMMA 36 Mad. 591: (1912) M. W. N. 1233: 16 I. C. 178: 24 M. L. J. 559.

MALABAR LAW—Maintenance.

———*Maintenance—Separate maintenance—Rights to—Arrears—Part maintenance*

Separate maintenance in a family governed by *Aliyasanthana Law* will be awarded only where there is inconvenience in living in the family house on account of want of space or quarrels among the members or misconduct of the *karnavan* or where the woman and her children are living with her husband in his house. In awarding maintenance one member should not be allowed more than what he would be entitled to, if he remains in the house and it is also wrong to divide the total income into as many shares as there are members because the ceremonial expenses and other expenses of management have to be met by the *karnavan*. 7 M 233, 14 M. 101 relied upon. In a suit for part maintenance, the Court can infer waiver of the right to it from the conduct of the parties and it may be sufficient to show that the conduct of the parties was such as to lead to that inference. 24 M. 73 Rel. (*Sundara Iyer and Spencer, JJ.*) MARAVADI *v.* PAMAKKAR.
36 Mad. 203: 11 M. L. T. 112: (1912) M. W. N. 109: 14 I. C. 383: 22 M. L. J. 309.

Mortgage.

———*Mortgage—"Panayam."*

The word "Panayam in documents executed in Malabar means a mortgage of the property. Such mortgage is a simple mortgage, even if the transfer of interest is not formally expressed in it. (21 M. L. J. 562: 23 M. L. T. 131, 26 M. L. J. 514: F. 10 M. 509 Diss: 29 I. C. 605 Dist. (*Sadasiva Aiyar and Spencer, JJ.*) SAMANDAN KARAKAT ETATHIL *v.* MANIKOTH VELLUVA VETTIL. **6 L. W. 296. 42 I. C. 849: 33 M. L. J. 679**

———*Mortgage—Improvements—South Canara—Mortgagee—Meaning of Improvements.*

In South Canara a usufructuary mortgagee is, except in case of contract, entitled to the value of improvements effected by him. Improvements mean any work beneficial to the property or a work to which a reasonable owner would have consented. (*Subramania Aiyar and Davies, JJ.*) DARAMMA *v.* MARIAMMA. **19 I. C. 371: 24 M. L. J. 397.**

Mutt.

———*Mutt—Succession — Election—Nomination.*

Unlike the east coast Mutts, the rule of succession in the west coast Mutts is generally based on the injunctions contained in the Smritis *i. e.*, the title to headship does not depend upon nomination by the head, nor on selection by the disciples, but solely upon the length of the period during which a person has been a sannyasin. According to the established usage of the Naduvilai *Mutt* in Malabar, a sannyasi can become a member of the *Mutt* by the ordination of the head of the *Mutt* only, which a junior swami cannot do. (*Ayling and Napier, JJ.*) NARAYANA BARATHIGAL *v.* ITTULUI AMMA. **39 I. C. 893.**

Nambudiris.

———*Nambudiris—Law governing.*

The rule of Hindu Law that a son is bound to pay his father's debts does not apply to *Nambudiris*. A *Nambudiri Illom* though governed by the ordinary rules of Hindu Law, is also governed by the rules relating to the *Marumakkathayam tarwad* in some respects (*Miller and Sadasiva Aiyar JJ.*) KUNHA KUTTI AMMAH *v.* MALLAPRATHA.
38 Mad. 527. (1914) M. W. N. 149 22 I. C. 546: 15 M. L. T. 201

———*Nambudiris—Affiliation by illom.*

Among Nambudiris of Malabar, the members of an illom consisting of one male and two females, cannot validly affiliate another by requiring a member of another illom to marry and beget issue for the first illom, unless he is the lady proposed to be married to him, is previously made legally an heir of the aforesaid illom. The female issue born of the marriage would be validly affiliated if the said condition is fulfilled *Quaere*—Whether the affiliation is valid without the said condition precedent. (*Benson and Wallis, JJ.*) TACHOOR POONKUZHI ILLATH *v.* NICHOLAS.
23 M. L. J. 165: 15 I. C. 100: (1912) M. W. N. 728.

Partition.

———*Partition—Tavazhis whether joint or divided.*

In a suit by the members of a Tavazhi of a Mopla Tarwad against another Tavazhi and an alienee from the latter on the ground that the Tavazhis were joint and undivided and that the alienation was invalid and not binding on plaintiffs.

Held reversing the decision of the High Court that the parties having long been living separately and enjoying separate properties must be held to have divided.

By the Law which governs a Mopla Tarwad, there cannot be a partition unless all the members consent.

The word Tavazhi is a word of equivocal meaning and may fairly be used when the separation is complete. (*Sir Lawrence Jenkins.*) SULAIMAN *v.* BIVATHUMMAH. **32 M. L. J. 137: (1917) M. W. N. 213: 1 Pat. L. W. 210: 21 M. L. T. 210: 25 C. L. J. 273: 21 C. W. N. 553: 39 I. C. 243: 19 Bom. L. R. 394 P. C.).**

———*Partition—Consent of all members, if essential—Ratification by will.*

Where in spite of the dissent of one of the members a partition of the *tarwad* property was effected and the share of the dissenting member was kept separate and he did not sue to set it aside but left a will stating that his wife and children are to take his share in case he did not himself set the partition aside in his lifetime, *held* in a suit for fresh partition by the widow and children of the dissenting member, that the will was a conditional ratification of the partition which became effective when the testator died, that the ratification completed the partition and that the suit was not maintainable. (*Wallis, C. J. and Seshagiri Iyer, J.*) KALLINI AMMAL *v.* NARAYAN MENON. **45 I. C. 758: (1918) M. W. N. 38.**

———*Partition—Tarwad—Rights of junior members.*

A *tarwad* can be validly partitioned only with the consent of all its members but one member cannot sue for partition. A partition effected in

a Malabar Tarwad lawfully between all the adult members, leaves unaffected the right of junior members to question alienations or acts of mismanagement of the *karnavan* in order to preserve the integrity of the family property *Per Seshagiri Aiyar, J.*—The junior members of a tarwad can question the acts of the *karnavan* for the purpose of preserving the tarwad property for their benefit and ask for the karnavan's removal. *Per Sankaran Nair and Coutts Trotter, JJ.*—The minor members of a Malabar tarwad are not entitled to interfere in a family arrangement in so far as it affects the adult parties thereto, but can show that their interest were not properly represented or that the karar was in fraud of their rights and ask relief for themselves on that footing. (*Sankaran Nair and Coutts Trotter, JJ.*) PARUKUTTI *v.* KELLAPPAN NAIR.
31 M. L. J. 479: 34 I. C. 818: (1917) M. W. N. 106.

———*Partition—When allowed — Aliyasanthana law.*

Under Aliyasanthana Law as in Marumakatayam Law, no partition of *Tarwad* property should be permitted during the minority of some members of the Tarwad, unless such partition is shown to be beneficial to such minors. 29 M. 62 F.B. (*Wallis, C.J. and Sadasiva Aiyar, J.*) SARVESHAI SHETTATHI *v.* PUTTAMMA SHETTATHI.
29 I. C. 474.

———*Partition—Limited estate.*

Generally holders of limited estate in property under a karar are entitled to enforce partition. (*Benson and Sundara Aiyar, JJ.*) CHERIA IMBICHI BEEBI *v.* SYED ALI.
13 I. C. 791 : (1912) M. W. N. 45.

———*Partition— Tarwad separating into distinct branches—Claim to jointness—Onus of proof*

Where a tarwad separated into distinct branches enjoying properties separately for a long series of years, the party asserting jointness must prove it. Opinions of members do not affect the real status of the family, 20 M. 256 Ref. Lapse of time, though it cannot destroy community of interest will, coupled with apparent non-exercise of proprietary right, raise a presumption against jointness which will become stronger with increase of time. Community of pollution merely shows descent from common ancestors and is no proof of jointness. Acquiescence in the alienations by another branch though it will not destroy jointness, will, especially if the parties have lived and behaved like members of a divided family raise an inference of division. (*Benson and Sundara Iyer, JJ.*) NANU *v.* MUNDACHERI PUVAYIL.
9 I. C. 849 : (1911) 1 M. W. N. 281.

Pre-emption.

———*Pre-emption—Involuntary sale —Effect.*

The right of pre emption of an *othi* mortgagee in Malabar does not arise in the case of involuntary sales, unless the statute under which the sale takes place provides for this right. The statutory provisions of the C. P. Code as to sales in execution of decrees are inconsistent with the *othidar's*

right of pre-emption against a purchaser in Court auction. (*Wallis, C. J., Sadasiva Aiyar and Spencer, JJ.*) VASUDEVAN *v.* ITTIRARICHAN NAIR.
41 Mad. 582 : 23 M. L. T. 302 : (1918) M. W. N. 318 : 7 L. W. 547 : 45 I. C. 46 : 34 M. L. J. 412.

———*Pre-emption — Othidar's right—Limitation.*

The Othidar's right to pre-empt consists in his right to elect, where there has been an attempt on the part of the owner of the property to sell it to a third person, from the moment the fact comes to his knowledge, whether he will buy it for the same price as that offered by the third person or not. (*Abdur Rahim and Sundara Iyer, JJ.*) MAMADI *v.* ACHARATH PARAKAT.
38 Mad. 67 : 12 M. L. T. 535 : (1912) M. W. N. 1217 : 17 I. C. 337 : 23 M. L. J. 607.

———*Pre-emption—Othidar's right.*

An *othi* of temple land was executed by A, the trustee in favour of B. A then wanted a further loan from B. Before this further loan was granted, A created an *othi* in favour of C in respect of property mortgaged to B. A part of the consideration for the second *othi* was the discharge of a previous kanom mortgage held by C. In a suit for cancellation of the second *othi*, instituted by B. *Held*, that B had not waived his pre-emption right as A gave no notice to B as to how much money and on what conditions C was prepared to advance. The mortgage in favour of C being a complete transaction, pre-emption could be claimed by B As C was not bound under his mortgage to surrender the lands previously held by him on *kanom* unless he was put in possession of B's lands, the Court could not direct a conveyance in favour of B. The proper course is to declare C's mortgage invalid as against B's *othi* right. (*Benson and Sundara Iyer, JJ.*) PALLAKUNNATH KOLAYI *v.* NARAYANA MANGALNATH.
9 M. L. T. 495 : 9 I. C. 1010: (1911) M. W. N. 263.

Stanom.

———*Stanom—Stanomdar— Powers of alienation.*

A *Stanomdar* is also a manager of the family for the time being ; if he grants a lease or makes an alienation to enure beyond his life-time which is for the benefit of the family, it will be upheld, as, on the other hand any such transaction, if prejudicial to the family will be set aside. (*Spencer and Venkatasubba Rao, JJ.*) MEETHALE CHALIL P. T. KELU KURUP *v.* K. P. P. RAMAN NAIR.
1924 Mad. 247.

———*Stanom — Alienation by stani— When binding on successor.*

The party by whom it is alleged that an alienation by a stani is valid beyond the life-time of the grantor, that is, that it is binding on his successors, ought to prove that the alienation was for the benefit of the estate or (to put it in a different way) was such as would be binding on the other members of a joint Hindu family if made by a

MALABAR LAW—Stanom

manager of the family. (*Wallis, C. J. Sadasiva Aiyar and Spencer, JJ.*) KOZHIKOT SRI MANAVEDAN *v.* ZAMORIN OF CALICUT. **25 M. L. T. 85 : 9 L. W. 268 : (1919) M. W. N 228 and 436 : 49 I. C. 303 : 36 M. L. J. 103.**

——*Stanom—Stani, powers of.*

A *stani* can create a valid melcharth for 12 years and it is *prima facie* binding on his successor who to set it aside must prove that it was not granted in the ordinary course of business or that a proper and reasonable rent was not reserved. Cases on the subject considered. (*Ayling and Napier, JJ.*) ANANTANARAYANA IYER *v.* KOZHIKOTE PATINHARE KOVILLAKATH THIRUVEERANA YANA. **(1917) M. W. N. 707 : 41 I. C. 536 : 33 M. L. J. 459.**

——*Stanom—Succession.*

If a member of a *Tarwad* succeeds to a *Stanom* and acquires property which he does not dispose of his *Tarwad* will be entitled to it. If the *Tarwad* becomes extinct the quondam member who had become a *stani* may claim the property Attainment to a *Stanom* does not sever the relationship altogether. (*Seshagiri Iyer and Napier, JJ.*) KRISHNA KIDAYU *v* RAMAN. **38 I. C. 638 : 39 Mad. 918.**

——*Stanom—Stani—Position of.*

A stanom property vests in the *stani* and not in his family. A *stani* has an estate in the property similar to that of a Hindu widow and on his succession to the *stanom* he loses his rights in the tarwad property, though there is no breakage in his relationship for religious and ceremonial purposes. Succession to *stanom* property is determined by seniority in age and any disqualification to succeed such as the holding of a *palni hakar Rajaship* must be made by clear evidence of family tradition and custom. (*Ayling and Seshagiri Iyer, JJ.*) PATINHARKURU *v.* RAMAN VARMA. **24 I. C. 519 : 28 M. L. J. 669**

Tarwad.

——*Tarwad—Tavazhi — Exclusion of male members—Custom.*

There is no custom or usage prevailing among the Marumakkattayam Mappilas of the North Malabar, by which property may be settled as *strisothu* on the female members of *tarwad* or *tavazi* to the exclusion of the males or so as at least to authorise the female members to sell the family property otherwise than for necessary *tarwad* purposes without the consent of the males. *Held* that the evidence was wholly inadequate to prove the prevalence of any custom by which males are treated as having no right to be consulted in the management of the affairs of the *tarward* or *thavazi* and no right to participate in the income of the *tarwad* or *tavazi* properties. (*Spencer, Kumaraswami Sastri and Ramesam, JJ.*) MAHOMED KUNHI *v.* PACKRICHI UMMA. **46 Mad. 650 : 18 L. W 502 : (1923) M. W. N. 849 : 1924 Mad. 28.**

——*Tarwad—Acquisitions of members of family—Devolution on instestacy—Tawazhi—Relationship between—Possession by Tavazhi when adverse.*

MALABAR LAW—Tarwad.

Under the Malabar law the acquisitions of a member of the tarwad if undisposed of at his death do not go to his nephews but form part of the family properties being managed by the eldest surviving male member. Where the eldest male member of a Tavazhi forming a branch of a tarwad, also happens to be the karnavan of the tarwad, there can be no question of adverse possession by the Tavazhi as against the Tarwad. (*Spencer and Devadoss, JJ.*) ABUVAKHAR *v* KUNHIKUTTIYALI. **16 L. W 768 : 31 M. L. T. 389 (H. C.) : 1923 Mad. 153.**

——*Tarwad—Conversion of a member to Mahomedanism—Effect.*

Apostacy from Hinduism does not entitle a member of a Malabar *Tarwad* to claim partition of the property and delivery to him of his share under the Removal of Caste Disabilities Act. The effect is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. (1912 M. W. N. 386 Diss from) (*Wallis, C. J. Spencer and Kumaraswami Sastri, JJ.*) PATUMMA *v.* RAMAN NAMBIAR. **44 Mad. 891 : (1921) M. W. N. 594 : 14 L. W. 257 : 64 I. C. 676 : 41 M L. J. 243 (F. B.)**

——*Tarwad — Renewal of lease by junior members—Effect.*

Where a *tarwad*, which took a lease, refuses to renew it, but the junior members alone take the renewal, it does not enure for the whole *tarwad*. A presumption may however arise in favour of co-lessees. *Per Oldfield, J* :—The renewal of lease by junior members is presumed to be taken on behalf of the other members of the *tarwad* as well. (*Oldfield and Seshagiri Aiyar, JJ.*) THAMA-PANIKKAR *v.* KUNHUNNI PANIKKAR. **63 I. C. 3 : 13 L. W. 441.**

——*Tarwad—Alienation—No steps by junior members Attaladakam heirs.*

Where the junior members did not question or set aside alienations by a karnavan of a tavazhi either during the lifetime or after his death the attaladakkam heirs cannot set aside the sale on the death of the last surviving member. (*Abdur Rahim and Oldfield, JJ.*) KATTAPRATH VATAKKA PURAYIL MAMMAD KARNAVAN *v.* MAMMAD. **29 M. L. T. 45 : 12 L. W. 634 : (1920) M. W. N. 768 : 60 I C. 118 : 39 M. L. J. 702.**

——*Tarwad—Alienation of property—Right of sale.*

A sale of the joint property of a *tarwad* by some of the members cannot bind the other members of the *tarwad* as a whole, unless it is for consideration and is beneficial to the family as a whole and unless the *karnavan* also joins in it representing the *tarwad*. The fact of *karnavan's* absence from the place at the time of sale will not make the sale of the property by others binding on the *tarwad*. (*Oldfield and Phillips, JJ.*) PUTHISSERI *v* THOZUKK. **(1917) M. W. N. 222 : 21 M. L. T. 299 : 39 I. C. 46 : 32 M. L. J. 489.**

——*Tarwad—Acquisition—Property in name of one member—Presumption.*

There is no presumption that properties standing in the name of an *Anandravan* are *Tarwad*

properties; nor is there a presumption that the property is self-acquired by the Anandravan. The question whether such properties belong to the tarwad or to the Anandravan will depend upon the circumstances of each case. (1917) M W N. 535 (*Wallis, C.J and Burn, J*) DHARNU SETTI *v.* DEJAMMA. **5 L. W 259 : 38 I. C 292 : 1917 M. W. N. 535.**

——*Tarwad—Right of junior members—Reimbursement.*

When it appears that money was taken and spent by junior members of the family for protecting the tarwad property from malversation or mismanagement the lender should have a claim on the tarwad for the loan. *Per Wallis C. J.*—If the *Karnavan* is submitting to an infringement of the tarwad right of property it is competent to the next senior members to institute a suit to protect the rights of the family. *Per Seshagiri Aiyar, J,*—Though as a rule only the *Karnavan* can represent the *tarwad* in transactions with strangers or pledge the family credit, yet when the *Karnavan* is acting improperly and to the detriment of the *Tarwad*, the junior members have the right to take necessary steps to protect the family interest and the expenses rightly incurred for this purpose can be reimbursed out of the family estate, even though lenders in such cases have a risk of losing the money, if it is found that the purpose of the loan is unnecessary or not beneficial to the family. The right of junior members to question alienations to sue to recover property from trespassers to claim maintenance and to succeed to the *karnavanship* are all personal rights. Where the acts of a *Karnavan* are such as to endanger tarwad property the junior members of the tarwad have power to act on their behalf. There is no right to proceed against the share of the alienating member in a *Tarwad* unlike in a joint Hindu family in case the alienation does not bind the whole family. Defendants 1 and 2, two junior members of a *Tarwad*, contracted to engage the services of a certain person the plff. in the suit in connection with a contemplated suit against Government to protect the family estate and had promised to pay him certain remuneration in the event of success. The first defendant compromised the suit. In a suit by a plff to recover his remuneration, *Held*, that in the absence of proof that the suit was in the interest of the family and also that the agreement to pay the plff. the remuneration stipulated for was necessary, the action was unsustainable. (*Wallis, C. J. and Seshagiri Iyer, J.*) RAJA OF ARAKAL *v* CHURIA KUNHI KANNAN. **31 I. C. 482 : 29 M. L. J. 632.**

——*Tarwad—Tavazhi—Formation of.*

The result of a woman marrying another husband and bearing children to the latter will be that there will be two separate groups in the same *Tavazhi* holding two separate *Tavazhi* properties, the senior male in each *Tavazhi* group being the *Karnavan* of that *Tavazhi* group. (*Wallis, C. J. Sadasiva Aiyar and Srinivasa Iyengar, JJ.*) CHAKKARA KANNAN *v.* KUNHI POKKER. **39 Mad. 317 : 18 M. L. T. 255 : (1915) M. W. N. 740 : 30 I. C 755 : 29 M. L. J. 481 (F.B.)**

——*Tarwad—Acquisition—Purchase of property in son's name.*

Where a person, governed by the *Marumakkathayam Law* purchases property in the name of his son to benefit his own wife and children, the property is that of the family and not of the sons. An alienee of certain *Tarwad* properties cannot rely on the existence of decree debts against the *Tarwad* in order to support his purchase, if there are materials enough in the decree to put him on enquiry in the validity of the proceedings. (*Ayling and Tyabji, JJ.*) PAZAYA OTTAYIL MUHAMMAD *v.* ITHIRU AMMAH. **30 I. C. 692.**

——*Tarwad—Acquisition in name of junior member—Presumption.*

When property is acquired in the name of a junior member of a tarwad, there is no presumption that it was acquired for him or for the tarwad. The presumption is one of fact to be drawn from the circumstances of each case and is not one of law (*Benson and Sundara Aiyar, JJ.*) P. C. GOVINDA PANIKKAR *v* T. P. V. NANI *alis* NARAYANI NANGIAR. **21 I.C. 211 : 36 Mad. 304.**

——*Tarwad Rights of members in property.*

Members concurring with each other may dispose of *Tarwad* property as they please. But even if one of the members does not join in an alienation it is invalid unless justified by family necessity because the ownership is in any one dissenting member as in all the other members together. (*Sundara Iyer and Sadasiva Iyer, JJ.*) GOVINDAN NAIR *v.* NARAYANAN NAIR. **12 M. L. T. 585 : (1913) M W. N. 79 : 17 I. C. 473 : 23 M. L. J. 706.**

——*Tarwad—Demise by junior member—Onus.*

There is no presumption that when a junior member of a Malabar Tarwad makes a demise, he does so on behalf of the tarwad The burden of proving that he acted on behalf of the tarwad is on the party alleging the same. (*Sundara Aiyar and Ayling, JJ.*) ETTAKKAMANA MANHOLI GOVINDAN *v.* AMAYA MANGALATH. **15 I. C. 103 : (1912) M. W. N. 821.**

——*Tarwad—Rights of members—Conversion of some member to Christianity—Effect on rights of parties.*

The effect of conversion dissolves the coparcenary. The result is the convert members become co-owners without having the rights and obligations of coparceners as under the *Marumakkathayam Law*. They become tenants-in-common of their joint property and on death of each of them his or her rights descend under the Succession Act by inheritance to his or her children. It is not open to the converts to retain the original law of succession A contract by the converts with the other members to hold property subject to survivorship might be proved even by conduct without evidence of any express agreement. 10 M 69 Foll ; 31 B. 25, not foll : 1 W. R. (P.C.) 1 Ref. to. (*Abdur Rahim and Sundara Iyer, JJ.*) KUNHICHEKKAN *v.* LYDIA ARUKENDEN. **11 M. L. T. 238 : 14 I. C. 480 : (1912) M. W. N. 386.**

MALABAR LAW—Tarwad

———*Tarwad—Gift to children—Effect—Property by the name of the most senior member—Presumption*

A gift to children has not in itself the effect of constituting them into a *Tarwad*.

If the donees do not constitute an independent *Tavazhi* it cannot be presumed that the property which the senior most member acquires in his name, belongs to his brother and sisters and the descendants of the latter. (*Miller and Abdur Rahim, JJ.*) UDAYAMMADATH VITTIL CHATHUKUTTI NAMBIAR *v.* UDAYAMMADATH THAYATH VITTIL RAMAN NAMBIAR. **12 I. C 120 : 10 M. L T. 130.**

———*Tarwad—Temple—Tarwad property.*

Lands set apart for private temples attached to a *Tarwad* cannot be regarded as *Tarwad* properties. They are trust properties which can be held by the *Tarwad* only for purpose of the trust (9 B. 169 F) *Quaere*—Whether where a temple was founded by a *Tarwad* for the benefit of the family, the members for the time being can put an end to the trust so as to affect those who may be subsequently born in the family. (*Benson and Sundara Iyer, JJ.*) PATTANUR VALANGERI *v.* NARAYANAN NAMBIAR. **(1911) 2 M W. N. 378 : 10 M. L. T. 64 : 10 I. C. 398 : 21 M. L. J. 585.**

Tavazhi.

———*Tavazhi—Acquisitions with Tavazhi funds—Nature of—Nucleus.*

Where a member of a Tavazhi acquires properties with the help of tavazhi putravaksam properties, the acquisitions become the property of the Tavazhi and the karnavan of the tarwad cannot claim them. The fact that the Tavazhi was possessed of some funds or nucleus is insufficient to impress the acquisitions of a member with the character of *Tavazhi* property. (*Spencer and Devadoss, JJ.*) ABUVAKKAR *v.* KUNHIKUTTIZALI. **16 L. W. 768 : 31 M. L. T. (H. C.) 389 : 1923 Mad. 153 :**

———*Tavazhi—Self-acquisitions of female.*

The members of the tavazhi and not of the tarwad are entitled to the self-acquisitions of a female member of a Marumakkathayam tarwad after her death as heirs and not as survivors. The descendants form a tavazhi and in their absence, the mother and her descendants form it. (*Benson, O. C. J., Sankaran Nair and Sundara Iyer, JJ.*) KRISHNAN NAIR *v.* DAMODARAM NAIR **38 Mad. 48 : 13 M. L. T. 166 : 17 I. C. 769 : 24 M. L. J. 240.**

———*Tavazhi—Rights of members.*

A member of a Malabar tavazhi, who has incurred expenses for his medical treatment, cannot claim the same as against the karnavan of the tavazhi. He can enforce the same from the karnavan of the tarwad. (*Sundara Iyer and Sadasiva Aiyar, JJ.*) KELU ACHAN *v.* UMALA ACHAN. **17 I. C. 704.**

MALABAR MARRIAGE ACT (IV OF 1896).

———**Ss. 17 and 18**—*Scope of—Registration of marriage—Claim against tarwad.*

Ss. 17 and 18 of the Act do not deprive a member of a tarwad of his or her rights in the tarwad. The registration of the marriage of a female member of a tarwad, under the Act does not cause a forfeiture of her rights and cast the duty of maintaining her and her children on her husband. S. 18 leaves the guardianship of the property untouched. (*Seshagiri Iyer and Bakewell, JJ.*) MANIKKATH AMMINI AMMAL *v.* NANIKKATH PADMANABH MENON. **41 Mad. 1076 : 24 M. L. T. 498 : 48 I C. 104 : 35 M. L. J 509.**

MALABAR MARTIAL LAW ORDINANCE (I OF 1922), S. 4 (2) (b)—*Special Magistrate—Appointment of retired Deputy Collector—Legality of—Criminal Proc. Code, Ss. 12 and 40—General Clauses Act, S. 3 (31).*

The only persons who under S. 4 (2) (b) of Ordinance I of 1922 can legally be appointed Special Magistrates are Magistrates who at the time of their appointment are acting as such and who have exercised the powers of a first class magistrate for not less than two years The appointment of a Deputy Collector who had exercised first class magisterial powers for over two years but who had retired from public service before his appointment as special magistrate, is invalid since his retirement had *ipso facto* determined his magisterial powers.

The definition of " Magistrate " in S. 3 (31) of the General Clauses Act is not exhaustive and is inapplicable to the interpretation of an Ordinance. (*Oldfield and Ramesam, JJ.*) KOTTITHODI MAHOMED HAJI *In re.* **17 L. W. 426 : (1923) M. W. N. 288 : 32 M. L. T. (H. C.) 195 : 24 Cr. L. J. 381 (2) : 44 M. L. J. 428 : 1923 Mad. 598.**

MALABAR (RESTORATION OF ORDER) ORDINANCE (I of 1922), S. 10—*Power to examine witnesses on commission does not exsit.*

Reading S.10 of the Malabar Ordinance of 1922 with S. 503 of the Criminal Procedure Code, a special Judge under the Ordinance has no power to issue a commission to examine witnesses. (*Ayling and Odgers, JJ.*) AYAVALI POKKER, *In re.* **(1923) M. W. N. 758 : 18 L. W. 899 : 74 I. C. 952 : 24 Cr. L. J. 840 : 45 M. L. J. 305.**

MALABAR WILLS ACT (V OF 1898).

———**S. 9**—*Oral bequest, is valid.*

Under S. 9 of Mad. Act V of 1898, oral bequest of immoveable or moveable property in Malabar are invalid. (*Abdur Rahim and Spencer, JJ.*) KADIRI KANAKKA PILLANTAKATH *v.* KOCHIPALLI HUSSAIN. **42 Mad. 761 : 10 L. W. 204 : 20 M. L. T. 195 : (1919) M. W. N 6[illegible]0 : 53 I. C. 262 : 37 M. L. J. 316.**

MALICE—*See* TORT.

MALICIOUS ARREST.
See TEST.

MALICIOUS PROSECUTION.
Abatement of suit.
Burden of proof.
Civil action.
Damages.
Elements to be proved
Innocence.

MALICIOUS PROSECUTION—Abatement of suit.

Malice.
Prosecution.
Reasonable and probable Cause.
Sanction.

Abatement of suit.

——— *Abatement of suit—Death of appellant*

In a suit for damages for malicious search, plaintiff failed to get a decree in the trial Court and during the pendency of appeal died. Being a personal action the suit abates. The rule of English Law as to abatement of personal actions applies to India. (*Abdur Rahim, O.C.J. and Krishnan, J.*) GADIJI MAREPPA *v.* FIRM OF MARWADI VANNAJEE VAJUNJU. **20 M. L. T. 303 : (1916) 2 M. W. N. 280 : 38 I. C. 823 : 31 M. L. J. 772.**

Burden of proof.

——— *Burden of proof—Reasonable and Probable cause.*

In a suit for malicious prosecution, the onus is on the plaintiff to show absence of reasonable and probable cause. Reasonable and probable cause means reasonable grounds for believing that the plaintiff was guilty of the offence charged and not reasonable grounds for coming to the conclusion that the Court would convict him of it. (*Sundarier and Spencer, JJ.*) VAIDENADIER *v.* KRISHNASWAMY AIYAR **36 Mad. 375 : 19 I. C. 665 : 24 M. L. J. 515.**

Civil Action.

——— *Civil action—Suit for damages—Maintainability.*

A suit for malicious prosecution will not lie for bringing an ordinary action however malicious or however great the want of reasonable or probable cause may be except where the proceedings involve "either scandal to reputation or possible loss of liberty to the person" or are specially provided for by the statute. (*Fletcher and Richardson, JJ.*) MOHINI MOHAN MISSER *v* SURENDRA NARAYAN SINGH. **42 Cal 550 : 18 C. W. N. 1189 : 26 I. C. 296 : 21 C. L. J 68.**

Damages.

——— *Damages — Institution of proceeding under S. 107 of the Cr P. C.*

An action for damages for malicious prosecution can be based on the starting of proceedings under S. 107, Cr. P. Code. (*Tudball and Rafique, JJ.*) CHIRANJI SINGH *v.* DHARAM. **19 A. L. J. 191 : 43 All. 402.**

——— *Damages—Cause of action.*

The cause of action for malicious prosecution commences from the date of discharge or acquittal and is not suspended by the possibility of the decision being set aside in revision. (*Macleod, C. J. and Kanga, J.*) PURSHOTHAM VITHALDAS SHET *v.* RAVJI HARI ATHAVLE. **24 Bom. L. R. 507: 47 B. 28 : 1922 B. 209.**

——— *Damages—Suit for—Proof of malice—Reasonable belief—Privilege.*

As a rule, an action lies for the malicious publication of statements, which are false in fact and injurious to the character of another within certain limits, and the law considers such publications malicious, unless, it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In the later class of cases the occasion prevents the inference of malice which the law draws from unauthorised communications and a qualified privilege attaches to the statement so made, if fairly warranted by any reasonable occasion or exigency and honestly made or made in good faith for common convenience and welfare of society. There are three elements necessary to make the defence of qualified privilege good, namely, the occasion must be fit, the matter must have reference to the occasion and it must be published from right motive. Indeed, it is a duty which every one owes to society and to the state to assist in the investigation of any alleged misconduc and to promote the detection of any crime When it comes to the knowledge of any one that a crime has been committed a duty is laid on him as a citizen of the country to state to the authorities what he knows respecting the commission of the crime; and if he states only what he knows and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all not guilty of the crime For the sake of public Justice charges and communications which would otherwise be slanderous are protected, if *bona fide* made in the prosecution of enquiry into a suspected crime Odgers on Libel Slander, p. 272 (5th Edn.) 5 W. R. 282 ; 19 B 717 ; 3 A. 815 referred to. (*Karbhaiya Lal, A. J C.*) KISHAN LAL *v.* MOOSI RAZA. **9 O. & A. L. R. 302 : 1923 Oudh 247.**

——— *Damages—Basis of.*

Damages in these classes of cases are given on two basis *first* on the ground of solatium for injury to the feeling of the party prosecuted and *secondly* as reimbursement for legitimate expenses incurred by him in defending himself. In considering what should be allowed, the conduct of the plaintiff himself in the transaction which led to the prosecution may be taken into account. (*Fox, C. J. and Hartnoll, J.*) VOGIAZIS *v.* PAPPADEMITRIOUS. **20 I. C. 180 : 6 Bur. L. T. 59.**

Elements to be proved.

——— *Elements to be proved.*

In a suit to recover damages for malicious prosecution, the plaintiff must prove among other things that he was acquitted in the criminal proceedings (which is proof of malice) that damages was caused as a result of the prosecution and that there was absence of reasonable and probable cause for setting the Criminal law in motion. (*Mears, C J. and Rafiq, J.*) NAZIR HASAN *v.* BAKHTAWAR. **56 I. C. 161 : 2 U. P. L. R. (All.) 127**

——— *Elements to be proved—Reasonable and probable cause.*

In an action for malicious prosecution the plaintiff has to prove.—(1) that he was innocent and pronounced to be so by the trying on the

MALICIOUS PROSECUTION—Elements to be proved.

appellate tribunal. (2) Want of reasonable and probable cause for the prosecution. (3) Malice on the part of the defendant (*Holmwood and Chapman, JJ.*) SEMAKI CHUTIANI *v.* HEMKANTA SARMA MAUZADAR. **18 I. C. 880.**

———*Elements to be proved.*

An action for malicious prosecution lies where there is a concurrence of the following elements.—(1) Commencement or continuance of a criminal proceeding; (2) its legal causation by the present defendant against the plaintiff; (3) its *bona fide* termination in plaintiff's favour; (4) absence of probable cause; 5) malice; (6) legal damage. (*Mookerjee and Beachcroft, JJ.*) C. H. CROWDY *v.* L. O'REILLY. **17 C. W. N. 554 : 18 I. C. 737 : 17 C. L. J. 105.**

———*Elements to be proved.*

In actions for malicious prosecution the plaintiff has to prove both malice and want of reasonable and probable cause (*Sadasiva Aiyar and Napier, JJ.*) CHENNA REDDI *v.* VENKATASAMI. **10 L. W. 314 : 53 I. C. 70 26 M. L. T 214 : 1920 M. W. N. 171.**

———*Elements to be proved.*

The essentials which have to be proved in a suit for malicious prosecution are:—(1) the fact of prosecution; (2) that the prosecution ended favourably to plaintiff; (3) that the defendant acted without reasonable or probable cause; (4) and that the defendant was actuated by *malice.* (*Wallis, C. J. and Spencer, J.*) GOPALAKRISHNA KUDUA *v.* BANGLE NARAYAN KANTHY. **23 M. L. T. 341 : 7 L. W. 604 : 45 I. C. 803 : (1918) M. W. N. 454 : 34 M. L. J. 517**

———*Elements to be proved—Per Curiam.*

To sustain a suit for damages for malicious prosecution, there must be damage to a man's reputation or property or danger to his liberty. Such a suit is not restricted to criminal proceedings only; nor does it lie for all criminal prosecutions. (*Seshagiri Aiyar and Napier, JJ.*) SRIRAMULU NAIDU *v.* KOLANDAVELU MUDALI. **20 M. L. T. 308 : (1916) 2 M. W. N. 242 : 4 L. W. 332 : 37 I. C. 374 31 M. L. J. 479.**

———*Elements to be proved.*

Malice and absence of reasonable and probable cause have both to be proved in an action for malicious prosecution. (*Sundarier and Spencer, JJ.*) VAIDENADIER *v.* KRISHNASWAMY AIYAR. **36 Mad. 375 : 19 I. C. 665 : 24 M. L. J 515.**

———*Elements to be proved—Damages.*

In a suit for damages for malicious prosecution, the plaintiff must prove four things, *viz.* (1) His innocence of the crime alleged against him; (2) His innocence having been pronounced by a competent tribunal; (3) Want of reasonable and probable cause for the prosecution against him; (4) Malicious spirit of the proceedings initiated against him. A conviction in the lower Court of the plaintiff in a suit for damages for malicious prosecution although reversed on appeal is a fatal defect to his suit for malicious prosecution except

MALICIOUS PROSECUTION—Innocence.

in exceptional circumstances 29 I. C. 884. (*Fox, C. J. and Hartnoll, J.*) PADASHIN *v.* MAUNG LUN. **8 Bur. L. T. 69 : 29 I. C. 883 : 8 L. B. R. 78.**

——— *Elements to be proved—Malice—Reasonable and Probable cause.*

The plaintiff in a suit for malicious prosecution must prove that the defendant prosecuted him maliciously and without reasonable and probable cause. (*Fox, C. J. Hartnoll, J.*) VOGIAZIS *v.* PAPPADEMTRIOUS. **6 Bur. L. T. 59 ; 20 I. C. 180.**

Innocence.

———*Innocence—Proof of.*

In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the criminal court before which the accusation was made. It is not enough for plff. to produce the judgment of the criminal court which acquitted him but he must prove his innocence by other independent evidence. (*Lindsay and Stuart, JJ.*) GOBERDHAN SINGH *v.* RAM BADAN SINGH. **44 A. 485 : L. R. 3 A. 199 : 20 A. L. J. 284 : 1922 A. 209.**

———*Innocence—Acquittal—Charge of theft of electricity thrown out.*

The plaintiff in the case made certain alterations in the electric wires of his estate which had the effect of transmitting the current avoiding the metre kept for measuring the energy supplied. The Municipal Chairman prosecuted plaintiff for theft of electricity under S. 39 (5) of the Electricity Act, but the plaintiff was acquitted. He then sued the Chairman for damages for malicious prosecution. *Held* that the plaintiff cannot, as a reasonable man, have been ignorant of the fact that his alteration of the wires would cause wrongful loss to the Municipality, there was no malice in law on the part of the defendant and on the ordinary principle that a person intends the reasonable and probable consequences of his acts, plaintiff's conduct was dishonest within the meaning of the Penal Code. The suit was dismissed. (*Holmwood and Chapman, JJ.*) CARL FORSTMANN *v.* H. T. S FORREST. **27 I. C. 591.**

———*Innocence—Finding of Criminal Court.*

In a civil suit for damages for malicious prosecution, the criminal Court's finding as to plaintiff's innocence though *prima facie* strongevidence is not conclusive. The plff must prove his innocence to justify the inference that the prosecution was without reasonable cause. 5 W. R. 27; 10 W. R. 56; 12 W. R. 477, 14 W. R. 339 and 1909 App. Cases 549, Foll. (*Beachcroft and Mookerjee, JJ.*) MUCHI ASTA *v.* HORSMULL MARWARI. **19 I. C. 24 : 17 C. W. N. 434.**

———*Innocence—Acquittal, effect of.*

That the plaintiff was convicted by the trying Court but acquitted by the appellate Court is not conclusive in defendant's favour, though it ought to be considered in determining if there was reasonable and probable cause. (*Holmwood and Chapman, JJ.*) SAMAKI CHUTANI *v.* HEMKANTA SARMA MAUZADAR. **18 I. C. 880.**

MALICIOUS PROSECUTION—Innocence.

———*Innocence—Acquittal—Effect.*

A verdict of not guilty fully establishes the innocence of the accused. (*Lawrence Jenkins, C. J., Brett and D. Chatterjee, JJ.*) EMPEROR *v* NONI GOPAL. 15 C. W.N 646 11 I. C. 580 : 12 Cr. L. J. 396

———*Innocence—Acquittal.*

Where there is an acquittal it is conclusive; for, a judgment of not guilty fully establishes the innocence of an accused. The convictions also are similarly conclusive. (*Jenkins, C. J. Brett and Chatterjee. JJ.*) NONI GOPAL *v.* EMPEROR. 12 Cr. L J. 286 : 10 I.C. 582 : 15 C. W. N. 593 : 38 C. 559.

———*Innocence—Proof of—Acquittal in criminal case.*

In a suit for damages for malicious prosecution, the plaintiff must lead evidence to prove that he was innocent of the charge that had been brought against him and that it had been brought without reasonable and probable cause. It is not enough to show that the criminal proceedings terminated in his favour especially if the criminal case had been dismissed on technical grounds. 31 I.C. 324, 24 Mad 50, 6 Bom. 376, Ref. (*Broadway, J.*) POHLG RAM *v.* HUKUM SINGH. 32 P. R 1919 : 51 I. C. 279 : 77 P. L. R 1919.

———*Innocence—Acquittal.*

Apart from showing that he was discharged or acquitted in the case, the plff. is not bound to prove his innocence affirmatively. (*Wallis, C. J and Spencer, J.*) GOPAL KRISHNA KUDWA *v.* BANGLE NARAYAN KAMTHY. 23 M. L. T. 341 : 7 L. W. 604 : (1918) M. W N. 454 : 45 I. C. 803 : 34 M. L. J. 517.

———*Innocence—Proof of.*

In an action for malicious prosecution the plff. has to prove that his innocence was pronounced by the Court before which the accusation was made. A man is not to be mulcted in damages merely because he fails to prove another's guilt nor is a man to receive compensation merely because there is a reasonable doubt about his guilt ; if there is any doubt about his innocence, he fails to prove the absence of reasonable and probable cause. A man is acquitted in a criminal case if there is a reasonable doubt of his guilt but a Civil Court will not award him compensation in a subsequent suit for damages for malicious prosecution, unless it has not only itself no reasonable doubt as to his innocence but considers that the prosecutor either had or should, as a reasonable man, have had, none either. (*Young, J.*) *M. G.* THA HLA *v.* MOKHLAS 31 I. C. 324 : 9 Bur. L. T. 48.

Malice.

———*Malice—Suit of damages.*

When the complaint is false to the knowledge of the defendants, the Court is bound to infer malice from the complainant's conduct. (*Tudball and Abdul Raooff, JJ*) PUTTA LAL *v.* RAM SARUP. 46 I. C. 190 : 16 A. L. J 468.

———*Malice—Proof—False charge.*

A false charge to the knowledge of the prosecutor imports in law malice sufficient to support a civil action. No question of reasonable or probable cause arises in a case where the charge must have been true or false to the knowledge of the defendant and in which there could be no mistake on his part. (*Knox, J.*) RADHE LAL *v.* MUNNOO. 18 I C 280 : 11 A. L. J. 125.

MALICIOUS PROSECUTION—Malice.

———*Malice—Want of probable cause—If can be inferred from.*

The want of probable cause cannot be inferred from mere evidence of malice. (*Fletcher and Richardson, JJ*) MOHINI MOHAN MISSER *v.* SURENDRA NARAIN SINGH. 42 Cal. 550 : 18 C. W. N. 1189 : 26 I. C. 296 : 21 C. L. J. 68.

———*Malice—Inquiry by Police Officer.*

The term "malice" does not necessarily imply personal spite or grudge on the part of the deft. and it exists wherever there is an improper motive actuating the prosecution in instituting the criminal proceedings against plff. A police officer directing the prosecution of a person on a criminal charge after an enquiry is not liable in damages, if it turns out there was no reasonable cause for the inquiry. (*Rattigan, C. J. and Abdoor Raoof. J.*) JAMES SYMON EVANS *v.* SECRETARY OF STATE FOR INDIA. 54 I. C. 950 : 143 P. R. 1919.

———*Malice—What is.*

The use of the expression legal malice as distinguished from malice in fact is misleading in actions for malicious prosecution. Carelessness in deciding whether there was reasonable and probable cause will not amount to malice. (*Sadasiva Iyer and Napier, JJ.*) CHENNAN REDDI *v.* VENKATASAMI. 10 L. W 314 : 26 M L. T. 214 : 53 I. C. 70 : (1920 M W N. 171.

———*Malice—Proof.*

When a person makes a complaint against another which is false to his knowledge, not only is want of reasonable and probable cause proved but malice also is proved That the defendant had grounds for suspecting the plaintiff or her husband of having committed some wrongful act in connection with his property is no reason for holding that the defendant could not be deemed to have been actuated by malice in himself bringing a case on allegations false to his knowledge. (*Sadasiva Iyer and Napier, JJ.*) KHADER UNNISSA BEGAM *v.* MUHAMMAD MUSTAN ALI BADSHA. 2 L. W. 428 : 29 I. C. 12 : 17 M. L. T. 391.

———*Malice—Carelessness—Recklessness.*

Carelessness on the part of the deft in deciding whether there was reasonable and probable cause would not amount to malice If a man has been reckless, whether the charge be true or false, that might amount to malice but recklessness in coming to the conclusion that there was reasonable and probable cause would not. (*Sundara Aiyar and Spencer, JJ.*) VAIDENADIER *v.* KRISHNASWAMI AIYAR. 36 Mad. 375 : 19 I. C. 665 : 24 M. L. J. 515.

———*Malice—Damages. liability for—Magistrate acting bona fide.*

Where the deft. a Magistrate under S. 480. Cr. P. C. charged the appellant with an offence under

MALICIOUS PROSECUTION—Malice.

S. 228, I P. C committed by the appellant's walking in view of the deft with shoes while the latter was discharging his duties as Magistrate, and where the plff. got off by apologizing. *Held*, that the deft did not act maliciously. (*Benson and Sundara Iyer, JJ*) VEMAREDDI *v.* YOKE, J. ABBOY NAIDU. **9 M L. T 444 : 10 I. C. 391 : (1911) 1 M. W. N. 319.**

——*Malice—Appellate court acquitting accused.*

Malice should not be ordinarily inferred where appellate court acquits accused. (*Buckhil, J.*) RAGHUPAT SAHAI *v.* EMPEROR. **3 P L T. 93 : 1922 P 160 : 23 Cr.L. J. 272 : 1922 Pat. 26.**

——*Malice—Questions of Law*

The question of reasonable and probable cause as well as that of malice are questions of law to be determined upon certain facts found. (*Mullick, J.*) NAIK PANDEY *v.* BIDYA PANDEY **1 Pat. L. J 149 : 34 I. C. 149 : 3 Pat L. W 415.**

——*Malice—Discharge of accused— Police prosecution—Liability of complainant.*

The discharge of an accused person is such a termination of the prosecution as entitles the accused to maintain a suit for malicious prosecution. If a complainant does not go beyond giving what he believes to be correct information to the police he should not be made liable for damages. But if he has given a wilfully false charge he ought not to escape on the technical ground that the prosecution was not concluded by him. To sustain an action for malicious prosecution there must be malice proved or such a wilfully false statement that would justify an inference of malice. (*Saunders, J. C.*) MAUNG PO LUN *v.* MA NYEIN. **46 I. C. 337 : (1918) 3 U. B. R. 67.**

——*Malice—Meaning of.*

The term "malice" in this form of action in not to be considered in the sense of spite or hatred against the individual but of *malus animus* and as denoting that the party was actuated by improper and indirect motives and not by a sense of furthering justice. (*Fox, C J. and Hartnoll, J.*) VOGIAZIS *v.* PAPPADEMIDTRIOUS. **20 I. C. 180 : 3 Bur L. T. 59.**

Prosecution.

——*Prosecution—Complaint dismissed for nonpayment of batta—Damages.*

A complaint was dismissed for failure of the complainant to pay expenses of witnesses. The accused sued for damages for malicious prosecution The defence was that the (accused) plaintiff was not prosecuted and hence he suit was not maintainable. *Held*, from the fact, tha the prosecution was clear and the suit was maintainable. (*Tudball and Rafique, JJ*) AZMAL ALI *v.* QURBAN AHMED. **42 All. 305 : 18 A L J 204 : 58 I. C 542 : 2 U. P. L. R. (A). 427.**

——*Prosecution — Criminal Proceedings— Cr. P. C., S. 107.*

Proceedings under S. 107, Cr. P C, are of *quasi* criminal nature and an action to recover damages for malicious prosecution would lie for initiating such proceedings. (*Piggott and Walsh, JJ.*) NIZULLAH KHAN *v.* JAIPAM **41 All. 503 : 50 I. C. 140 : 17 A. L. J. 776.**

MALICIOUS PROSECUTION—Prosecution.

——*Prosecution — Prosecutor— Defendant's liability—Measure of damages.*

In a suit for malicious prosecution, plaintiff need not prove that the defendant in the case was in fact the actual prosecutor in the proceedings before the Criminal Court. Where the prosecution of the plaintiff before the Criminal Court was substantially the work of the defendant, he is liable for damages on failure of the criminal proceedings and the plaintiff is entitled to claim damages for his mental distress and bodily discomfort resulting from his arrest and detention in the lockup. (*Piggott, J.*) BALDEO SHUKUL *v.* BALBHADAR. **27 I C. 410.**

——*Prosecution- Cause of action—Application for sanction to prosecute—Damages*

The maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which that term is used in the Code of Criminal Procedure. The application for sanction is a preliminary or initial stage in a criminal prosecution and it is immaterial that this was done as the law required, in a civil and not in a criminal court. Where the allegations in the plaint are that the defendant maliciously and without just, reasonable or probable cause instituted proceedings for sanction and the plaintiff was obliged to defend the case they are sufficient to disclose a cause of action for malicious prosecution. (*Teunon and Newbould, JJ.*) NORENDRA NATH DAY *v.* JOTISH CHANDRA PAL. **1922 Cal. 145**

——*Prosecution—Master and servant.*

If a person maliciously and without reasonable cause sets the machinery of the criminal law in motion, he is liable in a suit for damages for malicious prosecution. The prosecution commences as soon as the complaint is made to the magistrate, irrespective of the result of the prosecution or the stage at which it may fall through. If a servant acts at the instigation of his master in launching a malicious prosecution, the master will be liable in damages 38 C. 880 dist, 20 C. L. J. 518 foll 17 C. L J. 105 Ref. (*Newbould and Panton, JJ.*) BISHAN SINGH *v.* RAM BAHAL ROY. **64 I. C. 741.**

——*Prosecution—Mere complaint.*

The mere filing of a petition of complaint would not by itself be sufficient to maintain an action for damages for malicious prosecution against the complainants (*Fletcher and Newbould, JJ*) DIGAMBAR DAS *v.* BISHVASHWAR CHAUDHARI. **41 I. C. 12.**

——*Prosecution—Security proceedings—Initiation of.*

"Prosecution" is not to be interpreted in its strictest sense as used in he Cr. Pro. Code. It includes a proceeding maliciously taken against a person to compel him to furnish security to keep the peace, may be made, the foundation of a suit for damages for a malicious prosecution If a person maliciously sets the criminal law in

MALICIOUS PROSECUTION—Prosecution.

motion, he is responsible for the consequences, if proceedings prove infructuous or unsustainable. The point of commencement of a prosecution is independent of the result. It commences when a complaint is made to a Magistrate. A prosecution exists where a criminal charge is made before a Judicial officer or a tribunal and any person who makes or is actively instrumental in the making of such a charge is a prosecutor. Authorities reviewed. (*Mookerjee and Beachcroft, JJ.*) BISHUN PERGASH NARAIN SINGH *v.* FUL MAN SINGH. **20 C. L. J. 518 : 27 I. C. 449 : 19 C W. N. 935.**

———*Prosecution—Proceedings under Bengal Disorderly Houses Act—Libel Damages.*

Proceedings under the Disorderly Houses Act cannot be said to be prosecutions and a suit for damages in respect of such proceedings is not a suit for malicious prosecution governed by Art. 23 of the Limitation Act, but is one for compensation for libel governed by Art 24 of the Limitation Act, 21 A. 368, rel. on. (*Mookerjee and Beachcroft, JJ.*) DHIRAJ BALA DASI *v.* GOPAL CHANDRA MOOKERJEE. **20 I. C. 768 : 18 C. L. J. 352.**

———*Prosecution—Meaning of.*

The word 'prosecution' in the term 'malicious prosecution ought not to be interpreted in the restricted sense in which it is used in Cr. P. C. and initiation of proceedings under Ss. 144 and 145 of the Cr. P. C. may constitute malicious prosecution. (*Mookerjee and Beachcroft, JJ.*) C. H. CROWDY *v.* L. O. REILLY. **17 C. W. N. 554 : 18 I. C. 737 : 17 C. L. J. 105.**

———*Prosecution—Accused not summoned—Suit for damages whether lies.*

A person against whom a complaint is preferred but the same is dismissed without summons being issued against him, is not an accused person ; and no suit for damages lies at the instance of the latter against the complainant. (*Lawrence Jenkins, C. J. and Woodroffe, J.*) GOLAP JAN *v* BHOLA NATH. **38 Cal. 850 : 11 I. C. 311 : 15 C. W. N. 917.**

———*Prosecution—Suit against witness.*

No civil action lies against a witness for giving false evidence though the evidence is given as a result of conspiracy to obtain the conviction of the accused person 25 B. 230, Foll. (*Shah Din and Leslie Jones, JJ.*) KAMAL DIN *v.* MIR ABDULLAH. **32 P. R. 1917 : 66 P. L. R. 1917 : 38 I. C. 678 : 47 P. W. R. 1917.**

———*Prosecution—Commencement.*

A prosecution cannot be said to commence on presentation of a complaint nor upon giving information to the police. The mere fact that a prosecution may not have commenced does not conclude the matter against the plaintiff in a suit for damages. Plaintiff's allegations were that defendant informed the police constable that there was opium in some parcel which by a trick of the defendant, plaintiff was made to take, that the police arrested him and that for three days he was with them after which he was found innocent, that no process was issued by any Magistrate and that he was not formally put under

MALICIOUS PROSECUTION—Prosecution.

arrest or detained in the lock-up. *Held*, that in the circumstances plaintiff suffered definite and tangible injury in consequence of the wrongful act of defendant. (*Johnstone, J.*) GODHARAM *v.* DEBIDAS. **14 P. L. R. 1916 : 28 I. C. 273 : 1 P R 1915.**

———*Prosecution — Information to police—Police starting prosecution on suspicion—Opinion—Suspicion.*

Deft. in whose premises burglary was committed gave intimation to the police and the police on suspicion arrested plff., searched his house, and found a great number of articles belonging to the deft. The deft. declared the articles were stolen from his premises and that the police may take such action as they thought admissible, *Held*, that deft should not be said to have prosecuted the plff. or taken part in the conduct of the prosecution so as to render him liable for damages for malicious prosecution. The fact that he was examined as a witness for the prosecution is immaterial. 10 L. W. 235, Dist. (*Wallis, C. J. and Krishnan, J.*) RAJAGOPALA NAYAGAR *v.* SPENCER & Co., LTD. **12 L. W. 87 : 59 I. C. 218 : 28 M. L. T. 298.**

———*Prosecution — Informer, if liable for damages.*

A suit for damages is maintainable against a person who supplied the information on which a criminal prosecution was initiated though he is not the complainant. (*Sadasiva Aiyar and Spencer, JJ.*) SHANMUGHA UDAYAR *v.* KANDASAMI ASARI. **59 I. C. 973 : 12 L. W. 170.**

———*Prosecution—Police acting on information of.*

An action for damages for malicous prosecution lies against a person even though he only made a report to the Village Munsif as a result of which the Police after investigation launched and conducted a prosecution, if the other essentials necessary for an action for malicious prosecution are present. 25 Mad. 362 Diss. (*Ayling and Napier, JJ.*) PERIYA GOUNDAN *v.* KUPPA GOUNDAN. **10 L. W. 235 : 26 M. L. T. 140 : 42 Mad. 880 : (1919) M. W. N. 577 : 52 I. C. 782 : 37 M. L J. 234.**

———*Prosecution—When a suit lies.*

A suit for malicious prosecution lies if the deft. causes or procures a prosecution through a third person whether the latter is an officer of law or not, but if he does not set the law in motion against the plff., he is not liable. (*Ayling and Tyabji, JJ.*) MANIKAM MUDALIAR *v.* KUMARALANGUTTAY MUNNUSAWY. **18 M. L. T. 500 : (1915) M W. N. 911 : 31 I. C. 246 : 29 M. L. J. 694.**

———*Prosecution — Meaning of—Commencement of.*

Where, on receiving a complaint of an offence of defamation, the Magistrate issued a notice only and not a summons or warrant to the accused, and the notice merely informed him that a preliminary inquiry would be held in the matter of the complaint and the complaint was dismissed under S. 202, Cr. P. C. after hearing both partie

MALICIOUS PROSECUTION—Prosecution.

there is no prosecution of any offence by the complainant so as to give rise to a cause of action for a suit for damages for malicious prosecution. The sending of the notice and the hearing thereon are not authorized by Cr. P. C Prosecution commences with the issue of process summons or warrant after the complaint has been entertained by the Magistrate. (*Bakewell, J.*) SHAIK MEERAN SAIB *v.* RATNAVELU MUDAI.

37 Mad. 181 : 21 I. C. 703 : 25 M. L J. 1.

———*Prosecution — Reference to plff.— No charge preferred—Prosecution by police.*

Per *Dawson Miller, C J.*—The plff. must in a case relating to malicious prosecution establish affirmatively that the deft. was either (*a*) the actual prosecutor or (*b*) gave information leading to false criminal charge against the plff. and in consequence of that the prosecution ensued, the action having been done maliciously or without any reasonable or probable cause. It is thus essential that the deft. should have taken an active part in bringing about the prosecution by preferring some charge of a criminal nature against the plff. Mere writing a letter to the C. I. D. who had already begun investigation against the plff. is not prosecution though the C.I.D. discovered other evidence in consequence of the letter (*Miller, C. J. and Coutts Trotter, JJ.*) JAGADAMBA PRASAD *v.* RAGHUNANDAN LAL

57 I C. 392 : 1 Pat. L. T. 422

———*Prosecution—Complaint to a Magistrate —Search by Police.*

The party guilty of action is responsible for the result where a certain result is the inevitable consequence of a certain act. A complaint of theft to a responsible authority must inevitably result in the search of the house of the person accused of the offence. A search caused by the malicious complaint is, therefore a malicious search. (*Sharfuddin and Roe, JJ.*) JAIPANDE *v.* JALDHARI RAUT.

1917 Pat. 383 : 40 I. C 679 : 4 Pat. L. W. 98

Reasonable and probable cause.

———*Reasonable and probable cause — Damages.*

A party cannot be made liable in damages merely because he alleges in his complaint certain facts found to be correct but which did not constitute an offence under the particular section of the Penal Code alleged by him. If a person alleges certain facts for which there is and other facts for which there is not reasonable and probable cause the Court can award damages in respect of the latter charge. (*Richards and Banerjee, JJ.*) MRS. M. I. POWELL *v.* A. E. HART. **18 I. C. 925.**

———*Reasonable and probable Cause.*

No question of reasonable and probable cause arises in a case whether the charge must have been true or false to the knowledge of the defendant and in which there could be no mistake on his part. (*Knox, J.*) RADHELAL *v.* MUNNOO.

18 I. C. 280 . 11 A. L. J. 125.

———*Reasonable and probable cause—Court's opinion.*

MALICIOUS PROSECUTION—Reasonable and Probable cause.

The Court has to see whether the charge was false to the knowledge of the complainant Criminal Court's belief in the complaint is not sufficient proof of reasonable and probable cause. (*Knox J.*) PADARATH *v.* DULAM.

17 I C. 879 : 10 A. L. J. 423.

———*Reasonable and probable cause.*

The mere fact that an unpaid vendor found goods in a third person's shop is not reasonable and probable cause for instituting a prosecution for cheating. (*Richards, C. J. and Banerjee, J.*) KESHO PRASHAD *v.* RAM KISHEN DAS

17 I. C. 316.

———*Reasonable and probable cause—Bona fides.*

Where ths deft. had no honest belief in the guilt of the plff. but was moved by the disappointment he experienced in not being able to reap the fruits of his purchase in a Court auction he could not be held to have had reasonable and probable cause for instituting a prosecution for theft. (*Macleod, C. J. and Fawcett, J.*) JAMNADAS *v.* CHUNILAL.

22 Bom. L. R 1207 : 59 I. C 520 : 45 B 227.

———*Reasonable and probable cause—Conviction by first Court—Acquittal on appeal.*

The proof upon which all actions for malicious prosecution turn is the state of the mind of the prosecutor at the time he initiates or authorizes the prosecution. If he receives information from others and acts upon it by making a criminal charge against any person, the motives of the informant or the truth in fact of the story they tell are to a great extent irrelevant. Three questions are most important : (*a*) Did the deft. believe the story upon which he acted ? (*b*) can his conduct in believing and acting on it be said to be that of a reasonable man of ordinary prudence ? (*c*) was his motive in making the charge an indirect one ? (1909) A. C 549 and 25 T L R. 631. Foll

Conviction by one Court and acquittal by another on appeal is the strongest possible evidence against the plea of want of reasonable and probable cause. (*Chatterjee and Smither, JJ.*) SOWRENDRA MOHAN SINHA *v.* SOSHI BHUSAN KOER. **49 I. C. 232.**

———*Reasonable and probable cause—Malice —Proof of.*

To succeed in an action for malicious prosecution the plaintiff must allege and establish both (*a*) absence of reasonable and probable cause and (*b*) malice, and must fail altogether if he fails to establish both. An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed The malice necessary to be established is not even malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact ; *malus animus* indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper motives though these may be wholly unconnected with

MALICIOUS PROSECUTION—Reasonable and Probable cause.

any uncharitable feeling towards any body. In all these questions the burden of proof is on the plaintiff. If, in order to show the absence of reasonable and probable cause, there are minor questions which it is necessary to determine, the burden of proving each of those minor questions lies upon the plaintiffs, just as much as the burden of proving the whole does. The test as to the burden or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on the parties from moment to moment may reach points at which the tribunal will have to say that, if the case stops there it must be decided in a particular manner. (*Abdul Raoof and Campbell, JJ.*) ABDUL SHAKUR *v.* LIPTON AND CO. **1924 Lah. 1.**

———*Reasonable and probable cause—Acquittal of pltf.*

In a civil suit for damages against the prosecutor in a criminal case in which the plaintiff was acquitted it must be affirmatively shown that there was absence of reasonable and probable cause. There was a longstanding feud between the families of the plaintiff and the defendant and the latter's son was murdered. The defendant prosecuted plaintiff for murder on the strength of the allegations in the dying declaration and the statements of certain witnesses. In the circumstances defendant had reasonable and probable cause for the prosecution. No action for damages will lie against a witness for giving false evidence though it was given in pursuance of a conspiracy to obtain the conviction of the plaintiff. The proper remedy against the witness is to prosecute for perjury. (*Shah Din and Jones, JJ.*) KAMAL DIN *v.* MIR ABDULLA. **32 P. R. 1917 : 47 P. W. R. 1917 : 38 I. C. 678 : 66 P. L. R. 1917.**

———*Reasonable and probable cause—Meaning of.*

The term reasonable and probable cause, means a cause which an ordinarily reasonable man having knowledge of facts and the belief (arrived at in a reasonable manner) as to facts which the defendant then had would be justified in considering as affording a fair basis for the opinion that a criminal offence has been committed by the plaintiff. The Courts should not draw a distinction between reasonable cause and probable cause. The question of want of reasonable and probable cause is one of fact and not of law Cases reviewed. 36 Mad. 475. (*Sadasiva Iyer and Napier, JJ.*) CHENNARA REDDI *v.* VENKATASWAMI. **26 M. L. T. 214 : 10 L. W. 314 : 53 I. C. 70 : (1920) M. W. N. 171**

———*Reasonable and probable cause—Meaning of.*

Reasonable and probable cause means an honest belief in the guilt of the accused based on a full conviction founded on reasonable grounds having regard to the circumstances of the case, 24 M. 59 doubted. (*Wallis, C. J. and Spencer, J.*) GOPAL KRISHNA KUDVA *v.* BANGLE NARAYAN KAMTHY. **23 M. L. T. 341 : 7 L. W. 604 : (1918) M. W. N. 454 : 45 I. C. 303 : 34 M. L. J. 517.**

MALICIOUS PROSECUTION — Reasonable and Probable cause.

———*Reasonable or proper cause—Ulterior and improper motive.*

In an action for malicious prosecution the plaintiff must prove that the prosecution was launched without reasonable or proper cause and not simply that it was improper or had an ulterior object. Where, in an action for malicious prosecution, evidence as little incriminating the plaintiff as possible was let in by the defendant as a result of a compromise of the civil disputes between the parties, it is no proof of the absence of reasonable or probable cause. (*Wallis, C. J. and Seshagiri Aiyar, J.*) MUTHU VEERAPPA CHETTI *v.* RAMASWAMI CHETTI. **40 Mad. 285 : 34 I. C. 401 : 31 M. L. J. 264.**

———*Reasonable and probable cause—Malice—Burden of proof—Judgment of Criminal Court—If evidence.*

In an action for malicious prosecution, the guiding rule is that there must have existed a state of circumstances upon which a reasonable and discreet person would have acted. The rule prescribes not a standard of absolute rectitude and certainty but of reasonableness and probability, in relation to a defendant's mind. A prosecution, not malicious in the outset, may become malicious if the prosecutor, having acquired knowledge of the innocence of the accused perseveres in the prosecution. The allegation of want of probable cause must be substantively and expressly proved From the want of probable cause, malice may be, and is inferred, but from the most express malice, want of probable cause cannot be inferred. The judgment of a Criminal Court, discharging or acquitting the plaintiff is no evidence either of malice or want of probable and reasonable cause. (*Wazir Hasan, A. J. C.*) KAZIM HUSAIN *v.* BASIT HUSAIN. **61 I. C. 970 8 O. L. J. 147.**

———*Reasonable and Probable cause — Presumption—Conviction by trial Court—Reversal on appeal.*

If in a suit for damages for malicious prosecution the plaintiff has been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known to the defendant to be false or on the wilful suppression by him of material information. 12 C. L. J. 410 foll. A Court ought not to try the issue as to malice and the absence of reasonable and probable cause as a preliminary issue, without taking any evidence and on the simple fact that the plaintiff had been convicted by the Original Court, although he had been acquitted on appeal. 30 A. 525 foll. (*Das and Kulwant Sahay, JJ.*) JAG NARAIN DUBEY *v.* BIDAPAT DUBEY. **4 Pat. L. T. 202 : 1 Pat L. R. 332 : 1923 P. 344.**

———*Reasonable and probable cause—Meaning of.*

Reasonable and probable cause may be defined as an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming to be true, would

MALICIOUS PROSECUTION—Sanction.

ordinarily lead any ordinarily prudent and conscientious man placed in the position of the complainant to the conclusion that the person charged was probably guilty of the crime imputed. (*Fox, C.J. and Hartnoll, J.*) VOGIAZIS *v.* PAPPADIMITRIOUS. **20 I. C. 180 : 6 Bur. L. T. 59.**

Sanction.

———*Sanction—Application for sanction.*

Application for sanction to prosecute is an initial stage in a criminal prosecution and can be the basis of a suit for malicious prosecution. (*Teunon and Newbould, JJ.*) **67 I. C. 705.**

MALIKHANA.

See Also (1) C. P. CODE, S. 60.
(2) HINDU LAW, MAINTENANCE.
(3) T. P. ACT, S. 6.

———*Right to—Settlement of mouzah in* 1865 *—Effect of.*

Where the *malikhana* for the whole *jaghir* was fixed in 1780 there is no right to enhanced *malikhana* on the basis of the settlement of 1865. (*Lord Mersey*). RAMESHWAR SINGH *v.* SECRETARY OF STATE FOR INDIA. **39 Cal. 1 : 38 I. A. 189 : 15 C. W. N. 1029 : 12 I. C. 114 : 10 M. L. T. 285.**

MAMLATDAR.

See BOM. MAMLATDAR COURTS ACT.

MANAGER.

See HINDU LAW - JOINT FAMILY, ETC.

MANDAMUS.

See SP. RELIEF ACT, S. 45.

MAPS.

See EVIDENCE ACT, SS. 35, 74 AND 83.

MARAKAYAR.

See (1) HINDU LAW.
(2) MAHOMEDAN LAW.

MARITIME JURISDICTION.

See SHIPPING LETTTERS PATENT.

MARITIME LAW.

———*Inland navigation — Mate's receipt — Legal nature.*

Mate's receipts given by inland water carrier are not bills of lading nor are they negotiable instruments. The holder of such receipt has no *prima facie* right over the relative goods and notice of lien given by the holder is not binding on the carrier who ought to deliver only to the person he has contracted with. (*Foxe, C. J. and Twomey, J.*) IRRAWADY FLOTILLA & CO., LTD. *v.* NACHIAPPA CHETTY. **9 I. C. 465 : 4 Bur. L. T 21.**

MARRIAGE.

See also (1) EVIDENCE ACT, SS 112, 114.
(2) HINDU LAW, MARRIAGE.
(3) MAHOMEDAN LAW, MARRIAGE.
(4) RESTITUTION OF CONJUGAL RIGHTS.

MARTIAL LAW ORDINANCE (IV OF 1919).

———*Law applicable—Lex Loci.*

The law of the place where a marriage is contracted determines the validity of a marriage. (*Robinson, J.*) MA TWE *v* LWE HAIN. **13 Bur. L. T. 105 : 59 I. C. 555 : 22 Cr. L. J. 123.**

MARRIED WOMAN'S PROPERTY ACT (III OF 1874)

———*Applicability--Hindus.*

The Married Woman's Property Act is not applicable to Hindus (*Benson and Sundara Iyer, JJ.*) ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LTD. *v.* VANTEDU AMMI RAJU. **35 Mad. 162 : 9 M. L T. 451 : 10 I. C. 263 : (1911) 1 M. W. N. 276.**

———**Ss. 2 and 6** — *Applicability to Hindu males.*

S. 6 of the Act applies to a policy of insurance effected by a Hindu male for the benefit of his wife or his children or of his wife and children or any of them. The *words*, "for the benefit of his wife or of his wife and children or any of them" mean "for the benefit of his wife or of his children or of his wife and children or any of them." *Tyabji, J*—"Married woman" in S. 2 does not apply to a daughter of the assured, even if she is married. (*White, C J. Sankaran Nair and Tyabji, JJ*) POKKUNURI BALAMBA *v.* KAKARAPARTI KRISHNAYYA. **37 Mad. 483 : (1913) M W. N 697 : 14 M. L. T. 363 : 20 I. C. 934 : 25 M. L. J. 65.**

———**S. 6.**—*Applicability—Hindus.*

The Act does not apply to Hindus. A Hindu wife cannot claim the benefit of its provision. (*Scott, C. J. and Chandavarkar, J*) SANKAR VISVANATH WAGH *v.* UMABAI SADASHIVA WAGTE. **37 Bom. 471: 19 I. C. 736: 15 Bom. L. R. 320.**

———**Ss. 6 and 2**—*Applicability—Hindus—Insurance for benefit of wife and children—Whether estate of the deceased.*

S. 6 of the Act does not apply to a policy of assurance effected by a Hindu on his own life for the benefit of his wife and children and the money due on it forms part of the estate of the deceased available for payment of his debts. The Act does not apply to Hindus. The Governor-General in Council has no power to exempt the Hindu Mahomedan and Buddhist communities from the operation of the Act. (*Fletcher and Richardson, JJ.*) ISHANI DASI *v.* GOPAL CHANDRA DEY. **18 C. W. N. 1335: 25 I. C. 236: 20 C. L. J. 44.**

———**S. 6**—*Scope.*

Where a Hindu male insured his life "for the benefit of his wife and children" and died leaving a daughter, *held*, that S. 6 creates a trust in favour of the daughter and the amount of the policy is not available to the creditors but in cases contemplated by S. 6 the beneficiaries have no cause of action apart from the Act. (*White, C. J., Sankaran Nair and Tyabji, JJ.*) POKKUNURI BALAMBA *v.* KAKARAPARTI KRISHNAYYA. **25 M. L. J 65 : (1913) M. W N. 697: 14 M. L. T. 363 : 20 I. C. 934 : 37 Mad. 483 (F. B.)**

MARSHALLING. *See* T. P. ACT, SS. 81 AND 82.

MARTIAL LAW ORDINANCE (IV OF 1919).—*Scope and applicability of Regulation (X of 1804) —Government of India Act, Ss. 65 and 72.*

MARTIAL LAW ORDINANCE (II OF 1921).

The Martial Law (Further extension) Ordinance 1919 is not limited to persons taken in the act of committing one of the offences specified in Regulation X of 1804, or to the persons and offences described in Martial Law Ordinance I of 1919, but extends to all offences commited on or after 30—3—19. S. 65 (2) of the Govt. of India Act, 1915 does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege his allegiance to depend; it only refers to laws which directly affect the allegiance of the subject. Observations of *Phear, J.* in 6 B L. R 392 and 459 approved. The ordinance may be described as repugnant to the Act so far as British born subjects are concerned, but that it is void only to the extent of that repugnancy *i. e.* British born subjects. (*Viscount Cave.*) BUGGA *v.* THE KING EMPEROR **1 Lah. 326: 24 C. W N. 650: 22 Bom. L. R. 609: 18 A. L. J. 455: (1920) M. W. N. 326. 2 U. P. L R (P. C.) 50: 12 L W. 296 : 56 I. C. 440 : 21 Cr. L. J. 456 : 39 M. L. J. 1. (P.C.)**

——— **(II OF 1921)** —*Arrest of a person outside Martial Law area—Legality—Writ of Habeas Corpus.*

The provisions of the Cr. P. C. are not abrogated or suspended by the introduction of martial law and so far as the arrest of martial law offenders outside the martial law area is concerned the provisions of the Code apply. *Per Spencer, J.:—Quaere*: Whether the power of the High Court to issue a writ of *Habeas Corpus* in such cases is not taken away by Cl. 16 of the Ordinance. *Per Kumaraswami Sastri, J.*—The jurisdiction of the Martial Law Magistrate is purely territorial. They cannot try offences committed outside such area or hold Court outside such area. If such Magistrate is also the ordinary Magistrate of the place he can arrest and remand the offender in the exercise of his ordinary powers. The jurisdiction of the High Court to issue writs of *Habeas Corpus* is one inherited from the Supreme Court and is not curtailed by S. 16 of the Ordinance where the acts of the Magistrate are wholly without jurisdiction. (*Spencer and Kumarasamy Sastry, JJ.*) KOCHUNNI ELAYA NAIR. *In re.* **14 L W. 465: 41 M. L J. 441: 68 I. C. 26: (1921) M. W. N. 708.**

——— **(I OF 1922)** —*Conviction—Appeal against — Limitation — Time requisite for obtaining copies—Deduction of—Act X of 1922—Effect of —Lim. Act, Ss. 5 and 12.*

Since the passing of Act X of 1922 an appellant appealing against a conviction under Ordinance is entitled to credit for the time spent in obtaining a copy of the judgment under S. 12 of the Lim. Act. But an appellate Court has no power to excuse delay in filing the appeal under S. 5 of the Lim. Act. (*Oldfield and Ramesam, JJ.*) MI TOOR MOHIDDIN HAJI *In re.* **43 M L. J. 561 : 16 L. W. 764 24 Cr. L. J. 89 : 1923 M. 95.**

MASTER AND SERVANT.

See also **Tort.**

Contract of service.
Crown servants.

MASTER AND SERVANT—Crown servants.

Dismissal from service.
Fraud of servant.
Offence by servant.
Reasonable notice.
Resignation by servant.
Tort by servant.
Miscellaneous.

Contract of Service.

——— *Contract of service—Daily and Monthly hiring—Distinction*

The plff. received a daily wage from the defendant and the amount earned during a month was calculated according to the days on which he actually worked The plff left without notice after working 26 days in a month *held* that the contract was that of daily hiring and the plff. was entitled to wages or the 26 days. (*Macleod, C. J. and Shah, J.*) ARJOON VISHNU *v.* HORMESJEE SHAHPURJEE **23 Bom. L. R 793 : 1922 B. 184.**

——— *Contract of service—Notice.*

There is nothing illegal or contrary to public policy for a master to make a rule that 15 days' notice should be given by his servants before his service is left by them. (2 C. W. N. 687 F.) (*Batchelor and Rao, JJ.*) ARYADAYA SPINNING AND WEAVING CO. LD *v.* SIVA VIRCHAND. **9 I. C. 348: 13 Bom. L. R 19.**

——— *Contract of service—Obligation to supply work - Wages dependent on work done.*

An agreement to retain or employ a servant does not include, in the absence of express stipulation or necessary implication to that effect an agreement to supply work. But when the contract is to engage the servant for a definite period and he is to be paid by wages in proportion with his work, ordinarily there is an obligation to supply work and this presumption is stronger if the contract contains a stipulation providing for dismissal by a specified length of notice. (*Pratt, J C. and Fawcett, A. J. C.*) JACOB ELIAS SASOON *v.* DOSSA KALIAN **15 I. C. 757: 5 S. L. R. 192.**

Crown servants.

——— *Crown Servants—Who are—Right of dismissal.*

It is a general rule and well established principle that in the absence of statutory provision any servant in the civil or military employment of the Crown can be dismissed by it. Persons engaged in certain commercial undertakings of the Government are servants of the Crown, and the servants of the East India Co occupied the same position as servants of the Crown. (*Fletcher, J.*) EMPEROR *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **15 C. W. N. 486 (Note). 9 I. C. 858 : 13 C. L. J. 537.**

——— *Crown servants — Tortious act—Carelessness.*

Where a tortious act is done by a Government servant owing to carelessness, there is no cause of action against the Government. (*Sundara Aiyar and Spencer, JJ.*) RAMASWAMY AIYENGAR *v.* MUTHUSWAMY AIYAR. **13 I C. 799: (1912) M. W. N. 42.**

——— *Crown servants— Liability for acts of servant.*

MASTER AND SERVANT—Dismissal from service.

Per *Kanhaya Lal, A. J. C.* The acts of a Government Officer while acting in the discharge of his duties within the limits of his authority bind the Government. If such officer exceeds that authority it will still bind the Government if in fact, the latter ratifies the excess. (*Lindsay, J. C and Kanhaiya Lal, A. C. J.*) BARATI *v* SECY. OF STATE. **24 O C. 33 : 8 O. L J. 233 : 61 I. C. 721 : 3 U. P. L. R J C. 35.**

Dismissal from service.

——— *Dismissal from service — No reason assigned—No misconduct proved.*

Where a Municipal servant is suspended and then dismissed from service, without any reasons assigned therefor, or any misconduct alleged or proved, he can claim wages for the whole period of suspension. (*Asutosh Mukerji, A. C J. and Ernest Fletcher, J.*) KAMINI KUMAR CHANDRA *v.* REBATI RAMAN DAS. **60 I. C. 756 : 38 C. L. J. 336.**

——— *Dismissal from service —Remedy of servant—Appointment of successor.*

The only remedy of a servant wrongfully dismissed by his master is by way of damages. A servant dismissed from service has no *locus standi* to question the validity of the appointment, by the master of a person as his successor. A Court will interfere in the case of dismissal of an officer of a Trust Corporation where the relationship between the Corporation and the Officer is one of Trustee and *cestui que trust*, but will not, where the relationship is a contractual one as that of master and servant. The question whether the relationship is of the former or the latter kind depends upon the statute or deed creating the relationship. (*Chatterjee and Walmsley, JJ.*) RAM CHANDRA BAJPYE *v.* RAKHALADS MOOKERJEE. **41 Cal. 19 : 20 I. C. 157 : 17 C W. N. 1045.**

——— *Dismissal from service—Right of suit for damages.*

A servant by whom notice of his dismissal has been received and wages for the remainder of the term covered by the notice have been got cannot sue for wrongful dismissal (*Fletcher, J.*) EMPEROR *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **15 C. W. N. 486 (Note) : 9 I. C. 858 : 13 C. L J. 537.**

——— *Dismissal from service— Condition of service—Interference by Court.*

When a servant refused to work on a Sunday on which he was bound to work as per the conditions of service and the master dismissed him and prescribed a heavy forfeiture. *Held*, that the Court cannot interfere with the master's dismissal of the servant, but can determine whether the forfeiture is justifiable. (*Kensington C. J.*) AMAR SINGH *v.* KARAM SINGH. **50 P R. 1914 : 251 P. L. R. 1914 : 25 I. C. 441 : 163 P. W. R 1914.**

——— *Dismissal from service —Master and servant—Wrongful dismissal—Temple committee —Trustee.*

Where a temple committee dismisses a trustee in an irregular manner without convening a proper meeting but by circulation of papers, the dismissal is wrongful and the individual members of the committee are liable in damages to the dismissed trustee. In a suit by such trustee for damages it is not open to the members to plead sufficiency of grounds for the dismissal (*Wallis, C J. and Kumaraswami Sastri, J.*) VENKATA NARAYANA PILLAI *v.* PONNUSWAMI NADAR. **41 Mad. 357 : 33 M.L.J. 660 : (1917) M.W N. 839 : 22 M. L. T. 454 : 43 I. C. 205 :7 L W. 85.**

——— *Dismissal from service—Office held at pleasure—Notice.*

No notice or the framing of charges is necessary to validate the dismissal of the holder of an office held at pleasure. (*Wallis, C. J. and Oldfield, J.*) CHELLAM AIYAR *v.* CORPORATION OF MADRAS. **42 I. C. 513 : 6 L. W 284.**

——— *Dismissal from service—Incompetency of servant.*

The dismissal of a servant not competent for his office even before the time fixed in the agreement does not afford ground for an action for damages, there being no difference between a servant who will not and a servant who cannot perform his duty. (*Abdur Rahim, O. C, J. and Seshagiri Iyer, J.*) RAMASWAMI IYER *v.* MADRAS TIMES PRINTING AND PUBLISHING CO., LTD **37 I. C. 655.**

——— *Dismissal from service—Editor of newspaper— Qualifications of—Right to remuneration.*

A person appointed co-editor of a newspaper should put forth or publish the paper and exercise a general supervision over the matter which is written for the paper or extracted as news. For this, certain literary and business qualifications are necessary. If he is absolutely incapable of performing these duties, which the company has a right to expect of him, and if it is not proved that he was retained for some other purpose, his dismissal on that account from editorship is right. (*Bakewell, J.*) RAMASWAMI IYER *v.* THE MADRAS TIMES PRINTING AND PUBLISHING CO., LTD. **32 I. C. 350 : 38 Mad 991.**

——— *Dismissal from service— Damages— Notice.*

A dismissed servant is not entitled to claim wages. In case the dismissal is wrongful, his remedy is by action for damages. There is no authority for holding that a monthly servant is entitled to a month's notice. In the absence of agreement or custom the contract of service is terminable by reasonable notice. (*Maung Kin, J.*) DAVID *v.* SUPT., ST. ANTHONY'S HIGH SCHOOL. **63 I. C. 982 : 13 Bur. L. T. 168.**

——— *Dismissal from service — Damages — Measure of.*

A servant improperly dismissed, need not wait till the expiration of the term for which he was engaged to serve, before bringing his action for damages. The onus is on the master of showing that the servant could not have obtained employment elsewhere. (*Maung Kin and Rigg, JJ.*) MOULMEIN RUBBER PLANTATION CO., LTD. *v.* C. W. MITCHELL. **46 I C. 615.**

MASTER AND SERVANT—Dismissal from service.

——— *Dimissal from service—Misconduct.*

Misconduct inconsistent with the due discharge of duties justifies dismissal. (*Twomey, J.*) I O KIN *v.* MAUNG KALA. **25 I. C. 815 : 7 L. B. R. 264.**

——— *Dismissal from service—Provision for period of notice—Damages.*

In an action for wrongful dismissal, the general rule is that the plff. may recover damages for the whole unexpired period of service; where however, it is provided that the agreement may be terminated at an earlier date by giving a previous notice, the parties may reasonably be held to have contemplated the time limit of the notice as attaching to any liability for wrongful termination of the agreement. In such cases, damages for wrongful dismissal should be limited to the period of notice required under the agreement. Where the law creates a duty and a party is disabled from performing it without any default of his own by the act of God, the law will excuse him, but where a party by his own contract creates a duty he is bound to make it good notwithstanding any accident by inevitable necessity. Where the master does not repudiate a contract which has been broken by the servant, but merely intimates, that he would claim damages for the breach of contract and allows the servant to continue to perform his part of the contract, such conduct amounts to a waiver of the master's right to repudiate the contract. (1893) 2 Q. B. D. 274, Rel. Ordinarily, it is not necessary that a servant should be dismissed by his master for a valid reason; it is sufficient if a valid reason in fact exists even if the master be not aware of it at the time of the dismissal. But this rule has no application to a case where the master has knowledge of the facts constituting the justification for the dismissal, and deliberately condones them and waives his right to dismiss the servant on account of them. (*Pratt, J. C. and Fawcett, A. J. C.*) JACOB ELIAS SASSOON *v.* DOSSA KABAN. **15 I C. 757 : 5 S. L. R. 192.**

Fraud by Servant.

——— *Fraud by servant — Concealment—Master's liability.*

A plea that the master is not responsible for the servant's acts in excess of his authority will hold good only where it is shown that the servant had concealed the acts from his master in such a way that the master could not by taking ordinary precautions, have discovered what the servant was doing. (*Macleod, J.*) CHOGMAL *v* JAINARAYAN. **20 I, C. 882 : 15 Bom. L, R. 750**

Offence by Servant.

——— *Offence by servant—Criminal liability of master.*

The employer is not criminally liable for the damage caused to his neighbour as a result of a contractor's negligence in omitting to prop the neighbour's wall. (*Tudball, J.*) SHRISH CHANDRA *v.* EMPEROR. **50 I. C. 347 : 20 Cr. L. J. 299 : 17 A. L. J. 343.**

——— *Offence by servant— Intimidation by servants—Rival hats.*

Where illegal means in the nature of intimidation and physical compulsion were employed by

MASTER AND SERVANT—Offence by servant.

agents of the defendants acting within the scope of their employment to induce traders who would have gone to plff.'s old *hat* to attend deft's. new *hat* and as a natural consequence thereof there was diminution of plff.'s profits from his *hat. Held*, that the plff was entitled to a Civil remedy by way of a suit for damages. (*Richardson and Greaves, JJ.*) HEM CHANDRA ROY *v.* BEPIN BEHARY SAHA SIRDAR. **24 C W. N. 800: 58 I. C. 879: 47 C. 1079.**

——— *Offence by servant—Criminal liability.*

Under the Criminal Law the master is generally not liable for his servant's criminal acts or omissions. (*Richard on and Huda, JJ.*) BHUBAN RAM *v.* BIBHUTI BHUSAN BISWAS. **46 Cal. 515: 22 C. W N. 1062 : 19 Cr. L, J 915 : 47 I. C. 287 : 29 C. L. J. 262.**

——— *Offence by servant—Liability.*

Unless the master can be shown to have authorised a criminal act of the servant, he is not responsible for the servant's criminal act. If the servant does anything within the scope of his employment, the master will be criminally liable for the servant's wrongful act. (*Caspersz and Sharfuddin, JJ.*) ULTAN CHAND *v.* EMPEROR. **39 Cal. 344 : 16 C. W. N. 551 : 15 I. C 1007 : 13 Cr. L, J. 591 : 15 C L J. 401.**

——— *Offence by servant—Liability of master—Rash driving of motor car.*

The owner is responsible for the negligence of his servant permitted by him to use his motor car. A general injunction to the chauffeur never to drive the car beyond the regulation speed is not sufficient to get rid of the owner's responsibility; want of knowledge is no defence. (*Holmwood and Sharfuddin, JJ.*) EDWARD THORNTON *v.* EMPEROR. **38 Cal. 415 : 15 C. W. N. 390 : 13 C. L. J. 335: 9 I. C. 480 : 12 Cr. L. J. 89.**

——— *Offence by servant.*

Where two persons are convicted one for offences under Ss. 280 and 304 A of the Penal Code and the other for abetment of those offences and it was found that the former was only a servant acting under the directions of the latter and was not guilty of any negligent act, the conviction as against him is bad and may be set aside by the High Court even though he has not filed a revision petition himself against the order of conviction. The conviction of the first accused for abetment could not stand and so retrial under S. 304 A, was ordered. (*Abdur Rahim and Sundara Aiyar, JJ.*) SANGILI NADAN *v.* EMPEROR. **12 Cr. L. J. 495 : 12 I. C. 215 : (1911) 2 M. W. N. 170**

——— *Offence by servant—Liability of master.*

A master is not criminally responsible for the acts of his servants unless he expressly commands or personally co-operates with them or unless the criminal liability is imposed by statute upon him as regards the acts or omissions of his servants. In the cases where a master is held liable for the criminal acts of his servants under a statute, the question is whether, upon the true construction of the statute in question, the master is intended to be made criminally liable

MASTER AND SERVANT—Offence by servant.

for the acts of his servants done within the scope or in the course of their employment. (*Stanyon, A. J. C.*) SIAYYAD RAHIM *v.* EMPEROR.
16 Cr. L. J. 485 . 2d I. C. 325 : 11 N. L. R. 76.

———*Offence by servant—Breach of condition in a license.*

A licensee or other persons permitted to sell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants whether authorised by him or not, even if this Act is in contravention of his instructions provided that those servants were acting within the scope of their master's authority, unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to sell the timber. (*Rigg, J.*) EMPEROR *v.* UGYAW **11 Bur L. T. 102: 44 I. C. 347 : 19 Cr. L. J. 331 : 9 L. B. R. 112.**

Reasonable Notice.

———*Reasonable notice—Tutor in family.*

The position which a tutor holds, the station which he occupies in the family and the manner in which such a person is usually treated in society place him in a very different situation from that which mere menial and domestic servants hold. Consequently a month's notice to terminate his employment is not sufficient. A term's (six months) notice would be reasonable in the case of a tutor. (*Greaves, J.*) WITTENBAKER *v.* J. C. GALSTAUN. **36 C. L. J. 256 43 I. C. 11: 44 Cal. 917.**

———*Reasonable notice—Schoolmaster.*

The rule of one month's notice which applies to menials, will not apply to the case of a school master. The rule as to yearly hiring extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and each case must be considered by itself and in each case it must be decided what notice would be reasonable. In the case of a schoolmaster, especially when he was intending to leave his profession and join another, a notice of three months would be reasonable and the period of three months may be regarded to be equivalent to about a term, (1858) 8 Exch, 150 distinguished, 44 Cal. 917 followed. (*Jwala Prasad and Adami, JJ.*) NIROD CHANDRA ROY *v.* RAJA KIRTYA NANDA SINGH. **1922 P. 24.**

———*Reasonable notice—Municipal Secretary—Termination of service.*

In the absence of any custom or stipulation as to notice, and where a contract of service is not one which can be regarded as a yearly hiring, the service is terminable on reasonable notice. What is "Reasonable notice" will depend on the circumstances of each case. A Municipal Secretary in India is entitled to a 3 months' notice. (25 B. 387; (1897) P. J. 140 F.) (*Fawcett, J. C.*) MUNICIPALITY OF TATTA *v.* ASSANMAL CHANDUMAL. **29 I. C. 597 : 8 S. L. R. 294.**

MASTER AND SERVANT—Test by Servant.

Resignation by Servant.

———*Resignation by servant—Notice—Office clerk.*

An office clerk like a menial servant is bound to give one month's notice before leaving the service of his employers and is not entitled to get a remuneration for the broken portion of the month when he leaves the service in the middle of the month without his master's consent. 10 B. H. C.R. 57 Ref. (*Tudball, J.*) RALLI BROTHERS *v.* AMLUK PRASAD. **35 All. 132 : 18 I. C. 699 : 11 A. L. J. 104**

———*Resignation by servant—Discontinuance of service in the middle of a month—Salary—Right to.*

When a teacher drawing monthly salary from a School Committee resigns his post in the middle of a month without sufficient cause, he could not recover his salary for that fraction of the month during which he had served. 13. M L. I. 680 Ref. (*Oldfield, J.*) THE CUDDALORE MUNICIPAL COUNCIL *v.* T. M. PANCHABIKESA AYYAR **(1922) M W N 153 : 15 L. W. 362 : 31 M. L. T. 83 (H.C.) : 1922 Mad. 102.**

———*Resignation by servant—Wages payable.*

Ss. 39 and 64 of the Contract Act and justice, equity and good conscience requires that a servant who quits his master's service in India before the expiry of the contract period should be ordinarily paid for the full period he worked under the master deducting the damages of the master by the breach. (*Sadasiva Aiyar, J.*) CHOKALINGA MUDALIAR *v.* MAHOMED SHERIFF SAHIB **12 M. L. T. 594 : (1912) M W. N. 1212 : 17 I. C. 894 : 23 M L. J. 680.**

———*Resignation by servant—Default without notice.*

A master is entitled to reasonable notice and if no notice is given he can plead set off in a suit by the servant for recovery of wages The default of payment of a servant after the day on which a periodical payment of wages accrued due would not deprive him of his right to recover such payment. (*Young, J.*) P. H RIPLEY *v.* VAITHENATHA AIYAR. **26 I. C. 270 : 8 Bur. L. T. 15.**

———*Resignation by servant—Monthly servant—Wages.*

A monthly servant, leaving without notice must be paid to the date when wages were last due, but not for the broken period served since that date. (*Twomey, J.*) STEWART *v.* SIMON GONSALVES. **5 Bur. L. T. 167 : 17 I. C. 900 : 6 L. B. R. 74.**

Tort by servant.

———*Tort by servant—Liability of master.*

A master is liable for the acts of his servant (1) if the injury caused is the consequence of an act done by a servant with ordinary care in the execution of the master's specific orders, (2) if it is due to want of care in the execution of the above-said work, (3) or if it is due to excessive or mistaken execution of a lawful authority and (4) or if a wilful wrong is done in the master's behalf

MASTER AND SERVANT—Tort by servant.

Where the driver and guard of a Railway Company assaulted the plaintiff for stopping a running train by pulling a chain, it was held that the Ry. Company was not liable, for the Ry. Company itself had no power to arrest persons for pulling a chain and consequently the acts of the servants were not done in the course of the employment. (*Scott, C. J. and Batchelor, J.*) GIRJASHANKAR DAYASHANKAR *v.* B. B. AND C. I. RY.
43 Bom. 103 : 45 I.C. 715 : 20 Bom. L. R. 126.

———*Tort by servant—Malicious prosecution—Damages.*

Where the malicious prosecution is the result of the instigation of master by the servant, the master is held liable for the damages (*Newbould and Panton, JJ.*) BISHAN SINGH *v.* RAMBABAL ROY.
64 I. C. 741.

———*Tort by servant—Liability of servant.*

A wrong doer cannot escape liability on the ground that he was a servant acting on behalf of his master. (*Drake Brockman, J. C.*) DAJI *v.* RUKHMA.
17 I.C. 378 : 8 N. L. R 159.

———*Tort by servant—Liability—Test—Onus.*

To maintain a suit for damages against a master for wrong done by his servants plff. must show that the act complained of was done in the course of employment or was authorised by the master to be done. (*Das, J.*) RAJA DHAKESHWAR PRASAD NARAIN SINGH *v.* MANNA LAL.
51 I. C. 753.

———*Tort by servant—Authority—Onus.*

A master is liable for the wrongs of his servant if they are done in the course of the employment of the master's work and for his benefit. Whether an act is or is not within the scope of the servant's employment has to be proved only by the master and the onus of proof is on him since it is a matter specially within his knowledge. The owner of a vessel is liable as employer for the negligence of the crew. (*Twomey, C. J. and Maung Kin, J.*) BRUCE, D. M. *v.* KYAW ZIN.
45 I. C. 822.

———*Tort by servant—Negligence.*

Where M made over a buffalo to N an independent contractor, to tend on payment of paddy and both M and N knew it to be vicious and while in the charge of N's son, it gored to death the plff.'s buffalo. *Held*, that N. alone was liable and not M. The test is to see whether the relation of master and servant existed between them (*Rigg, J.*) MANYANING *v.* MAUNG SHWE THE.
10 Bur. L. T. 223 : 42 I. C. 52 : 9 L B, R. 54.

———*Tort by servant—Servant acting outside authority—If master liable—Indian Railways Act (IX of 1890).*

Where the servants of the Railway Company who have no power to remove a passenger, did actually remove one, they acted beyond the scope of their authority and in such a case, the master, *i.e.*, in this case the Secretary of State for India, cannot be made liable for damages. (*Fawcett, A. J. C.*) MATHRADAS *v.* SECRETARY OF STATE FOR INDIA.
13 I. C. 237 : 5 S. L. R. 140.

Miscellaneous.

———*Liability of master—Order given by servant under master's instructions.*

MAXIMS.

A person is liable to pay for work done for him, under an order given by his servant under his instructions. (*Tudball, J.*) REBECCA STEWART *v.* DEBI PRASAD.
25 I. C. 779 : 12 A. L. J. 271.

———*Negligence of one servant—If another has—cause of action against master—Master's duty.*

In India a servant has no cause of action against the master for the negligent act of another servant of the same master though the services are quite dissimilar, but the master has got a duty to employ competent servants and provide proper appliances for doing work. (*Richards, C. J. and Banerji, J.*) BLANCHETT *v.* SECRETARY OF STATE.
13 I. C. 417 : 9 A. L. J. 173.

———*Proof of relationship—Criminal trial.*

Where in a criminal trial it is sought to bind the master by the statement of his servant the relationship of the master and servant must be strictly proved. (*Atkinson and Ali Imam, JJ.*) RITTARAN SINGH *v.* EMPEROR. **4 Pat. L. W. 120 : 46 I. C. 709 : 19 Cr. L. J. 789.**

MATERIAL ALTERATION

See (1) DEED—ALTERATION.
(2) NEGOTIABLE INSTRUMENTS ACT, S. 87.

MATERIAL IRREGULARITY.

See CIV. PRO. CODE, S. 115.

MATRIMONIAL DOMICILE.

See DOMICILE.

MATRIMONIAL JURISDICTION.

See (1) DIVORCE ACT.
(2) RESTITUTION OF CONJUGAL RIGHTS.

MAXIMS.

———*Actio personalis moritur cum persona—Applicability*

The only cases in which apart from breach of contract a remedy for a wrongful act can be pursued against the estate of a deceased wrongdoer are those in which the property or the proceeds of the value of the property belonging to another have been appropriated and the deceased's estate has increased thereby. (*Benson, O. C. J. and Abdur Rahim, J.*) LUMMADA NAGABHUSHANAM *v.* SRI RAJAH VENKATADRI.
(1912) M. W. N 899 : 12 M. L. T. 383 : 17 I. C. 226 : 23 M. L. J. 255.

———*Actio personalis moritur cum persona—Applicability of—Tort.*

In cases of tort, this maxim, coupled with the variation in England and India is applicable. (*Kotwal and Macnair, A. J. Cs.*) RAKHMA BAI *v.* DHANRAJ.
64 I. C. 311.

———*Act of Court—Not to prejudice party.*

A person cannot suffer for an act or default of the Court. (*Das, J.*) DHUNMUN SINGH *v.* LACHMI LAL.
57 I. C. 492.

———*'A man shall not take advantage of his own fraud'—Distinguished from estoppel.*

Estoppel and the above equitable rule are quite different. The former is no more than a

rule of evidence and its operation hardly extends to cases falling under the above equitable principles The applicability of the maxim depends on the question whether any fraud was committed at all by the person and on the question whether any advantage was derived by him by the fraud assuming constructive fraud on his part. (*Beaman and Heaton, JJ.*) MOTI RAIJI *v.* LALDAS JIBHAI. 41 Bom. 93 : 37 I. C. 945 : 18 Bom. L. R. 954.

——*Cuicunque aliquis quid concedit concedere videtur et id, sine quo res ipsa esse non potuit.*

A grant carries with it the means reasonably necessary for its enjoyment. (*Jenkins, C. J and Mookerjee, J.*) GOPAL CHAND *v.* JANKI KUAR. 41 Cal 286 : 18 C. L J. 151 : 20 I. C. 650 : 17 C. W. N. 1195.

——*'Delay defeats equities'—Limitations of rule.*

The maxim that delay defeats equities should not be applied to a case where want of fair dealing and inequality have been proved to exist and a person to whom great inconvenience will be caused by re-opening certain matters, cannot complain that the other party should have acted more promptly, if his own conduct has not been above board. (*Wallis, C. J. and Seshagiri Aiyar, J.*) ABDUL HUSSAIN *v.* MOHAMED IBRAHIM. 3 L. W. 379 : 35 I. C. 243 : 19 M. L. T. 346.

——*Equity considers that as done, which should have been done—Applicability of- Nemo-est haeres viventes — Contingent interest and mere expectancies.*

The doctrine that " *Equity considers that as done which should have been done*" cannot be applied to a case of a transfer of a *res successionis, i.e.*, such as the interests of a reversioner. There is no such character in law as the heir of a living person or his statutory next of kin. Possibilities coupled with an interest such as contingent interests may be called contingent interests and a bare possibility such as a hope of inheritance, mere expectancies inasmuch as a possibility coupled with an interest is more than a possibility and is a present devisable interest. (*Mookerjee, A. C. J. and Fletcher, J.*) ANANDA *v.* GOUR. 25 C. W. N. 496 : 65 I. C. 27 : 33 C. L. J. 457.

——*Expressio unius exclusio alterius.*

The maxim "expressio unius exclusio alterius" is one that certainly requires to be watched. The scope of maxim is very wide, its construction varying under different circumstances and being open to qualifications and exceptions. (*Mookerjee and Rankin, JJ.*) KISHEN KAMINI DASI *v.* NIL MADHAB SAHA. 36 C. L. J. 362 : 1923 C. 66

——*Expressio unius exclusio alterius.*

The maxim "expressio unius exclusio alterius" is at best an uncertain guide to the true meaning of a statute. (*Jenkins, C. J. Stephen, Woodroffe, Holmwood, and Chatterjee, JJ.*) MIDNAPORE ZAMINDARI CO. LTD. *v.* HRISHI KESH GHOSH. 41 Cal. 1108 : 18 C. W. N. 828 : 25 I. C. 562 : 19 C. L. J. 505 (F. B.).

——*Falsa domonstratis non nocet—Decree—Construction.*

Where a decree for possession was passed in respect of a whole village but the area given in the decree was incorrect, *held*, that this was a case of 'false demonstration, incorrect' and the decree-holder was entitled to the possession of the whole village (*Mittra, A. J. C.*) MADHO. *v.* BHAGIRATHI BAI. 42 I. C. 291.

——*Falsus in uno falsus in omnibus.*

The maxim *falsus in uno falsus in omnibus* is a maxim of ancient origin but it is no longer obeyed to the letter. It is for the court to sift the evidence and separate the chaff from the grain if it can (*Maung Kin, J.*) MAUNG PO GYAW *v.* MAUNG SO. 1 Bur. L. J. 213. 1923 Rang 30.

——*Generalia specialibus non derogant.*

A general rule does not weaken a special rule. (*Scott, C. J. and Beaman, J.*) KHEMRAJ SHRIKRISHNA DAS *v* KISANLALA SURAJMAL. 42 Bom. 5 : 19 Bom. L. R. 771 : 42 I. C. 67.

——*Good and bad—Inseparable—Effect.*

If the bad is not separable from the good the whole is bad. (*Mookerjee and Fletcher, JJ.*) HURMUKHROY *v.* THE JAPAN COTTON TRADING CO., LTD. 34 C. L. J. 253: 66 I. C 342.

——*He who comes to seek equity must come with clean hands.*

He who comes to seek equity must come with clean hands. (*Drake-Brockman, J. C. and Stanyon and Mittra, A. J. Cs.*) SALU BAI *v.* BAJAT KHAN. 42 I. C. 200 : 13 N. L. R. 130 (F. B.).

——*He who seeks equity must do equity.*

When the person affected by a voidable transaction seeks to avoid its consequences, he is in the position of a person who seeks equity and he must do equity. Thus not only can he not ignore the transaction but he must try to offer to reimburse the prior transferee whose money has benefited the transferor. (*Mookerjee and Cuming, JJ.*) DIJENDRA MOHAN SARMA *v.* MANORAMA DASI. 36 C. L. J. 326 : 1922 C. 150.

——*"Ignorantia juris non-excusat."*

Ignorance of law, though insufficient as an excuse it may extenuate the offence in particular cases (*Abdul Raoof, J.*) NANDI *v.* EMPEROR. 59 I. C. 33 : 22 Cr. L. J. 1 : 1 Lah. 440

——*'Ignorantia juris non excusat—'Jus', meaning of.*

The meaning of 'Jus' in the above maxim is not private right but general law. (*Rattigan, J*) AISHAN *v.* MUHAMMAD DIN. 37 I. C. 119 : 94 P. R. 1916.

——*Ignorantia juris non-exsat.*

The maxim 'Ignorance of law is no excuse,' does not apply where *bona fides* or otherwise are to be determined. (*Kotwal, Dhobley and Prideaux A. J.Cs.* DHUDABAI. *v* NARAYAN 5 N. L. J. 73 : 1922 Nag. 28.

——*In pari delicto.*

Where the purpose of a *benami* transaction is fraudulent, and has gone beyond the stage of mere

MAXIMS.

intention, the maxim will apply and a party to the transaction cannot avoid it. (*Mittra, Offg. A.J.C.*) ISMAIL *v.* WASUDEO.
59 I. C. 285 : 16 N. L. R. 129.

———*In pari delicto—Contract Act*, S. 65.
S. 65 of the Contract Act has no application where the contract embodies a purpose known to be illegal to which both sides are parties. (*Drake Brockman, J. C.*) BHURE *v.* SHEO-GOPAL.
54 I. C 794.

———*In pari delicto—Applicability of*
An exchange of pl ts by tenants-at-will, is void and the court will apply the maxim to the parties thereto and help neither party and let the estate remain where it falls. (*Wazir Hasan, A. J. C.*) BISHESHWAR *v.* RACHCHA RAM.
3 U. P. L. R. (J C.) 18 : 61 I C. 985 : 8 O L J, 200.

———*Justice, equity and good conscience—Right to declare title to property.*
Even in the absence of rules, parties have a right to have questions of the title to property declared in case of dispute, by a Court, as a matter of justice and equity. (*Sadasiva Aiyar and Spencer, JJ.*) MAHARAJA OF JEYPUR *v.* HARI KRISHNA. 32 I C. 226 : 29 M. L. J, 730.

———*Nemo allegans turpitudinam suam est audiendus*— Applicability to India. The maxim is applicable to India (*Schwabe, C. J. and Coutts Trotter J.*) PARTHASARATHY REDDY *v.* KANDASAMI REDDY. 32 M. L. T 349 (H.C.): 1923 M. 711.

———*No contribution between joint tortfeasors—Applicability to India.*
The doctrine that there is "no contribution between joint tortfeasors" enunciated in *Merryweather v. Nixon* (2 Sm. L. C 560) cannot safely be extended to India (*Richards, C. J. and Rafique, J.*) NIHAL SINGH *v.* COLLECTOR OF BULANDSHAHR. 38 All. 237 : 33 I. C 165: 14 A L. J. 275.

———*None shall profit by his own fraud.*
No man can be allowed to profit by his own fraud (*Russel and Chandavarkar, JJ.*) HILLAYA *v.* NARAYANAPPA TIMMAYA 36 Bom. 185 : 12 I. C. 913 : 13 Bom. L. R. 1200.

———*Omnia praesumuntur rite esse acta—Mutation officers- Statements recorded by.*
The presumption as to the regularity of official and judicial acts applies to statements recorded by officers conducting mutation proceedings. (*Lord Atkinson.*) SADIN HUSAIN KHAN *v.* HASHIM ALI KHAN. 38 All 627 : 31 M. L. J. 607 : 14 A L J. 1248 : 19 O. C. 192 : 18 Bom. L. R. 1037 : 21 C W N. 130 : (1916) 2 M.W.N. 577 : 21 M L T. 40 : 1 Pat. L. W 157 : 36 I.C. 104 : 4 O L. J. 22 : 25 C. L. J. 363 : 6 L W. 378 : 10 Bur. L. T. 146 : 43 I. A. 212 (P.C.).

———*Omnia praesumuntur rite esse acta—Applicability*
The presumption *Omnia praesumuntur rite esse acta* applies to procedure only and not to decisions on points of law. (*Holmwood and Chapman, JJ.*) CHOWDHURY *v.* JAFAR MUHAMMAD. 24 I C. 739.

MAXIMS.

———*Omnia praesumuntur rite esse acta.*
There is a presumption that every act is done rightly. (*Batten, A.J.C.*) BALKISAN *v.* NARASIMHA
42 I. C. 299 : 13 N.L.R. 121.

———*'Possession follows title'—Applicability and scope.*
The doctrine that "the Court may presume possession to follow title" can have no application where the plaintiff has to establish possession at a particular point of time, however, valuable it may be in deciding questions of limitation in case of conflicting evidence of possession on both sides. 20 W. R. 25 ; 16 C. 473 ; P. C. Full 8 C. 224 P. C.; 16 M. L. J. 272 P.C. ref. to (*Mookerjee and Beachcroft, JJ.*) KALIKANANDA *v.* BIPRO DAS PAL.
19 C. W. N. 18 : 26 I. C. 436 : 21 C. L. J. 265.

———*Quicquid plantatur solo, solo cedit—Meaning of and applicability to India.*
This maxim means that anything affixed to land with the object of improving the inheritance becomes part of the realty and the property of the owner whether it be affixed by him or some one else. This maxim is not applicable to India. (*McColl, J. C.*) MA PYN *v.* MAUNG PO CHET.
11 Bur. L. T. 14 : 39 I. C. 385 : (1916) 2 U. B. R. 148.

———*Quod fieri non debet factum valet—Service of summons.*
A service of summons by delivery or tender of a copy of the summons to the deft. is complete and no subsequent irregularity of the process-server can undo it. The maxim *quod fieri non debet factum valet* will apply (26 C. 101 Appr. 16 B 117 Diss.) (*Stanyon, A. J. C.*) GOPALDAS GIRDHARILAL *v.* ISLU. 46 I. C. 277.

———*Res-ipsa-loquitur—Negligence—Tort.*
In an action for damages for negligence the burden of proving that the injury was caused by an act or omission of the defendant for which he was in law responsible lies on the plff. The maxim '*res ipsa loquitur*, applies to those cases only when the facts already established are such that the proper and natural inference therefrom is that the injury was the result of the deft's negligence. (*Kariyi, J.*) CATES B. E *v.* MONGAIN BROS. 42 I. C. 82 : 19 Bom. L. R. 778

———*Sic utri tuo ut alienum non laedas—Right to slaughter cattle.*
A Mahomedan's right to slaughter cattle is a common law right which he enjoys in accordance with the principles *Sic utri tuo ut alienum non laedas.* (*Lindsay, J. C.*) ORI LAL *v.* MUHAMMAD YAKUB.
1 O. L. J. 496 : 25 I. C. 908 : 17 O. C. 354

———*Stare decicis—Scope of.*
An unconsious application of wrong law cannot set up a principle of *stare decisis* merely because it has been left unchallenged for a few years owing to the ignorance of the people affected by it. (*Stanyon, A. J. C.*) UJIYARA *v.* TILOCHAN. 44 I. C. 435.

———*Ut res magis valeat quam pariat—Construction of document.*

MEASURE OF DAMAGES.

A court will look to the surrounding circumstances to find out the intention of the parties to a transaction and will not construe a document so as to nullify one important clause therein. (*Spencer, Coutts Trotter and Napier, JJ.*) VENKATA SUBBIAH CHETTY *v.* SUBBA NAIDU.
2 L. W 977 : 18 M. L. T. 533 : 31 I. C. 152 : (1915) M. W. N. 822.

MEASURE OF DAMAGES.
See DAMAGES.

MEDICAL CERTIFICATE.
See EVIDENCE ACT, S. 74.

MEDICAL EVIDENCE.
See (1) EVIDENCE.
(2) EVIDENCE ACT, S 73.

MEMORANDUM OF OBJECTIONS.
See C. P. CODE, O. 41, R, 22.

MENS REA.
See TORT.

MERCANTILE CONTRACT.
See CONTRACT ACT.

MERCHANDISE MARKS ACT (IV OF 1898).
———*Limitation—Criminal prosecution.*

The prosecution for using false trade mark will be barred if not brought within 3 years from the date of the first offence of the series for the same trade mark. (*Pratt, J. C.*) JAGANNATH *v.* EMPEROR. **10 S. L. R. 45 : 35 I. C. 671 : 17 Cr. L J. 367.**

———**Ss. 2 (2), 4 and 7**—*Trade description—Design covering whole body of goods—Indian Patents and Designs Act, S. 2 (5).*

Where a design covers the whole body of goods and is part and parcel thereof, it is not a trade mark but a 'design' under the Indian Patents and Designs Act, 1911 Nor is it a 'Trade description' within S. 2 (2) of the Merchandise Marks Act, 1889. (*Hayward, J. C. and Boyd, A. J. C.*) NARUMAL KHEM CHAND *v.* THE BOMBAY CO, LTD.
8 S. L. R. 39 : 25 I. C. 998 : 15 Cr. L. J .670.

——— — **Ss. 6 and 7**—*Merchandise—Meaning of.*

The word 'merchandise' includes goods selected or guaranteed by the proprietor of the trade mark, and the selector-importer who affixes his name or trade mark to those goods is a person "whose merchandise they are" within S. 480, I. P. C. The main object of the Act is to prevent a trader passing off his own goods as those of another. (*Pratt, J. C. and Fawcett, A. J. C.*) DUNBAR *v.* HOLLAND BOMBAY TRADING CO.
12 S. L. R. 129 : 50 I. C. 165 : 20 Cr. L. J. 277

———**S. 15**—*Limitation—Long silence—Penal Code, S. 482—Infringement of trade mark.*

The period limited by S. 15 of the Merchandise Marks Act for a prosecution under S. 14 begins from the date of the particular infringement alleged against the accused. S. 15 does not prevent a prosecution under S. 482, I. P. C. The owner of a trade mark should not wait for several years while his trade mark is infringed continuously and then bring a criminal complaint in respect of some recent infringement. 2 Bur. L. T. 83 Foll. If the goods of a manufacturer from the mark he has used are known by a particular name the adoption by a rival trader of any mark which would cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as an actual copy of his device. In such cases dissimilarity of the rival mark is not a complete defence. (1865) 1 Ch. App. 192 Foll. A trade mark applied by a shirt maker to his shirts may be an infringement of a similar mark applied by a manufacturer to his cloth, (1890) 15 App. C. 252, foll. (*Twomey, J.*) ABDUL MAJID *v.* EMPEROR. **10 Bur. L. T. 19 : 36 I. C. 168 : 17 Cr. L. J. 488 : 9 L.B.R. 31.**

MERCHANT SEAMEN'S ACT (I OF 1859).
S. 35—*Wrongful dismissal—Compensation—Contract Act, if affects*

The maximum compensation allowable to a seaman, including an officer, for wrongful dismissal before the first month's wages have been earned, is one month's wages under S. 35 of the Act and the restriction is not removed by the Contract Act. (*Twomey, J.*) OWEN PHILLIPS *v.* LIM CHINT SONG. **6 Bur. L. T. 89 : 20 I. C. 285 : 7 L. B. R. 22.**

MERCHANT SHIPPING ACTS (57 AND 58 VIC, C. 60).
———**S 684**—*Murder on the High Seas—Trial—Jurisdiction.*

An Indian who commits murder on board a steamer on the High Seas may be tried by the Court having jurisdiction over the place where he may be found and the substantive law applicable, is the English Law (*Woodroffe, J.*) EMPEROR *v* SALIMULLA. **39 Cal. 487 : 14 I. C. 598 : 13 Cr L. J. 246 : 16 C. W. N. 471.**

MERGER.
See also (1) C. P. CODE, O. 34, R 3 (3).
(2) LANDLORD AND TENANT.
(3) T. P. ACT, S. 101.

———*Decree—Cause of action—Tort.*

If a party obtains a decree for damages for tort, the original cause of action merges in the decree but a decree in ejectment differs very much from other decrees and the doctrine of merger does not apply to it. (*Richards, C. J. and Rafique, J.*) DHANRAJ *v.* LAKHRANI KUAR.
38 All 509 : 35 I. C. 601 : 14 A. L. J. 709.

———*Debt—Creditor succeeding to estate of debtor—Widow—Limited estate—Extinguishment of the debt.*

There is an extinguishment of the debt if the person who is to receive the money is also the person who ought to pay. Where a Hindu lady who is a creditor of her husband's estate succeeds to that estate on her husband's death, there is no extinguishment of the debt as she is only a limited owner. In the case of a limited owner the presumption is against merger as it is not for her advantage that the charge should sink for the benefit of the remainderman. (*Spencer, J.*) CHIDAMBARAM PILLAI *v.* MEENAKSHI AMMAL.
16 L. W. 678.

———*Decree—Debt.*

Where a simple debt is sued on and a decree is obtained, the original debt becomes merged

MERGER.

and cannot be kept alive. (*Spencer and Krishnan, JJ.*) RAMAKRISHNA KUKKILAYA *v.* NEKKAR KUPPANNA. 6 L. W. 621 : 22 M. L. T. 422: 33 M. L. J. 581 : 43 I. C. 286 : (1918) M. W. N. 75.

———*Lessor and lessee—Acquisition of interest.*

Where a lessee acquires all the rights and interests of his lessor, it is difficult to understand how his lease can have any effect. (*Stuart, J. C.*) JAGMOHAN SINGH *v.* RAGHO RAM. 55 I. C. 638 : 7 O. L. J. 304

———*Intention—Evidence.*

The question of merger or no merger depends on the express or implied intention of the parties in a Court of equity. (*Chamier, C. J. and Sharfuddin, J.*) DULHNI LACHANBATI KOERI *v.* BODHNATH TEWARI. 5 Pat. L. W. 309 : 43 I. C. 449 . 1917 Pat. 337

MESNE PROFITS.

See also (1) C. P. CODE, S. 2 (12), O. 20 R. 12.
(2) HINDU LAW—(*a*) Alienation.
(*b*) Partition.
(3) PARTITION.

———*Decree of trial court affirmed in appeal—Effect.*

Where a decree of a trial court awarding mesne profits is affirmed in appeal, it must be reckoned from the decree of the trial court. (*Viscount Finlay.*) BAIJNATH GOENKA BAHADUR *v.* NANDA KUMAR SINGH. 28 C. W. N. 55 (P. C.)

———*Right to—Alienee from Hindu widow—Alienation set aside at the instance of reversioner—Right to mesne profits — Improvements set off, against mesne profits.*

Where alienee from Hindu widow has effected improvements thereby increasing the rental, *held*, that the increase in rental should be set off against mesne profits awarded to the successful reversioner. (*Lord Buckmaster*). BARHAM DEO NARAIN SINGH *v.* RAM RATAN SAHU. L. R. 3 (P. C.) 20.

———*Liability—Person in lawful possession.*

Where in a suit by the sons to set aside an alienation by their father a conditional decree for possession on payment of portion of consideration found to be binding on the estate is passed the sons are not entitled to mesne profits as the possession of the alienee was not unlawful. (*Lord Phillimore*) BANWARILAL *v.* MAHASH. 41 All 63: 45 I. A. 284 21 O. C. 328 : 23 C. W. N. 577 : 6 O. L. J. 168 : 49 I. C. 540: (1919) M. W. N 490 (P. C.).

———*Separate suit for mesne profits—Former suit for the cancellation of the sale-deed.*

The procedure of permitting separate suits for the mesne profits by allowing the plaintiffs to drop this claim in their original suit for cancellation of a deed should be severally discountenanced (*Walsh and Sundar Lal, JJ.*) BHIRGEE NATH *v.* NARSINGH TEWARI. 39 All. 61: 35 I. C. 475: 14 A. L. J. 1161.

———*Right to—Plaintiff not entitled to possession—Effect.*

MESNE PROFITS.

Where the plaintiff is not entitled to immediate possession of the land for the period for which he claimed mesne profits his claim is unsustainable. (*Walmsley and Ghose, JJ.*) SHEIKH KARIM *v.* SOBEDAR SHEIKH. 1924 C. 531.

———*Jurisdiction—Sum claimed in excess of pecuniary jurisdiction—Procedure.*

If the plaintiff makes an application in a suit for possession for mesne profits in excess of the pecuniary jurisdiction of the Court, the proper procedure for the Judge is to return the plaint to the plaintiff for presentation to the proper court for decision. The plaintiffs asked for mesne profits to the extent of Rs 3,000 odd. There was an objection made by the defendants at once to the jurisdiction of the Munsiff to try the question. *Held*, that the plaint in so far as it asked for mesne profits to be ascertained ought to be returned to the plaintiffs for presentation to the proper Court which is competent to try. (*Walmsley and Ghose, JJ.*) JOGNESWAR CHATTERJEE *v.* SURENDRA NATH CHATTERJEE. 38 C. L. J. 142: 1924 Cal. 167.

———*Pendente lite—Court fee.*

Court-fee is not leviable on a claim for mesne profits *pendente lite*. 21 M. 171; 13 C. W. N. 815 Rel on. But where the mesne profits have accrued due before suit and the plff. is in a position to value it even approximately be is bound to state the amount under O. 7, R. 2 (2), C.P.C. (*Mookerjee and Beachcroft, JJ.*) BHUPENDRA KUMAR *v.* PURNA CHANDRA BOSE. 24 I. C. 232.

———*Suit for—Effect of proceedings under S. 145, Cr. P. C.*

Where a suit is brought for mesne profits in respect of land by a person who was defeated in proceedings under S. 145, Cr. P. C., he need not vacate the Magistrate's order or ask for possession. If he succeeds in proving his title to claim mesne profits he will succeed in the action. (*Spencer and Devadoss, JJ.*) MUHAMMAD SHAMSGOYA ROWTHER *v.* OMANDU PILLAY. (1923) M. W. N. 779 ; 18 L. W. 649: 1924 M. 224.

———*Measure of—Rent payable to landholder—Deduction of.*

In a suit by certain occupancy ryots against their landholder for mesne profits for the period of their exclusion from the land *held*, that in ascertaining mesne profits, the landholder was entitled to deduct the rent which would have been payable to him by the ryots had they remained in possession, notwithstanding the fact that a suit or rent by the landholder against the ryots for the period in question had been dismissed by the Revenue Court. (*Oldfield and Venkatasubba Rao, JJ.*) GOLKONDA RAMACHANDRUDU *v.* VENKATA NARASIMHA GARU. 44 M. L. J. 486 : 17 L. W. 545 : 32 M. L. T (H. C.) 364 : (1923) M. W. N 437 (1) : 1923 Mad. 557.

———*Right to—Suit by Hindu reversioner—Alienation by limited owner without necessity.*

An arrangement by which a woman settles the properties on her daughters is not *bona fide* family settlement when there is no necessity

at all to do so. (*Spencer and Devadoss, JJ.*) JOGA VEERAYYA *v.* NAIKINA SALLEYA. 16 L. W 752 : 1923 M. 168 :

———*Right to—Joint family—Suit for partition by co-parcener.*

As in a partition suit the plaintiff is not entitled to claim past profits, his claim for profits before date of suit must be disallowed. A co owner in possession of the co ownership property is regarded as a trustee subject to all the liabilities under S. 95 of the Trusts Act. (*Oldfield and Venkatasubba Rao, JJ.*) RAMASWAMI AIYER *v.* SUBRAMANIA IYER. 16 L. W. 297 : 46 M. 47 : 43 M. L. J. 406 : 1923 M. 147

———*Preliminary decree negativing — Question cannot again be raised at the time of final decree.*

If the right to mesne profits is negatived in the preliminary decree and no appeal is preferred against the order disallowing them, he cannot raise the question again at the stage of passing the final decree. But if the omission to provide for them is due to inadvertence, the matter of mesne profits is not finally concluded till the passing of the final decree. (*Spencer, J.*) HUSSAIN SAHIB *v.* HAMMAD SAHEB. 16 L. W 312 : 312 M. L. T. 180 : (1922) M. W. N. 562 : 1923 M. 43.

———*Liability for.*

When the alienation by the manager is not binding on the other co-parcener, the latter may hold the alienee liable for the mesne profits from the date of the suit. (*Devadas and Kumaraswami Sastri, JJ.*) SUBBE GOUNDAN *v.* KRISHNAMACHARI. 45 M. 449 : 15 L W. 537 : 30 M. L. T. 217 : (1922 M. W. N. 269 : 42 M. L. J. 372 : 1922 M. 112.

———*Liability—Possession under decree.*

Where a person is in possession obtained under a proper decree of Court, his possession is not wrongful, and such person is not liable for mesne profits. (*Abdur Rahim and Odgers, JJ.*) MANIAN *v.* KUTHURI NATTATH KOTTAYIL RAMAN. 13 L. W. 449 : 62 I. C. 724 : 41 M L. J. 15

———*Right to—Hindu law—Alienation by manager—Suit by junior member to set aside.*

Junior members of a Hindu family suing to set aside unauthorised alienations of joint family properties by the manager are not entitled to mesne profits before suit as of right. Mesne profits are in the nature of damages which the Court will mould according to the justice of each case. (*Sir John Wallis, C. J. and Kumaraswami Sastri, JJ.*) GANESA AIYAR *v* AMIRTHASAMI ODAYAR. 23 M. L. T. 245 : 44 I. C. 605 : (1918) M W. N. 892.

———*Liability—Trespasser.*

Mesne profits are awarded against a person illegally in possession of land against the owner's will or without his consent. (*Sadasiva Aiyar and Napier, JJ.*) SIVARAMA IYER *v.* ALAGAPPA CHETTI. 2 L. W. 946 : 31 I. C. 211 : (1915) M. W N. 845.

———*Calculation—Evidence.*

In calculating mesne profits the respective income of the plff. and the deft in one fasl

might be taken as *prima facie* evidence of the income for the last year. (*Sundara Aiyar and Ayling, JJ.*) SRI RAJASAVA VENKATA MAHIPATHI SURYA RAO *v.* SRI RAJASAVA UBBAYAMMA. 10 M. L. T. 295 : (1911) 2 M. W. N. 308 : 12 I. C. 385 : 21 M. L. J. 965.

———*Liability for—Trespasser—Persons not abetting trespass.*

A defendant who has not trespassed upon the property of the plaintiff and who has not joined in abetting the trespass is not liable for mesne profits. 6 C. L. R. 357 ; 24 C. 413 referred to. A mortgagor is not liable for mesne profits on account of the wrongful possession of the auction-purchaser in execution of the mortgage decree. (*Mittra, A. J. C.*) SONI *v.* MEGHASHYAM. 1923 Nag. 103 (2).

———*Suit for—Denial of title—Duty to enquire in suit*

Where in a suit for mesne profits, defendant denies the extent of the plaintiff's share it is the duty of the Court to enquire into the claim in the suit itself and the Court is not justified in dismissing the suit on the ground of such denial. (*Hallifax, A. J. C.*) JAINNABI *v.* GHULAM MOHIDDIN. 1923 Nag. 55 (2).

———*Basis of claim for mesne profits by reversioners against alienee.*

A voidable transaction is good as against third parties till it is set aside, but as regards the person who has a right to avoid it, it is in a state of suspense until such party exercises his option. If he avoids it, it is treated as void from the outset as against him It is on this principle that mesne profits are always allowed in a suit by the reversioners to recover property from a transferee from a Hindu widow after her death. (*Daniels and Lyle, J. C.*) MOHAMMAD HADI *v.* PARBATI. 25 O. C. 2 : 9 O. L. J 312 : 1922 Oudh 91.

———*Amount to be awarded—Court Fees Act, S. 11.*

A plaintiff cannot ordinarily recover more than what he claims in the plaint but in a suit for mesne profits. S. 11 of the Court Fees Act permits the plf. to make an estimate of what is due to him and allows the Court to pass a decree for more than the amount at which he valued his relief if the profits are found to be in excess of the profits claimed provided additional Court-fee is paid thereon. The plf. is not tied down to his estimate unless there is something to show that he has relinquished anything that might be found due in excess of the claim. (*Kanhaiyalal, A. J. C.*) DURGA BHARATI *v.* BHAGWATI. 24 O. C. 209 : 64 I. C. 101 : 8 O. L. J. 477.

———*Basis of calculation.*

The gain made by the wrong-doer, and not the loss caused to the person wronged, is the true test to ascertain mesne profits. (*Das and Adami, JJ.*) TILAKDHARI SINGH *v.* RAM PRASAD SINGH. 62 I. C. 25.

———*Liability—Joint wrong doers.*

Joint wrong-doers are jointly and severally liable for the mesne profits. (*Jwala Prasad, J.*) MEEK *v* ISHAN CHANDRA. 57 I. C. 181 : 2 U. P. L. R. (Pat.) 144.

MESNE PROFITS.

——*Claim—Starting point.*

Where the plaint does not say from what date mesne profits are claimed presumably plaintiff claims mesne profits only from the date of institution of the suit. (*Brown, A. J. C.*) MAUNG LU GALE *v.* MAUNG LU SO.

1 Bur. L. J 267 : 4 U. B. R. 140 ; 1923 R. 110.

MESNE PROFITS AND IMPROVEMENTS ACT (XI OF 1885.)

——S. 2—*Applicability—Permanent lease of trust property—Eviction of lessee.*

The Mesne Profits and Improvements Act is applicable only to cases tried on the Original Side of the High Court. A permanent lease of the property of a religious trust is invalid and a lessee when evicted by proceedings in the mofussal Courts is not entitled to compensation for a house built by him either under S. 51 of the T. P. Act or under S. 2 of the Mesne Profits and Improvements Act, but can only remove the materials. The words "other absolute Estate" in S. 2, of the Mesne Profits and Improvements Act do not apply to the estate of lessee with permanent occupancy rights. (*Sadasiva Aiyar and Napier, JJ.*) VENKATAPPIER *v.* RAMASWAMI AIYAR.

10 L. W 137 : 52 I. C. 517 : (1919) M W. N. 548.

MIGRATION.

See HINDU LAW (1) APPLICABILITY OF.
(2) SCHOOLS OF LAW.

MINERALS.

See (1) LANDLORD AND TENANT—MINES AND MINERALS.
(2) MINES AND MINERALS.

MINES AND MINERALS.—*See also* LANDLORD AND TENANT—MINES AND MINERALS.

——*Mesne profits—Cases of mining—Allowances when possession under* bona fide *claim of title.*

Mining differs from agricultural operations on the surface. The coal which the judgment-debtor might have got was still there. Further if he was in possession under a *bona fide* claim of title he is entitled to allowances for royalties paid and to compensation for expenses incurred in working the mine. (*Richardson and Huda, JJ.*) SHAMBHU NATH *v.* SATISH CHANDRA 20 C. W. N. 369.

——"*Open mines*"—*Meaning of.*

"Whether a mine is open or not" is a question of intention. A mine is said to be open when it has been devoted, by the person lawfully entitled to do so, to the purpose of making a profit by the working and sale of the minerals therein. (*Mookerjee and Beachcroft, JJ.*) F. F. CHRISTIAN *v.* TEKAITNI NARBADA.

20 C. L J. 627 : 27 I. C. 471 : 19 C. W. N. 796.

——*Adjoining owners of mines—Rights and duties of—Injunction when can be given.*

An owner of a lower mine, must, if he wishes to guard against, the natural flow of water from the mines of his neighbours, have a barrier in the upper part of his mine to pen back the water and the lessee of such a mine may be held liable for any damage done by breaking down the barrier between the mines. It is however, not obligatory upon the lessee to leave a barrier of coal merely to prevent communication with the adjoining mines and therefore where the object of the plaintiff is only to prevent communication with adjoining mines an injunction cannot be issued. (*Mookerjee and Beachcroft, JJ.*) RAMJAS AGHARWALA *v.* BRAJOMOHAN.

20 C. L. J. 538 : 27 I. C. 244 : 19 C. W. N. 887.

——*Mining lease—Damages, measure of.*

The rate of interest per year of a leased holding is the measure of damages to be awarded for letting down the surface for mining purposes. (*Ross, J.*) LAKURKA COAL CO. LTD. *v.* BISESWAR CHATTERJI. 1923 P. 296.

——*Quarry—Adverse possession.*

Mere surface working or part working of a quarry cannot give claim to the whole by adverse possession beyond what is actually extracted. Where land is sold reserving the right to minerals, mere non-user for any length of time is not an abandonment of possession unless worked out by some one else. (*Miller, C. J. and Coutts-Trotter, J.*) KUMAR PRAMATHA NATH *v.* MEIK.

1920 Pat. 146 : 1 Pat L T 761 : 56 I. C. 184 : 5 Pat. L. J. 273.

——*Coal mine—Wrongful extraction of coal—Measure of damages.*

As to the basis on which damages for wrongful extraction of coal from an adjacent mine should be assessed. *Held*, that the deft. having not acted fairly and honestly or inadvertently or under a mere mistake or under a *bona fide* belief of title, the plff'. company was entitled to the value of pit's mouth, of the coal worked and got by the deft. from the plff.'s mine making to the deft. all just allowances for the cost and expenses incurred by him in bringing that coal to the pit's mouth but not including the cost of getting or separating the coal. (*Das and Foster, JJ.*) LODNA COLLIERY CO. *v.* BEPIN BEHARY. 55 I. C. 113 : 1 Pat. L. T. 84.

MINOR.

See also (1) C. P. CODE, O. 32.
(2) CONTRACT ACT, S 11.
(3) DECREE SETTING ASIDE.
(4) EVIDENCE ACT, S, 115.
(5) GUARDIAN AND WARD.
(6) GUARDIANS AND WARD ACTS.
(7) HINDU LAW—MINORITY AND GUARDIANSHIP.
(8) LIMITATION ACT, ART, 44.
(9) MAHOMEDAN LAW—GUARDIANSHIP.
(10) MINORS ACT.

Adjudication as insolvent.
Admissions of guardian.
Alienation by guardian.
Appointment of guardian.
Compromise.
Contract by guardian.
Contract by minor.
Custody.
Debt of guardian.
Decree against.
Estoppel.
Plea of minority.
Miscellaneous.

MINOR—Adjudication as Insolvent.

Adjudication as Insolvent.

——*Adjudication as insolvent — Partnership.*

A minor partner of a firm cannot individually be adjudged an insolvent. But an application for an adjudication may be directed against the firm and the minor's interest therein. 42 Cal. 225, Appr. (*Tudball and Sulaiman, JJ.*) JAGMOHAN *v.* GRISH BABU **42 All. 515 : 18 A. L. J 611 : 58 I. C. 557 : 2 U. P. L. R. (All.) 144.**

——*Adjudication as insolvent.*

Under S. 247 of the Contract Act a minor cannot be declared an insolvent. If a person is wrongly adjudged as an insolvent, the adjudication may be annulled under S. 42 of Pro. Insolvency Act. (*Lindsay, J. C.*) MUHAMMAD MUMTAZ ALI KHAN *v.* UGARAJ SINGH. **58 I C. 558 · 1 U P. L. R. (J. C.) 5.**

Admissions of guardian.

——*Admissions of guardian.*

Admissions made by the guardian of the person of an infant as to the property rights of the latter are not binding on the infant. (*Mookerjee and Beachcroft, JJ.*) BANWARILAL *v.* DWARKANATH. **52 I. C. 825 : 29 C. L. J. 577.**

Alienation by Guardian.

——*Alienation by Guardian*—Defacto *guardian—Powers of.*

The idea that a *defacto* guardian by reason of the fact that he is in charge of a child, he is in vested with certain powers over the infant's property, is erroneous. The situation of an unauthorised guardian is not bettered by calling him *defacto* guardian. He may, by his *defacto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot clothe himself with rights and assume legal power to sell it. (*Mr. Ameer Ali.*) IMAM BANDI *v.* MUTSADDI.
45 Cal. 878 45 I. A. 73: 35 M L. J. 422 ; 16 A. L. J. 800 · 24 M. L. T. 330: 28 C. L. J. 409 : 23 C. W N. 50 : 20 Bom. L. R. 1022 5 Pat. L W. 276 : (1919) M. W. N. 91 : 47 I. C. 513 : 9 L. W. 518 (P. C.)

——*Alienation by guardian—Lease.*

A lease of a minor's property by a person, not a certificated guardian nor a near relation, is not binding on the minor unless the lessee can prove that the lease was for the benefit of the minor. (*Rafique and Piggott, JJ.*) LALA *v.* RAMCHANDER. **63. I. C. 255**

——*Alienation by guardian—Sanction of Court not obtained—Effect.*

A certified guardian cannot alienate the minor's property without a sanction of the court and the sale is voidable at the instance of the party aggrieved. But such person, before applying to set aside the transfer must offer to reimburse the prior transferee for the money which has benifitted the minor. (*Mookerjee and Cuming, JJ.*) DIJENDRA MOHAN SARMA *v.* MANORAMA DASI.
36 C L. J 326 : 28 C. W. N. 57 : 1922 C. 150.

——*Alienation by guardian—Suits for possession by minor—Limitation.*

MINOR—Alienation by guardian.

When a right to avoid the sale of his property by a guardian is barred against the minor by limitation, his right to recover possession of the property is also barred. (*Chatterjee and Newbould, JJ.*) KRISHNA DHONI RAM *v.* BHAGVAN CHANDRA. **34. I. C. 188.**

——*Alienation by guardian—Liability of minor.*

Where a transaction is entered into by a guardian in his own name but it is found that he was acting not for himself but for and on behalf of minor, the transaction is substantially binding on the minor. (6 M. I. A. 393. Rel. (*Mookerjee and Beachcroft, JJ.*) GIRIJA NATH ROY CHAUDHURY *v.* UPENDRA NATH PAL. **20 I. C. 241.**

——*Alienation by guardian—Next friend.*

An alienation of a minor's property in dispute by his next friend who is not his guardian is nullity. (*Johnstone and Lal Chand, JJ.*) CHANDA SINGH *v.* HARBANS SINGH. **12 P. L. R. 1916: 30 I. C. 513: 108 P. W. R. 1915.**

——*Alienation by guardian —Mortgage — Mortgage not binding on minor—Mortgagee not entitled to fall back on the prior mortgage paid by him.*

In a mortgage suit if a mortgage executed by the minor's guardian was found to be not binding on the minor, the mortgagee cannot fall back on a prior mortgage paid off by him out of the consideration of the suit mortgage. (*Reid, C. J.*) ZUMARUDDIN *v.* PRABHU DIAL.
128 P. W. R. 1913: 19 I. C. 755: 215 P. L. R. 1913.

——*Alienation by guardian—Avoidance of sale—Conveyance of properties to stranger.*

Property belonging to a minor was sold by his mother and guardian. Subsequently on attaining majority he ignored the sale by mother and conveyed the property to the plaintiff who sued for possession. *Held* that, by selling the property to the plaintiff on the footing that the prior sale by his mother was not binding on him, the plaintiff's vendor had chosen to avoid the prior sale and that the plaintiff could sue for recovery of possession of the property without a prayer for setting aside the sale. 38 M. 867 distinguished. (*Ramesam and Coleridge, JJ.*) PUTEVU KAMARAJU *v.* CHUNDURI GUNNAYYA, **45 M. L. J 240: 18 L. W. 233 : (1923) M. W. N. 756 : 1924 M. 322.**

——*Alienation by guardian.*

If it is proved in a suit by a minor for possession of properties alienated by his guardian that the money was not required for the minor's benefit, the whole sale is void and the minor shall have to pay the remaining portion to the purchaser but if a substantial portion is spent for his benefit, the sale would be upheld and in such case there can be no decree for partition between the purchaser and the minor. (*Sadasiva Aiyar and Napier, JJ.*) RUKMANI SUNDARAMMAL *v.* MUTHIAMMAL.
26 I. C. 489 : (1915) M. W. N. 8.

——*Alienation by guardian—Duty of vendee.*

A sale of the minor's property by his guardian will not bind the minor if the sale price has not

MINOR—Alienation by guardian.

been properly invested. The vendee must at least show that he made *bona fide* enquiries as to the proper application of the money and he believed it to be for the minor's benefit. It is not sufficient if he believes the guardian's statement or recitals in the sale deed. (*Benson and Sundara Iyer, JJ.*) KALLIAPPA *v.* DEIVASIGAMANI.
18 I. C. 27: (1913) M. W. N. 795.

———*Alienation by guardian — Necessity—Rights of alienee of minor to question.*

An alienee who has acquired the rights of a minor in property is entitled to challenge a mortgage granted by the minor's guardian and make the mortgagee establish legal necessity for the loan or to show that the mortgage was for the minor's benefit. (*Prideaux, A. J. C.*) DALCHAND *v.* CHAND KHAN. **27 I. C. 859 : 11 N. L. R. 1**

———*Alienation by guardian—Guardian de-facto.*

An alienation of the minor's property by a *de-facto* but not *de jure* guardian is void and need not be set aside by the minor before obtaining possession of the property. (*Halifax, A. J. C.*) HUSEN *v.* RAJARAM. **26 I. C. 813: 10 N. L. R. 133.**

———*Alienation by guardian — Benefit or necessity of minor.*

A sale of minor's property by his *defacto* guardian for the benefit or necessity of the minors is valid. (*Maung Kin, J.*) MAUNG AUNG NYIN *v.* MAUNG GYI. **32 I. C. 638.**

Appointment of Guardian.

———*Appointment of guardian — Duty of Court—Appointment of by Court.*

Before appointing a guardian so as to prolong the minority of an infant then about to attain age it is the duty of the Court to consult the wishes of the minor and to consider his interests. (*Lord Parker.*) MRS ANNIE BESANT *v.* NARAYANAIH.
38 Mad. 807 : 41 I. A. 314: 18 C. W. N. 1089 : 16 M. L T. 165: 1 L W. 520: (1914) M. W. N. 585: 20 C. L. J. 253: 16 Bom. L. R. 625: 12 A.L.J. 1155: 24 I.C. 290 (P.C.): 27 M. L. J. 30.

———*Appointment of guardian— If can be appointed as Guardian of property of minor.*

A pardanashin lady is not disqualified from being appointed guardian of minor's property ; but the Court will exercise discretion whether she will be the proper guardian looking to the nature of the business. (*Kotval, A. J. C.*) MT. RAJRANI *v* MT. BHAGWANDAS, **1922 Nag. 232.**

———*Appointment of guardian— Considerations to be taken into account—Adopted boy—Right of adoptive parents.*

In matters relating to the appointment of a guardian for a minor the main question for the court is the welfare of the minor child and the court is not always bound to appoint the person having the best title to be the guardian of the person of the minor. In the absence of proof of incompetency or serious ill-treatment, the adoptive parents are the proper guardians of their minor adopted son, (*Ashworth, J. C.*) MT. GANGA JALI *v.* DIP NARAIN.
9 O. L. J. 325 : 1922 Oudh 129.

MINOR—Compromise

Compromise.

———*Compromise by guardian — Leave of Court not obtained—Effect — Invalid though supportable on other grounds.*

The provision of law, making it necessary to obtain the leave of the Court is of great importance to protect the interests of minors and in the absence of such leave, a compromise cannot be supported. A mortgage given by a trustee in pursuance of a compromise in a suit in which he was the guardian *ad-litem* of a minor without the sanction of the Court, is invalid on that very ground though supportable as a proper act on the part of the trustee. (*Lord Parmoor.*) SUBRAMANIAM CHETTIAR *v*, RAJA RAJESWARI DORAI.
39 Mad. 115: 19 M. L. T. 150 : 20 C. W. N. 201 : (1916) 1 M. W. N. 100 : 3 L W. 149 : 23 C. L. J. 337: 18 Bom. L. R. 360: 14 A. L J. 153: 32 I. C. 258 : 29 M. L. J. 856 (P. C.)

———*Compromise— Unrepresented, is no party.*

An unrepresented minor is no party to suit and a compromise on his behalf does not bind him. (*Ryves and Gokul Prasad, JJ.*) NARAIN SINGH *v* RAJ KUMAR SINGH. **20 A. L. J. 251 : 44 A. 428 : L. R. 3 A. 229 : 1922 All. 217.**

———*Compromise—Guardian's powers.*

A minor is bound by a comoromise made by his guardian unless his interest is not properly protected by the latter. A compromise made by the father of his minor son as his guardian to the effect that he gave up his (minor's) claims in an estate and the other parties to the compromise gave up their claim under an alleged will is not binding on the minor unless it is proved that there was a will and that their claim was honest and *bona fide.* Proof of the will in such a case need not be in a very solemn form. (*Chitty and Beachcroft, JJ.*) KRISHNA CHANDRA DUTTA *v.* HEMAJASANKAR NANDI. **45 I. C 477 : 22 C. W. N. 463.**

———*Compromise — Benefit— Payments of barred debt.*

A compromise, which obliges minors to pay barred debts cannot be said to be for the benefit of the minors. (*Shahdin and Agnew, JJ.*) MUKAND LAL *v.* ABDUL MAJID.
180 P. W. R. 1913 : 20 I. C. 501 : 292 P. L. R. 1913.

———*Compromise—Arbitration.*

A guardian cannot bind his ward's reversionary interest by a reference to arbitration. (*Oldfied and Bakewell, JJ.*) KANTALA VENKATA KRISHNAMACHARULU *v.* KANTALU PERUMDEVAMMAL. **56 I. C. 593.**

———*Compromise by the father — Benefit derived by minor—No attempt to set up title for a long time after majority— Estopped from redemption.*

When the father of a minor enters into a compromise which the minor has no power to enter into and the minor derives benefit from the compromise and makes no attempt to set up a title conflicting with the terms of the compromise for a long time after he becomes a major he is deemed to have adopted and ratified the arrangement and is

MINOR—Contract by guardian.

estopped equitably from asserting a right to redeem. (*Stuart, A. J. C. and Kanhaiyalal, A. J. C.*) RAJA *v.* SANT RAM DAS.
2 O. L. J. 228 : 30 I. C. 193 ; 18 O. C. 95.

Contract by guardian.

——*Contract by Guardian--Purchase of land.*

The guardian of a minor's estate has no power to bind the minor or his estate by contract for a purchase of land and the minor is not entitled to specific performance of the contract on attaining majority. (*Lord Maclaghlen*) MRS SARWARJAN *v.* FAKRUDDIN MAHOMED. 39 Cal. 232 : 16 C. W. N. 74 : (1912) M. W. N. 22: 9 A. L. J. 33 : 15 C. L. J. 69 : 14 Bom. L. R 5 : 11 M. L. T. 8 : 13 I. C. 331 : 39 I. A. 1 . 21 M. L. J. 1156.

——*Contract by guardian.*

Contract if entered into for the benefit of the minor by guardian binds the minor. (*Walsh, J.*) JWALA PROSAD *v.* RAGHUBIR PROSAD.
1923 All. 17.

——*Contract by guardian—Duty of Court.*

It is open to a minor to either affirm or disaffirm contracts entered into by his guardian but not binding on him. But it is the duty of the guardian to protect his interests by suing on his behalf. When such a suit is brought, it is the duty of the Court to entertain it and dispose of it according to law and not on grounds of expediency real or supposed. If the Court refuses to give relief on the ground that the suit can be brought by the minor after he has arrived at the age of majority, then the minor's interest may be seriously prejudiced by reason of important evidence, disappearing by the time the suit is brought. (*Chandavarkar and Batchelor, JJ*) VENKATARAMAN BHAT SHANKAR BHAT *v.* PADMANABH PARRAM BHAT. 15 I. C. 835 : 14 Bom. L. R. 383.

——*Contract by guardian—Specific performance—Guardian if can go behind a contract.*

A contract which is for the minor's benefit can be specifically enforced against him and a guardian cannot go behind a validly-made contract simply because he can make a better bargain elsewhere. 27 C. 276 ; 34 C. 163 rel. (*Coxe and Teunon, JJ.*) LAL GOPAL DUTTA *v.* KHIROO RIAH MAJOZILLA ZEMINDARY SYNDICATE LTD.
13 I. C. 673 : 16 C. W. N. 297.

——*Contract by guardian—Specific performance—When granted.*

Specific performance against a minor will not be granted unless it is beneficial to him. (*Abdul Raoof and Lumsden, JJ.*) BAHADUR CHAND *v.* MUHAMMAD ISMAIL.
4 Lah. 408 : 1924 L. 181.

——*Contract by guardian—De facto guardian—Lease of property*

A guardian has no power to enter into engagements on behalf of his minor ward making him liable under onerous covenants, such as a covenant to pay a sum of money every year as rent due under a lease. 19 C. 507 ; 39 C. 232 ; 11 Bom. 551 ; 27 M. L. T. 264 relied on. The action of a

MINOR—Contract by guardian.

de facto guardian will be binding on the minor's property only if it is for the minor's benefit or necessity. (*Krishnan and Ramesam, JJ.*) PUPPOOTH *v.* RAMAN SOMAYAJIPAD.
17 L. W. 558 : (1923) M. W. N. 301 : 32 M. L. T. (H. C.) 107 : 1923 Mad. 558 : 44 M. L. J. 515.

——*Contract by guardian—Benefit.*

Per Ayling and Seshagiri Iyer, JJ. (*Wallis, C. J. dissenting*). No decree should be passed against a minor or his estate on a contract entered into on his behalf by his guardian under which no charge is created on the estate except where the minor's estate would have been liable for the obligation under the personal law to which he is subject. (*Wallis, C. J., Ayling and Seshagiri Aiyar, JJ.*) BATCHU RAIMA JOGAYYA *v.* VAJJULA JAGGANNATHAM. 26 M. L. T. 23 : 9 L. W. 229 : 42 Mad. 185 ; (1919) M. W. N. 148 : 49 I. C. 872 (F. B.) : 36 M. L. J. 29.

——*Contract by guardian — Minor — Sole proprietor of business.*

A minor who is the sole owner of a business is not bound by the acts of his guardian unless such acts were done for the benefit of the minor. The natural guardian of a minor is personally liable in India on contracts entered into in the course of the business of the minor; the guardian is, however, entitled to indemnity for liabilities properly incurred but only out of the *assets of the minor embarked in business.* Similar right exists with the creditors of the minor. The guardian has no power to bind a ward by a personal contract. 11 B. 551 ; 19 C. 507 Relied upon. (*Wallis and Munro, JJ.*) SANKA KRISHNA MURTHI *v.* BANK OF BURMA. 35 Mad. 692 : (1911) 1 M. W. N 385 : 11 M. L. T. 56 : 11 I. C 79: 14 I. C. 389 : 21 M. L. J. 620.

——*Contract by guardian — Ratification—Power of on attaining majority.*

The occasion for ratification only arises when the obligation was not one originally binding on the minor and so far as he is concerned, the minor has full power to ratify a contract entered into by his guardian, with this qualification that he cannot ratify a transfer made during his minority by his guardian so as to affect the rights of an intermediate transferee for value. Where a debt contracted by the guardian is barred by limitation it is open to the minor to execute a fresh bond on attaining majority and such bond could be enforced against him under S. 25 (3) of the Contract Act. (*Batten, J. C.*) NANDRAM *v.* RANCHHODDAS. 5 N. L. J 178 : 1922 Nag. 250.

——*Contract by guardian—Personal liability—Acknowledgment of pre-existing debt—Liability of minor or his estate Court of Wards.*

Where the guardian of a minor executes a simple money bond in renewal of an antecedent debt due from the minor's estate, a decree on the bond could be passed on the bond against the minor's estate. An acknowledgment of a pre-existing debt stands on a different footing from the creation of a fresh liability by the guardian. In respect of the former a decree against the

MINOR—Contract by guardian.

minor may be passed and may be executed against his assets though not by his arrest. 11 B. 551; 2 N L R. 25: 13 N. L R. 109: 26 M 330, 19 C 507 dist. 29 A. 394; 40 C 784 Ref. The Court of Wards in charge of a minor's estate has no greater authority to bind the minor ward personally than an ordinary natural or certificated guardian, except so far as the statute confers special powers on the Court of Wards. (*Hallifax and Dhobley, A. J. C.*) JIWANDAS *v.* JANKI.
5 N. L. J. 49 : 18 N L. R. 145: 1922 Nag 98.

——*Contract by guardian.*

A compromise by guardian being ratified by minors after attaining majority cannot be set aside where minors have recieved benefit and when it is too late to restore parties to their old position. (*Kanhaiya Lal, J. C*) RAGHUBAR *v.* RAM BHAROSE. **66 I. C. 412 : 8 O. L. J. 392**

——*Contract by guardian—Lease in favour of minor—Lease when binding.*

Where a lease is taken on behalf of a minor by his guardian, the minor would not be bound by the lease unless it was for his benefit. 11 C.W.N. 207; 44 I A. 98 Ref. (*Ross, J.*) MT. HAFIZAN *v.* AKHALESWARI PRASAD. **1924 P. 186.**

——*Contract by guardian—Fraud for illegality*

If a guardian while acting for a minor is guilty of a fraud or illegality in contracts which he makes on the minor's behalf, the minor can no more enforce such contracts than the guardian could, if he were acting on his own behalf. 10 Cal. 951 to.l. (*Robinson, C. J. and Heald, J.*) MAUNG TIN *v.* MA MAI MEJINT.
65 I. C. 459 : 11 L. B. R. 83.

——*Contract by guardian—Defacto—Benefit of minor.*

A contract made by a *defacto* guardian of a Buddhist minor in good faith and for the minor's benefit is binding upon the minor. (*Twomey, J.*) MG PO THWE *v.* MA KAW.
13 I. C. 373 : 4 Bur. L. T. 272.

——*Contract by guardian--Guardian's agreement for enhanced rent.*

The fact that the infant's tenants would not litigate with the landlord, is not enough in itself for a guardian to make a fresh lease on behalf of the infants to pay enhanced rent. (*Fletcher and Teunon, JJ.*) DAUPATI MAHTO *v.* MIDNAPUR ZEMINDARI CO. **35 I. C. 582.**

Contract by minor.

——*Contract by a minor—Void and not voidable.*

A contract by a minor is void and not voidable. (*John Edge*) MAH HNIT *v.* HASHIM IBRAHIM METER. **18 A. L. J 335 : (1920) M. W. N. 319 : 2 U. P. L. R. (P. C.) 58 : 22 Bom. L R 531 : 55 I. C. 793 (P. C.) 36 M. L. J. 303.**

——*Contract by minor—Onus of proving minority.*

If a minor acted and appeared like a major, the burden of proving minority lies on the party alleging it and presumably basing its allegation on peculiar knowledge. (*Le Rossignal, J.*) DAHARAN SINGH *v.* HARBANS SINGH. **1922 Lah 75. (1).**

——*Contract by minor— Estoppal— Duty to restore benefit.*

Contract by a minor is void *abinitio.* A misrepresentation by a minor as to his age to a person who knows it to be false is not a fraud as to take away the privilege of infancy. The minor is not bound to restore the benefit which he obtained before avoiding the contract. (*Broadway, J.*) BESHEN SINGH *v.* BISHNA. **69 I. C. 543.**

——*Contract by minor—Ratification.*

Where a person contracts a loan while a minor and after attaining majority takes subsequent advances from the same creditor their subsequent conduct constitutes a ratification. (*Kensington, J.*) JAWAHAI MAL *v* DHANPAT.
163 P. W. R. 1912 : 17 I C. 223 : 170 P. L. R. 1912.

——*Contract by minor—Mortgage in favour of—Enforceability.*

A mortgage in favour of a minor who has advanced the whole mortgage money can be enforced by him or by others on his behalf. 33 M. 312: 30 C. 539 P. C. Exp. (*Wallis, C J. Abdur Rahim and Srinivasa Iyengar, JJ.*) RAGAVACHARIAR *v.* SRINIVASA RAGHAVACHARIAR.
40 Mad 308 : 20 M. L T. 407 : (1916) 2 M. W. N. 363 : 36 I. C. 921 (F. B) : 31 M. L. J. 575.

——*Contract by minor—Gift by a minor —Validity of.*

A gift is invalid if the donor is a minor and he can set it aside on attaining majority. Where a guardian was discharged owing to the fraud of a person other than the minor before the minor attained majority and subsequently the minor made a gift. *Held* that the discharge of the guardian did not bar the right of the minor to plead that he was a minor at the date of the gift and so it was void. Where a minor donor attests a document of sale by the donee he is not precluded from exercising his right of impeaching the gift, as the representation does not amount to an estoppel. (*Miller and Abdur Rahim, JJ.*) SUBRAMANIAM CHETTY *v.* DORAI SINGH TEWAR.
(1913) M. W. N. 365 : 16 I. C, 943 : 24 M L. J. 49.

——*Contract by minor—Loan to pay father's debts—Necessaries.*

Money paid to a minor to discharge his father's debts is not for necessaries and the estate of the minor is not liable for these debts. (*Dhobley, A. J. C.*) NILKANTH *v.* CHANDRA BHAN.
18 N. L. R. 119 : 1922 N. 247.

——*Contract by minor—Continuing obligation—Valid until disaffirmed.*

Contracts of continuing nature such as the engagement of a servant or a tenant are impliedly ratified or renewed by the party at whose instance it is voidable, accepting after majority the service or rent with full knowledge of all the facts without repudiating them after majority. (*Stuart and Kanhaiya Lal, A. J. C.*) HUSSAIN ALI MIRZA *v.* MUHAMMAD AZIN KHAN.
31 I. C. 728 : 18 O. C. 168.

MINOR—Contract by minor.

———*Contract by minor—Equity—Misrepresentation.*

A Court would at least direct restitution by minor of such part of the consideration of a void agreement which may be in a his hands. Even in the case of innocent misrepresentation, the minor is bound to refund the property over which he has control. This liability attaches to a minor not on the ground of estoppel but on the ground that an infant shall not take advantage of his own fraud. If therefore a contract has been induced by a minor's false representations the contractual obligation is under no circumstances enforced against him but equity may compel him to restore any benefit received by him If the property which the minor has obtained is still existing in specie he may be compelled to restore it, but if he has obtained money which has probably been spent and there is no possibility of tracing it and therefore of restoring the very thing obtained by fraud, it would be enforcing a void contract if he were made to re ly it. In other words a distinction must be observed between restitution and repayment. (*Kennedy, J. C. Raymond and Kemp, A. J. C.*) MT. HURI *v.* KOSHAN KHUDABUX.
16 S. L. R. 112 : 1923 Sind. 5.

Custody.

———*Custody—Suit by father.*

A suit by a father to recover custody of his minor sons from a person to whom he had delegated his right is not maintainable. An application under the Guardian and Wards Act is his only remedy. Where there is a delegation of guardianship, the father has power to resume it for proper cause. (*Lord Parker,*) MRS. ANNIE BESANT *v.* NARAYANIAH. **38 Mad. 807 : 41 I. A 314 : 18 C. W. N. 1089 : 1 L W. 520 : (1914) M. W. N. 585 : 16 M. L. T. 165 : 20 C. L. J. 253 : 16 Bom. L. R. 625 . 12 A. L. J. 1155 : 24 I. C 290 : (P. C.). 27 M. L. J. 30.**

———*Custody— Maternal grand-mother — Grand-father.*

The maternal grand-mother who had almost from birth, taken care of the minor child was entitled to the custody of the child as against the grandfather who had taken no interest in him. (*Kensington, J.*) AMBO *v.* GANGA SAHAI.
44 P. W. R. 1913 : 18 I. C. 141 : 193 P. L. R. 1913

Debts by guardian.

———*Debt by guardian—Expenses—Authority to incur.*

A guardian may be a *quasi* trustee for certain purposes, *e. g.* for money received by him, on behalf of his ward, but it is not clear that he can incur expenses to any extent he likes without seeking the intervention of any Court in the hope that he would be allowed to create a charge on the property of the minor to that extent. (*Broadway and Abdul Qadir, JJ.*) GOPI MAL *v.* PANNA LAL. **1924 Lah. 339.**

———*Debt by guardian—Agent—Execution of pronote—Power of attorney.*

Where an agent signs a pronote for a business belonging to a minor the holder must be presumed to know contents of the power of attorney and the extent of the agent's authority and also the fact of the business belonging to the minor. (*Wallis and Munro, JJ.*) SANKA KRISHNA MURTHI *v.* BANK OF BURMA. **35 Mad. 692 : (1911) 1 M. W. N. 385 : 11 M. L. T. 56 : 14 I. C. 389 : 11 I. C. 79 : 21 M. L. J. 620.**

MINOR—Decree against.

———*Debts by guardian—Necessity—Onus.*

It is incumbent on the person lending money to a guardian of the minor to satisfy himself as to the necessity for the loan. (*Hartnoll and Young, JJ.*) KADER HOSSEIN *v.* C. R. MUDALIAR.
5 Bur. L. T 281 : 18 I. C. 605 : (L. B.) 6 L. B. R. 166.

Decree against.

———*Decree against—Execution sale—Application by mother to set aside--Natural guardian.*

The mother is the natural guardian of her infant son and she is entitled to apply under O. 21, R. 90 of the C. P. Code to set aside an execution sale, of the minor's property, as being vitiated by fraud, material irregularity, etc. (*Lord Moulton.*) TEKHIT KRISHNA PRASAD SINGH *v.* MOTI CHAND. **40 Cal. 635 : 40 I. A 140 : 17 C. W. N. 637 : (1913) M. W. N. 487 : 11 A. L. J. 517 : 17 C. L. J 573 : 15 Bom. L. R. 515 : 14 M. L. T. 37 : 19 I. C. 296 : (P. C.) 25 M. L. J. 140.**

———*Decree against—No proper guardian—Proceedings null—Revival.*

If a wrongful guardian ad litem is appointed in a wrongful manner and thereafter a decree is passed against the minor the decree is bad and the proceedings null and void Such proceedings must be revived by a first application for appointment of another proper guardian. (*Walsh and Ryves, JJ.*) KIRPA KISHEN KISHORI *v.* BABU LAL.
45 All. 606.

———*Decree against—Non-representation in suit.*

Where a person appointed guardian-ad-litem for a minor defendant refused to act and intimated to the court his unwillingness but the court refused to remove him or appoint a fresh guardian-ad-litem, the decree passed against the minor is not binding on him. (*Stuart and Kanhaiya Lal, JJ.*) JANGI *v.* MUSSAMMAT SUNDAR.
L. R. 3 A. 458 : 1922 All. 416.

———*Decree against—Appeal by another next friend not valid.*

Where a guardian-ad-litem has once been appointed his appointment enures for the whole of the suit in the course of which it was made unless and until revoked by the court. Consequently an appeal against a decree passed against the minor can only be prepared by him. An appeal presented by another next friend is not a valid presentation. 14 A. 35 ; 22 M. 187. 2 A. L. J. 489 foll. (*Stuart and Ryves, JJ.*) SHAMBHO *v.* KANHAYAN.
20 A. L. J. 599 : 44 All. 619 : L. R. 3 A. 513 : 1922 All. 332.

———*Decree against—When can be impeached.*

A minor is as much bound as a person of full age by a decree in a suit—except in the case of

MINOR—Decree against.

gross laches of the guardian or fraud or collusion, it cannot be impeached. (*Walsh and Ryves, JJ.*) JAMMU *v.* MAHADEO PRASAD.

L. R. 3 A. 195 (Rev) : 4 U. P. L. R. (A) 84 : 1922 A. 294.

———*Decree against—Suit to set aside,*

In a suit for setting aside a decree against a minor, the court has power to go into merits of litigation. (*Lindsay and Ryves, JJ.*) MURLIDHAR *v.* PITAMBAR LAL. 20 A L. J. 329 : 44 A. 525 : 1922 A. 91.

———*Decree against—Offer by Guardian* ad litem *abide by plff's. oath—Binding nature of.*

Where a guardian *ad litem* of a minor deft. offered to abide by the oath of the plff and to suffer a decree *held* in so far as the statement of the plff. on oath was concerned the minor was bound but the offer to suffer a decree, cannot bind the minor, because it would amount to a compromise. not sanctioned by the Court. (*Tudbal and Sulaiman, JJ*) PARBHU DAYAL *v.* JAMIL AHMAD. 64 I. C. 646 : 19 A. L. J. 911.

———*Decree against—Guardian negligent—Review.*

A minor can ask for a review of judgment if his guardian has conducted the case with gross negligence. (*Richards, C. J. and Rafique, J.*) BENI PRASAD *v.* LAJJARAM. 38 All 452 : 35 I. C. 63 : 14 A. L. J. 438.

———*Decree against—Application for review.*

Application by a minor for review of judgment may be granted in special circumstances, though not based on fraud or gross negligence on the part of his next friend, unless such application does not aim at setting up altogether, a new case or at least to get some new point determined. (*Ashutosh and Beachcroft, JJ.*) JOGESHWAR NARAIN SINGH *v.* ROY RADHA RAMAN.

16 I. C. 543.

———*Decree against—No representation—Decree void—Appeal presented by persons other than guardian* ad litem*—Legality of.*

A decree passed on appeal against a minor without the minor being represented in the Court of Appeal is void and must be set aside. Where the guardian *adlitem* appointed in the Court below did not act for the minor and had gone away, an appeal on behalf of the minor could be presented by another person as next friend. (*Broadway and Abdul Qadir, JJ.*) MT. FATIMA BEGAM *v.* HASSAN KHAN. 3 Lah. 417 : 1923 Lah. 271.

———*Decree against—Setting aside-Majority at the time of decree—Effect of.*

Where a person had as a matter of fact attained majority at the time when a compromise decree was passed against him with the court's sanction the decree is not voidable at the instance of the minor. The fact that he was represented by a guardian ad litem even after attaining majority does not vitiate the decree. 24 P. R 1919. 39 M. 1031; 6 C. 687 ; 34 C. 83 Ref. (*Le Rossignol, J.*) GHULAM NABI *v.* BASHESHAR MAL.

4 Lah. L. J. 298 : 1922 Lah. 407.

———*Decree against—Representation in suit—Decree when a nullity.*

MINOR—Decree against.

When a minor is entirely unrepresented before the court which issues the decree against him that decree is a nullity so far as the minor is concerned. But when a minor is a party to the case and the decree is issued against him there is no reason to hold that the decree so long as it stands is invalid. It is only voidable at the instance of the minor. (*Le Rossignal and Campbell, JJ.*) INDARSAIN *v.* PRABHU LAL. 3 Lah. 88 : 66 I. C. 4 . 1922 Lah. 277.

———*Decree against—Guardian ad litem—Negligence.*

A decree against a minor is not a dullity by reason of the fact that the guardian-*ad litem* was negligent in the conduct of the suit. It is only voidable by the minor and a sale in execution of such a decree is perfectly valid. (*Martineau, J.*) KIRPA SINGH *v.* MULA SINGH. 63 I. C. 970.

———*Decree against—Gross negligence of guardian-ad-litem.*

A minor is entitled to have a decree set aside when there has been gross negligence on the part of the guardian *ad litem* in defending the suit. 3 P. R. 1905; 91 P. R. 1907; 24 P. R. 1893 dist. 35 P. R. 1898 , 13 I C. 20 approved. (*Johnstone, C. J.*) MOHAN LAL *v.* NEKI. 37 I. C 195 : 117 P. L. R. 1916.

———*Decree against—Guardian ad litem—Negligence of.*

Negligence of the guardian *ad litem*, is sufficient apart from fraud and collusion to prevent a minor being bound by a decree passed in the suit. A. W. N. (1894) 141 Diss; 35 P. R. 1898 Foll. (*Chevis, J.*) MOHAMMAD *v.* SUKHA SINGH.

36 P. W. R. 1912 : 13 I. C. 20 : 15 P. L. R. 1912.

———*Decree against—Mortgage by father—Debt not binding—Father not proper guardian.*

In a suit on a mortgage against a Hindu father, when it is found the debt is not a binding one, the father is not a fit person represent his minor son's interests as they are adverse A decree against the son represented by the father is of no effect, as the son is not legally represented. (*Odgers and Hughes, JJ.*) SELLAPPA GOUNDAN *v.* MASA NAICKEN.

45 M. L. J. 675 : 18 L. W. 838 : 33 M. L. T. 126 : (1923) M. W. N. 775 : 47 Mad. 79 : (H. C.) 1924 Mad. 297.

———*Decree against.*

A Minor is not bound by a decree passed against him in a suit where his guardian acted with gross negligence, as by not setting up a valid available defence (*Schwabe, J,*) ABDUL KADIR *v* SOMA SUNDARAM. 45 M 827 : 16 L. W. 485 : 43 M. L. J. 467 : 31 M. L. T. 441 : 1923 M. 76.

———*Decree against—Negligence of guardian.*

A minor is not bound by a decree passed against him in a suit where his guardian acted with gross negligence as by not setting a valid available defence. (*Spencer and Ramesam, JJ.*) CHUNDURU PONNIYYA *v.* RAJAM VIRARA.

42 M. L. J. 429 : 45 M. 425 : (1922) M. W. N. 213 : 15 L. W. 427 : 1922 M. 273.

MINOR—Decree against.

——*Decree against—Avoidance of.*

A minor can seek to avoid the decree *in toto* and not only in part. (*Ayling and Tyabji, JJ.*) DAVULUM VIJAYA RAMAYYA *v.* DAVALURU VENKATASUBBA RAO. **39 Mad. 853 : 32 I. C 881 : 30 M L. J. 465.**

——*Decree against—Setting aside — Negligence of guardian.*

A minor is not bound by a decree passed against him in which his guardian was guilty of gross negligence in conducting it. (*Sankaran Nair and Spencer, JJ.*) GOTTEPATI SUBBANNA *v.* GOTTEPATI NARASAMMA **26 I. C. 16 : 27 M. L. J. 486.**

——*Decree against—Rights of minor.*

A minor in a decree for mesne profits against him cannot deduct the amount remitted to the ricts as being poor, the commission paid to the Court of Wards for management as well the uncollected rent. (*Sundara Aiyar and Ayling, JJ.*) SRI RAJAKAVU VENKATA KUMARA MAHIPATHI SURYA RAO *v.* SRI RAJAKAVU SUBBAYAMMA. **10 M. L. T. 295 : 12 I. C 385 : (1911) 2 M. W. N 308 : 21 M. L. J. 965**

——*Decree against—No representation in suit—Decree not binding on him.*

A minor defendant who is not represented in the suit by a properly appointed guardian is not a party to the suit in the proper sense of the term and the proceedings in the suit cannot bind him. 31 A. 572 (P. C.), Ref. (*Kotwal, A. J. C.*) PERMANAND *v.* LAKHMICHAND. **66 I C. 460.**

——*Decree against—Disqualified guardian ad litem.*

A minor is not represented in litigation by a person absolutely disqualified from being appointed as guardian *ad litem* (*Lindsay, J. C.*) DRIGPAL SINGH *v.* SUKHANANDAN LAL. **7 O. L. J. 164: 56 I. C. 299: 2 U. P. L. R. (J. C.) 96.**

——*Decree against—Ex-parte—Grounds for setting aside.*

Although a minor can impeach a decree passed against him during minority for reasons such as fraud or collusion, yet in absence of such special reason the decree is perfectly valid as one passed against an adult. That the guardian *ad litem* did not appear on the date of hearing and an *ex parte* decree was passed against the minor would not justify a presumption of gross negligence against the guardian. (*Kendall, J. C.*) RAGURAJ GIR *v.* BABU RUDRA PARTAB SINGH. **19 O. C. 119: 36 I. C. 811: 3 O. L J. 585.**

——*Decree against—Case heard ex parte—Guardians not informed—Insufficient notice—C. P. C. (Act V of 1908), O. XXXII, R. 3.*

A case cannot be heard *ex parte* against minor defts. where the guardians *ad litem* were appointed without notices to the proposed guardians or to the minors as required by O. 32, R. 3, and on this irregularity being brought to light notices were issued against them but were not sufficiently served. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) LAL HANWANT RAM *v.* MUHAMMAD ABDUL HASAN KHAN. **26 I. C. 712: 1 O. L. J. 708.**

MINOR—Estoppel.

——*—Decree against—No representation.*

A decree against minor in the absence of his guardian is a nullity. A defect in appointment of guardian is a mere irregularity, not vitiating decree unless the minor's interests are prejudiced. (*Jwala Prasad and Adami, JJ.*) KUMARI DEBI *v.* PANDHA RATHA MOHAN SINGARI **66 I C. 137 3 Pat L. T. 451: 1922 P. 291**

——*Decree against—Setting aside—Guardian with adverse interest.*

A minor when he comes of age, can attack a decree obtained against him during his minority on the ground that the person who represented him had at the time an interest actually adverse to his own (*Chapman and Jwala Prasad, JJ.*) SURAJ DEO NARAIN MISRA *v.* SARJUG PRASAD MISRA. **1 Pat. L. W. 647: 1917 P. H. C. C. 198: 40 I. C. 227: 2 Pat. L. J 390.**

Estoppel.

——*Estoppel—Ratification—What amounts to*

The mere fact that a minor after majority executes a decree obtained on his behalf by his trustee, does not amount to a ratification of all acts of the trustee or estop the minor from impeaching other transactions. (*Piggott and Walsh, JJ.*) FAKIR CHAND *v.* NANUG RAM. **1924 A. 277.**

——*Estoppel—Misrepresentation.*

A minor is not estopped from pleading infancy simply because he has been guilty of fraudulent misrepresentation as to his age. (*Karamat Hussain and Chamier, JJ.*) KANHAIYA LAL *v.* GIRDHARI LAL. **13 I. C. 956: 9 A. L. J. 103.**

——*Estoppel.*

A minor cannot be made liable on a contract by means of estoppel as the contract is not binding on him according to Contract Act which supersedes the law of estoppel. (*Chatterjee and Newbould, JJ.*) GOLAM ABDIN *v.* HEM CHANDRA. **32 I. C. 388: 20 C. W. N. 418.**

——*Estoppel—Fraud of minor—Acts of guardian.*

As a general rule estoppel does not apply against an infant but there is an exception in cases of fraud. If an infant is old and cunning enough to contrive and carry on a fraud he ought to make amends for it. An infant cannot be barred by estoppel by the acts or admissions of his guardian or of another person. (*Mookerjee and Beachcroft, JJ.*) RAM CHARAN DAS *v.* JOY RAM MAJHI. **17 C. W. N. 10: 16 I. C. 825 15 C. L J. 185.**

——*Estoppel—Equity.*

A case of fraudulent misrepresentation by a minor on the subject of his age cannot be given effect to, and the plea of minority would prevail in spite of the minor's fraudulent misrepresentation. The minor however, cannot seek to set aside the transaction without restoring the benefit that he has received thereunder. (*Moti Sagar, J.*) KAPURA *v.* ARJAN SINGH. **1923 Lah. 511.**

——*Estoppel—Fraud by minor—Misrepresentation as to age.*

Plff. suing to set aside a mortgage-deed on the ground of minority cannot plead his minority it

he has practised fraud on the defendant by falsely representing himself to be a major. (*Kincaid, J. C. and De Souza, A. J. C.*) LUNIDOMAL *v.* GHANUMAL. **62 I. C. 237 : 14 S. L. R. 104.**

Plea of Minority.

——*Plea of minority—Burden of proof—Suit on promissory note—Burden of proof of—Validity of contract.*

Where in a suit on a promissory note the deft. pleads that he was a minor at the time of execution the burden of proof is on the plff. to prove that he was not a minor and that the contract was a valid one. 6 A. L. J. 693 Foll. (*Karamat Hussain and Chamier, JJ.*) KANNAIYA LAL *v.* GIRDHARI LAL. **13 I. C. 956: 9 A. L. J. 103.**

——*Plea of minority—Burden of proof—Evidence.*

Where the executant of a deed pleads that he was a minor on that date, the burden of proof is on him to make out his plea. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) KANHAIYA LAL *v.* MOHAMED MAHMAD ALAM. **63 I. C. 525: 8 O. L. J. 324.**

Miscellaneous.

——*Legal representatives intermeddling with the estate of—Liability of.*

The representatives of persons intermeddling with the estate of a minor are liable to account in respect of dealings of the persons whom they represent to the extent of the estate which comes into their hands. (*Woodroffe and Coxe, JJ.*) GOLAK CHANDRA CHOWDHURY *v.* PRABHAT CHANDRA ROY. **26 I. C. 612.**

——*Right of suit.*

A minor may sue, on his becoming *sui juris*, for anything for which his guardian through ignorance, negligence or fraud, has omitted to sue. (*Chatterjee and N.R. Chatterjee, JJ.*) ABDUL GAFFUR *v.* SONA BIBI. **14 I. C. 95.**

——*Sale of property—Right to have sale set aside—Refund of purchase-money.*

The minor who seeks to recover the property is bound in equity to refund the purchase-money under S. 41 of the Specific Relief Act as a condition precedent to obtaining a decree for possession. (*Moti Sagar, J.*) KAPURA *v.* HARDIT SINGH. **1923 Lah. 510.**

——*Transferee cannot challenge validity of prior transfer by minor.*

Though a minor may sue through a next friend to set aside a transfer even during his minority, he and he alone can exercise this personal privilege. A transferee, is not entitled to question a previous transaction or to assume the privileges which are personal to the minor and to nobody else whether the transfer was effected after or before the minor attained majority. (*Le Rossignol and Harrison, JJ.*) MAHOMED HAFIZULLAH KHAN *v.* BULAGI MAL. **4 Lah. 156 : 5 Lah. L. J. 355 : 1923 Lah. 299 (1).**

——*Guardian—Agent appointed by—Suit for accounts against agent.*

An agent appointed by the guardian of a minor is not liable to account to the minor for his acts as an agent. It would be unsafe to extend the rule

with respect to trustees *de son tort* to the persons in the position of agents of the guardian of a minor. (*Abdur Rahim and Ayling, JJ.*) RAMANATHA CHETTIAR *v.* MUTHIAH CHETTY. **43 Mad. 429: 11 L. W. 405: 38 M. L. J. 247: 56 I. C. 358: (1920) M. W. N. 270.**

——*Trespass by guardian — Liability of estate.*

Where the estate of a minor has benefited by a trespass on the part of the guardian, the estate will be liable for the resulting damage to third persons. 28 B. 330: 40 Mad 632, 638 Foll. (*Kotwal, A. J. C.*) CHATARYA *v.* DAWLAT. **5 N. L. J. 206 : 1922 Nag. 48.**

——*Guardian—Torts of—Liability of minor's estate.*

The estate of a minor is not liable for damages for a tort committed by his guardian. The only person responsible would be the actual tort-feasor the guardian himself. 31 C. 859; 6 N. L. R. 6 Dist. 13 N. L. R. 101 Foll. (*Hallifax, A. J. C.*) SADARAM *v.* RAO SAHEB MANNULAL SAO. **64 I. C. 473.**

——*Partnership business on behalf of—Presumption of benefit.*

In the case of a business undertaking, in which a minor is a partner, where transactions are carried on in the usual course of business, it is not necessary for the creditor to give specific evidence of benefit in each individual transaction. The fact that the transactions were carried on in the usual course of business is sufficient to raise a presumption that they were for the benefit of the business. (*Daniels, A. J. C.*) WILAYAT HUSAIN *v.* PUTTU LAL. **25 O. C. 7 : 1923 Oudh 35.**

——*Cancellation of sale—Duty to restore benefit received.*

A minor seeking to recover property by cancelling a sale must restore any benefit received by him thereunder. (*Daniels, J. C.*) RAGHUNATH SINGH *v.* DHONDE SINGH. **24 O. C 348 : 9 O. L. J. 31 : 1922 Oudh 30.**

——*Legal necessity—Lender's duty.*

The doctrine of legal necessity has application only when the minor has an estate or a fund which it is the duty of the Court of equity to protect as against the improvident act of the guardian. A minor, bought with funds supplied by his aunt, a property which had been sold in execution of a mortgage deed. As full purchase money had not been paid to avoid confirmation of sale in execution of mortgage decree, the property was mortgaged by the minor purchaser and the vendors became sureties. *Held*, looking at the two transactions as one, once it is realized that the minor was not in possession of any estate independently of the transaction which he was seeking to challenge, it becomes manifest that the Court cannot extend its protection to the minor by denying validity to the transaction which had brought the estate into existence. If the two transactions are regarded as separate, then in dealing with a guardian of a minor, the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy

himself that the guardian is acting, in the particular instance, for the benefit of the ward. No authority imposes upon the lender the further duty of enquiring into the necessity for an altogether different transaction which perhaps has made the proposed transaction inevitable. If the law did impose such a duty upon the lender, then it might be said that he is bound to enquire into the antecedent management of the estate. But it is settled law that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or has been a party, he is not affected by the precedent mismanagement of the estate. (*Das and Adami, JJ.*) KANHAI LAL KHEMKA *v.* THAKUR PRASAD SINGH.
1923 P. 268.

——*Guardian's act.*

A minor can always repudiate the illegal acts of his guardian. (*Mullick and Atkinson, JJ.*) SARADA PRASAD *v.* TRIGUNA CHARAN,
3 Pat. L. J. 415 : 46 I. C. 117 :
1918 Pat. 349.

——*Jurisdiction over—Chief Court of Lower Burma.*

The Chief Court of Lower Burma has no special jurisdiction over infants beyond those given under the Guardians and Wards Act. Its powers are those only of a District Court. (*Rigg, J.*) HAZARA BIBI *v.* SULEIMAN HAJI MOHAMMAD.
59 I. C. 562 : 13 Bur. L. T. 86

MINORITY.
See (1) HINDU LAW.
(2) MAHOMEDAN LAW.
(3) MAJORITY ACT.
(4) MINOR.

MIRASI.
See LAND TENURE—MIRASI.

MISCONDUCT.
See LEGAL PRACTITIONER.

MISJOINDER.
See C. P. CODE. O. 1, RR 9 AND 13.

MISJOINDER OF CAUSES OF ACTION.
See C. P. CODE. S. 99 AND O. 2, R. 7.

MISJOINDER OF PARTIES.
See C. P. CODE, S 99 AND O. 1, R. 13.

MISREPRESENTATION.
See (1) CONTRACT ACT, S. 17.
(2) SP. REL. ACT, S. 39.

MISTAKE.
See also (1) CONTRACT ACT, SS. 20, 21 AND 72.
(2) SP. REL. ACT, S. 39.

——*Doubt coupled with failure to enquire—Excluded plea of honest mistake.*

A person who feels a doubt as to the existence, present or future, of a certain fact but deliberately omits to make an enquiry which any prudent man would, under the circumstances have made, and which would have protected him, cannot say that he has been misled by an honest mistake. (*Mookerjee and Beachcroft, JJ.*) HARIDHAN DEB NATH *v.* BHAGABATI DASI.
41 Cal. 862
19 C. L. J. 420 : 23 I. C 214 :
19 C. W. N. 89.

MITAKSHARA.
See HINDU LAW—TEXTS.

MODIFICATION OF DECREE.
See C. P. CODE., SS. 148, 151 AND 152.

MOGHOLOI BRAHMOTTAR.
See GRANT.

MOHUNT.
See HINDU LAW—RELIGIOUS ENDOWMENT.

MONEY HAD AND RECEIVED.
See LIM. ACT, ART. 62.

MORTGAGE.
Abandonment.
Adverse Possession.
Co mortgagees.
Co-mortgagors.
Construction.
Co sharer.
Discharge.
Equity of Redemption.
Foreclosure.
Instalments.
Interest.
Moveables.
Redemption.
Rights of Mortgagee.
Shares.
Sub mortgagee.
Substitution of new mortgage.
Time for.
Undivided share.

Abandonment.

——*Abandonment—Redemption, period for.*

The question of abandonment does not arise, till the period for redemption has expired. (*Scott-Smith, J.*) MUHAMMAD CHIRAGH SHAH *v.* CHOGHATTA.
99 P. L. R. 1916 : 36 I. C 221 :
184 P. W. R. 1916.

Accession.
See T. P. ACT, SS. 63 AND 70.

Accounts.
See (1) C. P. CODE O. 34, RR, 2—7.
(2) T. P. ACT, SS 72 AND 76.

Adverse possession.

——*Adverse possession*

If a mortgagee acquires rights of one mortgagor to the knowledge of the other, the right of the co-mortgagor to redeem his share will be extinguished after 12 years. (*Macleod, C. J. and Shah, J.*) IBRAHIM GULAM HUSAIN *v.* MOHIDDIN BALKU.
24 Bom. L. R. 287 : 1922 B. 1.

——*Adverse possession—Effect.*

A person taking possession of property which is subject to a simple mortgage takes only the mortgagor's equity of redemption and the property is still liable to be sold for the mortgage debt. 33 C. 1015 ; 35 M. 231 ; 7 M. 1 Dist. (*Sanderson, C. J. and Mookerjee, J.*) PRIYA SAKHI DEBI *v.* BIRESHWAR SAMANTA.
44 Cal 425 : 21 C. W. N. 177 :
37 I. C. 277 : 27 C. L. J. 212.

MORTGAGE—Adverse possession.

——*Adverse possession.*

Mortgagees cannot rely on the 12 years' rule of limitation in support of a plea of adverse possession unless they can prove a subsequent valid sale. (*Scott-Smith, J.*) AMIR *v.* NADIR ALI.
1923 Lah. 74.

——*Adverse possession—Effect of.*

Where the Archaka's Office and his properties were usufructuarily mortgaged and where the mortgagee continued in possession during the prescriptive period after the period of redemption had expired, the mortgagee got by adverse possession the mere right of usufructuary mortgagee and not an absolute ownership (*Sundara Aiyar and Sadasiva Aiyar, JJ*) SUNDARA GURUKKAL *v.* SUBRAMANIA ARCHAKAR. **16 I. C. 960.**

——*Adverse possession — Mortgagee in possession—Receipt of rents and profits.*

So long as the mortgagee is in possession his possession is to some extent that of a trustee; unlike ordinary lessees he is bound to preserve the right, title and interest of a mortgagor and to prevent any invasion of that right by any stranger. The mortgagor having put the mortgagee in his stead in the possession of the property enjoys immunity and believes that so far as his possession is concerned, his interest will be protected by the mortgagee. Therefore, if the mortgagee has either by his neglect or in collusion allowed any other person to come into possession of the property, there will be no invasion of the rights of the mortgagor and when the time for redemption arrives, he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession will not commence against the mortgagor unless and until the mortgagor has exercised his rights of redemption and had redeemed the property. This is the case of a complete possession where no right of possession is exercised by the mortgagor. There may, however, be cases where the mortgagor and the mortgagee are both in possession of the property in accordance with the arrangements arrived at by them and set forth in the covenant in the bond The possession of the mortgagee consists in the appropriation of the usufruct of the property and that usufruct may be enjoyed by both mortgagor and mortgagee for the usufruct and the income of the property might far exceed the interest in lieu of which the mortgagee enjoys the possession of the property. In such a case the application of the principle will be varied; but the principle will apply to that portion of the usufruct which is supposed to be in the possession of the mortgagee. When *kakajri* or rents and profits are reserved by the mortgagee and are payable to the mortgagor there is no reason why the principle of adverse possession should not apply, though in order to take advantage of adverse possession it must satisfy all the conditions required for adverse possession, namely, it must be open and hostile and to the knowledge of the mortgagor. A mere non-payment of *kakajri* or forbearance to realise it for any length of time would not create any adverse possession nor a mere payment of the same to a stranger by duress, force or compulsion, unless such payment is made with the knowledge of the mortgagor that it was being paid against his interest. (*Jwala Prasad and Ross, JJ.*) BINANAND SAWATE *v.* THUROO MAHTO.
1923 Pat. 249: 4 Pat L. T. 659: 1923 P. 592.

MORTGAGE—Co-mortgagors.

Anomalous.

See T. P. ACT, SS. 58 AND 98.

Assignment.

See T. P. ACT, SS. 54, 130 AND 132.

Attestation.

See (1) EVIDENCE ACT, SS. 68 AND 69.
(2) T. P. ACT, S. 58.

Bai-bil-Wafa.

See T. P. ACT, SS. 58 AND 98.

Charge.

See T. P. ACT, SS, 58 AND 100.

Co-mortgagees.

See also CONTRACT ACT, SS. 43 AND 45.

——*Co-mortgagees—Extent of interest in mortgage money—Presumption.*

In the absence of specification of shares of two co-mortgagees in the mortgage money, it is to be presumed that each of them has advanced half the money and therefore if one co-mortgagee admits satisfaction of his interests in the mortgage, the interest that remains to be satisfied is only one half of the original, *i.e.* the interest of the other mortgagee. (*Lindsay, A. J. C*) RAM DATT *v.* DEOTA DIN. **44 I. C. 621 : 4 O. L. J. 755.**

——*Co-mortgagees—Suit against mortgagor and co mortgagee as* pro forma *deft.—Decree — Form of.*

In a suit by a co-mortgagee against the mortgagor impleading the other co mortgagee as a *pro forma* deft. only the court having passed a simple money decree in favour of the plft. against the *pro forma* deft. on finding that the mortgagor had paid the full amount to the *pro forma* deft. entitled to receive the same, on behalf of both the mortgagors, *Held*, that the decree was bad and that the suit was liable to dismissal. (*Stuart, A. J. C.*) CHANDI DAYAL *v.* GANESH PRASAD.
37 I. C. 449 : 3 O. L. J. 628.

Co-mortgagors.

——*Co-mortgagors—Sale by one of equity of redemption—Effect on others.*

The sale by one co-mortgagor of the whole equity of redemption to the mortgagee is illegal and the latter cannot found upon it a title by adverse possession against those whose shares had been illegally sold. (*Scott Smith, J.*) AMIR *v.* NADIR ALI.
1923 Lah. 74 (1).

——*Co-mortgagors—Notice—Notice to minor.*

Notice of demand received by a co-mortgagor for himself and as guardian of his minor brother is notice to the latter. (*Scott-Smith and Wilberforce, JJ.*) GORDHAN DAS *v.* RUKMAN.
1 Lah 292 : 58 I. C. 11 : 2 Lah. L. J. 198 : 2 U. P. L. R. (L.) 154 : 4 P. L. R. 1921.

MORTGAGE—Co-mortgagors.

——Co-mortgagors — Redemption by one—Charge—Subrogation.

The doctrine of subrogation applies to the case of substitution of one creditor for another by operation of law, and where one of the several mortgagors redeems the mortgaged property he has a charge on the share of each of the other co-mortgagors. (*Daniels and Wazir Hassan, A. J. C.*) JAI KISHORI *v.* MUHAMAD ALI MUHAMAD KHAN. **60 I. C. 560 : 7 O. L. J. 620.**

——Co-mortgagors—One mortgagee paying the amount—Charge.

Where a sale in execution of a mortgage-decree is set aside on paying the decretal amount by one of the mortgagors, he cannot be said to have a charge on the property as by so paying he cannot be said to have redeemed the mortgage, which is already extinguished by the decree. (*Lindsay, J. C.*) RABNATH BAKSH *v.* GANESH PRASAD. **60 I. C. 213 : 23 O. C. 334.**

Conditional Sale.

See T. P. ACT, S. 58.

Consideration.

See also (1) EVIDENCE ACT, SS. 102 AND 103, (2) T. P. ACT, S. 58.

——Consideration—Suit for portion of consideration remaining unpaid not maintainable.

A suit by a mortgagor to recover portion of the mortgage money remaining unpaid is not maintainable. (*Walmsley, J.*) SAMSAL HAQ *v.* ABDUL KARIM, **1923 Cal, 567.**

Construction.

——Construction — Provision for sale on default of delivery of possession—Enforceability—Agreement between mortgagor and mortgagee as to the amount of expenses.

A mortgage with possession to secure a sum of Rs. 1,80,000 with interest at 12 per cent. per annum, stipulated that the principal sum was to be repaid in annual instalments of Rs. 10,000 for 6 years after which the entire balance and interest was payable. There was a provision under which the mortgagor was to be allowed to remain in possession of the property for two years after which possession was to be delivered to the mortgagee. In case possession was not so delivered to the mortgagee the whole estate was to be sold to him for the entire amount due including principal and interest. *Held*, that the main object and obligation of the deed was to secure the payment of the instalments of mortgage money and that the other provisions in the mortgage, however extensive and far-reaching, were merely intended as security to enforce the obligation; that the mortgagee was bound to accept a tender of the first instalment though made a few days after the due date ; and that the mortgagor, though he did not deliver possession of the mortgaged property after the expiry of two years as stipulated, could sell the property to a stranger and pay up the mortgage and that there is nothing to prevent a mortgagor and a mortgagee from agreeing as to what sum could be charged annually for the expenses to be incurred by the mortgagee in possession. (*Lord Buckmaster*) CHELIKANI VENKATARAYANIM GARU *v.* SREE RAJAH VATSAVAYA VENKATA SUBADRAYAMMA. **44 M. L. J. 631 : 32 M. L T. 70 (P. C.) 46 Mad. 108: 17 L. W. 383 : 25 Bom. L R. 541 : 38 C. L. J. 34 : 28 C. W. N. 25 : 50 I. A. 41 : 1923 P. C. 26 (P. C.).**

MORTGAGE—Construction.

——Construction — Sub mortgage— Indemnity clause—Construction.

A mortgagee having created a sub-mortgage under him, agreed, at the time of receiving the amount of the mortgage, to compensate the mortgagors for any loss or damage they might suffer from any claims made by any one under the mortgage. If, under these circumstances the sub mortgagee, sues on the mortgage and obtains a preliminary decree, and the mortgagors pay it off, they (the mortgagors) are entitled to be indemnified by the mortgagee under the very wide terms of the indemnity clause even though the decree has been voluntarily paid. (*Lord Atkinson,*) SACHINDRA NATH ROY *v.* MAHARAJ BAHADUR SINGH. **L. R. 3 P. C. 174 (P. C.).**

——Construction.

A mortgage deed contained a stipulation " that after the expiry of 30 years at the time of redemption, interest shall be paid along with the principal at the rate of 1 per cent. per mensem," *held*, upon a proper construction of the terms, the condition to pay interest only came into force and interest began to run only after the expiry of 30 years. (*Mr. Ameer Ali.*) MOHAMED ALI *v.* RAMZAN ALI. **69 I. C. 68 : 14 L. W. 710 (P. C.)**

——Construction—Arrears from tenants—Premia occupancy tenants.

Where a mortgage document provided that on redemption the mortgagor was to pay all sums then due as regards arrears from tenants, *held*, it could only mean such arrears as have not become time-barred but could be recovered by action. Where the mortgagee had given occupancy rights on receipt of premia, he is under the obligation to pay the same to the mortgagor as otherwise the hypotheca when returned will be burdened with obligations. (*Lindsay and Kanhaiya Lal, JJ.*) GHASI RAM *v.* BHOLA NATH. **21 A. L. J. 886 : L. R. 5 A. (Civ.) 1 : 46 All. 115 : 1924 All. 153.**

——Construction— Interest— Payment of rents—Provision for realisation of arrears of interest and mortgage money by sale of the mortgaged property—Simple mortgage.

Under a deed of mortgage, the owner of a shop mortgaged it for Rs. 200 and put the mortgagee in possession. The mortgagee was to set off the rent of the shop against the interest on Rs. 100 out of the principal money and the interest on the remaining Rs. 100 was to be paid by the mortgagor. The mortgage money was to be paid within 2 years on default of which the mortgagee would have a right to realise it from the shop,

MORTGAGE—Construction.

on a construction of the deed. *Held*, that it was a simple mortgage for Rs. 200 and not two separate mortgages and that the mortgagor on redemption was bound to pay the mortgage money which included the whole of the principal and interest due upon it at the time of the suit. 2 A. 527 Dist. (*Ryves and Gokul Prasad, JJ.*) SUNDER LAL *v.* SHIB NARAIN. **L. R. 3 A. 325 : 1922 All. 362.**

———*Construction—Description of property.*

Where the mortgage was in respect of the mortgagor's eight gundas share in any of four villages and the decree for sale was for a four anna share in the Mahal in each of the four villages and the judgment-debtor contended that only eight gundas out of the entire four annas (*i. e.*) one-tenth of the original share in each village was meant. *Held*, that the property directed by the decree to be sold was the entire share of the mortgagor which in a partition before the mortgage was described as four annas in mahal and described in the mortgage as eight gundas in each of the villages. (*Rafique and Piggott, JJ.*) SUKHLAL RAI *v.* LACHMI NARAYANA RAI. **40 I. C. 888 : 15 A. L. J. 276.**

———*Construction—Lease—Rent in cash and kind—Rasum Zamindari Cess.*

Where the defts. had agreed to pay both in cash and in kind rent for the Zamindari property, let to them by a usufructuary mortgagee and the words used in the Kabuliyat were "Rasum Zemindari, *Held*, on the construction of the Kabuliyat in a suit for rent, the defts had agreed to deliver the produce as part of the rent. 16 I. C. 422, Dist. (*Richards, C. J., Knox and Tudball, JJ.*) RANGI LAL *v.* JASSA. **38 All. 286 : 35 I. C. 208 : 14 A. L. J. 393 (F. B.)**

———*Construction—Kobala—Right of mortgagee to possession.*

The apparent result of *kat kobala* is that possession is obtained by the mortgagee and that the mortgagor parts with his title for the time being. (*Walmsley and Panton, JJ.*) RAMNARAYAN GOPE *v.* KULA CHANDRA CHAKRABARTY. **49 I. C. 426.**

———*Construction—Description of properties.*

Where a mortgage deed made specific mention of certain properties but in describing the rent therefor incorrectly included the rents of other lands as well, *held*, that the mortgage should be deemed operative in respect only of the properties mentioned in the deed. (*Mookerjee and Beachcroft, JJ.*) AMRITA LAL *v.* NRITYA GOPAL GHOSE. **24 I. C. 465.**

———*Construction— Mortgage—No provision for payment of interest—Redemption.*

In a deed of mortgage there were four conditions: (1) that within three years the mortgage would be redeemed on payment of the mortgage money namely Rs. 180 ; (2) that the mortgagor would pay interest at the rate of one rupee six annas per cent. ; (3) that the mortgagee would retain possession of the mortgaged property and (4) that the mortgagee would be responsible for repairs. *Held*, on a construction of the mortgage that the condition as to redemption on payment of the mortgage money was complete in itself and that the condition as to payment of interest constituted a separate account and there was nothing in the deed which made it obligatory on the mortgagor to pay interest as a condition precedent to redemption. (*Scott Smith, J, on a difference of opinion between Martineau and Harrison, JJ.*) JWALA SINGH *v.* TEJA SINGH. **1924 L. 273.**

———*Construction—Improvements— Redemption—Liability of mortgagor.*

A mortgage of house property provided for the mortgagee rebuilding the house and for payment of the cost of rebuilding with interest by the mortgagor. The mortgagee rebuilt the house but considerably improved it also. Subsequently the motrgagors sold the house directing the vendee to pay off the mortgage money and interest and also all sums spent by the mortgagee in rebuilding. *Held* that having regard to the terms of the mortgage and the subsequent conduct of the mortgagors their vendee was bound to pay the mortgage money, interest and the cost of rebuilding. (*Broadway and Abdul Qadir, JJ.*) KRIPARAM *v.* JOWANDA MAL. **1922 Lah. 252.**

———*Construction — Mortgage money, meaning of.*

Where a deed provided that interest on the principal sum would be paid every year and in default compound interest would be paid and on payment of the mortgage money, the mortgage would be redeemed, the term 'mortgage money' did not include the interest on the principal sum lent. (*Chevis and Abdul Raoof, JJ.*) NATHA SINGH *v.* GANGA RAM. **60 I. C. 490.**

———*Construction—Property charged with liability for principal and interest.*

A mortgage-deed which stipulated for redemption on payment of the principal mortgage money, provided that the property was mortgaged for the principal and interest. *Held*, that the mortgagor could redeem only on payment of the principal sum and also the interest thereon. (*Wilberforce, J.*) GHANASHIAM DAS *v.* MUBARAK. **56 I. C. 576.**

———*Construction—Possession — Default of payment of interest half yearly—Waiver—Subsequent default—Notice of intention to take possession.*

A mortgagee, who has once waived the right to possession of the mortgaged land upon default in payment by the mortgagor of interest due on the principal mortgage money must if he desires to avail himself of the right upon a future default give the mortgagor clear and reasonable notice of his intention. 35 B. 511, Foll. (*Rattigan, C. J, and Shah Din, J.*) BANU MAL *v.* FARS RAM. **30 P. R. 1918 : 47 P. L. R. 1918 : 43 I. C. 656 : 35 P. W. R. 1918.**

———*Construction—Mortgage with possession —Termination at a fixed time—Right to redeem —Mortgagee's right to retain possession for uncollected rent.*

A executed a mortgage deed with possession of his village to D. stipulating that the mortgage should *ipso facto* expire on a particular day. After

that date A petitioned the Revenue authorities for mutation of redemption, which was accordingly ordered. After this mutation, B instituted a suit for possession of the mortgaged properties on the ground that no redemption could be made till the amount due on account of arrears of rent had been paid to him, *held*, that the deed did not contemplate to create a charge on the land for unpaid rent especially where a large portion of it was due not from the village tenants but from A himself and that therefore B could not get a decree for possession. (*Shah Din and Rossignol, JJ.*) MUSSAMAT RUKIA *v.* DUNGAR MAL. **56 P. L. R. 1915 : 27 I. C. 710 : 252 P. W. R. 1915.**

———*Construction—Redemption.*

In a certain mortgage deed the words "*Zar-i-Marhunah*" in the redemption clause meant only mortgage money and had no reference to interest. The words 'Hamrah Chahih Sen Pachchas Rupia' meant calculated on Rs. 650. That latter clause referred to interest and compound interest but had no connection with the redemption clause but the mortgagor should be held personally liable for the interest and he could redeem on payment of mortgage money only without interest. (*Kensington and Shah Din, JJ.*) AULIA KHAN *v* KANSHI RAM. **25 P. W R. 1913 : 45 P. R. 1913 : 17 I. C. 677 : 145 P. L. R. 1913.**

———*Construction — Mortgage — Mortgagor leaving a portion of money for payment to a prior mortgagee—Delay by mortgagee—Acquiescence of mortgagor—Reasonable time—How determined.*

A mortgage provided that the mortgagee was to pay off a previous mortgage to another and was to be entitled to possession on default of the mortgagor to pay interest in any one year. The mortgagee did not pay the prior mortgagee for more than six years and the mortgagor again mortgaged the same properties. The mortgagee after paying the prior mortgage, 11 years after the second mortgage, brought a suit for possession alleging non-payment of rent by the mortgagor and the latter pleaded that the suit must fail as the mortgagee did not pay off the prior mortgage till a very long time and that the suit was barred by limitation. *Held*, that the suit was within the time as the mortgagor himself admitted payment within 12 years before suit and that the mortgagor's conduct amounted to acquiescence in the mortgagee's delay and that he could not plead that mortgage was ineffectual. (*Johnstone and Rattigan, JJ.*) KIMAN *v.* SULTANIMAL. **82 P. W R. 1912 : 148 P. L. R. 1912 : 13 I. C. 559 : 66 P. R. 1912.**

———*Construction—Personal covenant.*

Where a mortgage document recited 'Having paid the principal amount before the 7th July 1917 and having endorsed it in the deed, I shall enjoy the land. . . . ' If even after the fixed time 'money is paid at the cultivation season of any time you receive it and deliver the land' *Held*, there is a distinct promise to pay. (*Odgers and Hughes, JJ.*) RANGASWAMI AYYANGAR *v.* VEERA RAGHAVACHARI. **18 L. W 620 : (1923) M. W. N. 789 : 33 M. L. T. 73 (H. C). 46 M. L. J. 56 : 1924 M. 513.**

———*Construction—Provision for notice before enforcing mortgage—Covenant not mutual.*

Where a mortgage contains a provision that the mortgagee, if he wanted payment of the mortgage money, must give notice before the beginning of the cultivation season in any year, *held* that the provision did not affect the mortgagor who could bring a suit for redemption at any time. (*Krishnan and Ramesam, JJ.*) PUPPORTH *v* RAMAN SOMAYAJIPAD. **17 L. W. 558: (1923) M. W. N. 301 : 32 M. L. T (H. C) 107 : 44 M. L J. 515 : 1923 Mad 553.**

———*Construction.*

Where a mortgage deed contained a provision that a certain land usufructuarily mortgaged to a third party shall be security 'after discharging the debt due to that third party'; *held* it was intended to embody merely the undertaking given by the mortgagors to discharge the usufructuary mortgage-deeds and not to postpone the date from which the cause of action for the enforcement of the mortgagee's right was to rise. (*Sadasiva Aiyar and Spencer, JJ.*) YAGNA SANYASIAH *v.* MYCHERLA PEDDA ATCHANNA. **15 L. W. 289 : 70 I. C. 759 : 42 M. L. J. 339.**

———*Construction — Covenant to pay — Option given to mortgagor.*

A deed of usufructuary mortgage provided. 'In the above stated time, you shall take possession and make improvements and enjoy and also pay *thirva* due' *held* there was no covenant to pay but only on option given to the mortgagor to re-pay the mortgage amount and get back the properties. Where a subsequent deed recited 'If I fail to pay even then. I shall pay the amount of this document along with the amount under the above-mentioned document after the *vaida* time of the aforesaid usufructuary mortgage.' *Held* there was an express covenant to pay after the period mentioned in the usufructuary mortgage. (*Abdur Rahim and Oldfield, JJ.*) KUNHIMAI KUTTI BEARI *v.* HALKOTI AISABI. **62 I. C. 723 : 13 L. W. 434.**

———*Construction—Usufruct — Mortgage of — Intention.*

A mortgage of 100 villages began by stating that 100 villages with hamlets, tanks, ra-ams, channel, fruit tree, garden, forests, forest poramboke, etc., were made security and then recited that 92 out of the 100 villages were secured without possession and that the remaining eight were mortgaged usufructuarily. But the addition of forest and forest produce was not repeated though it was expressly stated that the mortgagee was to enjoy all the income realisable from the eight villages. *Held*, that the intention was clear to include forest and forest produce in respect of the 8 villages also. (*Sadasiva Aiyar and Phillips, JJ.*) ZAMINDAR OF KARVETNAGAR *v* SUBBARAYA PILLAI. **(1918) M. W. N. 146 : 43 I. C. 871 : 7 L. W. 36.**

———*Construction — Stipulation for annual payments by mortgagee—Payments to be credited at redemption without regard to limitation.*

The obligation of the mortgagee to make the payments provided in the mortgage-deed, subsists so long as the relation of mortgagor and

mortgagee continues, notwithstanding more than six years have passed since the stipulated time for payments. (*Benson and Sundara Aiyar, JJ.*) PARASURAMA PATTER *v.* VENKATACHELLAM PATTER. (1914) M. W. N. 198 : 21 I. C. 701 : 25 M. L. J. 561.

———*Construction—Entry relating to existing mortgage—If amounts to a new mortgage.*

An entry relating to an existing mortgage and fixing the amount due under it does not amount to a new mortgage (*Benson and Sundara Iyer, JJ.*) PITCHUVIER *v.* PERUMAL KONAN. 11 M. L. T. 160 : 13 I. C. 651 : (1912) M. W. N. 163.

———*Construction — Enforceability — Money paid for interest—Deduction.*

Deft No. 2 executed three mortgage bonds to the plffs. First deft. agreed under an agreement to pay a certain portion of the principal sum within 3 months, the interest on the principal immediately, and to execute a fresh mortgage for the balance. The agreement was not carried out except that the first deft. paid Rs 10,000 out of the principal and the interest on the whole to a certain date. Plffs. sued the deft. No. 1 for the balance of the amount due to them under 3 mortgage bonds executed by the 1st deft. *Held*, that the plffs. could sue on the mortgages and were not bound to enforce specifically; first deft's. agreement and that the first deft. could not get a refund of the interest paid in the part performance of his obligations under the agreement. (*Benson and Sundara Aiyar, JJ.*) RUNGIAH GOUNDEN *v.* FAKIR MAHOMED. 10 I. C. 627 : 10 M. L. T. 338

———*Construction—Personal liability—Conditions negativing.*

If the mortgage is a mortgage with a condition of "*lahan gahan*" it ordinarily involves no personal liability on the part of the mortgagor for repayment of the debt, unless it may by special agreement or local custom confer on the mortgagee the option of recovering the money from the mortgagor personally. The parties having adopted a form of mortgage which ordinarily is understood to involve no personal liability must be taken not to have contemplated it. (*Kotwal, A. J. C.*) KUNDANMAL *v.* WASUDEO. 5 N. L. J. 259 : 19 N. L. R. 67 : 1922 Nag. 119.

———*Construction—Usufructuary mortgage—Deed of further charge—Effect of foreclosure decree—Variation of terms of original mortgage.*

There was at first a usufructuary mortgage Thereafter there was a deed of further charge to the effect that if the mortgagor did not pay the mortgage money on the due date the original mortgage was to become an absolute sale. *Held* that the effect of the further charge was merely to add the right of foreclosure to the rights already granted under the usufructuary mortgage. (*Ashworth and Simpson, A. J. Cs.*) SANGAT BAKHSH SINGH *v.* DIJDEO SINGH. 9 O. L. J. 511 : 1923 Oudh 143.

———*Construction—Payment of revenue—Covenant for—Liability of mortgagor.*

At the time when a mortgage was executed no revenue was assessed on the land. It was provided in the deed that if any revenue should be assessed in future the mortgagor would pay it and would not claim to redeem without so paying it. *Held* that if the mortgagee paid the revenue on the land he was entitled to a charge on the property. (*Daniels and Lyle, A. J. Cs.*) SAIYID MAHOMED HADI *v.* MT. PARBATI. 25 O. C. 2 : 9 O. L. J. 312 : 1922 Oudh 91.

———*Construction — Mortgagee, right of, to possession—Waiver—Penal clauses—Suit by mortgagee for possession—Redemption if allowable—Consideration whether questionable.*

Default being made, mortgagees sued for possession on a mortgage comprising the terms that on default of payment of interest on a fixed day compound interest was to be charged, and the mortgagee may sell the property or enter into possession till redeemed. Mortgagee had accepted some deeds of charge for the arrears of interest. *Held*, that the acceptance of deeds of charge was not waiver of mortgagee's right to possession that the mortgage deed contained no penal clause, that the question of consideration cannot be gone into in this suit and that the mortgagor cannot be permitted to redeem in this suit. (*Stuart, J. C.*) GOKUL PRASAD *v.* SITAL PRASAD. 56 I. C. 348 : 7 O. L. J. 184.

———*Construction — Provision for payment year by year—Default—Addition to principal.*

A deed of charge provided that interest would be paid year by year; in case of default it was to be added to the principal and compound interest would be charged; that the mortgagee might realise the interes every year by suit or might have it added to the principal, and that at the time of redemption or foreclosure the total interest due would be deemed to be a separate item which the mortgagee would be entitled to recover from the person and other property of the mortgagors. *Held* that the deed gave the mortgagee an option either to sue for his interest year by year or to allow it to be compounded and to sue for it at the time of redemption or foreclosure. 16 O. C. 645, 20 O. C. 132 : 51 I. C. 985 : 22 O. C. 169 Ref. (*Daniels and Lyle, A. J. Cs.*) MAHARAJ PRAG DIN *v.* BHAGWATI SAHAI. 66 I. C. 687 : 8 O. L. J. 418.

———*Construction—Covenants.*

It is open to the mortgagee to waive one of the covenants and enforce the others. (*Kanhaiya Lal, J. C.*) KALI CHARAN *v.* CHHAB NATH. 1 U. P. L. R. (J. C.) 39 : 6 O. L. J. 358 : 52 I. C. 413 : 22 O. C. 159.

———*Construction—Mortgage by co-sharer—Mortgagor tenant of mortgagee—Vendee from co-sharer asked to pay off arrears of rent—Suit for rent by mortgagee.*

When a co-sharer of a village became tenant of his mortgagee and, having subsequently sold his share, left a portion of the purchase money with the vendee for payment of arrears of rent due to the mortgagee and the *Lambardar*, the mortgagee cannot proceed in a Civil Court against the vendee for his share of the money but only against the *Lambardar* in a Rent Court, the *Lambardar*

MORTGAGE—Construction.

having received the whole money from the vendee. (*Stuart, J. C.*) BENI MADAO *v.* ASGHAR HUSAIN. **37 I. C. 65 : 3 O. L. J. 515.**

——*Construction—Right to sue—Accrual of.*

In a mortgage deed it was provided that the mortgagee cannot sue unless the entire demand for two instalments for two consecutive years remained unpaid and also interest on the principal. Nothing was paid for two consecutive years on account of principal or interest. *Held* that the right to sue did not arise unless nothing has been paid on account of principal or interest. (*Stuart and Kanhaiya Lal, A. J. Cs.*) NARENDRA BAHADUR SINGH *v.* OUDH COMMERCIAL BANK. **30 I. C. 323 : 2 O. L. J. 402.**

——*Construction—Personal liability of mortgagor—Covenant—Promise to pay within fixed period.*

Whether the mortgagor is personally liable under a deed depends on the construction of the instrument in each case, the test being the remedy provided for the satisfaction of the mortgage-debt. Where the mortgage-deed provided that the property should be sold to the mortgagee in case of non-payment of the mortgage money within a certain time, there is no personal liability on the part of the mortgagor to pay. Nor does a mere covenant for title or a mere promise to pay the money, within a fixed period impart a personal liability. (*Lindsay, J. C.*) NAZIMA HUSAIN *v.* MAHABIR PRASAD. **30 I. C. 224: 3 O. L. J. 357.**

——*Construction — Agreement of further charge—Right to security.*

Where subsequent to a mortgage an agreement to hypothecate certain other property to safeguard the mortgagee's interest was entered into whereby the mortgagee was given the right to take possession on the occurrence of certain contingencies, and on the occurrence of such contingency, the mortgagee entered into possession. *Held*, that the mortgagor was entitled to get back possession of it as satisfying that contingency and subject to the mortgagee's right on the occurrence of other contingencies. (*Kanhaiya Lal, A. J. C.*) BUNIYARD HUSSAIN *v.* MUNESHWAR SINGH. **20 I. C. 648.**

——*Construction—Right to redeem—Interest—If payable before redemption.*

A mortgage deed provided for the interest being realised out of a shop of which the mortgagees were put in possession, and the balance being paid by the mortgagors and that on payment of the principal amount, redemption should follow. *Held*, in a suit for redemption, the mortgagees could not insist on payment of interest also before redemption is allowed. (*[illegible] C. J. and Kulwant Sahay, J.*) KISHUN PRASAD SAHU *v.* HAKIM CHAUDHARI. **1924 P. 302.**

Contribution.

See T. P. ACT, S. 82.

Covenants.

See T. P. ACT, Ss. 65—76.

Co-sharer.

——*Co-sharers —Mortgage by one of four brothers.*

MORTGAGE—Discharge.

Where one brother out of four mortgages a house, the joint property of all the brothers, the mortgage is valid only of the share of the mortgagor who can mortgage only his share in the property. (*Hartnoll, J.*) MAUNG PO THEIN *v.* MA ON BWIN. **12 I. C. 858 : 4 Bur. L. T. 143.**

Deposit.

See (1) C.P. CODE, O. 34, Rr. 2—7.
(2) T. P. ACT Ss. 83 AND 84, O.34. RR. 2—7.

Discharge.

See also (1) EVIDENCE ACT, Ss. 102 AND 114.
(2) T. P. ACT, Ss. 58, 62, ETC.

——*Discharge—Priority—Prior mortgagee undertaking to pay subsequent mortgagee—Extent of priority.*

The owners of certain property mortgaged it first to the defendants and later on to the plaintiff. Subsequent to the plaintiff's mortgage the same property was mortgaged to the defendants and the amount of the first mortgage was added in that deed. The defendants though they undertook to pay off the plaintiff's mortgage never did so. *Held* that the defendants having undertaken to pay off the plaintiff's mortgage could not claim priority in respect of the sum due on their prior mortgage. 33 A. 101. (*Banerji and Gokul Prasad, JJ.*) MAKHAN LAL *v.* NATTHI. **21 A. L. J. 382 : L. R. 4 A. 412 : 1923 A. 509.**

——*Discharge—Mortgagee's right assigned—Payment made to assignor—Effect.*

Where the mortgagor pays full amount of the mortgage to mortgagee who has already assigned his interest, the payment amounts to a discharge in absence of collusion. No inference of constructive notice can be drawn by the mere fact that at the time of payment the mortgage-deed was not in the possession of the mortgagee. (*Spencer and Krishnan, JJ.*) NEELAMANI *v.* SUKADUVA. **43 Mad. 803 : 60 I. C. 255 : 12 L. W. 269.**

——*Discharge—Payment of mortgage debt to one of several co-mortgagees—Debt, whether discharged.*

Payment of a mortgage-debt to one of several co-mortgagees operates as a discharge of the entire mortgage-debt. (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) PONNUSAMI PILLAI *v.* THIYAGARAJA PILLAI. **32 I. C. 17 : 3 L W. 22.**

——*Discharge of—Proof.*

The mere fact of the mortgagee collecting the outstandings of the mortgagors as their agent is insufficient to prove that the mortgage debt is discharged. (*Wallis, O. C. J. and Seshagiri Aiyar, J.*) PALANIAPPA CHETTI *v.* NITHAN CHETTI. **26 I. C. 834 : 2 L. W. 64.**

——*Discharge—Extinction—Effect of decree passed.*

The mere passing of a mortgage decree does not extinguish the equity of redemption, as it subsists until the sale is held and the proceeds distributed. (*Das and Kulwant Sahay, JJ.*) SARJU PRASAD MISSIR *v.* HARISCHANDRA CHAUDHURI. **1924 P. 530.**

——*Discharge—Prior mortgage—Subrogation—Right to.*

MORTGAGE—Discharge.

Where all that appears is that the money advanced by a creditor was probably utilised to discharge a prior mortgage and it is not even shown that the creditor was aware of the prior mortgage, there is no right of subrogation in favour of the creditor. (*Das and Kulwant Sahay, JJ.*) JAI PRAGASH SINGH *v.* RUP MANJARI.
4 Pat. L. T. 91 : 1923 P. 199.

———*Discharge—By stranger—Preference to puisne mortgagees—Change in the law.*

Where the decree obtained by a first mortgagee was satisfied by money advanced by a third party and subsequently a puisne mortgagee claimed priority over the third party. *Held*, the charge in the latter's favour must be deemed to have been kept alive and what was manifestly to his advantage and benefit must be deemed to have been intended, 43 All. 469 (P. C.) followed and the change in law noticed. (*Das and Adami, JJ.*) RAM NARAYAN SAH *v.* SAHDEO SINGH.
1922 Pat. 174 : 3 Pat. L. T. 261 : 1 Pat. 332 : 1922 P. 181.

———*Discharge—By person under covenant to pay it—Subrogation.*

A person who pays a mortgage not for his protection but to perform a covenant cannot be substituted to the mortgagee rights. (*Dass and Ross, JJ.*) AKHAURI PREM NARAIN *v.* KULDIP SINGH.
62 I. C. 621.

Equitable.

See T. P. ACT, S. 58.

Debt.

See (1) C. P. CODE, O. 21, R. 4.
(2) T. P. ACT, S. 58.

Decree.

See C. P. CODE, O. 34.

Equity of redemption.

———*Equity of redemption—Purchaser of—Position of—Prior and subsequent Mortgages—Decree under the former not executed—Suit under the latter.*

Where a person purchased a property which was mortgaged to two different persons and a decree obtained by the prior mortgagee was assigned to the purchaser, *Held*, in a suit by the 2nd mortgagee that, the purchaser could not claim priority over the 2nd mortgagee inasmuch as the mortgage of 1880 had merged into a decree. (*Richards, C. J. and Lyle, J.*) SHADI RAM *v.* HET RAM.
20 I. C. 59 : 11 A. L. J. 634.

———*Equity of redemption — Compensation for land acquisition—Appropriation by mortgagee towards the unsecured debts of the mortgagor—Rights of purchaser of the equity of redemption.*

Where a portion of the mortgaged property was acquired compulsorily by the government under the Land Acquistion Act and the compensation money was appropriated by the mortgagee towards the unsecured debts due from the mortgagor with his consent, it is not open to a subsequent purchaser of the equity of redemption to question the propriety of the appropriation. The purchaser of the equity of redemption stands in no better position than the mortgagor and cannot

MORTGAGE—Foreclosure.

dispute an appropriation assented to by him before the purchase of the equity of redemption. (*Walmsley and Ghose, JJ.*) THE KUSTEA LOAN OFFICE LTD. *v.* ANNADA CHARAN CHAKRABARTHY.
27 C. W. N. 763 : 1923 Cal. 681.

———*Equity of redemption — Transferee—Equitable relief to assignee for value.*

In a suit by the assignee for value of the equity of redemption from the mortgagor praying for redemption on payment of a smaller sum than would be due under the mortgage between his assignor and the mortgagee, it was held that the assignee could get equitable relief only if his assignor was entitled to it and that in the circumstances of that case neither was entitled to such relief. (*Robertson and Chevis, JJ.*) KISHEN SINGH *v.* NARINDER SINGH.
14 I. C 516 : 250 P. W. R. 1912.

———*Equity of redemption—Assignment of—Subrogation.*

D. mortgaged certain property which was sold under a money decree to K, the decree-holder, who however got no possession. D then sold it to S, the consideration being the discharge of a prior mortgage and a sum paid to D for payment to K to discharge the amount of sale certificate. S. took possession but no money was paid to K. On his successor in interest suing for possession. *Held*, that D had lost all interest under the Court sale, and so could not transfer the property to S, who had also no right to be reimbursed as the principle of subrogation did not apply. (*Oldfield and Hughes, JJ.*) GOVINDU PADAYACHI *v.* LOKANATHA AIYAR.
40 M. L. J. 114 : (1921) M. W. N. 87 : 62 I. C. 291 : 29 M. L. T. 156.

———*Equity of redemption—Purchaser of—Rights can't be curtailed by subsequent dealings between mortgagor and mortgagee.*

No subsequent dealings between mortgagor and mortgagee can affect the rights of the purchaser of the equity of redemption. (*Lindsay, J. C.*) SHEO PRASAD *v.* BISHESHAR NATH.
19 O. C. 12 : 34 I. C. 266 : 3 O. L. J. 129.

———*Equity of redemption—Purchase of by mortgagee—Effect.*

A purchase of the equity of redemption by a mortgagee is valid and puts an end to the right of the mortgagor. (*Dawson Miller and Adami, JJ.*) BALDEO SINGH *v.* MEGHU SINGH.
74 I. C. 202.

Extinction of Rights.

See (1) C. P. CODE, O. 34, RR. 3 (3), 8 (3),
(2) T. P. ACT, S. 101.

Foreclosure.

See also (1) BENGAL REGN. XVII OF 1806.
(2) C. P. CODE, O. 34, RR. 2 AND 3.
(3) T. P. ACT, S. 58.

———*Foreclosure—Failure to make a formal demand—Effect.*

Where the plaint did not disclose that any demand had been made before the notice was issued nor did the mortgagee at any later stage even assert that he had made such a demand, the

MORTGAGE—Foreclosure.

omission is a fatal flaw in the proceedings and the court will not presume that all formalities have been duly observed. 16 P. R. 1888; 106 P. R. 1889, Rel. (*Scott Smith and Harrison, JJ.*) BAKHTAWAR *v.* MOOL CHAND. **67 I. C. 161**

——*Foreclosure — Conditional sale—Foreclosure proceedings—Lease executed to the mortgagee—Decree for possession—Formal possession taken—Foreclosure proceedings whether can be questioned.*

Where a house and shops were mortgaged by conditional sale and the mortgagee got the foreclosure certificate after the expiry of the year of grace and then the mortgagor executed a lease for the house and handed over the other property to the mortgagee who obtained a decree and took formal possession of the same and that the mortgagor again took possession of the house and the mortgagee again sued for possession, it was held that the mortgagor or his representatives could not question the plff.'s title or the validity of the foreclosure proceedings. (*Chevis and Le Rossignol, JJ.*) KHAIRA *v.* JAGGU SHAH. **136 P. L. R. 1915 : 26 I. C 833 : 87 P. W. R. 1915.**

——*Foreclosure—Regulation XVII of 1806), Ss. 7 and 8—Mortgagee suing for possession—Prescribed procedure to be imperatively observed.*

Where a mortgagee sues for possession in pursuance of the conditional clause in the mortgage he must prove that all the provisions contained in Ss. 7 and 8 of Regulation have been observed (*i.e.*) he must show that the foreclosure is valid, that the year of grace had expired and that provisions regarding foreclosure have been observed. A mortgagee who fails to observe these things is not entitled to sue for possession. The provisions of Regn. XVII of 1806 are mandatory and not merely directory and are intended to protect poor men from fraud and oppression of money-lenders. 11 C. 111; 16 P. R. 1888. Foll.; 105 P. R. 1907, Dist. Omission to affix the seal of the Dist. Judge upon the foreclosure notice is fatal to the suit by the mortgage for possession as owner. 185 P. R. 1889, Rel. on. (*Johnstone and Rattigan, JJ.*) BAKHTAWARI *v.* SHIBB N LAL. **69 P. W. R. 1912 : 121 P. L. R. 1912 : 13 I. C. 621 : 59 P. R. 1912**

——*Foreclosure—Suit—Persons deriving title from mortgagor after mortgage not necessary parties.*

Persons deriving title from mortgagor after mortgage, for example, tenants, are not necessary parties to a suit between the mortgagor and the mortgagee and so a decree in foreclosure suit does not affect the rights of tenants. (*Macnair, A J.C.*) SHEORAM *v.* JAMNABAI. **65 I. C. 503.**

——*Foreclosure — Subsequent mortgagee made party at his own interest—Suit barred against him—Plea of limitation if can be set up—Proper order to pass.*

Where in foreclosure suit a subsequent mortgagee is made co-deft. at his own request after the period of limitation, *Held*, that he could not plead limitation and that the order making him a deft. should be set aside though the suit against him ought not to be dismissed. (*Hallifax, A. J. C.*) NARAYAN *v.* MAHADEO. **26 I. C. 720 : 10 N. L. R. 173.**

MORTGAGE—Interest.

Forms of.

See T. P. ACT, SS. 58 AND 98.

Improvements.

See T. P. ACT, SS. 72 AND 76.

Instalment.

——*Instalments—Failure.*

The deft. mortgaged to the plff in 1912 a house for Rs 15,000 to be paid back in 5 equal instalments beginning from January 1914. It also provided that 90 days after demand, the mortgagor will pay to the mortgagee the amount due by the mortgagor with interest and lawful charges. On first default the deft. was sued for the whole amount. No final demand having been made before the suit, the plff. can recover only unpaid instalment with interest upto the suit (*Shadi Lal and Jones, JJ.*) KANHAIYA LAL *v.* ALLIANCE BANK OF SIMLA, LTD. **62 P. R. 1916 : 162 P. W. R. 1916 : 35 I. C. 564 : 6 P. L. R. 1917.**

Interest.

See also (1) C. P. CODE, S. 34 AND O. 34, RR. 2 TO 8.
(2) INTEREST.
(3) T. P. ACT, SS. 58, 62.77 83 AND 84.

——*Interest—Construction—Stipulation as to payment of interest.*

If a mortgage giving possession of property and allowing enjoyment of the usufruct to mortgagee recites the conditions of the repayment of interest and principal at the time of redemption after a certain period, the condition of paying the interest only becomes enforceable after the expiry of the period. By a mortgage deed it was stipulated that the mortgagee was to remain in possession and enjoy the rents and profits and "that after the expiry of thirty years at the time of redemption interest shall be paid along with the principal at the rate of 1 per cent. per mensem." *Held*, that the mortgage deed did not bind the mortgagor to pay interest from the date of the mortgage and the condition to pay interest only came into force on the expiry of the thirty years. (*Mr. Ameer Ali.*) MOHAMMAD ALI MOHAMMAD KHAN BAHADHUR *v.* QAZI RAMZAN ALI. **24 C. W N 947 : 23 O. C. 150 : 58 I. C. 891 : 7 O L. J. 350.**

[On appeal from 38 I. C. 454 (Oudh).]

——*Interest—Arrears—Right to recover by sale.*

Apart from special stipulation there is no right to demand a sale of mortgaged lands for payment of interest in arrears. *Held*, on a construction of the mortgage in question that on default of payment of interest on the due date the mortgagor had power to sue for the whole amount, principal and interest. (*Lord Dunedin.*) SETHUCHALLA *v.* MAHARAJA OF JEYPORE. **42 Mad. 813 : 46 I. A. 151 : 17 A. L. J 694 : (1919 M. W. N. 502 : 21 Bom L. R 914 : 26 M. L. T. 127 : 30 C. L J. 209 : 23 C W. N. 1033 : 51 I. C. 185 : 10 L. W. 362 : 37 M L. J. 11.**

[On appeal from 34 I.C. 411: (1916) 1 M.W N. 354].

MORTGAGE—Interest.

———*Interest—Covenant to pay.*

Held, (reversing the decision of the High Court) that on the true construction of the mortgage there was clearly a personal covenant to pay interest on the mortgage money from year to year, and that the suit, which was for arrears of interest, was therefore maintainable. (*Lord Macnaughten.*) MADAPPA HEDGE *v.* RAMAKRISHNAN NARAYAN BHAT. **35 Bom. 327 : 15 C. W. N. 962 : (1911) 2 M. W. N 1 : 13 Bom. L. R. 698 : 12 I. C. 42 : 14 C. L. J. 245.**

———*Interest—Liability to pay after period fixed for redemption.*

Where in a mortgage by conditional sale the mortgagor covenanted to pay interest till the date fixed for payment after which the mortgagee was to become the absolute owner of the property and there was nothing expressed in the document to provide for payment of interest after the due date in case the mortgagee did not institute foreclosure proceedings, *Held*, that having regard to the terms of the whole document, its general tenor implied an obligation on the part of the borrower on the making of default to be liable for subsequent interes at the rate mentioned in the bond 19 A. 39; 20 A 171 : 25 C. 246. Ref. (*Mears, C. J. and Piggott, J.*) MAHADEO PRASAD *v.* DHIRAJ SINGH. **20 A. L. J. 752 : L. R. 3 A 536 : 44 A. 772 : 1923 A. 7.**

———*Interest—Right to—Waiver.*

In a mortgage payable by instalments where interest was to be charged on default and payments were made irregularly which were appropriated towards interest and principal, the mortgagee has a right to sue for interest and there is no waiver of interest. (*Ryves and Gokul Prasad, JJ.*) WEZARAT HUSSAIN *v.* MOHAN LAL **43 All. 38 : 18 A. L. J. 776 : 58 I C. 7 : 2 U. P. L. R. (A) 357.**

——*Interest—Post diem—Conditional sale.*

Where in a deed of mortgage by conditional sale for five years it was provided that in addition to the usufruct the mortgagor was to pay Rs. 10 to the mortgagee, *held*, that the mortgagee was to be entitled to Rs. 10 upto the time of payment (*Richards, C J and Tudball, J.*) ABDUL AHAD *v.* MAHTAB BIBI. **24 I. C. 674.**

——*Interest—Post diem.*

Mortgage is entitled to *post diem* damages the rate of interest stipulated in the instrument of mortgage and for the whole period during which the principal sum has remained unpaid. 3 Lah. 200 Rel. Interest on the cost of repairs should not be given. 57 P. R 188 dist. (*Campbell, J.*) RAMJI LAL *v.* SHIBBA. **1923 Lah. 309.**

——*Interest—Charge.*

Where *ante-diem* interest is not charged on the mortgaged property, *post diem* interest by way of damages cannot be charged on the property. (*Scott Smith and Brasher, JJ.*) TUSLI RAM *v.* KANSHI RAM. **1923 Lah 254 (2).**

——*Interest—Redemption.*

A property was mortgaged for Rs. 1,800 and was to be redeemed in 6 years. Out of the consideration Rs. 1,000 was to bear interest Rs. 250.

MORTGAGE—Interest.

Income from property was to be appropriated for interest on the remaining 800 Rupees. Plaintiff who purchased 1/3 of the equity of redemption sued for redemption.

Held, interest should be allowed on Rs. 333—5—4 *i.e.*, 1/3 of Rs. 1,000 on which interest was to be charged according to the original contract of six years at the contract rate and as to *post diem* interest 18 per cent. was a reasonable rate up to date of decree. (*Shadi Lal, C. J. and Abdul Qadir, J.*) GHANNU RAM *v.* HOTU RAM. **1923 Lah. 54.**

———*Interest—Default in payment — Clause for giving up possession— Waiver — Notice if necessary for subsequent default.*

Where a mortgage bond provides for possession being given to the mortgagee on failure to pay interest regularly, but the mortgagee did not enforce this right on prior occasions of default. *Held*, there is no general rule that a mortgagee who in the past has waived his right on the occurrence of a default is bound to give notice before enforcing his penalty, although it may be equitable in certain cases to insist on such notice. (*Le Rossignol and Harrison, JJ.*) PARTAB SINGH *v.* NATHU. **3 Lah. 285 : 1922 Lah. 416.**

———*Interest—Post diem—Damages—Quantum of.*

In the absence of a stipulation express or implied the mortgagee is not entitled to interest after the due date. But the mortgagee is entitled to damages to be calculated ordinarily at the covenant rate of interest and for the entire period during which the principal sum as remained unpaid unless the mortgagee is himself the plaintiff in which case the period would be the same as that prescribed by the statute of Limitation for a suit for the recovery of damages on the footing of the mortgage in his favour. 19 A. 39; 20 A. 171; 17 A 511; 95 P. R. 1902 Rel. (*Shadi Lal, C. J.*) *Chevis, Scott Smith, Le Rossignol and Broadway, JJ.*) MOHAN LAL *v.* MUHAMMAD BAKSH. **4 U. P. L. R. (Lah), 55 : 3 Lah. 200 : 42 P. L R. 1922 : 1922 Lah. 254.**

———*Interest—Period fixed for redemption—Interest subsequent to that date.*

Where it is agreed that a mortgage with possession of a house should be redeemed within four years on payment of the principal sum with interest at 9 per cent. per annum, failing which the mortgage would become a sale, no interest could be allowed after the expiry of that period. 57 P.R. 1914 ; 94 P. R. 1914 Foll. (*Martineau, J.*) GHATU RAM *v.* RAM MAL. **64 I. C. 230.**

———*Interest—Post diem—Interest after the fixed period for redemption.*

Interest continues to run after the expiry of the period fixed for redemption though it is not so mentioned. (*Rattigan and Shadi Lal, JJ.*) MOTA SINGH *v.* BISHEN SINGH. **5 P. R. 1916 : 32 I. C. 821 : 23 P. W R. 1916.**

———*Interest — Not charged on mortgaged property — Right of mortgagee to interest—Extent.*

MORTGAGE—Interest.

In a suit upon mortgage, unless interest on the mortgage debt is specifically made also a charge on the mortgaged property, the mortgage cannot be entitled to more than six years interest. (*Kensington, C. J. and Shah Din, J.*) BULAKI MAL *v.* DUNI CHAND. **116 P. L. R. 1914 : 95 P. W. R. 1914 : 22 I. C. 837 : 94 P. R. 1914.**

——*Interest—Rent.*

Separate documents, one a mortgage deed silent as to interest and another stipulating to pay two years' rent, cannot mean that the rent was meant as interest on the mortgage money (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MAMAMBATH PETTIYETH *v.* CHERIA UTHALAMMA. **16. I.C. 560.**

——*Interest—Stipulation as to—Interpretation.*

A general stipulation in a mortgage deed that the mortgage money with interest at As. 7 per cent, per mensem was to be paid in 7 years and that if the interest was not paid half yearly it was to be added to principal and bear compound interest at the same rate, can only be treated as applicable to the entire period for which the money might remain unpaid. (*Kanhaiya Lal, J C.*) NAJM-UN-NISSA *v.* RAGHUNATH. **25 O. C. 36 : 1922 Oudh 122.**

——*Interest*—Post diem—*Deed — Construction.*

Where the mortgage deed provides for the payment of the mortgage money with interest compoundable half-yearly after the expiry of five years and also foreclosure on default, the mortgagee is entitled to claim interest on the mortgage money for the period subsequent to five years as long as the money remains unpaid. (*Kanhaiya Lal, A. J. C.*) RAMESHWAR BAKHSH SINGH *v.* PRABHU DAYAL, **57 I. C. 533 : 7 O. L. J. 348.**

——*Interest— Construction — Provision for compound interest—Mortgage.*

The mortgagor agreed to pay interest every six months and, if not paid it was to be added to the principal and at the close of the second period of six months, interest was to be paid for the whole year. If the interest was not paid for the whole year the mortgagee was entitled to recover the same by suit *Held*, that the intention was that compound interest should be paid. (*Lindsay, J.C. and Stuart, A.J.C*). MANGAL PRASAD *v.* IMTIAZUN NISSA. **49 I. C. 414 : 6. O.L.J. 22.**

——*Interest*—Post diem.

A mortgage deed provided for the payment of the mortgage money in 2 years and that the property would be liable to redemption on the payment of the principal and interest due till then, and that if the money is not paid in the proper time the property shall stand foreclosed for the principal and interest. The mortgagee was *held* entitled to *post diem* interest till the date of redemption. (*Evans, A. J. C.*) BHAGAWANDIT *v.* BANSI DUBE. **12. I. C. 352.**

——*Interest*—Pendente lite—*Appeal—Court fees—Appeal—Valuation.*

MORTGAGE—Moveables.

Where a mortgage suit is dismissed the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization or to pay court-fee thereon. But if any future interest is determined by the trial court and is entered in the decree, additional court-fee on such interest has to be paid. If the appellate court grants him a decree for an amount larger than that claimed in the court below, court fee must be paid on the difference and unless this is done the decree cannot be executed. (*Jwala Prasad, J.*) KALI PRASAD SINGH *v.* MATHURA PRASAD SINGH. **1 Pat. L. R. 16 : 3 P. L. T. 813 : 1923 P. 28.**

——*Interest—Court's power of interference with rate—Contract Act, Ss. 16 and 74.*

A Court has no jurisdiction to reduce the rate of interest in a mortgage bond unless a case is made out under S. 16 of the Contract Act. Indian law does not recognize the English principle of equity which gives relief to a debtor whenever a Court considers the rate of interest unduly high. Where the only facts found were that the mortgagor was badly in need of money and the mortgagee was the only person who could advance the sum, undue influence cannot be inferred. The fact that the security is sufficient for payment of the loan is not a consideration at all; nor does the stipulation for compound interest make it a penalty. (*Das and Adami, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION, LTD *v.* BHAGWAT BUX RAI. **1 Pat. 263 : 1922 P. 491.**

——*Interest—Decree awarding — Appeal—Court-fee.*

In an appeal where interest after institution of suit is awarded the plaintiffs were bound to pay additional court-fee on the amount of interest. (*Jwala Prasad, A C. J. and Ross, J.*) JAMUNA RAI *v.* RAMTAHAL RAUT. **1 Pat. 19 : 3 P. L. T. 780: 1922 P. 387 (2).**

——*Interest—Decree for a larger amount than claimed, as including interest* pendente lite—*Court fee to be paid on excess before execution.*

If in a suit, the decree is passed for a larger amount than claimed, as including interest *pendente lite*, the decree could not be executed, until the court-fee on the total amount decreed is paid. (*Coutts and Ross, JJ.*) RAM BHUJHWAN PRASAD *v.* NATTU RAM. **3. Pat. L. T. 146 : 1922 P. 59.**

Joint Hindu Family.

See HINDU LAW (1) ALIENATION.
(2) JOINT FAMILY.

Keeping Alive.

See T. P. ACT, Ss. 75 AND 101.

Marshalling.

See T. P. ACT, S. 81.

Merger.

See (1) C. P. CODE, O. 34, RR. 3 (3) AND 8 (3).
(2) T. P. ACT, Ss 75 AND 101.

Moveables.

See also CONTRACT ACT, Ss. 172 AND 181.

MORTGAGE—Moveables.

———*Moveables—Shares—Accretion.*

Per Macleod, C. J.—Mortgage of shares whether new shares or an accretion to the old depends on whether accumulated profits are distributed as dividends or changed into capital. Where the new shares are given instead of dividends the mortgagee of the old shares is entitled to the new shares. But where the amount to the credit of the reserve is transferred to the capital accounts and new shares to be transferred to the existing new shareholders the mortgagor is entitled to the old shares. (*Macleod, C. J. and Shah, J.*) HIRALAL *v.* BAI MANI. **23 Bom. L. R. 1279.**

———*Moveables—Contract Act, Ss.*108 *and* 178.

A parol mortgage of moveables is as valid as a mortgage of the same by writing and has the immediate effect of passing property without actual possession and the object of Ss. 108 and 178 of the Contract Act which are based on estoppel rules is to protect the interests of *bona fide* purchaser and pledgees so that a *bona fide* purchaser from one who is held out by the true owner as able to confer good title, is protected against objections by the true owner. (*Beaman, J.*) TEHILRAM GIRDHARDAS *v.* LONGIN D'MELLO. **37 I. C. 231 : 18 Bom. L. R. 587.**

———*Moveables—Rights of mortgagee.*

There is no law preventing a person having a mortgage of moveable property from following the property into the hands of purchasers with notice of the mortgage. (*Chevis, C. J. and Dundas, J.*) THE ORIENTAL BANK OF INDIA, LTD. *v.* GHULAM FATIMA. **57 I. C. 117 : 1 Lah. 422 : 2 U. P. L. R. (L). 143.**

———*Moveables.*

The plaintiff claimed a mortgage on moveable property of which he had not got possession by virtue of the mortgage *Held*, if the mortgagor chooses to dispose of the mortgaged property to a third party, the mortgagee cannot follow that property into the hands of that third person unless he can show that that party had at the time he took the property, notice of the mortgage. (*Maung Kin, J.*) MAUNG SHWE HNYIN *v.* LALA FUL CHAND. **1 Bur. L. J. 136 : 1923 R. 60.**

Novation.

See CONTRACT ACT, S. 62.

Occupancy Holdings.

See OCCUPANCY HOLDING.

Penalty.

See (1) CONTRACT ACT, S. 74,
(2) T. P. ACT, S. 60.

Personal Covenant, Liability, Remedy.

See (1) C. P. CODE, O. 34, R. 6,
(2) T. P. ACT, Ss. 58, 68 AND 69.

Prior and Subsequent.

See (1) C. P. CODE, S. 11.
(2) C. P. CODE, O. 34.
(3) T. P. ACT, Ss. 74 AND 75.

Priority.

See T. P. ACT, Ss. 75 AND 101

Receiver.

See (1) C. P. CODE, S. 51 AND O. 40, R. 1.
(2) RECEIVER.

MORTGAGE—Redemption.

Redemption.

See also (1) C. P. CODE, O. 34, R. 1.
(2) T. P. ACT, Ss. 60, 74, 75 AND 91.

———*Redemption—Invalidity of document—Found in a pre-emption suit—Effect.*

In a suit brought to redeem, a judgment in a previous pre-emption suit wherein it was found the document was a sham and fictitious one having relied on as conclusive to show its nature. *Held*, the judgment is admissible but is not conclusive. (*Lindsay and Kanhaiya Lal, JJ.*) CHAIDDU *v.* DESRAJ. **21 A. L. J. 793 : L. R. 5 A. (Civ.) 55 : 1924 All. 294.**

———*Redemption—Integrity, when broken.*

If a mortgagee releases a portion of the mortgaged property by receiving the amount of money alleged to be due from such portion, he does not thereby break the integrity of the mortgage, nor does it entitle the mortgagor to a redemption of a portion only of the property. (*Bannerjee and Gokul Prasad, JJ.*) HAJI ALI JAN KHAN *v.* MAJID-UD-DIN. **45 A. 524 : 21 A. L. J. 450 : L. R. 4 A. 244 :45 All. 524 : L. R 4 All. (Civ.) 244 : 1923 A. 499.**

———*Redemption—Right to—Occupancy holding—Lessee.*

The holders of a certain occupancy holding mortgaged their rights with possession before the passing of the Agra Ten. Act. After they had done so, they took a permanent lease of the holding from the zemindar and transferred their rights under the lease to a certain person who proceeded to redeem the mortgage. *Held*, that he had a right to redeem the mortgage. (*Mears, C.J. and Stuart, J.*) MAHABIR CHAUBE *v.* DIP NARAIN CHAUBE. **20 A. L. J. 976 : 1923 A. 140 (2).**

———*Redemption—Successive suits for redemption.*

A mortgagor has an unfettered right to sue for redemption unless that right has been extinguished by act of the parties or by an order of a court. (*Ryves and Stuart, JJ.*) HARI RAM *v.* INDARAJ. **20 A. L. J. 631 : 44 A. 730 : L.R. 3 A. 397: 1922 A. 377.**

———*Redemption—Mortgagee's liability.*

On redemption taking place, the mortgagee, who took possession under the mortgage, must return the land to the mortgagor or his assignees. (*Tudball and Rafique, JJ.*) TAMESHWAR *v.* MAHARAJ SINGH. **63 I. C. 114.**

———*Redemption—Time of.*

Where a mortgage-deed provided for redemption after a number of years and for payment of interest annually but in case of default empowered the mortgagee to sue for the entire mortgage money, *held*, that on equitable grounds the mortgagor was entitled to redeem even before the expiry of the number of years. (*Ryves and Stuart, JJ.*) HIRA KUAR *v.* GAMBHIR SINGH. **19 A. L. J. 460 : 62 I. C. 985 : 3 U.P.L.R. (All.) 72.**

———*Redemption—Mortgagor and mortgagee—Suit for redemption—Mortgagee if estopped from denying mortgagor's title.*

MORTGAGE—Redemption.

In a suit for redemption where the mortgagee pleaded that he was the real owner of the property, and that the mortgage was a fictitious transaction, deft. was not estopped from denying the genuineness of the transaction and the court was entitled to go into the evidence as to the real nature of the transaction. (*Richard, C. J. and Banerjee, J.*) FATELAL *v.* CHELA. **22 I. C. 655.**

———*Redemption—Suit for—Part of property lost owing to negligence of mortgagee—Liability of determinal in a suit.*

The liability of the mortgagee for the loss of the property owing to his negligence should be determined in a redemption suit The mortgagee is liable to restore the property or its value as he could not give back possession thereof (*Macleod, C. J. and Shah, J.*) ANANDARAO *v.* BHIKAJI. **64 I. C 485 : 23 Bom. L. R. 979.**

———*Redemption—Proof of mortgage.*

Plff sues as owner in an ejectment suit. In a redemption suit he sues as an owner of an interest in it. No question of title is involved in a redemption suit. The suit fails independent of title being proved if mortgage is not proved. (*Chandavarkar and Hayward, JJ.*) MAHOMED IBRAHIM *v.* SHEIKH HAMJA. **35 Bom. 507: 12 I.C. 387 : 13 Bom. L. R. 895.**

———*Redemption— Prior mortgage—Puisne mortgages.*

A mortgagor can redeem each of the mortgagees in turn, and cannot redeem the first mortgagee alone in a suit brought by him and omit all the intermediate mortgagees. (*Beaman, J*) HOPE MILLS, LTD *v.* SIR KOVASJI J READYMONEY. **10 I. C. 748 :18 Bom. L. R. 162.**

———*Redemption—Partial rdemption when allowed—Sale under decree—Effect on right to redeem.*

A mortgage contract is indivisible and it is the right equally of the mortgagor and mortgagee to keep it indivisible. The general rule is that a mortgagee cannot be required at the instance of a purchaser of part of the premises to apportion his mortgage debt among the several parts into which the property has been divided and to look to each only for its proportionate share, unless circumstances have happened the effect of which, in fact or in law, is to create a severance of the security. In exceptional cases it will be allowed as where it is necessary for the benefit of one who has taken a part of the property under necessity and for the protection of his own interest, or where the mortgagee himself has been the owner of a part of the equity of redemption or where by his own conduct there has been a break up of the entire security. The test to be applied in each case is, whether there has been a severance of the security at the instance or with the consent of the mortgagee, and an apportionment will not be forced on him unless special equitable considerations are proved. So long as the sale under a mortgage decree stands, the right to redeem vanishes. 47 I A. 91 Foll. (*Mookerjee and Buckland, JJ.*) DINANATH MAHISH *v.* NABAKUMAR HAJRA. **70 I. C. 542 : 35 C. L. J. 332.**

MORTGAGE—Redemption.

———*Redemption—Property sold—Right of purchaser.*

An occupancy holding was sold under a money decree, subject to prior mortgage. The mortgagee sued on his mortgage but did not join the purchaser as deft. Under a decree which was passed in the suit, the mortgagee purchased the holding; the first purchaser then sued for possession. *Held*, that he must first redeem the mortgage in order to obtain possession (*Mookerjee A. C. J. and Fletcher, J.*) KALU SHARIF *v.* ABHOY CHARAN. **62 I. C. 445 : 25 C.W.N. 253.**

———*Redemption suit for— What plaintiff must prove.*

The plaintiff suing to redeem must prove a subsisting mortgage. Where the only evidence of the mortgage was that contained in a certified copy of the original mortgage deed, and an entry in the *Khasra Abadi* that certain A was then in possession as mortgagee. *Held*, the evidence is not sufficient, when no connection is established between A and the present defendant. (*Campbell, J.*) RALLA RAM *v.* FEROZ DIN. **1923 Lah. 665.**

———*Redemption — Onus of proof that the mortgage still subsists.*

Plaintiffs alleged that certain trees had been mortgaged by their ancestor to the predecessors in title of the defendants.

Held, the onus of proving that the mortgage subsists at the date of suit, lies on plaintiffs, in the first instance. If the defendants admit previous mortgage but allege subsequent sale, the onus is shifted on to them to prove ownership by sale. When they produce and prove revenue records in their favour the onus is re-shifted to the plaintiffs, who must prove their case. (*Broadway, J.*) JOTI PRASAD *v.* RAHMAT ALI. **1923 Lah. 243.**

———*Redemption—Mortgagee failing to keep account of the income—Agreement in mortgage deed.*

Where mortgagee failed to keep regular account of the income of the mortgaged property according to the agreement in the mortgage deed. *Held*, the interest on the mortgage money and the income of the garden should balance each other. 95 P.L.R. 1908. Ref. (*Shadi Lal, C. J. and Harrison, J.*) SHAMBHU NATH *v.* NIHAL CHAND. **1922 Lah. 213.**

———*Redemption—Usufructuary mortgage—Further charge created by subsequent simple mortgage—Redemption.*

Plff. sued to redeem an usufructuary mortgage. Subsequent to this mortgage a further charge was created on the same land under a simple mortgage-deed. In this second mortgage deed it was stipulated that the money due thereunder would be paid at the time of the redemption of the first mortgage. *Held*, that the plaintiff was not entitled to redeem the first mortgage without paying the money due on the second mortgage deed. 37 A. 634. dist. (*Broadway and Wilberforce, JJ.*) NATHWA *v.* KANHIYA. **65 I. C. 642 : 3 Lah. L. J. 432.**

MORTGAGE—Redemption.

——*Redemption—Decree — Appeal may be heard though redemption money is not paid.*

An appeal from a redemption decree may be heard though the redemption money has not been deposited as ordered by the Lower Court. 161 P. R. 1890 Appr. 23 A. 88 ; 31 A 328 ; 23 M. 521 Dist. (*Shadi Lal and Le Rossignal, JJ.*) THAKUR DAS *v.* RADHAKISHAN. **37 I. C. 125: 99 P. R. 1916**

——*Redemption—Right to—Admission of in mutation proceedings—If sufficient proof.*

An admission by a mortgagee of the right of redemption of his mortgage before a competent Revenue Officer in mutation proceedings is good proof of the right where it is also supported by other evidence. (*Johnstone and Shah Din, JJ.*) DIVAN CHAND *v.* KHUSAL SINGH **11 I. C. 410 : 94 P. W. R. 1911.**

——*Redemption—Irredeemable mortgage—Onus of proof—Neerozhika Otti Kanom.*

The onus of proving that a mortgage is irredeemable lies on the party setting up the plea. The tenure "Neerozhikka Otti" kanom is irredeemable. (*Krishnan and Ramesam, JJ.*) RYRU NAMBIAR *v.* KANARA KURUP. **(1923) M.W.N. 76 : 16 L. W. 930 :42 M. L. J. 350 : 1922 Mad. 185.**

——*Redemption—Receiver—Trust property.*

Where the receiver of trust property sued the mortgagee for possession alleging that the mortgage by trustee was collusive, and it was stated in the plaint that the plff. was willing to pay the mortgagee such sum as the Court may find just and proper. *Held*, that the plff.'s willingness to pay does not convert the suit into a suit for redemption. (*Sadasiva Aiyar and Spencer, JJ.*) AMMAHI AMMAL *v.* KRISHNAN NAIR. **62 I. C. 715.**

——*Redemption—Oral agreement.*

Where subsequent to a mortgage, the mortgagee under an agreement between the parties agrees to give up some lands and retain others as full owner, his title to the lands ripens into full ownership by prescription and the mortgagor cannot redeem them after 12 years. (*Ayling and Odgers, JJ.*) KANDASAMI PILLAI *v* CHINNAPPA. **44 Mad. 253 : (1921) M. W. N. 1: 29 M. L. T. 167 : 13 L. W. 423 : 62 I. C. 603 : 40 M L. J. 105**

——*Redemption—Clog— Relief when claimable.*

Relief against an agreement forming a clog on the equity of redemption can only be obtained if such agreement is impeached within reasonable time. It is an equitable relief which should not be granted as a matter of course. (*Batten J. C.*) BHICKA *v.* SHAIKH AMIR. **19 N. L. R. 1 : 1923 Nag. 60.**

——*Redemption—Right of—Term fixed in deed—Benefit to mortgagee.*

A mortgagor or puisne mortgagee may redeem at any time unless it appears from the nature of the mortgage or from other circumstances that the term was created in favour of the mortgagee as well as of the mortgagor. Where the term

MORTGAGE—Redemption.

fixed for redemption was 50 years it was held that it was fixed in the interests of the mortgagee also. 16 C P L.R. 59 Ref. (*Kotval, A. J. C.*) TUKARAM *v.* MANGAYA. **1923 Nag. 49.**

——*Redemption — Suit based on terms of decree of Settlement Court— If lies—Limitation.*

A suit for redemption of a mortgage based on the terms of a declaratory decree obtained in the Regular Settlement Court in Oudh is maintainable and is governed by the 60 years' rule of limitation. (*Wazir Hasan, A. J. C.*) BALDEO *v.* SHER BAHADUR SINGH. **9 O. & A. L. R. 761: 1924 O. 169.**

——*Redemption—Suit for—Court fees.*

If a suit for foreclosure or redemption is dismissed then for the purposes of the memorandum of appeal, the court fee should be calculated in accordance with the provisions of Court Fees Act, S. 7 (IX) and Sch. I, Art, 1. (*Daniels and Lyle, A J. C's.*) SANGHAT BAKSH SINGH *v.* RAWAT DIJDEO BAKSH SINGH **25 O C. 30 : 1922 O. 82.**

——*Redemption—Mortgages before T. P. Act—Forfeiture clause valid—Limitation Act, Art. 113—Three years to run from demand and refusal of redemption.*

A mortgage purported to be usufructuary mortgage under which possession of the land was made over to the respondent in lieu of interest and it was proved that respondent should lease the land to the mortgagors at an annual rental of 600 baskets of paddy. Regarded as a suit for specific performance to the covenant in the mortgage deed to allow redemption within two years, the period of limitation would be three years from the date on which redemption was refused. (*Lentaigne, J.*) MA HIN THA AND OTHERS *v.* MA THET SU AND ANOTHER. **1 Bur. L. J. 119 : 1923 R. 232**

——*Redemption—Defendant in possession setting up sale—Burden of proof.*

Possession is a good proof of complete title. Therefore, in a suit for redemption of property in the possession of the deft who sets up a sale, the plff. must prove that the transaction was a mortgage and not a sale. 5 L B R. 40. Dist., 27 B. 271 ; 1 A. 194 rel (*Rigg, J.*) MA LE GYI *v.* MAUNG PAN MAUNG. **38 I. C. 182.**

——*Redemption — Condition in mortgage that mortgagee was to be absolute owner in default of payment—T. P. Act, not applicable.*

In a case where T. P. Act does not apply, the mortgagor cannot redeem after the mortgagee has taken possession of the property as owner according to a clause in the deed that he is to become absolute owner on failure of payment of the mortgage money within a certain date. The principle applies both to simple and usufructuary mortgages. (*Fox, C. J. and Ormond, J.*) ABDUL HAMIL *v.* DUPRIA BIBI **36. I C 959 : 10 Bur. L. T 219.**

——*Redemption by the mortgagor.*

If a mortgagee gives an advance to a person other than the mortgagor without the latter's consent, the mortgagor is nevertheless entitled

to redeem the mortgaged property for the sum for which he mortgaged it and the mortgagee then retains a charge on the interest of the person to whom he made the subsequent advance (*Mc Coll, A. J. C.*) MGA SHAVE PA *v.* MIYON. **14 I. C. 815 : 5 Bur. L. T. 49.**

——*Redemption—Decree—Appeal—Date for redemption.*

An appellate court when making its own decree can fix a fresh date for redemption with reference to the date of its own decree. (*Pratt, J. C. and Crouch, A. J. C.*) BIKHOMAL *v.* RAIALMAL **19. I. C. 393 : 6 8 L. R. 140.**

Rights of mortgagee.

——*Rights of mortgagee--Equitable—Original satisfied—Indemnity.*

An equitable mortgage was created by a mortgagee by the deposit of mortgage deeds with another firm. Subsequently a settlement was arrived at between the mortgagor and the mortgagee whereby the latter contracted to indemnify the former against losses, etc., in respect of any matter relating to the mortgage-deed. The firm obtained a decree on the equitable mortgage against the original mortgagor but failed to execute it within time. The original mortgagor satisfied it although it was time-barred and relying on the indemnity bond sued his own mortgagee for recovery of the amount. The defendant pleaded that the payment was voluntary and therefore not binding on him.

Held, that though the decrees had become unenforceable the mortgagee had by his own act of depositing the deeds as a security with the firm blistered, encumbered and lessened in value their equity of redemption in the property mortgaged by these deeds and under the wide and far reaching turns of the indemnity the mortgagors were entitled to recover from his representaives what it had cost them to remedy the damage he had done to their property by paying off the encumbrance upon it which he had by his own acts created. (*Lord Atkinson*) SACHINDRA NATH ROY *v.* MEHRAJ BAHADUR SINGH.

4 U. P. L. R. (P. C) 57 : 30 M. L. T. 96 : 24 Bom. L. R. 659 : 1922 M. W. N 338 : 26 C. W. N. 858 : 48 I. A. 335 : 49 I C. 208 : 1922 (P.C.) 187.

——*Rights of mortgagee—Purchaser not personally liable.*

A purchaser of equity of redemption who retains a portion of the purchase money for paying off the mortgage does not thereby become personally liable to the mortgagee to discharge the mortgage debt. (*Lord Atkinson.*) NANKU PRASAD SINGH *v.* KAMTA PRASAD SINGH.

26 C.W.N. 771: 3 P. L. T. 637 : 1923 P. C. 54 (1).

——*Rights of mortgagee — Substituted Security—Doctrine of—when applicable.*

The doctrine of substituted security only applies where a possession of a particular property has been awarded to one party in lieu of an undivided share in the whole property which was the subject of partition. It does not apply when

the entire property mortgaged belonged to the mortgagors, and a person with no title has subsequently obtained possession of a portion of it behind the back of the mortgagees. (*Ryves and Daniels, JJ.*) MR. AFTAB BEGAM *v.* MAHOMED AYUB. **45 A. 653: L. R. 4 A. 337: 21 A L.J. 607 : 1924 A. 65.**

——*Rights of mortgagee—Prior and subsequent—Rights of purchasers in execution of decrees on prior and subsequent mortgages.*

The question in the case was whether the plaintiff respondent who was the purchaser of the property in dispute, under a prior mortgage decree, to which the defendants appellants were no parties, had a right to eject the defendants, the purchasers in execution of a decree, based on a puisne mortgage, to which the prior mortgagees were no parties. It appeared that in the year 1910 the second mortgagees obtained a decree on foot of their mortgage for sale of the property and purchased the property on 20th of April 1912, in execution of such decree. To this suit the prior mortgagee was not made a party. In the year 1915 the prior mortgagee got a decree for sale on foot of her mortgage, but to this suit, neither the puisne mortgagee, nor the purchaser in execution of his decree, were made parties. The prior mortgagee got a decree and put the property to sale and, in execution thereof purchased it herself. She obtained possession over three-fourths of the property and did not get possession over one fourth, which was in the possession of defendants.

She brought the present suit for the recovery of possession of the remaining one-fourth also, and in the alternative, for a conditional decree that the defendant should redeem her mortgage, and in case of his failure to do so, she should be put in possession of the property in dispute. *Held*, that the plaintiff had no right to possession of the property under the mortgage on which she based her title. It was a simple mortgage and not a possessory mortgage The suit was misconceived and should be dismissed. (*Stuart and Gokul Prasad, JJ.*) RAM NARAIN *v.* SOMI. **45 A: 189 : 1923 A. 449 (1).**

——*Rights of mortgagee—Suit on—Non-joinder.*

Prior and subsequent mortgages must be impleaded in order to sue successfully. Decree obtained by one mortgagee without impleading the other cannot be allowed. (*Gokul prosad, J.*) BENARSI GOLDSMITH *v.* BHULLA. **1923 A. 423.**

——*Rights of mortgagee—Puisne mortgagee not impleaded in suit on prior mortgage—Effect.*

Where in a suit by a prior mortgagee the subsequent mortgagee is not impleaded, the decree therein is not binding on him and his right to redeem still subsists, provided he comes within the period of limitation fixed by article 148 of the Lim. Act, (*Ryves and Gokul Prasad, JJ.*) PRIYA LAL *v.* BOHRA CHAMPA RAM.

45 A. 268: 1923 All. 271(2)

——*Rights of mortgagee—Prior and puisne mortgagees—Rights of— Foreclosure suit—Suit for redemption.*

MORTGAGE—Rights of Mortgagee.

A suit brought by a puisne usufructuary mortgagee to redeem a prior mortgagee by conditional sale, who in his turn is ready to redeem this puisne mortgagee and who has acquired the equity of redemption by obtaining a foreclosure decree in a suit to which the puisne mortgagee was not made a party, is equivalent in fact to a cross suit. In such case each of the two mortgagees is entitled to redeem the other but having regard to justice of the case, convenience and balance of equities in favour of the two mortgagees the prior mortgagee should be allowed to redeem the puisne mortgagee and the latter should not be allowed to redeem the former who having acquired the equity of redemption is entitled to redeem the latter at any time. (*Kyves and Gokul Prasad, JJ.*) PRASANNA SINGH *v.* PANDOHI.
20 A. L. J. 41 : 44 A. 462 : 67 I. C. 533 : 4 U. P. L. R. (A.) 145.

———*Rights of mortgagee—Transfer of property after decree for sale—Effect.*

Where the mortgagor sells his interest in the mortgaged property after a final decree for sale is passed, it does not affect the rights of the decree-holder to realise the money. (*Gokul Prasad and Stuart, JJ.*) RAM CHARAN DAS *v.* KANHAI LAL.
63 I. C. 144.

———*Rights of mortgagee — Discretion of court in suit on.*

In a mortgage suit the court ought to have the fullest power to direct what is right and equitable having regard to the circumstances of the case and the interest of all the parties to the suit in the property. (*Richards, C. J. and Banerji, J.*) MANOHAR LAL *v.* RAM BALRE. **9 A L. J. 323 : 14 I. C. 674 (2) : 34 A. 323.**

———*Rights of mortgagee—Mortgage decree —Execution of—Sale of house—Not invalid.*

A house belonging to an agriculturist may be sold in execution of a mortgage decree, and such sale is not invalid. (*Knox and Karamat Husain, JJ.*) JANKI DAS *v.* SANDAL. **9 I. C. 825 (1).**

———*Rights of mortgagee in possession—Suit to enforce mortgage barred by limitation—Effect of.*

Once the mortgagee gets into possession of the property mortgaged to him then the property is security for his debt and he is entitled to remain in possession, though as a matter of fact if he endeavoured to recover the mortgage money by suit he might find himself barred by statute of limitation. (*Macleod, C. J. and Crump, J.*) RANGAPPA *v.* VITHU. **47 Bom. 652 : 25 Bom. L. R. 278 : 1923 Bom. 199.**

———*Rights of mortgagee—Decree—Execution—Limitation.*

The period of limitation for executing a mortgage decree runs from the date of the final decree.

A fresh decree is not necessary before the decree holder can enforce his decree against properties other than those mentioned in the decree. (*Walmsley and B. B. Ghose, JJ.*) HAYATUNNESSA CHOWDHURANI *v.* ACHIA KHATUN.
50 Cal. 743 : 1924 Cal. 131.

MORTGAGE—Rights of mortgagee.

———*Rights of mortgagee — Good faith—Knowledge of the true facts.*

If the mortgagee did not know the true facts, then the person claiming under him will not be precluded from getting a good title to the property mortgaged by the mere fact that he know of the true state of things. (*Greaves and Ghose, JJ.*) SARODA PRASAD *v.* GOSTO BEHARI HAZRA.
36 C. L. J. 78 : 27 C. W. N. 943 : 1922 C. 542.

———*Rights of mortgagee—Decree — Time fixed for redemption—Payment not made in time —Effect.*

Where in a suit on a mortgage the decree of the Appellate Court simply dismisses the appeal leaving the decree of the first court untouched, the time for redemption runs from the date of the decree of the first court, 25 Cal. 311 (1897) ; 11 C. W. N. 679 (1907), foll.; 30 Bom. 175 (1914), dissented from. (*Newbould and Cuming, JJ.*) BASANTA KUMAR ADAK *v.* SM. RADHA RANI DASI.
1922 C. 329.

———*Rights of mortgagee—Suit—All heirs of mortgagor not made parties—Effect of.*

A suit by a mortgagee cannot be dismissed on the ground that all the heirs of the mortgagor are not made parties to the suit. The mortgagee is entitled to a decree for a proportionate share of the mortgage money as against the defts. who are on the record. (*Mookerjee, C. J. and Fletcher, J.*) HARCHANDRA ROY *v* MOHAMED HASIN.
66 I. C. 312 : 25 C. W. N. 594.

———*Rights of mortgagee—Renewal of--Lease by mortgagee—Whether mortgagor can claim benefit of.*

An occupancy tenant executed a mortgage by condition sale of his holding and then conveyed it to the plff. The mortgagee apprehending forfeiture, obtained a new lease from the landlord on payment of a premium. Plff. sued for redemption and for re-transfer to him of the occupancy holding which had been mortgaged to the deft. previous to the latter's taking settlement from the landlord. *Held* that he was not entitled to a decree for redemption as the mortgagee did not take the settlement from the landlord by taking advantage of his position as mortgagee in possession. (*Mookerjee, A. C. J., and Fletcher, J.*) ABBAS ALI SARKAR *v.* SALIMUDDIN SARKAR.
62 I. C. 692.

———*Rights of mortgagee—Two mortgages on the same property.*

Neither the C. P. Code nor T. P. Act debar the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit provided that he is not restrained by any covenant in either of the mortgage deeds, and that he cannot sell the property twice over, nor sell it under the second decree subject to the first. (*Asutosh Mukerji, A. C. J. and E. Fletcher, J.*) NILU ROY *v.* ASIRBAS-MANDAL.
33 C. L. J. 232 : 60 I. C. 809 : 25 C. W. N. 129.

———*Rights of mortgagee — Execution of decree.*

Where a mortgage decree was obtained for the sale of five properties three of which belonged to

MORTGAGE—Rights of mortgagee.

one of the mortgagors, but it was afterwards declared that these latter could not be subjected to the decree and the decree-holder applied in execution for the sale of the remaining two properties but was objected to by the judgment-debtor on the ground that these two properties could be held liable only for a proportionate amount and not the whole. *Held* that no such objection can be raised. (*Teunon and Beachcroft, JJ.*) HARENDRA LAL SANJAL *v.* PABNA MODEL COMPANY, LTD. **55 I. C. 256.**

———*Rights of mortgagee—No privity of contract between mortgagee and vendee about a sale by mortgagor—Vendee's liability.*

Harnam Singh mortgaged on a date unknown a house to Hira Singh for Rs. 700. On 12th March, 1917, Harnam Singh sold the same house to Ghulam Jilani for Rs. 1,700 and Rs. 700 were retained by Ghulam Jilani for payment to the mortgagee Hira Singh. On 24th November, 1919, Ghulam Jilali sold the bouse to Mt. Chet Kaur for Rs. 2,700 although she never got possession. The sale-deed recited that Hira Singh had a charge on the house and that Rs. 1,000 were left in deposit with the vendee for payment to Hira Singh or his legal representative. Harnam Singh's name is not mentioned. On 13th April, 1918, Hira Singh sued Harnam Singh on a bond and got a decree on 7th May 1918, for Rs. 115 and costs. Before suing out execution of this decree Hira Singh, according to his own statement in the present suit realised from Harnam Singh the mortgage charge of Rs. 700 on the house abovementioned by bringing to sale another house. In his application for execution of his decree for Rs. 115 against Harnam Singh, Hira Singh stated that a sum of Rs. 700 belonging to Harnam Singh was in the hands of Mt. chet Kaur and he asked for this to be attached. It was attached accordingly and was brought to auction sale. At the sale an objection was notified by Mt. Chet Kaur that she held no sum of Rs. 700 belonging to Harnam Singh. The money attached was purchased by Gurumukh Singh for Rs. 230, Gurumukh Singh then instituted the suit from which the present second appeal had arisen against Mt Chet Kaur for recovery of Rs. 700. Hira Singh and Harnam Singh were joined as defendants. The cause of auction was his auction purchase.

Held Chet Kaur's answer to the suit, that she possessed no money recoverable from her by Harnam Singh, mortgagor is effective. There is no privity of contract between the mortgagee and vendee. Where the mortgagor sells the property and retains money in the hands of the vendee to pay off mortgagee the vendee is not personally liable. (*Campbell, J.*) CHET KAUR *v.* GURUMUKH SINGH. **1923 L. 459.**

———*Rights of mortgagee—Prior or puisne mortgagee's suit for possession by puisne mortgagee—Limitation for—Effect of possession by third person.*

A puisne mortgagee need not file a suit for possession within twelve years from the date of the mortgage, when the property is not in the possession of the mortgagor, but is in the possession of a third party or a prior mortgagee. (*Shadi Lal, C. J. and Sagar, J.*) INDAR SINGH *v.* BASANTA. **63 I.C. 679.**

MORTGAGE—Rights of mortgagee.

———*Rights of mortgagee--Possession—Decree form of.*

In a suit by a mortgagee for possession, if the, right to possession is established a decree may be passed for possession and the amount of lien may be left to be decided on redemption. (*Johnstone and Rattigan, JJ.*) KUMAN *v.* SULTANI MAL. **82 P. W. R 1912 : 148 P. L. R. 1912 : 13 I. C. 559 : 66 P. R. 1912.**

———*Rights of mortgagee—Suit against alienor's reversioners—Proof of necessity.*

The mortgagee in a suit against the alienor's reversioners, cannot obtain possession unless he proves that the transaction was for necessity but where the consideration of the mortgage partially consists of an old mortgage which is for necessity he can rely upon the former mortgage. (*Chevis, J.*) MIRANBAKHSH *v.* GOUDERAM. **13 I. C. 556 : 89 P. W. R. 1912.**

———*Rights of mortgagee—Right to proceed against properties—Duty of Court.*

Though it is true to say that a mortgagee can execute his decree against the mortgaged properties in any order he likes, the Court can give directions as to the order in which they are to be sold. (*Spencer and Odgers JJ.*) NARAYANASWAMI CHETTY *v.* VELLAYA PILLAI. **33 M. L. T. 181 (H.C.) : (1923) M. W. N. 831 : 45 M. L. J. 722 : 1924 Mad. 366.**

———*Rights of mortgagee—Sale subject to prior usufructuary mortgage.*

If a mortgagee is entitled to get a decree for sale of certain items of property he is entitled to have them sold subject to his prior usufructuary mortgages. (*Sadasiva Aiyar and Spencer, JJ.*) JAGNA SANYA SIAH *v.* MYCHERLAPEDA ATCHARNNA. **15 L. W. 289 : 70 I. C. 759 : 32 M. L. J 339.**

———*Rights of mortgagee—Subrogation.*

Partial discharge of the prior mortgage by the puisne mortgagee does not entitle him to subrogation. (*Spencer and Odgers, JJ.*) BRAHMANDAM *v.* VENKATA LAKSHMI NARAYANA RAO. **16 L. W. 216 : 31 M. L. T. 170 : 43 M. L. J. 284 : 1922 Mad. 441.**

———*Rights of mortgagee—Mortgage during attachment.*

A person who obtains a mortgage on a property, during its attachment under a decree can add the amount paid by him to avert the sale in execution to his principal money and recover it along with. (*Spencer and Ramesam, JJ.*) VENKATA NARASIMHA RAJUGARU *v.* KUPPU CHETTY **63 I. C 24 : (1921) M. W. N. 479 : 40 M. L. J. 524.**

———*Rights of mortgagee—Misdescription in mortgage—Damages cannot be claimed against transferee of property.*

A claim for damages suffered by reason of misdescription of the property offered as security cannot be recovered against the purchaser of the equity of redemption. (*Wallis, C. J. and Seshagiri Aiyar, J.*) PANAGANTI RAMARAYANIM GARU *v.* MAHARAJAH OF VENKATAGIRI. **44 Mad. 301: 12 L. W. 685 : 28 M. L. T. 234 : 61 I. C. 612 : 40 M. L. J. 236.**

——*Rights of mortgagee—Full consideration not proved as paid.*

Where only a part of the consideration is found to be advanced, the mortgage should be set aside *in toto* and the mortgagee stands as unsecured creditor for the amount advanced. (*J. Wallis, C. J. and Krishnan, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SAMBANDA MUDALIAR.

43 Mad. 739 : 39 M. L. J. 345 : 60 I. C. 205 : 28 M. L. T. 258.

——*Rights of mortgagee—Subrogation by vendee—Partial payment of mortgaged money.*

The purchaser of a mortgaged property cannot claim the right to subrogate as against a pusine incumbrancer when he has paid only a portion of the mortgage debt. (*Sadasiva Aiyar and Napier, JJ.*) BESINATH KARUMANI *v.* DEVIDOSS.

29 I. C. 511.

——*Rights of mortgagee—Right to possession—Omission to implead all the persons in possession.*

When a mortgagee used for recovery of the whole of the mortgaged property but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit so much only of the claim should be decreed as was proportionate to the interest of the persons who were before the Court. (*Batten, J.C.*) HIRASA *v.* ONKAR.

1923 Nag. 234.

——*Rights of mortgagee—Failure to implead puisne mortgagee—Effect.*

Failure to implead pusine mortgagee does not invalidate the sale. (*Hallifax, A. J. C.*) LAXMI CHAND *v.* NARAYAN. **6 N.L.J. 237 : 1923 N. 225.**

——*Rights of mortgagee—Puisne mortgagee disclaiming interest—Effect—Subsequent—Suit.*

A subsequent incumbrancer who has been impleaded in a suit on a prior mortgage and who disclaims all interest in the mortgage properties is disentitled from claiming redemption of the prior mortgage in a suit on his own mortgage. (*Dalal and Simpson, A. J. Cs.*) DUBER *v.* RAM SAHAI. **10 O. L. J. 305 : 1924 Oudh 56.**

——*Rights of mortgagee—Lease by mortgagor lis pendens.*

A mortgagor is not entitled after making the mortgage to grant leases which may have the effect of materially diminishing the value of the security or the remedies of the mortgagee under the mortgage. Where a suit has been filed to enforce the mortgage the rights of the lessee are subject to the result of that suit and no effect can be given to them over the rights which another person may acquire in enforcement of the mortgage, 15 O. C. 239, Ref. (*Kanhaiya Lal, J. C.*) MUSSAMMAT BIBI SAIDUNNISSA *v.* FAIYAZ HASSAN

4 U. P. L. R. (O. C.) 76 : 9 O. L. J. 319. 1923 O. 1.

——*Rights of mortgagee—Simple mortgage—Provision for delivery of possession—Interest.*

Where a mortgagor undertakes to deliver possession after a certain period but does not do so, the mortgagee is entitled to enforce the initial terms of his mortgage independently of the position which would have been created had such possession been delivered. If the mortgage was originally a simple mortgage liable to be converted into a usufructuary mortgage at the expiry of a certain period the mortgagee can fall back on the simple mortgage and enforce it in case the mortgagor does not fulfil the obligation, he had undertaken. In such circumstances, if the mortgagor fails to deliver possession the mortgage should continue to retain its character of a simple mortgage and the mortgagee would be entitled to claim interest and also a decree for sale (*Kanhaiya Lal, J. C.*) DAL CHAND *v.* SITA RAM.

65 I. C. 449 : 8 O. L. J. 643.

——*Rights of mortgagee—Lease to the mortgagor—Arrears of rent need not be included in the mortgage money.*

Where a mortgagee gives possession of the property mortgaged to the mortgagor in consideration of a payment of rent by the latter, he can recover such rent as ordinary arrears of rent and he need not include such sums in the mortgage money, when suing on the mortgage deed. (*Stuart, J.C.*) MAHADEI *v.* BHIKHAN. **17 I C. 424 : 15 O. C. 291.**

——*Rights of mortgagee—To take possession—Possessory right—Unaffected by subsequent mortgage.*

The mere fact that the defendant held a prior simple mortgage of the same property would not entitle him to resist the plaintiff's suit for possession, the mere execution of a subsequent usufructuary mortgage would not take away from the plaintiff his right to take possession which had already accrued to him prior to the execution of the usufructuary mortgage to the defendant. (*Piggott, J. C.*) RANGU SINGH *v.* GANESH RAM.

14 I. C. 735.

——*Rights of mortgagee—Prior and subsequent— Failure to implead latter — Effect—Release of some properties.*

A puisne mortgagee who has not been impleaded in a suit for sale by a prior mortgagee has still his right to redeem intact. The latter cannot by releasing from the security one part throw the whole burden on the rest to the detriment of the former. (*Das and Kulwant Sahai, JJ.*) SARJUG PRASAD MISSIR *v.* HARISCHANDRA CHAUDHURI.

1924 P. 530.

——*Rights of mortgagee—Mortgagee becoming a part owner—Sale of entire property bad.*

Where a mortgagee has become a part owner of the mortgaged property which is ordered to be sold under the mortgage decree then in the absence of any direction in the decree to the contrary and of any equities created against himself, he is entitled to sell the mortgaged properties in whatever order he chooses: The purchase of the equity of redemptiom in a portion of the property splits up the mortgage and the mortgagee becomes entitled to recover only a proportionate share of the mortgage money by the sale of the remaining portion. He is not entitled to sell the remaining portion for the entire debt but the Court cannot compel him to sell the portion in

MORTGAGE—Rights of mortgagee.

which he has got equity of redemption. (*Mullick, and Macpherson, JJ.*) AULAD ALI *v.* ABDUL HAMID. **2 Pat. 715 : 1923 P. 490.**

———*Rights of mortgagee—Suit on prior mortgage without impleading puisne mortgagee—Effect.*

In a mortgage suit the puisne mortgage is a proper but not a necessary party. If a decree is passed in a mortgage suit wituout the puisne mortgagee being made a party the decree cannot affect the interest of the puisne mortgagee. (*Miller, C. J. and Mullick, J.*) SITAL PRASAD RAY *v.* ASHO SINGH. **1922 Pat. 326 : 1922 P. 651.**

———*Rights of mortgagee—Title—Denial by mortgagor.*

A mortgagor is estopped from denying in answer to a suit on the mortgage, the interest which he represented in the mortgage deed as his own proprietary right. (*Dowson Miller, C. J. and Froster, J.*) BRIJ RATAN DAS *v.* RAGHUNANDAN GIR. **7 P. L. R. 225: 4 P. L. T. 457: 1923 Pat. 49 : 1923 P. 203.**

———*Rights of mortgagee to sell hypotheca—Rights of purchoser.*

The balance of authorities is clearly in favour of the view that a mortgagee decree holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases and if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties in or in any of them may have subsequently become vested that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. Though every parcel of the mortgaged properties is liable rateably to its value and the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security, such an enquiry as in the rateable distribution of the mortgage debt cannot be made in execution proceedings without serious complications. (*Das and Adami, JJ.*) SURJU LAL *v.* BAIJNATH PRASAD. **1923 Pat. 6 : 1923 P. 44.**

Registration.

See (1) REGISTRATION ACT, Ss. 17 AND 49.
(2) T. P. ACT, S. 58.

Release.

See T. P. ACT, S. 82.

Shares.

———*Shares — Liquidation—Recovery from mortgagor.*

Plff. held shares of S. Bank as security for money advanced to deft. in Feb. 1913. When the S. Bank shares began to fall, the plff. sold some of the shares and was on liquidation of S. Bank forced to pay certain calls. *Held*, that plff. could recover his principal and interest and not the calls paid and no declaration could be obtained for indemnity as to his liability in respect of shares sold, as (1) there was no implied condition of indemnity in the contract of mortgage (2) as the plff. did not occupy the position of a trustee for the mortgagors at the time of paying the calls. (*Scott, C J. and Heaton, J.*) BIRDICHANDA JIVRAJ *v.* STANDARD BANK, LTD. **42 Bom. 159. 40 I. C. 167: 19 Bom. L. R. 341.**

MORTGAGE—Sub-mortgagee.

Splitting up.

See T. P. ACT, Ss. 60 AND 61.

Sub-Mortgagee

———*Sub-mortgagee—Rights of.*

A Sub-mortgagee may, not only enforce his own mortgage but also the original mortgage against the original mortgagor and thus cut off the equity of redemption of the original mortgagor, *i.e.*, his mortgagor's mortgagor. (*Mookerjee and Fletcher, JJ.*) KRISANA KISHORE DE *v.* AMAR NATH KHETTERY. **31 C. L. J. 272: 56 I. C. 532: 24 C. W. N. 633.**

———*Sub-mortgagee—Rights of.*

The interest of a sub-mortgagee is transferable and heritable. To a suit by the sub-mortgagee against the mortgagee for a declaration that the decree obtained by the latter against the mortgagor after the sub-mortgage, is held by the mortgagee in trust for the sub-mortgagee, the mortgagor is not a necessary party. (*Brett and Richardson, JJ.*) BHUPENDRA NARAYAN DUTT *v.* RAJENDRA NATH DUTT. **18 I. C. 455.**

———*Sub-mortgagee—Possession of—Payment to sub-mortgagee.*

A sub-mortgage involves a personal covenant by the sub-mortgagor and his position is closely analogous to that of a surety. He is entitled to recover the debt from the original debtor though he is bound to pay it over to the sub-mortgagee in discharge of the sub-mortgage. (*Scott-Smith and Leslie Jones, JJ.*) RAM CHANDA *v.* MEWA RAM. **44 I. C. 213 : 3 P. R. 1918.**

———*Sub-mortgagee—Suit by mortgagor for redemption—Omission to implead one of the sub-mortgagees—Right of sub-mortgagee.*

Certain properties, were mortgaged joint to B and C. C sub-mortgaged his interests to D and B his interest to R. The mortgagor brought a suit for redemption impleading B. C. and R, only and in that suit R claimed and obtained compensation or a shop on the footing that it was in the portion sub-mortgaged to him by B. Subsequently D filed a suit against C and R for recovery of the compensation on the ground that the shop was in the portion sub-mortgaged to herself and that the decision in the prior suit was erroneous. It was found that the shop was in the portion belonging to C. *Held*, (1) that notwithstanding the deeree in the suit for redemption, it was open to D the sub-mortgagee to pursue her rights against any property in the hands of the sub-mortgagor into which the security was converted; (2) that the plaintiff was not entitled to a decree against R. there being no privity of any kind between them; (3) that the plaintiff sub-mortgagee could, as against R, a stranger, subrogate herself only to such rights as her sub-mortgagor had against him and was bound by the decree between her sub-mortgagor and the stranger; (4) and that the plaintiff was entitled to a decree only against C her own mortgagor, for the money due to her.

MORTGAGE—Sub-mortgagee.

20 Cal. 241; 33 M. 429, Ref. (*Ramesam, J.*) RARICHAN *v.* DAMAYANTI. **44 M. L. J. 363: 17 L. W. 380: 32 M. L. T. (H. C.) 273: 1923 Mad. 440.**

——*Sub-mortgagee—Notice—Registration.*

The registration of a sub-mortgage is not a legal notice of its existence to the original mortgagor; and a mortgagor who in the absence of actual notice, of a sub-mortgagee, pays the amount under a decree in a redemption suit to the mortgagee is protected from the claims arising out of the sub-mortgage, 29 Bom. 199; 12 Mad 424; 40 All. 407 (P.C.); 39 Cal. 527 (P. C.), Ref. (*Sadasiva Aiyar and Napier, JJ.*) ISSAKAMATH MALAYIKKAL MAHOMED HAJI *v.* THEMMIL KYZAKKE NALAKATH MOIDIN KUTTI. **63 I. C. 192.**

——*Sub-mortgagee—Rights of—Discharge of prior mortgage—Effect of.*

Want of notice of an assignment of the mortgage does not render the sub-mortgage invalid except that the sub-mortgagee holds subject to accounts between him and the original mortgagee. A sub mortgage is not extinguished by the substitution of another mortgage in the place of the original mortgage. The sub-mortgagee has the right to bring to sale the right of the original mortgagee against the properties mortgaged to him and in that case the remedy of the mortgagor is to redeem it. (*Wallis, C. J. and Napier, J.*) PAPALA CHAKRAPANI *v.* LACHIMIACHI. **(1918) M. W. N. 249: 23 M. L. T. 300: 45 I. C. 769: 35 M. L. J. 309.**

——*Sub-mortgagee—Extinguished by mortgagor's payment to mortgagee in good faith and without notice.*

A payment of a mortgage-debt in good faith by the mortgagor to a mortgagee without notice or knowledge of the sub-mortgage extinguishes the sub-mortgage. 18 M. L. J. 462; 29 Bom. 199, Foll. (*Spencer and Phillips, JJ.*) POOSARLA CHINNASWAMY *v.* KATTAMOORI VENKATA. **4 L. W 502: 37 I. C. 778: (1917) M. W. N. 111.**

——*Sub-mortgagee—Suit by—Mortgagor suing 1st mortgagee—Prayer for decree, amount—Amendment of plaint—Discretion of Court.*

Where plff. mortgaged his property to 1st deft. who in his turn sub-mortgaged the property and when the mortgage was satisfied the sub-mortgagee obtained a decree against the plff. and the plff. before satisfying the decree sued the 1st deft. praying for the decretal amount or for deposit of amount in Court and before trial plff. paid off the sub-mortgagee and prayed for an amendment to that effect. *Held*, that the plff.'s suit for indemnity before actual loss was not sustainable though he might ask for deposit in Courts, and that he was entitled to the amendment of the plaint. (*Benson and Abdur Rahim, JJ.*) VARIANGATTIL PAKSSERI RAMAN *v.* SANKARA SUBBA MENON. **13 I. C. 203: (1912) M. W. N. 37.**

——*Sub-mortgagee—Rights of—Powers to sell property.*

A sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief, 20 M. 35; 27 A. 472, foll. (*Kotval, A. J. C.*) SINGHAI KANCHEDILAL *v.* SHRIDHAR. **19 N. L. R. 64: 1923 Nag. 222.**

MORTGAGE—Time for.

——*Sub-mortgagee—Rights of sub-mortgagee—Payment to mortgagee after sub-mortgage, when valid.*

A sub-mortgage operates to transfer all the rights and remedies which the original mortgagee had against his mortgagor to the sub-mortgagee. The latter has an additional remedy against the original mortgagee whose position is that of a surety for the debt due by the mortgagor to the sub-mortgagee. The original mortgagee is not entitled to exercise a power of sale after the sub-mortgage. The original mortgagor if he has notice of the sub-mortgage must pay the debt only to the sub-mortgagee. The bringing of a suit and the obtaining of a decree for sale by the original mortgagee and the non-execution thereof for more than three years, does not bar the sub-mortgagee from exercising his right of sale of the mortgaged property. (*Lindsay, A. J. C.*) KANHAI LAL *v.* MAHADEO PRASAD. **18 I. C. 389.**

Substituted Security.

See (1) HINDU LAW—PARTITION.
(2) PARTITION.
(3) T. P. ACT, SS. 71 AND 73.

Substitution of new mortgage.

——*Substitution of new mortgage—Old not extinguished.*

A fresh mortgage executed in renewal of the old one, does not extinguish the old, but the money due under it is a part of the consideration of the new one and the rights of the parties are presumed to continue as under the old. (*Mitra, A. J. C.*) JAGNATH *v.* RAGHUNATH. **60 I. C. 525.**

Subrogation.

See T. P. ACT, SS. 75 AND 101.

Suit-Parties.

See (1) C. P. C. O 34, R. 1.
(2) T. P. ACT, S. 91.

Tender.

See T. P. ACT, SS. 83 AND 84.

Time for.

——*Time for—Mortgage for a term—Provision for payment of mortgage money within a specified period—Redemption before time, if allowable.*

On the construction of a mortgage deed providing for the repayment of a portion of the mortgage debt at the end of March 1910, and for the payment of the balance 'within the end of March, 1952. *Held*, that the mortgage was redeemable at any time before the end of March 1952. A provision in it for payment by the mortgagor on or before a certain date is sufficient indication of an intention to allow him to redeem before that date. 23 M. 33; 16 M. L. J. 146, Foll. 27 M. L. J. 483, Dist. (*Wallis, C. J. and Seshagiri Iyer, J.*) CHANDU *v.* KOAJA POOJARI. **30 I. C. 370: 29 M. L. J. 86.**

MORTGAGE—Undivided Share.

Undivided Share.

———*Undivided share—Application to be made a party in a partition suit.*

A mortgagee of a share can be joined in a partition suit on his application on the ground that the mortgagor sharer is likely to misrepresent his share. (*Greaves, J.*) BASANTA KUMAR DAS *v.* KUSUM KUMARI DASI.

38 I. C. 584 : 44 Cal. 28.

———*Undivided share—Substituted security—Joint family—Mortgage of undivided share of a member—Subsequent partition—Rights of mortgagee.*

Where a member of a joint Hindu family mortgages his undivided share in certain items of property and in a subsequent partition, certain items are allotted to the mortgagor, the mortgagee should proceed only against the items which fell to the mortgagor on partition, 1 I A. 106 ; 101 P. R. (1894). Foll (*Chevis and Le Rossignal, JJ.*) PREM SHAH *v.* KHAN CHAND.

48 P. L. R. 1916 : 30 I. C. 31 : 128 P. W. R. 1915.

———*Undivided share—Rights of mortgagee—Substituted security.*

A mortgage of an undivided share in property which under a partition is alloted to another co sharer cannot in the absence of fraud be enforced by the mortgagee except against the share which was allotted to the mortgagor in lieu of the share mortgaged. The same rule would apply where the mortgagor was alloted a cash payment in lieu of his share in the property. 21 W. R 223 (P. C.), Ref. (*Kanhaiyalal, A J. C*) MAHADIN *v.* SHEO PRASAD. **20 I. C. 577 : 16 O. C. 161.**

Waste.

See T. P. ACT, SS. 65, 66, 72 AND 76.

MORTGAGOR AND MORTGAGEE.

See (1) MORTGAGE.
(2) T. P. ACT, SS. 58, 101.

MUAFI.

See (1) GRANT.
(2) LAND LORD AND TENANT.

MUKTEAR.

See LEGAL PRACTITIONER.

MULGENI LEASE.

See (1) LAND LORD TENURE.
(2) LEASE.

MULTIFARIOUSNESS.

See, also, C. P. C., S. 99 AND O. 1, R. 3.

———*Joinder of causes of action and parties.*

In a suit for possession by inheritance the plff. can, in one suit, attack several alienations to different alienees made by the deceased owner at different times in respect of various portions of property. There is no misjoinder of parties and causes of action in such a case. The difficulty arising from variety of defences can be cured by successive trials and by interlocutory judgments if necessary, 33 B. 293, Foll.; 1 P. R. 1905, Disappr. (*Sah Din, J.*) TUFAIL MAHOMED *v.* HIRA SINGH. **167 P. L. R. 1911 : 10 I. C. 48 : 120 P. W. R. 1911**

MUSSALMAN WAQF. VALIDATING ACT VI OF 1913), S. 3.

MUNICIPAL BOARD.

———*Representation of public rights—Failure to take action—Effect.*

Every Municipal Board represents the public regarding all property vested in them, but any neglect or refusal to assert or protect such a right will not affect such rights, and members of the public can in the way provided in the C. P. Code take action to safeguard their rights. (*Walsh and Ryves, JJ.*) RAM CHAND *v.* MAULA BAKSH.

21 A. L. J. 882 : L. R. 4 A. 583 : 46 All. 110 : 1924 All. 178 (Civ.).

———*Execution of deed by municipal council—Formalities for—Deed signed by chairman alone—Effect of.*

The expression "signed" in S. 37 of the Bengal Mun. Act implies that the signature must be affixed for purposes of execution of the document and the insertion of a name, in any part of the writing, in a manner to authenticate the instrument, is sufficient. But if the name occurs in a document, not as authenticating the whole, but only for a particular purpose of only with reference to a part, it is not an effective signature. (*Mookerjee and Cholzner, JJ.*) J. D. EZEKIEL *v.* ANNADA CHARAN SEN. **36 C. L. J. 109 : 50 C. 180 : 1923 C. 35.**

MUNICIPALITY.

See LOCAL ACTS.

MURSHIDABAD ACT (XV OF 1891).

———**S. 3** — *Notification under — Conclusive proof.*

A notification under S. 3 of the Murshidabad Act XV of 1891 is conclusive proof of all the subject-matter of the notification. Therefore, where the area of a holding is stated in the notification the holding must by reason of S. 3 be taken as having that area. (*Sanderson, C. J. and Panton, J.*) SHASHI BHUSAN DHUR *v.* NAWAB OF MURSHIDABAD. **49 I. C. 951.**

MUSHAA.

See MAHOMEDAN LAW—GIFT.

MUSSALMAN WAQF VALIDATING ACT (VI OF 1913)

———*Not retrospective.*

The Musalman Waqf Validity Act is not retrospective in effect. (*Viscount Cave.*) KHAJEH SOLEHMAN QUADIR *v.* NAVAB SIR SALIMULLAH BAHADUR. **31 M. L. T. 79 : 43 M L. J. 385 : 4 U. P. L. R. (P. C.) 70 : L. R. 3 P. C. 189 : 24 Bom. L. R 1257 : 27 C. W. N. 101 : 49 Cal. 820 : 49 I. A. 153 : 37 C. L. J. 56 : 21 A. L. J. 1 : 1922 P.C. 107 (P. C.).**

———*Not retrospective.*

The Mussalman Waqf Validating Act has no retrospective effect. An illusory charitable gift made before the Act is void. (*Stuart, J. C.*) MAHBUBAN *v.* ABDUR RAZZAK.

50 I. C. 77 : 6 O. L. J. 80.

———**S 3**—*Not retrospective.*

Semble.—The provisions of Act VI of 1913 though in terms declaratory, are not retrospective.

MUSSALMAN WAQF VALIDATING ACT (VI OF 1913), S. 3.

(*Lord Atkinson.*) RAMANADAN CHETTIAR *v.* VAVA LEVVAL MARAKAYALI. **40 Mad. 116 : 32 M. L. J. 101 : 15 A. L. J. 139 : 5 L. W. 293 : (1917) M. W. N. 180 : 25 C. L. J. 224 : 21 M. L. T. 215 : 21 C. W. N. 521 : 1 Pat. L. W. 394 : 19 Bom. L R. 401 : 44 I A. 21: 39 I. C 235 (P. C.)**

[Affirming 34 Mad. 12 : 6 I. C. 1.]

——— **Ss. 3 and 4**—*Not retrospective.*

Neither S. 3 nor. S. 4 of the Mussalmans Waqf Validating Act makes it retrospective in its operation; consequently if a waqf created before the passing of the Act was illusory and therefore invalid in the eye of the Mahomedan Law it would not be validated by reason of any restrospective operation of that Act. (*Piggot and Walsh, JJ.*) NIMUL HAQ *v.* MUHAMAD SUBHAN ALLAH. **41 All. 1 : 48 I. C. 94 (2) : 16 A.L.J. 841.**

——— **S. 3**—*Retrospective—Effect of.*

The Act has no retrospective effect and solely refers to waqfs created after the Act (*Macleod, J.*) AMIRBIBI *v.* AZIZABIBI. **39 Bom 563 : 26 I. C. 906 : 16 Bom. L. R. 977.**

——— **S. 3**—*Not retrospective.*

The Act is not a purely declaratory staute and is not retrospective in its operation. A waqf invalid in its inception is not validated by the subsequent passing of the Act. (*Mookerjee and Walmsley, JJ.*) HABIBULLA *v.* SOLEMAN QUADER. **30 C. L. J. 102 : 53 I. C. 764 : 24 C. W. N. 18.**

——— **S. 3**—*Scope of—Waqf before Act.*

A wakfnama though not governed by the Act will be valid if the dominating purpose and intention of the grantor was a charitable purpose and the secondary and subsidiary object was to secure for his daughters any surplus that might remain after defraying the expenses. (*Chatterjea and Richardson, JJ.*) RAHMATALI *v.* CHIKAN BIBI. **41 I. C. 684.**

——— **S. 3**—*Not retrospective,*

The operation of the Musalman Waqf Validating Act of 1913 is not retrospective. (*Jenkins, C, J. and Chatterjee, J.*) MAHOMED BUKTH *v.* AJMON RAJA. **32 I. C. 701 : 19 C. W N. 967 : 43 Cal. 158.**

——— **Ss. 3 and 4**—*Scope of—Not retrospective.*

The Mussalman *Waqf* Validating Act, 1913 has no retrospective effect. (*Chaudhuri, J.*) RAHIMUNNISA BIBI *v.* MANIK JAN. **27 I. C, 96 : 19 C. W. N. 76.**

——— **S. 3 (d)**—*Waqf for Payment of debts out of rents and profits of waqf property is valid.*

Under S. 3 (*d*) of the Act it is lawful for a person to create a waqf for the payment of his debts out of the rents and profits of the property dedicated. (*Mookerjee and Buckland, JJ.*) BIBI JINJIRA KHATUN *v.* FAKIRULLA MEA. **67 I. C. 77 : 34 C. L. J. 444.**

MUTA.

See MAH. LAW— MARRIAGE.

MUTATION.

MUTATION.

———*Consent knowledge—Presumption.*

In the absence of evidence the consent of persons adversely affected by mutation proceedings cannot be presumed. (*Raffique and Lindsay, JJ.*) BALBHANDA PRASAD *v.* PRAG DATT. **41 All. 492 : 50 I. C, 938 : 17 A. L. J. 765.**

——— *Consent to — Extinguishes proprietary rights.*

Inasmuch as the plff had expressly consented to the land in dispute being entered in the name of the defendant's father the mutation entry has the effect of extinguishing the proprietary rights of the plff. 31 A. 73 P. C., dist. (*Abdul Raoof, J.*) RAJA *v.* SALABAT. **66 I. C, 935 : 3 L. L. J. 26.**

——— *Mortgage—Punjab Land Revenue Act.*

If the mortgagee asks for mutation of names striking out the condition of sale in the mortgage and the mortgagor agrees to be a tenant then the mutation can be uuder the Punjab Land Revenue Act and not under the Punjab Alienation of Land Act. (*Tupper, F. C.*) HARJAS *v.* HARDITTA. **35 I. C. 709 : 79 P. L. R. 1916.**

——— *Inquiry, scope of—Gift—Duty of mutation officer.*

Where a gift properly attested is made by a Mahomedan, the mutation officer is not concerned with the intricate questions of religion and cu tomary law; if he finds the factum of gift is duly attested by the donor, he is bound to effect the mutation in accordance with the gift, whether valid or not. Until it is set aside by Rev. Court, it must be treated as valid. (*Fenton, F. C.*) LAL SINGH *v.* MALUK SINGH. **30 I. C. 839 : 1 P. W. R. 1915. (Rev.).**

——— *Inquiry—Scope of—Retaining name of deceased persou in jamabandi—Rule of* per capita, *succession.*

The name of a deceased person cannot be permitted to be retained in the jamabandi merely because there is a dispute as to succession. The mutation should be faced and dealt with according to well-established principles, one of which is that the inheritance as a rule goes *per capita* in the absence of proof of custom to the contrary Where the mutation case is one of succession, the question of possession counts for title, 101 P. R. 1879, Foll. The enquiry as to proof of a custom contrary to the general law necessarily exceeds the limits of the summary proceedings to which the scope of a mutation enquiry should be limited, 17 I. C 979, Foll. (*Fenton, F. C.*) MOHAMMAD KHAN *v.* ATA MUHAMMAD **3 P. R. 1913 (Rev) : 20 I. C. 436 : 289 P. L. R. 1913.**

——— *Register—Entry in—Value of.*

A entry in the Mutation Register as to gift of some land, followed by possession is sufficient proof of the circumstances under which it occured (*Chevis, J.*) HAYAT *v.* RAMZAN. **159 P. L R. 1912: 16 I. C. 889 : 149 P W. R. 1912.**

——— *Scope of.*

The revenue courts in mutation proceedings look in the first instance to possession as a guide

MUTAWALLI.

and a mutation order does not preclude the losing party from setting up title. (*Reid, C. J.*) BHAGTU *v.* BUA DITTA. 26 P. W. R. 1912 : 13 I. C. 957 : 34 P. L. R. 1912.

MUTAWALLI.
See MAH. LAW—WAKF.

MUTT.
See HINDU LAW—RELIGIOUS ENDOWMENT.

MUTUAL ACCOUNTS.
See (1) ACCOUNTS.
(2) LIMITATION ACT.

NAIKINS.
See HINDU LAW (1) ADOPTION.
(2) SUCCESSION.

NAMBUDRIS.
See, MALABAR LAW.

NANKER.
See also, LANDLORD AND TENANT—CESS.

———*Right to—Nature of.*

The fact that certain persons are entitled to cash *Nanker* does not mean that they have an under proprietary right in the land in the village. (*Campbell, J. M.*) SRI RAM KUAR *v.* HANOMAN SINGH. 30 I. C. 373: 2 O. L. J. 359.

———*Right to cash nanker—Under proprietary right.*

A right to receive cash nanker which is a set off against the rent in connection with other facts justifies the conclusion that a *prima facie* case for under-proprietary rights has been established. (*Tweedy, J. M.*) LAL MUNESHAR BAKSH SINGH *v.* SHAHZADE KHAN.
27 I. C. 175: 1 O. L. J. 733.

———*Nature of the right.*

Right to cash *Nankar* does not connote a right to possession as under proprietor. The grant of annual cash *Nankar* by usufructuary mortgagee to mortgagor for maintenance during or at the time of extention of the mortgage does not mean that the grant would operate after the mortgage becomes irredeemable as a grant of under proprietary right, (*Kanhaiya Lal, A. J. C.*) TIRBHUWAN BAHADUR SINGH *v.* UKTA PRASAD. 22 I.C. 125.

NATIVE CONVERTS MARRIAGE DISSOLUTION ACT (XXI OF 1866).

———*Matrimonial jurisdiction over Hindus.*

Except as provided by Act XXI of 1866 no Civil Court in British India has any matrimonial jurisdiction over Hindus and a decree for dissolution of marriage between a Hindu husband and wife passed by any such Court is *ultra vires* and a mere nullity. (*Stanyon, A. J. C.*) CHANDRABHAGA *v.* VISHWANATH, 20 I. C 557 : 9 N. L. R. 102.

NATIVE PASSENGER SHIPS ACT (X OF 1887).

———**Ss. 9, 10 and 31**—*Ships carrying passenger—Absence of certificate—Voyage—Meaning of.*

A ship sailing from a port calling at coast ports, stopping a short time at each and then returning to the port from which it originally sailed continues on a single voyage the whole time within the meaning of S. 9 of the Native

NATTUKOTTAI CHETTIES.

Passenger Ships Act. Absence of certificate wil not enable the ship to sail. (*Macleod and Shah, JJ.*) T. S. MACHADO *v.* EMPEROR.
46 Bom. 438 : 23 Bom. L. R. 1200 : 23 Cr. L. J. 651 : 1922 Bom. 167.

NATTUKKOTTAI CHETTIES.

———*Madura District—Custom of* patnibhaga —Moopu.

Among the particular class of Nattukottai Chetties living in the seven villages in the Madura Distict there exists a valid custom under which in the case of marriages of a second wife during the life of the first, the first wife is entitled to have some property set aside for her maintenance which would descend to her son if she had one and is called *moopu* and the property of the husband is notionally divided one mainly to the sons of the first wife and the other to the sons of the s cond wife as per division *patninbhaga.* (*Lord Phillimore.*) PALANIAPPA CHETTY *v.* ALAGAN CHETTY. 44 Mad. 740: 48 I. A. 539. 14 L.W. 609: 64 I.C. 439: (1921) M.W.N. 687(P.C.).

———*Rate of Interest.*

The Madras rate of interest prevailing among Nattukottai Chetties is 8½ per cent. (*Abdur Rahim O.C.J. and Moore, J.*) VENKATACHELLAM CHETTY *v.* RAMANADEN CHETTY. 12 L. W. 228: (1920) M. W. N. 502: 59 I. C. 501: 39 M. L. J. 269.

——— ——*Bankers of South India.*

It is a matter of general knowledge recognised in various decisions of the Madras High Court that Nattukottai Chetties are really the Indian bankers of this part of the country. (*Wallis, C. J. and Moore, J.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASWAMI CHETTY.
43 Mad. 741 : 12 L. W. 89 : 1920 M. W. N. 424: 59 I. C. 475: 39 M. L. J. 135.

———Thavanai *deposit—Meaning of.*

The "*Thavanai* deposit" with a Nattukottai Chetty firm means that the parties agree among themselves to add the interest at the end of each *Thavanai* period to the deposit instead of paying it in cash to the creditors treating both as fresh deposits. (*Wallis, C. J. and Krishnan, J.*) NARAYANAN CHETTY *v.* SUPIAH CHETTY.
43 Mad. 629. 11 L. W. 418 : (1920) M. W. N. 248 : 58 I.C. 639 : 38 M.L.J. 437.

———*Bankers*—Thavanai.

Nattukottai Chetties are Indian bankers and deposit on *thavanai* with them are payable on demand. (*Abdur Rahim and Spencer, JJ.*) ANNAMALAI CHETTI *v.* ANNAMALAI CHETTY.
52 I. C. 456 : 10 L. W. 67.

———*Trading family—Status of members of family.*

In a Nattukottai Chetty trading family the onus would lie on a member to prove that he was not a partner in the trade during his majority. Where a son assisted his father in the trade both when he was a minor and after he became a major the inference is clear that he was a partner

with his father in the family business. (*Wallis, C.J., Sadasiva Aiyar and Spencer, JJ.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* V P. L. R. M. PALANIAPPA CHETTY. **41 Mad. 824: 24 M.L.T. 216: 8 L. W. 530: (1918) M.W.N. 721: 49 I. C. 220: 35 M. L. J. 473.**

——Thavanai *rate—Practice of.*

The expression *thavanai* interest in the case of deposits made with Nattukottai Chetty firm means the customary rate of interest which is fixed by Nattukottai Chetties every two months. (*Wallis, C. J. and Kumaraswami Sastri, J.*) MUTHIA CHETTIAR *v.* RAMANATHAM CHETTIAR. **(1918) M. W. N. 242: 43 I. C. 972: 7 L. W. 330.**

——*Usage—Signature—Mode of.*

It is the custom among Nattukottai Chetties not to sign their names at the foot of their letters but to begin them by saying that the letters are from such and such a firm. The name so written at the top is a sufficient signature within S. 19 of the Limitation Act. (*Abdur Rahim and Oldfield, JJ.*) MUTHIA CHETTIAR *v.* KUTTAYAN CHETTY. **6 L. W. 790: : 43 I. C. 20: (1918) M. W. N. 42.**

——*Custom—Drawing hundies in the name of the agent of firm.*

It is a well known custom among Nattukottai Chetties to draw hundies, bills and promissory notes in the name of the agent of a firm represented by the firm's vilasam and in such cases, it is the firm indicated by the vilasam which is intended to be the payee and not the agent whose name appears on the instrument. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) GHULAMSA ROVUTHAR *v.* VISVANATH CHETTIAR. **5 L. W. 721: 40 I. C. 347: (1917) M. W. N. 344.**

——*Accounts*—Ainthugai *account—Meaning of.*

Among Nattukottai Chetties an *ainthugai* account is an account of properties in the possession of a person and it may include properties held by him on trust. (*Wallis, C.J. and Seshagiri Aiyar, J.*) RAMANATHAN CHETTY *v.* MURUGAPPA CHETTY. **3 L. W. 210: 33 I. C 969: (1916) 1 M. W. N. 208.**

——*Custom—Marriage—Partition.*

In a suit to obtain a partition of family properties, plff. set up the existence of a custom among the *Athangudi Chetties* or *Yezhoor Nagarathars* of the Madura District, by which the division was effected *per stirpes* according to the number of wives having sons (or according to the *Patnibhaga*). They also set up another custom according to which a member of the community who wished to marry a second wife during the lifetime of the first could only do so after reporting the matter to the *Nagarathars* or headman of the village and executing an agreement styled *Moopu Moori* binding himself to set apart a certain sum of money or extent of immoveable property or both (which provision is known as *Moopu*) as and for the maintenance of his discarded wife, which *Moopu* became her separate and absolute property, descendible to her own sons. *Held*, that the custom as regards *Patnibhaga* was not proved but that as regards the

provision for *Moopu* was made out. (*Sankaran Nair and Spencer, JJ.*) ALAGU CHETTY *v.* PALANIAPPA CHETTY. **2 L. W. 272: 28 I. C. 278: (1915) M. W. N. 221.**

——*Trade-assets and family property.*

The presumption is that Nattukottai Chetties make no distinction between their family properties and trade assets. Courts may, therefore, treat the property of members of such families as partnership property. It is open, however, to the parties to rebut this presumption by showing in particular cases that the proprietary rights of individual members have been kept distinct from the common trade-assets. 27 I. C. 376; 27 M. L. J. 654, Foll. (*Spencer and Seshagiri Aiyar, JJ.*) THE BANK OF BENGAL *v.* RAMANADHAN CHETTY. **28 I. C. 260: (1915) M. W. N. 180.**

——*Trade assets and family property.*

Among Nattukottai Chetties there is no distinction between family property and trade assets. Family property is trade assets. 26 I. C. 911, Foll. (*Sadasiva Aiyar and Napier, JJ.*) THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* VELLAIPPA CHETTY. **27 I. C. 376: 27 M. L. J. 654.**

——*Usage.*

Nattukottai Chetties usually make no distinction between their family property and their trade assets and in the absence of any evidence to the contrary their family properties should be treated as trade assets. (*Sankaran Nair and Spencer, JJ.*) CHIDAMBARAM CHETTY *v.* RAMASWAMI CHETTIAR. **26 I. C. 911: 27 M. L. J. 631.**

——*Mode of business—Whether guaranteeing another Chetti, necessary incident.*

In a Chetti banking business it is not necessary that the Chetti must necessarily guarantee another Chetti. In other words, Chetti business does not necessarily require standing guarantee for others who are not Chetties. (*Ormond and Parlett, JJ.*) RAMANATHAN CHETTY *v.* BANK OF BENGAL. **23 I. C. 516: 7 Bur L. T. 126.**

NATURAL RIVERS.

See (1) CROWN.
(2) EASEMENTS ACT.
(3) RIPARIAN RIGHTS.

NAVIGABLE RIVER.

See (1) ALLUVION AND DILUVION,
(2) CROWN.
(3) EASEMENT.
(4) GRANT.
(5) RIPARIAN RIGHTS.

NECESSITY.

See (1) HINDU LAW — ALIENATION — JOINT FAMILY.

NEGOTIABLE INSTRUMENTS.

See also (1) NEG. INS. ACT.
(2) PROMISSORY NOTE.

——*Consideration — Suit on—Alternative relief.*

In a suit on a negotiable instrument it is open to the plff. to frame his case in an alternative and

NEGOTIABLE INSTRUMENTS.

to sue both on the instrument and alternatively on the consideration. (*Lord Buckmaster.*) FIRM OF SADASUKH JANKI DAS *v.* KISHEN PRASAD.
46 Cal. 663 : 29 C. L. J. 340 : 17 A. L. J. 405 : 25 M L. T. 258 : 21 Bom. L. R. 605 : 1 U. P. L. R. (P. C.) 37 : (1919) M. W. N. 310 : 23 C. W. N. 937 : 10 L W. 143 : 50 I. C. 216 : 36 M. L. J. 429 (P. C.).

———*Bill of Exchange—Drawer discounting acceptance when acceptor owes nothing to him—Liability*

A drawer who discounts an acceptance when the acceptor owes nothing to him does avail himself of the acceptor's credit. (*Lord Dunedin.*) KARMALI ABDULLA ALLARKHIA *v.* BORA KARIMJI.
39 Bom. 261 : 42 I. A. 48 : 17 M. L. T. 85 : 2 L. W. 133 : 17 Bom. L. R. 103 : 19 C. W. N. 337 : 13 A. L. J. 121 : 21 C. L. J. 122 : (1915) M. W. N. 606 : 26 I. C. 915 : 28 M. L. J. 515 (P. C.).

———*Consideration—Suit on.*

A suit on the original consideration after the dismissal of the suit on the note on account of material alteration is maintainable. The causes of action in the two suits are different and mutually exclusive. (*Lord Moulton.*) SAMINATHAN CHETTY *v.* PALANIAPPA CHETTY.
18 C. W. N. 617 : 41 I. A. 142 : 26 I. C. 228 : 17 N. L. R. 56 : 83 L. J. P. C 131 : (1914) A. C 618 (P. C.).

———*Hundi—Payment to endorsee—Railway receipt—Forgery—Equity to recover—Endorsee's liability to refund.*

A payment by plff. to deft. of the amount of a Hundi as to an endorsee for collection on the security of a Railway receipt cannot be recovered in equity from the deft. if the security turns out to be a forgery but the deft. is liable to refund the money provided notice is given of the discovery of forgery and the plff. loses no time in making the communication in claiming the refund. (*Scott, C. J. and Davar, J.*) SETHNA *v.* JWALA PRASAD GAYA PRASAD. **39 Bom. 513 : 26 I. C. 896 : 16 Bom. L. R. 972.**

———*Hundi—Shahjog—Shah obtaining payment—Hundi forgery—Consequences.*

Under the custom among *Shroffs*, the *Shah* who obtains payment is bound if the *hundi* turns out to be forgery, to refund the amount with interest. The Shah guarantees the genuineness of the hundi and he is not entitled to payment if the drawee is not satisfied as to his respectability. The claim referred must be made as soon as possible after the forgery is discovered. (*Macleod, J.*) BANSIDHAR LACHHMINARAYEN *v.* JWALA PRASAD GAYA PRASAD. **25 I. C. 52 : 16 Bom. L. R. 434.**

———*Pro-note payable on demand—Overdue.*

Where a note payable on demand is negotiated, it is not overdue, for affecting the holder with defects of title, of which he had no notice, though a reasonable time for presenting it for payment, has passed after it is issued. (*Mookerjee and Chaudhuri, JJ.*) D. N. SHAH & CO. *v.* BENGAL NATIONAL BANK. **47 Cal. 861 : 60 I. C. 940 : 33 C. L. J. 541.**

NEGOTIABLE INSTRUMENTS.

———*Suit on original consideration—Limitation.*

If a hundi sued on is inadmissible in evidence for want of stamp, a decree may be given on the admitted consideration provided the suit is within three years of its payment. (*Chatterjee and Newbould, JJ.*) GOBINDA KUMAR *v.* RAMACHANDRA. **51 I. C. 945 : 29 C. L. J. 508.**

———*Suit on original consideration.*

Plff. had a right to get some money for goods sold. That transaction was liquidated in part by delivery of the *hundis*. The *hundis* were found to be inadmissible in evidence for want of stamp and that, through the default of the debtor. *Held*, that the plff. was at liberty to sue for the original consideration. (*Le Rossignol and Broadway, JJ.*) NATHU RAM *v.* DOGAR MAL.
4 Lah. 198 : 1924 L. 144.

———*Hundi—Substituted Hundi on unstamped paper—Liability under former not put an end to.*

Defendants executed a *hundi* which was not duly stamped for the same amount in favour of the plaintiffs by way of renewal of the previous *hundi* and made an endorsement on the back of the latter *hundi* that another *hundi* for Rs. 1,000 had been executed in lieu thereof. *Held*, the giving of the second *hundi* would have operated as a discharge of the previous *hundi*, only if the second *hundi* was legally enforceable. The question as to the negotiability or non negotiability of an instrument is quite distinct from the question of a party's discharge from liability of the holder, and that the liability of the drawer of a bill of exchange or of any subsequent party thereto is not in any way affected by the document being negotiable or otherwise. Nor can mere cancellation have the effect of discharging a party from liability unless it is made with the express intention of discharging that party for if it is made unintentionally or is made under a mistake it will be inoperative. The negotiable security by a debtor to his creditor operated as a conditional payment only and not as a satisfaction of the debt. (*Scott-Smith and Moti Sagar, JJ.*) FIRM RAHMAT ALI *v.* FIRM DEWA SINGH, MAN SINGH. **1923 Lah. 396.**

———*Consideration—Onus of proof—Question of law.*

Once the execution of a bond was admitted the onus of proving total or partial failure of consideration lies on the defendant. The Question of onus is one of law for purposes of second appeal. (*Broadway and Abdul Qadir, JJ.*) GURDIT SINGH *v.* KARAM DAD. **4 Lah. L. J. 199.**

———*Cheque accepted by the Manager of a Bank knowing that it was liable to be attached—Effect.*

A judgment-debtor cashed a cheque which was drawn upon the deft. Bank but after payment the judgment-debtor was served with an order restraining him from negotiating the cheque. The manager had knowledge that some such order would be issued and retained a part of the money under an independent transaction In a suit for declaration against the judgment-debtor

NEGOTIABLE INSTRUMENTS.

that the cheque was liable to attachment in execution of a decree against him *held* that the Bank obtained a good title to the cheque. (*Wilberforce and Abdul Qadir, JJ.*) SHANKER DAS *v.* PUNJAB NATIONAL BANK, LTD.

62 I. C. 792.

——*Hundi—Stamp insufficient—Suit on consideration.*

If a hundi executed in consideration of a loan is inadmissible being insufficiently stamped the debtor cannot be sued on the basis of the loan. (*Le Rossignol and Wilberforce, JJ.*) GURDASMAL SINGH *v.* ISHAR DAS. **3 Lah. L. J. 157 : 60 I. C. 107 : 3 U. P. L. R. (Lah.) 15.**

——*Suit on original consideration—Maintainability—Conditions.*

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor may, if the bill or note is paid at maturity may always sue for the original consideration if he has not endorsed or parted with the instrument to third persons. (*Shadi Lal, J.*) FIRM OF BHAGAT RAM *v.* CHAJJU RAM.

44 I. C. 886 : 15 P. W. R. 1918.

——*Untrue recital of consideration—Effect.*

Where the bond contained an untrue recital of consideration having been already paid in cash, whereas the fact was that certain sums had been paid to various persons on behalf of the plff, the plff. can only recover the amount already advanced, and should be directed to submit a statement of accounts and the deft. should be asked to surcharge thereon, and any stipulation for increased interest on default should not be enforced. (*Benson and Sundara Aiyar, JJ.*) MEENAKSHI AYEE *v.* ANDI NADAN.

9 I. C. 996 : 10 M. L. T. 18.

——*Hundi—Suit on Hundi decree in original consideration.*

Where a hundi is given in discharge of a debt due it does not extinguish the debt but is only a conditional payment unless the debtor proves it was accepted as a complete novation of the original liability. If the hundi cannot be sued on for some reason, *e. g.*, want of a proper stamp, a decree on the original consideration can be given. (*Stanyon, A. J. C.*) NATHUSA *v.* PHULCHANDSA. **14 I. C. 399 : 8 N. L. R. 7.**

——*Liability—Liability on contract—Difference.*

There is a difference between the law relating to liability on ordinary contracts and that on negotiable instrument. (*Wazir Hassan, A. J. C.*) JAGRUP SINGH *v.* RAMA KISHAN DAS.

23 O. C. 353 : 59 I. C. 596 : 7 O. L. J. 705.

——*Pro-note—Note not admissible—Other evidence.*

Where in a suit on a pro-note, the note is not admissible in evidence, the plff. may prove his case by other evidence. (*Jwala Prasad, J.*) BARTTAN DEO RAI *v.* RAM KISHUN MARTIN.

60 I. C. 652 : 2 Pat L. T. 184.

NEG. INS. ACT (XXVI OF 1881), S. 1.

——*Hundi—Suit on original consideration*

Where a cause of action for money is once complete whether for goods sold or for money lent, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor may, if the bill is not paid at maturity, always sue on the original consideration provided he has not endorsed, or lost or parted with the note in such a way as to make the debtor liable upon it to some third person. (*Das and Ross, JJ.*) RAM NARAIN SAHU *v.* LACHMI PRASAD SAHU. **60 I. C. 385 : 2 Pat. L. T. 323.**

——*'Payable on demand' —Payable after 'demand'—Meaning.*

The words ' payable on demand' have a legal meaning and sense which convey that the amount is payable on the date of execution and no demand is necessary prior to suit. If, however, the words were 'after demand' then a demand is necessary before a suit is instituted, (*Mullick and Atkinson, JJ.*) BISHUN CHAND *v.* AUDH-BIHARI LAL. **1 Pat. L. W. 615 : 2 Pat. L. J. 451: 40 I. C. 350 : (1917) Pat. 279.**

——*Hundi—Interest—Custom as to.*

Where a *hundi* is silent as to interest but there is a custom allowing interest if the *hundi* is not met with within a certain time, the drawer is liable to pay interest. (*Maung Kin, J.*) MAUNG PO SIN *v.* VELLAYAPPA CHETTY.

62 I. C. 315 : 10 L. B. R, 321.

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881)

——*Object.*

The Act legalises the system under which claims upon certain mercantile instruments can be treated like ordinary goods passing from one hand to another. (*Carnduff and Richardson, JJ.*) AKHOY KUMAR PAL *v.* HARI DAS BASAK.

18 C. W. N. 494 : 22 I C 500 : 19 C. L. J. 335.

——*Interpretation of—English Law—Reference to.*

The Negotiable Instruments Act is based on the principles of the English Law and where no special considerations arise with reference to Indian circumstances the Courts are justified in construing the statute conformably to the provisions of the English Law (*Abdur Rahim and Oldfield, JJ.*) VEERAPPA CHETTY *v.* VELLAYAN AMBALAM. **(1919) M. W. N. 780 : 52 I. C. 370 : 10 L. W. 39.**

——S. 1—*Mercantile usage—Contrary to the Act.*

Mercantile usage, however extensive, should not be recognised by court if contrary to the provisions of the statute. The Neg. Ins. Act is *prima facie* intended to lay down the whole law regarding cheques, bills of exchange and pro-notes (*Hayward, J.*) DOSSABHAI MIRCHAND *v.* VIRCHAND DALCHHARAM.

49 I. C. 388 : 21 Bom. L. R. 1.

——S. 1—*Hundi—Drawee orally accepting Hundi—Liability.*

By mercantile usage at Delhi a drawee who has accepted a Hundi orally is liable on the

NEG. INS. ACT (XXVI OF 1881), S. 1.

instrument. (*Shadi Lal and Bevan Petman, JJ.*) PANNA LAL LACHMAN DAS *v.* HAR GOPAL KHUBI RAM. **1 Lah. 80 : 55 I C. 931: 94 P. L. R. 1920.**

——S. 1—*Interest—Hundi—Trade usage.*

It is a well recognised rule in Rawalpindi that if interest was charged on a *Hundi* and such *Hundi* was not paid at maturity, the same rate of interest continued to be payable. (*Rattigan and Scott-Smith, JJ.*) KHIALIA SHAH *v* HANSAR, MAL NATHU MAL **24 P. R. 1915 : 29 I. C. 346 : 23 P. L. R. 1916.**

—— S. 1—*Instrument in oriental language.*

The Neg. Ins. Act does not affect any local usage relating to any instrument in an Eastern language. (*Reid, and Kensington, JJ.*) KHAN CHAND *v.* GULABRAM **142 P. L. R. 1911 : 39 P. R. 1911 : 10 I. C. 133 ; 234 P. W. R. 1911.**

——S. 1—*Instruments in oriental language —Law governing.*

Per *Spencer, J*:—The exception to S. 1 of the Neg. Ins. Act in favour of instruments in an oriental language saves them against the provisions of that Act overriding local usages but does not prevent the application of other Acts to such instruments. A hundi drawn payable to bearer on demand is illegal even though drawn in an oriental language. (*Sadasiva Aiyar and Spencer, JJ.*) VEERAPPA CHETTY *v.* MUTHURAMAN CHETTY. **58 I. C. 508 : 12 L. W. 12.**

——Ss. 4 and 5—*Shahjog Hundi.*

Shahjog hundi is not a bill of exchange nor a promissory note. (*Mookerjee and Roe, JJ.*) KESHARI CHAND *v.* ASHARAM MAHATO. **22 C. L. J. 209 : 33 I. C. 250 : 19 C. W. N. 1326.**

——S. 4—*Promissory-note—Interest payable annually—Effect.*

Where an instrument in writing containing an unconditional undertaking to pay a certain sum to X or order, contained a further clause undertaking to pay interest annually. *Held*, it was inconsistent with the document being a promissory note. Such a note if improperly stamped, is inadmissible for any purpose under S. 35 of the Stamp Act. (*Broadway, J.*) JOTI PARSHAD *v.* BRIJ RAJ SHARAN. **52 P. L. R. 1922 : 4 U. P. L. R. (Lah). 97 : 1923 L. 29.**

——S. 4—*Promissory note payable through another.*

A document in which the drawer undertakes to pay the sum there specified to the plff. or order "*maarfat* another person" is an unconditional one and that the words "*maarfat* another person" do not take the document out of S. 4 of the Neg. Ins. Act. (*Broadway, J.*) MELARAM *v.* BRIJ LAL. **54 I. C. 976 : 148 P. R. 1919.**

——S. 4—'*Certain person*'—*Community.*

Quaere Whether a promissory note or negotiable instrument can be executed in the name of a community. (*Krishnan, J.*) BUDAVARAM NARASIMHULU CHETTY *v.* NOOTA IBBUNDRUM NAGASAMI VARU. **(1923) M W N. 237 : 44 M. L. J. 240 : 1923 Mad. 434.**

NEG. INS. ACT (XXVI OF 1881), S. 4.

——Ss. 4 and 16—*Promissory note—Alternative payees—Amending Act V of 1914 not retrospective.*

Act V of 1914 is not retrospective and a pronote executed prior to the Act payable in the alternative to one of several payees is not a promissory note within S. 4 of the Neg. Ins. Act. (*Spencer and Odgers, JJ.*) CHANDU *v.* RAMUNNI. **28 M.L.T. 262 : 59 I. C. 943 : 13 L. W. 183 : (1920) M. W. N. 600 : 39 M. L. J. 273.**

——Ss. 4 and 27—*Promissory note executed under authority of a marksman—Validity.*

The ordinary law of agency stated in S. 226 of the Contract Act is applicable to Negotiable Instruments. A promissory note executed by a person under the authority of a marksman is valid even though the marksman has not affixed his mark thereto. (*Oldfield and Bakewell, JJ.*) BALLAYYA *v.* SUBBAYYA. **44 I. C. 813 : 40 Mad. 1171.**

——S. 4—"*Certain person*"—*Real promisee's name mentioned wrongly—Suit by promisee if maintainable.*

A suit is maintainable on a promissory note by a real promisee even though a wrong name is mentioned on the note if he is able to show that the wrong name was entered by mistake. 30 M. 38 Dist. (*Abdur Rahim, J.*) GOPAL RAO *v.* VEERAPPAN SERVAIKARNAM. **10 M. L. T. 522 : (1911) 2 M. W. N. 556 : 13 I. C. 95 : 22 M. L. J. 121.**

——Ss. 4 and 5—*Distinction between promissory note and bill of exchange—Hundi.*

In a promissory note the executant himself promises to pay, while in the latter he directs another to pay. In a bill of exchange the person liable is the responsible executant and not the scribe. When a Hundi is either a promissory note or bill of exchange it is governed by the Contract Act and not by Neg. Inst. Act. (*Stanyon, A. J. C.*) RADHAKISAN *v.* HIRALAL. **58 I. C. 313.**

——S. 4—*Note given as security for previous debts—Construction.*

A note given as security for sums already due contained a promise to pay, "Rukka Indul talab". *Held*, that the note was a new contract and evidenced a promissory note. 3 O. C. 195 ; 22 Bom. 986 Dist. (*Sabonadiere, A. J. C.*) ABDUL GHANI KHAN *v.* ABDUL MAJID KHAN. **21 I. C. 199.**

——S. 4—*Promissory note—Request to pay —Effect of.*

Where a document contained merely a request to the plaintiff to pay the defendants Rs. 500 which the defendant's promised to repay with interest. *Held*, this was a conditional contract. The liability was upon the defendants after an advance of Rs. 500 was made by the plaintiff. Although the payment had been proved and the liability under the document was clear, the document as executed was a conditional contract and was therefore, not a promissory note under

NEG. INS. ACT (XXVI OF 1881), S. 4.

the Negotiable Instruments Act. (*Jwala Prasad and Ross, JJ.*) SARJU SAHU *v.* SUKHI LAL.
4 Pat. L. T. 577 : 1924 P. 96.

——S. 4—" *Certain person* "—*Manager of Bank.*

Under S. 4, a promissory note payable to the Manager of a Bank is payable to a "certain person". (*Jwala Prasad and Adami, JJ.*) DAMODER DAS *v.* BENARES BANK, LTD.
5 Pat. L. J. 536 : 58 I. C. 265 : 1 P. L. T. 691.

——S. 5—*Hundi—Bill of exchange—Document on more papers than one.*

A hundi may be written on more papers than one; but the aggregate value of the stamp papers used should represent the correct value of the stamp to which such hundi is liable. A Bill of Exchange may include a hundi, but it does not follow that hundi includes a Bill of Exchange. (*Chitty and Panton, JJ.*) BISWANATH BHATTACHARJEE *v.* GOVINDA CHANDRA.
23 C. W. N. 534 : 51 I. C. 88 : 29 C. L. J. 305.

——S. 5—*Shahjog Hundi—Nature of—Bill of Exchange.*

A Shahjog Hundi is only payable to the respectable holder unlike a hundi payable to bearer or order. It is a bill of exchange payable to a certain person. The definition of "Bill of Exchange" does not contemplate that the drawer and drawee can be the same person. Where the drawer and the drawee are the same person, the holder of a bill of exchange can treat it at his option as a bill of exchange or as a promissory note. An attested Shahog Hundi can be sued on either as a promissory note or as a bond. (*Fletcher, J.*) ASSARAM *v.* KESRI CHAND.
33 I. C. 247 : 22 C. L. J. 22.

——Ss. 7 and 1—*Acceptance of hundi—Writing—Local usage.*

Acceptance must be in writing unless in the case of a hundi a local usage is proved which makes an acceptance by word of mouth as effectual as an acceptance in writing. (*Shadi Lal and Wilberforce, JJ.*) PANNA LAL LACHMAN DAS *v.* HARGOPAL KHUBI RAM.
51 I. C. 250 : 29 P. R. 1919.

——S. 7—*Hundi— Oral acceptance— Not sufficient.*

Where a hundi was not accepted as required by S. 7 of the Act, namely, by the drawee signing his assent on the bill, but the court found on the oral evidence that the applicants did accept it verbally and on this basis decreed the suit against them. *Held* this was erroneous in law. (*Daniels, J.*) FIRM OF DWARKA DAS AJODHYA PRASAD *v.* FIRM OF LACHMI NARAIN GIRDHARI LAL.
L. R. 4 A. 355 : 1924 A. 129.

——Ss. 8 and 78—*Promissory note—Holder Benamidar—Real owner cannot sue.*

Where a promissory note is in the name of *A* and he is *ex facie* the payee under the note, it is not open to another person *B* alleging himself to be the real owner who had advanced money under the note, to sue on the note. 13 A. L. J 665 ; 13 M. 88 ; 28 M. 205 foll. (*Ryves and Gokul Prasad, JJ.*) REOTI LAL *v.* MT. MANNA KUNWAR.
44 A 290 : 20 A. L. J. 126 : L. R. 3 A. 50 : 1922 All. 70.

NEG. INS. ACT (XXVI OF 1881), S. 8.

——Ss. 8 and 78—*Pronote--Suit by beneficial owner.*

An alleged beneficial owner of a promissory note whose name does not appear on the face of the instrument cannot sue on it. 28 M. 205; 18 M. L. J. 186, Ref. (*Piggott, J.*) DORI LAL *v.* SEWAK RAM.
29 I. C. 988 : 13 A. L. J. 695.

——Ss. 8, 9 and 78—' *Holder in due course'—Indorsee from payee of pronote prohibited from collecting by court's order.*

Where there is a prohibitory order of court restraining the payee from dealing with or receiving the money due under a promissory note an endorsee from him with knowledge of the prohibition is not a holder in due course under S. 9 of the Neg. Ins. Act. The title of a holder of a promissory note who is unable to deal with the note or receive money due under it is to that extent defective, and an indorsee from him who is aware of his disability has a sufficient cause to believe that a defect existed in his title and is therefore not a holder in due course. Such an indorsee is not even a holder of the note as the indorsement under which he derived title was an invalid indorsement, as the maker after the prohibitory order cannot transfer any better title to his indorsee. (*Phillips and Devadoss, JJ.*) SUBRAMANIA AIYAR *v.* CHOKKALINGA MUDALIAR.
46 Mad. 415 : 17 L. W. 314 : (1923) M. W. N. 91 : 44 M. L. J. 206 : 1923 Mad. 317 (2).

——S. 8—*Suit by one of the heirs of the promisee.*

A suit on a Negotiable Instrument by one of the heirs of the promisee alone is not maintainable. (*Odgers, J.*) ANTONISWAMI *v.* GNANAPRAKASAM PILLAI.
12 L. W. 532.

——Ss. 8 and 90—*Promissory note—Suit by payee—Plea of benami—Endorsement to one of the debtors—Endorsement struck off— Suit by original payee.*

It is not open to the deft. to plead that the payee is only a benamidar and therefore is not entitled to recover the amount due under it. 30 M. 88 Foll. Where a promissory note was endorsed to one of the debtors but not for consideration and the endorsement was struck off, the original payee can bring a suit upon the promissory note. (*Sankoran Nair and Oldfield, JJ.*) PASUPATHY AIYAR *v.* RAMAN CHETTY.
28 I. C. 501 : (1915) M. W. N. 227.

——S. 8—*Holder.*

A son lending father's money with his consent and obtaining a pro-note in his name is a holder of that pro-note and the presumption is that the money belongs to the son unless fraud or misrepresentation is established. (*Pratt, A. J. C.*) MA NYI MA *v.* MAUNG YAN SHIN.
57 I. C. 881: (1920) 3 U. B. R. 204.

——S. 8— *Promissory note — Stranger whether can sue.*

NEG. INS. ACT (XXVI OF 1881), S. 8.

S. 8 prevents a person suing on a negotiable instrument, who is not named as a payee nor entitled as endorsee or assignee. (*Pratt, J. C.*) MAUNG SAW *v.* INGRASWAMI. **56 I. C. 259: (1919) 3 U. B. R. 200.**

——S. 8—*Pro-note—Holder's right to sue.*

The holder of a negotiable instrument is the only person who can sue on it. An insolvent can sue on a pro-note in his favour, if the Official Assignee does not interfere and object. (*Fox, C. J., and Hartnol, J.*) RAM BULLAB RHIRKAWALA *v.* BICKRAJ. **6 L. B. R. 174: 19 I. C. 88 : 6 Bur. L. T. 81.**

——S. 8—*Holder in due course—Consideration.*

The mere fact of a person standing as surety for the payee of a promissory note in respect of a totally different transaction without making any payment of money, is not sufficient consideration for him to become the holder in due course of the promissory note through endorsement to him by the payee. (*Parlett, J.*) K. P. NAMBIAR *v.* SUNDARABAI. **14 I. C 813: 5 Bur. L. T. 47.**

—— Ss. 8, 9 and 58—*Holder in due course—Endorsee under a forged endorsement is not.*

It is as much a nullity as a forged cheque or a forged hundi provided there has been no negligence on the part of the true owner in allowing the instrument to come into the hands of the forger. A holder under such a forged indorsement is not a holder in due course. When an endorsement has been forged, it becomes null and void and hence cannot convey a title to the endorsee. 36 C. 239 ; 28 A. 428 ; 24 B. 65 Ref. (*Kemp, A. J. C.*) KODUMAL KALUMAL *v.* THE KARACHI BANK, LTD. **15 S. L R. 93.**

——S. 9—*Pro-note—Transfer before demand—Transferee is a holder in due course.*

A promissory note payable on demand does not become payable until a demand is actually made and if there is no evidence to show that the transfer of the note was made after the demand, it is perfectly valid transfer and the transferee is 'holder in due course'. 47 Cal 861 Ref.(*Campbell and Moti Sagar, JJ.*) BULAQI MAL *v.* ABDUL RAHIM. **1923 Lah. 638.**

——S. 9—*Holder in due course—Delivery by debtor to creditor.*

When a negotiable instrument of any sort is handed over by a debtor to his creditor in discharge of a pre-existing debt the creditor becomes a holder iu due course. (*Beaman, J.*) DAULAT RAM *v.* NAGINDASS. **19 I. C. 789: 15 Bom. L. R. 333.**

——Ss. 9, 10, 60 and 80—*Payments entered on back of pronote.*

Payments entered on the back of a promissory note do not prove full discharge of note and a former demand for its return. The maker of a promissory note is not discharged by paying off the payee if the note is negotiated. It is no defence against the holder that the maker should have secured the note in return and that his action cannot be said to be in good faith. (*Seshagiri Iyer, J.*) MUTHU REDDI *v.* VELU ASARI. **4 L. W 34: 35 I. C. 591 : (1916) 2 M. W. N. 107.**

NEG. INS. ACT (XXVI OF 1881), S. 13.

——S. 9—*Endorsement—Suit on promissory note.*

A person cannot sue upon a promissory note which has not been endorsed to him. 31 Mad. 534, Not Foll. 17 M. L. J. 393 Foll. (*Trotter, J.*) ULAGAPPA CHETTY *v.* RAMANATHAN CHETTY. **32 I. C. 821: 3 L. W. 171.**

——S. 9—*Holder in due course.*

Where no consideration exists either for the pronote or for the transfer, the endorsee is not a holder in due course. (*Krishnaswamy Aiyer, J.*) *In re* KANNUSAWMI PILLAI. **9 I.C. 79: 8 M.L.T. 463.**

——Ss. 9 and 18—*Holder in due course—Presumption—Betting transactions—Endorsee.*

Where the appellant, a book maker, having got a cheque which was obtained in a betting transaction, endorsed in his favour and it is proved that he had transactions for a long time with the endorser, the presumption in favour of the appellant as a holder in due course is rebutted. The onus is on the appellant to prove that not only he gave consideration but also that he gave it without having sufficient cause to believe the title of its endorsee. (1877) L. R. 2 A. C. 616 ; 24 I. C. 709 Foll. (*Duckworth, J.*) E. STEWART *v.* G. W. MERCADO. **1 Bur. L. J. 40.**

——S. 9—*Holder in due course—Suspicious circumstances.*

A person who takes a negotiable instrument under circumstances which create a suspicion that there is something wrong in the transaction, or who abstains from enquiry as to the facts presented to him is not a holder in due course. (*Rigg, J.*) H. J. GREEN *v.* BALON. **51 I. C. 537: 12 Bur. L. T. 16.**

——S. 13—*Cheque—'Bearer' struck out and 'order' substituted—Custom of negotiability.*

A cheque from which the word 'bearer' is struck out without substitution of the word 'order', is not negotiable under the Negotiable Instruments Act. The custom of trade which exists in the Bombay market, whereby such a cheque is regarded as an order cheque negotiable, extends the definition of the phrase "negotiable instrument", contained in S. 13 of the Negotiable Instruments Act and cannot be recognised by law. (*Hayward, J.*) DOSSABHAI *v.* VIRCHAND. **49 I. C. 388 : 21 Bom. L. R. 1.**

——S. 13—*Negotiable instrument—Test of—Transferable by delivery—Holder—Right of, to sue* pro tempore.

Before an instrument can be considered to be negotiable, it must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name and it must be by the custom of the trade transferable like cash by delivery. Share certificates with blank transfer deeds enclosed by the last registered owner are not negotiable instruments. (*Chaudhuri, J.*) HAZARI MULK SHOHANLAL *v.* SATISH CHANDRA GHOSE. **46 Cal. 331: 48 I. C. 966: 22 C. W. N. 1036.**

——S. 13 *Act VIII of 1819 S. 3—Nego-tiable Instrument—Definition.*

Under this definition a negotiable instrument means a promissory note, bill of exchange, or

NEG. INS. ACT (XXVI OF 1881), S. 13.

cheque payable either to order or to bearer, and a promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. (*Moti Sagar, J.*) HANS RAJ *v.* EACHIMI NARAIN. **1923 Lah. 388.**

——S. 13—*Negotiable instrument—Shah Jog Hundi—Incidents of.*

A bill payable to a Shah or banker, similar, to some extent to a cheque crossed generally and payable only to or through some banker, is a Shah Jog Hundi and it satisfies the requirements of a negotiable instrument. (*Shadi Lal and Wilberforce, JJ.*) MADHO RAM *v.* NANDU MAL. **58 I. C. 982 : 1 Lah. 429.**

——Ss. 13, 118—*Promissory note payable only to a specified person—Presumption under S. 118 if applies—Effect.*

A promissory note payable only to a specified person is not negotiable within S. 13 and the presumption laid down in S. 118 does not therefore apply to such a note ; the onus in such cases rests upon the creditor, to prove consideration. (*Scott Smith, J.*) TIRATH RAM *v.* AUTAR SINGH. **8 P. W. R. 1914: 22 I. C. 861: 32 P. L. R. 1914.**

——Ss. 13 and 46—*Promissory note payable to specified person or order—Negotiation.*

A promissory note payable to a specified person or order is a negotiable instrument and the transfer must be by endorsement and delivery. A verbal assignment of such a note is not recognised by law. (*Maung Kin, J.*) T. A. R. A. R. M. CHETTY FIRM *v.* SOLOMON. **55 I. C. 718 : 10 L. B. R. 96.**

——S. 13 (2)—*Shah Jog Hundis are negotiable instruments—Payable alternatively to one of several payees.*

Shah Jog hundis are negotiable instruments within the definition in S. 13 (2) of the Negotiable Instruments Act of 1881, as amended by the Neg. Ins Act of 1914 as being payable in the alternative to one of several payees. (*Schwabe, C. J. and Coutts Trotter, J*) KANNAYALAL BHOYA *v.* BALARAM PARAMSUKH DASS. **43 M. L. J 480 : 16 L. W. 608 : 31 M. L. T. 284 (H. C.) : 1923 M. 44.**

——S. 14—*Negotiability — Incidents of—Delivery order, if negotiable.*

A document is negotiable if by the custom of the money market, it is transferable like cash and the *bona fide* transferee obtains a good title although his transferor might have stolen it. A delivery order may or may not be negotiable ; the question depends upon the conditions attached to it and the usage of trade under which it is issued. A document containing conditions may be negotiated but when the real effect of a document is that the seller will hand over certain goods to any one producing the document provided he has them and has been paid his price, no usage of trade can compel him to hand the goods over if he has not the goods or has not been paid the price. (*Fox, C.J. and Ormond, J.*) KHOO E. O. KHWET *v.* NANIGRAM JAGANATHA FIRM. **10 Bur. L. T. 92 : 40 I. C. 86 : 9 L. B. R. 143.**

NEG. INS. ACT (XXVI OF 1881), S. 20.

——S. 15—*Indorsement — Assignment — Modes of.*

A negotiable instrument may be transferred otherwise than by endorsement alone. It may be otherwise assigned and the assignee may sue in his own name, the only difference being that the assignee will have only the right, title and interest of the assignor while the indorsee will have all the rights of a holder in due course. 28 Mad. 544 Ref. The assignment may be oral. (*Shadi Lal and Wilberforce, JJ.*) PANNA LAL LACHMAN DAS *v.* HARGOPAL KHUBI RAM. **51 I. C. 250 : 29 P. R. 1919.**

——S. 15—*Indorsement—Mere written acknowledgment of receipt of money is not.*

A mere written acknowledgment of the receipt of money due under a pro-note signed by the payee, does not by itself amount to an indorsement within S. 15 of the Act. Nor does it amount to a tranafer of an actionable claim under S. 130 of the T. P. Act in the absence of words of transfer. (*Spencer and Odgers, JJ.*) CHANDA *v.* RAMUNNI. **(1920) M. W. N. 600 : 28 M. L. T. 262 : 59 I. C. 943 : 13 L. W. 183 : 39 M. L. J. 273.**

——Ss. 15 and 16—*Indorsement by stranger.*

Quaere—Whether a suit can be filed on an endorsement made by a stranger on the back of a note, who does not satisfy the definition of an indorser. Such a usage is recognised in English Bills of Exchange Act, S. 56 and on the continent. (*Wallis, C. J. and Sadasiva Aiyar, J.*) KOTHANDARAMASWAMI NAIDU *v.* MUTHIAH CHETTY. **45 I. C. 186.**

——S. 16—*Indorsement—Direction to pay whether sufficient.*

If an indorsement contains a direction to pay though it may not contain actual words of direction it contains a direction to pay within the meaning of S. 1. (*Miller, J.*) SHRINIVASA PILLAI *v.* KANNAN. **19 I. C. 410 : 24 M. L. J. 296.**

——S. 17—*Hundi—Liability.*

A Hindi is some times a pro-note and some times a bill of exchange. In this case, the Hundi was not an ambiguous document but it was a promissory note and it made the drawer and endorser both liable for half and the endorser alone for the reminder. (*Stanyan, A. J. C.*) RADHA KISAN *v.* HIRA LAL. **58 I. C. 313.**

——S. 19—*Bill or note payable on demand.*

A bill of exchange is payable on demand though the demand cannot be made on the day when the bill is drawn. A note which does not fix any date for payment is payable on demand. (*Seshagiri Aiyar and Napier, JJ.*) TITTU GOPALACHARIAR *v.* MAIYAPPA CHETTY. **(1918) M. W. N. 177 : 45 I. C. 22 : 8 L. W. 501.**

——S. 20— *Unendorsed stamp—Cancelled according to S. 13 of the Stamp Act.*

A document whose stamp has not been crossed by the signature, might still come under S. 20 of the Act if the stamp had been cancelled in accordance with S. 12 of the Stamp Act. (*Piggott, J.*) JAWAHAR TAHKUR *v.* EMPEROR. **14 A. L. J. 643 : 34 I. C. 315 : 17 Cr. L. J. 203 : 38 All. 430.**

NEG. INS. ACT (XXVI OF 1881), S. 20.

——S 20—*Blank* Hundi *signed and delivered—Presumption.*

A person signing and delivering a blank *Hundi* to another *prima facie* authorises the latter to fill it up and give to the world the bill as accepted by him. He enables his agent to represent himself as acting under a general authority and cannot set up secret stipulations between himself and his agent, against a *bona fide* holder for value. (*Macnair, A. J. C.*) SHANTI DAS *v.* HIRA LAL. **59 I. C. 657.**

——S. 20—*Delivery of signed* hundi *left blank— Attachment of unsigned stamp—Estoppel.*

The estoppel under S. 20 of the Neg. Ins. Act can only be applied to the paper or papers which the signature covers. The delivery of a *hundi* paper signed but left blank cannot be taken to give *prima facie* authority to make thereon a negotiable instrument outside the maximum value covered by the stamp by attaching thereto other unsigned stamps. The delivery of several signed stamps separately does not give *prima facie* authority to stick them together for the purpose of a single instrument. It is only when the signature is across two or more stamp papers pasted together showing thereby that the several stamps have been united with the sanction of the person making the signature, that section 20 will govern as one transaction an instrument engrossed upon the jointed papers. (*Stanyon, A. J. C.*) GOKULDAS NAINRASUKHDAS *v.* RADHA KISAN. **54 I. C. 3.**

——S. 20—*Omission to state amount of the note, in the body of the instrument—Effect of.*

So long as the amount of a pronote can be found out from the instrument itself without extraneous aid, the omission to state it in the body of the pro-note does not vitiate its character as such 5 Bur. L. T. 162 Dist. (*Duckworth, J.*) MAUNG PO YE *v.* YE CHEIN HONG. **11 L. B. R. 439 : 1923 Rang. 97.**

——S. 20—*Inchoate instrument—Name of payee not given—Effect.*

Though a payee can fill in a blank in an inchoate instrument and sue on it himself or endorse it to some one else, no decree can be passed on such a blank instrument if it does not contain the name of the payee. Such an instrument is not negotiable. (*Twomey, J.*) M. N. P. L. FIRM *v.* KIRWAN GYAN. **17 I. C. 915 : 5 Bur. L. T. 162.**

——S. 22—*Time of presenting* hundi *for payment.*

Where a *Hundi* is drawn on 7th May and is payable 61 days after that date a presentment of it for payment on July 10th would be a correct presentment, the rule being that a bill of exchange not expressly payable at sight, on demand, or on presentment, must be presented for payment at maturity, *i. e.*, on the third day after the specified day for payment. Such a hundi need not be presented at once to the payee or the endorsee for acceptance. (*Walsh and Sundar Lal, JJ.*) GANGA PRASAD *v.* HIRA LAL. **39 All. 86 : 37 I. C. 656 : 14 A. L. J. 1166.**

——S. 22—Hundi—*Contract dispensing with days of grace—Whether permissible.*

NEG. INS. ACT (XXVI OF 1881), S. 28.

Per Seshagiri Aiyar, J.—Parties to a Hundi may contract that S. 22 relating to days of grace shall not apply to them as the giving up of the benefit does not offend public policy. Per *Sadasiva Aiyar J.* (*contra*).—As the provision in S. 14 of the English Bills of Exchange Act is left out in S. 22 of the Negotiable Instruments Act, it is not open to the parties to contract themselves out of the benefit of that section in regard to days of grace. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) VALLIAPPA CHETTY *v.* SUBRAMANIA CHETTY. **15 M. L. T. 342 : 23 I. C. 431 : 26 M. L. J. 494.**

——Ss. 22 (2) and 24—*Date of maturity—Limitation.*

A hundi payable on the 28th January was at maturity on the 31st of that month under S. 22 (2) on the Negotiable Instruments Act. (*Rattigan, J.*) NANAK SINGH *v.* KESHODOSS. **1 P. W. R. 1915 : 27 I. C. 608 : 84 P. L. R. 1915.**

——Ss. 26 and 27—*Pro-note by manager of joint family—Liability of other members.*

A Negotiable Instrument drawn by a Manager of a Hindu joint family is binding on other members provided it was made for family purposes. (*Piggott and Walsh, JJ.* KRISHNANAND NATH *v.* RAJA RAM SINGH. **20 A. L. J. 233 : 44 A. 393 : 1922 A. 116.**

——S. 26—*Minor—Bill of exchange.*

A minor can draw a bill or issue a cheque on the banker. A minor is not incompetent to be a payee. (*Wallis, C J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) RAGHAVA CHARIAR *v.* SRINIVASA RAGHAVA CHARIAR. **40 Mad. 308 : 20 M L.T. 407 : (1916) M. W. N. 363 : 36 I. C. 921 : 31 M. L. J. 575 (F. B.)**

——Ss. 27 and 28—*Trustee of a charity—Personal liability on the bill or note—Agent, meaning of.*

A person drawing a bill or making a note as trustee of a temple or charity is not acting on behalf of a principal personally liable on such bill or note. "Agent" in Ss. 27 and 28 means the agent of a person capable of contracting within the meaning of S. 26; and when the agent is not liable the principal is. **17 M. L. J. 615; (1911) 1 M. W. N. 143, 26 I.C. 35 : 32 M. L. J. 259** Foll. (*Wallis, C. J. and Spencer, J.*) PALANIAPPA CHETTIAR *v.* SHANMUGAM CHETTIAR. **41 Mad. 815 : 35 M. L. J. 90 : 24 M. L. T. 51 : 49 I. C. 23 : 8 L. W. 317.**

——S. 28—*Hundi—Principal and agent—Liability of agent—Person not named as party not liable.*

The name of a person or firm to be charged on a negotiable instrument should clearly be stated on the face or back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. In order to make a person liable as principal on a hundi executed by his agent, it is not sufficient that the name is disclosed in such a way that on any fair interpretation of the instrument his name is the name of the person really liable. A statement after the signature of the drawer that he is the "Superintendent" of another's affairs is merely descriptive and does not

NEG. INS. ACT (XXVI OF 1881), S. 28.

make the other person a party to the instrument. In an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it is not open by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. (*Lord Buckmaster.*) FIRM OF SADSUK JANKI DAS *v.* KISHEN PRASAD.

46 Cal. 663 : 29 C. L. J. 340 : 17 M. L. J. 405 : 25 M. L. T. 258 : 21 Bom. L. R. 605 : 1 U. P. L. R. (P.C.) 37 : (1919) M. W. N. 310 : 23 C. W. N. 937 : 10 L. W. 143 : 50 I. C. 216 : 36 M. L. J. 429. (P. C.)

——— S. 28—*Hundi—Signing as munim—Liability.*

Section 28 of the Negotiable Instruments Act can have no application to a case where it is found that the defendant signed the Hundi as munim and that money was lent not to him in his personal capacity but to the firm. (*Banerji and Gokul Prasad, JJ.*) FIRM OF HAZARI LAL-CHHANGA MAL *v.* SOHAN LAL. **1923 A. 407.**

——— S. 28 —*Promissory note— Liability of maker—Plea of agency—Proof of.*

Where the maker of a negotiable instrument does not indicate that he signed it as an agent nor is there anything in the document itself indicating that the executant did not thereby incur personal liability, the executant is personally liable. (*Newbould and Panton, JJ.*) DURGA PRASAD SEN *v.* KALI CHARAN AICH ROY. **64 I. C. 742.**

——— S. 28—*Agent—Signature with vilasam of principal—Liability.*

The agent of a Nattukottai Chetty, executed a pro-note in favour of the plaintiff to which he put his signature prefixing his principal's vilasam thereto. The amount was debited to the principal, in the body of the note. *Held*, that the executant had expressly excluded his personal liability, and that the principal alone was liable. (*Spencer and Krishnan, JJ.*) NATESA AIYAR *v.* SATTYA PILLAI. **51 I. C. 386 : 8 L. W. 622.**

——— S. 28—*Promissory note by agent, trustee or executor—Liability.*

Per *Kumaraswami Sastri, J* :—In a suit on promissory note executed by a trustee or an executor, who does not however sign as trustee or executor, there can only be a personal decree against the executant, or, if the executant is dead, against his or her legal heirs, and there cannot be a decree against the trust estate or the testator's heirs (*Sadasiva Aiyar and Kumaraswami Sastri, JJ.*) AMMALU AMMAL *v.* NAMGIRI AMMAL.

33 M. L. J. 631 : 22 M. L. T. 391 : 6 L. W. 722 : 43 I. C. 760 : (1918) M. W. N. 110.

——— S. 28—*Payee, agent of firm.*

The principle of S. 28 of the Act that if a promissory note is made payable by a person as agent of another, the latter is not liable personally on the note, applies also to the case of a payee. 28 M. 544 Foll. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) GULAMSA RAVUTHAR *v.* VISHVANATHAM CHETTIAR.

(1917) M. W. N. 344 : 40 I. C. 347 : 5 L. W. 721.

NEG. INS. ACT (XXVI OF 1881), S. 28.

——— Ss. 28 and 30—*Promissory note—Executed and singed by the guardian—Money spent for purposes binding on minor—Minor's estate if liable.*

Where the mother of the minor deft. borrowed from the plff. certain moneys for purposes binding on the minor and executed a promissory note therefor but did not sign the same as guardian and the deft. was sued on the note. *Held*, that the estate of the deft. should pay the debt. The Neg. Ins. Act contains no provision as to promissory notes signed by guardian and Ss. 28 and 30 of the Act do not cover all cases of representation and cannot therefore be applied to them. The case of one person signing for another who is *sui juris* is not on all fours with that of a person executing a document on behalf of another who is incapable of contracting. Where the validity of a transaction has to be looked at from two standpoints, each of them should be regarded as supplementing the other The doctrine of the Hindu Law is not to be lost sight of because a contract coming under its purview is also regulated by other provisions of law. 6 M. I. A. 393 ; 30 M. 88 ; 23 M. 597 ; 26 M. 330 ; 17 M. 221 ; Ref. (*Seshagiri Aiyar and Napier, JJ.*) PADMA KRISHNA CHETTIAR *v.* NAGAMANI AMMAL.

39 Mad. 915 : 30 I. C. 574 : 18 M. L. T. 216.

——— S. 28 — *Promissory note —Liability of agent.*

When the pro-note describes the executant as agent in the body and the agent signs as agent the agent is not personally liable, the inference being that he did not intend to make himself personally liable. (*Sadasiva Aiyar, J.*) SUNDERASA GURUKKAL *v.* SAMBARINA AIYAR.

28 I. C. 93 : 2 L. W. 188.

——— S. 28—*Pro-note—Agent—Signature not as agent—Personal liability of maker.*

An agent even if he is described as such in a pro-note is not exempted from personal liability if he does not sign the pro-note as an agent. 25 M. L. J. 425 (F. B.) Foll. S. 28 of the Negotiable Instruments Act applies both to instruments in English as well as in vernacular. (*Sadasiva Aiyar and Spencer, JJ.*) YINGUNATH CHINA VENKATARANIM GARU *v.* KATAGIRI VENKATA NARASIMHA RYEMIN.

14 M. L. T 502 : 21 I. C. 650 : (1913) M. W. N. 1005.

——— S. 28—*Maker describing himself as agent —Signature and promise unqualified.*

Where the maker of a note described himself as agent in the body of the pro-note but his promise to pay as well as his signature were unqualified by any reference to his alleged principal, he could not evade his personal liability. The agent will be liable unless he clearly expresses on the face of the instrument that he does not incur personal liability (*White, C. J., Ayling, and Oldfeld, JJ.*) KONETI NAICKER *v.* JATU GOPALA AIYAR.

38 Mad. 482 : 25 M. L. J. 425 : 21 I. C. 417 : 14 M. L. T. 414.

[Affirming 16 I. C. 869 : 12 M. L. T. 367.]

NEG. INS. ACT (XXVI OF 1881), S. 28.

——— S 28—*Agent's liability— Mere description as agent in the pro-note.*

Per Sadasiva Aiyar, J.—An agent making a pro-note cannot shirk his peronal liability unless he states distinctly in the body of the note that he did not undertake any personal liability for the same ; mere mention in the pro-note that he is an agent is not sufficient. Where a relief is claimed against persons other than the executants of a pro-note or in the alternative against the maker and at the trial a distinct issue is framed to determine the maker's liability under the Act, *held* that the additional issue was rightly framed and that the plfi 's claim could not be defeated by his original frame of the suit. *Per Sundara Aiyar, J.*—An indirect mention somewhere in the note of the agent's intention to avoid personal liability is sufficient under S. 28 of the Act. Such cases should not be allowed to be connected into suits on the negotiable instruments against the executants. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KONETI NAIKER *v.* JATU GOPALAIYAR.
12 M. L. T. 367 : (1912) M. W. N. 984 : 16 I. C. 869 : 23 M. L. J. 417 : Affirmed on appeal 21 I. C. 417 : 38 Mad. 482.

——— S. 29—*Liability of the executant.*

When the executant of a pro-note does not sign it in a representative capacity he is personally liable. (*Pratt, J. C. and Boyd, A. J C.*) RAMSINGH *v.* PERUMAL. **32 I. C. 582: 9 S. L. R. 150.**

——— S. 30—*Drawer—Liability of.*

The drawer of the bill of exchange is liable as surety till the acceptor pays the balance after his set off. (*Macleod, J.*) INDIAN SPECIE BANK, LTD. *v.* NAGINDAS HURGIVANDAS NANVATI. **35 I.C. 628: 18 Bom L. R. 689.**

——— Ss. 30, 93, 98—*Notice of dishonour not given—Damage—Burden of proof.*

The formal notice of dishonour to the drawer is not compulsory in every case and is dispensed with when the party charged could not suffer damage for want of such a notice, Ss. 30, 93 should be read along with S. 98 of the Negotiable Ins. Act. When no formal notice of dishonour is given and it is alleged that the party charged did not suffer damage for want of such notice, the burden of proof lies on the person who did not give the notice to prove absence of damage. (*Kensington J.*) ZINDA RAM *v.* TADA MALL.
96 P.W. R. 1911 : 10 I. C. 405 : 173 P. L. R. 1911.

——— S. 30—*Collateral agreement—Defence—Railway receipt given as security.*

The drawer of a bill of exchange or cheque cannot set up a collateral agreement as a defence to a claim under S. 30 of Neg. Ins. Act. When, as security for acceptance, the drawer of a *hundi* handed over to a Bank. Railway receipts for goods consigned to him as collateral security and the Bank through mistake handed over the receipts to the drawee before acceptance the loss of the collateral security in no way affects their right to recover the amount of *hundi* from the drawer. (*Pratt, J. C. and Fawcett, A. J. C.*) KARIM *v.* PEOPLE'S BANK OF INDIA. **30 I C. 35: 9 S.L.R, 32.**

——— Ss. 30, 93 and 106—*Drawer—Liability—When arises.*

NEG. INS. ACT (XXVI OF 1881), S. 32.

The drawer of a hundi is not liable if due notice of dishonour is not given him and the fact of the payee demanding payment two months after maturity is not a sufficient compliance, with Ss.93 and 106 of the Act. (*Pratt, J. C. and Fawcett, A.J. C.*) SOBHOMAL *v.* POHUMAL. **13 I. C. 255: 5 S. L. R. 168,**

——— Ss. 32, 37 and 44—*Liability of maker and acceptor—Burden of proof—Promissory note, without knowledge and in absence of payee to enable third person to raise money.*

The liability of a maker or acceptor of a negotiable instrument is based on the following principles:—When it is admitted that the maker of a note or acceptor of a bill made or accepted it, unless the plaintiff is charged with fraud and some *prima facie* case is made against him he need not explain the circumstances at all, and except under peculiar circumstances, the proof of which lies on the deft. a man who signs a bill is presumed to be liable for the whole amount appearing on its face. A pro-note executed in the absence and without the knowledge of the payee, to help a friend of the maker to raise money on it and money is subsequently advanced on such instrument to a third party, must be deemed to have been executed for consideration. Where a lesser amount than the one shown in the promissory note is subsequently advanced by the payee, the liability of the maker is proportionately reduced according to S. 44. (*Walsh and Stuart, JJ.*) NASIR ALI *v.* KHER CHAND.
36 I. C. 996.

——— Ss. 32 and 43—*Bills of exchange—Acceptance before war—Govt. proclamation allowing British subject to obtain goods on enemy steamer in neutral port—Effect of.*

A bill of exchange upon the deft. against goods in favour of the plffs. payable at thirty days' sight was accepted before the outbreak of war. The goods were despatched from an enemy port in an enemy steamer. The steamer reached Bombay before the outbreak of war but departed to a neutral port to avoid capture. The bill was presented on the due date and dishonoured. In the meantime, the Govt. issued a proclamation authorising British subjects to make payments for obtaining their cargoes in neutral ports to the agent of shipowners in an enemy country. The defts. denied their liability since their acceptance, was qualified, the bill having been drawn against goods not yet received, *held*, that (1) they were still bound to pay on demand after the proclamation whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports ; (2) the consideration for the acceptance did not fail, for the proclamation permitted performance before it was too late. (*Scott, C. J. and Heaton, J.*) MOTISHAW AND CO. *v.* MERCANTILE BANK OF INDIA. **41 Bom. 566 : 37 I. C. 258 : 18 Bom. L. R 521**

——— S. 32—*Partner executing pro-note to co-partner—Liability*

The fact that the maker of a pro-note is a partner of the payee is no defence to a suit on the note unless the instrument is treated as an escrow

NEG. INS. ACT (XXVI OF 1881), S. 32.

or a nullity. (*Phillips and Krishnan, JJ.*) SUNKARA RATHA DOSS *v.* SPARI KOPILS.

49 I. C. 191.

——Ss. 32 and 120—*Promissory note—Subsequent contract.*

A payee of a promissory note if he has made a contract to the contrary with the maker cannot sue on the note unless he has performed the contract, as the maker can set up against the payee such subsequent written agreement. (*Skinner, A. J. C.*) SHEIK IMAM *v.* ISHAK ALI.

10 I. C. 734 : 7 N. L. R. 39.

——S. 32—*Hundi—Liability of maker.*

The maker of a Hundi is not discharged from liability by the holder in due course getting payment of what is due and the ultimate drawee is entitled to recover from the maker what he paid. (*Kanhaiya Lal, J. C.*) JHAMMAN LAL *v.* BHAGWAN DAS. 53 I.C. 652: 6 O. L. J. 492.

——Ss. 32, 56 and 59—*Liability of maker of promissory note—Effect of endorsements—Fraud—Person liable for.*

A promissory note payable on demand is regarded as a continuing security. Endorsements of payment may be made on a pro-note under S. 56 and the note then becomes negotiable only for the balance due but if no endorsement is made, the note is negotiable for the full amount expressed in it. If the payee commits fraud for transferring the note for the full value without informing the endorsee that some payments have been made, the person to suffer by the fraud is the person who by his omission to insist on his payments being endorsed on the note enabled the fraud to be committed. (1889) 2 Q.B.D. 13 Ref. (*Fox, C. J.*) VITHALDAS KHANDAS *v.* INDRAVELLU.

8 Bur. L. T. 161 : 29 I. C. 936 : 8 L. B. R. 202.

——Ss. 35, 45 (a) and 81—*Loss of Hundi before presentation—Duplicate not obtained—Liability of endorser.*

The fact of the Bill of Exchange having been dishonoured and of its intimation to the endorser must be proved before the endorser is made liable under S. 35. (*Piggott and Gokul Prasad, JJ.*) SANEHI LAL *v.* ONKAR MAL.

18 A. L. J. 981 : 59 I. C. 675 : 2 U. P. L. R. (All.) 375.

——S 35—*Lost or stolen Hundi—Genuineness—Liability of indorser—English Law.*

A lost or stolen Hundi is *ex hypothesi* genuine and the liability of a *shah* who is paid does not rest on a guarantee of genuineness. The liability of a holder who endorses a bill of exchange and passes it on under the English Law is only that of a surety for the drawer and the acceptor but his position does not involve any liability to the acceptor. (*Scott, C.J. and Davar, J.*) SETHINA *v.* JWALA PRASAD GAYA PRASAD.

39 Bom. 513 : 26 I. C. 896 : 16 Bom. L. R. 972.

——S. 35—*Lost Hundi—Commission agent both payee and indorser of Hundi—Indemnity required—Mercantile usage.*

A Commission agent through whom a Hundi is purchased is liable to the buyer for the amount of the hundi when he is payee and endorser of the same. If he sets up a plea that his name was entered in the hundi benami and he is not liable by mercantile usage, he must prove that the transaction was benami and that his liability is avoided by such usage. (*Shah Din and Chevis, JJ.*) DURGA DAS *v.* KANSHI RAM.

166 P.L.R. 1912 : 16 I.C. 769 : 273 P. W. R. 1912.

——Ss. 35, 37 and 38—*Dishonour—Liability of indorser.*

An endorser is responsible to every subsequent holder in case of dishonour by the drawer if he has due notice of his dishonour, except when (*a*) there is a contract to the contrary or (*b*) he expressly excludes or limits his liability in the indorsement itself. He is liable as a surety for the maker, but he is also, in the absence of a contract to the contrary liable as principal to his endorsee. (*Parlett, J.*) SOMASUNDARAM CHETTY *v.* LAKSHMAN CHETTY.

17 I. C. 951 : 5 Bur. L. T. 173.

——Ss. 37 and 38—*Liability of maker of a pronote to holder.*

The maker of a promissory note is liable to the holder of it who pays consideration for it even if the instrument was originally made without consideration. (*Ryves and Lyle, JJ.*) HAZARI LAL *v.* TULSHI RAM. 19 I.C. 637 : 11 A.L.J. 481.

——S. 37—*Drawer of bill of exchange—Set off.*

The drawer of a bill of exchange is entitled to claim set off from the payee for the amount due to the acceptor of the bill from the payee. (*Macleod, J.*) INDIAN SPECIE BANK, LTD. *v.* NAGINDAS HURJIVANDAS NANAVATI.

35 I. C. 628 : 18 Bom. L R. 689.

——Ss. 37, 65 and 66—*Hundi drawn on himself—Presentment.*

The drawer of a hundi made payable after a specified period after date who is also the drawee is liable thereupon as principal debtor under S. 37 and presentment for acceptance or presentment for payment is unnecessary. (*Drake Brockman, J. C.*) LACHMAN PRASAD *v.* RAMACHANDRA.

51 I. C. 859 : 15 N. L. R. 128.

——S. 37—*Pronote— Joint—Promissors—Liability of—Evidence Act, S.92.*

S. 37 regards as principal debtors those who execute a pro-note when there is no other mutual understanding to the contrary. It is not open to one of the executants to prove by oral evidence that he was a surety. (*Young, J.*) VELLIAN CHETTI *v.* WOOMIDY YIRAMAH. 29 I. C. 760.

——Ss. 37 and 43—*Hundi—Holder in due course—Novation.*

Deft. promised to pay C. or order sixty days after date a sum of Rs 10,000 under a Hundi endorsed to plff. who sued for the money. The deft. pleaded that plff. was not a holder in due course and that the hundi was discharged by a subsequent mortgage given by the drawee to plff. by novation and that deft. who was a surety was discharged, *Held*, that the plff. was a holder in due course and that the deft. was liable as

NEG. INS. ACT (XXVI OF 1881), S. 43.

surety. S. 135 of the Contract Act did not apply. (*Hartnoll, C. J. and Young, J.*) J. E. LOADER *v.* THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA. 21 I. C. 222 : 6 Bur. L. T. 171.

——— S. 43—*Failure of consideration—No obligation created.*

Where a promissory note was executed as part consideration for the price of a room which could not be conveyed held that the consideration failed and the promissory note created no obligation to pay. (*Pratt, J.*) MC AYOOB AND ONE *v.* SOWDAGER. 1 Bur. L. J. 261 : 1923 R. 127 (2)

——— Ss 46, 58 and 85—*Indorsement by holder—Hundi sent by post to indorsee—Hundi taken by stranger—Payment to forged endorsement—Effect*

If a party primarily liable on a negotiable instrument pays the amount thereof to a wrong person, holding it under a forged indorsement, he remains liable to the true owner. The only exception to this is where the payee's indorsement on a cheque payable to order is forged. In such a case the drawer is discharged if he pays the amount in due course. No holder of a negotiable instrument, though he may be holder in due course, can acquire a title to the instrument through a forged indorsement. S. 58 of the Neg. Instruments Act which protects a holder in due course where a negotiable instrument has been obtained by means of an offence does not apply to a case of forgery. 24 B. 65; 28 A. 428; 36 C. 239 Ref. In the case of goods, if a man takes and sells them when he has no right the owner may waive the part and recover the proceeds in an action for money had and received. And equally if a person wrongfully convert a bill and receive the amount, the owner of the bill may either sue in tort or may waive the tort, and recover the money as received to his use. A person forging a name in a hundi and getting payment is guilty of a conversion of the hundi and the proceeds of the hundi received by him are the moneys of the true owner. (*Mulla, J.*) THORAPPA DEVANAPPA *v.* UMEDMALJI. 25 Bom. L. R. 604 : 1924 Bom 205.

——— Ss. 46, 47 and 48—*Transfer without indorsement or delivery—Rights of transferee.*

A negotiable instrument can be transferred under the general law without endorsement and delivery of possession. But the transferee under the general law would not be in the privileged position of a "holder" under the Negotiable Instruments Act, but would be merely in the position of a transferee of any ordinary chattels and would have no better title than his transferor. (*Carnduff and Chatterjea, JJ.*) BINODE KISHORE GOSWAMI *v.* ASHUTOSH MUKERJEE. 14 I. C. 720 : 16 C. W. N. 666.

——— Ss. 48 and 78—*T. P. Act, Ss. 123 and 130—Promissory note payable to order—Delivery without endorsement—Transfer if effected.*

Where a promissory note was handed over to a person by the payee without any endorsement, there is no completed legal transfer of the instrument either as a negotiable instrument or as an actionable claim, neither is there

NEG. INS. ACT (XXVI OF 1881), S. 57.

anything like an equitable assignment, and the transferee therefore without any endorsement in his favour gets no title. (*Carnduff and Richardson, JJ.*) AKHOY KUMAR PAD *v.* HARI DAS BASAK. 18 C. W. N. 494 : 22 I. C. 500 : 19 C. L. J. 335.

——— Ss. 48 and 15—*Assignment by separate writing.*

A written assignment of a promissory note in the shape of a separate document confers on the assignee a title to sue on the note. 16 C. W. N. 666; 24 M 654; 28 M. 544; 31 M. 534 Rel. 3 L.W. 171 not foll. 13 Bur. L. T. 37 : 14 Bur. L. R. 25; 8 L B R. 288 Ref. (*Duckworth, J.*) PALAWAN *v.* KANU. 66 I C. 501: 11. L. B. R. 174.

——— S. 50—*Rights of Indorsee.*

The endorsee of a pr -note stands in the shoes of the endorser unless his rights are specifically restricted. An endorsee of a pro-note cannot only sue the promisor personally but can also realise the amount from the assets of the family. (*Ayling and Seshagiri Aiyar, JJ.*) NATARAJA NAICKEN *v.* AYYASAMI PILLAI. 5 L. W. 410: (1917) M. W. N. 230: 32 M L. J. 354 : 38 I. C. 339 : 21 M. L. T. 405.

——— S. 50—*Indorsee cannot sue on original consideration.*

An indorsee of a pro-note can only sue on the note as such and cannot fall back on the original consideration. 21 M. L. J. 526 Rel. (*Robinson, C. J. and Duckworth, J.*) MAUNG PHO MYA *v.* DAWOOD & CO. 66 I. C. 584 : 11 L. B. R 137.

——— Ss. 51 and 50—*Endorsees for collection—Joint indorsees—Successive endorsements in blank—Effect of.*

S. 51 of the Neg. Ins. Act does not require that the endorsements should be at one and the same time. Its effect is only to prevent one of two or more payees or endorsees negotiating the promissory note and its requirements are satisfied if the endorsement is by all the payees or endorsees. Where one of three endorsees of a pro-note for collection endorsed it in blank and handed it over to the other two for collection and the other two later indorsed the note also in blank and delivered it to the plff., the plff. gets a good title to the note. (*Kumaraswami Sastri and Devadoss, JJ.*) ANNAMALAI CHETTY *v.* MUTHIAH CHETTY. (1922) M. W. N 263 : 1922 Mad. 210.

——— S. 56—*Promissory note—Transfer of balance due under.*

S. 56 of the Act does not prohibit the transfer of the balance due under a promissory note. It only prohibits a transfer of a portion only of the sum due upon it (*Johnstone, C. J.*) JAICHAND *v.* SARDAR SINGH. 5 P. W. R. 1918: 44 I. C. 264: 150 P. L. R. 1917.

——— S. 57—*Promissory note in favour of executor—Suit by legatee without indorsement—Not maintainable.*

NEG. INS. ACT (XXVI OF 1881), S. 57.

Defendant executed a promissory note in favour of A one of the executors of the estate of a deceased person. The executors were subsequently discharged and one of the legatees, in whom the estate vested, assigned the promissory note to the plaintiff. There was no indorsement of the promissory note by the executor in favour of the legatee. In a suit on the promissory note by the plaintiff *held* that the plaintiff had no valid title to the promissory note and the suit was not maintainable. (*Ayling and Odgers, JJ.*) KUPPUSWAMI MUDALIAR *v.* NARAYANASWAMI AIYER.

44 M. L. J. 510 : 32 M L T. (H. C.) 192 : 17 L. W. 676: (1923) M W. N. 382: 1923 Mad. 593.

——— **S. 57**—*Succeeding trustee if can sue on pro-note to predecessor without assignment or indorsement.*

A trustee can sue on a pro-note in favour of his predecessor in title without assignment or endorsement. (*Ayling and Seshagiri Aiyar, JJ.*) RAMANADHAN CHETTY *v* KATHAVALEN.

41 Mad. 353: 33 M. L. J 627: 22 M. L: T. 458: (1917) M. W. N. 843: 42 I. C. 934 : 6 L. W. 753 :

——— **Ss. 58 and 85**—*Inter-relation — Forged endorsement—No title can he got under.*

No person can claim title to any negotiable instrument through a forged endorsement except in cases mentioned in S. 85 of the Negotiable Instruments Act, The possession of the person with a defective title is different from the person that has no title at all. The endorsements through which the holder in due course can claim must be genuine. Though the pledgee may be ignorant of the fact that the endorsements had been forged still he takes the pledge at his peril and therefore acquires no title whatever. (*Kennedy, J. C. and Raymond, A. J. C.*) THE KARACHI BANK *v.* KODUMAL KALUMAL.

1923 Sind 54.

——— **S. 59**—*Surety—Paymet of dishonoured Hundi.*

It is only when the surety presents a hundi for payment within reasonable time, and gives notice of dishonour to the drawer, he gets into the shoes of a holder in due course. If a surety pays the amount of a dishonoured hundi, he can recover the amount from the drawer. (*Ayling and Napier,*) MUTHU RAMAN CHETTY *v.* CHUNNAVELYAN CHETTY.

39 Mad. 965; 30 M. L J. 369: 19 M. L, T. 278 : 3 L W. 393: 33 I. C. 508: (1916) 1 M. W. N. 290.

——— **S. 59**—*Failure of consideration—Endorsement by payee after maturity, effect of.*

Where consideration has failed, the payee cannot by endorsing the promissory note after maturity give any rights to the endorsee as against the maker. (*Lindsay, J. C.*) AJAZ HUSAIN *v.* MIRZA MD. SAJJAD. **32 I. C. 432 : 18 O C. 272**

——— **Ss. 63 and 83**—*Presentment for acceptance—Hundi payable on demand.*

The presentment requisite in the cases of a Hundi is presentment for payment and not presentment for acceptance. Ss. 63 and 83 of the Negotiable Instruments Act regulate the condition under which a presentment for acceptance is valid and the consequence of not complying with these conditions and have no application to hundi payable on demand. (*Daniels, J.*) NAND LAL *v.* FIRM GULAB RAI NARAIN DAS.

1923 A. 345.

NEG. INS. ACT (XXVI OF 1881), S. 64.

——— **Ss. 64 and 76** (d)—*Hundi—Drawer and drawee the same—Presentation for payment—Not necessary.*

In a case where the drawee and drawer of a hundi are the same, presentation for payment is not necessary, for no question of damage can arise as the facts are all known to the person drawing it. (*Ryves and Gokul Prasad, JJ.*) PACHKAURI LAL *v.* MUL CHAND.

44 All. 554: 20 A. L. J. 437: L.R. 3 A. 379 : 1922 All. 279.

——— **Ss. 64 and 76**—*Bill of exchange—Presentment—Drawer's liability—Onus.*

The payee of a bill of exchange endorsed it to plff. and became an insolvent. Plff. sued the drawer and the drawee without presenting the bill to the drawee The drawer had drawn the bill for articles sold to the drawee. *Held*, that no presentment having been made the drawee was not liable and the onus of proof that the drawer did not suffer damage lay on plff. (*Richards, C.J. and Tudball, J.*) NANHEY MAL *v.* CHAITRAM.

16 A. L. J. 899: 48. I. C. 364 : 41 All. 40.

——— **Ss. 64 and 76** (d)—*Presentation—Burden of proof.*

Where the holder of *hundi* sues the drawer and the other parties to it without however having made any presentment of the *hundi*, the onus is on him to prove that the drawer could not suffer damage by such non-presentation. Scope of Ss. 64 and 76 (d) Explained. 33 A. 4 Foll. *Richards, C. J. and* (*Rafique, J.*) GAYA DIN *v.* SRI RAM.

39 All. 864 : 39 I. C. 649: 15 A L. J. 267.

——— **S. 64**—*Indorsee—Proof of presentment.*

An endorsee of a bill of exchange cannot recover judgment against the drawee without proof of presentment. (*Harrington and Carnduff, JJ.*) SINGAR MAL *v.* BHUDAN SAHU.

19 I. C. 251.

——— **Ss 64 and 76** (a)—*Loss of Hundi does not excuse non presentment—Power to get duplicate—Power of Courts.*

Neither bankruptcy nor death of the party dispenses with the presentment under section 64 of the Neg. Ins. Act as even the loss of the bill or the note does not excuse non-presentment. Power to obtain duplicate in case of loss is a part of the mercantile laws of countries and ample scope is given to it by Court of Equity in England both on bills lost before and after maturity and on notes as well. Indian Courts administering rules of equity, justice, and good conscience will adopt the above as being not only in consonance with the spirit of the section but also as being the rule applied to similar cases in England. (*Scott Smith, J.*) FIRM OF UDHO RAM CHANDI RAM *v* FIRM OF HEM RAJ TEJ BHAN.

1924 Lah 198.

NEG. INS. ACT (XXVI OF 1881), S. 64.

——S. 64—*Hundis executed as collateral security—Non-presentation—Effect of.*

Under S. 64 of the Act the effect of non-presentment of Hundi is that it cannot be made the basis of a claim against the drawer or the person signing as surety. But where it has been given as a collateral security of a book debt and the creditor does not make use of it there is no novation and the creditor is not debarred from suing on the original cause of action. (*Robertson and Beadon, JJ.*) SURAJ KUMAR *v.* BALDEO DAS.
18 I. C. 701 : 23 P. W. R. 1913 : 60 P. L. R. 1913 : 48 P. R. 1913.

——S. 64 — *Hundi— Presentment—'Other parties'—Meaning of.*

Presentment for payment is necessary to charge the acceptors of a Hundi. The words "Other paties" in S. 64 mean parties other than the holder. 21 All. 450; 32 Bom. 247 not Foll. (*Daniels, A. J. C.*) THE OUDH COMMERCIAL BANK LTD, *v.* GUR DIN. **59 I. C. 604 : 23 O. C. 364.**

——S. 64—*Presentation of pronote— When necessary.*

Presentation of a pro-note is a necessary condition only for making liable persons other than the makers. (*Pratt, J. C. and Boyd, A. J. C.*) RAM SINGH *v.* PARUMAL.
32 I C. 582 : 9 S. L. R. 150.

——S. 67—*Promissory note—Plea of material alteration.*

Where one or two joint promisors admits execution of a promissory note it is not open to him to plead a material alteration of the note 26 M. L. J. 257 Dist. (*Hannay, J.*) TUNUGUNTLA BRAHMAYYA *v.* SANGAM RAMI REDDI.
25 I. C 590 : 16 M. L. T. 185 : (1914) M. W. N. 705.

——S. 74—*Applicability to instrument intended to be a continuing security.*

The rules as to reasonable time being necessary for presentation as contemplated by S. 74, should not be applied with extreme stringency with respect to an instrument intended to be a continuing security. (1871) 3 P. C. 574 Foll. (*Patheram, C. J., Princep and Piggott, JJ.*) SREE NATH ROY *v* PEARY MOHAN.
25 C.L.J. 91 : 39 I. C. 205 : 21 C. W. N. 479.

——S. 76—*Right to set off.*

The acceptor of a bill of exchange is entitled to set off on the due date against the payee and pay only the balance. (*Macleod, J.*) INDIAN SPECIE BANK, LTD. *v.* NAGINDAS NURIJIVANDAS NAUVATI. **35 I. C. 628 : 18 Bom. L. R. 689**

——S. 76—*Presentment for payment—Mere demand.*

A mere demand of money does not amount to a presentment for payment. In order to comply with the law the holder must exhibit the bill to the person from whom he demands payment and offer to deliver it on payment. (*Shadi Lal and Martineau, JJ.*) RAM SINGH *v.* GULAB RAI.
55 I. C, 610 : 2 Lah. L. J. 316 : 1 Lah. 262.

NEG. INS. ACT (XXVI OF 1881), S. 79.

——S. 76 (b)—*Engagement to pay.*

The engagement to pay must have been entered into prior to maturity according to S 76.(*b*). (*Lyle, J.C.*) THAKUR DIN *v.* THE OUDH COMMERCIAL BANK, LTD. **57 I. C. 304 : 23 O. C. 91.**

——S. 76 (d)—*Presentation— Plea of—Subsequent plea that no presentation was necessary—Drawee having no funds of drawer—Effect of.*

Though the plaintiff in a suit on a Hundi fails to prove that there had been a presentation of the Hundi as alleged by him he could nevertheless show that the case waa one in which no presentation was necessary. S. 76 (*d*) of the Neg. Ins. Act applies where the drawer has no funds with the drawee at the time the bill is being drawn or in a case where the drawer has no reasonable expectation that the drawee will accept for his accommodation. (*Lindsay and Kanhaiya Lal, JJ.*) GENDA LAL *v.* BALKISHAN.
L. R. 3 A. 519 : 1922 All. 422.

——S. 76 (d)—*Damage—Proof—Onus.*

The provisions of S. 76 (*d*) of the Neg. Ins. Act are by way of exeception to the general rule that presentment for payment is necessary and the burden is on the person who claims that his case falls within that exception and wished to make the drawer liable in spite of non-presentation to prove that the drawer could not suffer damage on account of non-presentation to the acceptor. (*Lyle, J. C.*) THAKUR DIN *v.* THE OUDH COMMERCIAL BANK, LTD.
57 I. C. 304 : 23 O. C. 91.

——S. 78—*Promissory note— Indorsement not for collection alone—Who can sue.*

When an indorsement on a promissory note bears out no accountability between the indorser and indorsee it is not an indorsement for collection merely and the holder alone can sue on the note. (*Seshagiri Aiyar, J.*) PATOJU SANGAYYA *v.* PATOJU SANYASI. **23 I. C. 545.**

——Ss. 78 and 82—*Joint promisees—Who can sue—Holder, meaning of.*

Each payee of a promissory note is not entitled to bring a separate suit for the recovery of his own share. But one or more payees can give a discharge without the concurrence of the others. The holder in the sections must be taken to mean all the payees jointly and not one or more of them. (*White, C. J., Sankaran Nair and Sadasiva Aiyar, JJ.*) MANNAVA ANNAPURNAMMA *v.* UPPALA AKKAYA. **36 Mad. 544 : 13 M. L. T. 268 : (1913) M. W. N. 328 : 19 I. C. 12 : 24 M. L. J. 333 (F. B.).**

——S. 79—*Interest—Rate.*

Plff. is entitled to interest at the stipulated rate from the date of the institution of the suit till the date fixed for payment. (*Kanhaiya Lal, A. J. C.*) GHAZAFFER HUSSAIN *v.* MAHABIR PRASAD.
17 I. C. 309.

——S. 79 — *Rate of interest specified — Power of court to disallow interest — Payment by instalments, when can be avoided.*

Under S. 79 of the Neg. Ins. Act the court has no option to disallow interest, where a specified

NEG. INST. ACT (XXVI OF 1881), S. 80.

rate is provided for in a pro-note; payment by instalments may be ordered where the rate of interest is exhorbitant. (*Tommey, J.*) GOVINDJEE *v.* C. KO. PO YEE. **11 I. C. 891 : 4 Bur. L. T. 203.**

——S. 80—*Interest on Hundi*

If there is no cogent reason, a Court must under S. 80 award interest at 6 per cent on a Hundi from the date of execution to the date of realization. (*Johnstone, J.*) THAKUR SINGH *v.* ISHAR SINGH. **43 P. W. R. 1911 : 10 I. C. 847 : 113 P. L. R. 1911**

——S. 80—*Interest*—Shah Jog *Hundi.*

Interest at 6 p. c. will be allowed on a *Shah Jog Hundi* when no rate is mentioned therein. (*Rattigan and Shah Din, JJ.*) KISHORE CHAND *v.* GURDITTA MAL. **165 P. L. R. 1911. 52 P. R. 1911 : 10 I. C. 315 : 162 P. W. R. 1911.**

——S. 80— *Rate of interest — Unstamped ageerment as to—Evidence.*

No secondary evidence of an unstamped written agreement to pay interest at a certain rate is allowed. In such case interest at 6 per cent, should be allowed under S. 80 of the Act. (*Mitra, A. J. C.*) PENTAYA *v.* KESHEORAO. **56 I. C. 249 : 16 N. L. R. 68.**

——S. 80—*Interest—Rate of.*

The statutory liability imposed by S. 90 of the Neg. Ins. Act upon the executant of a promissory note to pay interest is enforceable despite the absence of agreement to pay interest. The Interest is to be calculated from the date on which the consideration under the instrument ought to have been paid by the party charged, until tender or realization. (*Mittra, A. J. C.*) LAXMIBAI *v.* BHAGWANT SITARAM. **51 I. C. 106.**

——S. 80—*Interest— Contract to pay—Enforceability.*

A contract to pay interest made simultaneously with the execution of a promissory note but not embodied therein is valid, and will be enforced between the parties to such contracts. 29 A. 33 Foll. 6 A. L. J. 233 Diss. S. 80 only confers but does not take away a right to interest. (*Stanyon, A. J. C.*) RANGAPPA *v.* BISMILA KHAN. **32 I. C. 238 : 12 N. L. R. 9.**

——S. 80— *Interest — When note silent—Plff. cannot recover more than 6 per cent.*

Where a promissory note does not provide for repayment of interest the plaintiff cannot recover more than six per cent. interest per annum and the order of the lower Court awarding higher rate of interest must, therefore, be discharged. (*Kanhaiya Lal, J. C.*) KANHAIYA *v.* AZIM-UL-LAL. **25 O. C. 69 : 1922 Oudh 122.**

——S. 80—*Promissory Note—Interest.*

Where no rate of interest is mentioned in promissory note, the Court can allow only 6 per cent. interest. (*Coutts and Macpherson, JJ.*) SOMARENDARA *v.* MAHADEO. **63 I. C. 296.**

——S. 80—*Interest — Subsequent agreement to pay.*

S. 80 does not bar the recovery of the interest which the debtor subsequently to the execution

NEG. INST. ACT (XXVI OF 1881), S. 87.

of the promissory note agrees to pay in consideration of the creditor not pressing his demand immediately. (*Jwala Prasad and Adami, JJ.*) DAMODAR DAS *v.* BANARES BANK, LTD. **5 Pat. L J. 536 : 58 I. C. 265 : 1 P. L. T. 691.**

——S. 80—*Interest—Hand-note silent.*

Where a hand-note does not specify the rate of interest payable, the lender is entitled under S. 80 of the Act to interest at the rate of 6 per cent. per annum from the date when the money ought to have been paid. 29 A. 33 ; 6 A. L. J. 233 Foll; 30 C. 44 Not Foll. (*Mullick and Atkinson, JJ.*) BISHUN CHAND *v.* AUDH BIHARI LAL. **1 Pat L. W. 615 : 2 Pat. L. J. 451 : 40 I. C. 350 : 1917 Pat. 279.**

——S. 80—*Hundi—No mention of interest—Interest payable.*

When no rate of interest is mentioned in the hundi sued upon, the plff. is entitled to interest at the rate of 6 per cent per annum under S. 80 of the Negotiable Instruments Act unless there is special rate of interest contracted for by some other contract in writing, contemporaneous with the hundi (*Mullick, J.*) BANWARI LAL *v.* JAGAR NATH PRASAD. **35 I. C. 431 : 1 Pat. L. J. 71.**

——S. 83—*Applicability—All previous parties, meaning of.*

Per Reid, C J.—The words 'all previous parties' in S. 83 includes the drawer, S. 83 of the Act applies only to those bills of exchange in which acceptance by the drawer is obligatory. And the only bills requiring acceptance are those described as "after sight". The ordinary Hundi does not require presentation for acceptance. *Per Kensington, J.*—"All previous parties" do not include the drawer. (*Reid, C J., and Kensington, J.*) KHAN CHAND *v.* GOLAB RAM. **142 P. L. R, 1911 : 39 P. R 1911 : 10 I. C. 133 : 234 P. W. R. 1911.**

——S. 83—*Applicability — Presentment for payment.*

S. 83 of the Negotiable Instruments Act does not apply where a hundi is presented not for acceptance but for payment. (*Lindsay, J. C.*) TULSI RAM *v.* GUR DAYAL. **48 I C, 423 : 5 O. L. J. 445.**

——S. 83—*Applicability—Hundi payable at sight—Holder for valuable consideration—Return of consideration.*

S. 83 of the Act does not apply to cases of Hundis payable at sight for they are presented not for acceptance but for payment. Holders of hundis for valuable consideration are entitled to a return of the consideration money paid by them to their endorser if the hundis subsequently turn out to be worthless and no payment can be obtained upon them. (*Lindsay, J. C.*) RAM DAYAL *v.* LALTA PRASAD. **47 I. C. 683 : 5 O. L. J. 415.**

——S. 87—*Material alteration — Name of payee.*

An alteration of the name of the payee so as to make him an altogether different person is a material alteration within the meaning of S. 87 of the Neg Ins. Act. (*Stuart and Ryves, JJ.*) KAMAL KHAN *v.* NIZAMUDDIN. **20 A. L. J. 987 (2) : 1923 A. 123**

NEG. INST. ACT (XXVI OF 1881), S. 87.

——S. 87—*Pro-note — Material alteration—Decree on admissions.*

When the plff. in a suit upon a promissory note is proved to have materially altered it the Court would not grant him a decree even for the amount admitted by the deft. to be due. 5 C. W. N. 56 Dist 25 A. 580 (F. B.) not Foll. (*Rafique, J.*) BABUMAL *v.* DWARKA DASS. **25 I. C. 667.**

——S. 87—*Material alteration*—Bona fides.

An instrument is not vitiated by an alteration made in it in good faith by a party without the knowledge of the others if it was intended to carry out the original intention of the parties (*Woodroffe and Chaudhuri, JJ.*) ANANDA MOHAN SAHA *v.* ANANDA CHANDRA SAHA.
44 Cal. 154 : 35 I. C. 182 : 25 C. L. J. 155.

——S. 87—*Material alteration — Period of payment.*

Any alteration in the bill which changes the identity of the contract therein, must be regarded as a material alteration. (1882) 9 Q. B. D. 265 Rel. When the bill is materially altered it is discharged and the law does not allow the party claiming under it to fall back upon the contract as it existed prior to the alteration. The alteration in the period of payment discharges the non-consenting drawers from liability on the bill. (*Shadi Lal and Martineau, JJ.*) RAM SINGH *v.* FIRM OF GULAB RAI. **2 Lah. L. J. 316 : 55 I. C. 610 : 1 Lah. 262.**

——S. 87—*Pro-note altered in material portion—Suit on.*

Where a pro-note executed in Mysore was found torn in a material portion affecting its validity in the place of origin, it amounted to a material alteration invalidating the note and so could not be sued on in Madras. An alteration which gives a man a right of action which he would otherwise not have is a material alteration. (*White, C. J and Oldfield, J.*) LAKSHMAMMAL *v* NARASIMHARAGHAVA IYENGAR. **38 Mad 746 : (1913) M. W. N. 833 : 14 M. L T. 398 : 21 I. C. 445 : 25 M. L. J. 572.**

——S. 87—*Material alteration.*

Where a document is described as a promissory note but is torn to pieces and is pieced together in such a manner that the name of the payee and the words 'or order' were missing so that in effect it became a bond, it was held there was a material alteration whereby the legal character of the instrument itself was changed. (*Wallis, J.*) LAKSHMAMMAL *v.* NARASIMHARAGHAVA IYENGAR. **17 I. C. 281 : 12 M. L. T. 333**

——S. 87—*Misconstruction of section—Whether ground for revision.*

A mere misconstruction by a Subordinate Court of S. 87 of the Neg. Ins. Act, is not a ground for revision by the High Court under S. 115, C. P. C. (*Abdur Rahim, J.*) VENKATA SUBRAMANIAM *v.* KANCHI RAJU. **12 I. C. 138.**

——S. 87—*Material alteration — Alteration of date.*

The alteration in a pro-note of the date of execution, is a material alteration (*Pratt, J.*) KEDAR NATH SINGH *v.* W. C. GARRAD.
1922 L. B. 40 (1)

NEG. INST. ACT (XXVI OF 1881), S. 98.

——S. 87—*Negotiable instrument—Insertion of rate of interest.*

The insertion of a rate of interest not agreed upon by the parties when the note was first made is a material alteration of the document. (*Rigg. J.*) TRIBENI *v.* SAHU. **50 I. C. 517 : 11 Bur. L. T. 257.**

——Ss. 92 and 119—*Interpretation—Bill of exchange payable at sight or on demand—Dishonour by non-payment.*

The provisions of Ss. 91, 92 and 93 of the Neg. Ins. Act dealing with dishonur by non-payment are applicable to bills of exchange payable at sight or on demand. If the drawee refuses to accept, it becomes a dishonour by non-payment. There may be acceptance and dishonour by non payment of a bill payable on demand though presentment of acceptance is not required by law in such a case. (*Abdur Rahim and Oldfield, JJ.*) VEERAPPA CHETTY *v.* VELLAYAN AMBALAM.
10 L. W 39 : 52 I. C. 370 : (1919) M. W. N. 780.

——Ss. 93 and 98—*Rule as to—Presentment if admits of departure—Necessity for.*

The fact that the hundi was not presented on the due date did not have the effect of a non-suiting plaintiff as the *hundi* was expressly payable at the Aliance Bank of Simla at Delhi, and neither the acceptor nor any person authorised to pay had attended there during the usual business hours. Presentment was therefore not necessary under S. 76 (*a*) of the Act. The law in S. 93 of the Act requires the holder to give notice of dishonour to the person or persons other than the drawee or acceptor whom he seeks to make liable on a bill. This rule does not admit of any departure except in the cases enumerated in S. 98 and as the plaintiff in this case had failed to prove the only exemption relied upon by him *viz.*, that the party charged could not suffer damage for want of notice his suit against the drawers must also fail on the ground of want of notice of dishonour. (*Shadi Lal and Martineau, JJ.*) RAM SINGH *v.* GULAB RAI MEHR CHAND.
1 Lah. 262 : 55 I. C. 610 : 2 Lah. L. J. 316.

——Ss. 93, 94, 105 and 107—*Hundi—Notice of dsihonour—Delay*

Neglect to give notice of dishonour within a reasonable time exonerates the indorsers and others concerned specially where they are most likely to suffer damage thereby. 159 P. R. 882 Foll. (*Rattigan, J.*) JAGGAN NATH NATHU MAL *v.* RAM DAS BRIJ DAS.
140 P. W. R. 1914 : 25 I. C. 881 : 243 P. L. R. 1914.

——S 98—*Notice of—Dishonour.*

In a suit on a dishonoured bill of exchange notice of dishonour is absolutely necessary to give plaintiff a cause of action which can only be dispensed with under the circumstances mentioned in S 98. (*Knox and Griffin, JJ.*) MUTHAN *v.* PALTU. **14 I. C. 51.**

——S. 98—*Onus of proof—Exception.*

S. 98 of the Act contains the exceptions to the general rule requiring notice of dishonour and the person relying upon any such exception must

NEG. INS. ACT (XXVI OF 1881), S. 98.

establish all the requirements thereof. (*Shadi Lal and Martineau, JJ.*) RAM SINGH *v.* FIRM OF GULAB RAI. 1 Lah. 262 : 55 I. C. 610 : 2 Lah. L. J. 316

——S. 98—*Negotiable Instrument—Notice of dishonour not given to drawer—Damage—Onus.*

The more correct view is that reasonable opportunity should have been given to the plaintiff to prove their own point. In a suit by the holder of a dishonoured hundi where no notice of dishonour has been given to the drawer, the burden of proving that the party charged could not suffer damage for want of notice is on the plaintiff. There should be a definite issue on the point. (*Kensington, J.*) JHANDA RAM *v* TODA MAL. 96 P. W. R. 1911 : 10 I. C. 405 : 173 P. L. R. 1911.

——S. 105—*Presentment for payment—Reasonable time—Law or fact.*

The question as to the reasonableness of the time for presenting a bill of exchange for payment is mixed question of law and fact 31 M. 364, Dist. (*Shadi Lal and Dundas, JJ.*) FIRM OF KATASI SINGH KAHAN SINGH *v.* DAULAT RAM KIRPARAM. 56 I. C. 936 : 1 Lah. L. J. 158.

——S. 118—*Consideration—Recital of payment of cash—Presumption.*

In a suit on a promissory note a decree can be passed against the defendant if the promissory note tells of the payment of the consideration in cash, in which case there is a presumption in its favour, and if the defendant does not rebut it But if the plaintiff himself states that a part of the consideration was paid in cash and the rest in some other way but fails to prove the payment of the latter part, his claim must fail to the extent of the amount covered by the latter part. (*Mears, C. J. and Piggott, J.*) LALA SHAMBHU DAYAL *v.* LALA LALLU MAL. L. R. 4 A 458.

——S 118—*Hundi—Plea that transaction was by way of loan—Onus.*

Where a person alleges that a hundi was given by way of loan and that the transaction was really one of loan in the form of a hundi the onus of proofs lies on him (*Kotval, A. J. C.*) GOVARDHANDAS *v.* HARLAL RAMSUKH. 1923 Nag. 62

——S. 118 (a) — *Presumption — Criminal trial.*

The presumption that a pro-note was for consideration will not necessarily apply in a criminal trial and the prosecution must prove that the promissory note was in fact executed for consideration and that the accused committed perjury in saying that they were without consideration. (*Gokul Prasad, J.*) SAKHAWAT HAIDAR *v.* EMPEROR. 59 I. C 198 : 22 Cr. L. J. 54 : 18 A. L. J. 1151.

——S. 118 (a)—*Hundi—Presumption of consideration.*

Under the Act, it must be presumed that consideration passes when a *hundi* is drawn, unless evidence is given to the contrary. But if the plff. chose to open the case and lead evidence as to the passing of consideration, which was disbelieved by the Court, no such presumption arises (*Rafique, J.*) KISHEN BALLATH *v.* GHURE MAL. 28 I. C. 390: 13 A L. J. 322.

NEG. INS. ACT (XXVI OF 1881), S. 118.

——Ss. 118 (a) and 9—*Antecedent debt.*

The mere existence of an antecedent debt is consideration within the meaning of S. 118. (*Beaman, J.*) DAULAT RAM *v.* NAGINDASS. 19 I. C. 789 : 15 Bom. L. R. 333.

——S. 118 (a)—*Consideration—Inconsistent statements—Shifting of onus.*

There is no doubt a presumption under the law that a maker of a promissory-note has received the consideration, but the fact that the plaintiffs' agent's statement with regard to consideration for the promissory-note was entirely inconsistent with the plaintiffs' allegation in his plaint was sufficient to shift the onus on to the plaintiffs. 48 P. R. 1915 Foll. (*Martineau, J.*) SIRAJ-UD-DIN *v.* MT. CHAMPO. 68 I. C. 443 (2) : 3 Lah. L. J. 439.

——S. 118 (a) — *Consideration— Presumption.*

The onus of proving want of consideration for a *hundi* is on the drawer for there is a statutory presumption in favour of the passing of consideration. (*Shadi Lal and Wilberforce, JJ.*) MADHO RAM *v.* NANDU MAL. 58 I. C. 982 : 1 Lah. 429.

——S. 118 (a)—*Promissory note—Presumption of consideration—Onus.*

The initial presumption is that a pro-note is supported by consideration and the onus lies upon the executant to prove that no consideration passed. When in a pro-note the consideration was stated to have been paid in cash and the plff. was constrained to admit in his pleadings that consideration did not pass asstated in the pro-note the presumption is rebutted and the plff. should affirmatively prove consideration. (*Johnstone and Shah Din, JJ.*) ZOHRA JAN *v.* RAJAN BIBI. 62 P W. R. 1915 : 48 P. R. 1915 : 28 I. C. 402 : 146 P. L. R. 1915.

——S. 118 (a)—'*Burden of proof as to consideration*'.

Where the executant of a pro-note appeared to be a boy just emerged from minority without any ready money but with large expectations, the payee of the note should show that consideration passed from him for the note. 20 B. 367 ; 29 M. L. J. 23 Foll. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SAMI SAH *v.* PARTHASARATHY CHETTY. 31 I. C. 739.

——S. 118 (a)—*Promissory note—Consideration money—Burden of proof on plaintiff.*

The circumstances showing that the plff. did not pay the whole of consideration money of the promissory notes shifts on him the burden of proving that the consideration money was paid in full. (*Wallis, C. J. and Seshagiri Iyer, J.*) SUNDARAMMAL *v.* SUBRAMANIA CHETTIAR. 30 I. C. 971 : 29 M L. J. 236

——S. 118 (a)—*Indorsement—Consideration—Presumption.*

When the holder of a *hundi* endorses it in favour of another, there is a presumption unless

NEG. INS. ACT (XXVI OF 1881), S. 118.

rebutted by good evidence that the endorsement is for consideration. (*Lyle, J. C.*) THAKUR DIN *v.* THE OUDH COMMERCIAL BANK, LTD.
57 I. C. 304 : 23 O. C. 91.

——S. 118 (a)—*Pro-note Presumption of consideration—Proof.*

In a suit on a promissory note the evidence as to the earlier note is not necessary when the execution of the note in suit and payments of interest on it are satisfactorily proved. (*Twomey, J.*) MAUNG SAN HLA *v.* SUBRAMANIAM CHETTY.
12 I. C 861 : 4 Bur. L. T. 144.

——S. 118 (b)—*Antedated pro-note.*

If a promissory note is shown to be antedated, no presumption arises that it was executed on the date it bears on its face. The presumption as to consideration arising under S. 118, may in the case of a promissory note executed by a father (Hindu) also bind the son. But if the document itself is proved to be false even against the father, no presumption arises. (*Wallis, C. J. and Phillips, J.*) RAGHUNATHA CHARI *v.* ARVAMUTHAIYANGAR. **34 I. C. 617.**

——S. 118 (e)—*Endorsements—Order of—Presumption.*

When there is no satisfactory evidence as to the order in which indorsements on the note were made, the statutory presumption that they were made in the order in which they appear thereon will prevail. (*Wallis, C.J. and Sadasiva Aiyar, J.*) KOTHANDARAMASWAMI NAIDU *v.* MUTHIAH CHETTI. **45 I. C. 186.**

——S. 118 (g)—*Endorsee from payee of hundi—Holder in due course—Presumption.*

An endorsee from the payee of a *hundi* is presumed until the contrary is proved to be a holder in due course that is to say a holder for consideration by reason of S. 118 (g) of the Neg. Ins. Act and is unaffected by the absence of failure of consideration as between the drawer and the payee. (*Beaman and Hayward, JJ.*) SAKARAM MANSARAM *v.* GOLAPCHAND TARACHAND.
27 I. C. 362 : 16 Bom. L. R. 743.

——S. 119—*Dishonour—Protest.*

Under S. 119, Negotiable Instruments Act, a Court is entitled to presume dishonour if there is a proper protest. A mere entry by a notary public of the words "noted for non-payment" without giving the date of dishonour and in the absence of a certificate of protest. (*Abdur Rahim and Oldfield, JJ.*) VEERAPPA CHETTY *v.* VELLAYAN AMBALAM. **10 L. W. 39 : 52 I. C. 370 : (1919) M. W. N. 780.**

——Ss. 120 and 122—*Indorser, if estopped from disputing validity of hundi.*

Per Seshagiri Aiyar, J.—An endorser of a negotiable instrument is estopped as against the indorsee from setting up the invalidity of the instrument. (*Seshagiri Aiyar and Phillips, JJ.*) ARUNACHALLAM CHETTIAR *v.* NARAYANAN CHETTIAR. **42 Mad. 470 : 36 M. L. J. 301 : (1919) M. W. N. 188 : 51 I. C. 300 : 9 L. W. 438.**

NOABAD TALUQ.

——S. 120—*Holder in due course.*

The payee of a negotiable instrument to bearer is not a "holder in due course." (*Shaw, J. C.*) HIDAYAT ALI BEG *v.* NGA KYAING.
24 I C. 721. : (1914) U. B. R. II 13.

——S. 135—*Bills of exchange—Foreign bills—Dishonour, notice of—Acceptance—Customs of trade—Contract—Effect of war—English Bills of Exchange Act.*

Defts. shipped goods to London before the outbreak of war, in an enemy vessel destined ultimately to enemy ports. The goods were covered by Bills of Exchange drawn in Calcutta on London firms with their addresses given in the Bills as London. The bills were discounted with and endorsed to the plffs. in Calcutta. The Bills of Exchange reached London, one on the day war was declared, and the others on a subsequent day. The endorsees duly presented the bills for acceptance. They were returned dishonoured by the drawees. *Held*, that the bills were foreign instruments payable in a different place from that in which they were made and endorsed. S. 135 of the Neg. Ins. Act, applied and the law of England determined what constituted dishonour and what notice of dishonour was sufficient. Any further step in the performance of the contract was rendered impossible by the outbreak of war and the acceptance of the bills by the drawees would have amounted to a trading in goods destined for enemy ports. The drawees therefore were under no obligation to the drawers to accept the bills. The further performance of the contract having become impossible and there being no obligation of the drawees to accept, the plffs. were not bound to give notice of dishonour. The giving of notice of dishonour was an important part of the 'treatment' referred to in S. 42 and in the circumstances of the case where such notice of dishonour became unnecessary. The mere fact that the bills were left with the drawees for more than the customary time could not bar the plffs. from recovering on the bills. (*Sanderson, C. J. and Woodroffe, J.*) SUKHLALL CHANDAN MULL *v.* THE EASTERN BANK, LTD.
58 I.C. 641 : 46 Cal. 584.

NEGOTIABLE SECURITY.
See NEG. INST. ACT.

NEW POINT.
See PRACTICE.

NEXT FRIEND.
See (1) C. P. CODE, O. 32.
(2) MINOR.

NIHANG GOSAINS.
See HINDU LAW—SUCCESSION.

NIKKA.
See MAHOMEDAN LAW.

NOABAD TALUQ.

——*Government has right to settle lands with persons other than those in possession.*

Government's position as regards noabad land is equal to that of an ordinary zemindar. It may settle the lands, like any ordinary zemindar and is not bound to grant a pattah of those lands to the party in possession. It may as well settle the lands with persons other than those in possession. (*Chatterjee and Pearson, JJ.*) NAZIR AHMAD CHOWDHURY *v.* THE SECRETARY OF STATE FOR INDIA. **35 C.L.J. 580 : 26 C.W.N. 193 : 1922 C. 337.**

NOABAD TALUK.

——*If permanently settled.*

A Noabad-Taluq in Chittagong may or may not be a permanently settled one. 26 C. 792 Dist. (*Fletcher and Huda, JJ.*) ASHRAF ALI *v.* KARAM ALI. **46 I. C. 927 : 22 C. W. N. 1025.**

——*Report of Revenue Officers—Mistakes in, does not affect transfer.*

The nature of a transfer cannot be affected by a mistake in the report of a revenue officer relating to a mutation due to carelessness. (*Scott Smith and Harrison, JJ.*) SADHU RAM *v.* UTTAM DAS. **3 Lah. L. J. 516.**

NON-JOINDER.

See C. P. C., S. 99, O. 1, RR. 9 AND 13.

NON-OCCUPANCY HOLDING.

See (1) LANDLORD AND TENANT.
(2) OCCUPANCY HOLDING.

NON-TRANSFERABLE HOLDING.

See OCCUPANCY HOLDING.

NORTHERN INDIA CANAL AND DRAIN ACT (VIII OF 1873).

—— **Ss. 3 (2) 70**—*Watercourse used by permission—Stoppage—Offence*

Where one person merely permits another to take water through a watercourse existing on the farmer's land and after some years discontinues the permission and stops the watercourse, he cannot be held guilty of an offence under S. 70 of the Act. (*Wilberforce, J.*) HUKMAN *v.* EMPEROR. **1 P. W. R. 1921 Cr. : 61 I. C. 717 : 22 Cr. L. J. 429 : 13 P. L. R. 1921.**

—— **S. 15**—*Repairing canals—Entering upon adjacent land.*

The words "may execute all works" in S. 15 do not depend upon the preceding words and entering upon the land adjacent is a necessary preliminary for the execution of any work as a canal (*Harrison and Zafar Ali, JJ.*) PUNJAB COTTON PRESS COY *v.* SECRETARY OF STATE FOR INDIA. **4 Lah. 428 : 1924 Lah. 169.**

—— **Ss. 31 and 70 (12)**—*User of canal water for building house involves no penalty—Rr.* 10 *and* 33.

A person using canal water stored in a tank for the purpose of building a pucca house no doubt transgresses R. 10 of the Rules framed under the Act but incurs no penalty for there is none attached to such user. (*Shadi Lal, C. J.*) HARNAM SINGH *v.* EMPEROR. **64 I. C. 497 : 23 Cr. L. J 17 : 7 P. L. R. 1922.**

—— **Ss. 70 (1) and (2)**—*Scope of.*

The preventing of the digging of a watercourse for taking water from a canal does not come within S. 70. (*Scott-Smith, J.*) ARURA *v.* EMPEROR. **7 P.W.R. 1915 (Cr.) : 16 Cr. L. J. 202 : 27 I. C. 762 : 94 P. L. R. 1915.**

—— **S. 70 (4)**—*Distribution by proprietary body not within section.*

A distribution by the proprietary body only is not 'authorised distribution' within S. 70 (4). (*Chevis, A. C. J. and Dundas J.*) EMPEROR *v.* PAKKAR SINGH. **22 Cr. L. J. 203 : 60 I. C 59 : 1 Lah. 604.**

NOTARY PUBLIC.

N. W. F. P. REGULATION (VI OF 1901).

—— **S. 3**—*Hazara Settlement Rules—Effect and scope of.*

It is difficult to regard section 60 of the Hazara Settlement Rules of 1872 as laying down anything more than a rule of evidence. It is perfectly clear that the Legislature intended that Regulation VI of 1901 should be retrospective. It must be remembered that this Regulation goes beyond a mere repeal of the Regulation of 1872 and adds in section 3 a very definite pronouncement that entries made in the Regular Settlement of 1871 shall be regarded as having no mere force than entries made in any other Settlement. It would be difficult perhaps to describe this provision as having a retrospective effect, as its object is to prescribe a rule of evidence for Courts adjudicating upon cases which arise after its enactment. It could only be regarded as retrospective if it be assumed that Regulation I of 1872 not only prescribed a rule of evidence for the guidance of Courts, but also conferred an absolute title irrespective of the evidence upon which a title was based. If this latter view of Regulation I of 1872 be accepted, it is clear that the Legislature in putting into law Regulation VI of 1901 deliberately intended a retrospective effect, *i.e.*, that even if a valid title had been conferred by Regulation I of 1872, such a title should no longer be considered valid by the Courts and should be open to challenge exactly as any other title recorded in the Settlement is so open. (*Pipon, J. C.*) GHULAM HAIDAR SHAH *v.* BAZID SHAH. **72 I. C. 989.**

N. W. F. P. RENT ACT (XII OF 1881).

—— **S. 30-D**—*Acquisition of under-proprietary right—Planting grove inland—Payment of rent.*

In a suit for a declaration under S. 158 of the Tenancy Act that the plaintiffs had acquired under-proprietary rights under that section on the ground that the land in suit had been held rent-free for over 50 years, it was found that the land was granted to the predecessor of the plaintiffs under a written "danpatra" about 100 years ago. The grant gave the grantee the right either to use the land for cultivation or to plant it with a grove. The grantee planted a grove in it. There was evidence of the payment of rent by giving a half share of the produce of the grove. *Held* that the land in question not having been let or held for agricultural purposes within the meaning of S. 4 of the Tenancy Act, the plaintiff's suit was, unsustainable. (*Ryves and Daniels, JJ.*) KESHO DAS *v.* HANUMAN PANDAY. **45 A. 640 : 21 A. L. J. 576 : L. R. 4 A. 208 (Rev.) : 1924 A. 53.**

N. W. P. ACTS.

See (1) AGRA TENANCY ACT.
(2) U. P. ACTS.

NOTARY PUBLIC.

See NEGOTIABLE INSTRUMENTS ACT.

NOTICE.

See also (1) JUDICIAL ORDER.
(2) PRACTICE—NOTICE OF HEARING.
(3) REGISTRATION ACT, S. 50.
(4) SP. REL. ACT, S. 27.
(5) T. P. ACT, SS. 3 AND 41.
(6) TRUSTS ACT, S. 3.

———*Constructive—Possession by third person.*

Where a tenant in possession of the land, buys it under an oral agreement and part of the purchase money is paid, a subsequent purchaser from the landlord, who makes no inquiries about the nature of the tenant's possession must be taken to have had constructive notice of the oral agreement. (*Macleod, C. J. and Shah, J.*) VINAYAK RAO *v.* GYANOBA.
64 I. C. 246 : 23 Bom L R. 1062.

———*What is—Knowledge—Purchaser—Title deed.*

Notice to a party, even when actual is not necessarily knowledge but the same effects must be attributed to it which would flow from knowledge. It is a representative of, or substitute for actual knowledge. Where a party has obtained a full knowledge, there is no longer any need of seeking the legal aid of notice, and the rules concerning the latter no longer apply, for the very fact for which notice is intended only as a substitute, is accomplished by knowledge. Notice to a purchaser by his title-deeds in one transaction, is not notice to him in an independent subsequent transaction, in which the instruments containing the recitals, are not necessary to his title but he will have constructive notice of the fact which affects the purchase of the property in the chain of title of which the paper forms a necessary link. (*Mukerjee and Buckland, JJ.*) BEPIN KRISHNA *v.* JOGESHWAR.
26 C. W. N. 36 : 34 C. L. J. 256.

———*Constructive—Failure to make inquiries.*

Constructive failure to make enquiry which ordinarily would be made by any prudent man is ground against admitting a plea of want of notice. (*Mookerjee and Beachcroft, JJ.*) HANIDHAN DEB NATH *v.* BHAGABATI DASI.
41 Cal. 852 : 19 C. W. N. 89 : 23 I. C. 214 : 19 C. L. J. 420.

———*Constructive—Registration is.*

The registration of an instrument is tantamount to constructive notice of its contents. (*Shadi Lal, C. J. and Harrison, J.*) MALAN *v.* TARA SINGH. **63 I. C. 744.**

———*Judicial proceedings—Adverse order.*

In all judicial proceedings, where no specific rule as to notice exists, the rule "*audi alterim partem*" applies as a principle of natural justice. (*Spencer and Seshagiri Aiyar, JJ.*) VENKATA RAMAIYER *v.* KRISHNA AIYAR.
33 Mad 1091 : 2 L. W. 200 : (1915) M.W.N. 181 : 16 Cr. L. J. 128 : 17 M. L. T. 164 : 27. I. C. 192 : 28 M.L.J. 204.

———*Cancellation—Assignment of a mortgage bond—Validity.*

A notice cancelling an assignment of a mortgage bond should, in order to be effective at least signify an intention to bring a suit to cancel it. (*Sadasiva Aiyar and Tyabji, JJ.*) VENKATASUBBA AIYAR *v.* SUBBARATHNAM AIYAR.
1 L.W. 419 : 15 M.L.T. 331: 23 I. C. 607 : 27 M.L.J. 134.

Prior Agreement.

See SP. REL. ACT, S. 27.

NOTICE OF SUIT.

See also (1) C. P. CODE. S. 80.
(2) LOCAL ACTS.

———*Ownership of letters and documents.*

Where the plff. having sent to the deft. a notice of suit accompanied by some documents and claimed to recover the documents from the defts. *Held*, dismissing the claim, that when the plffs. wrote to the deft. enclosing the documents he did not retain any property in them unless he expressly asked in his letter that the copies should be returned. (*Macleod, C J. and Heaton, J.*) BALUBHAI *v.* THE SECY. OF STATE FOR INDIA. **57 I.C. 538 : 22 Bom. L.R. 785.**

———*Mere demand.*

A mere demand cannot be said to be a notice of suit. (*White, C. J. and Sankaran Nair, J.*) VENKATACHELAPATHY *v.* BOMMAVARA SATYANARAYANA. **25 I.C. 890 : 37 Mad. 283.**

NOTICE TO SUIT.

See (1) LANDLORD AND TENANT.
(2) T. P. ACT, Ss. 106 and 113

NOVATION.

See CONTRACT ACT, S. 62.

NUISANCE.

See (1) C. P. C., S. 91.
(2) TORT.

Injunction

See (1) SP. REL. ACT, SS. 52 TO 57.
(2) TORT.

OATH.

See OATHS ACT.

OATHS ACT (X OF 1873).

———**S. 1**—*Party agreeing to abide by oath of his opponent—Court cannot go into evidence.*

When a party agrees to abide by the oath of the other party or any particular witness, he clearly takes the risk of the witness swearing falsely. What he says in effect is: "whatever this witness states on oath, I am prepared to accept as true and to have the case decided on the basis of it." In such a case the court acts illegally and with material irregularity in entering into evidence on the question of consideration. If a Court notwithstanding such an agreement is to be at liberty to enter into evidence as to the truth or falsehood of the statement made, the effect in substance is to wipe out the agreement altogether ; it might not as well have been entered into. (*Daniels, J.*) MITHU LAL *v.* SRI LAL.
45 A. 724 : 21 A. L. J. 637 : L. R. 4 A. 596 : 1924 All. 126.

———**Ss. 4 and 14**—*Oath administered by foreign court—False evidence—No offence.*

Though the Act extends to the territories of native princes and states in alliance with His

OATHS ACT (X OF 1873), S. 5.

Majesty so far as regards the subjects of His Majesty the Vyara court in the Baroda State cannot be treated as a Court within the meaning of Ss. 4 and 14 of the Act, in relation to proceedings which were held before that Court entirely under the law of the State, and which had nothing to do with any proceedings in British India or under the law in force in British India. (*Shah and Kajiji, JJ.*) RAME BHARTHI HIRAB HARATHI, *In re.* **47 Bom, 907 : 25 Bom. L R. 772: 1924 Bom. 51.**

——S. 4—*Court—Oath.*

All courts are authorised to administer oaths and affirmation in the discharge of the duties or in the exercise of the powers imposed or conferred upon them by law. (*Chevis and Broadway, JJ.*) ABDUL AZIZ *v.* EMPEROR.
17 Cr. L. J. 491 : 36 I C. 171 : 34 P. R. 1916 Cr

——S. 5—*Offer of oath not made—Trial is bad.*

Asking whether a person would take oath and not recording the fact and not actually offering the oath are irregularities vitiating the trial. (*Sanderson, C. J. and Richardson, J.*) AFSAR KAHAN *v.* SHABU MONDOL. **1922 Cal. 148.**

——Ss. 5 and 6—*Omission to administer oath does not vitiate trial.*

The omission to administer oath to a witness would not invalidate the proceedings, or render inadmissible the evidence given. (*Miller, C. J., and Adami, J.*) FATU SANTAL *v* EMPEROR.
2 Pat. L. T 288 : 61 I. C. 705 : 22 Cr. L J. 417 : 6 P. L. J. 147

——Ss. 8 and 9—*Scope of—Reference to referee—Court discretion to refuse—Pleader's power to refer.*

Where the parties to an arbitration agreed merely to abide by the statement of a referee even though not 'on oath or solemn affirmation' then neither section 8 nor section 9 of the Oaths Act would be applicable. Section 9 is by no means mandatory and it seems that under certain special circumstances the Court may have discretion to refuse to refer the matter to the referee. If no judicial proceeding had been recorded, it might very well have been that the so-called agreement was an informal talk not reduced to writing, and in any case looking at the fact that the respondent had the very next day withdrawn from the agreement and revoked it, it cannot be said the Court was wrong in exercising its discretion and in ordering that the case should be disposed of on the merits. A party's agent binds the party by an agreement under section 9 as much as a party himself. A *vakalatnama* gives sufficient authority to a pleader to agree to make a reference under S. 9. 3 A. L. J. 651 Ref. (*Sulaiman, J.*) MT. MASITA BIBI *v.* KHUDA BAKSH. **1923 A. 65.**

——Ss. 8, 9 and 10—*Offer by agent holding special power of attorney to be bound by oath.*

A duly authorised agent holding a special power of attorney enabling him to conduct it in a manner he may deem fit and in particular to withdraw or compromise, can make an offer

OATHS ACT (X OF 1873), S. 9.

under S. 9 of the Oaths Act, to be bound by the oath, of the other party and to have the case decided in accordance therewith. 14 B 455 Dist. (*Tudball and Walsh, JJ.*) WASI-UZ-ZAMAN KHAN *v.* FAIZA BIBI. **38 All. 131 : 32 I. C. 348 : 14 A. L. J. 38**

——Ss. 8, 9, 10 and 11—*Applicability to criminal proceedings.*

The provision of Ss. 8 to 11 of the Act, do not apply to criminal proceedings. 13 B. 389 Rel. on. (*Pratt, J. C.*) IMPERATOR *v.* HUZA ALU.
13 I C. 215 : 13 Cr. L. J. 23 : 5 S. L. R. 129.

——Ss. 9 and 11—*Applicability—Criminal proceedings.*

Ss. 9 to 11 are not intended to apply to criminal proceedings nor to proceedings before a Village Police Patel under Ss. 14 and 15 of the Bombay Village Police Act, 1807. (*Shah and Hayward, JJ.*) CHIMAN DAMODAR BHATTE *v.* EMPEROR.
22 Bom. L. R 898 : 58 I. C. 147 : 21 Cr. L. J. 723 : 45 Bom. 96

——S 9—*Agreement to take oath—Resiling from—Duty of court*

It is not open to the parties to a suit, except for some good reason, to go behind an agreement to be bound by an oath of either party. 22 M. 234; 17 M. L. J. 99 ; 17 M. L. J. 536 ; 18 A. 46 ; 29 A. 49; 22 B. 281 Rel. The Court should consider whether the evidence of the person taking the oath completely disposes of the questions in controversy between the parties. 22 M. 234, Rel. (*Mookerjee and Beachcroft, JJ.*) HIRA LAL *v* JOGESWAR. **16 I. C. 733**

——S. 9—*Offer to be bound by oath—Withdrawal of—Discretion*

Where an offer is made by plaintiff to be bound by oath, the court has full discretion to call upon the deft. to accept or refuse the offer , and, subject to the exercise of that discretion, the offer once made stands, and if the defendant eventually accepts it, the plaintiff is bound by the result. It is not open to the plff. to withdraw the offer as in the case of an ordinary contract. (*Chevis and Harrison, JJ.*) KHAWAJ DIN *v.* MT. NUR.
65 I. C. 700.

——S. 9—*Oath—Person not summoned as witness—Binding effect of his oath.*

A person making a statement on oath on being challenged to do so, is though he is no party to the suit and not summoned as a witness none the less a " witness" and his oath has as much binding force as that of the regular witness. (*Johnstone, J.*) HUSSAIN BIBI *v* NEK ALAM.
157 P. W. R. 1911 : 11 I. C. 833 : 245 P. L. R. 1911.

——Ss. 9, 10 and 12—*Challenge to take oath—Oath taken on later day—Effect of.*

An agreement to an oath contained a provision that if owing to the challenger's failure to pay the cost of taking the oath, the same was not taken, it should be treated as equivalent to the oath having been taken. *Held*, that the provision introduced a method of decision which the law

OATHS ACT (X OF 1873), S. 9.

did not authorise and can have no legal consequence. 31 Mad. 1 Ref. Where the agreement was to take the oath on a particular day but the oath was taken on a later day the burden lies on the person who relies on the oath to show that time was not the essence of the contract, (*Oldfield and Seshagiri Aiyar, JJ.*) ATHERMANKUTTI *v.* CHANDROTH MOIDEENKUTTY.
10 L. W. 140 : 52 I. C. 619 : (1919) M. W. N. 535

——— **S. 9**—*Suit on a promissory note—Agreement to abide by oath—Evidence recorded prior to agreement.*

Where in a suit on a promissory note, evidence had been recorded before an agreement to abide by the deft.'s oath was entered into by plff. *Held*, that it was competent to the Court to decide the suit on the evidence already on record. 17 M. L. J. 99, Dist. (*Spencer, J.*) SESHAGIRI *v.* SANKAYYASETTI. **4 L. W. 258 : 36 I. C 1001 : (1917) M. W. N. 104.**

——— **S. 9**—*Resiling from oath.*

Even if a party resiles from taking oaths in matters to be proved by oaths, it is not equivalent of its proof. No decree can be passed under the circumstances against the resiling party. The Court then can proceed with the suit in ordinary manner drawing inferences from the defaulter's conduct and can impose upon him appropriate costs. (*Benson and Miller, JJ.*) ULAGAPPA CHETTIAR *v.* PERIA KARUPPAN CHETTY.
15 I. C. 195 : (1912) M. W. N. 361.

——— **Ss. 10 and 11**—*Decision on oath*—Res judicata.

The effect of an oath taken under the Oaths Act is merely to furnish conclusive evidence on the matter in issue and a decision on oath is *res judicata*. (*Benson and Sundara Aiyar, JJ.*) SANYASI *v.* ARTASWARO. **36 Mad. 287 : 13 M. L. T. 261 : (1913) M. W. N. 220 . 18 I. C. 835 : 24 M. L. J. 321.**

——— **S. 10**—*Agreement—Essentials.*

Agreement to take oath must specify the form of oath and place where the oath has to be administered. (*Munro, J.*) MANJI *v.* PARAMAYYA HEBBARRA. **9 M. L. T. 234 : 9 I. C. 260 : 21 M. L. J. 618.**

——— **S. 10**—*Oath taken in absence of other party.*

Oath should be taken in the presence of parties to be bound by it. (*Fox, C. J.*) DAR BUX *v.* DAB MEAH. **5 Bur. L. T. 165 . 17 I. C. 930 : 6 L. B. R. 60.**

——— **S. 11**—*Oath taken by plff. on offer by deft.—Effect of.*

Deft. offered to pay the amount claimed by plff. if the latter stated his case on oath in a particular form and the plff. thereupon took the oath as prescribed. *Held*, that the deft. having in effect confessed judgment subject to a condition and that condition having been fulfilled,

OATHS ACT (X OF 1873), S. 13.

there was no further question of law or fact to be tried and the plff. was entitled to a decree. (*Martineau, J.*) JAMNA DASS *v.* NANDA.
118 P. R. 1919 : 49 I. C 1005 : 29 P. W. R. 1919.

——— **S. 11**—*Oath—Effect of on other parties—Compromise.*

An oath is binding only on the person who offers to be bound by it. Where in a suit only one of the plffs. agrees to the dismissal of the suit, in case the deft. takes the oath and the deft. does so accordingly, the dismissal is conclusive only against the plff. who consented. The oath was not binding on the other plffs. though they were present in Court and were silently witnessing the proceedings. (*Chevis and Broadway, JJ.*) TALAWAND *v.* FATEH DIN.
50 P. W. R. 1918 : 83 P. R. 1918 : 45 I. C. 230 : 115 P. L. R. 1918.

——— **Ss 11 and 12**—*Agreement to abide by oath of opponent—Imposition of fresh condition.*

Where the party agreeing to abide by the oath of his opponent imposes fresh conditions at the time of taking the oath, the party taking the oath has the right to enforce the agreement originally entered and if he takes the oath according to the original agreement the evidence will be conclusive against the other party. (17 M. L. J. 99 Expl. 31 M. 1 Ref). (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) THUKKU GOUNDAN *v.* KUPPAUDA GOUNDAN. **17 I. C. 339 : 12 M. L. T. 613.**

——— **S. 12**—*Effect of refusal to take oath.*

A mere refusal to take a particular oath is not sufficient for deciding the issue against the party refusing it. 22 Bom. 680 Foll. (*Rattigan, J.*) GAPPA MAL *v.* PIARALAL.
32 I. C. 619 : 38 P. W. R. 1916.

——— **S. 12**—*Refusal by both parties to take oath,*

A court does not act irregularly or illegally in taking into consideration plff's. refusal to take oath, the deft. agreeing to be bound by it. But no weight should be attached to plff.'s refusal when deft. also refuses. (*Drake Brockman, J.C.*) SUKHDAS *v.* GANESH.
10 I. C. 472 : 7 N. L. R. 50.

——— **S. 13**—*Witness of tender years.*

The evidence of a witness of tender years, taken without administering an oath should be received with due care and caution, but is admissible in evidence under S. 13 of the Act. If the Court is satisfied that the witness is incapable of understanding the obligations of an oath, then his evidence may be taken without an oath. Before examining such witness the Court must satisfy itself whether the witness is capable of understanding the questions put to it and of giving rational answers. Capital sentence need not be passed if the substantial evidence relied on by the prosecution is of such a witness. (*Shah and Marten, JJ.*) HARI RAMJI PAWAR *v.* EMPEROR.
45 I. C. 497 : 19 Cr. L. J. 593 : 20 Bom. L. R. 365.

OATHS ACT (X OF 1873), S. 13.

——— S. 13—*Oath—Omission to administer oath.*

Omission to administer an oath or affirmation even if intentional would be cured by S. 13 of the Oaths Act ; 14 B. L. R. 294 (F. N.) Foll. (*Walmsley and Greaves, JJ.*) EMPEROR *v.* SHOSI BHUSAN MAITY. **32 C. L. J. 31 : 21 Cr. L. J. 817 : 58 I. C. 817 : 24 C. W. N. 767.**

——— S. 13—*Omission to administer oath—Irregularity.*

An omission to administer an oath or affirmation to a deponent is an irregularity which is saved by S. 13 of the Oaths Act. (*Chaudhuri, J.*) BALCHAND *v.* TARAK NATH SADHU. **16 Cr. L. J. 151 : 27 I. C. 215 : 18 C. W. N. 1323.**

——— S. 13—*Omission to take oath.*

Quaere.—Whether S. 13 of the Act applies to cases where the omission to take oath or affirmation is the result of the deliberate act of the Court or of the witness? 14 B L. R. 54 ; 14 B L. R. 295; 27 C. 428 ; 10 A. 207 ; 11 A. 183 ; 16 B. 359 ; 16 M 105 Ref. (*Mookerjee and Beachcroft, JJ.*) NAFAR SHEIKH *v.* EMPEROR. **41 Cal 406 : 14 Cr. L. J. 485 : 18 C. L. J. 582 : 20 I. C. 741 : 18 C. W. N. 147.**

——— S. 13—*Applicability of to intentional omission.*

S. 13 of the Oaths Act does not extend to intentional omission or affirmation of the oath. (*Twomey and Parlett, JJ.*) DEYA *v.* EMPEROR. **43 I. C. 86 : 19 Cr. L. J. 54 : 9 L. B. R. 88.**

——— S. 13 —'*Omission*'— *Accidental and deliberate.*

The words "omission to take an oath or make an affirmation" in S. 13 include only an accidental and not a deliberate omission to take an oath or make an affirmation. (*Twomey and Parlett, JJ.*) DEIYA *v.* EMPEROR. **36 I. C. 468 : 17 Cr. L. J. 500 : 9 Bur. L. T. 133.**

——— S. 14—*Child witness—Non-administration of oath does not affect trial.*

The Court should only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed in intellect to understand what it has seen and to afterwards inform the Court thereof. If the child was sufficiently developed intellectually to describe what she had suffered and, therefore, her testimony or account of it before the Magistrate cannot be brushed aside as inadmissible merely because no oath is administered to her. (*Jafar Ali, J.*) HUSSAIN KHAN *v.* EMPEROR. **1923 Lah. 332.**

OBITER DICTUM.

See PRACTICE—PRECEDENTS.

OBJECTION.

See C. P. CODE., O. 21, R. 57, ETC.

OCCUPANCY HOLDING.

See also LOCAL ACTS.

Determination.
Disposition by will.
Effect of mortgage.
Ejectment.
Exchange.
Execution sale.
Landlord's right afteertransfer.
Partition.
Position of (Purchaser) transferee.
Sub-lease.
Succession.
Transferability.
Miscellaneous.

Determination.

——— *Determination — Relinquishment by tenant—Effect.*

Where an occupancy tenant abandons his field to the Zamindar, the Zamindar becomes the transferee of any of the mortgagor's right that might arise and has a title to redeem. (*Stuart and Ryves, JJ.*) KUMAR SAITHWAR *v* BISHUN MOHAN SAHAI. **L. R. 3 A. 533.**

——— *Determination —Relinquishment—Actual surrender necessary.*

Unless a relinquishment of occupancy right is accompanied by actual surrender to the land, it is not operative. A mere agreement to relinquish occupancy rights, whether or not consideration passes cannot be legally enforced. (*Kanhaiya Lal, J. C.*) MT. BIBI SAIDUNNISSA *v.* FAIYAZ HASAN. **4 U. P. L. R. (O.) 76 : 9 O. L. J. 319 : 1923 Oudh 1.**

Disposition by Will.

——— *Disposition by will—Non-transferable —Devise of portion of holding.*

A non-transferable occupancy holding or a part thereof cannot apart from custom or local usage be devised by will. 42 C. 172 Dist; 42 C. 254 Foll. *Per Chatterjea, J.*—The validity of a transfer of the whole or part of an occupancy holding made voluntarily appears to depend upon the principle of estoppel and that of a transfer made involuntarily upon the principle of acquiescence and waiver. No such principles are applicable to the case of a testamentary disposition. (*Fletcher and N R. Chatterjea, JJ.*) UMASH CHANDRA DATTA *v.* JOY NATH DAS. **43 I. C. 779 : 22 C. W. N. 474.**

Effect of Mortgage.

——— *Effect of mortgage —Dispossession by Zemindar of fixed rate tenant—Effect.*

A fixed rate occupancy tenant mortgaged his holding and subsequently died. He was succeeded by his nepiew whom the Zemindar forcibly dispossessed. The nephew took no steps to recover the holding from the Zemindar. In a suit by the mortgagee to enforce the mortgage *held*, that the inaction of the tenant amounted merely to a surrender of the holdings and that surrender did not affect the rights of the mortgagee to enforce the mortgage. (*Mears, C. J. and Banerji, J.*) RAM KHELAWAN *v.* BRIJ LAL. **21 A. L. J. 296 : L. R. 4 A. 169 (Rev.) : 1923 A. 295 (1).**

——— *Effect of mortgage—Occupancy tenany mortgage of holding by, before Agra Tenanct Act—Relinquishment of holding by mortgagor.*

An occupancy tenant cannot relinquish his holding for consideration to the prejudice of a

OCCUPANCY HOLDING—Effect of mortgage.

mortgagee in possession from such tenant before the Agra Tenancy Act (II of 1901.) (*Piggott, J.*) SHEO MANGAL SINGH *v.* CHEDU.
31 I. C. 914 : 13 A. L. J. 1137.

———*Effect of mortgage—Occupancy holding and fixed rate holding—Legality.*

Where an occupancy holding and a fixed rate holding are mortgaged together for a fixed lump sum and the contract is one and indivisible, the whole transaction is void. (*Chamier, J.*) JWALA PRASAD RAI *v.* RAM SARUP RAI. **29 I. C. 923.**

———*Effect of mortgage—Subsequent relinquishment Decree in Revenue Court for ejectment of mortgagee—Effect—Suit for declaration that relinquishment is inoperative whether lies.*

Where an occupancy holding is first mortgaged and the same relinquished to the landlord later on the strength of which the latter obtained a decree *ex parte* in the Revenue Court for ejecting the mortgagee from the holding, no suit lies in a Civil Court at the instance of the mortgagee for a declaration that the relinquishment is inoperative as against him, first because of the principle of *res judicata* and secondly on the general principle that a Court will not grant a decree for declaration where such decree can lead to no result in favour of the person obtaining the same. (*Piggott, J.*) RAM DEI *v.* BINDESRI UPADYA. **11 I. C. 287 : 8 A. L. J. 940.**

———*Effect of mortgage—Suit by mortgagor to get back possession without payment of money, if maintainable—Duty of refund*

N usufructuarily mortgaged his occupancy holding to M and put M in possession. The mortgage of the holding was void in law. The mortgagor could not therefore recover possession of the property without refunding to the mortgagee the money he had taken as the consideration of the mortgage. (1888) A. W. N. 128. Foll : 19 A. 35, Dist. (*Banerjee, J.*) RAM NIHORA RAI *v.* MANBODH UPADYAYA. **10 I. C. 248.**

———*Effect of mortgage—Usufructuary mortgage—Occupancy tenancy—Determination*

An occupancy tenant who has mortgaged his holding cannot determine the mortgage by relinquishing his tenancy. The mortgagee can retain possession till the mortgage is redeemed or the tenancy is legally determined. (*Stanley, C. J. and Banerji, J.*) AMIR ALI *v.* KARAM ALI.
9 I. C. 456.

———*Effect of mortgage—Abatement—Right of landlord.*

Where a tenant mortgages his occupaucy holding which is not transferable by custom the mortgage is not invalid and does not confer any right on the landlord to have it declared invalid or not binding on the mortgagor. If the landlord acquires the interest of the mortgagors in the holding the mortgagee is entitled to enforce the mortgage as against the landlord. (*Walmsley and Ghose, JJ.*) SAJEDHAR RAHMAN *v.* RAKHAL CHANDRY ROY. **1924 C. 529.**

———*Effect of mortgage—Transfer.*

The deft. mortgaged his non-transferalbe holding to the plff. Other defts. (the co-sharer)

OCCUPANCY HOLDING—Ejectment.

landlords sued for their share of rent and purchased the same land in execution. *Held*, in a suit by plff. that the question of the non-transferability did not arise. (*Jenkins, C. J. and Woodroffe, J.*) CHANDI PROSANNA SEN *v.* GOUR CHANDRA DE. **33 I. C. 434 : 19 C. W. N. 1307.**

———*Effect of motgage—Right of Malguzar.*

As between the mortgagor and mortgagee the mortgage of an absolute occupancy holding is valid unless and until it is avoided by the malguzar. A mortgage ultimately assented to by the malguzar has priority over a subsequent mortgage consented to by the malguzar before the consent to the first mortgage. (*Batten, J. C.*) KUNJILAL *v.* PANNALAL. **19 N. L. R. 10 : 1923 Nag. 91 (1).**

———*Effect of mortgage—Death of tenant without heirs.*

On the death of tenant without heirs a mortgage of the occupancy holding granted by him necessarily determines also. The doctrine that a voluntary surrender by tenant cannot operate to prejudice the rights of one holding under him by virtue of a transaction good against the landlord has no application to a case where a tenant dies without heirs. (*Drake Brockman, A. J. C.*) RANI BAHU PARWAR *v.* SOBHA RAM. **43 I C. 912.**

———*Effect of mortgage—Mortgage to proprietors—Sale to co proprietor to satisfy mortgage if valid.*

In the case of a mortgage to the landlords of a raiyati holding where the holding is not transferable without the landlord's consent, they are bound to permit the mortgagor to transfer the holding to anybody whom he may choose (co-proprietor) in order to put to himself in funds to pay off the mortgage. (*Dawson Miller, C. J. and Coutts, J.*) KAMALA PRASAD CHOUDHRY *v.* KUNJI BEHARI MANDER. **5 P. L. J. 344 57 I. C. 11 : 1 P. L. T. 625 : 2 U. P. L. R. (Pat.) 159.**

———*Effect of mortgage—Mortgagee, purchase of—Portion of holding.*

A plff. mortgagee purchaser was in possession of a portion of a holding. Some of the co-sharer landlords brought a suit for rent against an alleged heir of the original tenant and obtained a decree. Plff. sued for stay of sale on the ground that the person against whom the decree had been obtained was not a tenant. Plff. though a transferee of a portion of the non transferable occupancy holding could bring the suit (*Chapman, J.*) JANG BAHADUR SINGH *v.* RAMSUNDAR SINGH.
38 I. C. 817 : 1 Pat. L. W. 194.

Ejectment.

———*Ejectment—Transfer by tenant—Abatement.*

Where a tenant transfers an occupancy holding not transferable by custom, and the transferee gets into possession of the property and remains in such possession for 9 years, the original tenant not making any arrangement for payment of rent of the landlord, there is an abandonment of the holding entitling a landlord to sue in ejectment. The landlord's rights of re-entry cannot be defeated by the transferee puttingan original tenant in ostensible possession of a portion of the holding

or pleading defects in his own title. The landlord in such a case need only prove that there has been a transfer of the entire interest of the tenant and that the transferee is in possession of the entire holding by virtue and in pursuance of such transfer. (*Woodroffe and Suhrawardy, JJ.*) SASHI BHUSANJHA *v.* AHMADULLAH CHOWDHURY.
1924 C. 372.

——— *Ejectment—Sale of share by tenant.*

A sale of a share of a non-transferable occupancy holding does not entitle the landlord to *khas* possession in the absence of proof of abandonment. (*Woodroffe and Ghose, JJ.*) SARAT CHANDRA DE *v.* MENORAMA DEBI.
1923 C. 181.

——— *Ejectment— Transfer in execution of decree*

If some co-sharer landlords of non-transferable occupancy holding have purchased it in execution of decree and the original tenants or their heirs accept sub-tenancies under the purchasers, they are liable to be ejected under a decree for *khas* possession by the purchasers and the other co-sharer landlords. (*Teunon and Huda, JJ.*) JOTENDRA NATH *v.* GOBINDA CHANDRA.
57 I. C. 813.

——— *Ejectment— Transfer of — Tenant continuing in possession—Rent.*

A tenant of a non-transferable holding after selling his interest continued in possession and paid rent to the landlord which the latter accepted with notice of the transfer. *Held* that the landlord could not eject him on the ground that he had sold his holding. (*Newbould, J.*) RADHIKA MOHUN ROY *v.* UTTAM PARBAT.
55 I. C. 432.

——— *Ejectment— Non-transferable—Mortgage of—Death of tenant without heirs.*

In case a non-transferable occupancy holding is mortgaged usufructuarily by the tenant without consulting the landlord, the landlord can drive out the mortgagee if the tenant dies without heirs. (*Richardson and Beachcroft, JJ.*) HARAPALLI SARKAR *v.* RAJABALI MIA. **44 I. C. 721.**

——— *Ejectment—Sale of arrears of rent—Notice to quit—Effect.*

A *raiyat* mortgaged the property with possession to a third person who let it to defts. The landlord sued for rent against the heirs of the *raiyat* and bought the holding at a sale for arrears of rent. *Held* that the occupancy holding still continued to exist even after the purchase by the landlord. The landlord sold thereafter the permanent raiyati right to another who also took a lease from the landlord and the latter sold it to the plff. The plff. served him with a notice and sued to eject the tenant. *Held*, the deft. was duly served with the notice to quit and must be ejected. (*Woodroffe and Mullick, JJ.*) EAKUF ALI *v.* MEAJAN. **29 I. C. 686 : 43 Cal. 164.**

——— *Ejectment—Transfer of portion—Ejectment by landlord—Collusive surrender.*

So long as a tenancy subsists the landlord cannot eject the transferee of a portion of holding. If the surrender by the transferor is collusive the tenancy did not terminate and so the landlord cannot eject. (*Mookerjee and Mullick, JJ.*) ASGAR ALI *v* GOWRI MOHAN ROY CHOWDHURY.
18 C. L. J. 257 : 21 I. C. 58: 18 C. W. N. 601

——— *Ejectment—Suit by landlord—Burden of proof.*

In an ejectment suit deft. pleading occupancy rights must prove them strictly. Mere length of tenure will not create a permanent occupancy for a ryot who has been let from year to year. (*Sadasiva Aiyar and Napier, JJ.*) NAINA PILLAI *v.* RAMANATHAN CHETTIAR.
41 I. C. 788: 33 M. L. J. 84

——— *Ejectment—Mortgage of, by tenants with the consent of one landlord—Suit by mortgagee—Surrender by heirs of one tenant—Suit by both landlords to eject mortgagee.*

Where an occupancy holding was mortgaged by tenants with the consent of one of the landlords and the heirs of one of the tenants surrendered the holding to the mortgagee because the latter had obtained a decree on his mortgage and the *Lambardar* brought a suit to eject the mortgagee adding as parties the other landlord also who had consented to the mortgage. *Held*, that the consent of one of them precluded both from acting together to avoid the transaction. (4 N. L. R. 45. Foll.) (*Drake Brockman, J C.*) BAPU *v.* TEMSA. **13 I. C. 982 : 8 N. L. R. 29.**

——— *Ejectment—Relinquishment after mortgage.*

Where a person, who holds lands in which he has heritable but not transferable rights mortgages thereon and subsequently relinquishes his right to hold the lands in favour of the landlord, the mortgagees have no rights left and can be ejected. 18 I. C. 383. Dissented from. (*Holms, S. M.*) RAJ PAL KUAR *v.* RUDRA PRATAB NARAIN.
34 I. C. 764: 3 O. L. J. 219.

——— *Ejectment—Transfer of—Ejectment by landlord.*

A holding is a parcel of lands for which a definite contract for rent has been made and the homestead land for which no rent is payable is not a part of the tenant's holding. The principle underlying all suits for ejectment of transferees is based not on the Tenancy Act but on the Common Law whereby the landlord is entitled to enter into possession of all lands secured to the payment of revenue in which no relationship of landlord and tenant exists. Where an occupancy holding is not transferable by custom, the landlord is entitled to eject the transferee who has acquired no right against the landlord; where it is transferable by custom, the transferee of the whole of an occupancy holding is entitled to set up his purchase as a bar to the landlord's entry. Where the transfer is made to two or more persons, the landlord is entitled to regard the holding as still in fact and still liable to be sold in its entirety for its arrears of rent. But the landlord is not bound to recognise a splitting up of the holding and where on account of the difference in the dates of the different portions of the holding, as in the present case, a joint purchase cannot be pleaded, the transferee can have no defence to a suit in ejectment inasmuch as the transfer of the

OCCUPANCY HOLDING—Ejectment.

part of a holding is not valid A raiyat may have a saleable interest in his entire holding. He has no saleable interest as against the Zemindar in a part of it only. (*Roe and Jwala Prasad, JJ.*) RAMJI PRASAD *v.* MOHAMMAD ANWAR ALI KHAN.
3 Pat. L. W. 299 : 43 I. C. 377 : 3 P. L. W. 263 : 1917 Pat. 360.

——*Ejectment— Transfer of portion of—Portion falling into* patti *of one* malik *on partition—Ejectment suit by that* malik*—Dismissal.*

A landlord cannot sue for ejectment on the ground of an unauthorised alienation in respect of a portion only of an occupancy holding. A portion of a holding was sold by a *raiyat*, which on partition between the *maliks*, fell into the *patti* of one of them. *Held*, that the transfer would be regarded as that of a portion only and a suit for ejectment against the transferee brought by the one *malik* into whose *patti* the portion fell on partition, would be dismissed. (*Chamier, C. J. and Sharfuddin, J.*) RADHA KISHUN *v.* BAGHAWAT PRASAD. **1 Pat. L. W. 19 : 38 I. C. 72: 1917 Pat. 76.**

Exchange.

——*Exchange—Exproprietary holding—Suit for possession of property transferred.*

An exchange of a house for the exproprietary right of a holding is illegal and the owner of the house is not entitled to sue for recovery of possession of the house. (*Fudball, J.*) LACHMAN DAS *v.* MUHAMAD YUSUF KHAN.
30 I. C. 192 : 13 A. L. J. 783.

Execution sale.

——*Execution sale.*

Having regard to the decision of the Full Bench in 42 Cal. 172 it must be held that a non-transferable occupancy holding is liable to be sold in execution of a money-decree notwithstanding the objections of the raiyat. 48 Cal. 184. (*Chatterjea and Cuming, JJ.*) KENARAM PAL *v* KINU MANDAL. **1924 Cal. 52 : 50 Cal. 508.**

——*Execution sale—Purchaser by co-sharer landlord—Status of purchaser.*

The plaintiffs and defendant were co-sharers in a taluq which comprised the disputed lands as an occupancy holding. The first plaintiff purchased the occupancy holding in execution of a mortgage decree. *Held* that the legal effect of this purchase was that the holding ceased to exist as an occupancy holding in the hands of the plaintiff as co-sharer landlord and the plaintiff held the land as non-occupancy raiyat. (*Mookerjee and Chotzner, JJ.*) ABINASH CHANDRA BHATTACHARJEE *v.* AMAR CHANDRA DE. **70 I.C. 328 : 27 C. W. N. 760.**

——*Execution sale—Effect of.*

The principle enunciated in *Dayamoyis case* 42 C. 172 *viz* that the transfer of the whole or part of an occupancy holding is operative against the raiyat where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside, is no longer law in view of the decision of the Full Banch in *Chandra Binode Kunda v. Ala Bux* 48 C. 148 Ref. (*Chatterjea and Panton, JJ.*) ABDUL SAMAD MONDAL *v.* BASIRUDDIN CHAUDHURY. **66 I. C. 220.**

OCCUPANCY HOLDING—Execution, Sale.

——*Execution sale—Sale in execution of two successive decrees— Proceedings to set aside—Lessee not parties—Effect.*

A mortgagee decree-holder purchased an occupancy holding in execution of his decree ; it was already sold under a rent decree and bought by the landlord. The decree-holder got the sale set aside but did not make the lessees form landlord parties to the proceedings. In a subsequent suit for possession *held* that the mortgagee decree-holder got no title against the lessees, who could not be represented by the landlord in the previous litigation. (*Teunon and Abdul Majid, JJ.*) ENDAJ ALI BISWAS *v.* ARJUN CHANDRA BISWAS.
62 I. C. 704.

——*Execution sale—Money decree in favour of landlord—Consent of tenant.*

The occupancy raiyat enjoys under the B.T. Act substantial rights in the land and his interest cannot be appopriately described as a merely "personal right" "or personal privilege." Apart from custom or local usage, the transfer for value of an occupancy holding in whole or in part is operative against the raiyat, whether it is made voluntarily or involuntarily. But such transfer is not effective against his landlord without his consent. The sole landlord of a raiyat is therefore competent to sell in execution of a money decree against his raiyat, whether his occupancy holding be or be not transferable by custom or usage. The doctrine of *stare decisis* did not stand in the way of overruling the decision in I. L. R. 24 Cal. 335. By setting it aside the Court would not affect transactions which might have been adjusted, rights which might have been determined, titles which which might have been obtained or personal status which might have been acquired, but would only be removing what had hitherto been erroneously regarded as a fetter upon the right of the execution creditor to realise his dues by the sale of an occupancy holding (*Mookerjee, C. J., Fletcher, Chatterjea, Teunon, Richardson, Chaudhuri and Shamsul Huda, JJ.*) CHANDRA BINODE KUNDU *v.* SHEIKH ALA BUX DEWAN.
48 Cal. 184 : 24 C.W. N. 818 : 31 C L. J. 510 : 58 I. C. 353. (F. B.)
[Overruling (1) 42 Cal. 172 : 20 C. L. J. 52 : 18 C. W. N. 971 : 27 I. C. 61 : (2) 39 I. C. 119 (Cal.) (3) 38 I. C. 942 (Cal)]

——*Execution sale—Non-transferable—Sale in execution of money decree—Cosharer raiyat—If can object.*

A co-sharer *raiyat* of a non transferable occupancy holding must confine his objection to the sale thereof in execution of a money decree, to the extent of his share. (*Woodroffe and Smither, JJ.*) FELANI MONDALANI *v.* MUKUNDO LAL.
46 I. C. 781.

——*Execution sale—Transferability—Usage.*

A landlord holding a money decree against one of his tenants cannot put up for sale in execution, the raiyat's occupancy holding which is not transferable by usage. (*Sharfuddin and Roe, JJ.*) MACPHERSON *v.* DEBI BHUSHAN LAL.
2 Pat. L. J. 530 : 42 I. C. 36.
[Contra 31 C. L. J. 510 : 58 I. C. 353 : 24 C. W. N. 818. (S. B.)]

OCCUPANCY HOLDING—Execution sale.

———*Execution sale—Non-transferable—Sale of—Recognition by landlord—Effect of.*

Even a subsequent sale in execution of a money decree with a prior actual delivery of possession and recognition by landlord as tenant of a non-transferable occupancy holding disentitles a prior purchaser in execution of a money decree, without delivery of possession where the landlord was entitled to re-enter, the tenant having abandoned the tenancy. (*Chatterjee and Richardson, JJ.*) ISHWAR CHANDRA SARMA *v.* KAILASH CHANDRA NATH. **41 I. C. 639.**

———*Execution sale—Money decree—Consent of tenant not obtained—Validity.*

An occupancy holding found to be non-transferable by custom cannot be sold in execution of a money decree if the tenant objects, though the decree-holder obtains the consent of the landlord. 21 C. W. N. 400; 38 I. C. 942 Foll. (*Chatterjee and Newbould, JJ.*) SWARANAMOYI DEBI *v.* ADU. **39 I. C. 119 (1).**

[Overruled by 31 C. L. J. 510 : 24 C. W. N. 818 : 58 I. C. 353 (S. B.).]

———*Execution sale—Sale of in execution of a money decree without raiyati consent.*

An occupancy holding not transferable by custom or usage cannot be sold in execution of a money decree if the *raiyat* objects to the sale. (*Chatterjee and Newbould, JJ.*) RAM SUNDAR KARMOKAR *v.* LOCHAN. **38 I. C. 942.**

[Overruled by 31 C. L. J. 510 : 58 I. C. 353 : 24 C. W. N. 848 : (S. B.)]

———*Execution sale — Non-transferable — Transfer in execution of decree — Division between transferee and raiyat — Surrender collusive—Landlord's right to* khas *possession.*

The raiyat of a non-transferable occupancy holding, sold in execution of money decree, came to an arrangement with the auction purchaser of it, by which they divided the holding. The raiyat subsequently made a collusive surrender and the landlord sued for *khas* possession. It was held, that under the arrangement the auction-purchaser became a transferee of a portion of the holding and there being no abandonment the landlord could not get *khas* possession. (*N. R. Chatterjee and Richardson, JJ.*) NABA KISHORE SAHA *v.* DHANANJOY SAHA. **33 I. C. 611 : 20 C. W. N. 610.**

———*Execution sale — Transfer of — If operative against a co-sharer landlord purchasing it subsequently in execution of a money-decree.*

Transfer of a non-transferable occupancy holding made by a *ryot* is operative against a subsequent purchaser of the same in execution of a money decree against the *ryot* and this is so even when such purchaser happens to be a co-sharer landlord. 42 C. 172 Appl. (*Sharfuddin and Teunon, JJ.*) DEO ARAND LAL *v.* BALESWAR MANDAL. **32 I. C. 1003.**

———*Execution sale—Objection by raiyat.*

An occupancy holding which is not saleable by custom or usage cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent and in this respect a

OCCUPANCY HOLDING—Execution sale.

cosharer landlord is in the same position as an ordinary executing creditor. A raiyat is entitled to have a sale of his holding in execution of a money-decree set aside after it takes place and the holding cannot be sold in execution of such a decree, where the raiyat objects to the sale before it takes place. A non-transferable occupancy holding is not a saleable property. The principle deducible from 18 C.W.N. 971 (F.B.) is applicable to an involuntary transfer of the whole as well as a part of the holding. 34 C. 199. Dist. 13 I. C. 192. Not Foll. (*Chatterjee and Greaves, JJ.*) BADARENNESSA *v.* ALAM GAZI. **29 I. C 877 : 19 C. W. N. 814 : 21 C. L. J. 650.**

———*Execution sale— Non-transferability—Who can raise this objection?*

A co-sharer landlord having a three-fourths share is entitled to raise the question of transferability of the holding. The purchaser of a non-transferable holding can be evicted by any of the co-sharer landlords to the extent of his own share. If the possession of the entire holding has been acquired by some of the co-sharers, the other co-sharers are entitled to joint possession thereof. (*Mookerjee and Beachcroft, JJ.*) KANCHAN MANDAR *v.* KAMALA PROSAD. **29 I. C. 734 : 21 C. L. J. 441.**

———*Execution sale—Objection—Procedure.*

In an execution proceeding for the sale of an attached holding the Munsif allowed an objection to the sale to stand over and held the sale without making enquiries into the objection. *Held* that the proceedings of the Munsif were wholly irregular. The proper procedure in such a case for the judgment-debtor was to appeal against the order refusing to postpone the sale or directing the sale to take place notwithstanding the pendency of the application in which the question of the saleability of the holding was raised. (*N. R. Chatterjea and Mullick, JJ.*) LAKENATULLA *v.* ASMATULLA SARKAR. **29 I. C. 616.**

———*Execution sale — Transferability— Sale in execution—Burden of proof.*

The onus is on the decree holder desiring to bring an occupancy holding of the judgment debtor to sale in execution to prove that the holding is transferable by custom or local usage. (*Mookerjee and Beachcroft, JJ.*) NUR MIA *v.* CHANDRA MOHAN ROY. **23 I. C. 939.**

———*Execution sale—Plff.'s. purchase—Mortgage decree sale—Deft's purchase at co-sharer landlord's rent decree sale—Question of transferability of holding if can be raised by deft.*

Plffs. purchased a holding in execution of his decree on a mortgage held by them against the admitted tenant. Defts. subsequently purchased the same holding in execution of a decree for rent held by a co-sharer landlord. *Held*, that the title of the plffs. was superior to that of the defts. who, as purchasers at a sale in execution of a decree for rent by a co-sharer landlord, were in the same position as a purchaser at a sale held in execution of a decree for money. (*Mookerjee, and Carnduff, JJ.*) TULSI SINGH *v.* DAYAL SINGH. **15 I. C. 718.**

OCCUPANCY HOLDING—Execution sale.

——*Execution sale.*

A non-transferable occupancy holding can be sold in execution of a m ney decree. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v* PARTAP RAI. **2 Pat. 739 : 4 Pat. L. T. 405 : 1923 Pat. 213 : 1923 P. 514.**

——*Execution sale—Right of decree-holder.*

A decree holder, not being the landlord can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money decree where there is no local custom of inalienability. (*Coutts and Das, JJ.*) RAGHUNATH SAHAY *v.* CHOWA MAHTON.
3 Pat. L. T. 525 : 1922 P. 602.

——*Execution sale—Rights of purchasers in execution of rent decree and mortgage decree respectively.*

The purchaser in execution of a rent decree purchases the holding itself and is entitled to say that he takes the holding free of incumbrance, if, in fact, there is no encumbrance valid in law outstanding against it which it is necessary, for him to annul. Where a holding is non-transferable, a mortgage of it is of no effect as against the holding or the persons who purchases the holding in a rent execution. Such a mortgage cannot effectively create a lien in limitation of the interest of the original tenant. It would operate not by force of any title to the holding created thereby but by way of estoppel. (*Coutts and Ross, JJ.*) LALA MURLIDHAR *v.* SURAT LAL CHOUDHURY. **3 Pat. L. T. 362 : 1922 Pat. 135 : 1922 P. 555 (1).**

——*Execution sale — Non-transferability—Objection by tenant—Execution by landlord.*

A tenant is entitled to assert in execution proceedings that the landlord is not entitled to bring a holding to sale in pursuance of a rent decree, if the holding is not transferable. (*Atkinson, J.*) SHAIKH ABDUL AZIZ *v.* BIBI TAUHIDUNNISSA.
52 I. C. 380.

——*Execution sale —Non-transferability—Objection by tenant.*

A tenant can object to the sale of a non-transferable holding in execution of a money decree even if the landlord consents to it. (*Imam and Thornhill, JJ.*) RAMESWAR SINGH BAHADUR *v.* KESHWAR RAI. **47 I. C. 790.**

——*Execution sale—Sale of a portion of his holding in execution of simple money decree—Objection by tenant.*

An occupancy *raiyat* whose holding is not transferable by custom, can object to the sale of a portion of the holding in execution of a simple money decree against him. (*Chamier, C. J. and Jwala Prasad, J.*) SADARI KUNWARI *v.* PALAKNATH.
1 Pat. L. J. 257: 33 I. C. 937: 3 Pat. L. W. 104.

Landlord's right after transfer.

——*Landlord's right after transfer—Suit for possession by purchaser—Defence.*

A co-sharer landlord, as such, is entitled to raise a plea of non-transferability in a suit brought

OCCUPANCY HOLDING—Landlord's right after transfer.

against him by the purchaser of a nontransferable occupancy holding for establishment of title and recovery of possession of the holding. (*Newbould, J.*) JADU NATH MANDAL *v.* RAI CHARAN KOYAL. **64 I. C. 186.**

——*Landlord's rights after transfer—Non-transferable—Transfer of—Recognition by landlord—Sale of holding in execution of decree against old tenant.*

Where a landlord unconditionally recognises the transferee of a mere transferable occupancy holding, the original tenant is not liable for the arrears of rent, and the landlord is not entitled to bring to sale the holding as the holding of the old tenant. (*Chatterjea and Newbould, JJ.*) GIRISH CHANDRA MONDAL *v.* NARENDRA NATH HALDAR. **52 I. C. 759 : 23 C. W. N. 654.**

——*Landlord's right after transfer—Non-transferable—Transfer of undivided share by one of the raiyats—Landlord, if can re-enter.*

If a raiyat transfers or abandons his undivided share in a non-transferable occupancy holding without parting with the remainder of the holding belonging to his co-sharers, there is no abandonment so as to entitle the co-sharer landlord under whom the share was held to re-enter. (*Fletcher and Newbould, JJ.*) SWARNA MOYI DASI *v.* GAYARATULLA SARDAR. **41 I. C. 704.**

——*Landlord's right after transfer—Transfer of—Auction-sale of holding—Deposit by transferee—Objection by landlord—Withdrawal—Estoppel.*

If a tenant is upon his holding, which is not transferable by custom, his possession protects the party to whom he transfers a portion of his interest. But if the tenant is no longer on the land after the holding has been sold his property becomes that of the landlord. A purchaser of a non-transferable holding can, after the holding has been sold and the original tenant is no longer on the land, be a party to a suit for recovery of possession from the landlord. At an auction sale of a holding not transferable by custom a transferee of that holding made a deposit to set aside the sale. The landlord objected but on the Court overruling the objection withdrew the money from the Court. *Held*, that the landlord was not estopped from suing for possession since he acted under an order of Court in withdrawing the deposit. There was no duty on the part of the landlord to appeal against the decree overruling his objections. (*Woodroffe and Newbould, JJ.*) BHATA RAM DAS *v.* CHANDRA LAHIRI. **30 I. C. 83.**

——*Landlord's right after transfer—Transfer of part—Right of re-entry.*

Landlord is ordinarily entitled to re-entry on transfer of the whole holding but on transfer of a part, the landlord is not entitled to possession unless there is (*a*) an abandonment within S. 87 of the B. T. Act or (*b*) a relinquishment of the holding or (*c*) a repudiation of the tenancy. The transfer of a whole or a part is operative as against the landlord in all cases in which it is operative as against a *raiyat* provided the landlord has given previous or subsequent consent.

OCCUPANCY HOLDING—Landlords right after transfer.

(*Jenkins, C. J. Stephenson, Woodroffe, Mookerjee and Holmswood, JJ.*) DAYAMOYI *v.* ANAND MOHAN. **42 Cal. 172: 18 C. W. N. 971 : 20 C. L. J. 52: 27 I C. 61 (F.B.)**
[Overruled by 58 I. C. 353 :24 C. W. N 818 (S.B.) 31 C. L. J. 510]

——*Landlord's right after transfer—Transfer by co-sharer—Recognition by others—Effect.*

When the transfer of an occupancy holding by one co-sharer landlord is recognised by the others, it will amount to evidence either that the holding is transferable, or that though voidable at their instance, it has been validated. (*Woodroffe and Mullick, JJ.*) INATULLAH DAFTRY *v.* MOISON ALI. **25 I. C. 414.**

——*Landlord's right after transfer—Non-transferability—Rights of transferee—Recognition by landlord.*

A transfer of a non-transferable occupancy holding is not binding on the landlord unless he recognises the transferee in which case he would be a representative in interest of the landlord and is not estopped from raising the question of non-transferability in a suit by a prior transferee not recognised by the landlord, for possession. (*Mookerjee and Beachcroft, JJ.*) MADHU SUDAN SARKAR *v.* KALIDAS. **25 I. C. 300.**

——*Landlord's rights after transfer — Transfer of— When voidable.*

A transfer of an occupancy holding is voidable at the landlord's instance, unless he had consented to the transfer at the time it was made or subsequently. (*Hallifax, A.J C.*) JAIRAM *v.* SUNDAR LAL. **26 I. C. 698: 10 N. L. R. 146.**

——*Landlord's rights after transfer—Usufructuary mortgage—Notice to landlord.*

A hard and fast rule cannot be laid down that all usufructuary mortgages of occupancy rights require notice to landlords and give rise to a claim for pre-emption. 11 C. P. L. R. 127 distinguished. (*Mitra, Offg. A. J. C*) RAGHUNATH *v.* GANPAT. **23 I. C. 213 : 10 N. L. R. 21.**

——*Landlord's right after transfer.*

Receipt of rent by the landlord from the transferee of a holding not transferable by custom will validate the transfer by tenant. Acceptance of rent by gomastah or patwari is not binding on the landlord unless he has knowledge of the source from which the rent came. To constitute recognition, the landlord must have acquiesced deliberately and with full knowledge as to its effects. (*Das and Adami, JJ.*) BHOLAL CHAUDHARI *v.* VINCENT. **1922 P. 619.**

——*Landlord's right after transfer—Non-transferable—Transfer in favour—Right of re-entry.*

If a non-transferable holding is sold to a *Zarpeshgidar* of the holding the landlord has a right of re-entry even if the purchaser had been recognised by the landlord prior to sale. (*Roe and Coutts-Trotter, JJ.*) MUKHARAM SINGH *v.* SADAS KOER. **47 I C. 132.**

——*Landlord's rights after transfer—Transfer of by tenant.*

A tenant of a transferable occupancy holding can transfer a portion of it. But the landlord is not bound to recognise the purchase. (*Chamier, C. J. and Jwala Prasad, J.*) KUNJA BIHARI SINGH *v.* SITARAM SINGH. **42 I. C. 101: 3 Pat. L. W. 292.**

OCCUPANCY HOLDING—Position of (Purchaser) transferee.

——*Landlord's right after transfer—Transfer of occupancy holding—Right of landlord.*

Where a tenant transfers his whole occupancy holding, the village being in possession of *ticcadars*, the landlord can only sue for a declaration that the transfer is not binding on him and that he will be entitled to possession after the expiry of the *ticca*, before which he cannot recover possession. (*Chamier, C. J. and Sharfuddin, J.*) MAHADEO CHAUDHURY *v.* BHAGELU SAHU. **39 I. C. 596: 1 Pat. L. W. 405.**

Partition.

——*Partition— Non-transferability — Consent by co-sharer—Landlord.*

A co-sharer can recognise a transfer to the extent of his own share but it is not binding on others and does not prevent them from subdividing the holding. (*Chatterjee and Beachcroft, JJ.*) MUHAMMAD ALI *v.* JNANADA SUNDARI. **32 I. C. 577.**

——*Partition—Landlord whether bound.*

Any property held for the time being jointly can be partitioned between joint holders. Therefore a suit for the partition of an occupancy-holding is maintainable. But the division, unless made with the landlord's permission, would not be binding on him. (*Carnduff and Chapman, JJ.*) RAJENDRA NARAIN SAHA *v.* SATISH CHANDRA PAL. **15 I. C. 331.**

——*Partition—Effect of—Transfer of part by tenant — Partition between co-owner landlords—Effect.*

A partition of the landlord's interests ought not to be held to confer upon the holders of one of the new *Mahals* or *pattis* rights against tenants or their transferees which the landlords did not possess before the partition and which do not necessarily result from the partition. Even if transfer of part of an original holding could be treated as a transfer of an entire holding, the consequence of a subsequent partition and division of the original holding into several new holdings, it would not avail the landlord to whom the transferred holding is allotted, to treat it as transfer of an entire holding and to claim right of re-entry. (*Chamier, C. J. and Sharfuddin, J.*) SURAJ DEO NARAYAN SINGH *v.* PACHH NARAYAN SINGH. **1 Pat. L. W. 443 : 39 I. C 98: 2 Pat. L. J. 225.**

Position of (Purchaser) transferee.

——*Position of transferee—Mortgage—Fraudulent relinquishment, not valid against mortgagee—Suit for declaration of invalidity—Civil Court—Jurisdiction.*

An occupancy tenant can validly mortgage his occupancy tenancy with possession under the N. W. P. Rent Act, XII of 1881, and any fraudulent and collusive relinquishment by the occupancy tenant would be void against the mortgagee. The mortgagee can sue for a declaration in the Civil Court that the relinquishment does not operate as

OCCUPANCY HOLDING—Position of (Purchaser) transferee.

against him. (*Richards, C. J. and Banerjee, J.*) JAI GOPAL *v.* UMADAT. **10 I. C. 573 : 8 A. L. J. 695.**

———*Position of purchaser.*

Where a purchaser of a non-transferable occupancy holding pays rent which is accepted and receipts passed to him as *murfatdar*, he is deemed to be a tenant though his name is not entered in the landlord's *Sherista*. (*Newbould and Buckland, JJ.*) KALIBROHMA MUKERJEE *v.* SAYIDAR RAHAMAN. **57 I. C. 986.**

———*Position of transferee—Non-transferable—Right of landlord to enter on transfer.*

A tenant of a non-transferable occupancy transferred the holding to his wife and daughter but remained on the holding and resided at the house erected on a portion thereof till his death. *Held*, that the possession of the widow and daughter, after the death of the tenant was lawful possession as heirs and the landlord did not acquire a right of re-entry. (*Fletcher and Cuming, JJ.*) GULABJAN BIBI *v.* DIL MAMUD. **54 I. C. 394.**

———*Position of transferee—Sale and surrender of.*

A *raiyat* selling a part of non-transferable holding, cannot surrender that part to the landlord, so as to entitle him to eject the purchaser. (*Fletcher, Beachcroft and Greaves, JJ.*) DASTAR ALI *v.* RAM KUMAR GOPE. **50 I. C. 378.**

———*Position of transferee— Rent—Sale of portion of occupancy holding—Leave from purchaser—Settlement by the landlord—Effect—Estoppel.*

A sale of a portion of an occupancy holding does not forfeit the tenancy So far as the landlord is concerned, the tenancy is unaffected and he can ask for payment of rent to his recorded tenant. The holding is not abandoned if the original tenant, after selling a portion of the holding, remains in actual possession of it as an under-raiyat from the purchaser. The tenant took a sub lease of the portion of land which he subsequently sold in execution. A settlement was taken from the superior landlord. After an attempt to eject the purchaser under a decree he was opposed by the representative of the original tenant. The objection was allowed. The landlord then brought the present suit for rent against the defendant as his under-raiyat. *Held* (1) that there was no relation of landlord and tenant between the plff. and the defendant and the claim for rent did not lie, (2) that the original tenancy still continued and the landlord could not create a valid occupancy holding in favour of the plaintiff and (3) that the defendant was not estopped from questioning the plaintiff's title. (*Mookerjee and Roe, JJ.*) KALIM SHEIKH *v.* MOCHAM. **36 I. C. 719 : 24 C. L. J. 113.**

———*Position of purchaser—Non-transferable—Purchaser of a share.*

A purchaser of a share of an occupancy holding, is entitled to possession even as against the landlord, in as much as the tenancy is not determined and interposes a barrier between him and

OCCUPANCY HOLDING—Position of (Purchaser) transferee.

the landlord 42 Cal. 172. Foll. (*Sanderson, C. J. Woodroffee, Mookerjee, Holmwood and Chatterjee, JJ.*) PURNA CHANDRA TRIVEDI *v.* CHANDRA MOHINI DASSI. **20 C. W. N. 586 : 33 I. C. 49 : 23 C. L. J. 304.**

———*Position of transferee—Transfer of recognition.*

Acceptance of rent paid by the mortgagee of an occupancy holding as such without protest amounts to a recognition of rights of the mortgagee in possession as a trespasser. 13 C. W. N. 833 Ref. (*Chatterjee and Walmsley, JJ.*) MOTOOKDHARI *v.* JUGDIP SINGH. **19 C. W. N. 1319: 28 I. C. 343 : 24 C. L. J. 261.**

———*Position of transferee—Transfer--Principles governing.*

A transfer for value of the whole or a part of an occupancy holding is operative as against the raiyat, (*a*) where it is made voluntarily, (*b*) where it is made involuntarily and the *raiyat* with knowledge fails or omits to set it aside. (*Jenkins, C. J., Stephen, Woodroofe, Mookerjee and Holmwood, JJ.*) DAYAMOYI *v.* ANANDA MOHAN ROY. **42 Cal. 172 : 18 C. W. N. 971 : 27 I. C. 61 : 20 C. L. J. 52. (F. B.)**

———*Position of transferee—Non-transferable—Purchase—Validity of.*

A purchaser of a non-transferable occupancy holding acquires no interest against the landlords even though the purchaser is one of the landlords himself. (*Jenkins, C. J. and Mookerjee, J.*) LAKHI KANT DAS *v.* BALBHADRA PRASAD DAS. **25 I. C. 546 : 19 C. L. J. 400.**

———*Position of transferee—Non transferable—Transfer by tenant—Occupation by purchaser, for over twelve years—Creation of limited interest of tenancy.*

Where the transferee of a non-transferable occupancy holding had obtained *marfatdari* rent receipts from the predecessor in title of the plff. for over twelve years, *Held*, that the statute of limitation operated to create a limited interest of tenancy and barred a suit by the plff. for *khas* possession. (*Jenkins, C. J. and Mookerjee, J.*) PROBHABATI DASI *v.* TAIBATURINESSA. **17 C. W. N. 1088 : 20 I. C. 664 : 19 C. L. J. 62.**

———*Position of transferee—Non-transferable—Transfer of—Rights of—Transferee.*

The transferee of a non-transferable occupancy holding acquires nothing at all as against the landlord refusing to recognise the transfer, and has no *locus standi* either to attach a rent decree obtained by the landlord against the transferor, as fraudulent, or to save the holding from sale in execution of the decree. Nor can he assert any possessory title as against the landlord. (*Richardson and Newbould, JJ.*) RAM PAD BANDOPADHYA *v.* TARINI CHARAN GHOSE. **20 I. C. 201.**

———*Position of transferee—Non-transferable—Transfer of by tenant—Receipt of rent from purchaser as* marfatdar*—If recognition as tenant.*

Receiving rent from and granting receipts to a purchaser of a non-transferable occupancy holding as *Marfatdar* or *Suharakar* of the old tenant

OCCUPANCY HOLDING—Position of (Purchaser) transferee.

do not amount to a recognition of the purchaser as a tenant by the landlord. (*Newboula and Roy, JJ.*) HARISH CHANDRA *v.* BAHADUR SINGH.
20 I. C. 54.

——— *Position of transferee—Non-transferable—Fraudulent rent decree by landlord—Deposit of amount by transferee—Suit by transferor that rent decree fraudulent and for recovery of money deposited.*

A transferee by sale without the landlord's consent of a portion of an occupancy holding not transferable by custom is not entitled to deposit the amount of the landlord's decree under S. 170 (3) of the B. T. Act. But he can sue the landlord and the original recorded tenants to set aside an *ex parte* rent decree obtained by the landlord against the original tenant by fraud and conspiracy as a consequence whereof the transferee sustained damage. There need be no privity of contract or parties in order to maintain an action of this nature. 16 C.L.J. 141: 2 Pat. L J. 457, Ref. Where the transferee of a portion of a non-transferable occupancy holding deposited the decretal amount prior to the Full Bench decision of 1917 Pat. 189 and the landlord withdrew the deposited amount, the landlord is estopped from denying that the transferee was entitled to deposit the amount. The deposit should be considered as money paid under terror of legal proceedings fraudulently directed against the transferee and as such recoverable. A judgment and a decree obtained by fraud upon a Court binds neither such Court nor another and is a nullity. (*Atkinson, Coutts and Mauuk, JJ.*) ASARFO SINGH *v.* RAM KHELWAN SINHA. **4 Pat. L J. 115 : 49 I. C. 785 : 1919 Pat. 49 : (F. B.).**

——— *Position of transferee Non-transferable—Transfer of portion—Rights of landlord—Consent of some of the landlords — Effect — Rent decree against recorded tenant—Transferee, if bound.*

A transferee of a portion of a non-transferable occupancy holding has no right to obtain a declaration prohibiting the landlord from proceeding with an action against his recorded tenant. The transferee is not entitled before he is actually dispossessed by the landlord to bring an action against the landlord for a declaration that a tenant alleged by the landlord to be his recorded tenant is not in fact his tenant and that a decree obtained by the landlord against the alleged tenant is fraudulent. Having no legal title or interest which the landlords are interested in denying the transferee cannot invoke S. 42 of the Sp. Rel.Act. If some out of a number of co.sharer landlords transfer either a part or the whole of a non-transferable occupancy holding, the remaining co-sharers are not entitled to eject the transferee. By obtaining recognition from a co-sharer landlord the transferee does not acquire any rights or valid title in the holding itself as against the entire body of landlords, notwithstanding such recognition the remaining co-sharers can sue the original tenant for the entire rent by impleading the transferee. If the consenting co-sharer landlords repudiate their consent and join the non-consenting landlords in suing the original tenant for the entire rent on the footing that the consent given by them does not create a division of the tenancy, it is open to them to do so. It may be that the transferee will be entitled to sue the consenting co-sharer for damages for fraud. (*Miller, C: J, and Mullick, J.*) GANANATH SATPATHEY *v.* HARIHAR PANDHI. **5 Pat. L. W. 232 : 48 I. C. 359 : 1918 Pat. 289.**

OCCUPANCY HOLDING—Transferability.

Sub-lease.

——— *Sub-lease—Landlord's consent— Necessity.*

The transfer by the lessee of an absolute occupancy tenant of his interest under a sublease binding on the landlord does not, in the absence of a contract to the contrary, require the landlord's consent. (*Kotwal, Offg. A. J. C.*) SETH NARAYAN DAS *v.* KRISHNA RAO.
43 I. C. 570 : 14 N. L R. 188.

——— *Sub-lease— Under proprietary rights in Sir and Nankar not affected—Occupancy right.*

Refusal to effect sub-settlement with appelants ancestors would not affect their under proprietary rights in *Sir and Nankar* lands. But an application relinquishing all claims to the village as well as to *Sir and Nankar* would be fatal to the appellants claim to under-proprietary rights. But that would not affect appellants, claim to occupancy rights in such lands in which occupancy rights have been established. (*Holms, S. M, and Campbell, J. M.*) BABOO RAM TEWARI *v.* BAGWAN BUX SINGH. **29 I. C. 653 (2).**

Succession.

——— *Succession—Right of one of the heirs.*

On the death of an occupancy tenant the occupancy right devolves by operation of law on all the heirs as co-tenants and any one of them willing to do so can take up the whole tenancy in the event of the other heirs being unwilling to do so. (*Stanyon, J.C.*) KALWA *v.* BHAWAR SINGH.
44 I. C. 1001.

Transferability.

——— *Transferability—Contract Act, S. 24.*

The defendant borrowed money from the plaintiff's father and executed a bond agreeing to repay it on a certain date. There was a further condition that if the money was not repaid on that date the creditor could enter into possession of the plaintiffs cultivatory holding as a usufructuary mortgagee.

Held, that the whole contract is not illegal within S. 24 of the Contract Act and that the plaintiff could get money decree. 35 I. C. 202 Foll. (*Walsh and Kanhaiya Lal, JJ.*) JARBANDHAN *v.* BADRI. **45 A. 621 : 21 A. L. J. 480 : L. R. 4 A. (Civ.) 581 : 1924 A. 80.**

——— *Transferability—Conditional transfer—Mortgage—Defaults in payment of instalments.*

A mortgage deed providing for the right of the mortgagee on default of payment of instalments to get possession of cultivatory holding in which the mortgagors had rights of occupancy, is invalid even as regards the mortgage enforceable at law on the personal covenant it contained on the part of the debtors to pay the amount. (*Sunder Lal J.*) MAHOMED SHAKUR *v.* GOPI. **35 I. C 202.**

OCCUPANCY HOLDING—Transferability.

———*Transferability— Fixed rate holding—Sale of, by the same deed—Suit to set aside the sale—Suit not maintainable.*

Where a person sold his occupancy and fixed rate holdings for a certain consideration by one deed, he could not set aside the sale of the fixed rate holding. The contract for sale is one thing and a deed of transfer is another, and it does not necessarily follow that because the contract is unenforceable the transfer is void. (*Richards, C.J. and Rafique, J.*) BAJRANGI LAL *v.* GHURARI. **38 All. 232 : 32 I. C. 913 : 14 A. L. J. 270.**

———*Transferability*—Mandari *tenure.*

A *Mandari* tenure is an occupancy holding and therefore is not saleable or otherwise transferable. A suit for the sale of such a tenure on foot of mortgage is not maintainable. (*Banerjee and Tudball, J.*) KIDAR NATH *v.* NAIPAL SINGH. **34 All. 155 : 12 I. C. 922 : 8 A. L. J. 1308.**

———*Transferability—Conditional transfer — Transferable on payment of nazar — Custom—Rate of* nazar.

Where by custom the landlord is entitled to *nazar* when an occupancy holding is required to be transferred, he can recover possession from the transferee if there is no proof of the payment of the said *nazar*. If there is a rate of such *nazar*, the transferee gets no title unless he pays it. (*Chatterjee and Panton, JJ.*) MINA KUMARI SAHEBA *v.* AHORDDI SHEIKH. **57 I. C. 848.**

———*Transferability — Who can question—Transfer of—Third party—Not to question—*

No person other than the landlord can question the transferability of an occupancy holding. A transfer operating against a *raiyat*, also operates against third persons 42 C. 172 F. B, Foll. (*Beachcroft, J.*) SHEIKH GARIBULLAH *v.* SHEIKH MODU. **50 I. C. 301.**

———*Transferability—Transfer of—Settlement by landlord.*

Settlements made by the landlord might be regarded as signifying the landlord's consent to the transfers set up by the rival transferees of the holding and in as much as the transfer set up by the defts. was from a pretended owner, the consent of the landlord could have no validating effect upon the title derived by the deft. from that transfer but it operated to validate and confirm the title derived by the plff. from the true owners. (*Teunon and Richardson, JJ.*) WAHID ALI BHUYA *v* MAHAMAD ANSAR ALI. **47 I. C. 147.**

———*Transferability of—Conditional transfer—Whether conditional on payment of nazar.*

In order to establish a custom of transferability of an holding subject to payment of a customary *nazar*, the evidence must show that the transfer must be recognised by the landlord if the *nazar* is paid. A custom which does not fix the rate or the amount of the *nazar* but leaves it to be settled by one of the parties is bad for uncertainty. Where a transfer is recognised only on condition of paying the *nazar*, failure to pay *nazar* does not confer any

OCCUPANCY HOLDING —Transferability.

title on the transferee. (*Richardson and Walmsely, JJ.*) MINA KUMARI SAHEBA *v.* ICHAMOYEE CHOUDHURANI. **27 C. L. J. 587 : 45 I. C. 747 : 22 C. W. N. 929.**

———*Transferability — Non-transferable — Mortgage—Purchase of same by landlord in execution—Suit to enforce the Mortgage—Question of transferability if arises.*

A defendant mortgaged to plaintiff his non-transferable occupancy holding without consent of his landlords. Before the mortgage, other defendants who were co-sharer landlords had sued for their share of rent and obtained decree.

In execution they purchased the land. In a suit by plaintiff to enforce his mortgage it was held that no question of transferability arose. (*Jenkins, C. J. and Woodroffe, J.*) CHANDI RROSANNA SEN *v.* GOUR CHANDRA DEY. **33 I. C. 434 : 19 C. W. N. 1307**

———*Transferability—Transfer—Partition.*

In a case where the interests of an heir and his sister were sold to the plffs. and the other heirs obtained a decree for recovery of their share, the Lower Appellate Court having awarded a decree for an interest proportionate to that of the co-sharer landlord who had recognised the sons of the former heir as co sharer, it was held, that no question of transferability arose. To let an undivided share is an unwarrantable invasion of the rights of the co sharers (*Jenkins, C. J. and Woodroffe, J.*) RAJAB ALI *v.* DINA NATH SAHA. **33 I. C. 261 : 19 C. W. N. 1305.**

———*Transferability of—Custom.*

Proof of payment of *nazar* by the transferees of occupancy holdings to the landlords and recognition thereon of such transferees by the landlord does not amount to proof of custom compelling the landlord to recognise such transferees. (*Sharfuddin and Coxe, JJ.*) BHOIRAT CHANDRA MANDAL *v.* SITAL CHANDRA SARKAR. **17 I. C. 15 : 16 C. W. N. 955.**

———*Transferability —Question if can be raised by stranger.*

Where two parties claim an occupancy holding under the original owner, the plff. by right of inheritance and the deft under a deed of transfer, cannot contend the plff. that the deed did not take effect in respect of the occupancy holding because it was not transferable by custom. That is a question which only the landlord or his representative in interest is competent to raise. (*Mookerjee and Carnduff, JJ.*) RAHIMJAN BIBI *v.* IMANJAN BIBI. **15 I. C. 698 : 17 C. L. J. 173.**

———*Transferability — Non-transferable — Landlord taking mortgage—Purchaser of holding—Assignment of mortgage from landlord—Knowledge—Estoppel.*

The fact that the landlord himself took a mortgage of a certain non-transferable occupancy-holding under him, would, by itself, be no evidence of transferability of jotes, because a landlord himself can purchase or take a mortgage of a holding though non-transferable. Deft. purchased a non-transferable occupancy-holding in execution of his own mortgage decree and with the intention of perfecting his title took an

OCCUPANCY HOLDING—Transferability.

assignment for consideration, of a mortgage held by the plff. in respect of the holding. The plffs had full knowledge of the purchase of the holding by the deft. and of the fact that he was taking the assignment in order to perfect his title. The plff. subsequently sued the deft. for recovery of possession on the ground that as the holding was non-transferable, the deft. got no title from his purchase. *Held*, that the plff landlord was estopped from denying that the deft had acquired a right to the *jote*. To allow the landlord to succeed would be to encourage a fraud upon the deft. (*N. Chatterjea and Richardson. JJ.*) MOHESH NARAIN ROY *v.* MAHARAJ BAHADUR SINGH.
15 I. C. 171 : 17 C. W. N. 70.

———*Transferability.*

In a suit for the rent of a holding consisting of *pahi* land, which was compromised, the condition of the compromise was that if the defendant did not pay the decretal amount within the specified time, the decree holder would be entitled to sell the holding, *held* the defendant could not afterwards object to the sale on the ground that the holding was not transferable without the landlord's consent. (*Das and Adami, JJ.*) NIDHI PARIDA *v.* KARUNAKAR PADHAN.
1 P. 153 : 1922 P. 483 (1).

———*Transferability — Maurasi—Void—Estoppel.*

A maurasi tenancy which can be transferred is not known to the law. A transfer of an occupancy holding which is void cannot be validated by estoppel. (*Hopkins, J. M.*) SHEO SHANKAR SINGH *v.* RAO BATUK PRASADA. **52. I. C. 100 : 1 U. P. L. R. (B. R.) 1.**

Miscellaneous.

———*Mortgage before and relinquishment after Agra Tenancy Act—Effect.*

Where an occupancy holding was mortgaged for fiftynine years before the passing of the Agra Tenancy Act and after the passing of the Act, the occupancy tenant entered into an agreement with the *Zemindar* to relinquish his rights with a view to defeat the mortgagee's rights, *held*, that the relinquishment was ineffectual against the mortgagee. (*Richards, C. J. Banerjee and Tudball. JJ.*) BIRJ KUMAR LAL *v.* SHEO KUMAR MISSIR. **37 All. 444 : 29 I. C. 215 : 13 A. L. J. 649 (F. B.).**

———*Cultivation.*

The owner of an occupancy holding need not necessarily do the cultivation himself but may employ others for the same. (*Richards, C.J. and Tudball, J.*) PARMANAND SINGH *v.* RAMANAND GIR. **35 All. 474 : 21 I. C 43 : 11 A. L. J. 761.**

———*Long possession does not create permanent tenancy.*

Mere length of possession is not effective to confer a right of permanent tenancy. (*Kumaraswami Sastry and Devadoss. JJ.*) TANAKU MAHALAXMI *v.* CHAMARTY NARASIMHAMURTHY.
(1922 M. W. N. 146 : 15 L. W. 449 : 1922 M. 82.

ORDER IN COUNCIL (1908), R. 18.

———*Occupancy right—Exception to rule—Onus of proof.*

The onus of proving exception to the rule of occupancy is ordinarily on the landlord. (*Stanyon, A. J. C.*) TEJ SINGH *v.* LALJI.
14 I. C. 788 : 8 N. L. R. 39.

OFFENCE.
See LOCAL ACTS.

OFFER.
See CONTRACT ACT, S. 2.

OFFICE.

———*Resignation—When takes effect.*

Only the acceptance of a resignation makes an office vacant and not the resignation. This applies to the case of an honorary magistrate also. (*Ramesam, J.*) AKULA SUDARSANA RAO *v.* CHRISTIAN PILLAI. **45 M. L. J. 798 : 1924 M. 396.**

OFFICIAL ACTS.
See EVIDENCE ACT, S. 114.

OFFICIAL ASSIGNEE.
See (1) INSOLVENCY ACT.
(2) PRES. TOWNS INS. ACT.

OFFICIAL RECEIVER.
See (1) INSOLVENCY.
(2) PROV. INS. ACT.

OFFICIAL REFEREE.

———*Power of—Rules determining.*

The Official Referee in Madras is only a permanent Commissioner. His powers must be determined with reference to the Civil Procedure Code and the Original Side Rules and not the Rules of the Supreme Court with regard to Referees and Masters. (*Kumaraswamy Sastry, J.*) ABDUL WAHAB SAHIB *v.* ROKIA BIBI SAHIBA.
1924 M. 406.

ONUS OF PROOF.
See EVIDENCE ACT, S. 101.

OOTACAMUND MUNICIPALITY.

———*Bye-Law No. 54 "Other building material" if includes sand.*

In by-law No. 54 of the Ootacamund Municipality, the expression "the other building material" does not include sand. (*Ayling, J.*) *In re* HASSAN SAHIB. **30 I. C. 1004 : 16 Cr. L. J. 716.**

OPINION—Evidence.
See EVIDENCE ACT, Ss. 45, 51.

ORDER IN-COUNCIL (1908).

———R. 18—*Privy Council—Appeal—Registrar—Power of.*

The word 'Registrar' in R. 18 of the Order-in-Council (1908) means the registrar or any other officer in custody of the record in the Court appealed from. He is the proper person to determine what papers are to be included in the paper book. R. 18 applies only to papers that were in the record at the time the appeal was heard in the High Court. (*Miller, C. J. and Adami, J.*) SRIPAT SINGH *v.* BUDHU SINGH.
2 Pat. L. T. 641 : 61 I. C. 657 : 6 Pat. L. J. 114.

ORISSA TENANCY ACT (II OF 1913).

——— *"Tenant"—Meaning.*

Per *Chapman, J.*:—A person is a tenant though under an arrangement with his landlord he is not required to pay rent. (*Sharfuddin and Chapman, JJ.*) GOPI BISWAL *v.* RAMCHANDRA SAHU. **2 Pat. L. J. 46 : 38 I. C 667 · 3 Pat. L. W. 397.**

——— **Ss. 3 (4) and (6)**— *Notification— Deputy Collectors—Powers of.*

A person empowered by notification to discharge any of the function of a Deputy Collector under the Act is a Deputy Collector within S. 3 (4) and (6) and therefore a Collector and has jurisdiction to try a suit for recovery of a mutation fee. (*Miller, C. J, and Roe, J.*) MAHANT GOBIND RAMANUJA DAS *v.* RANI DEBENDRABALA DASI. **52 I. C. 231 : 4 Pat L. J. 387.**

——— **Ss. 16 and 31**—*Non-transferable tenure* —Miadri, Sarbarikari—*Transfer — Refusal to register—Suit to recover mutation fee.*

A transfer of *sarbarikari* tenure is not complete and valid as against the landlord until the landlord has given his consent to it. If he refuses to register the transfer of a non-transferable tenure, registration cannot be enforced against him under S. 16 (3). A landlord is not entitled to claim the mutation fee under S. 16 until he has registered the transfer. 3 Pat. L.J. 351. Dist. The institution of a suit for the recovery of the mutation fee under S. 16 does not amount to consent to the transfer. (*Miller, C. J. and Roe, J.*) MAHANT GOBIND RAMANUJA DAS *v.* RANI DEBENDRABALA DASI.

52 I. C. 231 : 4 Pat. L.J. 387.

——— **S. 31**—*Transfer of occupancy holding— Landlord's consent—Fee for registration.*

Whenever an occupancy holding in Orissa is transferred whether the transfer be with or without the consent of the landlord, the transferee must apply for registration of the transfer and is bound to pay a fee for such registration. (*Coutts and Das, JJ.*) BALMAKUND KANANGOE *v.* MERITUNJOY PAHARAJ. **5 Pat. L. J. 357 : 57 I. C. 7 : 1 Pat. L. T. 593.**

——— **Ss. 31 and 250**—*Registration—Meaning.*

Registration means consent of a landlord, verbal, written or in any proper way, to the transfer. On obtaining the landlord's consent payment of Registration fee is obligatory on the transferee. A suit and a second appeal lies in case of refusal. (*Mullick and Atkinson, JJ.*) MIRTUNJOY PRAHARAJ *v.* JAGANNATH JEN.

47 I. C. 34 : 3 Pat. L.J. 351

——— **S. 31**—*Execution sale of occupancy right —Procedure.*

In Orissa occupancy rights are transferable without the landlord's consent, unless the Collector is satisfied that the landlord has good reason for his objection. The decisions in Bengal to the contrary do not apply to Orissa. The proper procedure is to allow the sale on a decree on the mortgage of the occupancy holding. The purchaser then should apply to the landlord under S. 31 for registration. If the landlord accepts

ORISSA TENANCY ACT (II OF 1913), S. 204.

the fee the sale is valid. If he refuses, the purchaser should apply to the Collector who will decide whether there is good and sufficient reason for such refusal. (*Roe and Jwala Prasad, JJ.*) GIRIDHARI NAIK *v.* KASHI TINDI.

41 I. C 128 : 2 Pat. L. J. 476.

——— **S. 31 (4)**—*Sale of occupancy holding in execution—Plea of non-transferability.*

An occupancy raiyat can object to the sale of the holding in execution of a money decree on the ground that his rights are not transferable without the consent of the landlord. 2 P. L. J. 530 ; 2 P L. J 476, Ref. (*Chapman and Roe, JJ.*) MADHU PADHAN *v.* JAGU JENA.

51 I. C. 139 : 4 Pat. L. J. 294.

——— **Ss. 57, 215, 220 and 221**—*Interest of an under-raiyat—Incumbrance— Auction purchaser —Ejectment.*

An under-raiyat in occupation of land is an incumbrancer within S. 215 of the Orissa Tenancy Act. Ss. 220 and 221 regulate the manner in which the incumbrance can be annulled by the auction purchaser. Where the procedure for annulment of incumbrances provided by S. 221 is not followed and a year is allowed to elapse the purchaser without taking steps to annul the incumbrance is not entitled to eject the under-raiyat under S. 57. If he takes the prescribed steps to annul the incumbrance and the under-raiyat refuses to give up possession, the latter can be ejected under S. 57. (*Mullick and Atkinson, JJ.*) SHIBA DAS *v.* GAJENDRA NATH DAS.

44 I. C. 593 : 3 Pat. L. J. 112.

——— **Ss. 154 and 232**—*"Nij Khas" land— What is—Occupancy rights—Acquisition of.*

S. 154 of the Orissa Tenancy Act does not entitle a landlord to a declaration that a certain land is 'Nij Khas' unless it is so recorded in the Provincial Settlement and in the Settlement between the years 1906 and 1912. S. 232 of the said Act makes it clear that the Legislature intended to give effect to contracts between landlord and tenant preventing the acquisition of occupancy rights by the tenant, if the contracts had been made more than six years before the Act. (*Chapman and Roe, JJ.*) AKBAR ALI *v.* GOPAL PRASAD.

46 I. C. 556 : 3 Pat L. J. 475.

——— **Ss 193 and 210**—*Application by tenant to determine rent—Jurisdiction of Civil Court.*

An ordinary suit for possession of land is not a suit under the Orissa Tenancy Act. A Civil Court has jurisdiction to determine under S. 210 (1) (*d*) the rent payable by the tenant. (*Miller, C.J. and Mullick, J.*) BANAMALI STANATHI *v.* CHOUDHURI ARTARAN MAHAPATRA.

51 I C. 222 : 4 Pat. L. J. 72.

——— **S. 204 (b)**—*Decision of Deputy Collector —Appeal—Tenancy when ceases—Non-payment of rent.*

According to S. 204 (*b*) of the Orissa Tenancy Act an appeal from the judgment of the Collector or Deputy Collector shall lie under Sub-S. 3 to the District Judge. *Chapman, J.*—A person does not cease to be a tenant merely because by an arrangement with

ORISSA TENANCY ACT (II OF 1913), S. 204.

his landlord, he is released from the payment of rent. (*Sharfuddin and Chapman, JJ.*) GOPI BISWAL *v.* RAMCHANDRA SAHU.

2 P. L. J. 46 : 38 I. C. 667 : 3 P. L. W. 397.

——— **S. 204 (3)**—*Order of Deputy Collector—Appeal.*

An appeal lies to the Dt. Judge from the decision of a Dy. Collector holding that no rent is payable by the deft. for a *Sarbarakari* tenure held by him. (*Sharfuddin and Chapman, JJ.*) GOPI BISWAL *v.* RAMACHANDRA SAHU.

2 Pat. L. J. 46 : 38 I. C. 667 : 3 Pat. L. W. 397.

——— **S. 236**—*Shikmi tenant not liable—Ejectment on notice.*

S. 236 of the Act applies to Shikmi tenants of homestead land and they are not liable to be ejected upon mere notice to quit. 21 C. L J. 478. Foll. (*Das and Adami, JJ.*) KANDURI SAHU *v.* ARJUN SAHU. **1 P. 161 : 1922 P. 416.**

OUDH CIVIL COURTS ACT (XIII of 1879).

——— **S. 37**—*Entry in partition record—Ejectment—Possession under ancient mortgage—Burden of proof.*

Where the legal relation between parties concerned has arisen out of partition proceedings carried out by Revenue Court and the deft. pleads that his possession as evidenced by the entry in the partition record is that of a mortgagee holding under an ancient mortgage, such entry in the partition record cannot be treated as conclusive evidence of the mortgage relation much less of the incidents of that relation. The deft. who pleads that he is in possession under a mortgage "of long standing" cannot be allowed to tence with the plff. and to rest his claim with vague and in conclusive evidence and statements. *Prima facie* the title being with the plff. the deft. if he desires to hold on the property in dispute must adduce proof of a definite title. (*Lindsay, J. C.*) BISHESHAR SINGH *v.* BRIJ BHOOKHAN SINGH

20 O. C. 336 : 43 I. C. 300 : 5 O. L. J. 18.

——— **S. 37**—*Mortgage of 1852—Mortgage executed without authority if can extinguish prior mortgage —Redemption.*

A mortgage executed by a person without authority cannot extinguish a prior mortgage validly executed by another person. A mortgage of 1852 is *prima facie* not redeemable in view of S. 37 of Act XIII of 1879. In redemption suits it is the plaintiff's duty to show *prima facie* that he has got a subsisting right to redeem. (*Lindsay and Kanhaiya Lal, A. J. Cs.*) SARJU PRASAD *v.* MANNI LAL. **18 I. C. 229.**

OUDH CIVIL DIGEST (1912).

——— **Para. 172**—*Decree transferred for execution—Execution of.*

A decree does not become incapable of execution within para. 172 of the Digest. merely because an attempt to execute it has proved unsuccessful. The Court to which a decree is sent for execution is competent to persevere with the execution until satisfaction has been obtained or execution is no longer possible. (*Lindsay, J. C. and Stuart, A. J. C.*) GUR DAYAL *v.* MESSRS. BIGG SUTHERLAND AND CO.

48 I. C. 722 : 21 O. C. 261.

OUDH COURTS ACT (XIV OF 1891), S. 8.

——— **Para 272**—*Fee certificate—Govt. Pleader appearing for Tahsildar—Liquidator of Co-operative Society.*

A Govt. Pleader appearing in a case for the Tahsildar who was been impleaded in his capacity as a liquidator appointed under S. 42 (1) of the Co-operative Societies Act is not exempted from filing his fee certificate as required by para. 272 of the Oudh Digest. (*Stuart and Kanhaiya Lal, A. J. Cs.*) BENI MADHO SINGH *v.* LIQUIDATOR, DEWARA BANK.

44 I. C. 353 : 4 O. L. J. 583.

——— *Para. 272, R 3, Vol. 1, Chap. VII, as corrected—Effect of.*

R. 3 of para. 272 ch. 7, Oudh Civil Digest (1912), Vol 1 as corrected by the correction slips, dated 18th February 1914, does not introduce any new rule but declares the meaning of the rules as they stood before. (*Lindsay, J. C.*) BASUDEO SINGH *v.* RAM PHAL SINGH.

32 I C. 748 : 2 O. L. J. 607.

——— **Para. 272, R. 9**—*Land Acquisition Act, S. 18, proceedings under—Pleader's fees.*

For the purpose of assessing pleader's fees proceedings under S. 18 of the Land Acquisition Act are not to be treated as a suit within the meaning of the rules contained in para. 272 of the Digest. In such cases pleader's fees should be assessed under R. 9 of the said paragraph. (*Lindsay, J. C and Stuart, A, J. C.*) SAJJAD ALI KHAN *v.* SECRETARY OF STATE.

25 I. C. 732 : 17 O. C. 284.

——— **Para 272 (XI)**—*Pleader's fee—Taxation.*

Where one pleader appears for the respondent at an earlier stage of the case and another pleader appears at the hearing of the appeal, full fee should be allowed and not merely half the full scale. (*Daniels and Lyle, A J. Cs.*) RAHU INDRAPRATAB SAHI *v.* RAJA ABU JAFAR.

25 O. C. 279 : 1923 Oudh 55 (2).

——— **R. 24**—*Interpretation of procedure.*

R. 24 of the Digest cannot be interpreted to mean that no plaint or application can be received in Court unless the Court-fee thereon has been purchased on the date of the presentation. In such cases a note of the date of presentation should be made on the Court-fee labels and the plaint or application ought then to be admitted. (*Lindsay, J. C.*) DEPUTY COMMISSIONER, BAHRAICH *v.* RAJA RAM. **1 O. L. J. 223 : 24 I. C. 119 : 17 O. C. 148.**

——— **R. 573**—*Agency—Signature of applicant.*

The signature of a general agent duly authorised to receive money on behalf of a person to whom money is payable by the Civil Court may be accepted as the signature of the applicant for the purpose of R. 573 of the Digest. (*Piggott, J. C.*) BHAGAWATI PRASAD SINGH *v.* PARMESHER.

25 I. C. 608 : 1 O. L. J. 356

OUDH COURTS ACT (XIV OF 1891).

——— **S. 8**—*Consolidation of appeals—Pecuniary valuation.*

Where separate decrees are prepared in separate suits between the same parties, and there is a separate appeal against each decree, the appeals

OUDH COURTS ACT (XIV OF 1891), S. 8.

cannot for the purpose of pecuniary jurisdiction be consolidated, so as to make the appeals triable by a Bench of two Judges. (*Lindsay, J. C.*) TIKA DAS *v.* LALA RADHA KISHAN.

52 I. C. 15 : 6 O. L. J. 287.

——S. 8 (c)—*Pauper appeal—Subject-matter over Rs.* 10,000.

An application for leave to appeal as a pauper can be decided by one Judge of the Judicial Commissioner's Court but when the subject-matter is of the value of Rs. 10,000 or upwards, it is advisable to refer the application for leave to appeal as pauper to a Bench of two Judges under S. 8 (*c*). (*Lindsay, J. C. and Stuart, A. J. C.*) TEJ KISHEN *v.* ABDUL HAMID KHAN.

38 I. C. 541 : 3 O. L. J. 694.

OUDH ESTATES ACT (I OF 1869).

——*Rights of succession—Reversioner.*

Under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu law and the reversioner during the life-time of the widow has no more than an expectancy, and so has no interest in the property which he is competent to transfer or bind. *Held*, in a suit for a declaration that a will was void the Court could only make a declaration binding on the widows and it was not within its competence to make a valid declaration that would create in reversioner's favour an interest in the property that did not otherwise exist. (*Sir Lawrence Jenkins.*) THAKURAIN HARNATH KUAR *v.* THAKUR INDAR BAHADUR SINGH.

9 O. L. J. 652 : 50 I. A. 69 : 37 C. L. J. 346 : 45 A. 179 : 27 C. W. N. 949 : 26 O. C. 223 : 18 L. W. 383 : 44 M. L. J. 489 :(1922) P. C. 403.

——*Bequest to one other than next heir—Effect.*

Under the Act, a bequest to one other than the next heir, breaks the line of succession, ousts the special limitations provided by the statute and thus makes the property subject to the ordinary law of succession. (*Lord Phillimore.*) SITLA BUKSH SINGH *v.* SITAL SINGH.

43 All. 245 : 48 I. A. 288 : 19 A. L. J. 337 : 8 O. L. J. 214 : 25 C. W. N. 721 : 24 O. C. 107 : 60 I. C. 548 : 33 C. L. J. 520 : 40 M L. J. 449 (P. C.).

[On Appeal from 40 I. C. 469 : 4 O. L. J. 193.]

——*Summary settlement—Object and scope of.*

The first summary settlement in Oudh did not finally decide the proprietary title of the person who had engaged to pay the fixed revenue to the British Government. To allay mis-giving in the minds of the landholder it was considered necessary to settle proprietary rights after confiscation. All such proprietary rights were grants from the British Government and started fresh titles to the property, but it does not follow that these titles were free from the personal law of the grantees as regards succession and title of heirs. This settlement gave finality and perpetuity in respect to the proprietary right in the soil. Subsequently to emphasize this fact of the grant of a proprietary title sanads were issued to Taluqdars in accordance with letters of the Governor-General in Council. These letters were subsequently given the force of legislation under Act I of 1869. They declare that every Taluqdar with whom a summary settlement had been made since the re-occupation of the Province, thereby acquired a permanent hereditary and transferable right in the Taluqa for which he had engaged including the perpetual privilege of engaging with the Government for the revenue of the Taluqa. The Chief Commissioner proposed a form of sanad and the approved form was sent to him by the Governor General whith his letter dated 19th October 1859. The Sanads were given by Lord Canning at a Darbar held on 26th October 1859 The Sanad conferred no new rights but only declared the rights already determined in the 2nd Summary Settlement of 1859. Where a grant is made to a person and his heir for ever, the grantee takes an absolute estate. (*Simpson and Dalal, A. J. Cs.*) RAM RATAN *v.* GANGA BUKHSH SINGH.

26 O. C. 245 : 10 O. L. J. 193 : 9 O. & A. L. R. 222: 1923 Oudh 265.

——*Power of talukdar to will away.*

A Hindu has the power to make a bequest independently of Act I of 1869. (*Lindsay and Kanhaiya Lal, A. J. Cs.*) BHARATH SINGH *v.* BALBHADAR SINGH.

20 I. C. 429.

——Ss. 2, 14 and 22, *U. P. Act (III of* 1910). S. 3—*If retrospective—Sanad in primogeniture form—Heir or legatee of a Talukdar—"Would have succeeded"—Meaning of.*

A transfer to a person coming under any of the clauses of S. 22 of the Oudh Estates Act does not bring it within S. 14 of the Act if that person would be excluded by the senior member in his own class. The grouping in the clauses of S 22 cannot be held to bind the rule of succession therein. The amendment made by U. P. Act III of 1910 in the definition of legatee as given in S. 2 of the Oudh Estates Act is not retrospective where it affects vested rights. The words "would have succeeded" in S. 14 of Act I of 1809 are not equivalent to "might have succeeded" and must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate or without making a transfer. The rule of primogeniture laid down in the sanads in this case granted by Lord Canning meant the rule of lineal primogeniture as known to English Law. The word "successors," as used in the sanad means "successors on death" and includes both heirs and devisees but not transferees, *inter vivos*. The meaning of an ordinary primogeniture sanad is this. In the event of intestacy the case of all relatives of legitimate descent would be considered, all females and those coming through females would be excluded and the succession would be going to the surviving representative of the highest line collaterals only being admitted in the absence of surviving descendants. (*Stuart and Kanhaiya Lal, A J. Cs.*) GHULAM ABBAS KHAN *v.* BIBI UMMATTUL FATIMA.

18 O. C. 188 : 31 I. C. 748 : 2 O. L. J. 636.

——Ss. 3 and 5—*Govt. sanad—Death of grantee before the Act—Status and rights of.*

OUDH ESTATES ACT (I OF 1869), S, 3.

The grantee of a *taluka* received a sanad in 1861 from the Govt. conferring on him the full proprietary right, title and possession of the *taluka* descendible to his nearest male heir by primogeniture. The grantee died in 1865 but him name was entered in lists 1 and 2. *Held*, that the grantee'e death before the passing of the Oudh Estates Act made no difference in his status and that he was a "talukdar" within S. 3 of the Act, with a permanent heritable and transferable right to the taluk. The provision in S. 8 that the lists should be prepared within six months after the passing of the Act was meant as a limit for their completion and for their initiation. (*Mr. Ameer Ali.*) MURTAZA HUSAIN KHAN *v.* MOHAMMAD YASEN ALI KHAN.

38 All. 552: 20 M. L. T. 362 : 14 A. L. J. 1083: 18 Bom. L. R. 884 : (1916) 2 M. W. N. 555 : 25 C. L. J. 1: 19 O. C. 290: 1 Pat. L. W. 122 : 21 C W. N. 410: 4 O. L. J. 8 : 4 L. W. 538 : 36 I. C 299 : 43 I. A. 269 : 31 M. L. J. 804. (P. C.)

——— **Ss. 3, 8, 10 and 22**—*Summary settlement—Consent to settlement before October* 10, 1859—*Formal documents executed later—Settlement in* 1859 *as* mulguzar—*Inclusion of name among Talukdars—Lists I and II.*

The holder of an impartible taluk in Oudh annexed during the mutiny having petitioned the Govt. for a settlement of his former property, the Chief Commissioner consented to half the taluk being settled with him, by a letter dated 5—10—1859. The patta and the kabuliyat were executed on 13—10—1859. *Held*, the holder acquired a statutory, permanent, heritable and transferable right in the estate so settled, the delay in the execution of the formal documents being immaterial. Though the settlement was made with the holder as *mulguzar* yet as his name was entered in Lists I and II under S. 8 of Act I of 1869, succession to the estate would be governed as for the estates of *talukdars* under S. 22 of the Act. The properties settled with the holder in 1859 together with those which he got under decrees passed in his favour in the course of the regular settlement in 1865, 1866 constituted an "estate" within S. 3 of Act I of 1869 and are consequently impartible. (*Mr Ameer Ali.*) JANKI PERSHAD SINGH *v.* DWARKA PERSHAD SINGH.

35 All. 391 : 40 I. A. 170 : 17 C. W. N. 1029: 14 M. L. T. 110 : (1913) M. W. N. 630 : 18 C. L J. 200 : 11 A. L. J. 818: 15 Bom. L. R. 853 : 20. I. C. 73 : 16 O. C. 216 : 25 M. L. J. 34 (P. C.)

——— **S. 3**—*"Estate."*

For a property to be an "estate" a summary settlement with the talukdar within the prescribed dates is necessary or a talukdari sanad must have been granted. Where summary settlement was ordered to be made before 10—10—1859 but it was so made and a kabuliyat was executed on 13—10—1859, the property is not "estate." But where the order sanctioning settlement was made before 10—10—1859 but formalities of executing kabuliyat were made afterwards, the property concerned is "estate" within S. 3. Property acquired by the Talukdar out of savings

OUDH ESTATES ACT (I OF 1869), S. 8.

is self-acquired and therefore it is not "estate" but is a partible property. (*Sundar Lal and Piggott, A. J. Cs.*) JANAKI PRASAD SINGH *v.* DWARAKA PRASAD SINGH. **9 I. C. 83.**

——— **S. 6**—*Redemption—Village included in deft's. sanad—Adverse possession.*

Plffs. sued in 1905 for recovery of a half share in six villages in Oudh from the deft., by whose ancestor had been obtained a settlement and possession as owner in 1859 and afterwards a *talukdari* sanad which included them. Plff.'s case was that the villages originally belonged to their ancestor, that his widow in 1849 had for convenience of management consented to their being included in the *kabuliyat* given by the deft.'s ancestor to the King of Oudh, that at the time of the settlement in 1859 she had been directed to apply for the release of the villages on payment of the dues thereon, that she omitted to do so and that in 1868 her application for settlement had been refused as the villages were included in the deft.'s sanad. *Held*, that plaintiffs had not established in the proceedings of 1859 to 1868 anything which constituted deft.'s ancestor a trustee for the widow and that his possession was adverse from 1868. The suit was consequently barred by limitation. If the suit was regarded as one for redemption, it would be barred by S. 6 of the Oudh Estates Act. (*Mr Ameer Ali.*) MUHAMMAD BAKAR *v.* MUHAMMAD BAKAR ALI KHAN.

33 All 125 : 38 I. A. 23 : 13 C. L. J. 63 : 8 A. L. J. 132: 15 C. W. N. 273: 9 M. L. T. 200: (1911) 1 M. W. N. 127: 13 Bom L. R 75: 9 I. C. 391: 14 O. C. 95 : 21 M. L. J. 109 (P. C.)

——— **S. 6**—*Redemption—Term fixed—Effect.*

In 1835 a mortgage was executed stating that redemption would take place in the 25th year when the land was clear of both the crops or in any year after that whenever the money could be paid to the mortgagee. The heirs of the original mortgagor filed a suit for redemption which was contended on the ground that the mortgage was irredeemable under the provisions of S. 6 of Oudh Estates Act, *held*, that the suit was not barred as there was a distinct term fixed for redemption of the mortgage and as that term had not expired before the 13th February 1856. (*Stuart, and Kanhaiya Lal, A. J. Cs.*) RAJA *v.* SANT RAI DAS. **2 O. L. J. 228 : 20 I. C. 193 : 18 O. C. 95.**

——— **Ss. 8, 10 and 22**—*Name of grantee entered in lists, 1 and 2— Primogeniture—Sanad—Accretion—Pre-existing custom*—Wajib-ul-arz, *value of.*

The inclusion of the name of a grantee in list 2 prepared under S. 8 of the Oudh Estates Act, is conclusive evidence under S. 10 not only of the fact that he was a 'talukdar' as defined in S. 2 but also of the fact that there was a pre-existing custom of impartibility and descent to a single heir in the family of the grantee and this is so although the *talukdari* estate is held under a primogeniture sanad. Succession even to after-acquired non-*talukdari* property is presumably governed by the pre-existing family custom of

OUDH ESTATES ACT (I OF 1869), S. 8.

descent to a single heir in the case of a Mahomedan *talukdar* whose ancestral and separate property are subject to the same rule of devolution. *Wajib-ul arzes* merely narrating tradition and the history of certain families are not sufficient to rebut the presumption. (*Mr. Ameer Ali,*) MURTAZA HUSAIN KHAN *v.* MAHAMMAD YASIN KHAN.

38 All. 552: 20 M. L T. 362: 14 A. L. J. 1083: 18 Bom. L. R. 884: (1916) 2 M W. N. 555: 25 C. L J. 1: 19 O. C. 290: 1 Pat. L. W. 122: 21 C. W. N 410: 4 O L. J. 8: 4 L. W 538: 36 I. C. 299 : 43 I. A. 269 : 31 M. L. J. 804 (P. C.)

——— **Ss. 8, 10 and 115**—*Presumption of primogeniture.*

Ss. 8 and 10 do not apply to property which has been alienated by a *Taluqdar* in his lifetime, nor has it any concern with the alienee or the family of an alienee. (*Stuart and Kanhaiya Lal, A. J. Cs.*) QASSIM ALI KHAN *v.* AHMAD SHAH.

32 I. C. 516 : 2 O. L. J. 758.

——— **Ss. 10 and 2**—*Presumption under section —Applicability to non-talukdari property.*

The conclusiveness of the presumption under S. 10, does not extend to property which was not held by the talukdar on or before 13th February 1856 or which was not an "estate" as defined by S. 2 of the Act. But the existence of a family custom referred to in S 8 may be relevant evidence to show that similar rule applies also to other property which the talukdar may have acquired and left undisposed of at the time of his death. (*Kanhaiya Lal and Sabonadiere, A. J. Cs.*) YASIN ALI KHAN *v.* MURTUZA HUSAIN KHAN.

22 I. C. 577 : 16 O. C. 290.

——— **Ss. 10 and 8**—*Entry in list—Effect.*

The Court must, under S. 10, treat the entry in the list prepared under S. 8 as conclusive that the person whose name is so entered, is a talukdar. Where the Talukdar's name is entered in List II the estate descends to a single heir and in such cases, in the absence of proof of a contrary custom the succession goes to the eldest son. (*Sundar Lal and Piggott, A. J. Cs.*) JANKI PRASAD SINGH *v.* DWARAKA PRASAD SINGH. **9 I. C. 83.**

——— **Ss. 12, 13 and 22**—*Talukdar--Will—Person who should have succeeded to estate—Meaning of.*

A will or gift under the Act is not subject to any special rules of Hindu or Mahomedan Law. S. 12 lays down restrictions under which a gift to an unborn person may be made. The heirs of a legatee of the description in cls. (1) and (2) of the Act would equally enjoy the benefit of the exemption contained in that section by virtue of being his heirs. The exemption is inapplicable to devisees coming within the Act or entitled to inherit under the ordinary law. (*Kanhaiya Lal and Daniels, A. J. Cs.*) BRIJRAJ KUAR *v.* MAHADEO BUX SINGH. **21 O. C. 374 : 50 I. C. 249 : 6 O. L. J. 101.**

——— **Ss. 13 and 16**—*Transfer by—Unregistered deed.*

A transfer by an unregistered deed is not invalid if it is made in accordance with the terms

OUDH ESTATES ACT (I OF 1869), S. 14.

of the will registered under S. 13 of the Oudh Estates Act, as such a transfer does not fall under S. 16 of the Act. (*Viscount Cave.*) LAL JAGADISH BAHADUR SINGH *v.* MAHABIR PRASAD SINGH.

42 All. 422 : 24 C. W. N. 529 : (1920) M. W. N. 342 : 7 O. L. J. 196 : 2 U. P. L. R. (P.C.) 71 : 23 O. C. 54 : 58 I. C. 845 : 47 I. A. 116 : 13 L. W. 19 (P. C.)

——— **Ss. 13 and 15**—*Transfer by gift--Registration—Succession to donee.*

Transfer by gift falling under the provisions of Ss. 13 and 15 of the Act would be governed by the personal law modified by custom, if any, to which the transferee is subject and not by any custom of succession prevailing in the Taluka. Such property becomes the self-acquired property of the transferee and if he dies intestate it would descend under the rules of personal law. Under the provisions of S. 13 of the Oudh Estates Act a transfer of property, whether by gift or will, requires to be registered and attested and the circumstance that the compromise whereby the transfer was made, later became merged in a decree does not affect the question. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) NARAIN SINGH *v.* DEPUTY COMMISSIONER OF PARTABGARH.

55 I. C. 896 : 7 O. L. J. 93.

——— **S. 13 (1)**—*Object and scope of.*

Section 13 was devised to impose restrictions on sudden freaks of impulse. It insisted upon certain formalities in the case of gifts and devises and fixed certain time limits for the performance thereof in order that the strongest possible proof might be available of a disposing mind of deliberate intention in case the donee or legatee happened to be a person who was not the legal heir to the estate under the special rules of succession or the ordinary law applicable to such estates or one of his younger sons (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) CHAUDHRAIN TARIF UN-NISA *v.* CHAUDHRI SHAFIQ-UZ-ZAMAN.

26 O. C. 133 : 1923 Oudh 185.

——— **S. 14**—*Amendment—Interpretation.*

S. 14 of the Oudh Estates Act, as amended, should not be so interpreted as to convert an invalid bequest into a valid bequest. A void bequest can have no operation whatever. The result of the section is that where a valid bequest of taluqdari property had been made to an younger son before the Amending Act, such property in the hands of the legatee became *talukdari* property again. (*Daniels and Lyle, A. J Cs*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD.

25 O. C. 189 : 9 O L. J. 235 : 1922 Oudh 236.

——— **S. 14**—*"Would have succeeded"—Meaning.*

The expression "a person would have succeeded according to the provisions of the Act" used in S. 14 is equivalent to a person or one of the persons to whom the estate would have descended according to the provisions of the special clause of S. 22 applicable to the particular case. (*Stuart and Kanhaiya Lal, A. J. Cs.*) GHULAM ABBAS KHAN *v.* BIBI UMMATUL FATIMA **18 O. C. 188: 31 I. C. 748 : O. L. J. 636**

OUDH ESTATES ACT (I OF 1869), S. 14.

——— **Ss. 14 and 32-A**—*Estate, meaning of—Ancestral property—Execution against such property.*

Land conveyed by the owner of an estate ceases to be an estate, and the rules relating to sale in execution of decrees of ancestral properties and estates do not apply to voluntary transfers. (*Lindsay, J, C. and Sobonadiere, J.*) ASGHARI KHANAM *v.* RAJ BIBI.

22 I. C. 267 : 16 O. C. 277.

——— **Ss. 15, 22 and 23**—*Primogeniture sanad—Estate entered in list II—Bequest in favour of non-talukdar—Law applicable.*

S. 15 of the Act is declaratory and operates prospectively and re-prospectively where a talukdar whose estate was entered in list II, died before the Oudh Estates Act, came into force bequeathing estate to his son-in-law who was not a talukdar nor a grantee, nor a person next in succession. *Held*, that the suit of succession contained in the sanad was inapplicable to the succession to the estate after the death of the grantee. (*Lindsay, J. C. Kanhaiya Lal, A. J. C.*) BALRAJ KUAR *v.* MAHDEO PAL SINGH.

4 O. L. J. 589 : 44 I. C. 59 : 20 O. C. 360.

——— **Ss. 15, 22, 8, 10 and 14**—*Primogeniture sanad—'Successor,' meaning of—Will in favour of a non-successor—Absolute estate conferred by will.*

The ancestor of the last male holder was granted a primogeniture sanad. The last male holder executed a will in 1895 by which the taluka was to go to his mother as absolute owner. *Held*, that the mother took an absolute interest in the taluka on the death of the testator under the terms of the will. 28 C. 490, Foll. 10 C. 342 ; 22 W. R. 409 (P.C.); 35 C. 896 (P.C.); 9 O C. 119, Dist. That under S. 15 of Act I of 1869 the effect of the will in favour of the mother who would not have succeded to the taluka except for the will was to take the taluka for the purposes of succession out of the Act and the successors to the mother were to be found under ordinary Hindu law ; as the rule of succession laid down in the sanad was not applicable because the mother being a legatee under the will, was not a successor. Case law Discussed (*Kanhaiya Lal and Kendall, A. J. Cs.*) SITLA SINGH *v.* SITLA BAKSHA SINGH.

4 O. L. J. 193 : 40 I. C 469 : [On appeal *see* 40 M. L. J. 449.]

——— **S. 16**—*Transfer.*

The word 'transfer' in the section refers to alienation *inter vivos* and not a mere right of possession granted under a will duly executed as provided by the section. (*Kanhaiyalal and Kendall, A. J. C.*) MAHABIR PRASAD SINGH *v.* JAGDISH BAHADUR SINGH.

38 I. C. 471 : 3 O. L. J. 762.

——— **S. 21**—Wajib-ul-Tarfain—*Meaning of.*

The word '*Wajib-ul Tarfain*' in the Oudh Estates Act means that the person to whom it is applied is a person of good family on both sides. (*Lindsay and Daniels, J. C.*) AHMAD KHAN *v.* HURMUZI KHANAM.

61 I. C. 177 : 8 O.L. J. 27.

OUDH ESTATES ACT (I OF 1869), S. 22.

——— **S. 22**—*Oudh Taluka — Succession — Primogeniture sanad.*

The acquisitions of a Taluqdar descend to his heirs under the personal law in the absence of family custom of primogeniture. But where villages are substituted by Govt. for Talukdari villages and a house is alloted for use of talukdar, the succession to them is by primogeniture. (*Sir John Edge.*) RAJENDRA BAHADUR SINGH *v.* RAGHUBANS KUNWAR.

40 All. 470 : 21 O. C. 106 : 24 M. L. T. 282 : 5 O. L. J. 401 : 8 L. W. 570: (1918) M. W. N. 831: 28 C. L. J. 456 : 23 C. W. N. 101 : 20 Bom. L. R. 1075 : 48 I. C. 213 : 45 I. A. 134 (P. C.).

——— **Ss. 22 and 13**—*Succession to estates—Rules governing.*

The special provisions embodied in section 22 of the Oudh Estates Act govern the succession to the estates mentioned in the second, third, and fifth of the lists, while the ordinary law to which persons of the donor's or testator's tribe and religion are subject governs the succession to the estates who would succeed to cases enterec in the 4th and 6th lists. In the former class of estates the person who would succeed to the estates, if the taluqdar or grantee were to die intestate would be the person to whom the special provisions of section 22 would apply. In the latter class of estates the person who would succeed to the estate, if the taluqdar or grantee died intestate, would be the person whom the ordinary law of the tribe or religion of the taluqdar or grantee would select. If the estate is one entered in lists 2, 3 and 5 the succession to which is regulated by primogeniture or the special rules of succession laid down in S. 22, the ordinary rules of the tribe and religion of the taluqdar or grantee would obviously be inapplicable, because, the heir to such an estate would only be one individual, and the ordinary law may point to many. If the estate was one entered in lists 4 and 6 the ordinary law of the trice and religion of the testator would govern the succession to such an estate, and the person entitled to succeed to the same may be one or more but they must be persons of equal degree. In other words S. 19 provides an execution in favour of a person who would have succeeded to the estate if the taluqdar or grantee had died intestate under the special provis ons relating to succession embodied in the Act. if the estate was one to which those special provisions relating to succession were applicable or under the ordinary law of the tribe and religion of the taluqdar or grantee, if the special provisions relating to succession so laid down, were not applicable. The person in whose favour the exception has been made would in any case be the person who would have been the immediate heir or the heir at law of the talukdar or grantee, bad the latter died intestate according to the law applicable to his estate. A similar exception is made in favour of the younger son of the taluqdar or grantee, if the estate was one entered in the 3rd or the 5th of the lists mentioned in S. 8, because by rule of primogeniture or impartibility applicable to such estate, such a younger son would be out of the pale of immediate succession and a gift or devise

in his favour would not divert the estate out of the line. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) CHAUDHRAIN ZARIF-UN-NISA *v.* CHAUDHRI SHAFIQ-UZ-ZAMAN. **26 O. C. 133 : 1923 Oudh 185.**

——S. 22—*Family agreement—Prescribing line of inheritance—Effect.*

Where 3 brothers executed a deed providing that as regards their shares their *najib ul tarfain* wives and children should be their heirs, and that children and wives not falling in the above description should only get maintenance and that on failure of the first category, the second should succeed. *Held*, the deed did not prescribe a line of inheritance varying the ordinary law. (*Kanhaiya Lal, J. C and Lyle, A. J. C.*) MOHAMED YAKUB KHAN *v.* MOHAMED SHAHID ALI KHAN. **25 O. C. 21 : 9 O. L. J. 160 : 1922 Oudh 87.**

——Ss. 22—*Adoption—Affiliation—Distinction between—Hindu Law.*

An adoption under the provisions of S. 22 of the Oudh Estates Act is merely a selection which need not be according to the conditions and the restrictions found in the personal law applicable to the person making adoption A male Hindu under the Mitakshara Law can only change his *gotra* on adoption. (*Stuart and Kanhaiya Lal, A. J. Cs.*) LALA TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER, FYZABAD. **47 I. C. 225 : 5 O. L. J. 294.**

——S. 22—*Scheme of—Widow—Reversioner—Transfer of estate by reversioner.*

Though under S. 22 of the Oudh Estates Act the widow of a Hindu talukdar has an interest in many respects different from the interest held by a female heir under the ordinary Hindu Law, yet this does not make any difference in the nature of the legal position of the porson who is entitled to succeed after the widow's death. A person entitled to the estate left by a talukdar under S. 22, cl. 14 of the Oudh Estates Act, but for the existence of the talukdar's widow who was in possession of the estate under cl. 8 of the section has no vested interest but merely an expectancy of inheritance in the estate which he could not transfer. (*Lindsay, J. C. and Stuart, A. J. C.*) HAR NATH KUAR *v.* INDRA BAHADUR SINGH. **47 I. C. 214 : 5 O. L. J. 277.**

——S. 22—*Taluka—Succession—Lord Canning's proclamation — Summary settlement — Title under sanad—Hindu widow—Position of.*

Lord Canning's proclamation of 1858 resulted in divesting all landed property from proprietors in Oudh and vesting them in the British Govt. The second summary settlement did not of itself vest the absolute proprietary and heritable right in talukas but amounted to a permission to the person with whom the settlements were made to engage for the payment of the Govt. revenue. The effect of the declaration in the Governor-General's letter of the 10th Oct. 1859 being to invest the talukdars in possession under the Summary Settlement with permanent hereditary and transferable proprietary rights in their taluks, including the perpetual privilege of engaging with the Govt. for the revenue of those taluks, the two sanads addressed to the widow of the last owner having purported to confer upon her and her heirs for ever the full proprietary right, title and possession of the taluka, and intention of the Govt. being deducible from its own act and not from that of the widow, the widow took the taluka in her own right as full owner and not as a Hindu widow inheriting to her husband. If she failed to exercise the special powers of transfer conferred upon her the taluka would revert after her death to the nearest male heir of her deceased husband according to the rule of primogeniture. The succession would be governed by S. 22 of the Oudh Estates Act. (*Lindsay, J. C. and Stuart, A. J. C.*) BISESHAR BAKSH SINGH *v.* RAMESHAR BAKHSH SINGH. **4 O. L. J. 648 : 44 I. C. 368 : 21 O. C. 1.**

——Ss. 22 and 23—*Primogeniture sannad—Estates entered in lists IV and VI—Suppression of sanad—Crown Grants Act, Ss. 2 and 5.*

The succession to an estate is governed by the ordinary law and not by the primogeniture sanad granted by the British Government which is part of the ordinary law only in cases of estates entered in lists 3 and 5 and not in the case of those entered in lists 2, 4 and 6; that the operation of the sanad was superseded by the Oudh Estates Act and the Crown Grants Act had not the effect of reviving the sanad already declared inoperative under Act I of 1869. 1 C. L. R. 318 P. C.; 3 A. 457, P.C. Foll.; 32 A. 599 P.C Expl. A family custom of male lineal primogeniture under which females would necessarily be excluded was held to have been not established by evidence. *Per Kanhaiya Lal, A. J. C.*—The sanad was not wholly superseded by the Oudh Estates Act and must be considered like custom as part of the personal law referred in Ss. 22 (2) and 23 of the Act. 40 C. 391, P.C.; 32 A. 599 P.C.; 38 A. 562 P C.; 27 A. 634 P.C.; Foll, 20 C. 649 P.C.; 31 A. 457 P.C.; Dist. (*Kanhaiya-lal and Kendall, A. J.C s.*) BADRI NARAIN SINGH *v.* HARNAM KAUR. **4 O.L.J. 233 : 40. I.C. 555.**

——Ss. 22 and 23—*Talukdari property—Self-acquisition*—Illaqa, *meaning of*—*Succession.*

Properties acquired by son of a *taluqdar* from the profits of taluqdari property are his self acquisitions and his brother cannot claim any share therein. Where it was provided by a will that an *illaqa* shall go to the eldest son, the property acquired by the testator from the profits of the taluqs does not pass with the *illaqa*. Succession to the property of a taluqdar other than the taluqdari property governed by S. 22 is governed by the ordinary law of the *taluqdars*. 14 B L.R. 159; 16 M. 54 Ref. (*Chamier, J.C. and Evans, A. J.C.*) LAL SINGH *v.* CHANDRAPAL SINGH. **9. I.C. 76.**

——S. 22, Cls. 1 to 10—*Sanad—Applicability of.*

In ascertaining the single heir to the estate of Oudh Taluqdar whose name was entered in List No. 2 to which special provisions of Cls. 1 to 10 of S 22 did not apply, the limitations in

OUDH ESTATES ACT (I OF 1869), S. 22.

the sanad granted to the talukdar cannot be appealed to, as they are superseded by the Act. (*Lindsay, J. C. and Stuart, A.J.C.*) GHISA SINGH *v.* GAJRAJ SINGH.

33 I. C. 371: 18 O.C. 289 : 3 O.L.J. 45.

——S. 22 (ii)—*Cases coming under list No. 3.*

Where S. 22 applies, cl. (ii) provides special limitations, and does not remit the succession to the ordinary law of the *Talukdar's* religion and tribe but the rule of primogeniture will operate in cases coming under list No. 3. (*Lord Phillimore.*) SITLA BAKSH SINGH *v.* SITLA SINGH.

43 All. 245 : 48 I. A. 288 : 19 A. L. J. 337 : 33 C. L. J 520 : 8 O. L. J. 214 : 25 C. W N. 721 : 24 O. C. 107 : 60 I. C. 548 : 40 M. L. J. 449 (P.C.).

[On Appeal from 40 I. C. 469 : 4 O.L.J. 193.]

——S. 22 (4)—*Death of Talukdar—Natural and affiliated family—Preference.*

The succession to a person obtaining a taluka under the provisions of S. 22 of cl. 4, of the Oudh Estates Act, and dying intestate, goes, in the absence of any male lenial descendant, to the line of the person who affiliated him and treated him in all respects as a son, and not to his natural line. (*Stuart and Kanhaiya Lal, A.J.Cs.*) LAL TRIBHUWAN NATH SINGH *v* DEPUTY COMMISSIONER, FYZABAD.

5 O.L.J. 294 : 47 I.C. 225.

——S. 22 (11)—*Scope of Act—Adoption by Hindu widow—Rights of adopted son.*

The provisions of the Oudh Estates Act apply to Hindus, Mahomedans and Christians alike, and the Act takes no account of any peculiarities of Hindu law. Where a widow is holding under the Act the heir is not determined until her death and the adoption must necessarily have preceded that event. It is not the law that because a widow was given a life estate under a will, a son validly adopted to her deceased husband should be deprived of his rights in favour of a collateral. 21 O. C. 374 dist. (*Daniels and Lyle, A.J.Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD.

9 O L. J. 235: 25 O. C. 189 : 1922 Oudh 236.

——S. 23—*"Ordinary law," meaning of—Male primogeniture sanad—Estate entered in list 4—Succession.*

The words "ordinary law" in S. 23 of the Oudh Estates Act refer to the law which would govern the parties apart from the statute and include any sanad giving title to the property in dispute.

Where the dispute related to a succession to a Talukdari estate which had been entered in list 4, and the sanad relating to the property specifically laid down that on intestacy the estate was to descend to the nearest male heir, *held* the latter was to be preferred to the widow.

A custom cannot be set up to prove a rule of succession directly contrary to the terms of the sanad. (*Viscount Cave.*) BADRI NARAIN SINGH *v.* HAKNAM KUAR.

44 All. 449: 9 O.L.J. 428 31 M.L.T. 195 (P.C.) : 27 C. W. N 129 : 25 O. C. 313 : 49 I. A. 276 : 1922 P. C. 289 (P.C.).

——S. 33—*Reference to British Indian Association and Financial Commissioner—Award if binding on parties.*

OUDH ESTATES ACT (III OF 1910), S. 3.

The rules of the British Indian Association do not exhaust the powers of the Association and the Financial Commissioner as private arbitrators to settle disputes about property between the members of the family. Awards made by them, irrespective of the rules, are binding upon the parties to the submission, to the same extent as those made under the rules filed and enforced under S. 33 of the Oudh Estates Act. 32 A. 92; 23 C. 838, Ref. (*Kanhaiya Lal, A.J.C.*) ABDUL RAHMAN KHAN *v.* AMIR ALI KHAN.

30 I.C. 249 : 2 O.L.J. 269.

——Sch. II —*Under-proprietary rights—Confiscation and restoration of proprietary rights.*

The proclamation of the 15th March 1858, confiscated both proprietary and under-proprietary rights. But when Govt. restored their estates to the *talukdars*, its intention was to restore them subject to under-proprietary rights as they should be found by subsequent proceedings to have existed at the date of the general confiscation. When the subsequent proceedings were completed the rights of under-proprietors were restored to them in the exact condition in which they would have been if no confiscation had taken place. Consequently where an under-proprietary holding was restored, the restoration has the effect of reviving in favour of other persons all the reversionary or other rights incidental to the ancestral character of the holding (*Lyle and Ashworth, A. J. Cs*) OUDH BIHARI SINGH *v* SURAJ BALI.

22 O. C. 201 : 53 I. C. 98 : 6 O L.J. 394.

OUDH ESTATES ACT (III OF 1910).

——*Estate included in list (2)—Transfer to a person not the immediate successor—Effect.*

A transfer before the Amending Act of 1910 to a person who was not the immediate successor, even though that person be in the line of succession, operates to take the estate out of the special limitations of descent. (*Lord Phillimore.*) LAL RAM *v.* DEPUTY COMMISSIONER OF PARTABGAR.

45 A. 596: 21 A. L. J. 777: 33 M. L. T. 355 (P. C.): 26 O. C. 257: 9 O. & A L. R. 746: 50 I. A. 256: (1923) M. W. N. 591: 1923 P. C. 160.

——Ss. 2 and 21—*Death of original grantee before the passing of the Act.*

An original grantee died before the passing of the Oudh Estates Act and his brother succeeded to his estate as his heir. After his death his son succeeded him before the passing of the amendment Act. *Held* that in case of the estate in the hands of the original grantee's nephew and his descendants, the rules of their ordinary personal law were applicable. (*Lindsay, J.C.*) ACHHAIBAR SINGH *v.* JANG BAHADUR SINGH.

48 I. C. 901 : 5 O. L. J. 687.

——S. 3 Expln.—*Refers to estate of* talukdars *only.*

S. 3 refers to the heritable and transferable rights of *taluqdars* in their estate and the explanation refers only to the succession to the estates of a *taluqdar*. (*Stuart and Kanhaiya Lal, A. J. Cs.*) GHULAM ABBAS KHAN *v.* BIBI UMMATUL FATIMA.

18 O. C. 188 : 31 I. C. 748: 2 O. L. J. 636.

OUDH LAND LAW.

——*Confiscation in Lucknow City—Waiver confined to Mohallas of the City—Village included within Municipal limits.*

The waiver of rights referred to in the letter of the Financial Commissioner, dated the 7th August, 1868, was only with regard to the inhabited area within the Mohallas of the Lucknow City and not with regard to the inhabited area within the villages included within the Municipal limits of Lucknow City Kundi though included within the Municipal limits of Lucknow is not a Mohalla of the City, but a village, as the papers prepared for this area at the time of settlement were prepared as though it were a village and not a portion of the City. (*Stuart, A. J. C.*) SHEODAT PRASAD *v.* SURAJ BALI. **18 O. C. 138: 30 I. C. 295: 2 O. L. J. 305.**

OUDH LAND REVENUE ACT (XVII OF 1876).

——S. 119—*Partition—Rev. Court's power to make partition of trees—New and Old Act.*

Trees growing upon land subject to partition by Revenue authorities are also subject to partition along with the land. The addition of provisions to the Land Rev. Act which did not exist in Old Act of 1873 has not ousted the jurisdiction of Rev. Courts in the matter of a partition of trees. (*Stuart, J. C.*) SUMER SINGH *v.* MASHAL SINGH. **36 I. C. 832: 19 O C. 151.**

——Ss. 162 and 165—*Statement by Deputy Commissioner—When binding.*

Statements made by the Deputy Commissioner or the Board of Revenue in derogation of a person's rights while his estate was in the possession of the Court of Wards under Ss. 162 and 165 of the Oudh Land Revenue Act are not to be considered as made on behalf of the proprietor. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) CHAUDHRAIN-ZARIF-UN-NISA *v.* CHAUDHRI SHAFIQ-UZ-ZAMAN. **26 O. C. 133 : 1923 Oudh 185.**

——S. 173—*Not limited to charge or interest taking effect at once*

There is nothing in S. 173 of the Act to limit it to an interest, which is to take effect immediately. (*Daniels and Wazir Husan, A. J. Cs*) RADHA KISHEN *v.* JAMNA PRASAD. **61 I. C. 956: 8 O. L. J. 127.**

——S. 174—*Court of Wards—Contract by disqualified proprietor—Sale in execution of decree on, after release of property from management.*

On a true construction of S. 174 of the Oudh Land Revenue Act a decree made in respect of a contract entered into by any disqualified proprietor during the time his property was under the superintendence of the Court of Wards cannot be executed against any part of such property, even though at the date of the decree and the execution proceedings the property has been discharged from superintendence. 14 Oudh Cases 6 Disapproved. (*Lord Shaw.*) DEBI BAKSH SINGH *v.* SHADI LAL.
38 All. 271: 43 I A. 69: 14 A L. J. 477: 24 C. L J. 15: 20 M. L. T. 53: 19 O. C. 55: 20 C. W. N. 770: 18 Bom L. R. 412: (1916) 1 M. W. N. 425: 3 L.W. 525: 33 I.C. 681 : 4 O. L. J. 1: 31 M. L. J. 72 (P. C.)

OUDH LAWS ACT (XVIII OF 1876). S. 3.

——S. 174—*Execution of decree—Contract entered into while property under Court of Wards.*

Acquisitions made by a person from the profits realised by him from his estate after its release from the superintendence of the Court of Wards are liable to attachment in execution of a decree obtained against him in respect of a contract entered into while his estate was under the superintendence of the Court of Wards. (*Kanhaiya Lal, A. J. C.*) DEBI BAKSH SINGH *v.* BED NATH. **45 I. C. 219 : 5 O. L. J. 90.**

OUDH LAWS ACT (XVIII OF 1876).

——*Pre-emption—Heritability of the right—Ownership.*

Under the Oudh Laws Act the right of pre-emption is a personal right in the owner and incident to the ownership of land and is heritable. A person not having this right at the date of sale but inheriting the property by reason of the ownership of which the right of pre-emption arose from a person who had such right is entitled to pre-emption. (*Lindsay and Stuart, A. J. Cs.*) RAGHUNANDAN *v.* JEGESHAR SINGH.
2 O. L. J. 595: 32 I. C. 424: 18 O. C. 256.

——Ch. II—*Applicability to transfers under Court sale.*

The chapter does not apply to a transfer made by a Court sale but applies only to voluntary transfers by way of sale. No right of pre emption can be exercised in respect of such transfer. (*Stuart, J. C.*) MANSABALI *v.* SALIGRAM **38 I. C. 471: 3 O. L. J. 739.**

——Ch. II—*Property sold not in possession of vendor—Suit for pre-emption.*

A sale of a mere right to recover a property cannot be the subject of a suit for a pre-emption under Chap. II of Oudh Laws Act. (*Chamier, J.C.*) SUKHANDAN *v.* PARSHADI. **11 I. C. 279.**

——Ch. IV—*Good faith—Discretion of Court.*

Ch. IV of the Oudh Laws Act does not allow any discretion to a Court in a pre-emption suit to go into the question of the good faith of the plff. (*Lyle and Ashworth, A. J. Cs.*) HANUMAN SINGH *v.* ADIYA PRASAD. **54 I. C. 520 (2) : 22 O. C. 323**

——S. 3—*Mahomedan Law—Applicability of—Gift—Creation of trust.*

The Mahomedan Law is to be applied in judging of the validity of a gift to a beneficiary through the medium of a trustee. The word "gift" in S. 3 is not confined to a direct gift. (*Lord Atkinson.*) SADIK HUSAIN KHAN *v* HASHIM ALI KHAN.
38 All. 627: 14 A. L. J 1248 : 19 O. C. 192: 18 Bom. L. R. 1037: 21 C W. N. 130: (1916 2 M. W. N. 577 31 M. L T. 40: 1 Pat. L. W 157: 4 O. L. J. 22: 25 C. L. J. 363: 6 L. W 378 : 10 Bur. L. T. 140 : 36 I. C. 104 : 43 I. A 212 : 31 M. L. J. 607 (P.C.).

——S. 3—*Mahomedan Law—Applicability of.*

Oudh Laws Act, S. 3 requires that in the absence of a custom to the contrary, Mahomedan

OUDH LAWS ACT (XVIII OF 1876), S 3.

Law shall be applicable to questions relating to gifts between Mahomedans. (*Kanhaiya Lal, A. J. C.*) MUNIFA BIBI *v.* FATEH ALI.
17 O. C. 60: 23 I. C. 453: 1 O. L. J. 133.

——S. 3 (b)—*Applicability of Mahomedan Law to trusts—"Gift", meaning of.*

Under S 3 (*b*) of the Oudh Laws Act, the Mahomedan Law does not apply to trusts and the word "gift" cannot be meant to include Trust (*Evans, J. C. and Lindsay, A. J. C*) MAHMAD HASHIM *v.* SADIQ HASAN KHAN. **13 I. C. 882 : 14 O. C. 356**

——S. 5—*Dower—Means of parents of husband.*

Where the husband's means of subsistence is an allowance made to him by his parents the court can in fixing the amount of dower take their means into account especially where the marriage had taken place while the bridegroom was still below the age of majority. (*Lindsay, J.C.*) SAJJAD HUSAIN *v.* AMIR JAHAN.
7 O. L. J. 17 : 55 I. C. 441 : 2 U. P. L. R. (J. C) 31.

——S. 5—*Dower—Claim for—Matters to be considered in determining.*

Under S. 5 the first matter to be considered is whether the sum agreed upon is excessive compared with the means of the husband. If it is not found to be so it is unnecessary to go any further to discuss the status of wife for reducing the amount. The expression 'means of the husband' in S. 5 signifies the value of the husband's estate at the time of his death in cases where the claim is made by a widow In determining whether any sum fixed for dower is reasonable or excessive the extent and nature of the claims of the various persons who as heirs are entitled to divide the estate are to be considered. If it appears that the payment of a certain sum on account of dower would reduce the divisible estate to such an extent as to leave the heirs poorly provided for the sum is excessive. (*Lindsay and Kendall, A. J. Cs.*) BAQAR MIRZA *v.* MEHDI HASAN.
37 I. C. 203 : 19 O. C. 246.

——S. 5—*Dower—Reasonable sum—Power of Judge to award lump sum of money.*

Where the property left by the deceased husband was estimated at 9 lacs of rupees, *Held*, that one lac of rupees was a reasonable and sufficient amount of dower to be awarded to the wife, 21 Cal 135, (P C) Ref. To avoid future disputes the Judge may award as dower a lump sum of money instead of a fractional share of the property of the deceased husband on the rough estimated value of the property. 21 Cal. 135 (P.C.) Ref. (*Lindsay, J. C. and Kanhaiya Lal, A.J.Cs*) SURIYA QUADIR *v.* QUDSIA BEGAM. **24 I. C. 643 : 1 O. L. J. 281.**

——S. 5—*Discretion of Court under.*

Under this section, the Court considers the status, of the lady and the assets of the husband's estate, irrespective of liability incurred by him before his death. (*Lindsay, J.C. and Sabonadeire. A. J. Cs*) BISMILLAH BEGAM *v.* SHAHR BANO BEGAM. **1 O. L. J. 1 : 22 I. C. 529 : 16 O. C. 325**

——S. 6—*Pre-emption—Previous denial of title of vendor—Sale of share in a law suit.*

OUDH LAWS ACT (XVIII OF 1876), S. 9.

A previous denial of title of the vendor does not deprive a person of a right of pre-emption under the Oudh Laws Act. 22 O. C. 144, Foll. A sale of a mere share in a law suit does not give rise to a right of pre-emption and the mere fact that legal proceedings are necessary to obtain possession of the property sold is no ground for holding that the sale does not give rise to a right of pre-emption. The question whether a sale is a genuine sale or a sale of a share in a law suit is one to be determined on the facts of each case. (*Stuart, J.*) MUNTAZIM HUSAIN *v.* AHMAD HUSAIN.
7 O. L. J. 64 : 2 U. P. L. R. (J.C.) 44 : 55 I. C. 529 : 23 O. C. 13.

——Ss. 6, 9 and 10—*Pre-emption— Wajib-ul-arz—Construction.*

When it is provided by the Wajib ul-arz of a village that no sharer in the village can dispose, either by way of sale or mortgage of his share or a portion of it to any stranger so long as a co-sharer is willing to take it, this principle applies also to a transfer by a co-sharer to another co-sharer and the rights are regulated by S. 9 of the Oudh Laws Act except when there is a well-established custom regulating the rights otherwise. S. 6 is to be read along with S. 9 of of the Oudh Laws Act. (*Lindsay, J. C. and Stuart, A. J. C.*) SHEORATAN SINGH *v.* UJAGAR SINGH.
16 I. C. 800 : 15 O. C. 389.

——S. 7—*Pre-emption—Wajib-ul-arz silent on question of—Presumption.*

The existence of pre-emption is presumed under S. 7 of the Act where the Wajib ul-arz is silent on the point of the right of pre-emption. (*Kanhaiya Lal, A. J. C.*) ATA HUSSAIN KHAN *v.* AGHA HADI. **33 I. C. 775 : 3 O. L. J. 7.**

——S. 7—*Presumption in favour of pre-emption—Nature of—Contract to the contrary.*

The presumption as to a right of pre-emption, is in the absence of a custom or contract to the contrary a statutory one created by S. 7 of the Oudh Laws Act, and an entry in a Wajib-ul-arz to the effect that every co-sharer is entitled to sell his share to whomsoever he pleased is sufficient to exclude the right of pre-emption. (*Lindsay, J.*) ABDUL RAHMAN *v.* KALE KHAN.
1 O. L. J. 152 : 23 I. C. 943 : 17 O. C. 105.

——S. 9— *Pre-emption — Preference on account of relationship.*

If every khata in the village is distinct without any joint right or joint obligation with the other khatas every khata would be in the position of a separate mahal and the co-shares of every khata would be separate and independent. Under these circumstances among the parties who are members of the village community so far as the right of pre emption is concerned no right of preference is given on account of relationship. (*Dalal, A.J.C.*) RAM ADHIN AND OTHERS *v* GAYA PRASAD AND OTHERS. **1923 Oudh 159.**

——S. 9 — *Pre-emption — Right to— Pre-emptor's property subsequently sold—Rights of heir of pre-emptor and vendee from him—Gift to son—Donee if entitled to pre-empt—Co-sharer—Rights—Pre-emption a personal right.*

The general principle is that the right of pre-emption runs with the land. It is settled law that a transfer by inheritance of the pre-emptor's property, subsequent to the sale which is to be pre-empted, transfers to the heir the right of pre-emption. A transfer of the pre-emptor's property by sale to a stranger subsequent to the sale to be pre empted does not transfer the right of pre emption to the vendee. A gift to a son of the pre-emptor falls within the general principle.

The expression "co-sharer" in cls. (1) and (2) of S. 9 of the Oudh Laws Act denotes persons possessing interests in immoveable property. Under the statute mere relationship does not create the right of pre-emption as it does in certain cases of custom. Relationship under the Oudh Laws Act is a ground of preference only provided the relation satisfies the *sine qua non* of ownership in property. A survey of Ch. II of the Oudh Laws Act shows that the right of pre-emption is an incident to the ownership of one land and a burden on the ownership of another land. On general principle the incident and the burden respectively will follow such lands.

The ownership in the one land as in the other may be acquired in any of the various modes of acquisition of property known to law. It may be under a gift, by purchase or inheritance A person is a co-sharer within the meaning of the sections of Ch. II of the Oudh Laws Act whether the property in virtue of the ownership of which he is a co-sharer is acquired in one way or in another, and a person who proposes to sell the same, no matter how he acquired the ownership of it. The last vendee in chain of successive vendees of a property which bears the burden of pre-emption is as liable to deliver the property to a legitimate pre-emptor as is the first vendee, the general principle being that the assignee of property takes it subject to all the obligations or liabilities. When the property the ownership of which confers on a person the capacity of a co-sharer, is transferred, the transferee acquires the status of a co-sharer, subject always to all the obligations and liabilities with which the property is burdened. Consequently if an intending vendor has complied with the provisions of S 10 of the Oudh Laws Act, by giving the proper notice to the pre-emptors, his successors in estate shall be deemed to have discharged the duty of giving the statutory notice, and the successor in the estate of the pre-emptor shall lose his right of pre-emption if his predecessor has not within three months from the date of the notice paid the price to the intending vendor. The right of pre-emption is a personal right in the sense that it is an interest protected solely against determinate individuals and not against the world at large which is the characteristic of a real right but to say that it is a personal right in the sense that it is an attribute of the status of the pre-emptor is based on a misconception. In one sense every right whether real or personal involves a personal relation. (*Simpson and Wazir Hasan, A.J.C.*) MIRZA SADIQ HUSAIN *v.* MAHOMED KARIM.

9 O. L. J. 456 : 25 O. C. 319 : 1922 Oudh 289.

——S. 9—*Under-proprietary tenure—Extent.*

On a proper interpretation of S. 9 of the Oudh Laws Act, an under-proprietary tenure may be any area of lands, whether constituting an entire mahal or only a small portion thereof. (*Dalal, A. J. C.*) MAHOMED ABDUL AZIZ *v.* BHAGWAN DAS.

8 O. L. J. 560 : 1922 Oudh 101.

——S. 9—*Pre-emption—Right to mortgage—Object of defeating right of pre-emption.*

The right of pre emption in respect of a deed of mortgage arises, under S. 9 of the Oudh Laws Act when the mortgage is foreclosed. It also arises where it is shown that the transaction was an out and out transfer and the right of redemption reserved was merely nominal. In order to establish this it must be shown that the terms of the transaction are such as to render it practically impossible for the mortgagors ever to recover the property. If a genuine right of redemption is reserved there is nothing in the parties resorting to a mortgage instead of a sale for the purpose of avoiding pre-emption. (*Daniels, J. C. and Dalal, A. J. C.*) SARJU PRASAD *v.* BISHESHAR PRASAD.

64 I. C. 744 : 24 O. C. 353.

——Ss. 9 and 10—*Mahal—Taluqdari—Pre-emption.*

"*Mahal*" in S. 9 of the Oudh Laws Act comprises many villages separately assessed to revenue but carrying a joint liability for revenue in the taluqdari mahal, though no separate Record of Rights is prepared for the whole mahal but only for each of the villages comprising that mahal. 32 A. 551, Ref. (*Lyle and Ashworth, A. J. C.*) LAL RAGOINDRA PRATAB SAHI *v.* ABU JAFAR.

6 O. L. J. 618 : 54 I. C. 371 : 22 O. C. 353.

——S. 9—*Under-proprietary village—Division into mahals and patties—Pre-emption.*

Though the liability to pay Govt. Revenue may remain joint whenever an under-proprietary village is divided into mahals and sub-divided into pattis there come into existence sub-divisions of tenure which should be treated as separate entities for the purposes of S. 9 of the Oudh Laws Act. (*Kanhaiya Lal, J. C.*) MOHAMMED SARFARAZ HUSAIN *v.* MOHAMMED SHAHIN KHAN.

22 O. C. 97 : 52 I. C. 69 : 6 O. L. J 420.

——S. 9—*Pre-emption—Co-sharer — Joint ownership in* shamilat khata.

Joint ownership in *Shamilat khata* by a co-sharer does not make him co-sharer in sub-division, if he owns no land in the *khata* a part of which is sold. (*Daniels, A.J.C.*) GAJARAJ SINGH *v.* GUR BAKSH SINGH. **50 I. C. 945.**

——S. 9 and Ch. II—*Pre-emption—Sale of house by raiyat.*

A sale by an occupier of a house in a village who has merely the ordinary rights of a raiyat in it does not give rise to a right of pre-emption exercisable under Chap. II of the Oudh Laws Act. 4 O. C. 26, Foll. (*Stuart, J.C. and Kanhaiya Lal, A. J. C.*) ABBAS BANDI BIBI *v.* ABDUL GHANI.

47 I. C. 678 : 5 O L. J. 450.

——S. 9—*Pre-emption—Rent-free grantee—If member of village community.*

A mere rent free grantee is not a member of the village community for pre-emption purposes within S. 9 of the Oudh Laws Act not having

proprietary or under-proprietary rights in the village. (*Kanhaiya Lal and Daniels, A. J. Cs.*) MURLI *v.* GAJRAJ SINGH.
21 O. C. 124 : 46 I. C. 443 : 5 O. L. J. 241.

——S. 9—*Pre-emption — Lapse of right—Whether amounts to sale.*

When the right of a successful pre-emptor lapses by reason of his failing to execute his decree within the time allowed by law, such lapse whether intentional or accidental does not amount to a resale of the pre-empted property so as to give rise to a right of pre-emption on its own account under S 9., 14 A L. J. 102 Dist. (*Kanhaiya Lal, A. J. C.*) GHUTUR SINGH *v.* ANGAD PANDE. **41 I. C. 467 : 4 O. L. J. 422.**

——S. 9—*Sale or gift.*

A transfer of a part on condition that a transferee shall pay the mortgage money over the whole and also the rent, for some period, is a sale and not gift. (*Kanhaiya Lal, J. C.*) TIR BHAVAN SINGH *v.* RAGHUBAR DAYAL. **38 I. C. 71 : 19 O. C. 394.**

——S. 9—*Member of joint family, if co-sharer.*

S 9 of the Act includes a member of a joint Hindu family with a share in the joint family property, as a co-sharer of the sub-division where the property is situated in spite of his name not appearing in the *Khewat.* (*Stuart and Kanhaiya Lal A. J. Cs.*) LALTA SINGH *v.* CHHATTAR SINGH. **3 O. L. J. 552 : 37 I. C. 188 : 19 O. C. 306.**

——S. 9—*Pre-emption in Agra different from that in Oudh.*

The principles of the pre-emption in Agra as enunciated by the Allahabad High Court, cannot be made to affect the scope of the Oudh Laws Act on pre-emption in Oudh. (*Lindsay, J C. and Stuart, A. J. C.*) RAJ BAHADUR SINGH *v.* CHANDRA PAL. **37 I. C. 170 : 19 O. C. 185 Note.**

——Ss. 9 and 10—*Pre-emption—Right of suit—Co-sharer after sale—Right acquired subsequent to the accrual of cause of action.*

Where certain persons had no share in the thak which included the property sold at the date of the sale but acquired some share in it subsequently under a gift and claimed a preferential right of pre-emption on the basis of the gift, *held*, that the subsequent acquisition could not give them a retrospective right in respect of a sale effected before their acquisition. *Held*, further, that a defence, available to a person in possession, may not be available to his opponent not in possession and no man can be preferred to another who has superior right, on the basis of a title acquired after the right to sue accrued (*Kanhaiya Lal, J.C.*) RATAN *v.* RAM NIWAZ.
19 O. C. 110 : 36 I. C. 799 : 3 O. L. J. 580.

——S. 9—*Pre-emption —Under-proprietor of mahal in village.*

Under S 9 an under-proprietor of certain specified plots in a mahal of a village and the proprietor of another mahal in the same village are both members of the village community and

neither has a right of pre-emption superior to that of the other. So lots must be drawn between them. (*Stuart and Pandit Kanhaiya Lal, A.J Cs.*) GAJADHAR *v.* UDIT NARAIN SINGH.
34 I. C. 682 : 3 O. L. J. 193.

——S. 9—Hiba-bil-ewaz— *Effect on pre-emption.*

Hiba-bil-ewaz is not a sale within S. 9 of the Act and confers no right of pre-emption under Chap. II of the Act. (*Stuart, A. J. C.*) RAM PRASAD *v.* RAHATBIBI. **33 I. C. 622 : 18 O. C. 367.**

——S. 9 and Ch. II—*Sale by Hindu widow of her estate in proprietary share without legal necessity.*

A sale made without a legal necessity by a Hindu widow, governed by the *Mitakshara* law, of her estate as a Hindu widow in a proprietary share is not a sale of a full proprietary estate, nor is it a sale of a proprietary tenure or a share of a proprietary tenure within S 9, and no right for pre-emption under Ch. II of Act XVIII of 1876 arises, by such a sale. (*Stuart, A. J. C.*) RAMPAL SINGH *v.* GANESHA. **32 I. C. 225.**

——S. 9—*Pre-emption.*

Property may be liable to pre-emption but only in a case where a transfer is made in one of two ways, namely, by sale or foreclosure There is no right of pre-emption against transfers by lease, mortgage or gift. (8 O. C. 121 ; 14 O. C. 41, Dist., (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) DATTA RAM TEWARY *v.* DEO KALI TEWARI.
1 O. L. J. 463 : 25 I. C. 855 : 17 O. C. 299.

——S. 9—*Vendee and pre-emptors both becoming equally entitled to purchase disputed property—Effect.*

Where before a pre-emption suit is finally disposed of, the vendee becomes equally entitled to purchase the property in dispute, lots must be cast under S. 9 of the Act to determine which of them should buy the property. (*Kendall, A, J.C.*) ONKAR SINGH *v.* BHAGWAN DAT SINGH.
25 I. C. 694 : 17 O. C. 242.

——S. 9—*Relationship, meaning of—Pre-emption.*

S. 9 of the Act only contemplates a legitimate relationship and therefore illegitimate sons, who are entitled only to maintenance and not to the inheritance, have no better right to pre-emption than a legitimate collateral relation. (*Kendall, A. J. C.*) DURGA *v.* MAN. **25 I. C. 688 : 17 O. C. 250.**

——Ss. 9 and 13—*Pre-emption—Transfer in lieu of dower—Consideration.*

To determine if a transfer in lieu of dower gives rise to a right of pre emption under the Oudh Laws Act the adequacy of consideration is material for it may or may not amount to a sale under the Act though it may be a *Hiba bil ewaz* under the Mahomedan Law. If a *bona fide* sale is intended a right of pre-emption would accrue irrespective of consideration. (*Kanhaiya Lal, A. J. C.*) ALLA BAKSH *v.* HAJJIN IMDADI.
21 I. C. 60.

OUDH LAWS ACT (XVIII OF 1876), S. 9.

——S. 9—Khatta, *if sub-division of tenure—Separate assessment of Revenue in village papers if essential.*

Where a village was divided into two *Thoks* of two *pattis* each, and one of the *pattis* was further sub-divided into *khattas*, each *khatta* consisting of a definitely assigned area, *Held*, that each *khatta* was a sub-division within S. 9 of the Act, and it is not essential that a separate amount of revenue on each *khatta* should be shown in the village papers. (*Lindsay, A. J. C.*) BAIJNATH SINGH *v.* MAHA BIR SINGH.
20 I. C. 646 : 16 O. C. 203.

——S. 9—*Tenure, interpretation of*—Patti—Thok.

'Tenure' under S. 9 of the Act is the proprietary or the under-proprietary tenure in which the property sold may be comprised and the sub-division thereof would be a *patti* or *thok* or other defined part made by the division of that tenure. (*Kanhaiya Lal, A. J. C.*) PATISHAR *v.* CHEDDI. **20 I. C. 474.**

——S. 9—*Pre-emption — Sale—Consideration.*

A sale of an equity of redemption effected partly in lieu of money and partly in lieu of something computable in money or valued in money is subject to the right of pre-emption under S. 9 of the Act, where the vendor was admittedly the owner of the property and there was no cloud over his title preventing him or his vendee from recovering the property from the mortgagees. 9 O. C. 8 ; 9 O. C. 331, Dist. (*Kanhaiya Lal, A. J. C.*) LAIQ SINGH *v.* HARNAM SINGH. **20 I. C. 351 : 16 O. C. 99.**

——S. 9—*Pre-emption —Relationship—Test and meaning.*

The test of relationship mentioned in S. 9 of the Oudh Laws Act is nearness and not the position of the line of inheritance ; the relationship is not confined to relationship through but means relationship from a common stock as opposed to affinity or relationship by marriage. (*Lindsay, J. C.*) MUHAMMAD AYUB KHAN *v.* KAZIN FATIMA BIBI. **11 I. C. 919 : 14 O. C. 193.**

——S. 9 (1) —*Pre-emption —Co-sharer—Under-proprietary tenure.*

If a vendor and pre emptor are co-sharers in an under-proprietary tenure the pre-emptor has a preferential right over the vendees who is a co-sharer merely in the proprietary tenure in which the under proprietary tenure is situate. 32 All. 351 : 10 O. C. 351 ; 22 O. C. 297 Dist. (*Dalal, A. J. C.*) MAHOMED ABDUL AZIZ *v.* BHAGWAN DAS. **8 O. L. J. 560 : 1922 Oudh 101.**

——S. 9 (1)— *Pre-emption — Sub-division—Meaning of.*

The word "sub-division" in S. 9 has no technical meaning nor is it confined to a portion of a village described as *patti* in the Revenue Records, but where separate villages are component parts of a mahal, each village is a sub-division. (*Evans, J. C.*) PANCHAM SINGH *v.* GANGA BAKSH SINGH. **13 I. C. 490.**

OUDH LAWS ACT (XVIII OF 1876), S. 10.

——S. 9, (2)—*Sharer in mahal if entitled to preference over another sharer by virtue of relationship to vendor.*

Lands held in under-proprietary tenure situate in a village consisting of only one mahal, within S. 9 were sold to persons who owned a proprietary share in the village but not related to the vendor ; *Held*, that the proprietors who were related to the vendors could pre-empt the stranger sharers. (*Stuart, J. C.*) BAKKHA SINGH *v.* GAYA DIN SINGH. **17 O. C. 339 : 26 I. C. 517 : 2 O. L. J. 148.**

——S. 10—*Mortgage —Pre-emptor—Failure to give notice—Costs of redemption—Vendee—Co-sharer.*

A provision in a sale-deed as to redemption of the mortgage as economically as possible does not affect the nature of the transaction, if the pre-emptor happens to be the mortgagee of the property sold. If a vendee fails to see that the vendor complies with S. 10 of the Act and files a redemption suit against the mortgagee who files a simultaneous pre-emption suit, the vendee cannot recover from the pre-emptor mortgagee the costs of the redemption suit. A pre-emptor does not lose his right of pre-emption by reason of the vendee becoming a co-sharer after the date of the sale in question but before the date of the pre-emption suit. Up to the date of sale the pre-emptor has merely the right to be preferred which is a potential or imperfect right. That potential right gives place on the happening of the sale to a stranger to an actual or perfect right to be substituted for the vendee and such right cannot be defeated by any act of the vendee after the right has accrued. A purchaser who purchases property without ascertaining that it has been offered first to a person having a preferential right of purchase, is assisting the vendor in evading his obligation to give notice under S. 10 of the Oudh Laws Act and he cannot take advantage of his own wrong. (*Lyle and Ashworth, A. J. Cs.*) LAL RAGOINDRA PRATAB SAHI *v.* THE HON'BLE RAJA SAIYAD ABU JAFAR.
6 O. L. J. 618 : 54 I. C. 371 : 22 O. C. 353.

——S. 10—*Issue of notice—Contract of sale—Period of affixture—Knowledge.*

To comply with S. 10 of the Oudh Laws Act notice need not be issued before any contract to sell has been entered into. It is sufficient if it is issued after the contract has been entered into, but before actual sale has been completed. In the absence of any fraud on the part of the vendor or the vendee in the publication of the notice, it is not necessary that the notice should remain affixed on the chaupal or other public place of the village in which the property is situate, for the whole period of three months, especially in a case where it is found that the notice did remain so affixed for a sufficiently long period, that the co-sharers were aware of the issue of the notice and that along with the affixation of the notice the proposal of sale was notified throughout the village by beat of drum. (*Lyle and Ashworth, A. J. Cs.*) CHIRANJU *v.* MOHAN LAL. **53 I. C. 647 : 6 O. L. J. 501.**

OUDH LAWS ACT (XVIII OF 1876), S. 10.

——S. 10—*Pre-emption suit by one co-sharer without making other co-sharers of equal degree, parties—Rights of latter.*

A pre-emption decree obtained by one co-sharer against the holder of a foreclosure decree, without impleading other co-sharers, equally entitled to pre-empt with him, as parties to the suit, furnishes a cause of action to the latter for a suit against the former (the pre-emption decree-holder) for pre-emption of the property pre-empted by the former. The non-impleading of the holder of the decree for foreclosure, in such a suit is not fatal to the suit. The carrying on of a pre-emption suit with the money supplied by a third person is no ground for its dismissal. 13 I. C. 508. Dist. (*Kanhaiya Lal and Kendall, A. J. Cs.*) RAM SAHAI *v* JAGADAMBA SINGH.

19 O. C. 153 : 37 I. C. 163 : 3 O. L. J. 683.

——S. 10—*Sale clothed as mortgage—Pre-emptor can show it to be sale.*

Where property is transferred with all the usual incidents of a sale, the fact that the transfer masquerades under a cloak of a mortgage to defeat pre-emption will not prevent the pre-emptor, from claiming the pre-emption, if he can show that a sale was really effected. The Court will look to the terms of the document, the surrounding circumstances and the previous and subsequent conduct of the parties. (*Piggott, J. C. and Kanhaiya Lal, A. J. C.*) BALDEO SINGH *v*. PUTTU LAL.

21 I. C. 69.

——S. 10—*Pre-emption—Notice, validity of.*

Where a vendor has given notice under S. 10 the purchaser is not affected though the notice was issued more than one year before sale. (*Chamier, J. C.*) JUGAL *v*. BADRI.

12 I. C. 321 : 14 O. C. 332.

——Ss. 10 and 11—*Pre-emption—Notice—Sale-deed executed before expiry of the period fixed for tender—Effect.*

Notice under S. 10 was issued by vendor but the sale-deed was executed before the three months allowed for tender under S. 11. *Held*, the failure to make the tender did not bar his right to sue for pre-emption. (*Lindsay, A. J. C.*) MURLIDHAR *v*. KALKA SINGH.

9 I. C. 333 : 14 O. C. 1.

——Ss. 11 and 6—*Scope.*

Section 11 lays down the procedure where the sale-deed has not been executed yet. (*Simpson, A. J. C.*) SHEO DUTT BAHADUR SINGH *v*. BISHUNATH SINGH AND OTHERS.

9 O. L. J. 546 : 1923 Oudh 91.

——S. 13—*Fancy price—Pre-emption.*

To determine whether the price has been fixed in good faith, the Court can examine whether there is any very great difference between that price and the market value of the property. If the price entered in the deed greatly exceeds the market value, that fact would be relevant to the issue of good faith but it would be open to the vendee to show special circumstances which

OUDH LAWS ACT (XVIII OF 1876), S. 15.

induced him to pay a fancy price for the property. (*Lyle and Ashworth, A. J. Cs.*) NARAIN PRASAD *v*. DURGA SINGH.

22 O. C. 335 : 54 I. C. 95 : 6 O. L. J. 585.

——S. 13—*Pre-emption—Suit by mortgagee—Amount payable to vendee—Determination of market value.*

The vendor left with the purchaser a portion of the sale money to be paid to the mortgagee of the property. The pre emptor who was the mortgagee applied and obtained an amendment of the decree to the effect that the deft. vendee was entitled to receive from him only such sums as the latter had paid to the vendor. *Held*, that the Court was right in applying S. 151 and in amending the decree as prayed for. In the absence of any special reason for paying fancy price for the property, the fact that such a fancy price has been entered in the sale-deed is in itself evidence of the price being fictitious. Under S. 13 of the Oudh Laws Act if any single item forming part of the price mentioned in the sale-deed is found to be fictitious, the Court must fix such price as appears to it to be the fair market value of the property sold (*Lyle, A. J. C.*) SHEIKH ZAHUR AHMAD *v*. MOHARBAM ALI.

54 I. C. 34 : 2 U. P. L. R. (J. C.) 54.

——Ss. 13—*Pre-emption— Genuineness or fictitious nature of sale and amount for payment in the pre-emption suit.*

In cases of pre-emption, a Court can on facts determine the genuineness or the fictitious nature of the sale as also of the amount for payment in the pre-emption suit on the market value, but when there is no evidence showing bad faith the fact that the price offered and paid was one which a reasonable businessman would not offer, raises no legal presumption of bad faith. (*Stuart, A. J. C.*) SHAMBHUDATT *v*. JAGANNATH.

37 I. C. 173 : 3 O. L. J. 543.

——Ss 14 and 15—*Pre-emption—Failure to deposit amount in time—Right is lost—Appeal.*

Under Ss. 14 and 15, Oudh Laws Act, when the plaintiff pre-emptor fails to deposit the amount in Court within the time limited, the right is lost. The period cannot be extended under S. 148 C. P. Code, nor can an appeal be preferred thereafter. (*Dalal, J, C.*) IMAM DIN KHAN *v*. ABDUL SATTAR KHAN.

1924 Oudh 102.

——S. 15—*Deposit of part of money out of time owing to mistake is not invalid.*

The respondent obtained a pre-emption decree subject to payment of Rs 80 which he duly deposited but subsequently attached and withdrew on account of the amount due to him for costs a sum of Rs. 22. The appellate court increased the amount payable for the property to Rs. 106-6. He accordingly paid the balance of Rs. 26-6 and obtained possession of the property. Under the decree both parties were to pay their own costs in the event of the plaintiff complying with the decree. On the matter being brought to notice the plaintiff paid in the amount of Rs. 22 which he had withdrawn but not within the one month allowed by the decree.

OUDH LAWS ACT (XVIII OF 1876), S. 15.

Held, that there was a sufficient compliance with the decree. 34 A. 595, Foll. It made no difference that in Oudh the right of pre-emption is a statutory right and payment is made in accordance with S. 15 of the Oudh Laws Act. (*Daniels, J. C.*) BINDA PRASAD *v.* BAHU BANARSI DAS. **10 O. L. J. 206 : 1923 O. 271.**

——S. 15—*Provisions of—Mandatory.*

S. 15 is mandatory and the validity or otherwise of the tender of the purchase money in a pre-emption suit must be determined according to S. 15 of the Oudh Laws Act. (*Wazir Hasan, A. J. C.*) JANGA SINGH *v.* LACHMINARAIN. **23 O. C. 254 : 7 O. L. J. 378 : 57 I. C. 488 : 2 U. P. L. R. (J. C.) 171**

——S. 15—*Pre-emption decree— Order of dismissal for non-payment of purchase money—Appeal—Revision.*

A decree, declaring that in default of payment of the amount specified therein, the suit shall stand dismissed, becomes a decree for dismissal on the happening of such default. Such an order of dismissal is appealable as a decree to the proper Court and no revision can be entertained by the second appellate Court. (*Lindsay, J. C.*) BHOLA *v.* SHEODARSHAN SINGH. **24 I. C. 109 : 1 O. L. J. 191.**

——S. 15—*Pre-emption— Payment out of Court—Whether valid.*

Under S. 15 a pre-emptor must pay the purchase money specified in the decree into Court, whether the decree does or does not expressly provide for payment into Court. 8 O. C 57, Ref. (*Evans and Piggott, A. J. Cs.*) LATIFF-UN-NISA *v.* ACHAMBIT LAL. **10 I. C. 721 : 14 O. C. 85.**

——S. 20—*Commissioner's sanction—Execution of mortgage decree.*

The Commissioner's sanction under S. 20 of the Oudh Laws Act is not a mere formality, but an essential preliminary to a legal sale being held, and parties to a decree cannot dispense with it. S. 20 applies to sales in execution of mortgage decrees. (*Kanhaiya Lal and Daniels, A. J. Cs.*) KANIZ MEHDI BEGUM *v.* RASUL BEG. **48 I. C. 39 : 5 O. L. J. 551.**

——S. 20—*Grant—Govt. grant free of land revenue—Sale of, in execution of decree—Validity—Suit for declaration in Civil Court.*

Where the plaintiff brought to sale the lands granted to the deft. by Govt. free of payment of land revenue and on objection by the Govt. that it was inalienable, made the Govt. and a subsequent transferor also a party, to a suit to declare his rights to the property, *Held*, that although the Local Govt. had unfettered discretion to refuse sale in such a case, yet the declaration made by it in the same order as to the terms of the grant must be treated to have been made in its capacity as grantor and could be challenged and that the Civil Court had jurisdiction to hear the suit. The question of discretion possessed by the Court in the matter of granting declarations could not be considered until the case had been heard on the merits. (*Stuart and Kanhaiya Lal, A. J. Cs.*) AMAR CHAND PAL *v.* THE SECRETARY OF STATE FOR INDIA. **27 I. C. 354 : 17 O. C. 369.**

OUDH RENT ACT (XXII OF 1886), Ch. VII-A.

——S. 20—*Property—Meaning of—Mortgagee rights.*

The term "property" in S. 20 of the Act means "land" itself and not any interest that may be acquired in it and hence the mortgagee rights can be sold without previous sanction. (*Lindsay, J. C.*) HAR GOPAL SHUKUL *v.* MUHAMMAD EWAZ ALI KHAN. **14 I. C. 351.**

——S. 25—"*Transferred*"—*Meaning of.*

The word "transferred" as used in S. 25 of the Oudh Laws Act is of general import and its meaning cannot be restricted to the cases in which the transfer has been made under order of the Court. (*Lindsay, J. C.*) NADIR SINGH *v.* INDRASEN SINGH. **47 I. C. 652 : 5 O. L. J. 426.**

OUDH PARTITION.

——*Mahals—Oudh Revenue Law.*

The Revenue Law in U. P. contemplates the partition of Mahals held by persons holding settlement as heritable, and non-transferable lessees and whose rent though liable to increment was fixed by a settlement officer. (*Lindsay, J C.*) RUDRA PRATAB SINGH *v.* SIKHANDAR KHAN. **39 I. C. 598 : 20 O. C. 104.**

OUDH RENT ACT (XXII OF 1886).

——*U. P. Land Revenue Act* (1901)—*Powers of Revenue Courts and Civil Courts.*

In Oudh where the two Acts apply, the Revenue Courts can decide the status of tenants and terms of tenancy, while the Civil Courts are exclusively empowered to decide proprietary and under-proprietary tenures. Suit for possession and declaration that deft. has neither proprietary nor under-proprietary rights in a Civil Court should be dismissed as to former but decreed as to latter. (*Sir John Edge.*) MUHAMMAD ABDUL HUSAN KHAN *v.* PRAG. **15 A. L. J. 113 : 21 M. L. T. 102 : 20 O. C. 8 : 19 Bom. L. R. 202 : (1917) M.W.N. 232 and 456 : 21 C. W. N. 582 : 26 C. L. J 165 : 5 O. L. J. 34 : 38 I. C. 814 : 32 M. L. J. 388 (P. C.).**

——*Interpretation—General Clauses Act* (*X of* 1897) — *Reference and application to Oudh Rent Act—Immoveable property—Trees.*

The Oudh Rent Act XXII of 1886, is an Act of the Governor-General in Council and it is to be interpreted with reference to the provisions of the General Clauses Act and not those of the United Provinces Act (I of 1904). Under Oudh Rent Act, trees must be regarded as immoveable property. (*Lindsay, J. C.*) SHEO BAKSH SINGH *v.* MUSSAMMAT UMEDA. **22 I. C. 605 : 16 O. C. 346.**

——*Tenancy—Transferability of.*

In Oudh the ordinary tenancy is not transferable. The incidents of an ordinary tenure are created by Act XXII of 1886, which only can clearly explain them. (*Stuart, A. J. C.*) TIKA *v.* SHEO NARAIN. **34 I. C. 426 : 3 O. L. J. 175.**

——Ch. VII-A—*Rent-free—Lands.*

Chapter VII-A of the Oudh Rent Act does not apply to lands held rent-free merely by reason of their being so held, if it is found that they are not held under any grant. (*Ashworth, A. J. C.*) RATIPAL SINGH *v.* UDAI BHAN PRATAB SINGH. **53 I. C. 667 : 6 O. L. J. 508.**

OUDH RENT ACT (XXII OF 1886), CH. VII-A.

——Ch. VII A—*Distinction between Guzara and Muafi.*

In Oudh where the relationship of landlord and tenant does not exist between the parties, there may be a *Guzara*, but where the relationship does not exist there is *Muafi*. The Chapter applies to a suit for possession of land held as rent free *Muafi* and not by way of *Guzara* and the Civil Courts cannot entertain such suits. (*Stuart, J. C.*) BHAGWAN SINGH *v.* BISHESHAR NATH. **38 I. C. 677 : 20 O. C. 37.**

——Ch. VII A—Ss. 107 H and 108, cl. 5 (A)—*Resumption of land—Jurisdiction—Civil Court.*

Where in a suit under S. 108, cl. 5 (A) of the Act on the allegation that the defendants were *muafidars*, the defendants contended that they were proprietors but the Court held under S. 107 (*a*) that the defendants were under-proprietors and the defendants thereupon sued in the Civil Court for a declaration that they were proprietors. *Held*, that the Civil Court is not debarred from trying the question, by the decision of the Revenue Court. (*Lindsay, J. C.*) MATAISINGH *v.* AJUDHYA SINGH. **24 I. C. 223 : 17 O. C. 86.**

——S. 2 (5)—"*Rent*"—"*Portion of the produce of land*" *exclaimed—Tenant's negligence to cultivate land—Landlord's remedy.*

"Portion of the produce of land" in the definition of "rent" in S. 2, cl. 5 of the Act means a portion of what the land actually produced and not what it ought to have produced; so that where a tenant liable to pay rent in kind, deliberately omits to cultivate his holding, he cannot be sued for rent, as there has been no produce at all, but can be sued only for breach of contract. (*Stuart, A. J. C.*) SRI KRISHNA LAL *v* GHULAM SUBHANI. **17 O. C. 55 : 23 I. C. 460 : 1 O. L. J. 147.**

——Ss. 3, 107 and 107 (a)—*Thikadar—Favourable rent payable by—Enhancement of*

A favourable rent payable by a Thikadar or person to whom the collection of the rent of a mauza has been leased, is liable to be enhanced under Ch VII A added to the Rent Act by the U. P. Act IV of 1901, in the circumstances and subject to the conditions therein provided. (*Sir John Edge.*) PARBATI KUNWAR *v.* DEPUTY COMMISSIONER OF KHERI. **41 All. 541 : 5 O. L. J. 433 : 24 M L. T. 292 : 16 A. L. J. 865 : 8 L. W. 586 : 5 Pat. L. W 302 : 28 C. L. J 449 : (1918) M. W N. 880 : 23 C. W. N. 125 : 20 Bom. L. R, 1095 : 47 I. C. 394 : 45 I A. 111 : 35 M. L. J. 525 (P. C.),**

——S. 3 (3)—'*Land*'—*Grove.*

For the purpose of resumption proceedings a grove is 'land' within S. 3 (3). 20 L. J. 772 Dist. (*Lindsay, J. C.*) BHAGWAN DIN *v.* JAGMOHAN SINGH. **38 I. C 488 : 3 O. L. J. 717.**

——S. 3 (8)—*Under-proprietary rights.*

If in any circumstance a proprietor is afforded a right of re-entry against a transferee of agricultural land in Oudh, such transferee will not be entitled to under proprietary rights. Where there is no possibility for the exercise by the lessor of a right of re-entry, the possible bar for the defendants' under-proprietary title having been removed, the rights conferred by the lease are perfected into under proprietary rights. (*Kanhaiya Lal, J. C. and Dalal, A J. C.*) SHAIKH RUTAB ALI *v.* MAHOMED ZAMAN BEG. **9 O. L. J. 101 : 1923 Oudh 47.**

OUDH RENT ACT (XXII OF 1886), S. 5.

——S. 3 (8)—*Under proprietary rights—Perpetual lease—Absence of provision for re-entry.*

A deed of lease styled a "perpetual lease" prescribed a rent of Rs. 102—2—0 payable annually by the lessee to the lessor. The lessee was to continue in possession from generation to generation and to have all sorts of proprietary powers. There was no provision for re-entry in favour of the grantor in any event. *Held*, hat the lease created an absolute interest in the donee subject to a liability to pay Rs. 102—2—0. The donee therefore became an under proprietor within the meaning of S. 3. Clause 8 of the Oudh Rent Act. 24 Cal. 834 ; 30 All. 84 ; 25 C.W.N. 511 ; 17 Cal. 826 ; 43 All. 291 Ref. (*Dalal and Wazir Hasan, A. J. Cs.*) KARIM DAD KHAN *v.* MT. BIBI GHAFURAN. **9 O. L. J. 104 : 1922 Oudh 42.**

——S. 3 (8)—'*For which he is liable to pay rent*'—*Meaning of.*

The expression "for which he is liable to pay rent" in S. 3 (8) of the Act constitutes the distinction between an under-proprietary and a proprietary right and refers to a potential and not necessarily a present liability. (*Daniels, A. J. C.*) BIKAROO *v.* ANANT BAHADUR. **63 I. C. 551 : 8 O. L. J. 311.**

——S. 3 (8)—*If exhaustive—Rights of under-proprietor.*

S. 3 (8) of the Act is not exhaustive of the rights of an under proprietor. (*Stuart and Kanhaiya Lal, A. J. Cs*) RAMESHAR BAKSH SINGH *v.* SANKATA BAKSH SINGH. **25 I. C. 675 : 1 O. L. J. 389.**

——Ss. 3 (10), 48—*Heir—Meaning of.*

The expression "heir of a tenant" includes the heir of a tenant. The word "heir" is used to denote the sense of representation of the first tenant through his successors in inheritance for the whole term of the tenancy. (*Wazir Hasan, A. J. C*) RAM NARESH SINGH *v.* DALPAT SINGH. **10 O. L. J. 357 : 9 O. & A L. R. 614 : 5 L. R. Oudh 15: 1924 Oudh 142.**

——Ss. 3 and 10—*Tenant—Person holding land for specific purpose.*

A person, holding a land for a specific purpose without a contract to pay any rent, is not a tenant and cannot be ejected by a notice simply on the ground that the land is liable to resumption or assessment if brought under cultivation. (*Kanhaiya Lal, A. J. C.*) DURGA PRASAD *v.* RAM CHARAN. **48 I. C. 417 : 6 O L. J. 639.**

——S. 5—*Intention of.*

S. 5 of the Oudh Rent Act does not intend to limit occupancy rights to persons who had lost proprietorship before the annexation. (*Ferard, S. M. and Hopkins, J.M.*) LAL BAHADUR SINGH *v.* TRIBHAVAN BAHADUR SINGH, **61 I. C. 158 : 8 O. L. J. (B. R.) 64.**

——S. 5—*Occupancy and under-proprietary rights—Both not to be decreed.*

Occupancy rights cannot be decreed under S. 5 of the Act in favour of persons in whose favour is also decreed a *prima facie* claim to under-proprietary rights. (*Holms, S. M. and Campbell, J M.*) RAM DIAL *v.* BISHNATH SINGH. **29 I. C. 653.**

——S. 5—*Occupancy tenant—Right to plant trees without permission.*

An occupancy tenant in Oudh can plant trees without the landlord's permission, for, he does not derive his right to tenancy out of any contract with the owner, and hence he cannot be ordered to remove the trees. (*Stuart and Kanhaiya Lal, A J. Cs.*) MUHAMMAD ALI KHAN *v.* LALTA SINGH. **16 O. C. 341 : 21 I C: 744 : 1 O. L. J. 33.**

——S. 7—*Pre-emption —Custom*—Wajib-ul-arz.

An entry in *wajib-ul-arz* against a custom of a pre-emption may serve as an evidence of a contract between the then co-sharers of the village capable of enforcement against their successors in interest. Such a contract renders, S. 7 inapplicable 37 A. 129 (P. C.) Ref. An entry in a *wajib ul-arz* showing that the co-sharers of the village had stated that they had a right to transfer their shares as they pleased, negatives a custom of pre-emption. 17 O. C. 105, Ref. (*Kanhaiya Lal, A. J. C*) HIRA LAL *v.* GANESH PRASAD. **36 I. C. 668 : 3 O. L. J. 415.**

——S. 7-A—*Ex-proprietary right — Relinquishment of.*

The prohibition under S. 7-A of the Oudh Rent Act applies only to the sale of ex-proprietary rights or the relinquishment thereof for consideration. Where a person sells what he does not own and agrees not to claim ex-proprietary rights therein, the vendee can claim compensation for the vendor's failure to make good his proprietary title. (*Kanhaiya Lal and Daniel, A. J. Cs.*) ADITYA PRASAD *v.* MUHAMMAD MUBARAK ALI SHAH. **48 I. C. 257 : 21 O. C. 234.**

——S. 7-A, Cl. (4)—*Occupancy right—Relinquishment—Ex-proprietor—Holding rent-free for life.*

A voluntary agreement by an ex-proprietor before the enactment of S. 7-A of the Oudh Rent Act, to reliquish his occupancy rights in *Sir* land in consideration of his holding that land rent-free for his life-time, cannot be regarded as invalid or forbidden by law. The successors-in-interest of the ex-proprietor after his death are liable to ejectment as trespassers. (*Kanhaiya Lal, A. J. C.*) VISHUNATH KUAR *v.* GAURI SHANKAR. **27 I. C. 376 (2) : 1 O. L. J. 719.**

——Ss 22 to 28—*Transfer of Property Act (IV of 1882), S. 108—Applicability.*

When it is doubtful that the Oudh Rent Act completely covers a case, the provisions of S. 108 of the Transfer of Property Act may be applied. (*Evans, J. C. and Piggott, A. J. C*) RAGUNANDAN SINGH *v.* JARAO. **13 I. C. 554: 15 O. C. 170.**

——S. 23—*Improvements—Compensation.*

S. 23 of the Act contemplates the possibility of tenant's making improvement without the landlord's consent but the tenant will not be entitled to compensation unless there is a written consent of the landlord for making improvements. (*Evans, J. C. and Piggott, A. J. C*) RAGUNANDAN SINGH *v.* JARAO. **13 I. C. 554 : 15 O. C. 170.**

——S. 36—*Lease by mortgagee in possession —Redemption—Right of tenant to possession of holding.*

Every tenant, not being a tenant with occupancy rights, or a sub-tenant, has, on redemption, a right to retain possession for a period of seven years from the date on which he was admitted to possession. (*Evens, J. C. and Lindsay, A. J. C.*) GOBRE SINGH *v.* JWALA PRASAD. **11 O. C. 924 : 14 O.C. 204.**

——S. 38 (2)—*Levy of Nazrana—Co-sharer—Liability for profit to other co-sharers.*

The levy of nazrana is not illegal if the sum so levied and the enhancement taken together do not offend the provision of S. 37, Cl (2) of the Act. A co sharer is liable to account for whatever profits he receives on account of the joint land to his co-sharers, whether he receives it in the shape of nazarana or in the shape of rent. (*Kanhaiya Lal, J. C.*) NAROTAM DAS *v.* NARAIN DAS. **54 I. C. 232 : 22 O. C. 264.**

——S. 47—*Compromise enhancing rent—Suit for rent.*

A suit to contest a notice of ejectment was settled by a compromise under which the existing rent was enhanced by nearly half as much and one of the relations of the tenant was admitted as a co-tenant. The landlord subsequently sued the tenants for rent. The landlord can only get the enhanced rate allowed by S. 47. (*Lindsay, J. C*) MUHAMMAD ABDUL HASSAN *v.* PARKASHI. **41 I. C. 407: 4 O. L. J. 107.**

——S. 47—*Illegal enhancement of rent—Tenant re-admited after ejectment to a portion of.*

Where a tenant after ejectment was subsequently given a lease for a portion of the said area on an enhanced rent, *held*, that S. 47 (1) of the Act applied to the case and the enhancement was illegal. (*Stuart and Kanhaiya Lal, A. J. Cs.*) FATEH BAHADUR KHAN *v.* JAGRAJ KUNWAR. **40 I. C. 130: 20 O. C. 190.**

——S. 47—*Enhanced rent—Contract for.*

A tenant re-admitted after ejectment to a greater area could not challenge a contract for increased rent as being against the provisions of S. 47. (*Landsay, J. C.*) LATCHMAN SINGH *v.* SARAFARAZ KUNWAR. **18 O. C 361 : 33 I. C. 560 : 3 O. L. J. 126.**

——S. 47—*Meaning of 'tenant'.*

In the section 'tenant' means an unprivileged tenant and the section is meant to protect him and not the landlord. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MAHADEO *v.* JAGANNATH. **2 O. L. J. 279: 30 I. C. 261: 18 O. C. 134.**

——S. 48—*Right based on inheritance—Right not proved—Dismissal of suit.*

Where the plff. in a suit for possession of a cultivatory holding alleges title based on inheritance and his right by inheritance is not proved

OUDH RENT ACT (XXII OF 1886), S. 49.

the suit will be dismissed though the deft. be in possession without any right at all. (*Lindsay, J. C.*) KALI DIN *v.* SHEO SARAN.
60 I. C. 711: 7 O. L. J 690.

——**Ss. 49 and 50**—*'Grain rent'—Limit of.*

Grain rent, payable by a tenant, whose tenancy has been determined under the Act, cannot exceed by more than an anna in a rupee, the cash rent payable by tenant immediately preceding him, except as under Ss. 49 and 50. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MAHADEO *v.* JAGANNATH. **2 O. L. J. 279 : 30 I C 261: 18 O. C. 1 34**

——**Ss. 52 and 141**— *Maintenance grant—Tenant— Arrears of rent.*

The defendant a junior member of the family held a village for his maintenance under a grant from the Talukdar subject to the payment of the revenue assessed on the same and 15 per cent. mal kana and 7 per cent sawai to the talukdar. The grant was to be resumable, if the grantee failed to maintain the members of his family a d while the grant was hereditary the grantee had no power to sell or mortgage the villages. *Held*, that the grantee was a tenant holding under special agreement within S. 52 of the Oudh Rent Act and was, therefore, liable to pay interest on the arrears of rent due from him under S. 141 of the Act. (*Kanhaiya Lal, A.J.C.*) SHEORAJ SINGH SRIPRAKASH SINGH.
45 I. C. 855 : 5 O. L. J. 141.

——**Ss 52 and 108 (4)**—*Perpetual hereditary farming lease, holder of—Ejectment.*

A person not holding under-proprietary rights but a decree for perpetual hereditary farming lease is a tenant under S. 52 and cannot be ejected by a Civil Court. 6 O C. 94, Ref. No suit for possession or damages against persons holding land under a decree of a settlement Court or under lease from the superior proprietor can be maintained in a Civil Court. 1 O. L. J. 344 ; 1 O. L J. 512, Ref.) *Kanhaiya Lal and Kendall, A. J. Cs.*) SHEO NATH *v.* MUHAMMAD ABUL HASSAN KHAN. **19 O. C. 339 : 36 I. C. 664 : 3 O. L. J. 408**

——**S. 52**—*Relinquishment of tenancy held under the decree of Court after mortgage—Receipt of rent from mortgagee—Effect—Estoppel.*

Where a tenant holding under the decree of a Settlement Court mortgaged it and thereafter relinquished the holding to the landlord and the latter had accepted rent from the mortgagee, *Held*, that the landlord was estopped from setting up the invalidity of the mortgage. (*Kanhaiya Lal, A, J. C.*) JAGRAJ *v.* GANGA DIN.
18 I. C. 383.

——**S. 53**—*Oudh Rent Act* (1886)—*Amendment Act* (*No. 3 of* 1901)—*Jurisdiction · Revenue Court—Civil Court—Ejectment—Proprietary and under-proprietary rights—Declaration.*

In cases to which the Oudh Rent Act (1886), Amendment Act, 1901 (Act 3 of 1901) applies the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of

OUDH RENT ACT (XXII OF 1886). S. 61

lands, and what are the special or other terms on which such tenant holds, and the Civil Court has the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands. The Revenue Court decided that the holders of a village were in 1852 owners of zamindari rights in the village, that they had not lost those rights, that it must be presumed that they were not ordinary tenants, and that the proprietor of the village should establish in the Civil Court that they were ordinary lessees. The proprietor then brought a suit in the Civil Court for a declaration that they had no proprietary rights of the nature of zamindari superior or inferior, in the village, and also for a declaration that the decision of the Revenue Court did not affect his rights.

Held, that the decision of the Revenue Court, which was subsequently acted upon in the preparation of the *Khewat* of the village, made it necessary for the proprietor to bring the suit. The fact that the holders of the village did not in their written statement in the suit set up that they had any proprietary or under proprietary right, did not disentitle the proprietor to the declarations which he claimed. (*Sir John Edge.*) MOHAMMAD ABUL HUSAN KHAN *v.* PRAG.
15 A. L. J. 113 : 21 M L. T. 102 : 20 O. C. 8 : 19 Bom. L. R. 202 : 21 C. W. N. 582 : 26 C. L. J. 165 : 5 O. L. J. 34 : 38 I. C. 814 : (1917) M. W. N 232 and 456 : 32 M. L. J. 388 (P. C.).

——**S. 55**—*Suit to eject a tenant—Jurisdiction.*

A Civil Court has no jurisdiction to try a suit by a Zemindar to eject a person holding under a Thekadar after the expiry of the theka. (*Stuart, A. J. C.*) GOPAL *v.* JHAU LAL. **22 O. C. 52 : 51 I. C. 402 : 6 O. L. J. 176.**

——**Ss. 55 and 127**—*Trespasser—Ejectment of.*

A trespasser under S. 127 can be ejected by a Revenue Court by a notice issued under S 55 (*Tweedy, J. M.*) HEMNATH *v.* BAL DEO SINGH.
30 I. C. 257 : 2 O. L. J. 275.

——**Ss. 61 and 145**—*Application under S. 61 cannot extend limitation under S. 145.*

An application under S. 61 of the Oudh Rent Act cannot extend the period of limitation provided for execution of a decree by S. 145 of the Act. (*Kanhaiya Lal, J. C*) KHUSHAL SINGH *v.* THAKUR CHANDRA PAL SINGH. **25 O C. 235 : 1923 Oudh 42 (1).**

——**S. 61**—*Adverse possession — How to determine.*

In considering the question of adverse possession, the nature of the possession set up is to be seen, and to be determined by the acts of person in possession.

A tenant B was served with a notice of ejectment, which he contested on the ground that he was an under-proprietor and hence not liable to ejectment by notice. The Talukdar then brought a suit against B in Revenue Court which found

OUDH RENT ACT (XXII OF 1886), S. 61

that his status was superior to that of an ordinary tenant. He again brought another suit against B for proprietary possession but it was dismissed. Five years after he sued B for arrears of rent and took steps for ejectment under S. 61 and obtained an *ex-parte* decree. B died and his son brought a suit in the Rent Court under S. 108 to contest the ejectment but it was dismissed. He afterwards brought a suit of restoration of possession. *Held*, the order of Revenue Court adverse to Talukdar and tenant's possession was undisturbed for more than 18 years since Talukdar's knowledge of hostile title; consequently his dispossession was illegal and he had acquired status of under proprietor by adverse possession at the time of ejectment. (*Lindsay, J. C*) MUHAMMAD MUMTAZ ALI KHAN *v.* UGARAJ SINGH. **58 I. C. 558 : 1 U. P. L. R. (J. C.) 5**

——Ss. 61 and 108 (10)—*Ejectment, illegal.*

Where the arrears of rent decreed by the Lower Court are reduced by the Appellate Court the ejectment of the tenant, under S. 61 of the Act is illegal and the tenant, if so ejected can recover possession under S. 108 (10). (*Baillie, S.M. and Tweedy, J. M.*) RAM LOTAN *v.* COURT OF WARDS, AJODHYA ESTATE. **25 I. C. 663 : 1 O. L. J. 385.**

——S. 61—*Ejectment—Execution.*

An application under S 61 of the Act made by a landlord holding an unsatisfied decree for arrears of rent is an application for execution of his decree. (*Lindsay, J. C and Rafique, A. J. C.*) DEPUTY COMMISSIOMER, FYZABAD *v.* VODIT SINGH. **19 I. C. 38 : 15 O. C. 381.**

——S. 102—*Classification of tenants—Exhaustive — Under-proprietor—Transfer—Right of.*

The Act, recognises only three classes of persons, as having an interest in and entitled to hold land in the province of Oudh, *viz.*, proprietor, under proprietor and tenant. The law attaches to the status of under-proprietor certain rights, among them the right to transfer and while he retains that status cannot be divested of any of those rights. Where, therefore, at the time of a settlement a land owner applied to be recorded as an under-proprietor, and under pressure from the Settlement Officer consented to be recorded, as an under-proprietor without right of transfer. *Held*, that he was creating a tenure unknown to the law and that no effect could be given to the words 'without right of transfer' in the Settlement Officer's decree. (*Mr. Ameer Ali.*) LAL SRIPAT SINGH *v.* LAL BASANT SINGH. **22 C. W. N. 986 : 8 L W. 328 : 21 O. C. 180 : 5 O. L. J. 497 : 24 M. L. T. 434 : 20 Bom. L. R. 1101 : 16 A. L. J. 817 : 5 Pat. L. W. 255 : 28 C. L. J. 468 : 47 I. C. 424 : (1918) M. W. N. 638 : 35 M. L. J. 595 (P. C.)**

——S. 107-B (b)—*Judicial decision—Settlement Court decision.*

A Settlement Court decision holding a person to be a '*Sirdar hukmi bila lagan*' is a judicial decision under the section *Campbell, J. M.*) UDIT NARAIN SINGH *v.* INDRA KUAR. **33 I. C. 145 : 2 O. L. J. 728**

OUDH RENT ACT (XXII OF 1886), S. 107-H.

——S. 107-B—"*Judicial decision*" *Interpretation of—Settlement Court decree.*

When a person is entitled to remain in rent-free possession so long as there is a succession by legal heirs under a settlement Court decree it is a Judicial decree within the meaning of Sec. 107-B. (*Baillie, S. M.*) SHAIBUNNISSA *v.* KARAMAT ALI. **26 I. C. 722 : 1 O. L. J. 692.**

——S. 107-G—*Suit for declaration that the plaintiff is entitled as under-proprietor and no as tenant—Jurisdiction of Civil Court.*

Civil Court has jurisdiction to try a suit filed by a person who has been held by the Revenue Court to be a tenant under S. 107-G of the Act, for the purpose of obtaining a declaration that he is an under proprietor and not a tenant (*Lindsay, J. C.*) NADIR SINGH *v* INDRASEN SINGH. **47 I. C. 652 : 5 O. L. J. 426.**

——S. 107-G and H—*Rent-free grant—Purchaser of—Position of.*

The purchaser of a rent-free grant cannot acquire a title superior to that of his vendor. 25 I. C. 594 Dist. (*Holms, S. M. and Campbell, J. M.*) LIHAZUNNISSA KHANAM *v.* DADHICH SINGH. **40 I. C. 60 : 4 O. L. J. 162.**

——S. 107-G—*Assessment of rent — Date from which it takes effect.*

Where in a suit for resumption under Ch. VII of the Act, it was held by the Dy. Commissioner that the case was covered by S. 107 G and the rent was fixed by him at Rs. 580 per annum and it was confirmed by the Commissioner but on appeal to the Board of Revenue the parties agreed that the rent should be Rs. 460 per annum and the Board passed a decree in those terms *held* that the defendant became a tenant of the land without a right of occupancy immediately upon the passing of the Deputy Commissioner's order and the rent ultimately fixed by the Board was payable from the date of the order of the Deputy Commissioner. (*Chamier, J. C.*) GAJRAJ SINGH *v.* BHAGWAN DIN. **9 I. C. 750 : 14 O. C. 58.**

——S. 107-H—"*Successors,*" *includes transferee.*

The word "successors" in the section includes a heir as well as a transferee, and the Court cannot limit the meaning of the word to the former only. (*Lovett, S.M., and Ferard, J. M.*) DEPUTY COMMISSIONER, HARDOI *v.* PURAI. **60 I. C. 641 : 7 O. L. J. (B. R.) 661.**

——S. 107-H—*Muafi—Transferability—Under-proprietary rights—T. P. Act, S. 6.*

A maufidar holding a rent-free tenure liable to resumption has no higher position than that of a tenant entitled to hold the land rent-free unless he is a grantee under other conditions. S. 6 of the T. P. Act does not apply to such a holding because tenants having an untransferable right of occupancy have been expressly excluded from the operation thereof. The possibility of a declaration of under-proprietary rights under S. 107-H of the Act being made in a future suit cannot be taken into account for determining whether the muafidar has at present a saleable interest or not *Kanhaiya Lal, J. C.*) SURAJ BAKSH SINGH *v.* BALDEO BIHARI. **22 O. C. 186: 6 O. L. J. 490 : 53 I. C. 459 : 1 U. P. L. R. (J C.) 83.**

OUDH RENT ACT (XXII OF 1886), S. 107-H.

——S. 107-H—*Under-proprietor—When can become muafidar.*

A Muafidar cannot acquire the status of an under-proprietor except under a declaration of the Revenue Court under S 107 H of the Oudh Rent Act. (*Kanhaiya Lal and Daniels, A. J. Cs.*) MURLI *v.* GAJRAJ SINGH. **21 O. C. 124 : 46 I. C. 443 : 5 O. L. J. 241.**

——S. 107-H—*Order under—Civil suit.*

The propriety of an order under S. 107-H cannot be challenged in Civil Court, though a declaratory suit on the basis of a pre-existing under-proprietary right does lie. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SHANKAR SAHAI *v.* GAJADHAR PRASAD. **20 O. C. 171 : 40 I. C. 200 : 4 O. L. J. 409.**

——S. 107-H—*No vested right—Section does not apply—Government Revenue—Reserved to grantor—No gift of full proprietary rights.*

When the payment of Government Revenue is specially reserved to the grantor there is no gift of full proprietary right. When there is no evidence of any 'vested right' nor there is any proof that the grant was given in consideration of the loss or surrender of a right of any kind the case does not come under the second paragraph of section 107 H. (*Tweedy, J.M.*) NARPAT SINGH *v.* GUR BAKHSH SINGH. **26 I. C. 686 (1) : 1 O. L. J. 589.**

——S. 107-H—*Rent free holding.*

A transfer of a rent free holding by a sale-deed is within S. 107 H of the Act. (*Baillie, S M. and Tweedy, J.M.*) GHULAM SARVAR *v.* MUHAMMAD AMBER ALI KAHN. **25. I. C. 594 : 1. O. L. J. 325.**

——S. 108—*Dispute as to the nature of the tenancy—Power of Court.*

Where the tenancy set up by the defendant is totally denied by the plaintiff, and there is no dispute as regards the nature of the tenancy, it is quite competent to the Civil Court to determine the genuineness or otherwise of the contract of lease set up in defence. 21 O. C. 210 dist. (*Kanhaiya Lal, J. C*) SHEO RATAN *v.* RAM NARAIN PANDE. **9 O. L. J. 98 : 66 I. C. 119 : (1922) Oudh 38.**

——Ss. 108 and 127—*Tenant holding against will of landlord is liable for rent.*

A tenant, holding a land against the will of the landlord, cannot claim a right to hold it without paying rent. (*Lindsay, J. C.*) LALJI *v.* TELLA SINGH. **61 I. C. 978 : 8 O. L. J. 144.**

——S. 108—*Exclusive ur sdiction — Rent Court.*

Under S. 108, a Rent Court has exclusive jurisdiction to decide suit for resumption of land granted for the purpose of planting and maintaining groves which subsequently lose that character. (*Lindsay, J. C.*) BHAGWAN DIN *v.* JAGMOHAN SINGH. **38 I. C. 488 : 3. O.L.J. 717.**

——Ss. 108 and 127—*Tenant—Ejectment by trespasser—Tenant's rights.*

A tenant who has been ejected by a trespasser can treat such trespasser as his sub-tenant and sue him for assessment and recovery of rent under S. 127 read with S. 108 of the Act. 4 O.C. 24 Diss. (*Stuart and Kanhaiya Lal, A.J. C's.*) SHIODATT SINGH *v.* KALI. **3 O. L. J. 630 : 37 I. C. 462 : 19 O. C. 370.**

OUDH RENT ACT (XXII OF 1886), S. 108.

——S. 108—*Tenant's suit for possession.*

A suit against the landlord for recovery of possession of the land from which he has unlawfully dispossessed the tenant is barred by S. 108. (*Chamier, J. C. and Evans, A. J. C.*) FATEH MUHAMMAD *v.* SHAWANI BHIKH. **9 I. C. 751 : 14 O. C. 60.**

——S. 108 (2)—*Suit for rent —Arrears of paramsana—Forum.*

A suit for arrears of *paramsana* rent will lie in a Revenue Court under S. 108 (2), Oudh Rent Act, in the same way as arrears of rent of any other kind. (*Kanhaiya Lal, J. C.*) SAT DEO *v.* JAI NATH. **9 O L. J. 141 : 4 U. P. L. R. (O. C.) 43 : 1922 Oudh 75.**

——S. 108. (2) and (4).—*Suit for arrears in ejectment—Jurisdiction—Civil Court.*

A landlord cannot bring a suit for ejectment in a Civil Court under the Act. The relation of landlord and tenant was created in this case by a compromise between the mortgagee and the mortgagor, the latter agreeing to pay rent and be liable for ejectment for default. (*Kanhaiya Lal, A. J. C.*) RAUNAQ ALI *v.* GUL MUHAMMAD. **48 I. C. 477.**

——S. 108, (2)—*Suit for rent—Claims in respect of several holdings—Joinder of.*

A single suit by a landlord for arrears of rent in respect of several holdings is maintainable, but the judgment must specify the arrears due from each holding. 29 A. 18. Dist. (*Evans, J. C. and Lindsay, A. J. C.*) RUDRA PRATAB SAHI *v.* GAJADHAR SINGH. **13 I. C. 462 : 14 O. C. 287.**

——S. 108 (4)—*Jurisdiction—Civil Court.*

When the defendant is a tenant entitled to hold on till he was ejected in the manner laid down in S. 108 (4) of the Act, the Civil Court could not give a decree for possession. (*Kanhaiya Lal, A. J. C.*) CHAUHAN *v.* RAMSARUP. **20 O. C. 232 : 42 I. C. 27 : 4 O. L. J. 535.**

——S. 108 (4)—*Suit by lambardar for possession—Civil Court.*

A suit by the lambardar to recover possession of the land transferred by the tenant against the decree of a Settlement Court is maintainable under S. 108 (4) and is not cognizable by the Civil Court. (*Chamier, J. C. and Piggott, A. J. C.*) BILASA *v.* DASHAN SING. **12 I. C. 764 : 14 O. C. 225.**

——S. 108 (5) —*Suit by landlord against Agent.*

S. 108 (5) of the Act is not applicable to the case of a suit by the landlord against his Mukhtar or agent for recovering money collected as rent of shops and the price of grain as the bazaar dues and the suit therefore can be brought only in a Civil Court, and is not governed by the period of limitation under the Act. 6 O. C. 104, Dist. (*Lindsay, J. C.*) PEARY *v.* JAGANNATH KUAR. **3 O. L. J. 538 : 37 I. C. 84 : 19 O. C. 314.**

OUDH RENT ACT (XXII OF 1886), S. 108 (5) (A).

——S. 108 (5) (A)—*Transfer of* muafi—*Suit for possession—Jurisdiction of Civil and Revenue Court.*

A suit for resumption of a *muafi khairati* after its transfer is triable solely by the Revenue Courts under the provisions of S. 108 (5), (a) of the Oudh Rent Act. It does not make any difference that the suit is framed as one for declaration of the invalidity of the transfer. 6 O. C. 110; 22 O. C. 186 Dist. (*Lyle, A. J. C.*) GOPI CHARAN *v.* DURGA PRASAD. **65 I. C. 702 : 8 O. L. J. 472.**

——S. 108 (5) (A) -*Favourable rent—Enhancement of—U. P. Land Revenue Act, S. 79—Board's Circulars, 2-I. R. 2 foot-note.*

The favourable, rent due under a heritable but non-transferable lease can be enhanced under S. 108 (5) (A) of the Rent Act, if the tenant is not holding under a judicial decision, S 79 of the Revenue Act does not apply to such cases and the foot-note to the Board's Circular 2 I. R. 2 is wrong and misleading in so far as it has no force under the present altered law. (*Baillie, S. M. and Tweedy, J. M.*) BEGAMUNNISA *v.* HABIB ULLAHKHAN. **25 I. C. 644 : 1 O. L. J. 357.**

——S. 108 (5) (A)—*Transferee of non-transferable holding—Ejectment.*

Suit for possession of the land against the transferee of a non-transferable grant after the death of the grantee is not a suit for resumption, but one in ejectment and can be brought in the Civil Court. A Talukdar can sue the transferee alone of a non-transferable grant without suing the grantee for resumption of the rent-free grant previously or at the same time. (*Evans, J C. and Piggott, A. J. C.*) SHAMBHU NATH *v.* RUDRA. **12 I C. 324.**

——S. 108, Cls. (8) and (10)—*Suit to contest—Notice of ejectment—Suit for declaration of status as under-proprietor before actual ejectment.*

A suit to contest notice of ejectment was dismissed by the Revenue Court, but the plaintiff before he was actually ejected from the land sued in Civil Court for a declaration of his status as an under-proprietor. *Held*, that though he was in possession of the land at the date of suit his case falls under the general rule and the suit cannot be entertained until he had exhausted his remedy in the Revenue Court under S. 108 (10). (*Lindsay, J. C.*) RAM PIARE *v.* RAMESHWAR. **36 I. C 623 : 19 O. C. 67.**

——S. 108 (10)—*Suit in ejectment—Possession not with plaintiff—Civil Court is the forum.*

A suit by a landlord not in possession of lands to eject a person who forcibly got into possession under an alleged sale deed is cognizable by a Civil Court and not by a Revenue Court under S. 108 (10), Oudh Rent Act. (*Dalal, A.J.C.*) ASHIQ ALI *v.* GHULAM SARWAR. **9 O. & A. L. R 521 : 1924 Oudh 175.**

——Ss. 108 (10)—*Illegal ejectment—Meaning of—Landlord and tenant—Disputes between—Forum.*

A dispute between two parties both claiming to be tenants of the same land under the same *Zamindar*, where the claimant has never held possession of the land, is within the jurisdiction of the Civil or of the Revenue Court. The words "illegally ejected" imply that the plaintiff must have been in possession and are not applicable to a case in which he had never been in possession. (*Daniels, A. J. C.*) GAYA DIN SINGH *v.* CHAUHARJA PANDE. **10 O. L. J. 178 : 9 O. & A. L. R. 87 : 1924 Oudh 14.**

——S. 108 (10)—*Suit for declaration of title—Possession with plaintiff.*

A person who is in possession is not bound to sue for a declaration of his title. A suit by such a person cannot be barred by limitation or by S. 108 (10) of the Act. (*Kanhaiya Lal, A. J. C.*) KAMPTA SIROMAN PRASAD SINGH *v.* NARPAT GIR GOSSAIN. **23 O. C. 25 : 7 O. L. J. 70 : 55 I. C. 534 : 2 U. P. L. R. (J. C.) 41.**

——S. 108 (10)—*Civil and Revenue Courts—Claim of under-proprietary right.*

The plaintiff's under-proprietary title was on the evidence held to be satisfactorily established and the present suit in the Civil Court for possession and damages was not barred by reason of the fact that the plaintiff's remedy under S. 108 (10) of the Act had been found by the Revenue Court to be barred by time. (*Kanhaiya Lal, A. J. C.*) KHADIM HUSSAIN *v* JAMIL BIBI. **44 I. C. 357 : 4 O. L. J. 577.**

——S. 108 (10)—*Contest between rival tenants.*

The section does not apply where the contest is between rival tenants claiming to cultivate the same land. (*Kanhaiya Lal, A. J. C.*) KALAP NATH *v.* MATA DIN. **28 I. C. 859 : 18 O. C. 48.**

——S. 108 (10)—*Declaration that plaintiff is not a tenant but proprietor—Jurisdiction of Civil or Revenue Court.*

The section is not confined only to under-proprietors whose rights as such have been declared by a competent Court or a person whose under-proprietary rights are admitted by the superior proprietor but also to persons who claim to be under-proprietors but are asserted by the superior proprietor to be tenants. It is not open to such persons to assert their title to under-proprietary rights in a Civil Court until they have instituted a suit under the section. (*Stuart, A. J. C.*) LALTA SINGH *v.* HUMAYUN QUADAR. **28 I. C. 303 : 2 O. L. J. 145.**

——S. 108 (10)—*Plot-proprietor—Suit by, for recovery of occupancy of land does not lie.*

A person recorded as a plot-proprietor, *i.e.*, a holder of what is generally known as a "*haquiyat mutafarriqa*" or miscellaneous area and paying revenue to the *lambardar*, has a right to engage for Government Revenue although for convenience sake, the engagement is generally made though the *lambardar*. A plot-proprietor stands in this respect on the same footing as a co-sharer for his name is in the *khewat*, and he is not an under-proprietor. He cannot sue for recovering occupancy of the land under S 108 of the Act. (*Baillie, S. M. and Tweedy, J. M.*) BAIJU SINGH *v.* NARAIN DIN. **25 I. C. 646 : 1 O. L. J. 364.**

OUDH RENT ACT (XXII OF 1886), S. 108.

——S. 108 (10) —*Under-proprietary rights —Occupancy—Possession.*

The application of S. 108, cl. (10) of the Act is limited to cases where the previous physical occupancy of the under-proprietor was either alleged or acknowledged. 'Occupancy' in S. 108 implies physical retention as distinguished from the word 'possession' which includes actual as well as constructive possession. (*Kanhaiya Lal, A J. C*) CHANDRIKA BAKSH SINGH *v.* RAGHUNATH KUNWAR. **18 I. C. 284 : 16 O. C. 105.**

——S. 108 (13)—*Suit for declaration and damages.*

A sale-deed provided that the lands should remain in the proprietary possession of the vendor free from liability for the payment of rent (Bila lagani). The vendee obtained, however, from Revenue Courts decrees against the vendor for arrears of revenue. Subsequently the vendor sued in the Civil Court for a declaration that the land was not liable to pay the revenue or any other demand, and for damages, as the words '*Bila lagani*' implied that the vendee was to be liable to pay the revenue, if any, that might be assessed on the land. *Held*, that the declaration could not be granted as it would trench on the jurisdiction of the Revenue Court; 12 O. C. 164, Dist., and that damages could not be granted as it practically meant a refund of the amounts decreed by the Revenue Court. 7 A. L J. 1064. Ref. (*Kanhaiya Lal, A. J. C.*) RAGHUMATHJI *v.* RAM RATAN. **39 I. C. 133 : 4 O. L. J. 68.**

——S. 108 (15)—*Suit for profits—Members of joint Hindu family.*

A suit for profits by a recorded co-sharer of a specific share is maintainable even against another member of a joint Hindu family. (*Daniels, A. J. C.*) MT. SOHBAT KUAR *v.* MT. RAJ DEVI. **9 O. & A. L. R. 236 : 1924 O. 118.**

——S. 108 (15)—*Suit for profits—Co-sharer need not be full proprietor—Hindu widows interest—Transferee of*

A co-sharer need not be a full proprietor to entitle him to file a suit against the lambardar for his share of the profits. Thus a transferee of a widow's life interest can sue in respect of the profits to which the widow would have been entitled had she not transferred her interest. (*Kanhaiya Lal, J. C.*) THAKUR PRASAD SINGH *v.* ADYA PRASAD SINGH. **66 I. C. 2 : 24 O. C. 399.**

——S. 108 (15)—*'Sharer'—Entry of name in Revenue papers.*

A 'sharer' means a person entitled to a share in the profits of land by virtue of his interest therein as shown by the entry of his name in the revenue papers; and therefore a lady who is recorded as holding some land in lieu of maintenance for life without power of alienation, can sue for profits. (*Kanhaiya Lal and Daniels, A. J. Cs.*) BISHWA NATH SINGH *v.* RAM RATI. **63 I. C. 187 : 8 O. L. J. 339.**

——S. 108 (15)—*Right to sue—Suit on behalf of plaintiff and others interested.*

Where the defendant in a suit knows that the plaintiff the manager of the Court of Wards is suing not only on behalf of the Ward but also on behalf of the other persons interested in the property he cannot plead that the Ward is not the sole owner of the property. (*Lindsay, J.C.*) HASHMAT ALI *v.* MAHEWA ESTATE. **45 I. C. 248 : 5 O. L. J. 31.**

OUDH RENT ACT (XXII OF 1886), S. 124-B.

——S. 108 (16)—*Pattidar—Suit for recovery of revenue paid—Jurisdiction of Civil Court.*

The parties to the suit were not co-sharers. The defendants were described as *sub-pattidars* of the plaintiffs. They occupied a position similar to that of subordinate proprietors. *Held*, that the Civil Court ought to have entertained the suits for recovery of revenue paid by the *pattidar* from the *sub-pattidars*. (*Kanhaiya Lal, J. C.*) BENI MADHO *v.* SHAMSHAD ALI. **26 O. C. 56 : 1923 Oudh 238.**

——S. 119-A—*Appeal under —Limitation expiring on a holiday.*

In a case in which the period of limitation for filing an appeal under S. 119-A of the Act expires on a holiday. The appeal is within time if it is filed on the day following. (*Kanhaiya Lal, A. J. C.*) BINDA PRASAD *v* RAM BHAJAN **25 I. C. 703 : 17 O. C. 254.**

——S. 119-B—*Amendment—Decree of Dt. Judge on appeal —No Revision.*

The power of the court of the Judicial Commissioner to interfere in appeals from the decrees of Revenue Courts is defined by and limited to the cases provided by section 119-B. and no power of revision from the appellate decrees of the district Judge is reserved to that Court. (*Kanhaiya Lal, B. C.*) KALI BAKHSH SINGH *v.* BHAGWAN DAS. **10 O L. J. 191 : 9 O. & A. L. R. 848 : 1924 Oudh 16.**

——S. 119-B — *Appeal against Appellate Order.*

An Appellate Order of the District Judge under S. 119 of the Oudh Rent Act is appealable. (*Piggott, J. C.*) EJAZ HUSSAIN *v.* SHAH ZAMAN MIRZA. **18 I. C. 97 : 16 O. C. 70.**

——S. 120-A—*Power of review—If exercisable by Revenue Courts in Oudh.*

According to C. P Code, Subordinate Revenue Courts in Oudh can review their decisions; S. 120-A of the Act giving a general power of review to the Board of Revenue does not debar them from the exercise of that power. 2 O. L J. 14 Ref. (*Stuartand Kanhaiya Lal, A. J. Cs.*) BHAGWAN BAKSH SINGH *v.* SARDAR SINGH. **39 I C. 147 : 4 O. L. J. 97.**

——Ss. 120-A and 135 —*Judicial Commissioner—Power to review decision in rent cases.*

The Court of the Judicial Commissioner of Oudh has power under the C. P. Code to review its own decision given in a rent appeal. This power is not affected by the provisions of Act XXII of 1886 which gives authority to the Board of Revenue to review its decision. (*Stuart, J. C.*) PARTAB BAHADUR SINGH *v.* BADLU. **48 I. C. 276 : 21 O. C. 254.**

——S. 124 B, 124 C, and 124 D—*Fixation of rent—Tenant at will—Fair occupation rent.*

OUDH RENT ACT (XXII OF 1886), S. 124-C.

Where at the time of partition a *khudkast* land of one person was thrown into the mahals of another person and by the agreement, the latter was to have the rights of an ordinary tenant at will but neither its rent nor the manner of paying it was fixed and a suit was brought for arrears of rent the plaintiff claiming half the produce for the same. *Held*, that the case, being one of an ordinary tenancy at will was not provided for by the Oudh Rent Act and the plaintiff was entitled to a fair occupation rent as compensation for the use and occupation of the land. (*Piggott, A. J. C.*) RAM DULARE *v.* HAIDAR ALI. **10 I. C. 2.**

——— **Ss. 124-C and 124-D**—*Applicability of*

Ss. 124-C and 124-D of the Act applies only when the suit has been instituted in a wrong Court and not when it has been instituted in a right Court upon an unsustainable cause of action. (*Stuart, A. J. C.*) SRI KRISHNA LAL *v.* GHULAM SUBHAIN. **17 O. C. 55 : 23 I. C. 460 : 1 O. L. J. 147.**

——— **S. 126**—*Lambardars—Admission by—How far binds co-sharers.*

Under S. 126 of the Act, a Lambardar has no unlimited powers to represent his co-sharers and he can't bind his co-sharers not parties to a suit for ejectment by admitting the existence of under-proprietary rights in the person to be ejected. (*Lindsay, J. C.*) HAR PRASAD *v.* BIKRAMJIT. **61 I. C. 959 : 8 O. L. J. 131.**

——— **S. 126**—*Joint tenants--Co-sharer, if competent to collect his share—Suit by him for his share.*

Under S. 126 a suit by a co-sharer for his own share of the rent is not maintainable unless there is a division of joint lands and of tenants and a payment, so long as there is no division as aforesaid, to one of the co-sharers, releases the tenant from his liability. (*Kanhaiya Lal, A. J. C.*) MAHADEI KUAR *v.* SANT BHKSH SINGH. **26 I. C. 237 : 1 O. L. J. 570.**

——— **S. 128 (1)**—*Lambardar—Powers of—Sale of fractional share--Right of sharers—Profits collected by lambardar—Co-sharer's right.*

Generally speaking, the *lambardar* is the manager of the common lands, entitled to collect rents, settle tenants, and eject them, enhance rents, etc. and do all other acts necessary to the management of the estate for the common benefit. The fact that the plaintiff purchases a fractional share in an undivided village, does not absolve the *lambardar* of his duty to take all steps to collect the rents from all persons who were liable to pay rents and in cases of failure to obtain rents, to take steps to eject the defaulters. Where there has been no division of lands amongst the sharer, every co-sharer is entitled to have his proportionate share of every rupee of profits collected by the *lambardar*. (*Lindsay, J. C.*) BHAN PARTAB SAHI *v.* MANOHAR LAL. **18 O. C. 5 : 28 I. C. 236: 2 O. L. J. 123.**

——— **S. 127**—*Tenant bringing grove under cultivation—Ejectment—'Rent-free'—What is.*

A landlord can proceed under S. 127 of the Act against the tenant who has brought a grove under cultivation bynotice ofejectment. The term 'rent-free' implies that the land is held under an agreement exempting it from rent. (*Hopkins S.M. and Porter, J. M.*) PANCHAM LAL *v.* NIHAL SINGH. **61 I. C. 192 : 8 O. L. J. 60.**

OUDH RENT ACT (XXII OF 1886), S. 135.

——— **S. 127**—*Trespasser—Thekadar in possession after ejectment—Position of.*

A Thekadar who continues to be in possession of the land after ejectment, is a trespasser and S. 127 of the Actapplies to such a case. (*Kanhaiya Lal, A, J. C.*) DIWAN SINGH *v.* BISHESHAR SINGH. **42 I. C. 41 : 4 O. L. J. 448.**

——— **S. 127**—*Trespasser—Ejectment.*

Under S. 127 a landlord can treat trespassers as tenants only for the purpose of paying rent and not ejecting through Revenue Court. (*Stuart, J. C.*) DONDOO SINGH *v.* SHEO NARAIN SINGH. **36 I. C. 770 : 3 O. L. J. 445.**

——— **S. 127**—*Suit for arrears of rent—Allegation of tenancy.*

Where in a suit for arrears of rent plaintiffs aver that defendants have been holding as their tenants under an agreement to pay rent, the Court cannot take action under S. 127 of the Act if the agreement is not proved. (*Lindsay, J. C.*) BINDESHWARI *v.* BISWESWAR. **30 I. C. 499 : 2 O. L. J. 383.**

——— **S. 127**—*Suit against trespasser—Jurisdiction of Civil and Revenue Courts.*

A person may sue the trespasser either in Civil Court for possession and damages or in Revenue Courts for a fair and equitable rent. He is not bound to seek the latter remedy alone. It is not right for a Civil Court that, while giving the decree for possession, it should leave the question of mesne profits for Revenue Courts. (*Kanhaiya Lal, A. J. C.*) INDAR DAT *v.* BALGOVIND. **30 I. C. 364 : 2 O. L. J. 393.**

——— **Ss. 127 and 108**—*Purchaser, if entitled to rent for the use and occupation of land after confirmation of sale.*

Where a co-sharer in a village continued to cultivate the lands after the auction-sale of the said lands to the plaintiff. *Held*, that the plaintiff's right to claim rent for the use and occupation of the land came into existence for the first time after the confirmation of the sale and in the absence of consent, plaintiff was entitled to have the rent under Ss. 127 and 108 in one suit. (*Kanhaiya Lal and Kendal, J. Cs.*) LALA SINGH *v.* HAZARI SINGH. **17 O. C. 343 : 26 I. C. 242 : 1 O. L. J. 574.**

——— **S. 127**—*Applicability—Holding over.*

S. 127 only applies to the case of persons wrongfully and unwarrantably entering upon and cultivating the land without the landlord's consent so it does not apply to a case of holding over after a lawful entry. (*Stuart, J. C.*) DEPUTY COMMISSIONER, FYZABAD *v.* GURU DAYAL SINGH. **17 I. C. 464 : 15 O. C. 311.**

——— **S. 135**—*Civil Procedure Code—Applicability of.*

The code applies to proceedings under the Act so far as its provisions are not inconsistent

OUDH RENT ACT (XXII OF 1886), S. 138.

with those of the Act. (*Lindsay and Beahman, JJ.*) DEPUTY COMMISSIONER, FYZABAD *v.* UDIT SINGH. **19 I. C. 38 : 15 O. C. 381.**

——**S. 138**—*Proviso—Scope of.*

The proviso to S. 138, Oudh Rent Act, is not a bar to the right of parties to a suit in the Revenue Court, including the intervener to agitate their rights in appeal. (*Dalal, A. J. C.*) RAJA SURAJ BAKSH SINGH *v.* MUNNU LAL. **10 O. L. J. 229 : 9 O. & A. L. R. 577 : 1924 O. 52.**

——**S. 138**—*Rent suit—Joinder of parties.*

When in a suit for rent the defendant pleads that he paid rent to a third person under compulsion, that third person cannot be joined as defendant. An intervener alone cannot appeal when the judgment-debtor does not. The question of title to receive rent between plaintiff and an intervener, can be decided only in a Civil Court and not in Rent Court. (*Stuart, A. J. C.*) CHANDRAWATI KUNWAR *v.* BHAGAWANT. **35 I. C. 444 : 19 O. C. 32**

——**S. 138**—*Rent—Payment of, to intervener—Good faith.*

The main question for consideration under S. 138 is whether the tenant paid rent for the period in suit to the intervener in good faith and whether he used to collect rent previously also. (*Kanhaiya Lal, A. J. C.*) MAHADEI KUAR *v.* SANT BAKSH SINGH. **26 I. C. 237 : 1 O. L. J. 570.**

——**S. 140**—*Arrears o rent—Suit to recover—Part-payment set off.*

In a suit for arrears of rent defendants can set up their claim to *dahyak* allowance not by way of set off but by way of part-payment. Anything agreed to be deducted out of rent would be a part-payment to that extent. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) MAHARAJA BHAGWATI PRASAD SINGH *v.* RAM JIWAN. **21 I. C. 201 : 17 O. C. 6.**

——**S. 141**—*Interest on arrears of rent reserved—Contract Act (IX of 1872), S. 73.*

Section 141 of the Oudh Rent Act does not exclude the liability for payment of interest on arrears of rent, the liability being apart from the act dervied from S. 73 of the Contract Act by reason of the lessee's failure to pay the rent stipulated for in the lease. (*Kanhaiya Lal, A. J. C.*) SHEIKH KIFAYAT ULLAH *v.* RAJA PROTAB BAHADUR SINGH. **21 I. C. 82.**

——**S. 142**—*Pre-emption suit—Co-sharer—Onus of proof.*

The onus of establishing that the plff. in a suit for pre-emption is a co-sharer and entitled to pre-empt is on the plff. and it is not discharged by the mere fact that in the revenue papers his name was entered as a co-sharer. (*Lindsay, A. J. C.*) RAM PRATAB *v.* BRIJ PRASAD. **18 I. C 386.**

——**Ss. 145 and 61**—*Limitation for execution—Application under S. 61 cannot extend.*

An application under section 61 cannot extend the period of limitation provided for execution of a decree by section 145. (*Kanhaiya Lal, J.*) KHUSAL *v.* THAKUR CHANDRAPAL. **25 O. C. 235 : 1923 O. 42 (1).**

OUDH RULES OF PRACTICE, R. 13.

——**Ss. 152 and 154**—*Pre-emption—Oudh Laws Act, S. 10—Under-proprietary lands—Decree for foreclosure—Liability to pay arrears of rent.*

A, the mortgagee, obtained a decree for foreclosure of some under-proprietary lands without giving the notice under S. 10 of the Oudh Laws Act. Arrears of rent, outstanding at the foreclosure date were realised from A by the Talukdar. In a suit for pre-emption against A, *held*, that the pre-emptors could not avoid any statutory liability to which A was subject at the time of foreclosure and that the payments made by him were in the nature of salvage made to save the property from sale, and on that principle also the plaintiffs were bound to pay the amount in addition to the amount of the foreclosure decree. 21 C 142, Ref. (*Lindsay, J. C.*) HAZARI LAL *v.* RAM NARAIN. **27 I. C. 420 : 17 O. C. 379.**

——**S. 154**—*Joint liability as to payment of rent—Under-proprietor's position.*

Section 154 nowhere says that the under-proprietor shall cease to be liable for the rent. Whether he would cease to be liable or not, must depend on the nature of the transfer. 9 O C. 185, Ref. A tenant or lessee who executes a sub-lease does not thereby become absolved from his liability to pay the rent due from him to his landlord nor is there any reason why an under proprietor should be in a different position. 26 I. A. 41, Dist. (*Daniels, A. J. C.*) THE SPECIAL MANAGER, COURT OF WARDS, BHOGAITAPUR ESTATE *v.* GULZARI LAL. **10 O. L. J. 45 : 9 O. & A. L. R. 121 : 26 O. C. 381 : 1923 O. 175.**

——**S. 154** — *Under-proprietor — Decree against, for arrears of rent—Encumbrancer—Suit on encumbrance.*

Non-satisfaction by the encumbrancer of an under-proprietary property of the decree for arrears of rent obtained by the superior proprietor against the under-proprietor does not disentitle him to bring a suit on the basis of his encumbrance. (*Lindsay, J C.*) SAIFU KHAN *v.* DEPUTY COMMISSIONER, FYZABAD. **40 I. C. 456 : 4 O. L. J. 305.**

——**S. 155**—"*Stranger*"—*Meaning of—Pre-emption.*

The word 'Stranger' in S. 155 of the Act means a person outside the whole village and not merely outside the *patti* or *mahal* in which the land is situated. (*Stuart, A. J. C.*) MEHDIHASAN KHAN *v.* BRIJ BHUSHAN MISRA. **40 I. C. 64 : 4 O. L J. 167.**

OUDH RULES OF PRACTICE.

——**R. 13**—*Extension of time—C. P. C., S. 148.*

The extension of time for depositing the cost of printing is allowed only once ; neither the Registrar nor the Court can extend it further. S. 148, C.P.C., does not apply to the case. (*Stuart, J. C. and Daniels, A. J. C.*) KUBRA BEGAM *v.* AKBAR SHAH. **50 I. C. 789 : 22 O. C. 13.**

OUDH SETTLEMENT.

———*—Sanad—'Successors'—Meaning—Alienees not included.*

The word 'successors' in the ordinary form of *sanad* granted to Oudh Talukdars means heirs, *i.e.*, those who succeed to the estate under the grant, but it does not include those who take the whole or part of it by alienation. (*Lord Buckmaster.*) GULAM ABBAS KHAN *v.* AMUTUL FATIMA.
43 All. 297 : 48 I. A. 135 : 19 A L. J. 433 : 8 O. L. J. 225 : 34 C. L. J. 113 : 24 O. C. 118: (1921) M. W. N. 349 : 14 L. W. 680 : 60 I C. 937 : 29 M L. T. 409 : 40 M. L. J 577 (P. C.). [On Appeal from 31 I. C. 748 : 18 O. C. 188.

———*Procedure in—Effect of decision of—Officer, on title to property.*

At the time of the summary settlement in Oudh, the Settlement Courts were enquiring into the old titles as they existed prior to the confiscation. Though the confiscation swept away all prior titles, its legal effect was not fully recognised, and the Government did not make an arbitrary or wholly new redistribution of property or proceed upon the motion that prior rights were to go for nothing. In very many cases, they enquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. *Held*, that decree of the Settlement Court in 1869 in favour of the widows of two deceased co-parceners did not affect or prove an anterior separation between them. (*Lord Shaw.*) NAGESHAR *v.* GANESHA.
42 All. 368 : 7 O. L. J. 48 : 2 U. P. L. R. (P.C.) 37 : 23 O. C. 1 : 18 A. L. J. 532: 22 Bom. L. R. 596 : 56 I. C 306 : 28 M. L. T. 5 : 38 M. L. J. 521 (P.C.)

———*Taluka—Profits of a village in Taluka—Talukdar not to deduct amount of new assessment from the gross income in case of division of profits of the village.*

When the revenue of a village in a *taluk* at a recent re-settlement was enhanced only for determining the amount of cesses, the talukdar, in estimating the profits of the village divisible between him and another person entitled to a share under a decree of the Privy Council, is not entitled to deduct the amount of new assessment from the gross income of the village before division. (*Lindsay, J. C.*) SUBHADRA KUAR *v.* SHAMBU PRASAD. **37 I. C. 500 : 3 O. L. J. 634.**

———*Decree—Binding nature of.*

The Extra-Assistant Commissioner had no authority to go behind or supersede or alter the settlement decree. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) JANG BAHADUR *v.* MUHAMMAD ABUL HASAN KHAN. **35 I. C. 743 : 3 O. L. J. 279.**

———*Proprietary right, proof of.*

In Oudh, no inference as to a person's proprietary right can be drawn though the first summary settlement was made with him. 8 O. C 145. (*Stuart, A. J. C.*) BISHESHUR SINGH *v.* TIRBHAWAN BAHADUR SINGH. **34 I. C. 768 : 3 O. L. J. 222.**

OUDH SUB-SETTLEMENT ACT (XXVI OF 1866).

———*Under-proprietary tenure — Shankalap Koshist.*

OUDH SUB-SETTLEMENT ACT (XXVI OF 1866), R. 11.

Where the statement of the agent of a Talukdar showed that the land was held as *Shankalap koshist* rent free by the ancestors of the plaintiffs from a time long before the year 1877 when a claim was made by the taluqdar for assessment of rent only and when the settlement of decree therefore did not for the first time create the tenure of *shankalap koshist* but merely recognised it as a pre-existing tenure on the admission made by the taluqdar's agent and where the assessment of rent was made on the tenure. *Held*, the holding had all along been treated as an under-proprietary tenure. (*Wazir Hasan, A. J. C.*) MANOHAR LAL *v.* ACHUTANAND.
9 O. L. J. 618 : 1923 Oudh 27.

———*Sub-settlement--Refusal to grant—Effect on under-proprietary rights—Adverse possession.*

A sub-settlement can be granted under the Oudh Sub-settlement Act only in certain circumstances specified in that Act. The refusal to grant such a sub-settlement not accompanied by an adverse finding as to an under-proprietary right does not necessarily destroy such under-proprietary right as the claimant might otherwise have possessed. The defendant was held to be a *birtdar* or under-proprietor, and even if the settlement decree did not confer the under-proprietary right claimed by the deft., it was perfected by adverse possession. (*Kanhaiya Lal, A. J. C.*) MUHAMMAD ABUL HASAN KHAN *v.* RAMANATH MISRA. **55 I. C. 641 : 7 O. L. J. 286.**

———*Subordinate proprietor—Rights of.*

The Oudh Sub-settlement Act of 1866 has recognised that the rights of subordinate proprietors which were to be enforced were those which they held on or before February 13, 1856, and the settlement was not intended to enlarge their rights. (*Kanhaiya Lal, J. C.*) BHUSHAN *v.* DEO NARAIN. **54 I. C. 82.**

———*Under-proprietary rights*

To establish an under-proprietary right under S. 11 of the Act, the *Nankar* must be shown to have been granted in consideration of having founded a *parwa* and even then the under-proprietary rights can be granted only in respect of such *nankar*. (*Evans, J. C. and Rafique, A. J. C.*) AMRIT LAL *v.* JANG BAHADUR SINGH.
11 I. C. 920 : 14 O. C. 196.

———**Rr. 2 and 10**—*Proprietor not entitled to sub-settlement—Right to claim under-proprietary right.*

A former proprietor not entitled to sub-settlement, can claim under-proprietary right in respect of *Sir* or *nankar* land, when he is in proprietary possession of the same within the limitation period either by himself or with some person from whom he derived his title. If the right to claim sub-settlement under R. 2 be denied by the Settlement Court, it cannot be revived. (*Kanhaiya Lal, A. J C.*) TIRBHUWAN BAHADUR SINGH *v.* MUKTA PRASAD. **22 I. C. 125.**

——— —**R. 11**—*Creation of tenure—Possession for two generations.*

Patta saklap followed by possession for more than two generations, raises a presumption of lawful origin for the grant. The grantee is

OUDH TALUKDARS ACT.

deemed to have taken an under-proprietary tenure, if he cut the forest, populated the place and nothing but a bar-Basti or rent is proved to be reserved. (*Kanhaiya Lal, A. J C.*) SHEOAMLIAR TEWARI *v.* KANIZ FIZZATT BIBI.
42 I. C. 937 : 20 O. C. 285.

OUDH TALUKDARS ACT.

——— S 1—*Sanads—Successor, meaning of.*

In an Oudh Talukdari primogeniture sanad, 'successor' means those designated persons who would succeed in the event of an intestacy and not persons who take by sale, gift or bequest. (*Sir John Edge.*) MOHAMMAD ABDUL GHANI *v.* FAKHR JAHAN BEGAM.
49 I. A. 195 : 44 A. 301 : 20 A. L. J. 994 : 27 C. W N. 53 : 31 M. L. T. 21 (P. C.) : 25 O. C. 95 : 9 O. L. J. 369 : L. R. 3 P. C. 198 : 24 Bom. L. R. 1268 : 43 M. L. J. 453 : 1922 P. C. 281 (P.C)

———S. 1—*Sanad—'Successor' does not include alienees.*

The word 'successors' in the ordinary form of *sanad* granted to Oudh Talukdars, means heirs *i.e.*, those who succeed to the estate under the grant, but it does not include those who take the whole or part of it by alienation. (*Lord Buckmaster.*) GHULAM ABBAS KHAN *v.* AMATUL FATIMA.
43 All. 297 : 48 I. A. 135 : 19 A. L. J. 433 : 34 C. L. J. 113 : 8 O. L. J. 225 : 24 O. C. 118 : (1921) M. W. N. 349 : 14 L. W. 680 : 29 M. L. T. 409 : 60 I. C. 937 : 40 M. L. J. 577 (P. C.)
[On Appeal from 31 I. C. 748 : 18 O. C. 188.

OUDH WASTE LAND RULES.

———*Purchase under—Grant.*

Land purchased under the Oudh Waste Land Rules is not a grant and no terms in the sale-deed could enable the purchaser to devise the property purchased in derogation of his own personal law. (*Stuart, A. J. C. and Kanhaiya Lal, A. J. C.*) MUHAMMAD ABDUL RAGIL KHAN *v.* SALAMAT BIBI.
25 I. C. 680 : 1. O L. J. 397.

OUSTER.

See ADVERSE POSSESSION.

OUT-CASTE.

See (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW — (*a*) CONVERSION, (*b*) MARRIAGE, (*c*) SUCCESSION, ETC.

PAKKA ADATIA.

See also CONTRACT ACT, Ss. 30, 182 TO 238.

———*Wagering contract— Relation between* Pakka adatia *and principal and third persons.*

A contract between *Pakka adatia* cannot be a wagering contract and the *adatia* must win unless the constituent can bring within Bombay Act III of 1865. In dealing with third persons the *Pakka adatia* deals as principal and the constituent has no right to be brought into contract with third parties. Also the transactions between *Pakka adatia* and third parties have no connection with transactions between constituents and third

PAPER CURRENCY ACT (XX OF 1882), S. 26.

parties. (*Macleod, C. J., and Fawcett, J.*) MANALAL RAGHUNATH *v.* RADHAKISHAN RAMJIVAN.
45 Bom 386 : 62 I. C. 361 : 22 Bom. L. R. 1018.

———*Duty of—Marwaris*

Among Marwaris doing forward business, the *Pakka adatia* is not bound to find buyers and sellers. As between him and his client the business is finished when an order for purchase or sale is accepted. The selling client cannot claim as of right the benefit of any covering contracts entered into by the *Pakka adatia* on the same day as the sales, there being no privity between him and the opposite contracting parties. The legal relationship between the client and *Adatia* is that of vendor and purchaser. (*Macleod, J.*) CHHOGMAL *v.* JAINARAYAN.
20 I. C. 882 : 15 Bom. L. R. 750.

———*Relationship between.*

Relationship between *pakka adatias* and their constituents is not one of principal and agent but of principal and principal. (*Kotwal, A. J. C.*) HARNARAYAN JODHRAJ *v.* RADHAKISHAN CHANDRABHAN.
1923 Nag. 324.

PAPER CURRENCY ACT (XX OF 1882).

———S. 24—*Pro-note payable to order or bearer—Legality.*

A pro-note payable to 'so and so or bearer or order or bearer' contravenes S. 24 of the Act and is therefore void. (*Shaw, J. C.*) HIDAYAT ALI BEG *v.* NGA KYAING.
24 I. C. 721 : (1914) II. U. B. R. 13.

——— S. 26—*Hundi drawn payable to bearer—Indorsement—Suit by original holder without cancellation of indorsement— Deposit in the hands of banker.*

A hundi drawn payable to bearer on presentation was endorsed by the plaintiff in favour of one P. Plaintiff got the hundi back and sued the drawer on the hundi without cancelling the indorsements. *Held*, that the hundi sued on being payable to bearer on demand contravened S. 26 of the Paper Currency Act and that the suit was bad. 40 Mad. 585 ; 42 Mad. 470 ; 6 L. W. 630, Foll. A person honestly in possession of a hundi and suing a drawee alone may deal with the indorsements in any manner he likes provided he does not thereby subject the drawer to a greater liability than he incurred originally. (*Sadasiva Aiyar and Spencer, JJ.*) VEERAPPA CHETTY *v.* MUTHURAMAN CHETTY.
58 I. C. 508 : 12 L. W. 12.

———S. 26—*Proviso—Hundi payable to bearer on demand drawn up on a banker—Intended deposit—Endorsement by the payee under the hundi—Endorser estopped from disputing validity of hundi — Negotiable Instruments Act,* Ss. 120 *and* 122.

A hundi drawn on a banker with the name of the payee as the creditor and the drawer as the debtor entered on the top of the hundi in the following terms 'the money with Rangoon current rate of interest should be paid on demand to the person who brings this by the Rangoon firm' offends against the provisions of S. 26 and a suit

PAPER CURRENCY ACT (XX OF 1882), S. 26.

is not maintainable on the same. Where such a hundi is drawn on a banker, even though the banker has no money of the customer on the date of the hundi, if a deposit to meet it is intended, the hundi is saved by the proviso to S. 26 (*Per Seshagiri Aiyar, J.*) Semble: The endorser of a negotiable instrument is estopped as against the endorsee from setting up that the instrument is invalid (*Seshagiri Aiyar and Phillips, JJ.*) ARUNACHELAM CHETTIAR *v.* NARAYAN CHETTIAR.
42 Mad. 470 : 1919 M W N. 188 : 9 L. W. 438 : 51 I. C. 300 : 36 M. L. J. 901.

——S 26—*Note payable to bearer on endorsement—Negotiable Instruments Act, S. 19.*

A note or bill 'payable to bearer who brings to the place of payment on the order of the payee' does not offend against S. 26 of the Paper Currency Act since there must be an endorsement by the payee. Such a note is made in accordance with law and is receivable in evidence. 40 Mad. 585 and 42 I.C. 706, Expl. (*Seshagiri Aiyar and Napier, JJ.*) TITTU GOPALACHARIAR *v.* MAIYAPPA CHETTY.
8 L. W. 501 : 45 I. C. 22 : (1918) M. W. N. 177.

——S. 26—*Promissory note payable to bearer—Enforceability—Evidence of acknowledgment of liability—Suit on original cause of action—Amendment of plaint.*

A promissory note payable to bearer on demand contravenes the provisions of S. 26 and no suit is maintainable on such a note. 40 M. 585, Foll. But the plaint may be allowed to be amended by basing the suit on the original cause of action. A promissory note which is unenforceable as offending against S. 26 can nevertheless be used as evidence of an acknowledgment of liability. (*Spencer and Krishnan, JJ.*) NACHIMUTHU CHETTY *v.* ANDIAPPA PILLAI.
6 L. W. 630 : 42 I. C. 706 : (1917) M. W N. 778.

——S. 26—*Promissory note payable to person, his order or bearer—Validity—Neg. Instr. Act—Suit on note payable to person or order or bearer—Decree on original consideration, if and when can be given*

S. 26 of the Pap. Cur. Act, which renders illegal a promissory note payable on demand to bearer, applies also to a promissory note payable to a person or his order or bearer. No suit can be maintained on such a note as such. The fact that the note and the loan for which it was given were contemporaneous is not conclusive of the non-existence of an obligation apart from the one contained in the note itself. (*Oldfield and Krishnan, JJ.*) CHIDAMBARAM CHETTIAR *v.* AYYASAMI THEVAN.
40 Mad. 585 : 20 M. L T. 350 : (1916) 2 M. W. N. 210 : 4 L. W. 261 : 36 I. C. 741 : 31 M. L. J. 401.

——S. 26—*Scope of*

S. 26 prohibits only the making or issuing of promissory note payable to bearer on demand and not the endorsement in blank of a promissory note though such endorsement has the effect of making the note so endorsed one payable to bearer on demand. (*Twomey, C J. and Robinson, J.*) SHAIK ISMAIL *v.* S. EZEKEIL.
56 I C. 930 : 12 Bur. L. T. 249.

PARDANASHIN LADY.

——S. 26—*Engagement for the payment of the money.*

It is doubtful whether a deposit receipt issued by a private banker whose value is payable to bearer on demand could be an 'engagement for the payment of money.' Where money was deposited with a private banker and was repayable to bearer on the production of the receipt and was paid to a cooly who stole the receipt without any enquiry as to how he came by it; *held*, that it was not paid in the *bona fide* belief that the cooly was authorised by the depositor to receive it. (*Parlett, J.*) GAGGERAO FRANCESCO *v.* L. P. R. CHETTY FIRM.
24 I. C. 201 : 7 Bur. L. T. 266.

——S. 26—*Promissory-note payable to bearer on demand.*

Indorsement in blank on a promissory note is not covered by prohibitions under S. 25 and is not an infringement. A promissory note made payable to a particular person does not become payable to the bearer on demand by an endorsement. (*Twomey, J.*) SANA EMAN SAHEB *v.* MOONA EMA MAHOMED MEERA SAHEB.
7 L. B R. 70 : 22 I C. 77 : 7 Bur. L. T. 96.

——(II OF 1910).

——S. 26—*Promissory notes—Contravention of the Act—Mortgage in renewal of pro-note—Valid.*

Where on a settlement of accounts between the parties a certain sum of money was found due and pro-notes were executed for the said sum, the fact that the pronotes offend S. 26 of the Act does not prevent the creditor from suing for the debt evidenced by the pro-notes or from enforcing a mortgage executed in lieu of the said pro-notes. There is no provision of law making pro-notes in a prohibited form inadmissible in evidence, as there is in respect of unregistered documents or unstamped documents 40 M. 727 ; 32 M.L.J. 354 ; 1917 M. W. N. 778 : 33 M. L. J. 302, Rel. (*Spencer and Devadoss, JJ.*) NATARAJULU NAICKER *v.* SUBRAMANIA CHETTIAR.
45 Mad. 778 : 16 L. W. 705 : (1922) M. W. N. 450 : 43 M. L. J. 695 : 1922 Mad. 181.

——S. 26—*Hundi—Payable to bearer—Endorser cannot deny validity.*

Under S. 26, a hundi made payable to a bearer on demand is invalid and so the endorser of such a hundi cannot deny its validity on this ground as against his endorsee. (*Abdur Rahim and Oldfield, JJ.*) ALAGAPPA CHETTY *v* NAGAPPA CHETTIAR.
44 Mad. 187: 60 I C. 130 : 39 M L. J. 573.

PARDANASHIN LADY.

See also CONTRACT ACT, S. 16.
Admissions.
Burden of Proof.
Compromise.
Examination of.
Knowledge of Transaction.
Power of Attorney.
Who is

PARDANASHIN LADY—Admissions.

Admissions.

———*Admissions—Deed executed with full knowledge of the contents and effect of.*

A pardanashin woman is bound by the terms of a deed executed by her with full knowledge of its contents and with full knowledge of its effects. (*Lindsay, J. C.*) NANHI KHANAM *v* MASUMAN. **33 I. C. 746. 3 O. L. J. 1**

Burden of Proof.

———*Burden of proof—Transfers and transactions by—Validity of—Onus on the person—Claims under the deed of transfer.*

Owing to the secluded life, *Pardanashin* ladies live, and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them. So in cases of sales and gifts made by *Paraanashin* ladies, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them, that the transaction was a real and *bona fide* one and was fully understood by the lady that disinterested and competent persons with fair understanding of the whole matter, advised her to execute the deed of transfer. (*Lord Atkinson.*) SARAT KUMARI DASI *v.* AMULYADHAN KUNDU. **32 M. L. T. 137 : 17 M. L. J. 481 : 27 C. W. N. 629 : 25 Bom. L. R. 548 : 37 C. L. J. 501 : 1923 M. W. N. 392 : 1923 P. C. 13 (P. C.).**

———*Burden of proof.*

The strongest and most satisfactory proof must be given by the donee of the entire property of a *Pardanashin* lady, that the gift was a real and *bona fide* one and fully understood by the lady. (*Lord Shaw.*) KAMAWATI *v.* DIGBIJAI SINGH. **26 C. W. N. 490: 1922 P. C. 14. (P. C.)**

———*Burden of proof — Deed—Relinquishment.*

A deed executed by a *Pardanashin* lady without consideration relinquishing her right of succession to one of his representatives who submitted the prepared document for her signature is invalid. In such circumstances the onus lies heavily on the persons relying on the deed to prove, that the transaction was a *bona fide* one, and understood fully by the executant. (*Lord Shaw.*) KAMAWATI *v.* DIGBIJAI SINGH. **43 All. 525 : 48 I. A. 381 : 64 I. C. 559 : 15 L. W. 1 (P. C.)**

———*Burden of proof—Transfer by—Validity.*

In transfers by *Pardanashin* women, the circumstances under which she agreed to transfer should be carefully examined in order to ascertain that she had independent advice and that she had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. (*Sir John Edge,*) MATILAL DAS *v.* THE EASTERN MORTGAGE AND AGENCY CO **(1920) M. W. N. 631 : 28 M. L. T. 351 : 2 U. P. L. R. (P. C.) 166 : 61 I. C. 486 : 47 I. A. 265 : 25 C. W. N. 265 (P. C.)**

PARDANASHIN LADY—Burden of proof.

———*Burden of proof—Mortgage.*

Every protection should be given to *Pardanashin* ladies and the proof required from the persons who have entered into transactions with *pardanashin* ladies and who seek to enforce those transactions against them should be adequate and satisfactory (*Mr Ameer Ali.*) MUHAMMAD ALI MUHAMMAD KHAN BAHADUR *v.* RAMZAN ALI QAZI. **24 C. W. N. 977 : 23 O. C. 160: 58 I. C. 891 : 7 O. L. J. 350 (P. C.)**

———*Burden of proof—Pleader and client —Mortgage by lady—Pleader securing mortgage in name of another—*Benami*—Extortionate bargain.*

Where a legal adviser to *pardanashin* lady acting the part of money-lender to her, procures the execution by her of a mortgage bond *benami* in the name of another to secure its repayment, the Court can examine the transaction with closer scrutiny and insist on strict proof that the lady was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one, *Held*, on the facts, that the terms of the mortgage-bond were extortionate and therefore, the deed, which was void was unenforceable. (*Lord Moulton,*) MAHABIR PRASAD *v.* TAJ BEGAM. **1 L. W. 959 : 23 I. C. 642 : 19 C. W. N. 162 : (1915) M. W. N. 387 : 27 M. L. J. 13 (P. C.)**

———*Burden of proof—Gift by— Independent advice—Undue influence—Business like and intelligent lady.*

In the case of a gift by a *pardanashin* lady the burden of proof rests not with those who attack but those who rely upon the deed. There is no absolute rule of law that in the absence of proof of independent advice, a gift by a *pardanashin* woman is invalid. The absence of independent advice is a fact to be taken into account on the issue as to whether the grantor thoroughly understood the transaction and carried it out deliberately and of her own free will. If a review of the facts including the nature of the transactions, the training and habit of mind of the grantor, and the proximate circumstance affecting the execution lead to the conclusion that independent advice would not have made any difference in the result, then the deed of gift ought to stand. The Privy Council upheld a grant of half of her property by a *pardanashin* lady to the son of her paramour. 39 I A. 156 and 15 I.A. 81, Ref. (*Lord Shaw.*) KALI BAKHSH SINGH *v.* RAM GOPAL SINGH. **36 All. 81 : 41 I. A. 23 : 16 O. C. 378 : 18 C.W.N. 282 12 A L.J. 115 : 15 M L. T. 130 : 19 C. L J. 172 : 21 I. C. 985 : 1 O. L. J. 67 : (1914) M. W. N. 112 : 16 Bom L R. 147 : 26 M. L. J. 121 (P C.).**

———*Burden of proof—Proof of intelligent execution—*Onus probandi.

In the case of deeds executed by *pardanashin* ladies in this case a *waqf* of her whole e tate those who rely on them should satisfy the Court that they have been explained to and understood by those who executed them. 7 I. A. 206 ; 29 I. A.

PARDANASHIN LADY—Burden of proof.

131, Ref. (*Lord Shaw.*) SAJJAD HUSSAIN *v.* ABID HUSSAIN KHAN. **34 All. 455 : 39 I. A. 156 : 16 C. W. N. 889 : 10 A. L. J. 364 : 16 C. L. J. 613: 14 Bom. L. R. 1055 : 16 I C. 197 : 12 M. L. T. 361 : (1912) M. W. N. 976 : 15 O. C. 271 : 23 M. L. J. 110 (P. C.).**

———*Burden of proof—Dealings—How conducted.*

In dealings with *pardanashin* ladies it is important to see that they understand what they are doing and whether there was real consideration. It is not necessary that they should have signed a document themselves and it is sufficient if it was executed by a person authorized by her to do so. (*Richards, C J. and Bannerji, J.*) BADRI PERSHAD *v.* GAMBIR KUNWAR. **26 I.C. 500.**

———*Burden of proof—Deed, execution of.*

The things that must be proved to validate a deed of a *Pardanashin* lady are (1) that she actually executed it with a full understanding of what she was about to do. (2) Full knowledge of the nature of the transaction. (3) Independent advice. The cases on this subject fall into two groups, first where the transferee stands towards the woman in a fiduciary character and secondly where the transferee is an absolute stranger. In the former case the Courts would act with great caution. The fairness of the bargain is the crucial test. The court should have regard also to the intellecutal attainments of the lady and to the particular facts of each case without moulding inelastic formulas and crystallised into inflexible rules of universal application. (*Mookerjee and Panton, JJ.*) NIBARAM CHANDRA *v.* NIRUPAMA. **34 C. L. J. 563: 69 I. C. 476 : 26 C. W. N. 570.**

———*Burden of proof—Deed by.*

The things that must be proved to validate a deed by a *Pardanashin* lady are (1) that she actually executed it with a full knowledge of the nature of the transaction. (2) Full understanding of what she was about to do (3) Independent advice. The cases on the subject fall into two groups, first where the transferee stands towards the woman in a fiduciary character and secondly where the transferee is an absolute stranger. In the former case the Courts would act with great caution. The fairness of the bargain is the crucial test. The Court should have regard also to the intellectual attainments of the lady and to the particular facts of each case without moulding inelastic formulas and crystallised into inflexible rules of universal application. (*Mookerjee and Buckland, JJ.*) SATIS .. KALIDASI. **68 I. C. 577 : 34 C. L. J. 529.**

See also **34 C. L. J. 333 : 25 C. W. N. 942.**

———*Burden of proof—Mortgage—Independent advice, necessity for—Proof of.*

In order to make *pardanashin* ladies liable under a mortgage executed by them, the mortgagee is bound to take the elementary precaution of seeing that the ladies have independent advice with regard to the transaction. (*Greaves and Newbould, JJ.*) KAILASH CHANDRA BANIK *v.* LATIFANNESSA KHATUN. **51 I. C. 556.**

———*Burden of proof—Deed--Execution—Independent advice—Donee—Fiduciary character—Onus.*

PARDANASHIN LADY—Burden of proof.

Sanderson, C. J.—There is no absolute rule of law that a *pardanashin* lady must have independent advice. The existence of independent advice or the absence of it, is a fact to be taken into consideration and will weigh on a review of the whole circumstances relevant to the issue as to whether the grantor thoroughly comprehended and deliberately of her own free will, carried out the transaction. If she did, the issue is solved, and the transaction is upheld, but if on a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor as well as on the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. *Per Mookerjee, J.*—Where the person seeking to hold a *pardanashin* lady to the terms of her deeds is one who stood towards her in a fiduciary character or in some relation of personal confidence, the Court will act with great caution and will presume confidence put and influence exerted. Where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length, the Court will require the confidence and influence to be proved. A Court will not be inclined to set aside a deed by a *pardanashin* lady, where the lady is proved to have been of business habits, to have been literate and to have possessed capacity to judge for herself. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) MARIAM BIBI *v.* SHAIKH MAHOMED IBRAHIM. **48 I. C. 561 : 28 C. L. J. 306.**

———*Burden of proof—Execution of deed—Mortgage when binding on her.*

To find whether there was intelligent execution of a deed by a *pardanashin* lady, the circumstances should be borne in mind. The mere translation of the deed or communication of its substance to the lady is not enough. It must be shown that the deed was explained to her. Where a mortgage-deed written in English was read out and explained to *pardanashin* Hindu widow and she executed it in the presence of her own people and the reversioners who witnessed the execution. *Held*, that the deed was binding on the lady. (*Chatterjee and Newbould, JJ.*) SYAMPEARY DASSYA *v.* EASTERN MORTGAGE AND AGENCY CO., LTD. **40 I. C. 865.**

———*Burden of proof—Deed—Enforceability—Document not explained.*

If the terms of a document are not adequately explained to the executant who is a *pardanashin* lady of weak intellect and were not understood by her, the document will not bind her. (*Jenkins, C. J. and N. R. Chatterjee. J.*) KASIM MAMOOJI *v.* K. B. DUTT. **27 I. C. 459 : 19 C. W. N. 45.**

———*Burden of proof—Duty of Court.*

Courts should always take care to see that deeds taken from *pardanashin* ladies have been fairly taken, that the party executing the deed has been fully informed and completely free to do as she chose. The burden of proving these facts is on the party claiming against the lady. (*Jenkins, C. J. and Chatterjee, J.*) BADIATUNESSA BIBI *v.* AMBIKA CHARAN GHOSE. **23 I. C. 401 : 18 C. W. N. 1133.**

PARDANASHIN LADY—Burden of proof.

——— *Burden of proof—Documents by—Duty of the Courts.*

Courts should be careful to see that deeds taken from *pardanashin* women have been fairly taken and that the party executing them had an intelligent apprehension of the transaction, and if this is proved the mere absence of advice will not vitiate the transaction. 14 W. R. (P. C.) 7 ; 15 Cal. 634 and 20 All. 447 Rel. (*Jenkins, C. J. and Woodroffe, J.*) KESHAB LAL PAYNE *v.* RADHA RAMAN NANDY. **20 I. C. 717 : 17 C. W. N. 991.**

———*Burden of proof—Execution of deed—Deed when enforceable.*

To enforce a document executed by a *pardanashin* lady, all that is necessary is to convince the Court that the transaction was a fair one and that the lady understood the act to which she was subscribing. (*Le Rossignol and Broadway. JJ.*) BHAGWATI *v.* CHAOLI **55 I. C. 698 : 2 U. P. L. R. (Lah.) 79.**

———*Burden of proof—Allegation of undue influence.*

Where in a deed of gift, undue influence is alleged to be exerted by a person in dominating position to effect an unconscionable bargain the onus lies heavy on the donee. (*Dalal and Wazir Hasan, A. J. Cs.*) CHAURAS KUAR *v.* ABHUIRAJ KUMAR. **65 I. C. 580 : 8 O. L. J. 681.**

———*Burden of proof—Deed—Execution.*

An endowment deed was executed by a *pardanashin* lady ; the evidence showed that the deed was explained to her, and she thoroughly understood it and signed it after execution and not under duress or undue influence but from her free and independent will. The disposition of the property was most natural and besides her strength of will and business capacity, she had independent outside advice coming from members of her own family who were interested in the promotion of the objects she had at heart. *Held*, that the endowment was a valid disposition. (*Stuart and Kanhaiya Lal, A. J. Cs.*) GANGA BUHKSH SINGH *v.* GOKUL PRASAD. **44 I. C. 645 : 4 O. L. J. 744.**

———*Burden of proof—Execution of deed by—Genuineness—Joint execution by husband—Effect.*

Where the genuineness of a deed executed by a *pardanashin* lady is doubted, those in whose favour it was executed must prove that the lady fully understood the nature and character of the transaction when she signed it. In deciding the question, the whole attendant circumstances and her mental capacity must be considered. Execution of the deed jointly with her husband does not make the execution less voluntary, though the husband may be the moving spirit in the negotiation of the loan. (*Kanhaiya Lal and Kendall, A. J. Cs.*) SALCHA BIBI *v.* OUDH COMMERCIAL BANK, LTD. **36 I. C. 673 : 3 O. L. J. 482.**

———*Burden of proof—Deed—Execution—Attestation.*

In a suit based upon a deed executed by a *pardanashin* lady, the burden of proof rests not with her as attacking, but with plaintiff as relying upon the deed and he must prove affirmatively and conclusively that it was not only executed by, but was explained to, and really understood by her acting in the free and independent exercise of her will. But it is not necessary to prove affirmatively that she had independent advice at the time of the execution. Where a *pardanashin* lady is unable under custom to appear before male witnesses, the attestation of a document, which by independent evidence is conclusively proved to have been executed by such a lady, is good, if the attesting witnesses present outside the *purda* satisfied themselves before attestation that there was no fraud and that the document had been actually executed by the lady inside the *purda*. 37 C. 526, Ref (*Stuart, A. J. C.*) SUGHRA BIBI *v.* KAMLAPAT RAM. **18 O. C. 147 : 30 I. C. 269 : 2 O. L. J. 313.**

———*Burden of proof—Transactions by.*

The onus lies heavily on the purchaser from a *pardanashin* lady that the transaction was real and *bona fide*, fully explained to and understood by her, 34 A. 455 (P. C.) ; 36 A. 81 (P. C.) ; 21 W. R. 340 (P.C.) ; 29 C. 749, (P.C.), Ref. (*Stuart, J. C. and Kanhaiya Lal, A. J. Cs.*) MUSSAMMAT MIRO *v.* LACHMAN PRASAD. **25 I. C. 861 : 1 O. L. J. 466.**

———*Burden of proof—Gift—*Bona fides.

The onus of proof of the *bona fides* and validity of a gift executed by a *pardanashin* lady lies on those claiming under it. (*Miller, C. J and Jwala Prasad, J.*) ZAKIR RAZA *v.* MADHUSUDHAN DAS. **45 I. C. 691 : 4 Pat. L. W. 417.**

Compromise.

———*Compromise—Proof of—Knowledge of the merits of the case—Evidence as to.*

Where persons claim under transactions with a *pardanashin* lady the burden is upon them to prove by the strongest and a most satisfactory evidence that the transactions were real and *bona fide* ones and fully understood by the lady. 21 W. R. 340 ; 23 C. 949 referred to. A compromise of a litigation by a *pardanashin* lady is sufficiently proved by showing that the general result of the compromise apart from its details and legal technicalities were explained to her by disinterested and competent persons fully conversant with the whole matter and that she understood the subject. Where the question is whether a compromise was consented to by a *pardanashin* lady, that the affirmative of the proposition is not established by showing that the evidence of witnesses who deposed to a contradictory negative proposition is not reliable. The fact that an appellant draws out money deposited in Court in pursuance of the decree of the lower Court does not preclude him from questioning the correctness of the decree on appeal. (*Lord Atkinson.*) SRIMATI SARAT KUMARI DASI *v.* AMULYADHAN KUNDU. **17 L. W. 481 : 32 M. L. T. 137 (P. C.) : 37 C. L. J. 501 : 25 Bom. L. R. 548 : (1923) M. W. N. 392 : 1923 P. C. 13 (P. C.)**

———*Compromise—Independent advice—True test.*

PARDANASHIN LADY—Compromise.

To validate transactions with *pardanashin* ladies it is not necessary to prove that she understood every detail of the matter. It is sufficient that she should understand its general effect, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise her. (*Lord Buckmaster.*) SUNITABALA DEBI *v.* DHARASUNDARI.
46 I. A. 272 : 17 A. L. J. 997 : (1919) M. W. N. 821 : 22 Bom. L. R. 1 : 24 C. W. N. 297 : 53 I. C. 131 : 11 L. W. 227 : 37 M. L. J. 483 (P. C.)

———*Compromise—Duty of Court to scrutinize.*

Before giving effect to a compromise to which *pardanashin* ladies are parties, it is the duty of the court to satisfy itself that the terms of the compromise were understood by them and that they had acted upon independent advice ; so too with respect to an oral compromise, the Court should consider the evidence of the terms of settlement with care and caution. (*Mookerjee and Beachcroft, JJ.*) KSHETRA MONI DASI *v.* AMODINI DASI. **16 I. C. 611.**

Examination of.

———*Examination of—Commission—Right of choice to place.*

A *pardanashin* lady has no right to be examined on commission at a place of her own choice or where she happened to be at the time of the issue of the commission. (*Ghose, J.*) SHITIPATI ROY *v.* DHARANI MOHAN.
64 I. C. 228 : 48 Cal. 448.

———*Examination of—How conducted--Practice.*

Pardanashin witnesses need not be compelled to attend the Court. Their evidence may be recorded in a room or a house near the Courtyard if they are able to secure one, regard being had to Gosha being preserved. (*Phillips, J.*) *In re* MAN BHOY. **12 I. C. 221 : 12 Cr. L. J. 501.**

———*Examination of—Commission—Criminal trial—Procedure if proper.*

The issue of a commission for the examination of a *Pardanashin* eye-witness in a serious criminal trial is a procedure which is much to be deprecated and should never be adopted except for the most cogent reasons. (*Coutts and Ross, JJ.*) LACHMI LAL *v.* EMPEROR.
3 Pat. L. T. 398 : 1922 P. 40 : 23 Cr. L. J. 218 : 1922 Pat. 159.

———*Examination of—Chambers or commission—Practice.*

Pardanashin women, whose evidence is necessary ought to be, as far as possible, examined in Chambers, after making due provision for maintaining their *Parda.* If a commission is applied for, the court should see to the necessity of issuing such a commission. (*Pratt, J. C. and Hayward, A. J. C.*) IMPERATOR *v.* MEWARAM.
11 I. C. 582 : 12 Cr. L. J 398 : 4 S. L. R. 257.

Knowledge of Transaction.

———*Knowledge of transaction--Execution of document.*

PARDANASHIN LADY—Knowledge of transaction.

Where the registration of the document in dispute was effected at the lady's house, that she put her thumb impression and mark below the acknowledgment of execution and that her thumb-mark was also obtained in the Sub-Registrar's book, *held* that in the circumstances, due execution by the lady could be safely assumed, that the document was understood by her and that it is not necessary that there should have been independent advice. (*Mears, C. J., and Banerji, J.*) BEHARI LAL SAHU *v.* MUHAMMAD HASAN. **63 I. C. 574 : 3 U. P. L. R. (A.) 191.**

———*Knowledge of transaction—Independent advice—Duty of Court.*

A Court called upon to enforce a deed executed by a *pardanashin* lady must satisfy itself on the evidence, first, that the deed was actually executed by her or some one duly authorised by her with a full understanding and knowledge of the nature and effect of the transactions and that she had independent and disinterested advice in the matter. The Court will have regard to the intellectual attainments of the lady concerned and will be reluctant to set aside the deed if the lady were proved to have possessed a capacity to judge for herself. 28 C. L. J. 366 ; 23 All. 137, Foll. (*Mookerjee and Buckland, JJ.*) KRISHNA *v.* NAGENDRABALA. **25 C. W. N. 942 : 66 I. C. 694 : 34 C. L. J. 333.**

———*Knowledge of transaction—Authority of agent—Suit against — Agreement to pay commission.*

A contract to pay a commission for bringing about a sale of immoveable property entered into by an attorney of a *pardanashin* lady authorized to go on her behalf, would bind her even apart from her not knowing the actual details of the agreement. (*Fletcher and Chatterjee, JJ.*) RAJENDRA NATH KUNDOO *v.* NAVAKUMARI DASI. **22 I. C. 657.**

———*Knowledge of transaction—Disposition of property by—Court, duty of.*

A court when dealing with the disposition of his property by a *pardanashin* woman, ought to be satisfied that the transaction was explained to her and that she knew what she was doing. Where a deed was executed by a *pardanashin* lady who was at the time of executing it suffering from illness, of which she died a few weeks after the deed was registered and was at that time in the house of the person in whose favour it was made and had no opportunity of consulting any of her relatives or the relatives of her deceased husband. *Held*, that under such circumstances it was open to grave suspicions and the burden was heavily on the person relying on the deed, to show that it was properly obtained and the lady understood what she was about. (*Abdul Raoof and Qadir JJ.*) HARI CHAND *v.* JUGAL KISHORE. **1922 Lah. 349.**

———*Knowledge of transaction—'Independent advice'—Application of doctrine of.*

The doctrine of 'independent advice' applies only when the *pardah* system is rigorous, but not where, as among Marcayars of S. India, *gosha* is no observed and even voluntary deliberate acts

PARDANASHIN LADY—Knowledge of transaction.

of a *pardanashin* woman should not be lightly set aside. (*Miller and Sadasiva Aiyar, JJ.*) ABDUR RAHMAN *v.* MUHAMMAD NUROLIN.
23 I. C. 547.

———*Knowledge of transaction—Burden of proof—Execution of deed.*

In order to charge a *pardanashin* lady upon an instrument purporting to have been executed by her, the person relying upon it should give satisfactory and conclusive evidence that it was not only executed by her but understood by her. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SHAHRUK RUQIAYA BEGAM *v.* SHEO PRASAD.
41 I. C. 435 : 4 O. L. J. 425.

———*Knowledge of transaction—Jurisdiction of Courts.*

The jurisdiction of courts of law to afford protection to *pardanashin* ladies rests on a presumption of imperfect knowledge of the world and exposure to undue influence. A person taking a document from such a lady is bound to show affirmatively that she understood the nature of the transaction and the effect of it. The duty of the Court in such cases is laid down by Mukerjee J. in 34 C. L. J. 563. (*Das and Kulwant Sahay, JJ.*) RAO BAHADUR MAN SINGH *v.* MAHARANI NAWALKHBATI. **2 Pat. 607 : 4 Pat. L. T. 335 : 1923 P. 492.**

———*Knowledge of transaction—Contention that no legal advice received.*

Where in a suit on a mortgage bond it was contended that the executant a *pardanashin* lady, did not receive independent legal advice and thus the deed could not be enforced against her, but it was proved that the deed was explained and read over to her, and that she had taken part in other transactions binding on her, *held* that the absence of legal advice did not render the bond unenforceable against her. (*Das and Adami, JJ.*) HIRA BIBI *v.* RAMDHAN LAL. **2 Pat. L. T. 752 : 62 I. C. 540 : 6 P. L J. 465.**

———*Knowledge of transaction — Hindu widow—Alienation for necessity.*

Where a Hindu widow, a *pardanashin* lady incurs a debt, the necessity for which is proved, and the creditor has made due enquiries he need not show that the lady had independent advice. (*Das and Adami, JJ.*) RADHA KISHEN *v.* JAG SAHU. **60 I. C. 173 : 3 U. P. L. R. (Pat.) 14.**

Power of Attorney.

———*Power of attorney—Proof of consent.*

A *pardanashin* lady drew up a mortgage security for loan through her own men under her instructions and got the same registered by husband and *mukhtear* under general power of attorney. *Held*, that the documents came from the side of the executant, that knowledge of contents should be presumed and that no proof of explanation of contents was necessary. *Held*, further, that the authority to appear in the Registration office implied an authority to appear for

PARDANASHIN LADY—Who is.

all purposes. (*Fletcher and Richardson, JJ.*) BHUBAN MOHINI DASI *v.* GAJALAKSHIMI.
32 I. C. 119 : 19 C. W. N. 1330.

———*Power of attorney—Authority of agent—Setting up money-lending business.*

Where a *pardanashin* lady carries on a money-lending business and employs a manager to transact that business on her behalf and herself sees nobody, it must be taken that she holds out to the public that the manager has full authority to act on her behalf in all matters connected with that business. She cannot in such a case repudiate contracts so entered into on the ground that express authority is not proved. (*Miller, C. J. and Mullick, J.*) BAIJU SINGH *v.* DHAPI KAUR.
58 I. C. 310 : 1 Pat. L. T. 578.

———*Power of attorney—Deed—Claim on—Burden of proof.*

Where claim is made against *pardanashin* ladies on the basis of a document executed by their agent, the plaintiff must shown not only that a power of attorney was actually signed by the *pardanashin* ladies but also that they knew what they were doing, the nature of the document and the extent of the powers they were conferring by executing such a document. (*Ormond, J.*) ASRI JAN *v.* S. S. CHELLAPPA CHETTY.
27 I. C. 610 : 8 Bur. L. T. 81.

Who is.

———*Who is.*

An Indian lady who does not ordinarily appear in public but goes about making purchases in the bazaars can hardly be described as a *pardanashin*. (*Rattigan, J.*) RAM DITTA MAL *v.* KARAM DEVI. **167 P. W. R. 1912 : 17 I. C. 243 : 190 P. L. R. 1912.**

———*Who is—Will—Proof—Onus—Presumption.*

The rule as to *pardanashins* does not apply to all *gosha* ladies alike. The rule at the best is one of presumption of want of ordinary capacity which can be rebutted. A *gosha* lady was, at the time of the execution of the will by her, about 55 years of age, was transacting business through agents to whom she gave personal instructions, interviewing Government Officers, giving evidence before Magistrates, directly presenting documents for registration, conducting heavy litigations through capable lawyers and giving them instructions. *Held*, on these facts that she could not be treated as a *pardanashin*, though she was belonging to a noble family, may be *gosha* when young and may not needlessly appear in public even when she was advanced in years. An Appellate Court should not allow a plea to be raised by the first time in appeal that the testatrix was a *pardanashin* lady and therefore incapable of understanding the terms of her will, at any rate without giving an opportunity to the plaintiff to adduce evidence of the testatrix's capacity and status, the circumstances attending the execution of the will and the means she had of obtaining independent advice. (*Spencer and Srinivasa Aiyangar, JJ.*) SRI VIKRAMA DEO GARU *v.* SIR VIKRAMA DEO MAHASAJULU GARU.
(1918) M. W. N. 69 : 43 I. C. 679 : 33 M. L. J. 665.

PARENTAGE—Proof of.

See EVIDENCE ACT, S. 112.

PARGANA OF KARWAI RAJ ACT (I OF 1911).

——Ss. 6 and 3—*Jurisdiction to entertain appeal.*

An appeal to the District Judge lies from an order by an Assistant Collector of the First Class under S. 4 of the Pargana of Karwai Raj Act, 1911, in a suit for rent. (*Karamat Hussain and Tudball, JJ.*) SRI NARAIN SINGH *v.* RAM KUMAR SINGH. **14 I. C. 123**

PAROL EVIDENCE.

See EVIDENCE ACT, Ss. 91—100.

PARSI INTESTATE SUCCESSION ACT (XXI OF 1865).

——Ss. 3, 5, 6 and 7—*Will of Parsi—Direction excluding a heir—Construction.*

A Parsi died leaving a will, having a son, two daughters and heirs of a predeceased daughter. The residue of the estate was to be held in trust, the net income thereof to be paid to his son during his lifetime; in the event of the sons' death leaving no issue but only a widow, a sum of Rs. 10,000 was to be paid absolutely to the widow and the half of the residuary estate was to be appropriated to certain charities and the other half to be divided amongst the heirs, according to the law of intestate succession among Parsis but excluding the widow from getting any share in the distribution. On the death of the son the widow contended that though by the above direction she was excluded as an heir of the testator, that she was not excluded as an heir of the son. *Held*, on a construction of the will that the widow was to be entirely excluded, whether as heir of the son or otherwise. (*Fawcett, A. J. C.*) DINBAI *v.* NUSERVANGJI R. MEHTAR. **28 I. C. 481.**

PARSI MARRIAGE AND DIVORC ACT (XV OF 1865).

——Ss. 3, 6, 8, 9 and 14—*Validity of marriage—Entry in register of marriage—Proof.*

The entry in a register maintained according to Ss. 6 to 14 is not in itself one of the requisites for a valid marriage amongst the Parsis. Where there is no certificate and no entry in the marriage register, any other relevant evidence is admissible to prove the marriage having taken place. (*Crump, J.*) BAI AWABI *v.* KHODADAD ARDESHER KOOCHABIOGI. **22 Bom. L. R 913 : 58 I. C. 91 : 45 Bom. 146**

——S. 17—*Delegate unable to understand proceedings—Appeal.*

No trial under the Parsi Marriage and Divorce Act can be satisfactory in which a delegate who is to all intents and purposes a member of a jury, cannot understand the proceedings. A delegate under the Parsi Marriage and Divorce Act is in a similar position to a juror, and cannot be challenged in appeal. (*Batten, A. J. C.*) DINBAI *v.* FROMROZ. **43 I. C. 71.**

——S. 31—*Judicial separation—Grant of alimony—Bombay High Court—Jurisdiction.*

The Bombay High Court cannot grant an order of judicial separation between a Parsi husband and wife. The Parsi Matrimonial Court has exclusive jurisdiction to entertain suits concerning matrimonial disputes among Parsis and also to order the husband to provide maintenance to his wife when it grants a decree for judicial separation. (*Macleod, J.*) BAI GULBHAI *v.* BEHRAM SHA. **38 Bom. 615 : 23 I. C. 441 : 16 Bom. L. R. 211.**

——S. 33—*Scope of—Pending suit.*

S. 33 applies merely to orders pending the suit and the payments are merely payments during the suit. It does not limit or qualify the liability of the husband to the wife's solicitors. The table of fees of the High Court contemplates merely party costs between the parties to a Parsi matrimonial suit and does not relate to the rights of the wife's solicitors to recover their attorney and client's costs from the husband. Court had no power to award anything more than what is fixed in that table. (*Davar, J.*) PAYNE & CO. *v.* PIROJ SHAH. **12 I. C. 554 : 13 Bom. L. R. 920.**

PARSIS.

See also ZOROASTRIAN RELIGION.

——*Law applicable.*

The common law of England applies to the Parsis who inhabit the town and Island of Bombay. The wife is entitled to pledge her husband's credit and defend herself in any action against her for dissolution of his marriage with her at his cost. The wife's solicitors must secure their costs from the husband before they apply for a charging order against her property recovered or preserved in the suit by them. (*Davar, J.*) PAYNE & CO. *v.* PIROJ SHAH. **12 I. C. 554 : 13 Bom L. R. 920.**

PARTIES.

See (1) C. P. CODE, O. 1 AND O. 34.

(2) CONTRACT.

(3) CONTRACT ACT, S. 2.

PARTITION.

Accounts.
Decree.
Effect of.
Entries.
Equities.
Jurisdiction.
Minors.
Mode of Division.
Occupancy Holding.
Oral.
Parties.
Principles.
Prior partition.
Procedure.
Right to.
Shamilat.
Subject-matter of.
Suit.
Trees.
Unregistered Deed.

PARTITION—Accounts.

Accounts.

———*Accounts—Collections subsequent to suit—Procedure.*

Where one of the sharers is alleged to have collected the rents of the properties subsequent to the suit and application is made to include that amount in the accounts between the parties, the proper course is to treat the application as a suit under S. 47 (2), C. P. C. (1908) and to levy additional Court-fee thereon and to direct the parties to submit accounts of the rents and profits collected. (*Sadasiva Aiyar and Napier, JJ.*) GOVINDA CHETTY *v.* DORASAMI CHETTY.
29 I. C. 905.

Decree.

See also C. P. CODE, O. 20, R. 12.

———*Decree—Stamps—Default in furnishing—Dismissal of suit.*

Where an order has been made for preparation of a partition of a decree in terms of an award and the plaintiff fails to comply with an order of the Court to pay the stamp duty as distinct from Court-fees, his omission to pay is no ground for dismissal of the suit. (*Oldfield and Seshagiri Aiyar, JJ.*) SHEOMANGAL *v.* DILRAJ.
17 A. L J. 493 ; 50 I. C. 886 : 1 U. P. L. R. (H.C.) 9.

———*Decree—Defendant has right to continue the proceedings if plaintiff unwilling to proceed.*

In execution of a decree for partition of house and lands, at the instance of the plaintiff a commissioner was appointed to effect a division of a house first. The commissioner made a report, but before the report could be given effect to the house was burnt down. The plaintiff thereupon applied to drop the execution proceedings. *Held*, that the defendant should be allowed to continue the application for execution and need not issue a fresh darkhast. (*Macleod, C. J., and Coyajee, J.*) CHUNILAL JAMNADAS *v.* MULCHAND HARJIVANDASS. **46 B. 937 : 24 Bom. L. R. 440 : 1923 B. 23 (2).**

———*Decree — Not properly executed—Re-adjustment of accounts.*

If a portion of the decree is not properly executed by the Collector, the re-adjustment of the orders can be ordered. (*Scott, C. J. and Shah, J.*) RAMCHANDRA DINKAR *v.* KRISHNAJI SAKHARAM.
40 Bom. 118 : 31 I. C. 311 17 Bom. L. R. 967

———*Decree—Right of defendant to get possession of his share.*

Where a suit for possession is treated as a suit for partition by the arbitrator to whom it is referred and the decree on the award allots a share to each of the parties, they are entitled to get their share by way of execution of the decree. (*Chevis, J.*) NARPAT RAI *v.* DEVI DAS.
16 P. W. R. 1912 : 14 I. C. 375 : 252 P. L. R. 1912.

PARTITION—Effect of.

———*Decree—Effect on mortgagee.*

A decree for partition between proprietors purports to divide the rights of the persons seeking partition as against the other co-owners of the said property It does not affect the rights of persons holding a simple mortgage over the same. (*Stuart and Kanhaiya Lal, A. J. Cs.*) JAI KISHORI *v.* AFZAL KHANAM. **22 O. C. 349 : 54 I. C. 544 : 2 U. P. L. R. (J.C.) 17.**

———*Decree, preliminary—Dismissal of suit thereafter—Impropriety of.*

In a suit for partition the court passed a preliminary decree and directed a commissioner to partition the joint properties. The commissioners partitioned some lands which were other than the joint property and the Court thereupon purported to dismiss the suit. *Held*, that the Court acted illegally in dismissing the suit after passing a preliminary decree and that Commissioner ought to be directed to partition the lands directed to be divided under the preliminary decree. (*Das and Kulwant Sahay, JJ.*) RANJIT SAHI *v.* MAULAVI QASIM. **2 Pat. 432 : 4 Pat. L T. 257: 1923 P. 342.**

———*Decree—Possession given in execution—Conveyance not necessary.*

M purchased a decree for partition, executed it, and obtained formal possession, *held* M had good title to the property partitioned, and no conveyance is required to perfect such title. (*Pratt, J.*) MA THA *v.* MG PO KIN.
1 Bur. L. J. 130 : 1923 R. 45 (2).

Effect of.

———*Effect of—Co-sharers—Lease of undivided land — Subsequent partition—Distinction between lease and mortgage.*

Where subsequent to the creation of a lease over a portion of joint property in the exclusive occupation of one co sharer with the consent of the others, a partition is effected among the co-sharers whereby the property leased is allotted to another, the rights of the lessee are not in any way affected. 1 C. W. N. 62, Foll. The difference between a lessee and a mortgagee of an undivided share in joint property (homestead and tank) is that in the case of a lease followed by possession of the property demised the title of the lessee is complete, while in the case of a mortgage the land is merely hypothecated and no title thereto is perfected until the security is enforced. 1 I. A. 106 Dist. (*Richardson and Cuming, JJ.*) BAINADDI MANDAL *v.* KAILAS CHANDRA SARDAR. **64 I. C. 448 : 35 C. L. J. 166.**

———*Effect of.*

Partition is the process by which property held by two or more persons in co-tenancy is converted into estates in severalty and thereby divided among them with the result that the land which before partition was held and enjoyed jointly is after partition held and enjoyed by the different parties according to the allotments made by the Court. (*Mookerjee and Richardson, JJ.*) KALI CHURN *v.* MOHANANDA DATTA. **29 I. C. 467.**

PARTITION—Effect of.

——*Effect of—New rights created.*

Whatever may be or may have been the rights of the parties before the partition with regard to the portions of land which were going to be the subject-matter of the partition the partition created new rights and it was under the partition that the suit lands were allotted to the plaintiffs and they became entitled to exclusive possession. 81 P. R. 1911, Foll. (*Abdul Raoof, J.*) MOHAMMAD DIN *v.* MUHAMMAD. **67 I. C. 425 : 3 L. L. J. 377.**

——*Effect of—Fresh title created.*

When lands are partitioned the partition creates a fresh title to the lands. (*Lindsay, J.C.*) HANOMAN SINGH *v.* RATAN SINGH. **57 I. C. 448 : 7 O. L. J. 336.**

——*Effect—Co-sharers, not parties, whether bound—Mortgagees, whether necessary party and whether bound.*

Presumably all the co sharers in a village and persons deriving title under them, are bound by the proceedings when partition takes place. Mortgagees are not necessary parties and they are bound by the result of the proceedings so far it affects the interests of mortgagor-co-sharers (*Lindsay, J. C.*) DRIGPAL SINGH *v.* NAKCHHED SINGH. **2 U. P. L R. (J. C.) 91: 56 I. C. 320: 7 O. L. J. 171.**

Entries.

——*Entries—Recording of land in the name of Pattidar—Presumption.*

According to an agreement between the parties the actual possession of all *sir* and *khudkast* had been left undisturbed, the holder being recorded as a tenant of any such land as fell in patti other than his own. The Amin at first entered a land as the defendant's *khudkast* in the plaintiff's patta. Such a state of things is of course an impossibility and the officer who made the partition ordered the Amin to correct the entry ; it was accordingly corrected into an entry showing the land as the plaintiff's *khudkast* and the jamabandi containing this entry was accepted and signed as correct by the parties. *Held*, the general statement of the Revenue Officer that the actual possession of *sir* and *khudkast* had not been disturbed by no means excludes the possibility of exceptions having been made and barely indicates a slight probability that an exception that appears on the face of the record was really due to a slip of the pen. (*Hallifax, A. J. C.*) NARSING *v.* KHEMU. **1923 Nag. 81.**

Equities.

——*Equities—Mortgage of undivided share—Co-sharer —Encumbrance—Allotment of encumbered property to other sharers.*

Where any land of undivided joint estate which is encumbered by any co-sharer is allotted on partition by a Collector to any other co-sharer, the latter takes it free of the interest so created. 1 I. A. 106, Foll. (*Holmwood and Chapman, JJ.*) TARINI KANTHA *v.* ISHUR CHANDRA. **18 I. C. 240 : 21 C. L. J. 603.**

——*Equities—Rights of alienee from Hindu widow.*

Some *Khamat* lands were sold by a Hindu widow to plaintiff on condition of paying Government Revenue to the vendor for paying to Government. The plaintiff's name not being registered as proprietor, he could not get the lands sold to him or their equivalent, at the time of partition which subsequently took place under the Partition Act. *Held*, he could follow the lands which fell to the lot of the widow under partition either absolute or limited interest according to the interest she acquires under the partition. (*Caspersz and Chatterjee, JJ.*) BRIJO NATH SAHA *v.* DANISH CHANDRA NEOGI. **9 I. C. 67.**

PARTITION—Equities.

——*Equities—Mortgagee from one sharer.*

A partition effected with the consent of the joint owners of the land is not invalidated by reason of the lack of consent of the mortgagee of an undivided share, and such a mortgagee has no claim to be made a party to the partition proceedings. (*Maynard, F. C.*) THAKAR DAS *v.* SULTAN BAKHSH. **2 P. R. 1918 (Rev.) : 45 I.C. 405: 3 P. W. R. 1918 (Rev.).**

——*Equities — Transfer of undivided shares to different persons — Prior transfer of specific plots—Mode of allotment.*

Where separate rights created in favour of different persons can all be exercised without encroaching upon each other they must be treated as relating to different portions of the property. The owner of certain property mortgaged an undivided half share in it to A, who subsequently foreclosed the mortgage and became the owner. Subsequently the remaining half share was sold to B. It was found as a fact that prior to the mortgage the owner had sold certain plots of land but this was not known to A or B. On a question arising at a partition between A and B. It was held that the plots so sold should be allotted to B's share of the property. (*Daniels, A. J. C.*) QAZI WALIUL HAQ *v.* MT. BIGGAN. **9 O. L. J. 355 : 1923 Oudh 42 (2).**

——*Equities—Mortgage of undivided share—Substituted security—Right of mortgagee only to properties allotted at partition to mortgagor.*

A mortgage of an undivided share in property which under a partition is allotted to another co-sharer cannot in the absence of fraud be enforced by the mortgagee except against the share allotted to the mortgagor in lieu of the share mortgaged. The remedy of the mortgagee is to proceed against the substituted security. (*Kanhaiya Lal, A. J. C.*) SAIYID MUHAMMAD *v.* JAWAD HUSAIN. **53 I. C. 659 : 6 O. L. J. 495.**

——*Equities—Mortgage of undivided share—Partition—Mortgagee's rights in case of.*

The mortgagee of an undivided share from a a co-sharer must in case of a subsequent partition among the co-sharer enforce his right as such against the partitioned share of his mortgagor in place of the undivided share mortgaged. 21 W. R. 233, Foll. Such a right is not a mere charge or equitable lien which can be defeated by a plea of *bona fide* purchase without notice. (*Lindsay, J. C.*) KIFAYAT ULLAH *v.* MAHABIR PRASAD. **24 I. C. 2 : 1 O. L. J. 175.**

PARTITION—Equities.

———*Equities—Mortgage of undivided share—Property allotted to another co-sharer—Effect.*

If in a partition between co-sharers a portion of the undivided property which had been mortgaged by one co-sharer to a third person falls to the share of another co sharer, the latter takes it free of the mortgage. (*Chamier, C J and Sharfuddin, J.*) RAJI RAM TEWARI *v.* SURAI TEWARI.
42 I. C. 454 : 3 Pat. L. J. 134.

Jurisdiction.

———*Jurisdiction—Order for, by Civil Court.*

An order for partition can be made by a Civil Court if the plff.'s title is not made precarious by the Revenue Settlement by the revenue authorities and the title is not affected merely because property is held under a periodical settlement from the Crown. (*Mookerjee and Buckland, JJ.*) MIDNAPORE ZAMINDARI CO. *v.* NARESH.
65 I. C. 833 : 33 C. L. J. 497.

———*Jurisdiction—Valuation.*

For purpose of jurisdiction in a partition case the suit is to be valued according to the plff.'s share in it. (*Jwala Prasad and Adami, JJ.*) DUKHI SINGH *v.* HARIHAR SHAH.
5 Pat. L. J. 540 : 1 Pat. L. T. 595 : 58 I. C. 236 : 1921 Pat. 89.

Minors.

———*Minors—When bound—Bona fide allotment—Full knowledge of facts—Guardian's Act when binding.*

Though a partition can be entered into during the minority of some of the members of a joint Hindu family, it is open to the minor members to show that the partition was unfair or prejudicial to their interest and their not binding on them. In the case of a co-owner who is only interested along with a minor in one or more items of property, when division is effected, such division must be a fair one and not prejudicial to the interests of the minor. Wherever an adult person deals with a minor through the minor's guardian it is his duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by an act or omission on his part. The duty is all the greater when the minor's guardian is a young widow having no independent advice and the adult co-owner knows everything about the property (*Spencer and Devadoss, JJ.*) PARAMASIVAM PILLAI *v.* MEENAKSHISUNDARAM PILLAI.
1923 Mad. 96.

———*Minors—Living in separate house.*

The fact that the minor sons might live separately in a house built by their mother would not constitute separation from other members. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRASAD NARAIN SINGH *v.* THAKUR NIRMAN PRASAD SINGH.
9 O. L. J. 552 : 1923 O 61.

Mode of division.

———*Mode of division—Fractional share incapable of partition.*

PARTITION—Oral.

Where the Court is unable, owing to the impartible nature of the estate, to separate by metes and bounds the plff.'s share from the rest, it should not dismiss the suit but should decree joint possession over such share as lawfully belongs to him. (*C. Piggott and Walsh, JJ.*) RAJJAB SHAH *v.* TAHIR SHAH.
43 All. 318 : 60 I. C. 878 : 19 A. L. J. 61.

———*Mode of division—A portion treated as separate from the rest.*

Where a part of the property to be partitioned is treated as separate from the rest, it is not improper to allow that part to be partitioned. (*Walmsley and Buckland, JJ.*) DURGACHARAN *v.* ENAMOL HUQ.
60 I. C. 762.

———*Mode of division.*

No court would be inclined to accede to the contention that a property is impartible unless it is shown that it is a property the division of which would be against public right or policy or would tend to impair some permanent right existing in a stranger to the co-tenancy or would outrage the public sense of propriety, decency and good morals. (*Mookerjee and Carnduff, JJ.*) NARAYAN LAL GUPTA *v.* CHULHAN LAL GUPTA.
14 I. C. 677 : 15 C. L. J. 376.

———*Mode of division—Encumbered fixed deposit receipt—No allotment by decree—How to be divided—Withdrawal of deposit by party—Estoppel.*

Where a partition decree did not declare to whom an encumbered deposit receipt for Rs. 10,000 belonging to the family was to be allotted, and the plaintiff withdrew the amount of the deposit from the bank, *Held*, that the plaintiffs and the defendants must share the fixed deposit amount alike deducting the amount due to the encumbrancer; that the mere fact of withdrawal from the bank did not estop the plaintiff from urging that the encumbered receipt should not be allotted to him alone. (*Chevis, J.*) NARPAT RAI *v.* DEVIDAS.
54 P. L. R. 1913 : 18 I. C. 88 : 11 P. W. R. 1913.

Occupancy Holding.

———*Occupancy holding—Land Revenue Act and B. T. Act.*

Any joint property is partible and so the suit for partition of an occupancy holding held jointly is maintainable but the landlord will be bound by the decision made without his permission. (*Carnduff and Chapman, JJ.*) RAJENDRA NARAIN SAHA *v.* SATISH CHANDRAL.
15 I. C. 331.

Oral.

———*Oral—If sufficient to establish—Nature of evidence.*

A partition may be established by oral evidence, which though not directly proving the factum of partition, may be of such a character as to justify the inference of a prior partition between the parties. The following circumstances held sufficient to prove partition; (*a*) Transfer of lands by one member to another in the family;

(*b*) long possession of specific parcels by different members ; (*c*) Reclamation and improvement of waste lands at great cost by individual members ; (*d*) admissions of a prior partition by the members of the family; (*e*) separate occupation of land and collection of rent from separate tenants. (*Mookerjee and Beachcroft, JJ*) KULADA PROSAD TEWARY *v.* SADHU CHARAN TEWARY.

27 I. C. 412 : 20 C. L. J. 32.

———*Oral—Validity of.*

A partition of joint family property need not be in writing and the T. P A. does not make it necessary. (*Fox, C. J. and Hartnoll, J.*) CHOCKALINGAM CHETTY *v.* MAUNG YAUNGNI.

5 Bur. L. T. 296 : 18 I. C. 524 : 6 L. B. R. 170.

Parties.

———*Parties—Persons interested—Effect of partition.*

Persons holding interests in a village of a nature subordinate to the interests which is the subject of the partition cannot be ejected on the ground that the land in their occupation has been allotted to a different co-sharer at the partition. A party is not necessarily entitled to actual possession of every land allotted to him in a partition proceeding. (*Wazir Hasan, A. J. C.*) LIAQT HUSAIN *v.* NAROTAM DAS.

4 U. P. L. R. (J. C.) 1 : 65 I. C. 780 : 8 O. L. J. 516.

———*Parties—Co-owners—Who are.*

A partition can be effected only as between co-owners. By co-owners is meant either joint tenants in common or co-parceners, all of whom must at the date of the partition have a legal interest in the property partitioned. (*Maung Kin, J.*) PO MAUNG *v.* ANUG DIN.

1 Bur. L. J. 26.

Principles.

———*Principles— Partial partition —When allowed—Co-tenants.*

The general rule is that all property held in co-tenancy and nothing but property held in co-tenancy should be included in a partition suit. A co tenant, whose title to an undivided share of joint property is admitted as clear is entitled to partition as a matter of right. A difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient ground for refusing a partition ; and it has sometimes been maintained that partition may be claimed, even though it be impossible to divide the property without materially impairing its value or even totally destroying it. Since partition can be claimed as a matter of right, a co-tenant is not required to make demand or to agree upon terms prior to institution of suit. But although, as a general rule, all joint property of the co-tenants must be included in a partition suit it is within the power of co-tenants, by mutual agreement, to make partition of a part only of the joint property, retaining the rest in common. The principle that a partition suit should include all the property of the co-tenancy is widely recognised, and it has been pointed out that if the rule were not enforced, a co-tenant might institute as many suits to partition the property as his caprice dictated. Consequently, a partial partition cannot, as a general rule, be compelled against co-tenants who do not consent thereto. But if some of the co-tenants desire to continue holding their moieties together and undivided the Court may permit them to do so, and instead of making a separate allotment to each, set apart to all who so desire an allotment to be held by them jointly. If it appears, however, that all the defendants have already received all that is equitably due to them, the remainder may be awarded to the plaintiff; this is not partial but complete partition. Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts. Again, a suit for partial partition has been allowed when the portion excluded is not in the possession of co-parceners and may consequently be deemed not to be really available for partition. A suit for partial partition has also been allowed when the portion excepted is impartible property. In another class of cases, the rule has been relaxed, namely, where the portion excluded is held jointly with strangers who have no interest in the family partition. But although partial partition by suit is allowed where different portions of the property lie in different jurisdictions, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with stranger who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. (*Mookerjee and Cuming, JJ.*) RAJENDRA KUMAR BOSE *v.* BROJENDRA KUMAR BOSE.

37 C. L. J. 191 : 1923 Cal. 501.

———*Principles.*

The principle of partition is that, if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made. If on the contrary no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share, which would fall to the plaintiff by partition. A claim by a co-owner to partition can not ordinarily be resisted. (*Saunders, J. C.*) HARDANDAS PALANDROY *v.* SUNDER. **4 U. B. R. (1921) 57 : 1922 U. B. 4.**

Prior Partition.

———*Prior partition—Evidence of—Possession of share.*

A private partition followed by long possession of a specific share and payment of separate revenue therefor creates title and bars the Collector from making a partition. (*Holmwood and Chapman, JJ.*) GOPALCHANDRA DEB GOSWAMI *v.* PADMAPANI GOSWAMI. **18 I. C. 814.**

———*Prior partition—Cause of action—Bar.*

The existence of a private partition is a bar to the re-partition of property. Where it is shown

PARTITION—Procedure.

that the parties have acquiesced in the result of a partition, it must be presumed that they or their predecessors-in-interest were parties to the original partition. The fact that the original partition proceedings have been lost in antiquity is not a reason for disturbing divisions which have existed for a long period. (*Roe and Imam, JJ.*) MANNO CHAUDHURY *v.* MUNSHI CHAUDHURY.
3 Pat. L. J. 188 : 43 I. C. 393 : 5 Pat. L. W. 97.

Procedure.

——*Procedure —Separation of shares of defendants—Court, duty of, to call for stamped application from defendants.*

An order of a Court, in a partition suit, requiring the defendants to put in stamped application if they wished to have their respective shares separated, is a perfectly correct order. 23 B. 184, Rel. on. (*Rattigan and Shahdin, JJ.*) MASHKURUNISSA *v.* HASHMATULLAH.
274 P. L. R. 1913 : 20 I.C. 177 : 183 P. W. R. 1913.

Right to.

——*Right to—Co-sharers—Rights after partition—Imperfect partition.*

The co-sharers in a *mahal* have a right to effect a partition by private arrangement amongst themselves and it may be the most convenient method of effecting such a partition to assign the entire holding of a particular tenant to a particula group of co-sharers. The only difference effected by a private arrangement and one properly carried out under the orders of the Court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village records which are at variance with actual facts. After partition it is open to the sharer to eject tenants at will continuing on the land. (*Mears, C.J. and Piggott, J.*) HAWAL RAI *v.* HAR PRASAD.
45 A. 711: 21 A L. J. 634 : L. R. 4 A. 437 (Rev.) : 1924 A. 57.

——*Right to—Co-sharers—Inconvenience—Party wall and stair-case.*

The inconvenience and difficulty of partitioning the subject-matter is no answer to a claim for partition by a co-owner. It is open to a court to order partition of a stair-case and party wall in a proper case. 10 C. 675 ; 13 C. L. J. 322 ; 7 Bom. L R. 482 ; 36 B. 275, Ref. (*Banerji, J.*) RAHMATULLAH *v.* DHARAM SINGH.
20 A. L. J. 90 : L. R. 3 A. 93 : 1922 All. 185.

——*Right to—Inconveniences.*

A suit for partition should not be dismissed because of the inconvenience of partitioning. (*Rafique, J.*) MASITI *v.* HAIDAR HUSAIN.
33 I.C. 810: 14 A. L. J. 35.

——*Right to—Suit by one tenant in common to recover his share of land and rent—Suit against lessees only of parties.*

Where lands owned in common have been leased out one of the owners in common can sue to recover by partition his share of the lands and its rents directly from the lessees without

PARTITION—Right to.

making the other owners parties to the suit. (*Beaman and Heaton, JJ.*) NARAYAN *v.* LEM.
42 Bom. 87 : 43 I. C. 471 : 19 Bom L. R. 9 32.

——*Right to—Joint possession—Proof of.*

In a suit for partition plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession, for, the object of the suit is to transform joint possession into possession in severalty. (*Mookerjee and Beachcroft, JJ.*) DURGA CHARAN ACHARJEE *v.* KHUNKAR ENAMAL HUQ.
45 I. C. 705: 27 C. L. J. 441.

——*Right to—Suit between holders of different interests.*

A suit for partition is maintainable although the interest of the parties in the property in the suit, though permanent, are not of the same grade, *e.g.*, one party is an occupancy raiyat and the other a permanent tenure-holder. 37 C. 918 (P. C.), Foll. Such a suit is competent though the partition is likely to be a temporary one. (*Fletcher and N. R. Chatterjee, JJ.*) ROSHEN *v.* ATAB ALI.
43 I. C. 341.

——*Right to—Sharer not in possession.*

A person who had no possession, actual or constructive, of any share of the disputed property is not entitled to maintain his suit for partition. His remedy is by a suit for joint possession and partition on payment of *ad valorem* Court-fee. (*Asutosh Mookerjee and Beachcroft, JJ.*) LOKENATH SINGH *v.* DHWAKESHWAR PROSAD.
21 C. L. J. 253 : 27 I. C. 465 : 20 C. W. N. 51.

——*Right to.*

The right to demand partition is one of the incidents of joint ownership which enables any of the joint owners to demand partition in spite of the fact that the previous suit was dismissed. (*Chevis and Shadi Lal, JJ.*) GULAB SHAH *v.* HAVELI SHAH.
87 P. R. 1915 : 31 I. C. 463 : 181 P. W. R. 1915.

——*Right to—Suit for title—Bar.*

Completion of partition is no bar to a subsequent suit for the determination of title which was not disposed of in the partition proceedings. (*Rattigan and Chevis, JJ.*) PARSHOTAM *v.* RAJ DEVI.
129 P. W. R. 1913 : 19 I. C. 702 : 219 P. L. R. 1913.

——*Right to—Plaintiff keeping back property in his hands—If suit for partition maintainable.*

A suit for partition is not maintainable if the plaintiff keeps back some property in his possession without throwing it into the *hotchpot*. (*Robertson, J.*) MAHBUB BAKSHA *v.* ABDUL RAHMAN.
4 P. W. R. 1912 : 13 I. C. 816 : 34 P. L. R. 1912.

——*Right to—Lessee can claim partition.*

It is not only the persons having permanent title that can claim partition but even lessees for years can do so. (*Chamier, C. J and Sharfuddin, J.*) LALIT KISHORE MITRA *v.* GIRDHARI SINGH.
20 C. W. N 1306 : 1 Pat. L. J. 441 : 35 I. C. 861 : 2 Pat. L W. 383.

PARTITION—Right to.

———*Right to—Plaintiff's want of title to share—Defendant's claim to share.*

Although it is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and he is *qua* his claim to a share on partition in the position of a plaintiff, yet where the case of the plaintiff fails on the ground that he has no right to a share at all and that a suit for partition is not maintainable at his instance, the reason of the rule fails to apply and there is no suit for partition and consequently for determining the defendant's share. The maxim applicable is "*cessante ratione, cessat ipsa lex*". (*Raymond, A. J. C.*) CHAITHRAM MANGHANMAL *v.* LALCHAND.
15 S. L. R. 195 : 1922 Sindh 4.

Shamilat.

———Shamilat—*Mode of partition—Maintenance of possession—Compensation for turning* Baraia *into* Chahi—*Revision—Limitation.*

Where *Shamilat* is being partitioned the possession of the shareholders therein should be preserved to the extent of their respective shares only. Where, however, a shareholder has sunk a well on his share of such land, thereby changed 16 karals 17 marals into Chahi from Barain he is, in equity, entitled, by way of compensation, to some portion of it. A Court of revision can review a finding upon a question of limitation. (*Meredith, F.C.*) HUKUM SINGH *v* SHAM SINGH.
10 I. C. 293 : 1 P. W. R. (Rev.) 1911.

Subject-matter of.

———*Subject-matter of—Easements.*

The same principle has been applied to partition of joint properties. On a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. 14 C. 797 ; 26 C. 516; 8 B. H. C. R. 181 ; 14 B. 452 ; 28 M. 495. (*Mookerjee and Chotzner, JJ.*) SAROJINI DEBI *v.* KRISHNA LAL HALDAR.
36 C. L. J. 406 : 1923 C. 256.

———*Subject-matter — Compromise decree—Fresh suit—Other property included.*

In a partition suit a compromise decree was passed. The properties were to be held in equal shares and the decree reserved liberty to the parties to apply for partition as occasions arose. On a fresh suit for partition of the properties held in equal shares along with some other property; *Held*, that the liberty reserved would not enable the plaintiff to apply for partition of the properties when there was no order in the decree itself for such partition. "The liberty to apply" did not empower the Court to deal with matters outside the scope of the order. (*Chatterjea and Pearson, JJ.*) HANSESWAR PAL *v.* BEPIN BEHARY PAL. **1922 Cal. 197.**

———*Subject-matter of.*

A partition suit cannot include property unless each of the parties to the suit claims an interest therein. (*Mookerjee and Roe, JJ.*) SRIS CHANDRA *v.* MAHIMA CHANDRA. **33 I. C. 17 : 23 C. L. J. 231.**

PARTITION—Suit.

———*Subject-matter of—Lands not belonging to all co-sharers.*

In a suit for partition, lands belonging to some co-sharer and not to all cannot be subject-matter for division. (*Jenkins, C. J. and Mookerjee, J.*) RAM TARAN *v.* HARI CHARAN. **22 I. C. 30 : 18 C. L. J. 556.**

———*Subject-matter of—Hindu and Mahomedan Law—Suit not maintainable.*

It is not expedient to allow suits for partition of a portion of the properties since it would lead to a multiplicity of suits and to endless litigation between the parties who are jointly entitled to the properties. There is no distinction in principle between partition of joint property under Hindu or Muhammadan Law. (*Chitty and Chatterjee, JJ.*) MAHOMED FAZLUR RAHMAN *v.* MAHOMED FAZLUR RAHMAN. **10 I. C. 354 : 15 C. W. N. 677.**

———*Subject-matter of — Common and not joint property—Exclusion of some items—Effect.*

A suit for partition of common property, not joint property, is not liable to dismissal on the ground that all the joint property in respect of which it might have been brought has not been included. The objection as to partial partition is not available in such a case. It is always open to the defendant in such a case, if he thinks himself prejudiced by the exclusion of any property, to bring a suit himself in respect of it and have it tried with the other suit. (*Oldfield and Devadoss, JJ.*) PAKKIRI KANNI *v.* HAJI MOHAMMED MANJOOR SAHIB. **18 L. W. 345 : (1923) M. W. N 565 : 33 M. L. T. 44 (H. C.) : 46 Mad. 840 : 45 M. L. J. 321 : 1924 M. 129.**

Suit.

———*Suit — Appeal against preliminary decree does not lie.*

In a partition suit no appeal lies from a preliminary decree alone, even though it is preferred before the passing of the final decree. (*Stanley, C.J. and Banerji, J.*) NARAIN DAS *v.* BALGOBIND. **8 A. L. J. 604 : 11 I. C. 517 (1) : 33 A. 528.**

———*Suit for—Questions to be considered.*

Considering that partition suits are always extremely complicated any question regarding disputes with regard to particulars, such as between a mortgagor and mortgagee should be kept out of the main partition suit or if they are taken up in the course of the trial, very great care should be taken to keep such question separate as far as possible. (*Macleod, C. J. and Crump, J.*) BABU SING NARAYANJI *v* SAMBHAJI SHIWAJI. **1923 Bom. 994.**

———*Suit for—Reliefs to be claimed—Separate suit for accounts for anterior period—Not allowed.*

When a person files a suit for partition of certain properties he must include therein all the claims he has at that time relating to the subject-matter of the suit. A subsequent suit for accounts relating to a period prior to the partition will not lie (*Macleod, C. J. and Coyajee, J.*) VISHNU MORESWAR DABHOLKAR *v.* GANGADHAR GANESH DABHOLKAR. **45 Bom. 823 : 24 Bom. L R. 302 : 1922 Bom. 10.**

PARTITION—Suit.

———*Suit for—Liability and negligence—Questions of, cannot be left open by court.*

It is not competent for a Court in a partition suit to leave open questions of the negligence of the manager and recovery of outstanding balances to separate suits. The proper procedure would be to deal with these matters in the partition proceedings themselves when accounts are being taken. When the Court left open such a matter and a subsidiary suit was brought in respect of the matter, *held* that the suit was not maintainable. (*Macleod, C. J. and Shah, J.*) GULAB CHAND *v.* RAMNATH.

64 I. C. 995 : 23 Bom. L. R. 1171.

———*Suit for—Plff.'s title defective—Procedure.*

All the parties are in the same position in a partition suit and if, at the date of suit the plff.'s title was defective but it has since been perfected the suit can proceed. The Court can also transpose a deft. as pld. and continue the suit. (*Macleod, C. J. and Fawcett, J.*) VISHNU NARHAR SAPRE *v* SHRIRAM RAGHUNATH KARKARE.

61 I. C. 398 : 23 Bom. L. R. 391.

———*Suit — Compromise among some of the parties—Effect of.*

There can be no compromise binding upon all the parties to a partition suit until and unless all the parties have joined in the compromise. 27 I.C. 242 Rel. (*Mookerjee and Rankin, JJ.*) TARAPRASANNA SARKAR *v.* KALIKA MOHAN SARKAR.

38 C. L. J. 111 : 1924 Cal. 80.

———*Suit for—Parties— Maintenance holder if necessary party—Mother.*

In a suit for partition of joint property all the share-holders must be represented before the court. But a person who has no present interest in the property but who would become entitled to a share in lieu of maintenance is not a necessary party. (*Mookerjee and Chotzner, JJ.*) JADU NATH SARKAR *v.* HARAN CHANDRA SARKAR.

49 C. 1043 : 36 C. L. J. 217 : 1923 C. 221.

———*Suit — Duty of Court — What properties to be included—Division on questions of disputed title—Parties to the suit.*

In a suit for partition, it is incumbent upon the Court, before the preliminary decree is made, to determine whether the property included in the suit are the joint properties as alleged, of the parties to the litigation. It is not the law that a question cannot be raised and tried in a partition suit unless its solution interests each of the parties to the litigation. A suit for partition may and does often involve the investigation of disputed questions of title, and an attempt to avoid them can only lead to needless multiplicity of litigation. The Court has ample authority to direct the successive trial of the issues separately affecting different defendants and even to record interlocutory judgments thereon to be made the basis of the final judgment at the conclusion of the whole case. There is no reason why disputed questions of title should not be decided in the course of a suit for partition of joint properties. The court which is one of general jurisdiction administering both legal and equitable remedies may determine issues of title, investigate disputes between parties claiming the same share, and then proceed with the partition so as to dispose of the whole controversy between them. Where there is conflicting claim to share in the land under the same right under which partition is sought the determination of the conflict is incidental to the partition and cannot be avoided before the partition is directed. (*Mookerjee and Cuming, JJ.*) ANNAPURNA DEBYA *v.* AMMAYANATH BANERJEE.

35 C. L. J. 530 : 1922 Cal. 307.

———*Suit—Frame of.*

In a suit for partition the plaint should include the whole of the family properties. A suit for partition asking for separate possession of his share cannot be treated as a suit for recovery of possession of immoveable property and a similar rent for moveable property so as to allow plaintiff to elect whether he will give up the claim for either. (*Teunon and Chaudhury, JJ.*) BENI MADHAB *v.* GOBINDA CHANDRA.

46 I. C. 165 : 22 C. W. N. 669.

———*Suit—Possession of plaintiff, if immaterial.*

In a partition suit it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in the Mofussil Court it is important, because, if plaintiff is out of possession he must ask, first of all, to be restored to possession of his share and pay additional *ad valorem* fee upon his plaint, whereas in a case where the plaintiff is in possession, he simply sues for partition and separation of his share on his plaint bearing a stamp of Rs. 10 only. (*Fletcher and Huda, JJ.*) AHAMUDDIN TAMIJUDDIN *v.* AMIRUDDIN.

44 I. C. 216.

———*Suit—Compromise by some of the parties—Consent—Decree—Validity of—Appeal.*

In a partition suit, defendants who were not parties to the petition of compromise entered into between the plaintiffs and other defendants are not bound by the terms and the decree based on the compromise. A partition by compromise cannot be effected when the compromise is not among all co-owners and therefore a consent decree based on such a compromise cannot bind any of the parties to the suit. An appeal may be preferred by a person not party to the consent-decree, though a consent-decree is not ordinarily appealable. (*Mookerjee and Beachcroft, JJ.*) GOBIND CHANDRA SARDAR *v.* BHAGABAT SARDAR.

27 I. C. 242.

———*Suit—Purchase by co-sharer, of joint family property, benami, in execution of decree—Suit for possession by other sharers.*

Under a butwara, which took place between the plaintiffs, M and others, the plffs. became entitled to a stable who sued for recovery of the same against M. M pleaded that in execution of a decree against him, the stable was purchased by H. It was found that the purchase was benami for M. *Held*, that H. being a benamidar, was not a necessary party. The butwara was binding upon M. and the plaintiffs could not be deprived of the benefit of the allotment that had been made in

their favour under the butwara. (*Ghosh and Pratt, JJ.*) WAJIHUDDIN *v.* MAZHAR HUSSAIN.
16 I. C. 457 : 16 C. L. J. 20 (Note)

——*Suit for—Effect—Parties.*

A partition creates new rights with respect to the property allotted to each co sharer irrespective of their rights prior to their partition and each becomes entitled to exclusive possession of the property allotted. A mortgagee is not a necessary party to a partition suit. Only owners and co-sharers are necessary parties to a partition proceeding and a mortgagee has no claim to be made a party to it. 2 P. R. 1918 Rev fol. (*Abdul Raoof, J.*) MOHAMMAD DIN *v* MUHAMMAD.
67 I. C. 425 : 3 Lah. L. J. 377.

——*Suit—Defendant—Right to share.*

Every co-sharer, whether plaintiff or defendant in a partition suit can take advantage of the decree and can claim his share of the property and the suit cannot be dismissed for default of one of the parties only (*Shah Din and Scott-Smith, JJ.*) DEBI SAHAI *v.* TARA CHANDRA.
44 P. W. R. 1818 : 44 I. C. 135 : 22 P. L. R. 1918.

——*Suit for—Omission of item by mistake—Failure to amend plaint—Effect.*

After preliminary decree in a partition suit, one more item of family property was brought to light and it was directed to be added to the list of properties on payment of court-fee but the plaint was by oversight not amended. *Held*, that the added property could still be included in the final decree. (*Ayling and Odgers, JJ.*) RAMASWAMY CHETTY *v.* PALANIAPPA CHETTY.
18 L. W. 656 : (1923) M. W. N 841 : 1924 Mad. 354.

——*Suit—Valuation — Court-fees—S. 7, Cl. (iv) (f).*

In a suit for partition part of the joint property to be divided is comprised of a mundi trade the plff. can value it under S. 7, cl. (iv) (*f*) and need not value it in accordance with a tentative valuation to be amended subsequently after inquiry. (*Oldfield, J.*) BALAPATTABHI *v.* SUBBARAYA.
14 L. W. 446 : (1921) M. W. N. 611 : 41 M. L. J. 433.

——*Suit—Parties—Co-sharers—Transfer of a share, if necessary—Essentials of action.*

The transferee from one of several co sharers can bring a suit for partition without impleading his transferor, though the latter may be a proper party. In order to succeed in a partition action there must be not only unity of title but also unity of possession, (*Coutts and Das, JJ.*) NANDKESHWAR MISRA *v.* SUDARSHAN.
1923 P. 162.

——*Suit—Interests of parties not co-ordinate—Procedure.*

In a partition suit, the mere fact of the parties owning interests which are not co-ordinate in decree is not a bar to partition provided the entire 16-annas of the superior and inferior interests are actually represented, and the balance of convenience is under the circumstances in favour of allowing the partition. (*Das and Ross, JJ.*) JOHN SOLONO *v.* RAM NARAIN. **61 I. C. 378.**

——*Suit—Compromise with some defendants Dismissal of suit—Right of other defendants to continue the suit.*

It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and he is *qua* his claim to a share on partition in the position of a plaintiff. But this principle does not apply to cases where it is found as a preliminary point that plaintiff is not entitled to any share. 31 Bom. 271, Foll. Hence where in the course of a partition suit, a compromise was arrived at with some defendants and the compromise petition stated that in consequence of a release deed executed by plfi.'s mother he was not entitled to a share at all, the other defendants were not entitled to proceed with the suit *qua* their shares. (*Raymond, A. J. C.*) CHOITHRAM MANGHANMAL *v.* LALCHAND.
66 I. C. 808 : 15 S. L R. 195.

——*Suit—Minor heir not made party—His title recognised—Decree.*

Where a minor heir was omitted in a partition suit between co-widows but the minor's title to a share was recognised and the Lower Court granted a decree to be made absolute only on the widows furnishing security for the proper care and maintenance of the minor and her share, *Held*, the Court had no jurisdiction to impose the condition and that the plaintiff was entitled to a decree unconditionally for partition of her share. (*Stuart, J. C. and Kendall, A. J. C.*) MAHRAJA *v.* SUKHRANI. **25 I. C. 904 : 1 O. L. J. 493.**

——*Suit—Court's powers.*

In a suit for partition a Court of equity does not act ministerially and at the call of parties entitled to partition ; it adjusts the equities of all parties concerned. (*Crouch, A J. C. and Boyd, A. J. C.*) TURABALISHA *v.* BIBI NAJU.
25 I. C. 863 : 8 S. L. R 28.

Trees.

——*Trees—Go with land.*

Trees growing upon the land, the subject of partition by the revenue authorities, go with the land and, if not excluded, will be deemed to have been allotted to him to whom the land was allotted. (*Banerjee, J.*) SUNDAR LAL *v.* DHARAM PAL.
28 I. C. 878.

Unregistered Deed.

——*Unregistered deed—Admissibility.*

The '*factum*' of a partition as distinguished from its terms may be proved by evidence independently of the deed of partition itself. *Per Beaman, J.*—A fact, which does not necessarily constitute a term in any real sense of a contract, grant or other disposition of property, may be proved, although the writing in which the terms of the grant or other disposition of property are embodied, cannot be proved for want of registration. (*Scott, C. J. and Beaman, J.*) CHOTA LAL ADITRAM TRAVADI *v.* BAI MAHAKORE. **41 Bom. 466 : 40 I. C. 83 : 19 Bom. L. R. 322.**

PARTITION ACT (IV OF 1893).

——*—Suit—Nature of.*

A suit for partition determines the shares of the co-sharers *inter se.* (*Stephen and Chatterjee, JJ.*) SARODA PRASAD ROY *v.* KAILASH BASHIN GUHA. **18 I. C 117 : 17 C. W. N. 128.**

——Ss. 1 (4), 2 and 3—*Partition of mortgagee right in Zamindari.*

Where a mortgagee right in a Zamindari property is sought to be partitioned the party to the suit owning at least a moiety can request the Court to have the property sold to the highest bidder and to distribute the proceeds amongst the sharer. (*Banerji and Ryves, JJ.*) BANKER LAL *v.* SHANTI PRASAD. **35 All. 387 : 19 I. C. 651 : 11 A. L. J. 534.**

——Ss. 2 and 3—*Application for sale—When to be made.*

The provisions of the partition Act apply to the stage at which the suit is in the Court of first instance. The various provisions of the Act manifestly indicate that, if any action can be taken under the Act, it can only be taken in the Court of first instance before a decree for partition has been actually made. After a decree for partition has been made, after one of the co-shares in the property has remained quiescent in both the Courts below, he could not be allowed to ask final Court of Appeal to do for him what the Court might have done if he had moved the Court when the case was under trial. (*Banerji, J.*) ABDUL HAQ *v.* MOTILAL. **1923 A. 293 (1).**

——S. 2—*Inconvenience—Procedure.*

If any party to a decree for partition finds it inconvenient in actual practice it is open to him to apply under S. 2 of the Act. (*Banerjee, J.*) RAHAMATULLAH *v.* DHARAM SINGH. **20 A. L. J. 90 : L. R. 3 A. 93 : 1922 All. 185.**

——Ss. 2 and 3—*Dwelling-house—Reasonably or conveniently partitioned—Application for withdrawal of suit.*

In a suit for partition the defendant offered to purchase the plaintiff's share at a valuation, should the Court be of opinion that the partition could not be effected and the Court thereupon appointed commissioners who valued the plaintiff's share and defendants were allowed to purchase it. *Held*, that the Court had acted in accordance with Ss. 2 and 3 of the Partition Act when the parties were not at issue on the point that a division could not be reasonably made. The Court had further exercised a sound discretion in disallowing the application for withdrawal of the suit inasmuch as it had been made at a stage at which the defendant had become entitled to the benefit of S. 3 of the Partition Act. (*Piggott and Walsh, JJ.*) UMRAO SINGH *v.* UMRAO SINGH. **47 I. C. 905 : 16 A. L. J. 584.**

——S. 2—*Suit for partition—Partition inconvenient—Whether Appellate Court can order sale of property.*

An Appellate Court can order sale of property, when the partitioning is inconvenient provided objection was taken to the mode of partitioning, in the Trial Court, and the mode suggested by the party was disallowed. (*Rafique, J.*) MASITI *v.* HAIDAR HUSAIN. **33 I. C 810 : 14 A. L. J. 35.**

PARTITION ACT (IV OF 1893), S. 2.

——Ss. 2 and 9—*Order for sale of item set apart for the share of one of the parties is not within section.*

If in a suit for partition there are two parcels of land one capable of partition and the other not so capable, the court can order the sale of the latter. But an order directing the sale of one of the allotments obtained after partition is not within S. 2 or S. 9 of the Partition Act. (*Mookerjee and Chotzner, JJ.*) JADUNATH SARKAR *v.* HARAN CHANDRA SARKAR. **36 C. L. J. 217 : 49 C. 1043 : 1923 C. 221.**

——S. 2—*Scope of.*

Under S. 2 of the Act, action can be taken not only when the property is wholly impartible but also when a partition cannot conveniently be made. (*Broadway and Martineau, JJ.*) MOHAMMED MAJID ULLAH KHAN *v.* MOHAMMAD HAMID ULLAH KHAN **1924 L. 325.**

——S. 2—*Partition of house—Impracticability—Power to auction.*

When the partition of a house is impracticable the court can order it to be put to auction according to the principles laid down in S. 2 of the Partition Act even in the absence of a formal objection by the parties as to the possibility of a satisfactory partition of the property. (*Wilberforce, J.*) GANDA RAM *v.* SONAYYA RAM. **66 I. C. 885 : 3 Lah. L. J. 102.**

——S. 2—*Order for sale—When inappropriate.*

Where a partition of joint property consisting of houses and lands could quite conveniently be made in the ordinary way by allotting to each sharer houses and lands approximately of the value of his share at the same time respecting as far as possible previous actual possession, as far as houses are concerned, any small excess or deficiency being made good by money payments, there is no occasion for resort to the method of auction. (*Johnstone, C. J. and Smith, J.*) FATEH CHAND *v.* BILAS RAI. **61 P. L. R. 1916 : 89 P. W. R. 1916 : 96 P. R. 1916 : 34 I. C. 587 : 140 P. W. R. 1916.**

——Ss. 2 and 7—*Withdrawal of consent.*

Any of the parties consenting to a sale under the Act, may withdraw his consent, but the withdrawal must be made before the order for sale is made. (*Wallis, C. J. and Ramesam, J.*) AKILANDAMMAL *v.* RANGANATHAM CHETTY. **62 I. C. 730 : 13 L. W. 429.**

——S. 2—*Inconvenience—Remedy.*

If a decree for partition is found to cause undue inconvenience it is open to either party to apply for its modification by the application of the Partition Act. (*Saunders, J. C.*) HARDANDAS PALADROY *v.* SUNDER. **4 U. B. R. (1921) 57 : 1922 U. B. 4.**

——Ss. 2 and 3—*Dwelling-house—Partition by metes and bounds.*

PARTITION ACT (IV OF 1893), S. 4.

Where the passage in a dwelling-house giving access to the rooms of different co sharers must, perforce, be left joint, the property is not susceptible of partition by metes and bounds. A co-sharer who applies for sale of the property has no right to buy up the shares of other co sharers; the right to buy out is vested in other co-sharers who have not applied for sale. (*Pratt, J. C. and Kemp, A. J. C.*) JHUMNADAS *v.* MULCHAND.
24 I. C. 273 : 7 S. L. R. 117

——— S. 4—*Scope and object of—Form of decree.*

The object of S. 4 of the Act is to provide in certain cases an alternative course by which a plaintiff claiming partition by metes and bounds, may be compelled at the option of the defendant to accept pecuniary compensation. The section must be strictly construed and the words 'shall undertake' in the section mean that there must be an unconditional offer, from which the person making it, will not be permitted to resile and on such undertaking the Court is bound to direct a sale. A decree passed under the sections should be one which has the effect in law of transferring the ownership of plaintiff's share to the defendant who has undertaken to purchase it. *Semble*—The decree should compel the plaintiff to execute a deed of sale in favour of the defendant, as in a suit for specific performance of contract. On refusal by plaintiff Court may execute the document. On this defendant would become liable for the unpaid purchase money and the plaintiff may maintain a suit for recovery of the same if unpaid. (*Piggott and Ryves, JJ.*) ILIAS AHMAD *v.* BULAQI CHAND.
39 All. 672 : 41 I. C. 867 : 15 A. L. J. 677.

——— S. 4—*Object of—Transferee of a sharer.*

Plff. was a transferee from one of the two co-sharers the other transferred his share to deft. No. 3. Plff. obtained a decree for possession of his one-third share against the original sharer deft. No. 2 who applied to have valued and paid off not only the share of the plff. but also of deft. No 3. *Held*, that he could have a valuation made of the plff.'s share but not of deft. No. 2 who was not suing. *Per Macleod, C. J.*—The object of S. 4 is to enable the members to buy out an outsider who is a transferee from one of the co-sharers. Ordinarily an application of this kind would be made before a preliminary decree is passed. This would put an end to the suit unless one of the defts. wished to continue and apply to have his name inserted as plff. in the place of the plff. who has been bought out a transferee who is not a member of the family is limited to a transferee. *Per Shah, J.*—S. 4 is limited to transferees who sue for partition. The right given to a sharer who is a stranger is limited to a trrnsferee who sues for partition and cannot be extended to any deft. co-sharer who may claim his share in a partition suit. (*Macleod, C. J. and Shah, J.*) KHANDERAO *v.* BALAKRISHNA.
64 I. C. 917 : 23 Bom. L. R. 1083.

——— S. 4—*Option given under is not taken away.*

A preliminary decree was passed in a partition suit declaring defendants 3 and 5 to be entitled to buy plaintiff's share or allow his share to be divided. Defendants 3 and 5 appealed and plaintiff filed a cross-objection to the effect that the option to purchase could not be legally restricted to defendants 3 and 5. This cross objection was not pressed. In the trial Court after this the first defendant who was admittedly owner of half share was given option to purchase on his application.—*Held*, that the preliminary decree in the suit could not take away from defendant No. 1 the option of purchase which was given to him under S. 4 of the Partition Act of 1893. 12 C. L. J. 525 and 45 Cal. 873 followed. The fact that the objection taken by the plaintiff in appeal was dismissed is of no assistance to the defendants 3 to 5. (*Newbould and Panton, JJ.*) KIRODI NARAIN BASU *v.* MRINALINI DASI.
1922 Cal. 129.

——— S. 4—*Order under—Decree—Appeal.*

An order under S. 4 of the Act made in the course of a partition suit is a 'decree' which is appealable. 'Court' in S. 4 includes an Appellate Court. An application under S. 4 may be made even after a preliminary decree in the suit. (*Richardson and Walmsley, JJ.*) PRAN KRISHNA BAHADURI *v* KESHAB CHANDRA ROY.
45 Cal. 873 : 45 I. C. 604 : 22 C. W. N. 515.

——— S. 4—*Scope—Interpretation.*

S. 4 of the Partition Act is not restricted in scope and applies even where the person who claims partition of a family dwelling-house has also obtained a transfer of a share of other family property. 12 C. L J. 525 Fol. (*Mookerjee and Beachcroft, JJ.*) GOPAL CHANDRA MUKHOPADHYA *v.* PROBHAT CHANDRA BISWAS. **40 I. C. 577.**

——— S. 4—*Inconvenience to divide property—Procedure to be adopted.*

In all partition cases apart from Act IV of 1893, where it is inconvenient to divide a property, it should be left in the possession of one in actual occupation and the others given compensation for their shares. (*Rampini and Sharfuddin, JJ.*) BASUNTA KUMAR *v.* MOTI LAL.
15 C.W.N. 555 Note: 11 I. C. 370 : 6 C.L.J. 8 Note.

——— S 4—*Scope of.*

S. 4 of the Partition Act refers to cases where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such a family the principle being that property must so far as possible be left in the possession of the person in occupation. (*Pipon, J. C.*) GHULAM HAIDER KHAN *v.* SARDAR ALI KHAN. **73 I. C. 748**

——— S. 4—*Undivided family—Right of member, to compel stranger to accept value for his share.*

The expression 'undivided family' in S. 4 of the Partition Act, means undivided *qua* the property sought to be divided and to be a family owning it without dividing the same. It is sufficient if the parties are co-owners, whether as joint tenants or tenants-in-common. In either case a member of a family so owning is entitled to claim that the transferee of a share who is a stranger, shall accept a money valuation of his share therein. 30 A 324, Ref. (*Pratt, J. C. and Crouch, A. J. C.*) KUNDAN DAS *v.* DEUMAL.
30 I. C. 936 : 9 S. L. R. 94.

PARTITION ACT (IV OF 1893), S. 10.

——— S. 10—*Applicability.*

S. 10 is applicable where a preliminary decree has been made but a final partition has not been effected. (*Benson, O. C. J. and Napier, J.*) SEPAHDUR KHAN SANTHOJI *v.* BADI BI.
12 M. L. T. 337 : 17 I. C. 284 : (1912) M.W.N. 943.

PARTNER.

See (1) CONTRACT ACT, Ss. 239—266.
(2) PARTNERSHIP.

PARTNERSHIP.

Accounts.
Authority of Partner.
Dissolution.
Good will.
Liability of Partners.
Rights of Partners.
Sub Partner.
Suit.

Accounts.

———*Accounts—Suit for barred—Another suit for share of assets received by ex partner.*

A partner hip was dissolved in 1910 before the death of one partner and a suit by the plaintiff in 1913 for partnership accounts and profits was dismissed on the ground of being barred by limitation. A second suit was lodged by the plaintiff for his share of assets alleged to have been received by the defendants as debts due to the old firm. *Held*, in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership assets which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership. If on the other hand no accounts have been taken and there is no contest, that the partners have squared up, then proper remedy, where such an item falls in, is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove and cannot prove that upon the due taking of the accounts he would be entitled to that share. It might well be the case that one of the reasons why no final balancing of the accounts took place was that A owed the partnership so much money and that it was anticipated that B would hereafter receive a particular item which would operate substantially to balance the claim. *Knox* v. *Gye* (L. R. 5 H. L. 656) referred to. *Dayal* v *Khatay* (12 Bom. H. C. R. 97) criticised. (*Viscount Haldane.*) K. GOPALA CHETTY *v.* L. G. VIJAYARAGHAVACHARIAR.
45 Mad 378: 30 M. L. T. 283 (P. C.) : 16 L. W. 200 : (1922) M. W. N. 386 : 26 C. W. N. 977 : L. R 3 P. C. 165 : 20 A. L J. 862 : 24 Bom. L. R. 1197 : 36 C. L. J. 308 : 49 I. A. 181: 43 M. L. J. 305 : 1922 P. C. 115 (P. C.).

———*Accounts—Refusal of one partner to perform his duties—Mode of taking accounts.*

The refusal and neglect on the part of one partner to perform his duties gives to any other partner the right to apply for dissolution or without legal proceedings the partnership could be dissolved by agreement between all partners; but when the rights to obtain dissolution are not exercised the partnership continues. In the taking of accounts a proper allowance should be made for the fact that the services of certain partners were withheld. (*Lord Buckmaster.*) KRISHNAMACHARIAR *v.* SANKARA SAH.
28 M. L. T. 265 : 12 L. W. 777 : 57 I. C. 713 : 22 Bom. L. R. 1343 : 13 C. L J 1 : 25 C. W. N. 314 : 39 M. L. J. 257 (P. C.).

———*Accounts—Production and discovery of all account books.*

For working out a partnership decree each party is bound to produce and discover all documents relating to the partnership in his possesion (*Lord Parker.*) DWARKA NATH SARKAR *v.* MAHOMED AKBAR.
18 C. W. N. 1025 : 1 L. W. 697 : (1914) M. W. N. 876 : 16 M. L. T 521 : 21 C. L. J. 1 : 17 Bom. L. R. 5 : 24 I. C. 307 : 27 M. L. J. 192 (P. C.).

———*Accounts. suit for, against another firm—The second firm suing for dissolution.*

If a partnership which conducts business with another firm which was the sole property of one of its own partner, sues for accounts and there is also a pending suit for dissolution and accounts by that partner, the former suit should be dismissed as the same relief is asked for in the latter action. (*Shah, A. C. J. and Crump, J.*) KRISHNA ANNAPPA *v.* GANPAT SAKHARAM.
25 Bom. L. R. 1307 : 1924 B. 263.

———*Accounts—Business brought to an end—Adjustment of accounts—Separate suit to recover sums which one partner may have realised.*

Two parties had been partners in a business which had been brought to an end, the only dispute between them, was as to the division of the property which could only be finally settled in a proper suit for dissolution of partnership and for adjustment of accounts. It is not desirable that each of the parties should proceed by separate suits in order to recover from the other any sums due to the partnership business which he alone may have realised. (*Brett and Richardson, JJ.*) RAM CHANDRA PAL *v.* KRISHNA LAL PAL.
17 I. C. 600 : 17 C. W. N. 351.

———*Accounts—Suit between partners without general account—Maintainable.*

Under certain circumstances, a suit can be maintained between partners without taking a general account of all the partnership dealings. But the question in each case depends upon its own circumstances, and upon the question whether justice can rea ly be done without taking such an account. 32 M. 76, Rel. On general principles the claims of outsiders should be given priority over those of partners in a banking business. (*Carnduff and Chapman, JJ.*) MAHADEO PROSAD SAHU *v.* GAJADHAR PROSAD SAHU.
16 I. C. 459 : 16 C. W N. 897.

———*Accounts—Suit for—Suit for partial settlement of accounts when maintainable.*

In regard to suits by one partner against another for a partial account, the general rule as applied

in India is that if the account is sought in respect of a matter which though arising out of partnership business or connected with it does not involve the taking of general accounts, the Court will as a rule give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account having regard to the rights of the parties under the contract. There is no rule of law that a partial account can be ordered only under exceptional circumstances. 32 M. 176; 1 A. L J. 24 Rel. Where accounts had been rendered properly up to a certain date during the course of the partnership a suit for accounts of the rest of the period would be. (*Abdul Raoof and Campbell, JJ.*) HARJI MAL MELA RAM *v.* KIRPA RAM BRIJ LAL.
2 Lah. 351 : 1922 Lah. 195.

———*Accounts—Balance struck—Errors and omissions excepted—Partner, if can reopen the same.*

Where at the time of the winding up of a partnership business, accounts are taken and in striking and admitting the balance due by one partner the phrase *bhul chuk* (errors and omissions excepted) was used he cannot on that account be allowed to go behind the settlement of accounts made. (*Johnstone and Chevis, JJ.*) DAYA RAM *v.* CHANDAR BHAN. **66 P. R. 1914 : 87 P. L. R. 1914 : 22 I. C. 647 : 39 P. W. R. 1914**

———*Accounts—Liability for—Onus.*

In a partnership suit though defendant may have been negligent in not keeping detailed accounts and may possibly be to blame for not producing books, plaintiff cannot succeed if he has been equally negligent in not keeping up any correct detail of various works undertaken and of the profits realised. (*Kensington and Chevis, JJ.*) BUDHU SINGH *v* BHAGWATI PARSHAD.
15 I. C. 878 : 110 P W. R. 1912.

———*Accounts—Suit by partner for his share in one item of partnership assets—Maintainability.*

A partner is not entitled to sue for his share in one item alone of partnership assets without first having an account taken of the partnership liabilities and deducting the sum total of them from the aggregate assets of the firm. A relief by way of accounts is not in the nature of a general relief and a suit by a partner for a share in one item of the firm's assets without a specific prayer for accounts is liable to be dismissed. 34 M L. J. 408 Foll (*Abdur Rahim and Spencer, JJ.*) ANNAMALAI CHETTY *v.* ANNAMALAI CHETTY.
52 I. C. 456 : 10 L. W. 67.

Authority of Partner.

———*Authority of partner—Agreement to refer to, by surviving partners—Legal representative of deceased partners not party—Contention put forward too late—Practice.*

Where the surviving partners agreed with the Secretary of State to refer their dispute to arbitration and the legal representative of the deceased partners were not parties to the reference and such legal representative sued the surviving partners for accounts and put forward, in appeal,

for the first time the plea that he was not bound by the award, it was held, that the contention was put forward at too late a stage. (*Lord Parker.*) DWARKA NATH SARKAR *v.* MAHOMED ABKAR. **18 C. W. N. 1025 : 1 L. W. 697 : (1914) M W. N. 876 : 16 M. L. T. 521 : 21 C L. J. 1 : 17 Bom. L. R. 5 : 24 I. C. 307 : 27 M. L. J. 192 (P. C.).**

———*Authority of partner—To bind minor members—Patent rights.*

The Court, which is bound to determine and to determine finally and to dispose of questions arising in the partnership suits, cannot shirk its duty in deciding how the partners intended the patent rights to be dealt with, merely because special powers have been given to litigants to apply to another Court. The special Court under the Patent Act would be bound in deciding any matter in relation to a patent in accordance with the sections of the Patent Act, to decide the controversy with reference to what had been established by the findings of the Court in the dissolution of the partnership which would be binding upon the parties in any controversy under the Patent Act. Where the contracting party is a minor represented by a guardian, and the contract was clearly for the benefit of the minor and was made at the request of the guardian for the convenience and benefit of the minor's interest, it binds the minor. (*Walsh, J.*) JWALA PRASAD *v.* RAGHUBIR PRASAD. **1923 A 17.**

———*Authority of partner—Negotiable instruments—Power to execute.*

In the case of partnerships, not of a mercantile character there is no implied authority in one partner to bind the others by negotiable instruments. Express authority is necessary for that purpose. 10 L. B. R. 321 ; 39 B. 261 ; 40 M. 727 dist. (*Robinson, C. J. and Duckworth, J.*) MAUNG PHO MYA *v.* DAWOOD & Co.
66 I. C. 584 : 11 L. B. R. 137.

Dissolution.

———*Dissolution—Assets discovered after—Remedy.*

If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he had to contribute to the debts of the partnership and received his share of the profits, the mutual rights and obligations having been thus all discharged and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or stated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership If, on the other hand, no accounts have been taken and there is no contract that the partners have squared up then the proper remedy when such item falls in is to have the accounts of the partnership taken. (*Lord Phillimore.*) GOPALA CHETTY *v.* VIJAYARAGHAVACHARIAR.
45 M 378 : 30 M. L. T. 283 : (1922) M. W. N. 386 : 16 L. W. 200 : 26 C. W N. 977 : 24 Bom. L. R. 1197 : 20 A. L. J. 862 36 C. L J 308 : 43 M. L. J. 305 : 1922 P. C. 115 (P. C.).

PARTNERSHIP—Dissolution.

———*Dissolution—Power of Court to order party to bring money into Court—Discretion.*

It is in the discretion of the Court, pending an enquiry into partnership accounts, to direct a party to deposit a certain sum in Court as being partnership funds alleged to be in his hands and to pay interest thereon. (*Lord Sumner.*) AHMED MUSAJI *v.* HASHIM EBRAHIM.

42 Cal. 914 : 42 I. A. 91 : 19 C. W. N. 449 : 17 M. L. T. 312 : 2 L. W. 377 : 21 C. L. J. 419 : 13 A. L. J. 540 : 17 Bom. L. R. 432 : (1915) M. W. N. 485 : 28 I. C. 710 : 29 M. L. J. 70 (P. C.).

———*Dissolution—Claims of partners—Preference.*

Obiter.—On general principles, the claims of outsiders should be given priority over those of partners in a banking business. (*Carnduff and Chapman, JJ.*) MAHADEO PRASAD SAHA *v.* GAJADHAR PROSAD SAHA.

16 I. C. 459 : 16 C. W. N. 897

———*Dissolution, suit for—Plea of previous settlement—Onus.*

The onus of proving a plea of previous settlement and dissolution by consent is on the person setting it up, in a suit for dissolution of a partnership. (*Shadi Lal and Wilberforce, JJ.*) SUNDAR SINGH *v.* DALIP SINGH.

46 I. C. 467 : 118 P. W. R. 1918.

———*Dissolution and accounts—Limitation.*

The suit for dissolution and rendition of accounts is governed by Art. 106, Lim. Act, and dissolution may be inferred from the fact that the partner has abandoned his interest. (*Shadi Lal, J.*) AMIRCHAND *v.* JAWAHARMAL.

32 I. C. 853 : 49 P. W. R. 1916

Good will.

———*Good will—Meaning of.*

The good will of a firm means the whole advantage, whatever it may be, of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money. (*Ayling, Seshagiri Aiyar and Bakewell, JJ.*) SUBRAMANIA AIYAR *v.* MUTHIA CHETTIAR.

41 Mad. 612 : 6 L. W. 750 : 43 I. C. 651 : 33 M. L. J. 705 (F. B.).

Liability of Partners.

———*Liability of partners—Joint adventure—Dealing by individual—Firm, liability of.*

Where goods are purchased or money raised for a joint adventure and the dealing through an individual is really a dealing of the joint by adventure, the adventurers are liable as partners. But there is no such liability for goods, etc., purchased on the credit of an individual adventurer previous to the contract though subsequently brought into the joint-stock as his contribution. (*Lord Dunedin.*) KARMALI ABDULLA ALLAKHIA *v.* BORA KARIMJI.

39 Bom. 261 : 17 M. L. T. 35 : 2 L.W. 133 : 17 Bom. L. R. 103 : 19 C. W. N. 337 : 13 A. L. J. 121 : 21 C. L. J. 122 : (1915) M. W N. 606 : 42 I. A. 48 : 26 I. C. 915 : 28 M. L. J. 515 (P. C.)

PARTNERSHIP—Liability of Partners.

———*Liabilities of partners—Hypothecation by a partner without knowledge of another partner.*

Where (1) an advance of a sum of money was made by the plaintiff to R on hypothecation of some press-machines, (2) a fresh advance was made by the plaintiff to S after the latter had become a partner with R, on hypothecation of the same press, and (3) a suit was brought by the plaintiff, and R contended that, as he had no notice of the transactions between plaintiff and his partner S, his half share in the press should not be proceeded against. *Held*, that the whole of the suit property was liable to sale under the mortgages. (*Beaman, J.*) TEHILRAM GIRDHARIDAS *v.* LONGIN D'MELLO.

37 I. C. 231 : 18 Bom. L. R 587.

———*Liability of partners.*

A person, admitted as partner into an existing firm, is not liable to the creditors of the firm for anything done before his admission, unless he agrees to be so liable. Such an agreement may be established by indirect evidence and the Courts are inclined in favour of such an agreement and will infer it from slight circumstances. (*Imam, J.*) JAGARNATH & CO. *v.* CRESSWELL.

22 I. C. 372 : 40 Cal. 814.

———*Liabilities of partners—Overdrawing by some partners—Whether interest is payable.*

Where some partners have overdrawn money from partnership for establishing other firms, they are liable to pay interest on such payments when the accounts are taken. (*Mookerjee and Teunon, JJ.*) GOKUL KRISHNA DAS *v.* SHASHI MUKHI DASI.

16 C. W. N. 299 : 13 I. C 23 : 15 C. L. J. 204.

———*Liability of partners—Minor partners.*

Minor members of a trading partnership are bound by the acts of managing members in the carrying on of the business and also in some cases where such acts have no bearing on the business. In such cases however the minor's liability is limited to his share in the business. (*Wallis and Munro, JJ.*) SANKA KRISHNAMURTHI *v.* THE BANK OF BURMA, LTD.

35 Mad 692 : (1911) 1 M. W. N. 385 : 11 M. L. T. 56 : 11 I C. 79 : 21 M. L. J. 620.

———*Liability of partners—Minor—Admission to benefit of the partnership—Effect—Whole transaction to be looked into.*

In considering whether admission to a partnership is for the benefit of the minor, what we have to consider is, not the benefit to the minor of an isolated clause of the partnership agreement but the total benefit which would result to him. There cannot be the least doubt that the rescue of a family business from its perilous financial situation was a benefit to the minor which far outweighed any restriction which might be placed upon his activities. It is straining to call the restriction upon competitive business as personal liability to and obligation of the firm. (*Pipon, J. C.*) MIR AHMAD SHAH *v.* MUSHARRIF SHAH.

72 I.C. 996.

———*Liability of partners—One partner borrowing money.*

Where one partner borrows money for partnership business and it is put down to the account of

the partnership, both the partners are liable. (*Maung Kin, J.*) MANUG PO SIN *v.* VELLAYAPPA CHETTY. **62 I. C. 315 : 10 L. B. R. 321.**

Rights of Partners.

———*Rights of partners.*

A partner investing money in business as consideration for his partnership share has only a right to a partnership account and division of ultimate assets, and such persons cannot be considered to be buyers from one another by entering into partnership. (*Beaman, J.*) TEHILRAM GIRDHARIDAS *v.* LONGIN D'MELLO.
37 I. C. 231 : 18 Bom. L. R. 587.

———*Rights of partners—Surety bond for managing partner—Liability for loss—Onus of proving loss.*

Where a surety bond was executed on behalf of the managing member of a partnership, whereby losses arising in the business should be deducted from the security money. *Held*, the onus was on the other partners to show that loss had occurred. (*Abdul Raoof and Harrison, JJ.*) KANSHI RAM *v.* MT. HARO.
4 Lah. L. J. 214 : 1922 Lah. 235.

———*Rights of partners—Agreement by one partner for services to be rendered to the partnership—Claim for remuneration.*

Where one partner contracts to perform for remuneration certain work for the partnership, he shall not be allowed to claim the remuneration without dissolution of the partnership and settling of accounts. (*Shah Din and Beadon, JJ.*) PALA RAM *v.* CHENA MAL. **80 P. L. R. 1914 : 22 I. C. 571 : 38 P. W. R. 1914.**

———*Rights of partners—Suit for accounts and share of collections after dissolution of partnership—Suit for accounts barred—Plaintiff whether entitled to prove collections to be within limitation—Right of defendant to go through general partnership accounts.*

In a suit for a settlement of accounts of a dissolved partnership and for a share of the collections made after the dissolution, the fact that the claim for settlement is barred is no reason to deprive the plaintiff of his right to prove what sums were received by the defendants within three years before the suit. But the defendants in such cases should be given an opportunity to show that the plaintiff will not be entitled to his claim, if a general partnership account is taken. (*Sadasiva Aiyar and Spencer, JJ.*) GOTTIPATI-CHINNA KONDIAH *v.* GOTTIPATINARASAPPA NAIDU. **22 I. C. 947 : 26 M. L. J. 221.**

———*Rights of partners—Right to dispose of property.*

Right of partners to dispose of property of the partnership is effective and the creditor has no right of consultation. (*Kotwal, A.J.C.*) JAMNADAS *v.* RAMDHAR. **1922 Nag. 70.**

———*Rights of partners—One advancing loan to partnership—Interest.*

A partner in a firm can have a dual capacity, that of creditor of the firm as well as that of a partner in it. A partner advancing money in excess of his share of the capital has a right to

interest on the money. In a suit for recovery of the money by the partner, all the other partners are liable. (*Halifax A. J. C.*) GOVIND *v.* GAJRAJ SINGH. **64 I. C. 183 : 14 N. L. R. 39.**

Sub-partner.

———*Sub-partner—Dissolution—Settlement—Sub-partners—Relations between partners and sub-partners.*

In regulating the rights *inter se* between a partner and a sub-partner, the rule of law embodied in S. 31 of the English Partnership Act can be followed in India. A settlement of account between a partner and his co-partner before the dissolution of partnership will be binding on his sub-partner. *Per Wallis, C. J.*—When once the partnership is dissolved any settlement will not be binding on the sub-partner but he will be entitled to ascertain the share of the partner under whom he claims. *Per Sadasiva Aiyar, J.*—A settlement of account made by a partner with his co-partner prior to dissolution and up to the date of the dissolution is binding on the sub partner It is for the purposes of winding up the partnership a partner settles an account with his co-partner in a proper manner. On principle such settlement should be held binding on the sub-partner to the extent that it is binding on the partner. English decisions which imply that a settlement made by a partner after the dissolution of partnership for the purposes of winding it up is in no way binding on the sub-partner ought not to be followed (*Wallis, C. J. and Sadasiva Aiyar, J.*) CHIDAMBARAM CHETTY *v.* KARUTHAN CHETTY. **28 M. L. T. 138 : 12 L. W. 444 : 58 I. C 80 : 39 M L. J 511.**

———*Sub-partners—Liability for debts of firm.*

Sub-partners are equally liable like principal partners to the creditors of the firm. (*Spencer and Krishnan, JJ.*) PUNNAYYA *v.* SREE VENUGOPALA RICE FACTORY CO., LTD
23 M. L. T 520 : 7 L. W. 114 : 43 I. C. 508 : (1918) M. W. N. 51.

———*Sub-partner—Right to sue for accounts.*

A suit by a sub-partner for an account of the partnership is maintainable against his partner and he must accept the accounts in the main partnership as settled between the partners of that partnership unless *mala fides* or mistake has been shown. (*Fawcett, J.C. and Kemp, A. J. C.*) GIDASINGH *v.* BIEHCHAND.
60 I. C. 967 : 14 S. L. R. 193.

Suit.

———*Suit—Dispute as to ownership of Patent—Patents Act.*

Where a dispute regarding the ownership of a patent arises in a partnership suit, the provisions of the Patent Act are a guide to the determination of the dispute. (*Walsh, J.*) JWALA PRASAD *v.* RAGHUBIR PRASAD. **1923 All. 17.**

———*Suit—Interest.*

Interest is not allowed in partnership suits except on sums advanced in excess of the capital agreed to be contributed. (*Scott Smith and Abdul Raoof, JJ.*) MT. RAM PIARI *v.* SULTAN BAKSH. **1923 Lah. 115.**

PARTNERSHIP—Suit.

——*Suit for recovery of share in one item of assets—Maintainability.*

Where final settlement of accounts has not been done, neither a partner nor his legal representative can bring a suit for his share in one item of debt due to the partnership. (*Phillips and Venkatasubba Rao, JJ.*) SUBRAMANIAN CHETTY *v.* LAKSHMANAN CHETTY. **18 L. W. 613 : 33 M. L. T. 71 (H. C.) : 1924 Mad. 161.**

——*Suit—Parties for the recovery of a debt due to the partnership.*

As a general rule all the members of a partnership firm ought to be joined as plaintiffs in a suit in respect of a transaction with a partnership. It is not open to the surviving partners alone to see for recovery of a debt due to the firm (*Ayling, J.*) MUTHAYYA CHETTY *v.* SOMASUNDARAM CHETTY. **16 L. W. 527 : 1923 Mad. 85 (1).**

——*Suit—Dispute as to terms—Reference of whole case to Official Referee—Order if valid—Nature of—Not appealable—If can be questioned—Duties of Court and Commissioner.*

In a suit for dissolution of partnership on the Original Side of the Madras High Court the Judge referred the whole suit to the Official Referee to determine shares, take accounts and submit report, *Held*, the order was not appealable as it was neither a decree under S. 2 (2) C. P. C., nor a judgment within Cl. 15 of the Letters Patent.

The court has no jurisdiction to refer questions as to terms of partnership shares, etc., to the Referee and the order is bad. But in the course of the suit itself the order and report cannot be treated as a nullity, the remedy of the aggrieved party being by way of appeal or review.

Functions of Judge and Commissioner in partnership suits considered. (*Kumaraswamy Sastri, J.*) ABDUL WAHAB SAHIB *v.* ROKIA BIBI SAHIBA. **1924 M. 406.**

——*Suit against, by third party—Submission to arbitration by partner sued—Award—Liability of other partners.*

Where one of several partners who is sued by a third party submits the dispute to arbitration, the award will not bind the other partners at the instance of the third party. Where however the submission has been made in good faith and the partner has to make payments in accordance with the award passed in the submission in good faith, then the partner is entitled to claim contribution from his partners on the basis of the award. (*Abdur Rahim, O. C. J. and Moore, J.*) VENKATACHALLAM CHETTY *v.* RAMANADHAN CHETTY, **12 L. W. 228 : (1920) M. W. N. 502 : 59 I. C. 501 : 39 M. L. J. 269.**

——*Suit—Pro-note executed by one partner to another—Liability of executant.*

It is open to a partner to sue another partner on a pro-note executed by him in respect of a matter, which though arising out of the partnership business or connected with it, does not involve the general taking of accounts. The suit will not be entertained in cases where the taking of partial accounts would work injustice. 32 Mad. 76, Foll. 31 M. 343 Ref. The fact that the maker of a promissory note is a partner of the payee is no defence under the Negotiable Instrument Act, unless the instrument can be treated as an escrow or a nullity.

Per Krishnan, J.—Even apart from the note the plaintiff has a cause of action on the settlements itself which is the basis of the note. The fact that there may be an unsettled account between the parties is insufficient to restrain a suit on that cause of action. (*Phillips and Krishnan, JJ.*) SUNKARA RATHADAS *v.* EPARI KOPILS. **49 I. C 191.**

——*Suit—Firms having common partners.*

No suit lies as between partners or between firms having common partners for recovery of moneys except on an application for leave to direct such accounts to be taken as may be just. 32 M. 76 ; 34 M. 112 ; 28 M. 344 Dist. 26 B. 739 Foll. (*Abdur Rahim and Oldfield, JJ.*) LAKSHMANAN CHETTY *v.* NAGAPPA CHETTY. **45 I. C. 86 : 34 M. L. J. 408.**

——*Suit for—Amendment—Practice—Partnership—Suit—Accounts—Mode of taking.*

In a partnership suit, a Court should take into account all transactions between partners to avoid multiplication of proceedings, and all such amendments shall be allowed as may be necessary to determine the real question in contest. (*Spencer, J.*) SAMBASIVA AIYAR *v.* GANAPATHY AIYAR. **23 I. C. 564.**

——*Suit by one of the partners—Maintainability.*

It is competent to one of the partners to bring a suit in the name of the partnership and it is not necessary that all the partners should have been named in the plaint as plaintiffs or should have signed the plaint. (*Dhobley, A. J. C.*). SHRIRAM SHANKERLAL *v.* MADHO PATIL. **1923 Nag. 137 (1).**

——*Suit for—Various defendants impleaded as having interest at different times—Other business—Multifariousness.*

There is neither multifariousness nor misjoinder in a case of dissolving of the partnership if a number of people were included at different times in the course of the business and accounts were asked to be submitted of other businesses related to the same. (*Jwala Prasad and Doss, JJ.*) LIMAYA *v.* WATVE. **1923 Pat. 276 : 1924 P. 65.**

PART PAYMENT.

See LIM. ACT, S. 20.

PART PERFORMANCE.

See also T. P. ACT, Ss. 54, 58, 107, 118, 119. EVIDENCE ACT, S. 115.

——*Mortgage unattested.*

Where in pursuance of an unattested mortgage the mortgagee is put in possession and subsequently deprived of it, he has a right to sue under S. 68 of the T. P. Act for the moneys advanced. (*Lord Parker.*) RAMA NARAYAN *v.* AZEINDRANATHA. **44 Cal. 388 : 21 M. L T. 12 : 15 A. L. J. 107 : (1917) M. W N 94 : 25 C. L. J. 121 : 21 C. W N 383 : 19 Bom. L. R. 194 : 44 I. A. 87 : 38 I. C. 932 (P. C.) : 32 M. L. J. 39.**

———*Contract not embodied in statutory form —Actings of parties—Defects cured in equity—English and Indian Law.*

The parties to a mortgage transaction compromised a pending litigation to the effect that the mortgagor was to be the absolute owner of a portion of the mortgaged property and the mortgagee of the remainder and the debt was deemed to be extinguished. No written conveyance was executed but a decree was passed on that footing in 1873 and the parties had acted on that contract for 40 years each dealing with the property allotted to him as absolutely his own. Subsequently the mortgagor's representatives treating the mortgage as subsisting sued to redeem. *Held*, that the suit was not maintainable. Whatever defects of the form there might have been in the compromise agreement as a transfer of the equity of redemption to the mortgagee, they were cured by the actings of the parties and the right to redeem was extinguished. Equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. The defendant is really charged on the equities resulting from the acts done in execution of the contract and not on the contract itself. (*Lord Shaw.*) MAHOMED MUSA *v.* AGHORE KUMAR. **42 Cal. 801 : 42 I. A. 1 : 17 Bom. L. R. 420 : 21 C. L. J. 231 : 19 C. W. N. 200 : 13 A. L. J. 228 : 17 M. L. T. 143 : 2 L. W. 258 : (1915) M. W. N. 621 : 28 I. C. 930 : 28 M. L. J. 548 (P. C.).**

———*Unregistered exchange —Actings of parties—Estoppel.*

Where in spite of the absence of a registered deed to evidence an exchange, the parties have acted upon an oral exchange and dealt with the properties, the transaction will become effectively binding upon them. Equity will support a transaction though clothed in imperfect legal forms if the bargain has been acted upon. 42 Cal. 801 Foll. (*Piggott and Walsh, JJ.*) SALAMATUZZAMANI BEGAM *v.* MASHA ALLAH KHAN. **40 All. 187 : 16 A. L. J. 98 : 43 I. C. 645 : [Contra 40 Mad. 1134 : Ibid 31 C. L. J. 75 : 55 I. C. 154 : 33 M. L. J. 253]**

———*Doctrine of—Applicability—Unregistered agreement to convey—Delivery of possession—Effect of.*

To render the doctrine of part performance applicable, the parties must have changed their position to such an extent that the change should be attributable to the contract alleged. For instance mere payment of purchase-money is not enough. (*Marten and Fawcett, JJ.*) SANDU VALJI *v.* BHIK CHAND. **25 Bom L. R. 381 : 47 B. 621 : 1923 B. 473**

———*Doctrine of—Applicability.*

The doctrine of part performance is only applicable where specific performance could have been obtained. (*Woodroffe and Cuming, JJ.*) LAKHI PRIA GUHA *v.* NANDA KUMAR BASU. **1923 Cal. 345.**

———*Doctrine of—Unregistered document.*

An unregistered agreement to lease which is meant to take effect as a present demise cannot be received in evidence in a suit for specific performance for its provisions when the document comes under S. 17 (1) *d* and is hit by S. 49 (*c*) of the Registration Act. (*Rankin, J.*) SANJIB CHANDRA *v.* SANTOSH KUMAR. **26 C. W. N. 329 : 49 Cal. 507 : 1922 C. 436.**

———*Doctrine of—Applicability.*

Where plff. claiming as *heir* of her father sued for joint possession of land on declaration of title and it was proved by the defence that the father had exchanged the suit land for some other land, *held* that on the equitable doctrine of part performance the plff. could not question the validity of the exchange on the ground that it had been effected by an unregistered document. (*Huda, J.*) MEHER ALI *v.* ARATUNESSA. **67 I. C. 167 : 25 C. W. N. 905.**

———*Doctrine of—Sale of land—Contract—Possession given—Deed not executed.*

When in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal document had not been executed, the legal position is as if the document is executed provided specific performance can be obtained between the parties to the agreement in the same Court and at the time when the question has to be determined. (*Mookerjee and Panton, JJ.*) SYAMKISHORE DE *v.* UMESH CHANDRA BHATTACHARYA. **31 C. L. J. 75 : 55 I. C. 154 : 24 C. W. N. 463. [Contra 40 Mad. 1134 : 33 M. L. J. 253].**

———*Doctrine of—Contract of sale—Possession.*

Where a person was put into possession under a contract for sale after payment of the entire consideration therefor, he cannot be ousted by a purchaser under a registered conveyance from the owner. (*N. R. Chatterjee and Newbould, JJ.*) JNAN CHANDRA DAS *v.* RAJANI KANTA PAL **41 I. C. 850 : 22 C. W. N. 522.**

———*Doctrine of—When applicable.*

Where a corporation is acting within the scope of legitimate purposes of its incorporation even parol contracts made by its authorised agents raise implied promises for the enforcement of which an action may well lie, especially when there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the corporation ; the exception based upon doctrine of part performance does not apply where the contract is, by statute, positively required to be under seal or is *ultra vires* in the sense that it is beyond the scope of the authority of the corporation under any circumstances. (*Mookerjee and Chatterjee, JJ.*) MOHAN SHAHA *v.* RAM KUMAR SHAHA **43 Cal. 790 : 23 C. L. J. 26 : 35 I. C. 305 : 20 C. W. N. 370.**

———*Doctrine of—Enforceability—Title, vesting of.*

The equitable doctrine of part performance precludes the parties to a contract from pleading want of title in the other where the other has already performed a part of the contract. A stranger can rely upon the doctrine. (*Chatterjee and Roe, JJ.*) KHAJENDRA NATH *v.* SONATAN GUHA. **31 I. C. 987 : 20 C. W. N. 149.**

PART PERFORMANCE.

——*Discretionary duty, whether becomes obligatory.*

Though it may be true in some cases that work which before it is begun only permissive becomes obligatory by part performance yet it is not true as an abstract proposition of law in every case. (*Chaudhuri, J.*) A. RASUL, *In the matter of.* **41 Cal. 518 : 24 I. C. 404 : 18 C. W. N. 430.**

——*Applicability of doctrine.*

The application of the rule of part performance also applies to cases where at the date of the suit a suit for specific performance is not barred by limitation. (*Phillips and Venkatasubba Rao, JJ.*) THE VIZAGAPATAM SUGAR & DEVELOPMENT CO., LTD. *v.* MUTHURAMA REDDY. **45 M. L. J. 826 : 1924 M. 296.**

——*Doctrine of—Applicability to India.*

In England the doctrine of part performance belongs to the sphere of contract and operates, where applicable, to allow a party to prove a contract in an action, in spite of a statutory prohibition. In India, however, neither the doctrine of part performance nor the doctrine that 'Equity regards that as done which ought to be done,' can be invoked so as to effect a valid transfer of immoveable property without a registered instrument in cases where such instrument is required by S. 54 of the Transfer of Property Act. Where under an unregistered deed of exchange the parties went into possession of the plots exchanged and one of them erected costly structures with the knowledge of the other. *Held,* that no title passed in the property in the absence of a registered conveyance and the parties could recover the plots which originally belonged to them. Per *Abdur Rahim, J.*—The parties were by their conduct and actings equitably estopped from claiming the plots exchanged. (*Abdur Rahim, Sadasiva Aiyar and Napier, JJ.*) RAMANATHAN CHETTY *v.* RANGANATHAN CHETTY. **40 Mad. 1134 : 6 L. W. 300: 22 M. L. T 173 33 M. L. J 252 : 43 I. C. 138 : (1917) M. W. N 757. [On Appeal from 32 I. C. 5 (Mad.) : Contra 40 All. 187 : 43 I. C. 645.]**

——*Non-registration—Effect of.*

The suit on the mortgage is maintainable where through the vendee's default the sale-deed was not registered, though he was put into possession and the vendor has taken a mortgage for the sale price. (*Ayling and Spencer, JJ.*) RAMA AIYAR *v.* VENKATARAMA AIYAR. **12 I. C. 310 : (1911) 2 M. W. N. 241 : [Cf. 43 I. C. 138 : 40 Mad. 1134].**

——*Building on land under agreement with owner—Equities.*

When a person under a verbal agreement with a landlord, for a certain interest in land or what amounts to the same thing, under an impression created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such promise, or expectation, lays out money upon the land and the landlord though aware does not object, a Court of Equity will compel the landlord to give effect to such a promise or expectation. (*Stanyan, A. J. C.*) BHAGWAN SINGH *v.* RAGHUBURSINGH **4 N. L. J. 227.**

——*Doctrine of—Landlord and tenant.*

The tenants surrendered their holdings to the landlords and it was found that the consideration in each case was a debt due to the landlords, that they obtained possession with the consent of the tenants, and that they had been in possession ever since. In a suit by the tenants for recovery of possession. *Held,* that as between the parties to those transactions, there had been such a part performance on both sides as to leave the tenants no room, in equity, for recovery of the lands. (*Miller, C. J. and Foster, J.*) RAM DHEYAN SINGH *v.* BHULOTAN SINGH. **1924 P. 392.**

——*Promise to mortgage land and delivery of possession—Promisee has a charge on the land for money advanced.*

A person who has advanced money on the strength of a promise to mortgage land and who has actually received possession of the land as part of his security for the money advanced cannot be ousted from that possession but the person who made the promise and put him in possession of the land or by any other person claiming under him with notice of the payment, *i e*, he has a charge or lien on the land so promised to be mortgaged to him. (*Heald, J.*) AUNG DUN *v.* MAUNG TUN YA. **1 R. 261 : 1923 R. 222.**

——*Plea of specific performance though barred, remedy in tact—Limitation.*

Limitation will only commence to run from the date when the vendee becomes aware that the vendor refused to complete the contract When plaintiff agreed to sell certain property to defendants, who were already in possession, and defendants paid up the purchase money, but omitted to take a registered conveyance, plaintiff is entitled to recover possession, even though the right to obtain specific performance of the agreement to sell had become time barred. (*Pratt, J.*) MAUNG SHWE HMON *v.* MAUNG THA BYAW. **11 L. B. R. 462 : 1923 Rang. 125.**

——*Document invalid for want of registration—Evidence* aliunde *if can be let in.*

Where a partition deed has been acted upon, proof of the arrangement under which the partition took place can be let in, in a suit by one member of the family against others for specific performance of the arrangement. (*Das and Macpherson, JJ.*) NAND LAL MAHTON *v.* DHANUKDHARI MAHTON. **4 Pat. L. T. 657 : 1924 P. 244.**

——*Doctrine of—Applicability in India.*

There is nothing in the Indian Law inconsistent with the doctrine of part performance on which Courts of Equity in England have acted for many years.

The jurisdiction to carry into execution transactions clothed imperfectly in legal forms being purely equitable, Courts of Equity have imposed on themselves certain limits for the exercise of the jurisdiction. Those limits must be clearly

PARTY WALL.

recognised and carefully guarded. The first essential condition for the exercise of the jurisdiction is that there must be a final engagement between the parties. If the circumstances in the case suggest that the matter still rested in negotiation, there is no room to charge a person on the equities resulting from the acts done in execution of the contract. The second essential condition is that there are such actings of the parties as must be unequivocally and in their own nature referable to the agreement alleged. (*Das and Adami, JJ.*) DEB MAL JHA *v.* BALDEO JHA.
2 U. P. L. R. (Pat.) 100 : 56 I. C. 277 : 1 Pat. L. T. 354.

PARTY WALL.
See also (1) CO-SHARER.
(2) EASEMENT.

——— *Proof of—Conduct.*

Where a wall stands between two houses, it is open to each of the owners of the two houses to show that it is a mere party wall. The mere fact that the wall was built by one of the two owners, is not in itself sufficient to make it impossible for the wall to be nothing more than a party wall if their conduct shows that they have by common consent always treated it as a party wall, it must be treated as such. (*Piggott, J. C.*) MUHAMMAD SHABBIR *v.* MAHAMMAD JAWAD.
15 I. C. 270.

PASTURAGE.
See EASEMENT.

PATENTS AND DESIGNS ACT (II OF 1911).
——— *—Object of—Procedure.*

The Patent Law is a provision made by the legislature for the encouragement of research, industry and progress. It rewards genuine discoveries by giving them a limited monopoly and thereby seeks to encourage commercial enterprise and development. (*Piggott and Walsh, JJ.*) LAKHPAT RAI *v.* SHRIKRISHNA DAS.
41 All. 68 : 48 I. C. 450 : 16 A. L. J. 941.

———**Ss. 1 (2), 2 (3) and 81**—*Patent granted in British India—Berar.*

A person obtained the exclusive privilege in respect of an invention under the Invention and Designs Act, 1888. Under the Patent and Designs Act, 1911, the privilege was converted into a patent and extended throughout the British India. The Act of 1888 was never applied to Berar. By a notification of the Government issued under the Act of 1911, Berar was included in the definition of British India *Held*, that the patent was operative in Berar and its infringement was actionable. Though a separate controller of Patents was not expressly appointed for Berar the officer appointed to this office for British India was the controller for Berar. Though the patent was granted on a date anterior to the date of the Notification of the Government of India, that Notification had the effect of making it valid in Berar from the date on which it was granted. (*Mitra, A. J. C.*) SHEOPRASAD *v.* GOVIND. **54 I. C. 417.**

——— **S. 2 (5)**—*Merchandise Marks Act, S. 2 (2)—Design—Trade description.*

Where a design covers the whole body of goods and is part and parcel thereof, it is not a trade-

PATENTS AND DESIGNS ACT (II OF 1911), S. 38.

mark but a 'design' under the Indian Patents and Designs Act, 1911, nor is it a 'trade description' within S. 2 (2) of the Merchandise Marks Act, 1889. (*Hayward, J. C. and Boyd, A.J.C.*) NARUKNAL KHEMCHAND *v.* THE BOMBAY COMPANY, LTD.
25 I. C. 998 : 15 Cr. L. J. 670 : 8 S. L. R. 39.

——— **S. 3**—*Novelty—Specification—Combination of old materials.*

Where the plaintiffs invented a process of turning out *banslochan* (a medicinal power) of which the essential features were the treatment of the substance at red heat, with sulphuric acid inside crucible or retort made entirely of earthenware, and there were several advantages in this process not found in the existing methods. *Held*, that this process was one of a new combination of admittedly old material, and that it was a good subject-matter for a patent. (*Piggott and Walsh, JJ.*) LAKHAPAT RAI *v.* SRI KISAN DAS.
41 All. 68 : 48 I. C. 450 : 16 A. L. J. 941.

——— **Ss. 26 and 28**—*Revocation of Patent—Burden of proof.*

In a petition under S. 26 for revocation of a patent, the onus lies heavily on the petitioner to show that the respondent is not the true and first inventor of the invention. (*Rattigan, J.*) THAKAR DAS *v.* SHAH DIN. **74 P. W. R. 1915 : 29 I. C. 904 : 148 P. L. R. 1915.**

——— **S. 29**—*Novelty and prior user.*

In the preparation of 'Banslochan' the Respondent had been given patent in respect of the improvement discovered by him *viz.* (1) the addition of sulphuric acid to the substance at a defined stage of the process, *i.e.* when red hot, (2) in the art of the process of heating in a stove constructed as described in the patent. In the action for infringement of the patent, it was not disputed, that prior to the date of the said patent 'bansolachau' had been prepared for the market by a process which included (2) washing the crude material in water, (*b*) treating it at some period of the process with sulphuric acid and (*c*) calcining the mass which had been so treated in an iron stove or pan at a high temperature, *Held*, that the claim in respect of improvement No. 1 was invalid for want of novelty and prior user. Further, *Held*, that in view of the above finding in respect of claim No. 1, it was unnecessary to examine claim No. 2, *Held*, further that it was necessary to adjudicate in each claim independently and not to construe the above specification as it was one for a combination and not for subject-matters which were distinctively claimed. (*Lord Carson.*) GOPI LAL *v.* LAKHPAT RAI. **L. R 4 P. C. 155 : 18 L. W. 141 : 38 C. W. N. 343 : 33 M. L. T. 279 : 1923 P. C. 103.**

——— **S. 38**—*User of design before—New or original design.*

Where the designs in question had been in use in the locality from long before the date when the registration of the patent was applied for by the plaintiff and it is not possible to say that those designs were new or original, the plaintiff is not entitled to the protection under the Patents Act. A combination of materials would not be entitled to protection unless it was a combination of a

PATENTS AND DESIGNS ACT (II OF 1911), S. 43.

character which involved the exercise of any special inventive power or had some originality about it. (*Kanhaiya Lal and Sulaiman, JJ.*) RAM SAHAI *v.* ANGNOO. **L. R. 3 A. 513 : 1922 A. 496.**

——S. 43--*New and original design—Novelty.*

Though the shape of a band could not be said to be new and original, the application of it to a watch to be worn on the wrist might be for a purpose so different from and for a use dissimilar to the purpose and use of the bracelet that the design in question might be said to be original. *Per Woodroffe, J.*--There was novelty in applying what was an old thing to new use. If that was so the design should be protected, provided, it was not merely, to use the words of the cases, analogous. *Per Sanderson, C.J.*— The test of novelty is the eye of the Judge. He must place the two designs side by side and see whether the one for which novelty is claimed is new. (*Sanderson, C.J. and Woodroffe, J.*) ERNEST OTTO GAMMETER *v.* THE CONTROLLER, PATENTS AND DESIGNS.

45 Cal. 606 : 48 I. C. 437 : 22 C. W. N. 580.

——Ss. 62, 64, 70 and 77—*Wrist band—Jurisdiction of Controller — Non-insertion or omission from the register—Cancellation of entry in register—Mandamus—Application to the High Court—Specific Relief Act, S. 45.*

The Controller upon the application of a private person has no jurisdiction to cancel the registration of a design. The ordinary way of expunging the registration of a design is to apply to the High Court under S. 64 The only person who can apply under S. 62 of the Patents and Designs Act is the registered proprietor or some person in whom his interest vested. The words 'non-insertion' in or omission from the register, in S. 64 do not include cancellation and so the High Court cannot interfere under that section when there has been an improper cancellation. Form No. 20 (under the Patents and Designs Act of 1911) must be limited to applications of a registered owner though it has been framed in a general way. Under S. 45 of the Specific Relief Act, 1877, the High Court can interfere when, in the opinion of the High Court, the doing or forbearing of the required act is 'consonant to right and justice' Therefore the High Court before it can direct the Controller to restore the registration of the design, has to consider, whether the design is new and original. (*Sanderson, C.J. and Woodroffe, J.*) ERNEST OTTO GAMMETER *v.* THE CONTROLLER, PATENTS AND DESIGNS.

45 Cal. 606 : 48 I. C. 437 : 22 C. W. N. 580.

PATNA HIGH COURT RULES.

——*Rule requiring duly filled forms not* ultra vires.

A party making an application for re-hearing of a suit must file with the application duly filled forms of processes for service of notice to the other party and this rule is not inconsistent with the provisions of the Civil Procedure Code (*Coutts and Ahmed, JJ.*) NANOO BABOO *v.* RAM NIVAJI. **61 I. C. 666 : 2 P. L T. 45.**

PATNA HIGH COURT RULES, CH. IX, R. 7.

——Ch. II, R. 13—*Presentation of appeal to Asst. Registrar, during vacation is not valid.*

Under the Rules of the Patna High Court coupled with O 41, R. 1, C.P.C., the Registrar is the proper person to receive appeals presented during the vacation, and in his absence, the Judge. Therefore the presentation of an appeal to the Asst. Registrar during the vacation is not a valid presentation. (*Jwala Prasad, J.*) ANAND RAM PRAMHAMS *v.* RAMGULAM SAHU. **3 P L.T. 820 : 1922 Pat. 365 : 1 Pat. L. R. 12 : 2 P. 264 : 1923 P. 150.**

——Ch. VI, Rr. 2 and 16—*Letters Patent Appeals—C.P. Code, O. 41, R. 11—Procedure.*

The High Court Rules which contemplate and authorize the procedure of preliminary hearing of Letters Patent Appeals in the manner provided by O 41, R. 11, C.P.C., having received the sanction of the Governor-General inCouncil and of the Local Government, have the force of law (*Miller, C. J. and Adami, J.*) JAGDIS CHANDRA DAS *v.* CHANDRA DAS. **4 Pat. L. J. 695 :54 I. C. 230 : 1919 Pat. 416.**

——Ch. VI, R. 5—*Person not party to action cannot appeal.*

A person, not a party to an action, and who cannot come under the class of persons mentioned in R. 5 of Ch. VI of the Patna High Court Rules, cannot be allowed to appeal against the decision arrived at in the action. (*Das and Adami, JJ.*) AHMED NAWAB *v.* ABBAS HUSSAIN.

6 P. L. J. 43 : 61 I C. 76 : 2 Pat. L. T. 624.

——Ch. VI, R. 5—*Applicability of.*

No person can appeal against a decree to which he is not a party merely on the ground that the person on record is a benamidar. (*Miller, C. J. and Coutts, J.*) GOBIND RAM *v.* BADRI NARAIN.

5 Pat. L. J. 256 : 55 I. C. 881 : 1 Pat. L. T. 159

——Ch. VII, R. 2—*Letters Patent Appeal—Copies of judgment and decree not required.*

Under Rule 2 of Ch. VII of the Rules of the Patna High Court a copy of the judgment of a single Judge is not required to be filed along with a Letters Patent Appeal and the time taken in obtaining such copies cannot be taken from the period of 30 days. (*Miller, C. J. and Mullick, J.*) DEOKI LAL *v.* RAMANAND LAL.

1920 Pat. 333 : 5 Pat. L. J. 701 : 2 U. P. L. R. (Pat.) 235 : 59 I. C. 179 : 2 Pat. L. T. 42.

——Chap. VII, R. 6—*Whether affects rule of limitation.*

R. 6 of Chap. VII of Patna High Court Rules does not affect the rule of limitation The rule was based upon the Old Code of Civil Procedure and has not been made under S.122 of the present Code. (*Jwala Prasad and Ross, JJ.*) RAMDEO SINGH *v.* MAKHAN SINGH. **74 I. C. 330 : 1923 Pat. 19.**

——Ch. IX, R. 7--*Paper book--Appeals in execution of decrees—Printing of decree.*

Where the appeal is from an order of the Subordinate Judge refusing to execute a decree, it

PATNA HIGH COURT RULES, CH. IX, R. 8.

is obvious that the decree is part of the record and it is not necessary for the applicant to tender the decree formally in evidence. Consequently, the decree should be included in the paper book. (*Das and Kulwant Sahay, JJ.*) NRIPENDRA NATH CHATTERJEE *v.* JHUMAK MANDER.
4 Pat. L. T. 512 : 1924 P. 184.

——Ch. IX, R. 8—*Legality of.*

The rules of the Patna High Court, 1916, are not *ultra vires*. The dismissal of an appeal for failure of the appellant to prepare and deliver a list of the papers to be inserted in the paper book is invalid (*Miller, C.J. and Mullick, J.*) RAJENDRA KISHORE *v.* RAJKUMAR KAMAKHYA NARAIN SINGH. **60 I. C. 285 : 5 Pat. L J. 719**

——R 45, E., Ch. XI, Vol. I—*Vakalatnama—Acceptance.*

The mere signing by the pleader of the *Vakalatnama* with the word 'received' without date without any indication as to the party from whom he received or without any certificate that he was satisfied that the person from whom he received it was the party himself or a servant or relation or agent is irregular. (*Miller, C.J., Mullick and Jwala Prasad, JJ.*) BAMMALI DAS, *In the matter of.* **1 P. 689 : 4 P. L. T. 235 : 1 P. L. R. 57 : 24 Cr. L J. 81 : 1922 P. 608 (2).**

PATNI.

See (1) BENGAL PATNI.
(2) BENGAL PATNI REGULATION.

PATTA & PATTADAR.

See LAND TENURE.
RYOTWARI.

PATTIDAR.

——*Presumption—Pattidari body.*

There is a strong presumption that persons related through males to a member of a *Pattidari* body are also themselves *Pattidars*. (*Bailli, S. M. and Tweedy, J. M.*) RAGHUNATH KUAR *v.* COURT OF WARDS. **26 I. C. 683 : 1 O. L. J. 587.**

PATWARI PAPERS.

See EVIDENCE ACT, S. 35.

PAUPER—APPEAL.

See C. P. CODE, O. 44, R. 1.

PAUPER—SUIT.

See C P. CODE, O. 33.

PAYMENT INTO COURT.

See (1) C. P. CODE, O 34.
(2) T. P. ACT, S. 83.

PEDIGREE.

See EVIDENCE ACT, S. 32.

PENALTY.

See CONTRACT ACT, S. 74.

PENSION.

See also PENSIONS ACT.

——*Civil Service Regulations, Arts. 458 and 464—Interpretation--Officer removed from Government service--Pension, right to.*

Under Articles 458 and 464, it is essential that an officer to be entitled to pension must be in the service on the date of his retirement. An Officer

PENSIONS ACT (XXIII OF 1871), S. 4.

removed from Government service can have no claim for any pension. (*Sadasiva Aiyar and Napier, JJ.*) KOTHANDARAMIAH *v* SECRETARY OF STATE. **2 L. W 431 : 29 I. C. 252 : (1915) M. W. N. 323.**

PENSIONS ACT (XXIII OF 1871).

——*Award—Distribution of pension.*

A decree in conformity with the award which provides for the distribution in a certain manner of a pension when received from Government does not militate against the provisions of the Act: (*Heaton and Rao, JJ.*) RAGHAVENDRA AYYAJI DESIA *v.* GURU RAO RAGHAVENDRA DESAI
37 Bom. 442 : 19 I. C. 882 : 15 Bom. L. R. 362.

——*Scope.*

A grant by the British Government confirming a previous grant made by the preceding rules of such rights as theGovernment possessed is excluded from the purview of the Pensions Act. 28 A. 104, Foll. (*Stuart and Kanhaiya Lal, A. J. C.*) HUSAIN ALI MIRZA *v.* MUHAMMAD AZIM KHAN. **31 I. C. 728 : 18 O. C. 168.**

——Ss. 3 and 4—*Grant—Land Revenue—Resumption by Government—Suit to declare invalidity.*

S. 4 of Act XXIII of 1871 does not require that the grant should be of the land revenue alone in order to shut out the jurisdiction of the Civil Court. The latter has no jurisdiction to entertain a suit relating to a grant of land revenue. Even where land revenue is granted along with the land itself, a Civil Court has no jurisdiction to determine a suit which relates to the land revenue alone. Freedom from liability to land revenue is not identical with holding a grant of land revenue. The land revenue arising from a man's own holding, when it is remitted and the land pays nothing, is rather extinguished than granted. 1 B. 75 at p. 81 Ref. The Pensions Act (XXIII of 1871) contemplates money payments to be received through the Collector from recorded persons bound to pay revenue. Whether, when there is a grant of the land revenue only to a person already owning the *kudivaram* right, there is anything in S. 4 of the Act XXIII of 1871, construed in the light of Regulation IV of 1832 and Act IV of 1862, to take away the jurisdiction of a Civil Court with respect to a claim to the *kudivaram* right. (*Benson and Sundara Aiyar, JJ.*) MUTHU SRI RAI SAHIB JIEJAMBA *v.* SECRETARY OF STATE.
(1913) M. W. N. 255 : 12 M. L. T. 541 : 15 I. C. 871 : 23 M. L. J. 687.

——Ss. 4 and 6—*Assignment of Government revenue—Jurisdiction of Civil Courts.*

A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay a grant of Government Revenue to any person. (*Richards, C, J and Piggott, J.*) SECRETARY OF STATE *v.* JWAHIR LAL. **37 All. 338: 29 I.C. 146: 13 A. L. J. 460.**

——Ss. 4 and 6—Muafi *land since British rule—Pension—Grant of land revenue, meaning of alienation.*

PENSIONS ACT (XXIII OF 1871), S. 4.

A village granted to the ancestor of the defendant by a Hindu Raja long prior to the establishment of the British rule was held as *Muafi*. The grant of the village is neither a pension nor a grant of land revenue within the meaning of the Pensions Act, 1874 but an ordinary *Muafi* which could be transferred by sale or mortgage and that the Pensions Act did not apply. (*Richards, C. J. and Banerjee, J.*) MANNU LAL *v.* FAZAL IMAM.
33 All. 580 : 10 I. C. 353 : 8 A. L. J. 692.

——S 4—*Suit for share in* Sar Deshmukhi Haq—*Certificate necessary.*

A suit against the Secretary of State to recover a share in the *Sar Deshmukhi Haq* cannot lie in the absence of the certificate under S. 6 of the Act (*Macleod, C. J. and Fawcett, J.*) MADHAVARAO MORESHWAR BHADONEKAR *v.* SECRETARY OF STATE FOR INDIA. **22 Bom. L. R. 1176 : 59 I. C. 452 : 45 B. 196.**

——Ss. 4 and 6—*Suit relating to grant.*

A certificate under S. 6 of the Pensions Act is not necessary to entertain a suit relating to a grant which is given to grantee's male descendants. (*Macleod, C. J. and Heaton, J.*) SAYDANOMIA RAHIMANUMIYA *v.* HASSAN MIA MANWAR MIYA.
58 I. C. 331 : 22 Bom. L. R. 959.

——S. 4—*Declaration—Share in vatan—Collector's certificate.*

A suit for declaration that the plaintiff is the owner of a certain share in a kulkarni vatan falls within S. 4 of the Pensions Act and is not maintainable without the certificate of the Collector. (*Basil Scott, C J. and Batchelor, J.*) BALKRISHNA SUMBHAJI GHATE *v.* DATTATRAYA MAHADEV GHATE. **42 Bom. 257 : 45 I. C 580 : 20 Bom. L. R. 325.**

——S. 4—Saranjam *right—Suit for possession.*

S. 4 of the Pensions Act is no bar to a suit to recover back possession of land in which *saranjam* right is resumed by the Government. (*Batchelor and Shah, JJ.*) GURU RAO SRINIVAS *v.* SECRETARY OF STATE FOR INDIA.
41 Bom. 408 : 39 I. C. 65 : 19 Bom. L. R. 117.

——S. 4—*Suit for share in* Deshpande Kulkarni Vatan.

A suit for a declaration of an eight-anna share in the *Deshpande Kulkarni Vatan*, consisting of a cash allowance whether coupled with a prayer to recover the actual cash received or not falls within the class of suits defined by S. 4 and is consequently not maintainable in a Civil Court unless a Collector's certificate is obtained. (*Batchelor and Rao, JJ.*) DWARKANATH AMRIT *v.* MAHADEV BALAKRISHNA. **37 Bom. 91 : 17 I. C. 661 : 14 Bom. L. R. 938.**

——S. 4—*Civil Court's jurisdiction.*

S 4 debars the Civil Court from entertaining a suit relating to a pension or grant of money conferred by the Government whatever may have been the consideration for such pension and whatever may have been the nature of the payment in lieu of which such person was granted. (*Stephen, J.*) SARAT CHANDRA DAS *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.
15 C. W. N. 470 : 9 I. C. 859 : 13 Cr. L. J. 360 : 38 Cal. 378.

PENSIONS ACT (XXIII OF 1871), S. 6.

——S. 4—*Applicability—Suit for partition.*

The pre-requisite of filing a certificate under S.4 of the Pensions Act is not applicable to a suit for partition of the inam among the members of the family to which it was given and it does not also apply where the grant is of land also and not merely of the land revenue. 7 M. 191 ; 36 M. 591 ; 36 M. 559 ; 33 A. 580, Foll. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) NUNJUNDIAH *v.* VENKATA SUBBAYYA. **1 L. W. 670 : 16 M. L. T. 239 : 26 I. C. 87 : 27 M. L. J. 618.**

——S. 4—*Grant of land by Government—Suit about* Melwaram—*Jurisdiction of Civil Court.*

Where certain land is granted by Government, the grant cannot be split up into two distinct grants of *Melwaram* and *Kudiwaram* so as to fall under S. 4 of Pensions Act in respect of the claim for *Melwaram*. But where the court is convinced that the grant is of the land revenue only the suit relating to it is not cognizable by Civil Court except with the sanction of the Collector. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SECRETARY OF STATE FOR INDIA *v* IKURTI SUBBARAYUDU. **36 Mad. 559 : 12 M. L. T. 266 ; (1912) M. W. N. 807 : 16 I. C. 18 : 23 M. L. J. 728.**

——S. 4—*Suit as* Pattedar—*Collector's certificate necessary—Adjournment—Second appeal.*

A suit for a declaration of a right to a share of the *Pattedari* of a village is not entertainable without the Collector's certificate under the Act. Where a plaintiff is guilty of considerable *laches* is not curing a technical defect in his plaint, he cannot be given in second appeal after the case has been argued, an adjournment for the purpose of enabling him to cure the defect. 23 A. 104, Dist. (*Crouch, A. J. C.*) JEHAN KHAN *v.* ROHALA KHAN. **20 I. C 508 : 7 S. L R. 5.**

——Ss. 5 and 6—Muafi *rights—Suits for declaration.*

Ss. 5 and 6 bar a suit for a declaration against Government that the plaintiff is entitled to *muafi* rights in a certain *mahal*. (*Mr. Ameer Ali.*) HAKIM SHIAM SUNDAR LAL *v* THE SECRETARY OF STATE FOR INDIA. **2 U. P. L. R. (P C.) 19 : 57 I. C. 156 (P.C.) : 12 L W. 311.**

——S. 6—Saranjam *inam—Suit to recover—Certificate of Collector—Failure to produce certificate—Appeal—Remand.*

The grant of a *Saranjam* should be presumed to be a grant of the land revenue and not of the soil. In a suit to recover a *saranjam* a preliminary issue was raised 'whether the suit lies without a certificate under the Pensions Act.' Plaintiff's pleader having admitted the necessity of the certificate, the Court decided that the certificate was necessary and gave time to the plaintiff to produce it. Plaintiff having failed to produce the certificate, the Court disposed of the suit on the preliminary issue. *Held*, that the

PENSIONS ACT (XXIII OF 1871), S. 6.

plaintiff was bound by his pleader's admission which was upon an issue regarding which evidence could have been given. 29 I. A. 76, Foll.; and that in absence of materials justifying reversal of the decree on the preliminary issue, the suit could not be remanded under O. 41, R. 23 of the C. P. Code (*Scott, C. J. and Batchelor, J.*) DATTAJI RAO *v.* NILKANTHA RAO.
39 Bom. 352 : 28 I. C. 485 : 17 Bom. L. R 187.

——— S. 6—*Suit for share of inam—Collector's certificate.*

A suit relating to a share in an inam consisting of two-third of the revenue is not cognizable without Collector's certificate. Where the plaintiff has not obtained the certificate, the hearing may be adjourned to enable him to produce it. (*Scott and Hayward, JJ.*) ANTAJI VASUDEV KELKAR *v.* VINAYAK KESHAV BHISE.
27 I. C. 927 : 17 Bom. L. R. 153.

———S. 6—*Applicability.*

S 6 does not apply to a suit for declaration that funeral expenses cannot be claimed to be paid out of income of a Jagir. 72 P. R. 1889, Ref. to. (*Chevis, J.*) ASAD ALI *v.* MT. SHARIF-UN-NISSA.
1922 Lah. 365.

———S. 6—*Right to receive — Government revenue—Absence of certificate.*

A suit to establish a right to collect Government revenue from the villages granted as endowment to a religious office is not maintainable in the absence of a certificate under S. 6 of the Pensions Act. (*Sadasiva Aiyar and Napier, JJ.*) MAHOMED KADIR *v.* GHULAM MAHOMED ALI.
28 I. C. 934.

———S. 7—*Pension — Attachment of, when permissible.*

A pension is ordinarily not attacnable for sale in execution. If the decree-holder wants to bring this within the exception and show that this individual's pension happened to be attached for sale he should have done so by appropriate proof. (*Mears, C. J. and Ryves, J.*) MAZHAR ALI KHAN *v.* MAHFAZ HASAN. **44 All. 697 : 20 A. L. J. 679 : L. R. 3 A. 469 : 1922 All. 429.**

———Ss. 11 and 12—*Endowment by Moghul Emperor—Subsequent management by the British —Allowance to descendants—Not assignable.*

An endowment made of the revenue of some villages by Akbar in favour of the descendants of a famous Saint, was taken over for management by the British Government, and out of the funds a portion was directed to be paid regularly in perpetuity to the descendants of the Saint. A suit was brought by the plaintiff to enforce his rights on a mortgage of this allowance by a descendant of the suit. *Held*, it was a pension within the meaning of S. 11 of the Pensions Act and as such the assignment was null and void under S. 12. 4 Bom. 432, followed. (*Lindsay and Gokul Prasad, JJ.*) HARNAM DAS *v.* FAIYAZI BEGAM. **44 A. 354 : L. R. 3 A 130 : 20 A. L. J. 172 : 4 U. P. L. R (A.) 48 : 1922 All. 22.**

PENSIONS ACT (XXIII OF 1871), S. 46.

———S. 11—*Political pension—No attachment.*

A political treaty pension cannot be attached in execution of a decree. (*Walsh, J.*) MAHFUZ HASAN *v.* MAZHAR ALI KHAN.
62 I. C. 273 : 3 U. P. L. R. (All) 11.

———S. 11—*Malikana allowance—Execution of decree.*

A Malikana allowance is in the nature of a pension and so cannot be attached in execution of a money decree. (*Knox and Griffin, JJ.*) LALMAN *v.* KALKA PRASAD.
8 A. L. J. 126 : 13 I. C. 194.

———S. 11—*Jagir—Political pension — Exempt from attachment.*

A jagir granted on political considerations is exempt from attachment whether or not it was granted for services rendered to the British Government. (*Martineau, J.*) NAND SINGH *v.* KAPURIA. **61 I. C. 895 (Lah.)**

———Ss. 11 and 12—*'Pension'—Meaning of.*

The word 'pension' involves the idea of a fixed periodical allowance of stipend and if it is granted for political consideration or for past services it cannot be assigned and comes within the protection afforded by S. 12. (*Scott-Smith and Shadi Lal, JJ.*) KARAR HASSAN *v.* MUSTAFA HASSAN. **86 P. R. 1914 : 26 I. C. 743 : 233 P. L. R. 1915.**

———S. 11—*Grant of land revenue—Liability for attachment.*

For the purposes of S. 11 a grant of land revenue is not a pension and is, therefore liable, to be attached in execution of a decree. The distinction drawn in the Act between pensions and grants of money and land revenue is not to be disregarded. 30 Mad. 153 ; 4 Bom. 432, Rel. upon. (*Oldfield and Seshagiri Aiyar, JJ.*) RAMA RAO *v.* KOTTIPI THIMMA REDDI.
54 I. C 331 : 11 L. W. 398.

———S. 11—*Wasika allowance—Arrears of—Whether can be attached.*

The arrears of wasika allowance accruing due in the life time of the wasikadar and paid after his death to his heirs cannot be attached in execution to satisfy the debts of the wasikadar in the hands of his heirs. (*Daniels, A. J. C.*) MOHAMMAD TAQI *v.* SAKINA BEGAM.
6 O. L. J. 137 : 49 I. C. 511 : 21 O. C. 329.

———S. 12—*Act if retrospective—Alienation before the Act—Validity of.*

The Pensions Act has not a retrospective effect and no alienations made before the Pensions Act came into force are invalid under S. 12 of the Act. (*Scott-Smith and Shadi Lal, JJ.*) KARAR HASSAN *v.* MUSTAFA HASSAN.
86 P. R. 1914 : 26 I. C. 743 : 233 P. L. R. 1915.

———Ss. 46 and 14—*Collector's certificate—Cancellation of, by Revenue Board—Order* ultra vires.

A Board of Revenue is not competent to revoke or cancel a certificate issued by a Collector under the Pensions Act. The rules issued by Government and printed at page 125 of the Boards

PERMANENT LEASE.

Standing Orders cannot be deemed to be framed under S. 14 of the Pensions Act and are *ultra vires.* (*Miller and Sadasiva Aiyar, JJ.*) SUBBA ROW *v.* RAMA ROW. 18 I. C. 353 : (1913) M. W. N. 374 : 25 M L. J. 155.

PERMANENT LEASE.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, S. 111, ETC.

PERMANENT SETTLEMENT.

——— *Land held from Government subject to survey and measurement—Reduction of rent.*

Land granted by Government at a rent increasing for a period of two years and afterwards subject to survey and measurement and the proprietary right which was under conditions generally applicable to owners of estates not permanently settled, is not a permanently settled area. (*Lord Moulton.*) KHETRAMONI DASI *v.* JIBAN KRISHNA KUNDU. 48 Cal 473 : 25 C. W. N. 361 : 48 I A. 39 : 33 C. L. J. 214 : 14 L. W. 248 : 60 I. C. 1 : 40 M. L. J. 232 (P.C.)

———*Object.*

The Permanent Settlement aims at confirming Zemindars in their holdings at a fixed rent and any assumptions made should justify the title rather than make it insecure. (*Lord Buckmaster.*) HARDES ACHARYYA CHOWDHURY *v.* SECRETARY OF STATE FOR INDIA. 22 M. L. T. 438 : 26 C. L. J. 590 : (1918) M. W. N. 28 : 43 I. C. 361 : 20 Bom. L. R 49 (P.C.).

PERMANENT TENANCY.

See (1) LANDLORD AND TENANT.
(2) TENANCY ACTS (LOCAL).

PERPETUAL INJUNCTION

See SP. REL. ACT, Ss 54, 55, ET SEQ.

PERPETUITY.

See T. P. ACT, S. 14.

PERSONA DESIGNATA.

See (1) DEED—CONSTRUCTION.
(2) WILL—CONSTRUCTION.

PERSONAL COVENANT.

See T. P. ACT, S. 40.

PERSONAL DECREE.

See CIVIL P. C., O. 34, R. 6.

PETROLEUM ACT (VIII OF 1899).

——— Ss. 11 and 15 (a)—*Possession.*

The word 'possession' in S. 15 (*a*) and 'amounts to keeping' within S. 11 which defines the quantity of petroleum, the keeping in excess of which amounts to an offence, must be understood with reference to S. 11 of the Act and a person receiving petroleum from the Company on the Railway premises will be adjudged guilty or not according as he is on the Railway premises with the permission of the Railway Company for a reasonable time or he uses it as a godown or storehouse for purposes of sale (*Abdur Rahim and Napier, JJ.*) *In re* SWAMINATHA AIYAR. 39 I. C. 995 : 18 Cr. L. J. 627 : (1917) M. W. N. 720.

POSSESSION—Burden of Proof.

PLACE OF PERFORMANCE.

See C. P. CODE, S. 16.

PLAINT.

See C. P. CODE, SS. 6 AND 7.

PLEA.

See (1) LIMITATION.
(2) LIMITATION ACT, S. 3.

PLEADER.

See (1) C. P. CODE, O 3.
(2) LEGAL PRACTITIONER.

PLEADER'S ACT (I OF 1846).

——— S. 6—*Pleader's fees—Assessment.*

For assessing the pleader's fees, an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist is regulated neither by S. 52 of Regulation II of 1827 nor by S 6 of the Pleader's Act, but by Rule 65 of the appellate side rules of the Bombay High Court. (*Batchelor and Rao, JJ.*) MANOHAR RAMCHANDRA HINGE *v.* COLLECTOR OF NASIK. 14 Bom. L. R. 1190 : 17 I. C. 964 : 37 Bom. 303.

PLEADER'S CLERK.

See LEGAL PRACTITIONER.

PLEADINGS.

See (1) C. P. CODE, Os. 6, 7 AND 8.
(2) PRACTICE.
(3) RELIEF.

PLEDGE

See CONTRACT ACT, Ss. 178—182.

PHYSICAL POSSESSION.

See POSSESSION.

POLICY OF INSURANCE.

See INSURANCE.

PORAMBOKE.

See (1) LANDLORD AND TENANT.
(2) MADRAS ESTATES LAND ACT.

POSSESSION.

See also (1) ADVERSE POSSESSION.
(2) CO-SHARERS.
(3) EJECTMENT.
(4) LIM. ACT, ARTS. 142 AND 144.

Burden of Proof.
Constructive Possession.
Co-sharers.
Evidence.
Meaning of.
Suit for.
Trespasser.
Miscellaneous

Burden of Proof.

——— *Burden of proof—Jungle lands.*

The person entitled to property is presumed to be in possession of jungle lands all along. (*Mr. Ameer Ali*). JAGADINDRA NATH *v.* HEMANTRA KUMARI. 15 C. W. N. 887 : (1911) 2 M. W. N, 101 : 10 M. L. T. 157 : 13 Bom. L. R. 806 : 14 C. L. J, 319 : 11. I. C. 542 : 8 A. L J. 1176 (P. C.).

———*Burden of proof—Suit—Plaintiff to prove a better title.*

POSSESSION—Burden of Proof.

In a suit for possession the plaintiff must prove a better title than the defendant. (*Knox, J.*) BANSIDHAR *v.* LAKSHIMI NARAIN.
11 I. C. 981 : 8 A. L. J. 849.

———*Burden of proof—Title, proof of.*

In a suit for possession it is for the party who comes into court to oust the other party from its possession to establish the alleged superior title. (*Shah Din, J.*) AMAR SINGH *v.* BHOLA.
26 I. C. 341 : 240 P. L. R. 1914.

———*Burden of proof—Defendants in possession for 12 years but land is uncultivated.*

If the defendants held the land uncultivated though for 12 years the plaintiff is presumably in possession of them. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) MURUGAPPA MUDALY *v.* PANAGANTI JAGANNATHA RAYANIM GARU.
30 I. C. 191.

———*Burden of proof—Suit—Proof by plaintiff of enjoyment and dispossession.*

Where plaintiff proves enjoyment and wrongful dispossession by the defendant he is entitled to a decree unless the defendant establishes his title. (*Abdur Rahim and Ayling, JJ.*) GOVINDA PADAYACHI *v.* DORAISWAMI PADAYACHI.
9 I. C. 595 : 9 M L. T. 409

———*Burden of proof—Dispossession—Land unfit for enjoyment.*

Where land is shown to have been unfit for actual enjoyment and it continued to be so till within twelve years before suit, the plaintiff was presumably in possession of it until the contrary is shown. (*Das and Adami, JJ.*) BRAHMANAND SINGH *v.* DUND BAHADUR SINGH.
2 U. P. L. R. (Pat.) 111 : 1 P. L. T. 229 : 56 I. C. 344 : 1920 Pat 245

———*Burden of proof.*

The person out of possession must prove the nature of the transaction by which the person in possession obtained that possession. This rule does not apply when the original relation of the parties is that of mortgagor and mortgagee. The party who alleges that the said relation has ceased must prove it. (*Twomey, J.*) MAUNG CHIT TON *v.* MAUNG AUNG.
17 I. C. 913: 5 Bur. L. T. 161.

Constructive Possession.

———*Constructive dispossession.*

The doctrine of constructive dispossession should not be extended. (*N. R. Chatterji and Suhrowardy, JJ.*) ARMAN PEADA *v.* MANIK SARKAR. 62 I. C 690

———*Constructive possession — Unoccupied land.*

Where a land is unoccupied, the possession must be deemed to be with the person having lawful title thereto (*Sanderson, C. J. and Mookerjee, J.*) PROMOTHA NATH ROY *v.* KISHORE LAL SAHA. 21 C. W. N. 304 : 38 I. C. 547 : 25 C L. J. 133.

———*Constructive possession—Symbolical possession—Evidence of—Legal fiction—Value of.*

A formal delivery of symbolical possession is conclusive evidence that possession was delivered but not that it continued. It is but a legal fiction in most cases and yet is valuable in that it affords a starting point for limitation. (*Coxe and Chatterjea, JJ.*) DEO NANDHAN PRASAD *v.* UDIT NARAYAN SINGH. 23 I. C. 298 : 18 C. W. N. 940.

———*Constructive possession—Rightful owner presumed to be in possession.*

Where neither party has had complete possession over a disputed land the possession in the eyes of law must be with the rightful owner. (*Mookerjee and Carnduff, JJ.*) SECRETARY OF STATE FOR INDIA *v.* KAILKA PROSAD MOOKERJEE.
14 I. C. 609 : 15 C. L. J. 281.

———*Constructive possession — Symbolical possession.*

Symbolical possession in execution proceedings to which judgment-debtor is a party is to be deemed equal to actual possession as against them. (*Abdul Raoof, J.*) SALAMAT ALI *v.* ALI AKBAR. 55 I. C. 646.

———*Constructive possession follows title.*

If a land is such over which nobody can exercise possession, possession would ordinarily follow title. (*Coutts and Das, JJ.*) LALA GIRI PRASAD *v.* JUGUL KISHORE 1922 P. 503.

———*Constructive possession—Possession of part whether possession of whole.*

Possession of part is constructive possession of the whole which is an incident of ownership resulting from title. This doctrine does not apply where the occupant depends on ground of possession only without proving title. (*Miller, C. J. and Coutts, J.*) KUMAR PREMATHA NATH *v.* MEIK.
1 Pat. L. T. 760 : 5 Pat. L. J. 273 : 56 I. C. 184 : 1920 Pat. 146.

Co-sharers.

———*Co-sharers - Exclusion.*

Possession of co owners is *prima facie* joint. One co-sharer seeking to defeat another's claim must prove special circumstances justifying exclusive occupation of the joint property. A co-sharer ousted by another from joint property can recover joint possession. (*Sanderson, C. J. and Mookerjee, J.*) JATINDRANATH ROY *v.* SABIDANNESSA KHATUN.
20 C. W. N. 1258 : 35 I. C. 36 : 24 C. L. J. 165.

———*Co-sharers—Existence of tenants settled by co-sharer—If sufficient answer to claim for khas—Occupancy rights.*

The mere fact of the existence of tenants settled by another co sharer is not sufficient answer to a claim for joint khas possession unless rights have been acquired which would form a complete defence, *e. g.*, occupancy right. (*Jenkins, C. J. and Chatterjea, J.*) ATALBAJADAR *v.* MADANDAI. 13 I C. 694.

———*Co-sharers—Building on common land—Remedy open to the other.*

Where one of the co-owners builds on the common land without the consent of the rest, the building should not be demolished unless the remaining co-owners can prove that the action has caused them such a material injury as cannot be

POSSESSION—Co-sharers.

remedied by partition of the common land. (*Broadway and Abdul Raoof, JJ.*) KALA SINGH *v.* KAHNA. **60 I. C. 531 : 3 U. P. L. R. (Lah.) 22.**

——— *Co-sharers—Joint possession--Purchaser from tenant-in-common.*

Where at a court sale the purchaser buys the rights of some tenants-in-common who were never in possession of piece of land sold, a decree for joint possession ought not to be passed in favour of the purchaser. 18 C. 10, Rel. 26 B. 141, Dist. (*Sadasiva Aiyar and Tyabji, JJ*) CHAKRAPANI MISRO *v* SADASIVA SODANGI.

14 M. L. T. 346 : 21 I. C. 314 : 25 M. L. J. 352.

———*Co-sharer—Ouster.*

Cases between co-owners should be decided according to justice, equity and good conscience. Ordinarily one co-sharer is entitled to keep possession of a portion of the joint property and to enjoy it in exclusive possession so long as he does not deny the title of this co-owner or oust him in the eye of law. The remedy of the co-owners in these circumstances is to apply for partition or compensation. (*Mullick and Atkinson, JJ.*) ATUL CHANDRA MITRA *v.* MIRTHUNJAI BOSE. **46 I. C. 162 : 3 Pat. L. J, 426.**

Evidence

——— *Evidence—Possession.*

In a suit for possession of land by the Secretary of State, it is not necessary to give any further evidence of possession than that of the plot of the land in dispute is a part of *nazul* lands belonging to Government. (*Piggott, J.*) INAYAT HUSSAIN *v.* SECRETARY OF STATE.

26 I. C. 86 : 12 A L. J. 894.

——— *Evidence of—Proof.*

So long as possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right rather than to a right contradicting ownership. 11 B. 422, Ref. (*Stanley, C. J. and Griffin, J.*) JAGDIP NARAIN SINGH *v.* BILLAR SINGH.

33 All. 463 : 9 I. C. 572 : 8 A. L. J. 324.

———*Evidence—Length of possession.*

An order as to mutation of names is not sufficient evidence of the actual period of possession. (*Stanley, C. J. and Banerjea, J.*) AMIR ALI *v.* KARIMALI. **9 I. C. 456.**

———*Evidence—Decree in Land Registration Proceedings does not prove possession.*

A decree in a land registration proceeding does not prove the decree-holder's possession. It proves that the Collector held that he had a right to possession (*Cuming, J.*) SEBA DAS JANA *v.* NIRODA BALA DASI. **63 I. C. 602.**

———*Evidence—Fire-arms.*

The knowledge of the existence of fire-arms found in a hut on search should not, without further evidence, be imported to any other person than the occupier of the hut nor would that presumption operate even against him if it could be proved that it was possible the arms might be there without his knowing it. (*Woodroffe and Beachcroft, JJ.*) ROMESCHANDRA *v.* EMPEROR.

18 C W. N. 498 : 23 I. C. 985: 15 Cr. L. J. 385 : 41 Cal. 350.

POSSESSION—Meaning of.

———*Evidence—Khewat—Entries in.*

An entry in the khewat is *at least* prima facie evidence of possession and if there is nothing to show any alteration in the entry the legitimate presumption arises that the state of things indicated by the entry continued up to the date of the death of the person, whose name appears in the khewat it not beyond it, when possession may devolve on his heirs 9 O. C 160, *Asher* v. *Whitelock* (1865) 1 Q. B 1, Ref. (*Wazir Hasan, A. J. C.*) GHULAM SARWAR KHAN *v* MAHOMED ALI KHAN. **8 O. L. J. 609 : 1922 Oudh 98.**

Meaning of.

——— *Meaning of.*

Possession is a legal expression and can be proved in many ways. A man can be in possession by cultivating himself through his tenants. (*Richards, C. J. and Rafique, J.*) SHEOPUJAN *v.* SOHBAT. **36 I. C. 427 : 14 A. L. J. 1066.**

———*Meaning of—Ownership, differs from possession.*

Ownership and possession are two distinct juristic conceptions and in every transfer of ownership from one person to another by act of parties a transfer of possession is not necessary. (*Karamat Hussain and Chamier, JJ.*) MUHAMMAD TALIB HUSSAIN *v.* INAYAT JAN.

33 All. 683 : 11 I. C. 762 : 8 A. L. J. 746.

———*Meaning of—Physical contact.*

Not merely physical contact, but mere possibility of the person dealing with a thing exclusively constitutes possession. (*Heaton and Pratt, JJ.*) EMPEROR *v.* LALLU WAGHJU.

21 Bom. L. R. 251 : 50 I. C. 999 : 20 Cr. L. J. 391 : 43 Bom. 550.

———*Meaning of—Evidence.*

Meaning of possession is not equivalent to actual user. In cases of waste, jungle and diluviated lands evidence of possession is not the same as in the case of a house or cultivated field. (*Chatterjee and Panton, JJ*) RAKHAL CHANDRA GHOSE *v.* DURGA DAS. **26 C. W. N. 724 : 1922 C. 557.**

———*Meaning of.*

Possession means the physical possibility of a person dealing with a property as he likes and not physical possession. (*Johnstone and Scott-Smith, JJ.*) BAHADUR CHAND *v.* NAINA MAL.

231 P. L. R. 1914 : 133 P. W. R. 1914 : 25 I. C. 35 : 14 P. R. 1915.

———*Meaning of--Lawful possession--What is.*

Lawful possession means possession which has been got neither by force nor fraud. (*Lindsay, J. C.*) AZIZ ULHAK *v.* MARIYAM BIBI.

1 O. L. J. 225 : 24 I. C. 45 : 17 O. C. 157.

———*Meaning of—Dispossession—What constitutes.*

"Dispossession" implies ouster, and the essence of ouster lies in that the person ousting is in actual possession. (*Das and Adami, JJ.*) BAHADUR ALI KHAN *v.* SECRETARY OF STATE FOR INDIA. **61 I. C. 78 : 2 Pat. L. T. 133.**

POSSESSION—Meaning of.

——*Meaning of—Juridical possession.*

Possession could not be said to be juridical where it is taken behind the deft.'s back and he did not acquiesce therein but sought to evict the plaintiff as soon as he discovered his dispossession 5 Bom. 208, Ref. to (*Fratt, J. C. and Crouch, A. J. C.*) VISHUNDAS *v.* MUNICIPALITY OF HYDRABAD. **34 I. C. 494 : 9 S. L. R. 220.**

Suit for.

——*Suit for—Parties—Action based on forfeiture.*

When a suit for possession is based upon forfeiture of term, all persons in possession including constructive possession, at the date of suit should be joined as parties. (*Rankin, J.*) EZRA *v* GUBBAY. **60 I C. 969 : 47 Cal. 907.**

——*Suit for—Title admitted—Deft. to prove tenancy—Burden of proof—Land in suit contiguous to holding of deft.—Shifting of onus.*

The plff.'s title as patnidar, being admitted, the deft. cannot resist plff.'s claim for khas possession, unless he can show that he has a tenancy entitling him to retain possession. The mere fact that the deft. holds some land as tenant under the plff. does not shift the burden of showing that, in respect of any other land which the deft may be found to be in possession of, he has no right as a tenant. If the lands sought to be recovered are admitted by the plff. to be contiguous to the holding of the defts. or where they have come to the possession of the defts. by encroachment, the plff. must prove that the lands in suit are outside the holding of the defts. (*N. Chatterjea, J.*) GOPINI DEBI *v.* LOKENATH. **11 I. C. 696 : 19 C. W. N. 140.**

——*Suit for—Possessory title—Rights under.*

A person who has a merely possessory title is entitled to a decree for possession against a person who has no title. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) NEELAGARA LINGAMMA *v* KINNAHAL HAMPIAH. **17 I. C. 167.**

——*Suit for*—Riavas.

There can be a suit between *riayas* for possession of village land appurtenent to a dwelling house where one has ousted the other. (*Stuart, J. C.*) RAM SARAN *v.* SAHEBDIN LAL. **37 I. C. 116 : 19 O. C. 169.**

——*Suit for—Right of possessor to sue in ejectment.*

Possession is good title against all persons except the rightful owner and a suit in ejectment may be maintained against any person other than such owner. (*Lindsay, A J. C.*) RAMZAN KHAN *v.* MUHAMMAD YAKUB KHAN. **11 I. C. 537.**

Trespasser.

——*Trespasser.*

The true owner of property can retain possession though obtained from a trespasser by force or other unlawful means without bringing himself within the law of estoppel. (*Russel and Chandavarkar, JJ.*) HILLAYYA *v.* NARAYANAPPA JINNAYYA. **36 Bom. 185 : 12 I. C. 913 : 13 Bom. L. R. 1200.**

POSSESSION—Miscellaneous.

——*Trespasser—Entry by.*

A mere trespasser cannot obtain possession in law, by an act of entry or by the continuance of that act so long as the act is disputed and resisted. (*Sadasiva Aiyar, J.*) DHARMALINGHA MUDALI, *In re* **1 L W. 911 : 26 I. C. 171 : 15 Cr . L, J. 723 : 39 Mad. 57.**

——*Trespasser—Presumption.*

Presumption of possession of whole existing in favour of person having title and possessing part does not apply to trespasser claiming adverse possession. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) KARIA KOWNDEN *v.* RAGHAVA REDDI. **23 I. C. 520 : 1 L. W. 410.**

——*Trespasser—Suit against, by person in possession—Previous possession—Ground.*

A person in possession of property for a long time, dispossessed by a trespasser, is entitled on the strength of his previous possession to recover possession of the same from a mere trespasser. (*Chamier, J. C.*) NAGESAR *v.* PURAN DEI. **11 I. C, 279.**

——*Trespasser—Disturbance of defendant of plaintiff's long-continued possession—Effect on plaintiff's title.*

Disturbance of long continued possession of plaintiffs by the defendants may be sufficient to entitle the plaintiffs to a decree for possession even if they are not able to sufficiently establish their possession on rights alleged by them (*Chamier, J. C.*) HUB LAL *v.* JAGESHAR. **11 I. C. 94.**

——*Trespasser.*

As against a trespasser, possession is title even though it be for less than 12 years if peaceful. (*Chamier, C. J. and Sharfuddin, J.*) SAHODRA KUAR *v.* GOBERDHAN TIWARI. **2 Pat. L. J. 280 : 39 I.C. 458: 1 Pat. L. W. 327 : 1917 Pat. 164.**

——*Trespasser—Ejectment.*

A person in possession though not owner can eject a mere trespasser and the plea of *jus tertii* does not stand unless the trespasser claims through such third person. (*Atkinson, J.*) CHANDI MISSER *v.* NARSINGH ROY. **39 I. C. 26.**

Miscellaneous.

——*Right to—Simple mortgagee not entitled to possession.*

It is well settled that an adverse possession against a mortgagor does not affect a simple mortgagee who as such is not entitled to possession. 44 Cal. 425 Ref. (*Mookerjee and Panton, JJ.*) SITAL CHANDRA MAJHI *v.* PARBATI CHARAN CHAKRABARTI. **35 C. L. J. 1 : 1922 Cal 32.**

——*Grazing cattle if an act of possession.*

The grazing of cattle occasionally by a person will not amount to an act of possession. Whether an act amounts to an act of possession depends upon the facts of the case 7 I. C. 700, Foll. (*Mookerjee and Carnduff, JJ.*) DEBENDRA NATH *v* BINDHUBALA DASI. **13 I. C. 125.**

——*Enforcement of, by a person out of possession.*

A person out of possession must enforce his right, if any, in lawful manner and not by use of

POSSESSION—Miscellaneous.

criminal force, (*Lindsay, A. J. C.*) SARABDAWAN SINGH *v.* EMPEROR. 17 O. C. 21: 15 Cr. L. J. 232: 23 I. C. 184 : 1 O. L. J. 527.

——*Revenue records—Entry.*

An entry in the revenue records does not transfer possession. (*Hayward, J. C. and Boyd, A. J. C.*) SECRETARY OF STATE *v.* MUSHTAKSING. 24 I. C. 813 : 7 S. L. R. 169.

POSSESSORY LIEN.

See POSSESSORY RIGHT.

POSSESSORY RIGHT.

——*Incorporeal hereditament.*

There cannot be a possessory right with regard to incorporeal hereditaments. If the enjoyment has not ripened into an easement, then the person in actual enjoyment has no remedy against any interference. 38 M. 280, Full 34 M. 173, Doubted (*Abdur Rahim and Napier, JJ.*) MAHANKALI LAKSHMIAH *v.* KARNAM NARAYANAPPA. (1918) M. W. N. 276: 45 I. C. 80: 23 M. L. T. 337 : 34 M. L. J. 425.

——*Incorporeal rights—Easement.*

An easement is something belonging, attached, adhering, appurtenant to the dominant estate itself and not to the owner thereof personally. Easements are not capable in an exact sense of being possessed. There cannot be a possessory right in respect of an easement before the full period of adverse enjoyment. (*Miller and Sadasiva Aiyar, JJ.*) NARASAPPAYYA *v.* GANAPATHI RAO. 29 I.C. 255 : 38 Mad. 280.

——*Heritability.*

The possessory right of a trespasser is heritable. (*Wazir Hasan, A. J. C.*) GHULAM SARWAR KHAN *v.* MAHOMED ALI KHAN. 1922 Oudh 98.

POSSESSORY SUIT.

See POSSESSION—SUIT FOR.

POSSESSORY TITLE.

[ARRANGED ACCORDING TO PROVINCES.]

——*Good against all but true owner.*

A person in possession of property without title has a good title against the whole world except the true owner. The possessory title is heritable. (*Lindsay, J.*) BAZMIR KHAN *v.* RUSTAM KHAN. 54 I. C. 398.

——*Good against all except true owner.*

The person in possession has stronger claim when both the litigants are parties to an invalid transaction. (*Walsh, J.*) NAJAF KHAN *v* GIRDHARIA. 32 I. C. 593.

——*Trespasser—Person in possession dispossessed by stranger without title.*

A person in possession though under a defective title cannot be dispossessed by a stranger without title. (*Richards, C. J. and Banerjea, J.*) UMRAO SINGH *v.* RAMJI DAS. 36 All 51: 22 I.C. 622 : 11 A. L. J. 1012.

——*Trespasser if can set up right of third party.*

A mere possessory title, except under the provisions of S. 9 of the Specific Relief Act, will not, in India, support a suit in ejectment. A trespasser can therefore set up *jus tertii* successfully unless

POSSESSORY TITLE.

plff. proves his ownership. (*Fletcher and Smither, JJ.*) GNENDRA NATH SANYAL *v.* MOHENDRA MOHINI DEBYA. 42 I. C 884.

——*Sufficiency of—Suit on—Maintainable.*

A person who has been in possession and has a title to possession, if dispossessed, has a right to possession. (*Jenkins, C. J. and Mookerjee, J.*) ADHAR CHANDRA PAL *v.* DIBARKAR BHUYAN. 25 I. C. 76 : 41 Cal. 894.

——*Decision on—If evidence of title.*

A decree based upon possessory title is *prima facie* evidence of title against a stranger. (*Jenkins, C. J. and Chatterjee, J.*) KOILASH CHANDRA SANTRA *v.* GAJENDRA NATH MISRA. 13 I. C. 407: 15 C. L. J. 1.

——*Good against all but true owner.*

Whether possession originated lawfully or not the person in possession is entitled to the property and the trees thereon as against all the world except the true owner. (*Broadway, J.*) SIDHU *v.* DHANNA. 67 I. C. 948 : 2 Lah. L J. 271.

——*Dispute as to—Several persons claiming to be owners.*

Where, on the death of a person, several persons claim to be entitled to the property and put their locks to the house, none of them can be said to have a possessory title. (*Broadway and Abdool Raoof, JJ.*) TIRATH RAM *v* KABAN DEVI. 1 Lah. 588 : 60 I. C. 101 : 3 Lah. L. J 35.

——*Possession after scramble, whether sufficient for decree.*

Where both plff. and deft. put a lock to the door of the property in suit plff.'s possession is not peaceful and exclusive so as to entitle him to a decree on the basis of possessory title. Mere possession which is sufficient under S. 9 of the Sp. Rel. Act is not sufficient. (*Broadway and Raoof, JJ.*) TIRATH RAM *v.* MUSSAMMAT KAHAN DEVI. 60 I. C. 101: 1 Lah. 588.

——*Sufficiency of—Co-sharers—Ejectment.*

The peaceful possession of a co-sharer of a plot of a common land will, if disturbed by other sharers, give him a right to sue on his possessory title. (*Scott-Smith, J.*) GANESHA MAL *v.* IBRAHIM. 53 I. C. 569: 104 P. R. 1919.

——*Mere user—Right to sue does not exist.*

A mere user which has not ripened by prescription will not give rise to any right upon which an action can be founded unless some kind of possessory title exists in plff.'s favour. (*Spencer and Ramesam, JJ.*) KAPNIAH SIVANANJIAH *v.* SITHAY GOUDAR. 14 L. W. 449 : 70 I. C. 367: (1921) M. W. N. 510: 41 M. L. J. 490.

——*Good against all but true owner.*

A person in actual possession has a possessory title against the whole world and can only be dispossessed by the true owner and those claiming under him. (*Wallis, C.J and Seshagiri Aiyar, J.*) UNNI MOHIDIN *v.* POCKER. (1920) M.W.N. 698: 28 M. L. T. 342. 12 L. W. 598: 60 I. C. 109 : 39 M. L. J. 626.

——*Receipt of rents.*

Possession by receipt of rents is a possession known to and respected by law and if that is inter-

POSSESSORY TITLE.

fered with by a rival landlord a suit is maintainable without impleading the tenants on the land. (*Oldfield and Seshagiri Aiyar, JJ.*) CHERIA KUNHI POCKER *v.* MALIKAIAMMAL. **10 L. W. 496: 26 M. L. T. 359: (1919) M.W.N. 815 : 53 I. C. 771: 37 M. L. J. 544.**

———*Good against all but true owner.*

A person in possession without a title has the right to maintain his possession against all the world except the rightful owner. The minor possession is itself a root of title and the prior possessor has all the rights of a true owner except of course against the owner himself. (*Ayling and Srinivasa Iyengar, JJ.*) SUBBAIYA PANDARAM *v.* MAHOMED MUSTAFA MARAKAYAR. **21 M. L. T. 62 : 5 L. W. 690: 40 I. C. 50 : 32 M. L. J. 85.**

———*Incorporeal right—Easement—Water—Right to take—Channel running through Govt. lands—Non-user for some years.*

A person having enjoyed an easement for less than the statutory period can obtain an injunction against a trespasser. 5 M. L. J. 24 ; 34 M. 173, Foll. (*Seshagiri Aiyar and Napier, JJ.*) ANANTHA DESIKACHARIAR *v.* VISWANATHA MUDALI. **30 I. C. 989 : 18 M. L. T. 515.**

———*Sufficiency of—Obstruction—Damages.*

Where plaintiff proved only a mere possessory right over a chawl for a period of 40 years, *Held* it amounted to sufficient possession to entitle the plaintiff to claim damages for obstruction in the enjoyment of that right. (*Wallis and Seshagiri Aiyar, JJ.*) KUTHIARVATHATH PRABHAKARAN *v.* SESHAN PATTAR. **27 I. C. 772.**

——— *Trespasser — Suit against — Interest enforceable by suit.*

Mere possession of property gives an interest enforceable in a suit against a trespasser. *Asher v. Whitlock*, 1 Q.B. 1 ; 12 A. 51 (P.C.) ; 26 M. 514, Fol. (*Ayling and Hannay, JJ.*) MARIKAL SERVAI *v.* THAMBUSWAMI SERVAI. **1 L. W. 853 : 25 I. C. 934 : (1914) M. W. N. 784.**

———*Burden of proof—Government.*

The Government must prove prior possession in itself or disprove the presumption of title in plaintiff arising from his possession at the time of suit. The onus is not discharged by proof that the Government had levied penal assessment on the land in suit. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KHANTAMPALI *v.* SECRETARY OF STATE FOR INDIA. **16 I. C. 589 : (1912) M. W. N. 881.**

———*Trespasser—Suit against.*

A title by adverse possession though not yet perfected by the lapse of 12 years is heritable, transferable and divisible. But one trespasser cannot be allowed to add to his possession the possession of another previous trespasser whom he dispossessed. (*Stanyon, A. J. C.*) GANNO *v.* BENI. **43 I. C. 943 : 14 N. L. R. 82**

———*Good against all but true owner.*

Possession is good title against all persons except the true owner. In a suit for possession on the ground of dispossession, the plaintiff must show that he was in continued possession before defendant's entry. (*Mitra, A. J. C.*) GANAJI *v.* DHANSINGH. **27 I. C. 977 : 11 N. L. R. 31.**

POST OFFICE ACT (VI OF 1898), S. 44.

———*Sufficiency of—Infringement—Suit on, when maintainable—Suit for declaration against tenants regarding their status.*

A mere possessory title will not suffice for maintenance of a suit against tenants, for a declaration that they are not under-proprietors. Also probability of some danger arising in the future to the exercise of possessory rights is not sufficient for this purpose. An application by tenants to the revenue Court to be recorded as under-proprietors does not amount to an invasion of,or interference with, the rights of a person whose only right is merely to remain in possession. (*Lyle, A. J. C.*) ANNAPURNA KUAR *v.* SHAMBU NATH. **53 I. C. 746 : 6 O. L. J. 499.**

———*Trespasser.*

Plaintiff's previous possession even for a shorter period than the statutory period entitles him to a decree against the trespasser. (*Sultan Ahmad, J.*) AJOODHYA SINGH *v.* AWADH BIHARI DAS. **57 I. C. 320 : 2 U. P. L. R. (Pat.) 167.**

———*Trespasser—Maintainability.*

Possession is not merely evidence of ownership but is also the foundation of a right to possession.. A possessor has better title in law against a mere trespasser. 8 Bom. L.R. 96: 41 C. 394; 39 I. C. 458, Ref. (*Mullick and Atkinson, JJ.*) SHAIKH MIRZA *v.* ABDUL GANI. **43 I. C. 338: 4 Pat. L. W. 130.**

———*Burden of proof.*

A person dispossessed but not suing under S. 9 of the Sp. Rel. Act, must prove a title which is based on adverse possession and must be for at least 12 years. (*Saunders, J. C.*) NGA THA ZAN *v.* SUNDAR SINGH. **50 I. C. 575: 3 U. B. R. (1918) 125.**

———*Good against all but true owner.*

A person in possession of land is entitled to retain possession of it until some one who can show that he has got a good title sues him and gets a decree. (*Fox, C. J.*) MAUNG TE *v.* MAUNG OH. **8 Bur. L. T. 127: 29 I. C. 894: 8 L. B. R. 165.**

———*Incorporeal right—Enjoyment of water course—Injunction.*

Where the plaintiffs were in enjoyment of a water-course for less than the prescriptive period sufficient to give them an easement they are entitled to an injunction restraining a trespasser from interfering with their enjoyment. (*Fawcett, J. C. and Crouch, A.J. C.*) GOBIND RAM *v.* SABGHATULLAH. **27 I. C. 999 : 8 S. L. R. 218.**

POST DIEM INTEREST.

See INTEREST.

POSTHUMOUS SON.

See HINDU LAW—SUCCESSION.

POST OFFICE ACT (VI OF 1898).

———S. 44 (1)—*Money remitted through post office—Ownership of—Attachment.*

Money remitted by money order through the Post Office does not cease to be the property of the remitter until it is actually paid to the remittee. (*Young, J.*) W. CHANCE *v.* BISWANATH. **52 I. C. 925 : 12 Bur. L. T. 105.**

POST OFFICE ACT (VI OF 1898), S. 52.

——S. 52—*Suspicion, if ground for decision.*

Where the only evidence against the accused charged with misappropriating a Telegraphic Money Order is that the account contained entries of delivery on dates different from the actual dates of delivery it simply creates suspicion and is not sufficient to prove misappropriation. (*Ayling, J.*) KUPPILI PRAKASA RAO, *In re.*

26 I. C. 307 : 16 Cr. L. J. 3.

POUNDAGE.

See (1) C. P. CODE, O 21, R. 93.
(2) MADRAS CIVIL RULES OF PRACTICE.

POWER OF ATTORNEY.

See also LEGAL PRACTITIONER.

——*Construction—Excess of authority.*

Where an act purporting to be done under a power of attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. 1893 A.C. 170, Foll. (*Mr. Ameer Ali.*) BANK OF BENGAL *v.* RAMANATHAN CHETTY. **43 Cal. 527 : 20 C. W. N. 329 : 3 L. W. 210 : 19 M. L. T 176: (1916) M. W. N. 150 : 14 A. L. J. 217 : 23 C. L. J. 348 : 18 Bom L R. 387 : 9 Bur. L.T. 1 : 8 L. B. R. 536 ; 43 I. A. 48 : 32 I. C. 419 : 30 M. L, J. 232. [Reversing 23 I. C. 516 : 7 Bur. L, T. 126.] (P. C.)**

——*Construction—Authority to compromise suit.*

A power of attorney authorising the agent to manage the business of the principal, to institute suits and oppose all suits that might be brought by or against the principal in respect of the business does not confer on the agent the power to compromise a suit. (*Mookerjee and Chatterjee, JJ.*) CHATTERJEE BRAHMIN *v.* DURGA DUTT AGARWALA. **23 C. L. J. 436 : 34 I. C. 394 : 20 C. W. N. 943**

——*Special—Genuineness—Registration.*

Though registration of special power of attorney is not compulsory yet the court is not bound to presume its genuineness if registered. (*Chatterjee and Beachcroft, JJ.*) MOHESH CHANDRA ADDY *v.* PANCHU MUDALI. **43 Cal. 884 : 23 C. L. J. 297 : 32 I. C. 395 : 20 C. W. N. 287.**

——*Constructions—Power to execute deeds of sale if includes to execute agreement for sale.*

A power given to an attorney to execute deeds of sale does not authorise him to execute agreements to sell. (*Mookerjee and Carnduff, JJ.*) JANKI PRASAD SINGH *v.* YAHEIA HOSSAIN.

13 I. C. 637 : 16 C. L. J. 119.

——*Construction—Power to carry on business, if includes power to enter into forward contracts.*

By a power of attorney the deft. empowered his manager to contract, superintend and carry on the business of general merchants in Singapore. The manager entered into forward contracts with the plff. in respect of sugar. The deft.'s firm was accustomed in Calcutta to enter into forward contracts in the sugar trade, *Held* that the manager had sufficient authority to enter into the contract sued upon. (*Harrington, J.*) SASOON & CO. *v.* ANGULLA & CO.

10 I. C. 895.

——*Construction of—Appeal if part of proceeding to recover debt.*

Where the manager of a bank is authorised by a Power-of-Attorney to take and use all lawful proceedings and means for recovering debts and advances and to commence, prosecute and defend at law, all actions, suits, claims, and disputes, the powers are wide enough to include the power to prefer an appeal. (*Martineau and Abdul Quadir, JJ.*) BHARAT NATIONAL BANK *v.* MOHANLAL.

53 I. C. 748.

——*Revocation.*

Where a power-of-attorney was given to the plaintiffs to recover all sums due to the grantor of the power under a contract with the defendants for doing certain work and under which the defts. are to pay the plffs. only after the production of the power which is to remain in force till the completion of the work under the contract, *Held*, that the deft.'s agent was not justified in making payments to the grantor of the power after production of it by the plff. to the defts., even though the grantor revoked the power afterwards while the work was being done. (*Chevis and Leslie Jones, JJ.*) BUTAMAL LACHMAN DAS *v.* SECRETARY OF STATE. **105 P. L. R. 1917: 40 I. C. 280 : 86 P. W. R. 1917.**

——*Construction—Agent—Compromise.*

Where a power-of-attorney was executed on behalf of one of the plffs. audhorising him specifically to engage a pleader to present applications to court and to refer to arbitration, *Held*, that the power did not confer an authorising upon him to put in a compromise and that the power to compromise or confess judgment was not *ejusdem generis* with the powers set forth by the powers of attorney. 50 P. R. 1898, Foll. (*Johnstone and Shah Din, JJ.*) BISHNA *v.* RATTANI.

20 P. W. R. 1912 : 13 I. C. 92 : 28 P. L. R. 1912.

——*Construction—Rules of.*

Power-of-attorney should be strictly construed and general powers of borrowing should be restricted to matters *ejusdem generis* with those already stated. (*Seshagiri Aiyar and Napier, JJ.*) KRISHNAN KIDAVU MEPPAT PARKUM ANANDRAVAN *v.* RAMAN. **38 I.C. 638: 39 Mad. 918.**

——*Construction.*

Where a power-of-attorney allowed an agent "to conduct and manage the estate property, moneys, affairs, concerns of the Zamindar and in all respects as fully and absolutely as the principal himself and to do all such acts and deeds whatever as may be considered requisite for the above purpose as amply and effectually as the principal could do in his own person" the words are wide enough to empower the agent to assign a decree to another even for less than the decree amount. (*Sadasiva Aiyar and Spencer, JJ.*) LINGAM KRISHNA BHOOPATHI DEO GARU *v.* RAJAH OF VIJIANAGARAM. **38 Mad. 832 : 15 M. L. T. 143 : 23 I. C. 235: 26 M. L. J. 185.**

POWER OF ATTORNEY.

———*Construction.*

A power-of-attorney must be construed strictly. Such a construction would not prevent the exercise of all powers necessary and incidental to the powers expressly conferred. A power-of-attorney conferring the right to execute a decree does not confer a right to assign the decree. Power expressly conferred in a power-of-attorney to execute the decree does not imply any power to transfer a decree for consideration. A power-of-attorney provided "to execute all decrees in the name of my father or in any other name on my behalf or otherwise to attach and realize all moneys due thereon". *Held*, that the agent acting under the power could not assign the decree. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) PALANIAPPA CHETTIAR *v.* ARUNACHELLAM CHETTIAR. **12 M. L. T. 528: (1912) M. W. N. 1204: 17 I. C. 139: 23 M. L. J. 595.**

———*Construction— Authority to manage—Jagir—Power to defend suit, and make admissions.*

A power-of-attorney should be strictly construed. A power of authority authorising a person to look after the management of a minor's jagir does not, in the absence of express terms, empower the agent to defend the owner's title to the jagir in a suit. Any admission made by such agent, in the course of a trial is not binding on the owner. (*Prideaux, A. J. C.*) NAZAR ALI *v.* ASHRAF ALI. **47 I. C. 528.**

———*Construction—Conduct of suit—Oath.*

An agent who is empowered to conduct a suit in any manner he may deem fit even to the extent of withdrawing it or entering into a compromise has power to bind his principal by an agreement to abide by a special oath entered into with the opposite party. (*Kanhaiya Lal, J. C.*) JHABBU *v.* ZAHID ALI. **22 O. C. 181 : 53 I. C. 453 : 1 U. P. L. R. (J.C.) 89.**

———*Construction.*

A lady is not liable on a pro-note executed by her agent authorised to borrow on her behalf only for necessity where he did not purport to borrow on her behalf or for actual necessity (*Stuart, J. C.*) MUHAMDI *v.* DURGA PRASAD. **40 I. C. 452 : 4 O. L. J. 299**

———*Strict construction—Power to sign a mortgage does not include power to contract debt.*

Powers of attorney should be strictly construed. A power to sign a mortgage does not carry with it a power to contract a debt on a mortgage or enter into the transaction but a power to execute a mortgage carries with it the power to enter into the transaction itself. 6 C.L. J. 493 Dist. (*Coutts and Das, JJ.*) RAM LAL SINGH *v.* MT. BIBI SHAHRUNISSA. **3 Pat. L. T. 442 : 1922 P. 559.**

———*Construction — Scope of authority — Mortgage—General power to—Power to pass a pro-note.*

A general power to sell mortgage, or pledge property implies a power to borrow money on mortgages on the principal's account, and to create an equitable mortgage by deposit of title deeds, but not to sign promissory note executed. (*Fox, C. J. and Hartnoll, J.*) M. A. R R. M. R. M. CHETTY *v.* BADIER RAHQMAN CHOWDRY. **36 I. C. 19 : 9 Bur. L T. 166.**

POWERS.

———*Construction.*

Powers of attorney are to be construed strictly. If an act is challenged as being in excess of the power it must be shown that the authority is to be found in the four corners of the power either expressly or by necessary implication (1893) A. C. 170 Ref. *Per Twomey, J.*—A power to sign accommodation notes may well be inferred from a power to sign promissory notes jointly with others. (*Hartnoll and Twomey, JJ.*) BANK OF RANGOON, LTD *v.* SOMASUNDARAM CHETTY. **8 L. B. R. 168 : 26 I. C. 253 : 8 Bur. L. T. 1.**

———*Construction.*

Power-of-attorney must be construed strictly and unless an express power is given to an agent to enter into contracts of guarantee on behalf of his principal or to execute negotiable instruments for his principal jointly with others the person alleging such power must show that the agent had in fact authority to enter into such a transaction. (*Ormond and Parlett, JJ.*) RAMANATHAM CHETTY *v.* BANK OF BENGAL. **7 Bur L. T. 126 : 23 I. C. 516. [Reversed on Appeal 43 Cal. 527: 32 I. C. 419 (P. C.]**

———*Construction—General powers.*

In a power of attorney which should be strictly construed, the operative part being controlled by the recitals, general words following an authority to do particular acts should not be taken to confer general powers, but should be limited to the purpose of the authority or to those necessary for the proper performance of particular acts. (*Fawcett, A.J. C.*) BHAGWANJI *v.* GANGA. **36 I. C. 968 : 10 S. L. R. 72.**

POWERS.

———*Joint power—Death of one—Survivor—When can execute.*

If power is given to A and B *persona designata* to do an act if and when they think it desirable the occasion cannot arise nor can the power be exercised unless they are both living and agree as to the act. This cannot be the case after the death of one of them, and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague, nor can he then do the act, seeing that the authority to do is only given to the two acting jointly. The case is different when the power is vested not in *persona designata* but in the occupants for the time being of a specified office such as executors or trustees. (*Lord Moulton,*) VENKATA NARASIMHA APPA ROW *v.* PARATHASARATHY APPA ROW. **37 Mad. 199 : 41 I. A. 51 (1914) M. W. N. 299 : 12 A L. J. 315 : 18 C. W. N. 554 : 15 M. L. T. 285 : 23 I. C. 166 : 16 Bom. L. R. 328 : 26 M. L. J. 411. (P. C.)**

———*Construction of—Liberal construction.*

Powers are to be construed in accordance with the intention of the donor or grantor ; that intention is to be collected from the instrument

itself, although a reference may sometimes be had to the circumstances under which it was given. All powers are to be liberally construed in equity for furthering the purpose for which they were created. (*Mookerjee and Beachcroft, JJ.*) SARADA PRASAD PAL *v.* RAMAPATI PAL.
17 C. W. N. 319 : 16 I. C. 817 : 16 C. L. J. 304.

PRACTICE.

Abandonment of Plea.
Additional Evidence.
Adjournment.
Administration.
Admissions.
Amendments.
Appeal
Appellate Court.
Burden of Proof.
Chief Court.
Civil Dispute.
Commissioner.
Consolidation of Suits.
Costs.
Decree.
Delay in Indian Litigation.
Discretion.
Ejectment.
Election of Remedies.
Evidence.
Execution.
Ex parte Hearing.
Formal Defect.
High Court.
Inconsistent Pleas.
Insolvency.
Interest.
Issues.
Judge.
Judgment.
Judicial Order.
Jurisdiction.
Justice, Equity and Good conscience.
Law governing.
Legal Representative.
Limitation.
Misjoinder of Causes of Action.
New Plea.
Non-Joinder of Parties.
Notice of Hearing.
Parties.
Partition Suit.
Pleader.
Pleader's fees.
Pleadings
Precedents.
Professional etiquette.
Record.
Rehearing.
Remand.
Restitution.
Retrial.
Revenue Court.
Review.
Revision.
Sanction.
Second Appeal.
Sentence.
Stay of Trial.
Subordinate Courts.
Subsequent.

PRACTICE—Abandonment of Plea.

Transfer of Case.
Trial.
Valuation.
Witness.

Abandonment of Plea.

———*Abandonment of plea—Effect.*

A party, abandoning his case set up in the trial Court, cannot advance it in second appeal. (*Piggott and Walsh, JJ.*) HARIMURAT *v.* RAMHIT.
63 I. C. 490 : 3 U. P. L. R. (A) 179.

———*Abandonment of plea—Point not argued.*

Where an appeal which comes before an appellate Court is heard upon the merits, a point which goes to the root of the suit being not argued, must be taken to be abandoned and therefore it is equivalent to a decision against the appellant. (*Walsh and Stuart, JJ.*) HANS RAJ *v.* BIJAI RAM SINGH. **40 I. C. 621.**

———*Abandonment of plea—If can be raised again.*

Where a party abandons any point of appeal he cannot be allowed afterwards to take up a point once abandoned. Where therefore the only point raised was a point of limitation which was decided against the appellant, he cannot be allowed to raise a new point of estoppel. (*Pratt and Fawcett, JJ.*) DODDAVA *v.* YELLAWA. **1922 Bom. 233.**

———*Abandonment of plea—Statements in judgment.*

A statement in a judgment that a point is not seriously pressed in the first court must be taken proof of its having been abandoned. (*Beachcroft, J.*) KORBAN ALI *v.* MAKHUL ALI.
50 I. C. 743.

———*Abandonment of plea—Appellate Court—Point not appealed against.*

Appellate Court cannot interfere with lower Court's decree on a matter against which no appeal has been preferred. (*Chatterjee, J.*) DWARKA NATH *v.* MOHIMA CHARAN **9 I. C. 121.**

———*Abandonment of plea—Memo. of appeal not disputing points raised in judgment.*

Where an appellate judgment states specifically certain points were argued, but the memorandum of appeals contains other points besides, consequently the presumption is that they were given up. (*Harrison and Zafar Ali, JJ.*) HARJI MAL *v.* DEVI DITTA MAL. **4 Lah. 364 : 1924 Lah. 107.**

———*Abandonment of plea.*

Plea given up in lower appellate Court cannot be advanced in second appeal. (*Reid, C. J. and Johnstone, J.*) JAIMAL *v.* LAL SINGH
11 I. C. 408 : 88 P. W. R. 1911.

———*Abandonment of plea.*

Held, that it is not open to the appellant to appeal solely on a ground which he deliberately abandoned in the Court below. (*Daniels, J. C.*) GHULAM SARWAR *v.* NAYAZ ALI.
64 I. C. 185 : 24 O. C. 181.

———*Abandonment of plea — Giving up grounds.*

A party to a suit may give up any of the grounds of relief before the case is decided,

PRACTICE—Abandonment of Plea.

(*Stuart and Kanhaiya Lal, A. J. Cs.*) HIRDE *v.* MUHAMAD ABDUL HASSAN KHAN.
30 I. C. 207 : 2 O. L. J. 335.

———*Abandonment of plea—Point cannot be argued at final disposal.*

A point which is abandoned by counsel when the case comes up for admission, cannot be allowed to be argued at the final disposal of the case. (*Pipon, J. C.*) GHULAM HAIDAR *v.* MANAGER, COMMITTEE SAMADH BABA PHULA SINGH.
73 I. C. 711

Additional Evidence.

———*Additional evidence—Not to be allowed in appeal.*

There is no precedent for allowing an appellant to lead evidence which could have been led in the Court below, in appeal. (*Macleod, C. J. and Kanga, J.*) MOTI CHAND RAOJI *v.* MANEKCHAND RAMCHAND GOJAR. 1922 Bom. 147.

———*Additional evidence—Second appeal.*

In second appeal, the party cannot urge that he should have been allowed to adduce evidence which was dispensed with in the first Court. (*Russel and Chandavarkar, JJ.*) PANNALAL *v.* GANU BAVAJI NHAVI. 12 I. C. 691 : 13 Bom. L. R. 1021.

———*Additional evidence—*Ex parte *decree—C. P. Code, O.* 41, *R.* 27 —Ex parte *case—Formal evidence given.*

Where plff. in an *ex parte* case gave formal evidence to prove his case, he might be allowed to give further evidence in appeal from such decree, if the appellate Court disagrees with the decree of the lower Court. (*Richardson and Huda, JJ.*) BROJESWAR *v.* SYAMA CHARAN. 50 I. C. 363.

———*Additional evidence—Appellate Court—Evidence.*

The appellate Court cannot admit evidence which becomes relevant because of the discovery of some documents which were previously out of the reach of the parties. (*Jenkins, C. J and Mookerjee, J.*) SHAIKH NURA *v* BAIKUNTHA NATH RAY. 30 I. C. 398 : 21 C. L. J. 596.

———*Additional evidence—Appeal.*

A party should be given an opportunity to prove a document if its importance is realized for the first time in appeal. (*Teunon, J.*) KIRTIBAS PANJA *v.* RAMA PADA BANERJEE.
22 I. C. 833 : 21 C. L. J. 574.

———*Additional evidence—Document not admitted in lower Courts—Admission in second appeal.*

A Court of second appeal ought not to admit a document which the lower Courts refused to admit on the ground that the same was not forthcoming at the first hearing of the case. (*Chamier, J. C.*) JAWALI SAHAI *v.* ABDUL GHAMI.
11 I. C. 289.

Adjournment.

See also C. P. CODE, O. 17.

———*Adjournment—Consent of parties.*

A court must always consider the convenience of parties and any contingency which may necessitate an adjournment. But it is not the business of the parties to decide when their suit shall be heard as the regulation of its procedure is entirely in the Court's discretion. (*Davar, J.*) MADHO PRASAD *v.* AJUDHAYA PRASAD.
10 I. C. 748 : 13 Bom. L. R. 161.

PRACTICE—Adjournment.

———*Adjournment—Payment of money on condition precedent—Effect of failure to pay.*

On a suit coming on for hearing, an adjournment order was made conditional on payment of a certain sum of money and "If the money is not paid by 1st June the suit will be dismissed with costs." The sum was not paid and the contention that the suit became *ipso facto* dead, being raised *held*, that if the order of adjournment contained the words "In default the suit will stand dismissed" no further order would have been necessary; but as it stood, a further order of Court was necessary before the suit was treated as dead (*Greaves, J.*) SEWARATAN *v.* KRISTO MOHAN SHAW. 48 Cal. 902 : 1922 Cal. 320.

———*Adjournment — Refusal — Prejudice—Retrial.*

Where on the day to which a small cause suit had been posted for trial both parties applied for time on the grounds that one of the material witnesses was unwell, that another had not brought the documents summoned, and that a third had not been served, and the Court refused the adjournment and tried the case on the merits, *Held*, that it was a proper case for the grant of an adjournment and there should be a retrial. (*Suhrawardy and Cuming, JJ.*) KHETRA NATH DAS *v.* MAHANANDA DAS. 65 I. C. 599.

———*Adjournment—Criminal case—When to be granted.*

An application by the prosecution in a criminal case, for adjournment on the ground that a co-accused was not present, does not entitle the other accused to a discharge. Nor is the absence of a co-accused a sufficient reason for the future postponement of proceedings. (*Teunon and Suhrawardy, JJ.*) BILLINGHURST *v.* MEEK.
61 I. C. 993 : 22 Cr. L. J. 465.

———*Adjournment—Refusal.*

At the first hearing, deft. applied for adjournment and for the issue of warrants against his witnesses who were absent. The Court adjourned the hearing but did not pass orders on the application for warrants. The defts. took no steps to secure the attendance of his witnesses and at the adjourned hearing, he again requested a further adjournment. *Held*, that the adjournment was rightly refused. (*Sundara Aiyar, J.*) ARUMUGAM PILLAY, *In re.* 15 I. C. 584.

———*Adjournment—Discretion of Court.*

Where a case has been definitely fixed for hearing and witnesses have been called and expense incurred, and if, owing to the default of one of the parties, the Court has no power to hear the case, the Court has a discretion to adjourn or dismiss it, but apart from an express provision of law, is not bound to grant an adjournment. (*Miller, C. J. and Mullick, J.*) RAMESHWAR SINGH *v.* HARIHAR JHA. 5 Pat. L. J. 390 : 57 I. C. 250 : 1 P. L. T 666 : 1921 Pat. 1.

PRACTICE—Adjournment.

——— *Adjournment and procedure—Notice of hearing—Parties not getting summonses not served in time—Court, power of.*

When parties had not taken the trouble to get summonses served on their witnesses in time for them to appear on the hearing day, the court should deal with the case on the materials at the time before it. (*Fox, C. J.*) MATHA *v.* P. L. M. M. CHETTY FIRM. **26 I. C. 240 : 7 Bur. L. T. 310.**

Administration.

See also (1) ADMINISTRATION.
(2) C. P. Code, O. 20, R. 13.

———*Administration—Accounts, if may be examined by Court.*

The investigation by the Court of the account of the administration is not necessary there being no procedure or practice for doing so. (*Chaudhuri, J.*) KANAILAL KHAN, *In the goods of.* **24 I. C. 447 : 18 C. W. N. 320.**

Admissions.

See also (1) C. P. CODE, O 12.
(2) EVIDENCE ACT, SS. 18 AND 19, ET SEQ.

———*Admission—Suit against several defts.*

Where some of several defts. admit plff.'s claim, and the court makes an order of dismissal, the order should be confined only to those defendants who make the admission. (*Newbould and Suhrawardy, JJ.*) SHEIKH TABRIJ *v.* KEDAR NATH DUTT. **62 I. C. 773.**

———*Admissions—Suit on mortgage—Admission of portion of claim—Dismissal of suit, improper.*

If in a suit on a mortgage, the mortgagor admits that a certain sum though short of the amount claimed, is due to the plff. mortgagee, it is not proper to dismiss the suit altogether, on the ground that the mortgagee failed to produce the original mortgage deed. (*Woodroffe and Newbould, JJ.*) INDRA NARAYAN SARKAR *v.* BEDESWARI DASSYA. **30 I. C. 32.**

———*Admissions —Defendants — Co-defendants.*

An admission by one deft. will not bind another. (*Coxe and Chatterjee, JJ.*) HEYAT BAKHSH *v.* LACHMINIA, **22 I. C 916.**

———*Admissions—Plaintiff entitled to decree on admission of defence—Cause of action.*

The question whether there is a cause of action or not does not depend upon the admission of the deft. Where the plaint discloses a cause of action, the plff. is entitled to get a decree on the admission of the defence. (*Ross, J.*) BAUL DAS MISRA *v.* DIGAMBAR KURI. **65 I. C 644 : 1921 Pat. 297.**

———*Admissions must be taken as a whole.*

Where an admission by witness examined by opposite party is relied upon, the whole admission must be taken into consideration. (*Das, J.*) GOBIND PRASAD *v.* CHATURBHUJ. **60 I. C. 482.**

Alternative Claims.

See C. P. CODE, O. 6.

PRACTICE—Amendments.

Amendment of Decree.

See also C. P. CODE, SS. 151, 152 AND 153.

———*Amendment of decree—Appellate Court.*

The lower court has no power to add to the decree of the appellate Court a direction which has been omitted, though wrongly, by the latter. (*Lindsay, J. C.*) SOM NATH *v.* RAM BILAS. **24 I. C. 113 : 1 O. L. J. 193.**

Amendment of plaints.

See also C. P. CODE, O. 6, R. 17.

———*Amendment of plaint—Suit for dissolution of partnership and accounts—Guardian to be made deft. in personal capacity.*

Where the mother acting as guardian *ad litem* in a suit against minors for dissolution of partnership and for accounts, and the plff. finds some difficulty in obtaining decree, he cannot be allowed to amend his plaint by putting the mother as deft. in her individual capacity. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) KAKUMANU VENKATASURYANARAYANA *v.* AKUTHOTA RAMAYYA. **29 M L T. 114 : 13 L. W 551 : 62 I. C. 802 : (1921) M. W. N. 100 : 40 M. L. J. 153.**

Amendments.

———*Amendment—Trial Court.*

The order of amendment by the lower appellate Court is bad when the High Court directed an amendment to be made by the first Court. (*Stephen and Mullick, JJ.*) MADAN MOHAN NATH *v.* MAHARAJA OF CHOTA NAGPUR. **22 I. C. 778 : 19 C. W. N. 200.**

———*Amendments—Second Appeal.*

Where the plaintiffs had full opportunity to amend their plaint in the courts below, but never did so and there was nothing to prevent the plffs. from suing in the alternative in the first instance and basing their suit upon two alternative grounds and no explanation was put forward as to why the plaint was not framed in this manner. *Held* an opportunity to amend the plaint in second appeal by introducing an entirely new cause of action should be refused. (*Moti Sagar, J.*) KIRPA *v.* MT. CHINTI. **1923 Lah. 530.**

———*Amendment.*

Amendment of a plaint in a suit on a pro-note so as to make the suit one on the original consideration also upheld. (*Krishnan, J.*) SUNDARA AIYAR *v.* ARUMUGAM PILLAI. **44 M. L. J. 361 : 17 L. W. 374 : 32 M. L. T. (H. C.) 118 (1) : 1924 M. 520.**

———*Amendments—Suit for partition by one joint tenant against another—Death of deft.—Survivorship of rights—Procedure.*

In a suit by plaintiff against her sister for partition and possession of a moiety of the stridhanam property of their mother the defendant died after the passing of a preliminary decree, recognising plaintiff's right to half the property, but before the passing of a final decree after ascertainment, by metes and bounds, of such share. On applications by the plaintiff, one for having the deceased's daughter impleaded as her legal representa-

tive, and another for an amendment of the plaint to enable plaintiff to obtain a decree for the other moiety to which she claimed to be entitled by survivorship on the death of her sister, *held*, that the first application ought to be granted, but that the second must be disallowed.

The first that by the death of her sister the plaintiff has lost the character of a joint tenant and has acquired in its stead a right to the whole estate is not sufficient to deprive her of her original cause of action, when the proceedings have been instituted and have resulted in recognition of her right in a preliminary decree. The ascertainment of plaintiff's half share and the making of a final decree can be done against any person who like the person sought to be impleaded as legal representative has come into possession in succession to the deceased.

The case is no exception to the ordinary rule that an amendment should not be made to introduce a new cause of action. The cause of action assumed in the amendment is the death of the plaintiff's sister ; and that was not available when the original plaint was presented. Plaintiff must be left to sue separately for the other moiety. (*Oldfield and Devadoss, JJ.*) LAKSHMI AMMAL *v.* ALAMELU AMMAL. **18 L. W. 874 : (1923) M. W. N. 839 : 45 M. L. J. 811 : 1924 Mad. 309.**

———*Amendments—Pleadings—Revision.*

Where the amendment sought to be made for the legal representative for a party is virtually a denial that a certain transaction which is the basis of the suit is binding on the legal representative it ought not to be allowed. The limits to the amendment should be determined by the consideration whether it should have been granted if the deceased had made the application. In cases of conflict of interest between the deceased plaintiff and the legal representative the proper course for the legal representative is to file a separate suit to enforce his rights. Order allowing amendment was set aside in revision. (*Kumaraswami Sastri, J.*) INAGANTHI VENKATRAMA RAO *v.* U. R. R. D. K. VENKATALINGAMA NAYANIM. **15 L. W. 72 : 30 M. L. T. 204 : 42 M. L. J. 43 : 1922 M. 49.**

———*Amendment—Clerical error—Judgment—Review.*

When during an appeal, an official receiver resigned, a successor was appointed and the High Court ordered the previous official receiver's name to be deleted, the High Court by mistake added his name in the judgment order, it was held that there was a mere clerical error and it ought to be corrected and there was no ground for review. *Quaere* : Whether the decision was vitiated by not bringing the succeeding official receiver on record. (*Sadasiva Aiyar, J.*) RAMA AIYAR *v.* OFFICIAL RECEIVER TINNEVELLY. **5 L. W. 507 : 40 I. C. 170 : 32 M. L. J. 520.**

———*Amendment—Procedure—Pleadings.*

Different procedure and sanctions apply to (1) amending pleadings, (2) furnishing particulars, and (3) presenting a pleading subsequent to written statement, though it may be that disobedience to an order to do any of them may have the same result (*i. e.*) adverse decision in the suit. (*Oldfield and Tyabji, JJ.*) NARAYANASAMI AIYAR *v.* KRISHNAMURTHI AIYAR. **(1915) M. W. N. 122 : 26 I. C. 927 : 17 M. L. T. 48.**

———*Amendment—Party—Addition of.*

Prayer for amendment is not to be refused merely because another party will have to be joined and against him the suit would be time barred. 2 N. L. R. 79. Ref. (*Skinner, J. C.*) BANISHDHAR *v.* RAGHUBIR. **10 I. C. 737 : 7 N. L. R. 43.**

——— *Amendment—Reliefs.*

Where in a suit upon a mortgage a decree for sale is asked for, the court can even at a late stage allow the plaintiff to amend the plaint by adding an alternative prayer for a simple money decree. (*Lindsay, J. C. and Kanhaiya Lal, A.J.C.*). MAHADEO PRASAD *v.* GAJRAJ SINGH. **34 I. C. 397 : 3 O. L. J. 164.**

Appeal.

See also C. P. CODE, S. 107 AND O. 41.

———*Appeal—Delay in filing—Implied extension of time by having appeal on the merits.*

Held, that by allowing the appeal to be argued on the merits and deciding it, the High Court had in effect extended the time for filing the appeal. (*Viscount Finlay.*) KRISHNA *v.* NALLAPERUMAL, **43 Mad. 550 : 22 Bom. L R. 568 : 18 A. L. J. 489 : 28 M L. T 28 : 12 L. W. 92 : (1920) M. W. N. 419 : 56 I. C. 163 : 2 U. P. L. R. (P.C.) 118 : 38 M. L. J. 444 (P. C.).**

———*Appeal—Delay in presentation—Procedure—Endorsement on memorandum of appeal.*

The question of delay in presentation of an appeal is to be determined at the stage of admission and not to be postponed till the final hearing. If an appeal is presented out of time the court should endorse on it the date of presentation and direct notice to the respondents (*Sir John Edge.*) SUNDERBAI *v.* COLLECTOR OF BELGAUM. **43 Bom 376 : (1919) M. W. N. 254 : 23 C. W. N. 753 : 21 Bom. L. R. 1148 : 52 I. C. 897 : 46 I. A. 15 (P.C.).**

———*Appeal — Delay in filing—Sufficient cause—Question of, to be determined before admission.*

Where there is delay in filing an appeal the question of excusing it for sufficient cause ought to be determined at the stage of admission of the appeal after notice to respondent. The practice of admitting the appeal subject to objections at the hearing condemned. (*Sir Lawrence Jenkins.*) KRISHNASWAMI PANIKONDAR *v.* RAMASWAMI CHETTIAR. **41 Mad. 412 : 45 I. A. 25 : 4 Pat. L. W. 54 : 16 A. L. J. 57 : 7 L. W. 156 : 23 M. L. T. 101 : 27 C. L. J. 253 : 2 P. L. R. 1918 : 22 C. W. N. 481 : 21 Bom. L. R. 541 : 11 Bur. L. T. 121 : 43 I. C. 493 : (1918) M W N 906 : 34 M. L. J. 63 (P. C.).**

———*Appeal—Right subject to grant of leave—Procedure.*

PRACTICE—Appeal.

Wherever any matter is appealable only after leave to appeal has been obtained, the memorandum of appeal should be accompanied by a petition for such leave. (*Piggott and Walsh, JJ.*) BALLI *v.* NAND LAL. **33 I C 773.**

——*Appeal—Respondent's case.*

A respondent can without filing cross-objections support the lower court's judgment on all points which may have been found against him by the lower court; on failure to do so, the appellate court will simply accept the findings of the lower court on those points. (*Holmwood and Chapman, JJ.*) NAGENDRA NATH GHOSE *v.* RAM BHAROSA HALVAI. **24 I. C. 68.**

——*Appeal—Party relying on documents must pay for printing.*

When a person has obtained a decree in his favour the onus is on the appellant in a Court of Appeal to show that the decision is wrong. This proposition no doubt is generally correct. But it is not the duty of the defendant-appellant to get those documents printed upon which the plaintiff-respondent relied in the Court below and on which to rely in the High Court. (*Scott-Smith and Moti Sagar, JJ.*) KARTAR SINGH *v.* LABH SINGH. **5 Lah. L. J. 190 : 1923 Lah. 355.**

——*Appeal—* Forma pauperis—*Order for security for costs not obeyed—Effect.*

No appeal lies from an order rejecting the appeal for failure to furnish security for costs. (*Chevis and Campbell, JJ.*) NAZIM *v.* ABDUL HAMID. **3 Lah. 30 : 1922 L. 87.**

——*Appeal—Right to—Suit where appeal is open.*

Where under the rules an appeal is provided against the order of a Municipal Committee refusing refund of customs duty, a suit for compensation for such refusal is premature before the institution of the appeal even though the procedure by way of appeal may be onerous. (*Reid, C J and Kensington, J.*) MUNICIPAL COMMITTEE, AMBALA *v.* MOHENDRA SINGH. **118 P. L. R. 1911: 38 P. R. 1911 : 9 I. C. 1000 : 97 P. W.R. 1911.**

——*Appeal—Reversing judgment — Decree reversed on some point only without expressing opinion on other points.*

Where the Privy Council reverses a decree on one point only without expressing an opinion on other points, their judgment cannot be taken to have decided inferentially any other of those points in favour of the appellants merely because the appeal was liable to be rejected if the other points had not been decided in appellant's favour. (14 C. W. N. 945 ; 12 M. I. A. 65 Dist.) (*Johnstone and Rattigan, JJ.*) KANHAYA LAL *v.* NATIONAL BANK OF INDIA, LIMITED, DELHI. **9 I. C. 966 : 32 P. W. R. 1911.**

——*Appeal—Delay in filing—Objections to admission when to be taken.*

Where the delay in presenting an appeal is excused by the Admission Court by an order *ex parte* the respondent if he wishes to object to an order must do so by the motion of the earliest opportunity after he becomes aware of the order. (*Schwabe and Wallace, JJ.*) MURUGAPPA NAICKER *v.* THAYAMMAL. **16 L.W. 662 : (1922 M W.N. 727 : 31 M. L. J. 456 : 1923 M. 32.**

——*Appeal — Conversion into revision—Technical objection—Revision.*

The High Court can, to mete out substantial justice, treat an appeal presented to it as a revision petition in cases where technical objections as to adequacy of court-fees, etc., prevents its entertaining the appeal. 19 A. 142 ; 22 A 380, Foll. (*Oldfield and Bakewell, JJ.*) SUBBA PILLAI *v.* RANGASWAMI. **40 I.C. 846: (1917) M.W.N. 306.**

——*Appeal—*Ex parte*—First hearing of an appeal—Respondent not appearing—Right to appear at subsequent stages.*

It is doubtful, whether a respondent who fails to appear at the first hearing can appear at subsequent stages as a matter of *right*. (*Sadasiva Aiyar, J.*) ARUNACHALAM CHETTIAR *v.* KASI NEVENDA PILLAI. **24 I. C. 1007.**

——*Appeal— Delay — Court-fee — Delay in payment.*

According to the practice of the Madras High Court an order of the Admission Judge excusing delay in payment of deficient court-fee is subject to objections by the other side before the Court hearing the appeal and its decision therein. (*Miller and Tyabji, JJ.*) ACHARATH PARAKKAT KUNHAMMAD *v.* ACHARATH BAPPAN KARNAVAN. **23 I. C. 946 : 1 L. W. 440s**

——*Appeal—Form of—Oudh Court—Persons jointly tried and convicted—Appeal on one petition and one copy of judgment, if valid.*

In Oudh, it is not practice to permit persons convicted together and not in jail to prefer an appeal on one petition of appeal and one copy of judgment, (*Stuart, J. C.*) BATASHA *v.* EMPEROR. **39 I. C. 480 : 18 Cr. L. J. 512 : 4 O. L. J. 82.**

——*Appeal—Finding of fact—Not attacked.*

The Court should not question a fact not disputed by the parties themselves. (*Stuart and Muhamad Ali, A. J. Cs.*) RAMAN LAL *v.* RAM GOPAL. **35 I. C. 713 : 3 O. L. J. 367.**

——*Appeal—Conversion into revision.*

Where an appeal filed in a matter wherein there is no such appeal, the appeal could be treated as revision under the special circumstances of the case (*Holmes, S. M. and Campbell, J. M.*) AMIRUL-RAHMAN *v.* DHANKUMAR DAS. **34 I. C. 689 : 3 O.L.J. 201.**

——*Appeal—Right of respondent to support decree.*

When all the facts are before the appellate Court, the respondent can support the lower Court's judgment even on ground not taken in the Court below. (*Lindsay, J. C.*) DILAPAT SINGH *v.* KASHI NATH. **17 O. C 108 : 24 I C. 542.**

——*Appeal—Dismissal for default if bars.*

The word 'appeal' in Sec. 96 of the C. P. C. do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not

bar the hearing of the fresh appeal. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAYAN SINGH *v.* PARTAB RAI. **4 Pat. L. T. 405 : 2 Pat. 739 : 1923 Pat. 213 : 1923 P. 514.**

———*Appeal—New plea—Interpretation of.*

Interpretation of a clause in a deed is not a simple question of fact and may be raised for the first time in appeal. (*Robinson, C. J. and Macgregor, JJ.*) KO THINE *v.* ISMAIL CASSIM MORAD. **1923 Rang. 61.**

Appellate Court.

———*Appellate Court — Evidence— Cogent grounds to alter conclusion of trial court.*

Cogent grounds would be needed to alter the conclusion drawn by the trial Court from the oral evidence which the appellant gave. (*Lord Sumner.*) SOCRATES ATYCHIDS *v.* SECRETARY OF STATE FOR INDIA. **1922 P. C. 371.**

———*Appellate Court—Finding of fact—Collision cases—Decision of trial Judge—Weight to be attached to.*

In collision cases, where questions of fact alone arise, a Court of appeal should be most slow to interfere with the decision of a trial Judge who sees the witnesses and has the opportunity of forming his estimate of them by their demeanour. In exceptional cases and for special reasons should such a Court reverse the judgment of the trial Judge on questions of fact. (*Lord Sumner.*) RIVER STEAM NAVIGATION CO., LTD. *v.* HATHOR STEAMSHIP CO., LTD. **20 C. W. N. 1022 : (1916) 1 M. W. N. 446 : 4 L. W. 176 : 35 I. C. 193: 31 M. L. J. 159 (P. C.)**

———*Appellate Court—Appreciation of evidence—Trial Judge—Opinion of—Will.*

On a question as to the truth of a verbal authority to adopt given by the deceased the view of the Judge who tried the case and saw the witnesses is entitled to great weight. (*Viscount Haldane.*) ADWAITYA PRASAD *v.* BALDEO DASS. **(1916) 1 M. W. N. 377 : 4 L. W. 587 : 33 I C. 852 : 20 C. W. N. 650 (P.C.)**

———*Appellate Court—Finding of fact on oral evidence by trial Judge—Weight due to.*

Upon a question of fact, great weight ought to be attached to the opinion of the trial Judge who had the advantage of seeing and hearing the witnesses and who might presumably be acquainted with the manners and customs of the people among whom the transactions in question is alleged to have occurred (*Lord Shaw.*) RAM PRAKASH DAS *v.* ANAND DAS. **43 Cal 707 48 I A 73 : 20 C. W. N. 802 : 14 A. L. J. 621 : (1916) 1 M. W. N. 406 : 18 Bom. L. R. 490 : 3 L. W. 556 : 24 C L. J. 116 : 20 M. L. T. 267 : 33 I. C. 583 : 31 M. L. J. 1 (P. C.)**

———*Appellate Court—Oral evidence—Weight due to opinion of trial Judge.*

It is no doubt true that on appeal the whole case including the facts are within the jurisdiction of the Appeal Court. But where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the finding of fact of the trying Judge who has seen and heard

the witnesses and has had an opportunity of noting their demeanour, should not be lightly disregarded. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Appellate Court. (*Sir George Farwell, J.*) BOMBAY COTTON MANUFACTURING CO. *v.* MOTI LAL. **39 Bom. 386 : 42 I. A. 110 : 19 C. W. N. 617 : 17 M. L. T. 408 : 21 C. L. J. 528 : 17 Bom. L. R. 455 : 2 L. W. 521 : (1915) M. W. N. 788 : 29 I. C. 229 : 28 M. L. J. 593 (P. C.)**

———*Appellate Court — Appreciation of evidence.*

The appellate Court should be guided in believing a witness by the impressions made on the Judge who saw the witnesses' manner and demeanour, but other circumstances showing the contrary, if existing in the case, should be taken into account. (*Richards, C. J. and Rafique, J.*) SHEOPUJAN TEWARI *v.* SOHBAT TEWARI. **36 I. C. 427 : 14 A. L. J. 1066.**

———*Appellate Court—Reversal and remand of suit—Point decided not open to attack again.*

Where in appeal the High Court reverses a decree and remands the suit for trial, the parties cannot re-agitate the point decided by the High Court. (*Richardson and Suhrawardy, JJ.*) SYED SADAQ REZA *v.* KHOSHMOHINI DASI. **1922 Cal. 317.**

———*Appellate Court—Conflict if testimony.*

Where there is a conflict of testimony, the court of appeal should not reverse the trial Court's decree, merely on doubts. The reversal must be based on the conviction that the decision was wrong. (*Mookerjee and Buckland, JJ.*) REES *v.* YOUNG. **25 C. W. N. 519 : 66 I. C. 745 : 34 C. L. J. 178.**

———*Appellate Court, duties of.*

There is really no conflict of judicial opinion as to the duties and functions of a Court of appeal though conclusions might differ when, in an individual case the evidence is reviewed and weighed. (*Mookerjee and Fletcher, JJ.*) DINANATH *v.* METHARAM. **64 I. C. 785 : 33 C. L. J 577.**

———*Appellate Court—Evidence relied upon by First Court.*

Where in a suit for recovery of possession of land on a declaration of title thereto, the First Court relied upon a sale-certificate before giving a decree to plaintiff the Appellate Court ought to have considered the sale-certificate before reversing the First Court's decree. (*N. R. Chatterjee and Panton, JJ.*) HARENDRA KUMAR ROY CHAUDHURI *v.* DURGA CHARAN SAHA. **62 I. C. 697.**

———*Appellate Court — Findings of fact—Appreciation of evidence.*

Per Richardson, J. :—A Court of appeal should in general be slow to differ from the trial Court, on a question of fact depending on the credibility and veracity of witnesses. But there are cases where the trial Judge has approached the evidence from a wrong standpoint or has applied to that evidence wrong standards of probability, or improbability. If a trial Judge says that a servant speaking for his master ought never to be believed, the appeal Court

is not obliged to accept his estimate of the servant's evidence. In such a case the question is not merely a question of the credibility of the particular witness but the witness has not been given a fair chance. They are verdicts or findings which are contrary to the weight of evidence. (*Richardson and Greaves, JJ.*) HEM CHANDRA ROY CHOWDHURY *v.* KRISTO CHANDRA SAHA
24 C. W. N. 800 : 58 I. C. 879 : 47 C. 1079.

——— *Appellate Court—Finding of fact.*

Appellate Court may arrive at a finding as to intention if omitted by the trial Judge provided the trial was without Jury. (*Woodroffe and Walmsley, JJ.*) PERRY *v.* OFFICIL ASSIGNEE OF CALCUTTA. **47 Cal. 254 : 31 C. L. J. 209 : 56 I. C. 778 : 21 Cr. L. J. 522 : 24 C. W. N. 425.**

——— *Appellate Court—Evidence— Appreciation of.*

Where the appellate court disagrees with the finding of the trial Court, it should come to an independent finding of its own upon the evidence on record. (*Chatterjee and Panton, JJ.*) MAJARADDIN CABIRAJ *v.* MAJIBAR RAHAMAN.
56 I. C. 248.

——— *Appellate Court—Findings of fact—Interference.*

A Court of appeal should be slow to differ from the primary court on a question of estimate of oral testimony. But this rule does not apply to a case where some of the important witnesses never appeared before the Judge but were examined on commission and others examined by the appellate Court itself. (*Mookerjee and Panton, JJ.*) SATISH CANTHA *v.* SATIS CHANDRA.
30 C L. J. 475 : 55 I. C. 689 : 24 C. W. N. 662.

——— *Appellate Court— Question of fact—Decision of trial Judge, not to be lightly set aside.*

Where the issue involves a simple question of fact to be decided chiefly, if not solely on oral evidence, a court of appeal should be slow to set aside the finding of the trial Judge who had the witnesses before him. (*Mookerjee and Panton, JJ.*) BEJOY KRISHNA MOOKERJI *v.* LAKSHMI NARAINJIN. **54 I. C. 736 : 30 C. L. J. 433.**

——— *Appellate Court — Question of fact—Weight due to the trial court's decision.*

Where a case has been decided on oral evidence weight should be given by the Appellate Court to the opinion of the trial Judge who saw and heard the witnesses. The Court of Appeal should not allow an appeal unless it is satisfied that the Court below is wrong, the burden of proof being upon the appellant to show grounds for reversal. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) MARIAN BIBEE *v.* MUHAMMAD IBRAHIM. **48 I. C. 561 : 28 C. L. J. 306.**

——— *Appellate Court—Duties of—Weighing of evidence.*

The appellate Court must weigh conflicting evidence and draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, should make due allowance in this respect. If the decision of a question depends to a large extent upon the verbal evidence or witnesses examined before the trial Court which had the advantage of seeing and hearing the witnesses, the Appellate Court ought not to interfere with such a decision unless it is clear that Court has come to a wrong decision. *Per Woodroffe, J.* :— If after arguments an appellate Court has a conviction that the judgment under appeal is erroneous, it should not be affirmed and this is not the less so because the judgment raised a question of fact. (*Sanderson, C.J., Woodroffe and Mookerjee, JJ.*) LALJEE MAHOMED *v.* DADHABAI JIVANJI GUZDAR, **43 Cal. 833 : 34 I. C. 807 : 23 C. L. J. 190.**

——— *Appellate Court-- Questions of fact—Opinion of trial Judge—When to be differed.*

The opinion of a trial Judge on a question of fact proved after seeing the witnesses and hearing their evidences ought not to be differed from by the Court of appeal except upon very clear grounds. (*Sanderson, C. J, Woodroffe and Mookerjee, JJ.*) JOHUR LAL DEY *v.* DHIRENDRA NATH DEY. **20 C. W. N. 304 : 34 I. C. 707 : 23 C. L. J. 314.**

——— *Appellate Court—Question of fact—Procedure.*

On appeal the appellate Court is not bound to accept the decision on facts of the lower Court. The appellant should however satisfy the Appellate Court that the judgment of the lower Court is erroneous. (*Jenkins, C.J., Woodroffe and Mookerjee, JJ.*) J. I. J. HYAM *v.* M. E. GUBBAY.
32 I. C. 53 : 20 C. W. N. 66.

——— *Appellate Court— Findings of fact—Interference.*

Where the case is one not so much of estimate of credibility of witnesses who have been believed by the trial Court as of the effect of their statements, on the assumption that they have spoken the truth the appellate Court will refuse to adopt the conclusion of the trial Court if good grounds are shown. (*Mookerjee and Beachcroft, JJ.*) SUSIL KUMAR BANERJEE *v* APSARI DEBI.
20 C. L. J. 501: 27 I. C. 276 : 19 C. W. N. 826

——— *Appellate Court—Appreciation of evidence—Evidence conflicting.*

In the case of conflicting evidence the Appellate Court in order to arrive at a proper appreciation of the same, must have regard for the opinion formed by the trial Judge in whose presence the evidence was given as regards credit to be attached to it. (*Carnduff and Richardson, JJ.*) BINDU BASINI DEBI *v.* AMAR CHANDRA BHOWMIK.
22 I. C. 512.

——— *Appellate Court.*

Evidence admitted without objection in trial court cannot be rejected by appellate court. (*Abdul Raoof and Abdul Qadir, JJ.*) MT. CHANNI BIBI *v.* AHMAD KHAN. **1924 Lah. 265.**

——— *Appellate Court— Powers of-- Amendment of ground of appeal.*

An appellate court can issue commissions for the purpose of examining the accounts and remedying certain mistakes and omissions made by the previous commissioner and it would be perfectly justified in passing an order for the production

of additional evidence if it found itself unable to decide appeal on the record as it stood at that time. It has full discretion to direct an appellant at any stage to amend his grounds of appeal if they are not sufficiently clear. (*Scott-Smith and Abdul Raoof, JJ.*) MT. RAM PIARI *v.* SULTAN BAKHSH. **3 Lah. 382 : 1923 L. 115.**

——*Appellate Court—New plea.*

A new plea cannot be taken before an appellate court for the first time. **4 Lah. L. J. 516.**

——*Appellate Court—Discretionary powers—Subordinate Court—Power to grant relief*

The pendency of application for review in the original court could not preclude the Appellate Court from hearing the appeals.

In the exercise of its discretionary powers, if the Appellate Court refuses to extend time for filing objections, the Chief Court cannot interfere in appeal without adequate reason. The principle of law is to the effect that when an Appellate Court is seized of the case, and is empowered by law to grant the relief claimed by the applicant, the latter should have recourse to the Appellate Court, and not to the Subordinate Court. (*Shadi Lal and Le Rossignol, JJ.*) THE PUNJAB SIND BANK, LTD., LYALLPUR *v.* RAM KISHEN. **35 I. C. 529 : 156 P. L. R. 1916.**

——*Appellate Court—Finding of fact by trial Court—Weight of.*

In all cases, where there is an appeal on questions of fact, it is a good working rule that the appellate tribunal will not lightly interfere with the findings of fact of the Court below. This rule applies most strongly where there has been a conflict of oral testimony and the judge had the advantage of seeing the witnesses and of observing their demeanour. But it is a rule which should not be pressed too far for there are many cases where there has been a conflict of evidence in the Court below in which the Court of appeal is bound to give effect to its own view if it differs from that of the judge, *e g.*, probabilities may be strongly against the view of the judge or there may be documents consistent with the evidence of appellant and inconsistent with that of respondent, etc. The demeanour of witnesses is not invariably a safe guide to the truth of their evidence. (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PEERA MAHOMED ISHACK *v* SACAVATH HUSSAIN AKBARI. **(1922) M. W. N. 434 : 31 M L. T. 40 : 43 M L. J. 199 : 1923 Mad. 103**

——*Appellate Court—Findings of fact by trial Judge.*

Per *Seshagiri Aiyar, J.*—The question which an appellate Court has to put before itself on a question of fact is not what its decision would have been, had it been the trial court, but whether there are sufficient grounds for not accepting the conclusion of the trial Court. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SRI JAGANADHA GAJAPATHI *v.* SRI KUNJU BIHARI DEO. **9 L. W. 385 : 25 M. L. T. 204 : 49 I C. 929 : (1919) M. W. N. 52.**

——*Appellate Court—Powers of.*

The functions of an Appellate Court are not the same in England and America as in India and consequently great care has to be exercised before the decisions based on practice and procedure of a highly technical character are followed in considering questions arising under the C. P. Code. (*Ayling and Kumaraswami Sastri, JJ.*) CHANGAL VALA GURRAZU *v.* MADAPATHI VENKATESWAR ROW. **19 M. L. T. 268 : (1916) 1 M. W. N. 223 : 33 I. C. 9 : 30 M. L. J. 379.**

——*Appellate Court—Finding of fact.*

The appellate Court should be very careful in disturbing the finding of the lower Court based on facts when the Court, who heard and saw them disbelieves them. (*White, C.J. and Spencer, J.*) MARMAVULA *v.* ANNAPURNI. **10 M. L T. 304 : 12 I. C 393 : (1911) 2 M. W. N. 330.**

——*Appellate Court—Findings of fact—Appreciation of evidence.*

Per *Kanhaiya Lal, A. J. C.*—The object of an appeal is to obtain a pronouncement from the Appellate Court both on law and facts, and the discretion of the Appellate Court is unrestricted. In many instances a trial Judge is in a better position to appraise the value of the oral evidence before him and where the issue is simple and straightforward, the findings of facts arrived at by him are entitled to weight. But where the evidence in a particular case, consists of the statements of the persons whose evidence is tainted, and there are circumstances showing that the signature and the handwriting of the alleged testator on the will are not genuine, the Appellate Court would look into the evidence as a whole and come to such conclusion as the materials placed before it and the circumstances proved might justify. (*Kanhaiya Lal and Daniels, A. J. Cs.*) SHEO BAHADUR SINGH *v.* BENI BAHADUR SINGH. **51 I. C. 419: 6 O. L. J. 178.**

——*Appellate Court—Evidence — Appreciation of.*

An Appellate Court ought not to differ from the trial court unless there are strong and weighty reasons for doing so. But the appellate court has certain responsibilities and is bound to examine the evidence with a view to see whether in giving judgment the trial judge did not misdirect himself. (*Das and Adami, JJ.*) MUSSAMMAT CHANDRAMA KUER *v.* RAMGAYAN. **1922 P. 111.**

——*Appellate Court—Discretion.*

The Appellate Court will not interfere with the exercise of discretion of the Lower Court in the matter of allowing a particular rate of interest (*Das and Ross, JJ.*) SURAJ PRASAD PANDAY *v.* SOMRA MAHTON. **68 I. C. 903: 2 Pat L. T. 648.**

——*Appellate Court—Findings of fact—Reversal of.*

A court of appeal should not readily disturb the findings of fact arrived at by the trial Judge even if it might be inclined to take a different view from reading the evidence but if the Appellate Court is satisfied beyond all reasonable doubt on considering the evidence that the findings were erroneous then it ought to interfere

PRACTICE—Appellate Court.

(*Miller, C. J., Mullick, Jwala Prasad, Ali Imam and Thornhill, JJ.*) UMASHANKER PRASAD *v.* NAGESWARI KOERI. **3 Pat. L. J. 663: 7 Pat. L W. 1: 48 I. C. 625 : (1919) Pat. 162.**

———*Appellate Court—Findings of fact—Reversal of—Reasons should be shown.*

Judges on appeal although they might have come to a different conclusion had they been judges in the first instance should be shown strong reason to reverse findings of a judge of first instance who has seen and heard the witnesses examined before him. (*Chapman and Atkinson, JJ.*) BINDESHARI PRASAD *v.* LEKHRAJ SAHU. **20 C. W. N. 760: 1 Pat. L. J. 48: 33 I. C. 711: 3 Pat. L. W. 405**

———*Appellate Court—Duty to hear on merits—Disposal—Technical points.*

It is always admissible in the interests of justice that an appeal should be heard upon its merits in preference to being rejected upon any technical point of law. (*Pipon, J. C.*) MURLI MAL *v.* VAISHNO DITTA. **73 I. C. 788.**

Burden of proof.

See also EVIDENCE ACT, SS. 102 AND 103.

———*Burden of proof—Question of, in appeal.*

Where evidence has been let in the trial court by both the parties and the relevant facts are before an Appellate Court, the question of burden of proof is immaterial. (*Mookerjee and Buckland, JJ.*) JOGENDRA *v.* JAGADINDRA. **67 I. C 170 : 34 C. L. J. 133.**

———*Burden of proof—Question of, in appeal.*

Where evidence has been adduced on both sides, and the Court has arrived at a finding upon the whole of such evidence, the question of burden of proof ceases to have any practical importance. (*Mookerji and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. *v.* EASTERN ASSAM COMPANY, LTD. **47 Cal. 1027: 61 I. C. 14: 33 C. L. J. 72.**

———*Burden of proof—Evidence.*

If a burden of proving some issues is laid on the plff. and of others on the deft. the plff. can reserve his case and produce rebutting evidence after deft.'s evidence only on those issues the burden of proving which is laid on the deft. (*Kensington and Johnstone, JJ.*) KARM BAKSH *v.* CHIRAGH DIN. **66 P. R. 1911: 104 P. L. R 1912 : 12 I. C. 862: 190 P. W. R 1911.**

———*Burden of proof—Bona fide purchase.*

The proposition that the defence of a *bona fide* purchaser for value without notice is a single defence and cannot be split up refers more to the form of pleading and cannot be treated as decisive of the question of onus in all cases. (*Abdur Rahim and Phillips, JJ.*) RAJA OF KARVETNAGAR *v.* SARAVANA PILLAI. **35 I. C. 893: 4 L. W. 200.**

———*Burden of proof—Immaterial after evidence.*

Whether a piece of evidence is enough for discharging the burden of proof depends upon the weight to be attached to that evidence and is not a question of law. So where each party has adduced evidence to prove or disprove an issue, the importance of the burden of proof disappears almost entirely, 13 M. 394; 34 A. 511; 24 M. L. J. 517, Foll. (*Ayling and Tyabji, JJ.*) GADIAN CHETTI *v.* VEERAPPA CHETTI. **26 I. C. 899: 28 M. L. J. 92.**

PRACTICE—Civil Dispute.

———*Burden of proof—Immaterial after evidence tendered.*

A Court should weigh the evidence tendered as a whole without paying much heed to the arguments as to the allocation of burden of proof, treat the pleadings of parties as admissions and endeavour to arrive at a clear finding upon the facts involved. (*Piggott, J. C. and Lindsay, A. J. C.*) MIR SYED HUSSAIN *v.* TIYABA BEGUM. **26 I. C. 547: 1 O. L. J. 591.**

———*Burden of proof—Question—Immaterial after evidence.*

There can be no question of burden of proof when the Court has only to determine the case on evidence fully recorded on both sides. (*Chapman, J.*) MAHTEB KHAN *v.* SHEOBARAT TELI. **37 I. C. 353.**

Case-Law.

See PRACTICE—PRECEDENTS.

Cause of action.

See C. P. CODE, O. 2, RR. 1 AND 2.

Chief Court.

———*Chief Court—Death sentences—Fine.*

The practice of the Chief Court is not to impose fines where death sentences have been given. (*Kensington and Shah Din, JJ.*) CHUHA *v* EMPEROR. **18 P. R. 1913 (Cr.) : 14 Cr. L. J. 522: 41 P. W. R. 1913 (Cr.): 20 I. C. 1002: 326 P. L. R. 1913.**

———*Chief Court—Punjab — Rulings of—Value due to North-West Frontier Province.*

There is invariably a presumption that Punjab rulings should be followed in preference to those of the Allahabad High Court in the Courts of the North-West Frontier Province. (*Pipon, J. C.*) AYA RAM *v.* PARSHOTAM LAL. **71 I. C. 145.**

Civil Dispute.

———*Civil dispute-Criminal case-Jurisdiction.*

Parties should not resort to the Criminal Courts where the point at issue between them can more appropriately be decided by a Civil Court. 33 P. R. (Cr.) 1910, Foll. (*Shadi Lal, J.*) PARS RAM *v.* JALAL DIN. **17 Cr. L J 7 : 32 I. C. 135 : 4 P. W. R. 1916. (Cr.)**

———*Civil dispute—Criminal trial.*

The habit of rushing to the criminal court where a civil dispute arises should be discouraged. (*Robertson, J.*) ANANT SINGH *v.* EMPEROR. **10 P. W. R. 1913 (Cr.) : 18 I. C. 688: 14 Cr. L. J. 128 : 33 P.L.R 1913.**

———*Civil dispute—Criminal Courts.*

Disputes between landlords and tenants should be left to Revenue Court and not taken up by Criminal Court. (*Seshagiri Aiyar, J.*) BAKIR ALI KHAN SAHEB, *In re*, **35 I. C. 966 : 17 Cr. L. J. 406.**

———*Civil dispute—Criminal dispute—Police being allowed to assist parties in enforcing rights of a civil nature.*

PRACTICE—Commission.

Police-officers should not be employed to assist parties to enforce what they claim to be their right in a matter of civil dispute until the matter had been decided by the Civil Courts. (*Chapman, J.*) JUGDEEP SINGH *v.* EMPEROR.
18 Cr. L.J. 640 : 39 I. C. 1008 : 1 Pat. L. W. 580.

Commission.

See C. P. CODE, O. 26.

Commissioner.

——*Commissioner—Partition suit.*

In a partition suit a relation of one of the parties or their pleader is not to be appointed as a commissioner except with the consent of the other party. (*Piggott and Walsh, JJ.*) ISLAM FATIMA *v.* LAINUDDIN. **39 I. C. 951.**

——*Commissioner—Damages—Assessment—Reference to Officer of Court*

Cases are not to be referred to other persons for assessing charge, etc., except when the enquiry involves questions of detail, resulting in waste of time, (1890) 6 T. L R. 356 Foll., *e.g.* the market rate of coal in a suit for breach of contract to supply coal can be ascertained by the Judge without referring it to assessors. (*Jenkins, C. J. and Woodroffe, J.*) D. N. GHOSE *v.* POPAT NARAIN.
42 Cal. 819 : 30 I C. 990 : 19 C. W. N. 609.

——*Commissioner—Powers of—Examination of witnesses—Discretion.*

The Commissioner appointed by the Court has complete power to stop proceedings and to take the direction of the Court whenever it appears to him that the pleader cross-examining a witness is abusing his position, and exceeding the limits of propriety, and the Court, in appointing a Commissioner, should in each case give him instructions so as to make it clear to him that he is not so powerless as it is imagined, and that he should exercise his power and stop proceedings for the purpose of taking the direction of the Court whenever he should think that it is necessary to do so. (*Das and Adami, JJ.*) MT. BIBI KANIZ ZAINAB *v.* SYED MOBARAK HUSSAIN.
1924 P. 284.

Consolidation of suit.

See also C. P. CODE, S. 151

——*Consolidation of suits—Suit by agent and against—Trial of both if could be together.*

A suit for accounts by a principal and a counter-suit by the agent for moneys due to him under the agency may, for the sake of convenience, be tried together but that does not mean that they should not be tried separately, (*Chitty and N. R. Chatterjee, JJ.*) CHANDRA KUMAR *v.* PRAMATHA NATH ROY. **11 I. C. 161 : 15 C. W. N. 930**

——*Consolidation of suits—Power of Court.*

It is within the jurisdiction of a court to pass an order for consolidation of suits even against the wishes of parties. (*Coutts and Dass, JJ.*) MUHAMMAD AFZAR *v.* MANKUMAR MAHTON.
3 Pat. L. T. 584 : 1 P. 69 : 1922 P. 566 (1).

Costs.

See also C. P. CODE, S 35.

——*Costs—Omission to bring proper provision of law to the notice of court—Disallowance of costs.*

PRACTICE—Costs.

In this case the Judicial Committee disallowed costs to the successful appellant on the ground that he had failed to place before the High Court the provision of the statute which entitled him to the relief claimed. (*Lord Buckmaster.*) NATHU KHAN *v.* THAKUR BUKTONATH SINGH.
20 A. L. J. 301 : 23 C.W.N 514 : L.R. 3 (P. C.) 82 : 24 Bom. L. R. 571 : 15 L. W 635 : (1922) M W. N. 323 : 35 C. L. J. 417 : 42 M. L J 444 : 1922 P C. 176 (P. C.)

——*Costs—Grounds for disallowing.*

Wrong procedure and dilatoriness will deprive successful appellant of costs. (*Sir Lawrence Jenkins.*) MOHAMMED SHER *v.* SWAMI DAYAL.
44 A. 185 : 49 I. A. 60 : 9 O. L J. 81 : 25 O. C. 8 : 35 C. L. J. 468 : (1922) M W. N. 373 : 24 Bom. L. R 695 : 30 M. L T. 220 : 20 A. L. J. 476 : 42 M.L.J. 584 : 1922 P. C. 17 (P. C.).

——*Costs—Order as to—Interference.*

Costs not following the event amounts to erroneous exercise of discretion and there is an interference on appeal. (*Walsh, J.*) HAKIN ZAHUR AHMAD *v.* FATEHULLAH. **64 I. C. 962 : 3 U. P. L. R. (A.) 55.**

——*Costs—Witness—Travelling expenses—Liability of unsuccessful party to pay.*

No doubt the party who summons a witness pays his travelling expenses in the first instance. But, clearly, if it is successful he is entitled as against the unsuccessful party against whom costs are awarded to recover all proper expenses including travelling expenses, incurred by summons of the witness and paid in the first instance by the successful party. (*Greaves, J.*) HARA SUNDER MAJUMDAR *v.* LAHAMBAR SINGH **1923 C 315.**

——*Costs—Principle of—Award in mofussil and metropolis.*

The practice in the mofussil is that costs should depend on the result of the case and it is usual when a suit partly succeeds for proportionate costs to be given. The important difference between cases in England and on the original side of the High Court and cases in the mofussil is that in cases in the mofussil costs are much more directly proportionate to the amount claimed. (*Newbould and Panton, JJ.*) KUMUD KANTA CHAKRABURTHY *v.* BIGNOLD,
1923 Cal. 306.

——*Costs—Divorce proceedings—Liability of husband—Rule and exceptions—Appeal.*

Costs in divorce proceedings are on the husband. (*Schwabe, C.J. and Ramesam, J.*) PRITCHARD *v.* PRITCHARD. **45 M.L.J. 327 1924 M. 150.**

——*Costs—Criminal revision-High Court has no power to grant.*

A High Court has no power to grant costs on revision petition preferred by a private prosecution against an acquittal. The power of Privy Council is derived from statute. (*Schwabe, C J., Oldfield and Trotter, JJ.*) SHANKARLINGA MUDALIAR *v.* NARAYANA MUDALIAR.
31 M L. T. 342 : 16 L. W 413 : (1922) M. W N. 579 : 45 M. 913 : 23 Cr. L. J. 583 : 43 M. L. J. 369 : 1922 M. 502 (F. B.).

———*Costs—Partition suit.*

Where a suit has to be brought for effecting a partition between the members of a family and neither party has been guilty of unfair contention, the costs till the preliminary decree should come out of the estate. 34 Cal 878 and 42 Cal.451, not Foll. (*Sadasiva Aiyar and Burn, JJ.*) VENKATARANGACHARLU *v.* SAMPATH KUMARA AIYANGAR. **54 I. C. 382 : 11 L. W. 5.**

———*Costs—Redemption suits.*

In redemption suits, a mortgagor is ordinarily entitled to costs unless he forfeits his right to it by laches. In Malabar, though question of compensation complicates redemption suits, yet where the mortgagor fails to deposit even the mortgage amount in full, the mortgagee must be given the costs of the suit. (*Oldfield and Phillips, JJ.*) HARIHARA MANGALATH *v.* KATAPRATHA KATHU. **38 I. C. 655 : (1917) M. W. N. 275.**

———*Costs—Expert witness—Special fees.*

An expert witness who has conducted elaborate and technical experiments ought to be allowed special expert fees as part of the costs in the case. (*Twomey, C. J. and Young, J.*) RANGOON MUNICIPAL COMMITTEE *v.* BURMA RAILWAYS CO., LTD **10 L. B. R. 203 : 59 I. C. 823 : 13 Bur. L. T. 62.**

———*Costs—Taxation—Review—Sind Judicial Commissioner's Court Rules 23, 24 and 27.*

Under R. 27 of Rules of the Court of the Judicial Commissioner in Sind, no application for review of taxation of costs is allowable, unless made before decree is signed. Where the final incidence of the burden of costs is left for the decision of the lower court, as in the case of remand, a party desiring his pleader's fees, to be included in the costs must file the usual certificate of fees in the Appellate Court before the decree of that Court is signed. (*Pratt, J.C. and Crouch, A. J. C.*) MATHRADAS *v.* THE SECRETARY OF STATE. **15 I. C. 828 : 5 S. L. R. 254.**

Court Fee.

See (1) COURT-FEE.
(2) COURT FEES ACT.

Death of Party.

See C. P. CODE, O. 22.

Declaratory Relief.

See SPECIFIC RELIEF ACT, S. 42.

Decree

———*Decree — Construction — Reference to pleadings.*

A court can refer to the pleadings and judgment for ascertaining the real meaning of a decree. (*Caspersz and D. Chatterjee, JJ.*) PROMOTHA NATH *v.* ALAMGIR KHAN. **13 I. C. 82.**

———*Decree—Suit for ejectment — Redemption could be decreed.*

A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. (*Broadway, J.*) PALU *v.* RASILU. **1923 Lah. 675.**

———*Decree — Setting aside — Effect of — Whether plaintiff can bring a fresh suit.*

A decree which was declared null and void against the defendant on account of fraud, does not revive the plaintiff's original suit ; the paintiff may bring a fresh suit. (*Scott-Smith, J.*) NET RAM *v.* AHMED YAR KHAN. **33 I. C. 890 : 32 P. W. R. 1916.**

———*Decree, form of—Decree for amount more than the subject-matter of the plaint.*

Where a widow sues for the recovery of her husband's property both for herself and a co-widow impleaded as deft., the Court can pass a decree for the whole property if the co-widow agrees to such a course. (*Sadasiva Aiyar and Spencer, JJ.*) RAMCHARI *v.* SARASWATI AMMAL. **12 L. W. 544 : 60 I. C. 246 : (1920) M. W. N. 721.**

———*Decree—Setting aside—Effect of—Suit to set aside fraudulent decree.*

Semble, the remedy of the plff. if he succeeds in getting the declaration that a decree was fraudulently obtained, is to apply to the Court to proceed with the suit. *Per Srinivasa Iyengar, J.* —The more appropriate mode of setting aside a consent decree for fraud is by a separate suit instituted for that purpose rather than by a motion in the cause in the nature of a review. A decree obtained by fraud is not a nullity and is not wholly void. (*Spencer and Srinivasa Iyengar, JJ.*) ARUNACHALAM CHETTY *v.* SABAPATHY CHETTY. **41 Mad. 213 : 6 L. W. 368 : 41 I. C. 937 : 33 M. L J. 499.**

Delay in Indian Litigation.

———*Delay in Indian litigation—Expression of disapproval by Privy Council.*

The Privy Council granted special leave to appeal with reluctance, strongly criticising the delays caused in the Indian courts it being a discredit on the administration of justice. (*Lord Buckmaster.*) UDHAM SINGH *v.* GURDIP SINGH. **38 C. L. J. 298 : 45 M L. J. 254 (P. C.)**

Delay—Limitation.

See LIMITATION ACT, S. 5.

Discretion

———*Discretion — Appellate Court — Interference when proper.*

It is opposed to sound practice for an appellate court to substitute its own discretion for that of the court from which an appeal has been preferred unless the court below has acted capriciously or in disregard of any legal principles in the exercise of its discretion. (*Sir Lawrence Jenkins.*) REHMAT-UN-NISSA BEGUM *v.* PRICE. **42 Bom. 380 : 22 C W.N. 601 : 16 A. L. J. 513 : 27 C. L. J 623 : 5 Pat. L. W. 25 : 23 M. L. T. 400: 8 L. W. 53 : 20 Bom. L, R. 714 : 12 Bur. L T. 91 : 45 I. A, 61 : 45 I. C 568 : 35 M. L. J. 262 (P. C)**

———*Discretion — Appellate Court — Interference when to be made.*

Where in the exercise of a judicial discretion a judge fails to apply a rule laid down for its exercise, the appellate court should either remit the case or itself exercise the discretion (1891) A. C. 173, Ref. (*Sir John Edge.*) GUNGESHWAR KUNWAR *v.* DURGA PRASAD SINGH **45 Cal. 17 : 22 M L. T. 403 : 22 C. W. N. 74 : 26 C. L. J. 557 : 16 A. L. J 1 : 20 Bom. L. R. 38 : (1918) M. W. N. 16 : 7 L. W 94 : 4 Pat L. W. 1 : 44 I. A. 229: 42 I. C. 849 : 34 M. L, J. 1 (P. C.)**

PRACTICE—Discretion.

——Discretion—Appellate Court.

Where a Judge assumes that there is no general rule for exercising discretion when in fact there is one, he misdirects himself and the superior court must either remit the case or exercise the discretion itself (*Lord Dunedin*) BRIJ INDAR SINGH *v.* LALA KAMSI RAM. **45 Cal. 94 : 22 M L T. 362 : 6 L. W. 592 : 126 P. W. R. 1917 : 15 A L J. 777 : 19 Bom L. R. 866 : 3 Pat. L. W. 313 26 C. L. J. 572 : 104 P R 1917 : (1917) M W. N. 811 : 22 C. W. N. 169 : 127 P. L R. 1917 : 44 I. A. 218 : 42 I C. 43 : 38 M. L. J. 486 (P. C.)**

——Discretion—Exercise by Superior Court

If a judge who purports to exercise discretion does so under the impression that there is no general rule, where in fact there is one, he cannot exercise judicial discretion and the superior Court must either remit the case or itself exercise the discretion. (*N.R. Chatterjea and Panton, JJ.*) THEKAMANI DASI *v.* PITAMBAR BHUIYA. **62 I. C. 957.**

——Discretion—Appellate Court.

The court of appeal ought to be slow to interfere with an exercise of a discretion by the Lower Court. (*Jenkins. C.J., Mookerjee and Richardson. JJ.*) AHMAD MUSAJI *v.* MAMOOJI MUSAJI, **31 I. C. 315 : 22 C. L. J. 293.**

——Discretion — Appellate Court — Interference.

In the matter of appointment of a guardian for a minor the appellate court will not interfere with the discretion of the lower Court unless weighty reasons have been made out for setting it aside. (*Mookerjee and Beachcroft, JJ.*) NIRODE BARAN DEBYA *v.* BHOLANATH SARKAR. **26 I. C. 30.**

——Discretion — Appellate Court — Interference with discretion of Lower Court.

A Court of Appeal will be reluctant to interfere with the Lower Court's discretion. (*Mookerjee and Beachcroft, JJ.*) FULKUMARI BIBEE *v.* BUDH SINGH DHUDHURIA. **25 I. C. 112 : 18 C. W. N. 1198.**

——Discretion—Appellate Court.

A Lower Court cannot use judicial discretion when the Appellate Court gives specific directions. (*Abdur Rahim and Sundara Aiyar ,JJ.*) MOHIDDIN KUPPAYYA *v.* MARYAN KANNI. **10 M. L. T. 284 : (1911) 2 M W. N 240 : 12 I. C. 139 : 21 M. L J. 1018.**

——Discretion—Co owners—Interference.

Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners though they will do so in proper cases (*Batten, O. J. C.*) RAGHOBA *v* ZIBOO. **11 I. C 687 : 7 N. L. R. 82.**

——Discretion—Appellate Court ought not to interfere.

An Appellate Court ought not to interfere with the discretion exercised by the Court below because upon the materials before it, it might have arrived at a different conclusion. But when that discretion has not in fact been exercised at all it is certainly open to the party aggrieved to raise the question on appeal 41 Mad. 412 (P.C.), Ref. (*Miller, C. J. and Coutts, J.*) MD. ABDUL KASIM *v.* CHATUR BHUJ SAHAI. **(1922) Pat. 20 : 6 P. L. J. 444 : 3 P. L. T. 110 : 1922 P. 47.**

PRACTICE—Ejectment.

——Discretion—Question of law.

A Judge should decide questions of law for himself and should not accept a view suggested by counsel unless he is satisfied as to its soundness. (*Parlett, J.*) MA MIN KYIN *v* MAUNG WA, **31 I. C. 875 : 9 Bur. L T, 53.**

Ejectment.

See also EJECTMENT.

——Ejectment--Decree for redemption—Costs—Conditional decree.

To avoid further litigation over matters substantially ripe for settlement, the Privy Council acceded to the plaintiff's prayer that his suit in ejectment should be converted into one for redemption of certain mortgages to which the property was held to be subject, on terms as to costs *viz.*, that plff. should pay the deft's costs in the Courts in India and each party to bear his costs of the Privy Council appeal. (*Lord Shaw.*) RICHARD ROSS SKINNER *v.* KUNWAR NAUNIHAL SINGH. **35 All. 211 : (1913) M W. N. 500 : 13 M. L. T. 488 : 11 A. L. J 494 : 17 C. L. J. 555 : 15 Bom. L. R. 502 : 17 C. W. N 853 : 19 I. C. 267 : 40 I. A. 105 : 25 M. L. J. 111 (P.C.).**

——Ejectment—Suit on title--Plea of adverse possession—Burden of proof.

The onus is on the defendant to plead and prove the adverse possession for the statutory period in a suit for declaration of title based on the defendant's alleged repudiation of it, 39 M. 617, Foll. (*Walsh, J.*) MUHAMED KAMIL *v.* HABIBULLAH. **37 I. C. 794.**

——Ejectment—Partition suit by Hindu sons for possession of property improperly alienated by their father—Suit allowed—Decree, form of.

In a suit by Hindu sons for possession of property improperly alienated by their father, the decree which allows the sons' claim should direct recovery of the whole property declaring at the same time that the purchaser had acquired the share and interest of the alienor and is entitled to take proceedings to have it ascertained by partition. 11 I.A. 26, Ref. But if there is an alternative prayer for partition, the Court should at once decree partition as the theoretical objection to it disappears. (*Scott, C. J. and Heaton, J.*) NARI GOPAL *v* PARAGOWDA BASAGOWDA. **41 Bom. 347 : 39 I. C. 23 : 19 Bom L. R. 69.**

——Ejectment—Title—Pleadings.

A sued B for possession of certain property. A claimed under a registered deed of gift made by the daughter of the last owner of the property. B claimed as the adopted son of the last owner. The question to be decided was whether B, failing in his defence as to adoption, could set up that A's deed of gift was invalid. *Held*, that B could not set up that plea. He could not rely on the ground of attack open to the donor if the latter sued the donee, within limitation, to set

aside the deed. The title of the donee could not be challenged by a third party without a title so long as the registered deed is there. (*Scott, C. J. and Rao, J.*) TRIMBAK *v.* SHANKAR.
36 Bom. 37 : 12 I. C. 532 : 13 Bom. L. R. 947.

———*Ejectment—Redemption.*
The practice of the Bombay High Court to pass a decree for redemption in a suit in ejectment is purely discretionary. (*Chandavarkar and Hayward, JJ.*) MAHOMED EBRAHIM *v.* SHEIKH HAMJA.
35 Bom. 507 : 12 I. C. 387 : 13 Bom. L. R. 895.

———*Ejectment—Suit on title—Decree on the strength of prescriptive acquisition.*
The question whether a plff. can succeed on a title by adverse possession not set up in the plaint depends mainly on the facts of each particular case and more particularly whether the defendant has or has not been taken by surprise and whether he has had an opportunity of meeting the case so set up. (*Newbould, J.*) BATA KRISTA PRAMANICK *v.* SHEBAITS OF THAKUR JOGENDRA NATH MAITY.
53 I. C. 639.

———*Ejectment—Decree for joint possession*
It is open to the Court to pass a decree for joint possession in a suit for exclusive possession, the plaintiff having been found so entitled, but the plaintiff cannot claim such a decree as of right.(*Sundara Aiyar,J.*) PURUVALA PERUMALA CHETTY, *In re.*
15 I. C. 665 : (1912) M. W. N. 1116.

———*Ejectment—Decree for partition.*
A suit in ejectment cannot be converted into one for partition. (*White, C. J. and Benson, J.*) VAITHILINGA *v.* MURUGAN. 37 Mad. 529 : (1912) M. W. N. 1127 : 15 I. C. 299 : 23 M. L. J. 189.

———*Ejectment—Redemption— Separate suit necessary.*
In a suit for possession by vendee the defendant can redeem the mortgage if the plaintiff is found entitled to possession as mortgagee. A separate suit for redemption is not necessary. (*Stuart and Kanhaiya Lal, A.J.Cs.*) BISRAM SINGH *v.* SANWAL SINGH. 7 O. L. J. 342 : 2 U. P. L. R. (J.C.) 123 : 57 I. C. 541 : 23 O. C. 238.

Election of Remedies.

———*Election of remedies- Inconsistent reliefs.*
On election of one of two alternative remedies, a party on failure cannot seek the other remedy. (*Piggott and Walsh, JJ.*) PITARAM *v.* JHUHARJH SINGH. 33 I. C. 798 : 15 A. L. J. 661.

———*Election of remedies—Alternative reliefs claimed—Grant of one—If can claim the other.*
If one relief is granted out of two reliefs claimed in alternative it is not open to the plaintiff to refuse the relief if granted to him and claim the other relief (*Sanderson, C.J. and Ghose, J.*) RAJUDDIN PATWARI *v.* SYED ABDUL JABBAR.
1924 C. 445.

———*Election of remedies.*
Where there is nothing in the code to limit a party to one particular mode of procedure, the fact that he gets a longer period of limitation by adopting a particular course is no ground for relief being refused. (*Kumaraswami Sastri, J.*) VIRUPAKSHI GOWD *v.* BANDAPPA. 9 L. W. 311: (1919) M. W. N. 246 : 50 I. C. 327 : 37 M. L J 59.

———*Election of remedies — Two remedies given by law—Right of party.*
Where two remedies are given by law to a party he is entitled to avail himself of either of them unless they are inconsistent. (*Sundara Aiyar and Phillips JJ.*) LAKSHMI *v.* MARUDEVI.
37 Mad. 29 : 10 M. L. T. 437 : 12 I. C. 664 : 21 M. L. J. 1063.

———*Election of remedies.*
Where a statute creates an obligation and provides for enforcing its performance in a particular manner, performance must be obtained in the manner in which it is agreed. (*Drake-Brockman, A. J. C.*) LAKHMICHAND *v.* CHATURBHUJ.
65 I. C. 230 : 4 N. L. J. 274.

Evidence.

See also (1) C. P. CODE, O. 18.
(2) EVIDENCE.
(3) EVIDENCE ACT.

———*Evidence—Appreciation of.*
Where a witness states that he could see and did see, in apparently very short time, that a certain quantity of land had not been cleared, the statement can be disbelieved as being improbable only if cross-examination is directed to the impracticability of forming a judgment by mere inspection even with the aid of glasses, as to the proportion cleared. (*Viscount Haldane.*) NABA KUMAR DAS *v.* RUDRA NARAYAN JANA.
45 M. L. J. 438 : 33 M. L. T. 309: (1923) M. W. N. 622 : 1923 P. C. 95 (P. C.).

———*Evidence—Appreciation of--Credibility of witnesses.*
When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box, by the manner in which he answers questions and how he seems to be affected by the questions that are put to him and so on. No doubt there the trial judge has an advantage which cannot possibly be shared by any appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of appeal is in just as good a situation as the judge of the first instance. (*Lord, Dunedin.*) SANKARA REDDI *v.* MAHALAKSHMAMMA.
31 M. L. T. 307 : 17 L. W. 1 : 27 C. W. N. 414 : 1922 P. C. 315 (P.C).

———*Evidence — Appreciation of — Trial Court's estimate of witnesses.*
The trial Court's estimate of the credibility of the witnesses whom it examined is entitled to great weight. (*Viscount Haldane.*) ADWAITYA PRASAD *v* BALDEO DAS. 20 C. W. N. 650 : 33 I. C. 852: (1916) 1 M. W. N. 377 : 4 L. W. 587.

———*Evidence—Appreciation of medical certificates.*

PRACTICE—Evidence.

If a court sees good reason to distrust a medical certificate presented on behalf of a party, its proper course is to summon the doctor or medical officer who has given the certificate and to insist upon his attendance. It is not fair to penalise a party on mere suspicion. (*Mears, C.J. and Piggott, J.*) KRISHNA DASS *v.* RAM UGRAH SINGH. **21 A. L. J. 500 : L. R 4 A. 423 : 1923 A. 549.**

———*Evidence—Question of title.*

In deciding questions of title, the claimant must be heard on merits, though his title appears to be weak. (*Walsh and Ryves, JJ.*) MISRI LAL *v* KANHAIYA LAL. **L. R. 3 A 285 : 1922 A. 128**

———*Evidence.*

When a plaintiff brings a trumpery suit which has no foundation in fact, the first rule upon which the defendant can rely is that he is entitled to call the best evidence which he has; the second rule is that it is not what appears to somebody else to be necessary after the event has been decided but what would appear to be necessary to a reasonable person before the day of the trial; the third rule is that the necessities of the defendant must be judged by the nature of the defence and not by the magnitude of the claim. Where a witness was called in a case and the First Court relied upon his evidence and described him together with three others as respectable and reliable and as has having testified that the defendant had been in possession for more than twelve years, the defendant had the right to summon such a witness. Where a local witness is transferred, and he is absent at the time of trial, it is a misdirection to describe him as other than a local witness. (*Walsh, J.*) HAKIM ZAHUR AHMAD *v.* FATEH ULLA. **64 I. C 962 : 3 U. P. L. R. (All.) 55.**

———*Evidence—Record of, how made.*

A Magistrate should record the evidence for the defence with the same care and precision as that for the prosecution; otherwise his opinion that the evidence is false cannot be easily found out. (*Walsh. J.*) MAHBOOB *v.* EMPEROR. **2 U. P. L. R. (All.) 113 : 56 I. C 856 : 21 Cr. L. J. 552.**

———*Evidence—Admissibility—Objection to.*

The objection to the admissibility of a document in evidence should be raised when the document is tendered. To raise objections to the admissibility of evidence, documentary or otherwise, for the first time in appeal, is improper. (*Richards, C J., Tudball and Ratique, JJ.*) JAGRANI *v.* BISASHAR DUBE. **38 All. 366 : 35 I. C. 701 : 14 A. L. J 449 (F.B.)**

——— *Evidence — Appreciation of—Attention paid to witnesses speaking in good character of accused.*

A Court in taking proceedings under S. 110, Criminal Procedure Code, ought to pay particular attention to the evidence of witnesses produced by accused about his good character, and though not bound to believe, should have good reason to disbelieve such evidence before making an order. If it fails to do so, the order can be revised. (*Richards, C. J.*) HAKIM SINGH *v.* EMPEROR. **16 Cr. L. J. 810 : 31 I.C. 826 : 13 A. L. J. 1055.**

———*Evidence—Agreement to dispense with.*

Where in the trial of a suit the parties agreed not to let in oral evidence but to abide by the result of local inspection by the Judge, his successor cannot act on the result of inspection made by his predecessor, and no question of estoppel can arise if the case is not tried by him in the regular course. (*Banerji, J.*) KISHAN NARAIN *v.* RAM BAKSH. **22 I. C. 51 : 12 A. L. J 48.**

———*Evidence—Relying on a rule of evidence is no fraud.*

A defendant relying on a rule of evidence which prevents a Court from taking certain evidence can hardly be said to be guilty of a fraud. (*Macleod, C. J. and Crump, J.*) TALAK CHAND BHERAJI *v* ATMARAM KESHEO VAIDYA. **25 Bom L. R 818 : 1924 Bom. 58.**

———*Evidence — Wrong admission — High Court in second appeal not to decide if there is other evidence to justify decree.*

Where a document has been wrongly admitted by the courts below, it is not possible in second appeal for the High Court to say whether apart from that document there is sufficient evidence to justify the decree. That is a matter which must be considered by the lower court. 7 Cal. 293, Ref. to. (*Mookerjee, A J.C. and Fletcher, J.*) UJIR ALI SIRDAH *v.* SHADHAI BEHARA. **35 C. L. J 182 : 1922 Cal. 185.**

———*Evidence—Documents admitted in the First Court*—Res judicata—*Question of.*

Where documents are admitted without objection in the First Court, no objection can be raised in the App Court, on the ground that they were not properly proved. The finding of the Lower App. Court is conclusive in second appeal; but if it commits a manifest error, the finding may be set aside. A question of *res judicata* though not raised by the parties in the Courts below may be gone into by the Lower App. Court if the case is remanded to it by the High Court. (*N.R. Chatterjee and Pearson, JJ.*) RAJESWARI DASI *v.* PULIN BEHARY. **62 I. C. 647 : 25 C. W. N. 881.**

——— *Evidence —Admissibility — Objection to second appeal.*

No objection to the admissibility of a document can be taken for the first time in second appeal when an answer to the objection involves an enquiry into facts. (*Woodroffe and Chatterjee, JJ.*) RAJ MOHAN DHUPI *v.* HIRENDRA CHANDRA. **56 I. C. 816**

———*Evidence—Appreciation—Corroboration.*

Part of a statement of an unreliable witness may be admitted if corroborated by other reliable witnesses (*Woodroffe and Walmsley, JJ.*) PERRY *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **31 C. L. J. 209 : 24 C W. N. 425 : 56 I. C. 778 : 21 Cr L. J. 522 : 47 Cal. 254.**

———*Evidence—Custom—Validity of, to be determined when custom established.*

PRACTICE—Evidence.

The question of the validity of a custom should not be considered till the custom itself has been established with precision (*Mukerjee and Beachcroft, JJ.*) YATINDRANATH *v.* HARI CHARAN. **26 I. C. 954 : 20 C. L. J. 426.**

——— *Evidence — Opinion of judge — How much weight to be given.*

In India the opinion of a Judge is to be subjected by the High Court to the same tests as that of a jury. (*Holmwood and Sharfuddin, JJ.*) MANINDRA CHANDRA GHOSE *v.* EMPEROR. **41 Cal. 754 : 123 I. C. 1002 : 15 Cr. L. J. 402 : 18 C. W. N. 580**

——— *Evidence — Court's duty to disclose whatever it relies on.*

Whatever is relied on by the Court should be made known at the trial to the parties to give them an opportunity of adducing evidence or argument on any point. (*Woodroffe Cox and Chatterjee, JJ.*) WESTON *v.* PIYARE MOHAN DAS. **40 Cal. 898 · 23 I. C. 25 : 18 C. W. N. 185.**

——— *Evidence—Appreciation of— Divergent allegation of parties- Conflict of oral testimony —Safe course.*

Where there are divergent allegations of the parties and there is also a conflict of oral testimony, the safe course to adopt is to test the evidence in the light of facts, admitted or proved beyond doubt. (*Mookerjee and Carnduff, JJ.*) IMAMBANDI *v.* MATASUDDI. **13 I. C. 678 : 15 C. L. J. 621.**

——— *Evidence—Admissibility—Objections on appeal.*

The plea of the inadmissibility of a document for want of registration must be raised in the first Court and not in appeal. (*Abdul Raoof, J.*) GHANIA *v.* SHIAMON. **57 I. C 58.**

——— *Evidence—Appreciation of—Witness improving on his former statement.*

It is unsafe to rely upon a witness who materially improves upon his former statement The presence of blood stains on articles of clothing or on the accused's person is not conclusive evidence of guilt in a murder case and may be explained in various ways. (*Johnstone and Scott-Smith, JJ*). NADIR *v.* EMPEROR. **43 P W R 1914 (Cr.) : 26 I. C. 667 : 16 Cr. L. J 75 : 212 P. L. R. 1915.**

——— *Evidence— Appreciation of—Evidence distrusted in part, it should be rejected altogether*

When the evidence produced in a particular case is distrusted in certain particulars by the Court, it is not necessary that it should distrust the whole. (*Rattigan and Chevis, JJ.*) LAKHA SINGH *v* EMPEROR. **89 P. L. R. 1914 : 15 Cr. L.J. 148 : 22 I.C. 724 : 30 P.W.R 1914 (Cr.)**

——— *Evidence—Admissibility of document— Objection in Appellate Court.*

Where the secondary evidence, *i. e.*, a copy of a document has been admitted without objection in the first court this evidence must stand even in his Appellate Court and the latter cannot raise such an objection *suo motu*, 31 C. 155 11 B. 820, Relied upon. (*Chevis, J.*) ZIAUDDIN *v* FATIMA. **14 I. C. 539 : 216 P. W. R. 1912**

PRACTICE—Evidence.

——— *Evidence — Appreciation of— Appellate Court.*

When the appellate Court reverses a finding of fact it ought to apply its mind to the consideration of the whole evidence in the case. (*Seshagiri Aiyar and Phillips, JJ.*) LAXMIPATHAYYA *v.* RAMCHANDRA. **31 M L J. 311 : (1916) 2 M. W. N 133: 35 I. C. 421 : 20 M L. T. 228.**

——— *Evidence—Appreciation of—Appeal.*

Where the questions at issue entirely depend on a proper appreciation of the evidence of the witnesses in the case the appellate tribunal is not to disturb the conclusion of the first court unless the Judge of that Court has, in dealing with the evidence of witnesses before him adopted an erroneous procedure and has decided against the clear weight of evidence. (*Sankaran Nair and Abdur Rahim, JJ.*) RAMASWAMI CHETTY *v.* KARUTHALACHI. **11 M L. T 38 : 12 I C. 751 : (1911) 2 M. W. N. 495.**

——— *Evidence—Appreciation of—Variation in evidence—Finding of Court—Discretion.*

For a Court to come to the conclusion that evidence as given by either party does not represent the true state of affairs, is not uncommon. (*Sundara Aiyar, J.*) *In re* GOPALA IYER. **12 I C. 208 : (1911) 2. M. W. N. 197.**

——— *Evidence— Admissions — Statement of accused.*

If the conviction is to be based solely on the statement of the accused, it is fair that the statement should, unless there is good reason to the contrary, be taken as a whole. (*Abdur Rahim and Ayling, JJ.*) KAMAKKA *v.* EMPEROR. **(1911) 1 M. W. N. 199 : 9 I. C. 790 : 12 Cr. L. J. 142: 9 M. L. T. 316.**

——— *Evidence—Cross-examination, stopping of—When improper.*

The Courts have full power to prevent any abuse of the rights of cross examination, in any manner appropriate to the circumstances of the case ; but before passing an order stopping further cross-examination, it must satisfy itself that questions were being asked which could not affect the result of the suit, in short that the right of cross-examination was being abused. (*Daniels, A. J. C.*) BANKE LAL *v.* KANHAIYA LAL. **1922 Oudh 124.**

——— *Evidence—Application to produce after case closed not to be entertained.*

After both parties have closed their case an application to be permitted toproduce evidence cannot be entertained. (*Wazir Hasan, A.J.C.*) JASODHA *v.* MURALIDHAR. **61 I. C. 144 : 24 O. C. 1.**

——— *Evidence—Failure to establish a custom.*

Where a plff. in order to succeed has to establish a particular custom and he fails to establish it, the Court should only dismiss the suit. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MUHAMMAD ALI KHAN *v.* GHAZANFOR ALI KHAN. **60 I. C. 147 : 7 O. L. J. 474.**

——— *Evidence—Application for filing documentary evidence.*

An application made on the first hearing for permission to file documentary evidence at a later

PRACTICE—Evidence.

stage should be decided at once. *Obiter.* An appeal cannot be preferred under O.43, C.P.C. against an order of refusal or acceptance of documentary evidence. (*Lindsay, J. C.*) PIYARI *v.* JAGANATH KUAR. 3 O. L. J. 538 . 37 I. C. 84 : 19 O. C. 314.

——*Evidence—Oath--Defendant's agreement to abide by plaintiff's oath—Resiling from—Effect.*

A plaintiff cannot get a decree merely because the defendant having agreed to abide by plaintiff's oath afterwards refused to abide by it. (*Stuart, J.C.*) RAM DAYAL *v.* RAM NEWAS. 37 I. C. 75 : 19 O. C. 161.

——*Evidence—Objection to—Party not pleading a point if can object to rebutting evidence by opposite party.*

A party trying to prove a point not raised in his pleading cannot object to the opposite party tendering rebutting evidence as to that point. (*Piggott and Lindsay, J.Cs*) MIR SYED HASAN *v.* TAYABA BEGUM. 26 I. C. 547 : 1 O. L. J, 591.

——*Evidence—Appreciation of—Conflicting evidence—Mass of oral and documentary evidence.*

Where there is a mass of oral evidence of a directly conflicting nature let in on behalf of the two parties on a vital question in a case, the decision should be based on the documentary evidence, which should afford a basis for decision as to the credibility of witnesses, The safe principle in such cases is to consider which story fits in with the admitted circumstances, 7 W.R.67 (P.C.); 38 C. 805, Ref (*Piggott, J.C. and Lindsay, A.J.C.*) AMIR ALI KHAN *v.* KULSUM BEGAM 14 I.C. 99.

——*Evidence--Document produced suspicious —Duty of Court.*

Where a certain document filed by one party is alleged to be a forgery, the Court is not bound to enquire into the details but the party alleging that it is a forgery must *prima facie* make out a case of forgery before asking the Court to reject the document as a forgery. (*Coutts and Das, JJ.*) LACHMI NARAIN *v.* MUKHARAM MARWARI. 24 Cr. L. J. 507: 1923 P. 31.

——*Evidence—Summons, issue of—Court's duty to enforce attendance.*

When once a court issues summons for the attendance of a witness it is its duty, unless the applicant is guilty of gross laches, to help him and enforce the attendance of such witness. A refusal to issue summons is a grave irregularity and contravenes the recognised principle embodied in the C. P. Code. (*Jwala Prasad and Bucknill, JJ.*) JADUNANDAN SINGH *v* SHEONANDAN PRASAD. 1 Pat. 644 : (1922) Pat 200 : 3 Pat. L. T. 487 : 1922 P. 276.

——*Evidence—Party's absence from witness box.*

Where the Small Cause Court dismissed plaintiff's case on the ground that he avoided going into witness box, without considering the evidence in the case the High Court reversed its decision. (*Jwala Prasad, J.*) JANGI MAHATO *v* MUNI MAHTO. 1922 P. 39.

PRACTICE—Ex parte hearing.

——*Evidence—Interdestructive evidence*

Where the evidence in support of one ground might be destructive of the other ground, the two grounds need not be set up in the same suit. (*Das and Adami, JJ.*) RAMAN CHOWBEY *v.* BACHHU MISER. 60 I. C. 393 : 2 Pat. L. T. 285.

——*Evidence — Admission of document—Subject to objections.*

A Court acts improperly in admitting a document "subject to objection" and not deciding the objection. (*Coutts and Das, JJ.*) KESHWAR GOPE *v.* EMPEROR. 21 Cr. L. J. 743 : 58 I. C. 247 : 1 Pat L. T. 491.

——*Evidence— Admissibility— Omission to object—Irrelevant document.*

It is the duty of the Court to exclude an irrelevant document from evidence even if no objection is taken to its admissibility by the parties. Omission to object would not render it admissible. (*Miller, C J. and Mullick, J.*) SUMITRA KUER *v.* RAM KAIR CHOWBEY. 1 Pat. L. T. 702 : (1921) Pat. 17 : 57 I. C. 561 : 5 Pat. L. J. 410.

——*Evidence—Historical works—Not referred in the first Court—Admissibility.*

Reference to works of history not given in evidence or referred to in the Court of First Instance at the appellate stage is irregular and should be avoided. (*Mullick, J*) TUNI ORAIN *v.* LEDA ORAIN. 1 Pat. L. J. 225 : 36 I. C. 206 : 20 C. W. N. 1082.

Exclusion of irrelevant Evidence.

See EVIDENCE ACT, Ss. 5, 167.

Execution.

See also (1) C. P. CODE, S. 47 AND O. 21.
(2) EXECUTION—EXECUTING COURT.
(3) EXECUTION SALE.

——*Execution—Story of.*

The Privy Council ordered stay of execution of the decree which was the subject of appeal to them, on terms which were contradictory to those imposed by the High Court. (*Lord Buckmaster.*) SHIBA PRASHAD SINGH *v.* RANI PRAYAG KUMARI DEBI. 27 C. W. N. 1004 : 32 M. L. T. 189 (P. C.).

——*Execution—Copy of decree and vakalatnama if necessary.*

A copy of decree as also a fresh vakalatnama are not necessary in execution proceedings. (*Mookerjee and Carnduff, JJ.*) RAGHUBAR DAYAL *v.* JADU NANDAN. 15 C. L. J. 89 : 13 I. C. 365 : 16 C. W. N. 736.

Ex parte hearing.

——Ex-parte *hearing -Duty of Counsel.*

When an appeal is heard *ex parte*, Counsel must bring to the notice of the Board adverse as well as favourable authorities. (*Sir Lawrence Jenkins*). DEONANDAN PRASAD *v.* JANKI SINGH. 44 Cal. 573 : 15 A L. J. 154 : 32 M L. J. 206 : 21 C. W. N 473 : 1 Pat. L. W. 294 : (1917) M. W. N. 254 : 25 C. L. J. 259 : 5 L. W. 526 : 19 Bom L. R. 410 : 39 I. C. 346 : 44 I. A. 30 : 21 M. L. T. 240 (P. C.).

PRACTICE—Ex parte hearing.

——Ex parte *hearing—Slip in the order.*

If there is a mistake in the order in an appeal heard *ex parte*, the error is attributable to the appellant. (*Lord Macnaghten.*) CHAMPAT SINGH *v.* JANGU SINGH. **16 C. W. N. 793 : 12 M. L. T 482 : 10 A. L. J. 379 : (1912) M. W. N. 1150 : 14 Bom. L. R. 1223 : 16 I. C 830 : 17 C L. J. 14 : 23 M. L. J 738 (P. C.).**

——Ex parte *hearing—Notice, necessity of.*

When a widow of one of the decree-holders got her name recorded in place of her husband without notice to other decree holders and when the other decree holders applied to be heard as to whether the order was wrong. *Held*, that the Court is bound to decide whether the *ex parte* order was correct. (*Macleod, C. J. and Coyajee, J.*) MOHANLAL AMRIT LAL *v.* BAI MAHAJAVERI. **1922 Bom. 280.**

——Ex parte *hearing—Default of appearance—Fault of party or his legal advisers—Proper course for the Court—Costs sufficient punishment for party in default.*

It is contrary to principles of natural justice, that cases should be decided on the hearing of one side only if the other side is ready and willing to be heard. In such case adequate punishment is to be found in the remedy of costs.

Where the defendants did not appear owing to a mistake of their Vakil and owing partly to their not having received a telegram which had been sent by their Vakil in such time that if it had been received in the normal course, he would have got them on the second day of hearing, it is not a fit case for trying the suit *ex parte* against the defendants. (*Schwabe, C. J. and Wallace, J.*) LAKSHMINARAYANA *v.* THE STANDARD OIL COMPANY, NEW YORK. **17 L. W. 627 : 32 M. L. T. (H. C.) 296 : 44 M. L. J. 488 : 1923 Mad. 581.**

——**Ex parte order.**

See (1) JUDICIAL ORDER.
(2) C. P. CODE, O. 9, R. 13.

——**Finding of fact.**

See (1) C. P. CODE, S. 100.
(2) PRACTICE—APPELLATE COURT.
(3) PRIVY COUNCIL.

Formal Defect.

——*Formal defect—Court whether bound by technicalities.*

A court should not be bound by any technicalities with regard to the form of the statement of claim in a plaint. (*Sanderson, C. J. and Mookerjee, J.*) SHEIKH YAKUB *v.* TAZIMUDDI MILLICK. **41 I. C. 842 : 26 C. L. J. 105.**

——*Formal defect—Application—Erroneous provision cited.*

A court should not refuse an application which it ought to allow on the merits, simply because it asks the Court to exercise its admitted powers under a wrong section. (*Mookerjee and Beachcroft, JJ.*) BECHAN SAHU *v.* SYED ALI. **16 I. C. 614.**

PRACTICE—High Court.

——*Formal defect—Not to defeat justice.*

The object of rules of procedure is to provide for the best and most convenient mode of adjudication and they should not be converted into mere mechanical tests by which courts may save themselves the trouble of deciding the real issues between the parties. (*Tyabji and Spencer, JJ.*) TADIPARTI HANUMANULU *v.* MADDUKURI GOLAYYA. **24 I. C. 822.**

——*Formal defect—Court's duty.*

Mere grounds of equity do not justify a court in construing an application as something essentially different from what it is. (*Pratt, J. C. and Crouch, A. J. C.*) JANUL *v.* HARUMAL. **11 I. C. 77 : 5 S. L. R. 68.**

High Court.

——*High Court—Full Bench—Reference to, on difference of opinion.*

In the ordinary course, on a difference of opinion arising between two division Benches of the same High Court, the case should be referred to a Full Bench. (*Lord Parker.*) HAMIRA BIBI *v.* ZUBAIDE BIBI. **38 All. 581 : 14 A. L. J. 1055 : 21 C. W. N. 1 : 18 Bom. L. R. 999 : 20 M. L. T. 505 : 4 L. W. 602 : (1916) 2 M. W N. 551 : 1 Pat. L. W. 57. 25 C.L J. 517 : 36 I. C. 87 : 43 I. A. 294 : 31 M. L. J. 799 (P. C.)**

——*High Court—Full Bench—Conflict of decisions—Private consultation bad.*

It is usual and expedient whenever a difference of opinion arises in the same High Court, to refer the point to the Full Bench It is undesirable to introduce the opinions of another Judge (not a party to the judgment) obtained on a private consultation, for the purpose of enforcing the conclusion arrived at. (*Mr. Ameer Ali*) BUDHA SINGH *v.* LALTHU SINGH. **37 All. 604 : 42 I. A. 208 : 13 A. L. J. 1007 : 18 M L. T. 409 : 17 Bom. L. R 1022 : 20 C. W. N. 1 : 22 C. L. J. 481 : 2 L. W. 897 : 30 I C. 529 : (1915) M.W.N. 772 : 29 M. L. J. 434 (P.C.).**

——*High Court, Bombay—Notice of motion—Limitation—Sufficiency of.*

When an application is to be made to the Court, it commences to be made when a notice of motion is first filed in the proper office of the Court. (*Macleod, C. J. and Crump, J.*) KANWAR VENKAPAIYA *v.* NAZERALLY TYABALLY. **25 Bom. L. R. 484 : 47 B. 764 ; 1924 Bom. 36.**

——*High Court—Original Side—Commissioner's report—Objections to—Appeal from the decision of the Court—Final decree passed before hearing of the appeal—Effect of—Appeal from final decree.*

In a case tried on the Original Side of the High Court there was a reference to the Commissioner and on that reference, a report was made. The plaintiff filed exceptions to the Commissioner's report which were heard by the trial Judge. The plaintiff dissatisfied with the decision of the Trial Judge filed an appeal and succeeded to a certain extent on the appeal.

PRACTICE—High Court.

When the appeal proceedings were pendin the case was set down before the Trial Judge for directions and costs on the Commissioner's report. The Court having made an order on further directions a decree was drawn up *Held*, that while the hearing of the exceptions was pending in the Appellate Court the lower Court was not competent to hear any application for further direction on the Commissioner's report which had not been finally settled; and that as the lower Court had passed a final decree the remedy of the plaintiff was only by way of appeal from the decree. (*Macleod C.J. and Crump, J.*) ELIAS HAJI AHMAD *v.* HAJI ESMAIL SAIT.
25 Bom. L. R 237 : 1923 Bom. 200.

———*High Court—Power to take action in case of contempt of Subordinate Court.*

High Court has jurisdiction to take cognizance of contempt of Subordinate Court. (*Macleod and Shah, JJ.*) EMPEROR *v.* BALKRISHNA GOVIND KULKARNI. **24 Bom. L. R, 16: 46 B. 592 : 23 Cr. L J 177 : 1922 Bom. 52.**

———*High Court—Original Side—Notice of mohors—Consent decree if can be set aside or varied by notice of motion.*

A consent decree cannot be set aside, varied or altered by a Judge on an application based merely on notice of motion. (*Dawar, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* FARDOONJI.
11 I. C. 356 : 13 Bom. L. R. 332.

———*High Court—Decision of Bench on Appellate Side—If binding on another Bench in Original Side.*

The opinion of an Appeal Bench in a matter of law or construction of a document is not binding upon another Bench sitting as a Court of First instance in another matter. (*Buckland, J.*) *In re* CELESTE CULLINGTON. **63 I. C. 819 : 22 Cr. L. J. 691 : 48 Cal 328.**

———*High Court—Original Side—Decision of single Judge.*

A Judge on the Original Side is ordinarily bound to consider the decision of another Judge on the Original Side but he need not follow it, if he considers it to be erroneous. (*Mookerjee, C. J and Flecther, J.*) VIRJIBUN DASS MOOLJI *v.* BISSESWER LAL HAR GOBIND. **60 I. C. 406: 24 C. W. N. 1032.**

———*High Court—Judgment delivered by one Judge on behalf o absent colleague.*

The judgment of one of two Judges comp ing a Bench read by the other in Court when the fo ner is on leave is a valid judgment. (*Sanderson, C J. Teunon and Walmsley, JJ.*) SARAJ RANJAN CHOUDHURY *v.* PREMCHAND CHOUDHURY.
22 C. W. N. 263 : 43 I. C. 781 : 27 C. L. J. 257.

———*High Court—Division Bench—Powers.*

It is not necessary that a division Bench of the Calcutta High Court must refer any particular case to a Full Bench, but it can follow a decision of he Court which it does not wholly approve of. (*Fletcher and Richardson, JJ.*) KHALIL RAHMAN *v.* KAFFILUDDIN DALAL. **38 I. C. 643**

PRACTICE—High Court.

———*High Court—Appeal heard ex-parte—No jurisdiction to another Bench to order rehearing of appeal.*

An appeal was heard and decreed *ex parte* by Division Bench of the High Court. Another Division Bench set aside the judgment and directed the rehearing of the appeal by the former Bench. *Held* that the order directing the rehearing of the appeal was without jurisdiction. If there were any grounds for setting aside the judgment of the former Bench the application ought to have been made to that Bench and none other. (*Fletcher and Richardson, JJ.*) RAM KRISHNA BOSE *v.* BHAGWAN RAMANUJA. **30 I. C 27.**

———*High Court—Original Side—Decree—Appeal—Date of payment.*

Where by a decree on the Original Side, payment was to be made by a certain day, and proceedings were stayed on appeal, which was however subsequently dismissed and the date fixed elapsed in the meanwhile. *Held* that application on the Original Side for fixing a fresh date was rightly made as it was a proceeding in execution. (*Chitty, J.*) HASHIM SALEJI *v.* AHMED MUSAJI SALEJI.
22 I. C. 368.

———*High Court—Rule nisi—Perversion of facts—Rule if can be made absolute*

A rule applied for in astute and intelligent perversion of facts cannot be made absolute unless there are strong grounds for doing so. (*Piggott and Gordon, JJ.*) KUNJI LAL BANNERJEE *v.* DHINA BHANDU JHA.
14 I. C. 458 : 15 C. L. J. 162.

———*High Court—Judgment—Amendment—Application for review.*

The judgment of a High Court is not complete until it is sealed and it can alter it without any application for review 14 C. 42; 2 A 177. Rel. on. 10 B 176, Not followed. (*Caspersz and Sharjuddin, JJ.*) AMODINI DASSI *v.* DARSON GOSH.
13 I. C. 776: 13 Cr. L. J. 120 : 38 Cal. 828.

———*High Court—Rule granted on one of several grounds—Fresh rule on other ground, whether may be issued.*

The High Court has no jurisdiction to grant a fresh rule when on the same facts a rule was granted on one only of several grounds. (*Caspersz and Sharjuddin, JJ.*) NARAIN SINGH *v.* JHAGRAIO SAHU. **38 Cal 933 : 12 Cr. L. J. 407 : 11 I. C. 591 : 15 C. L. J. 325.**

———*High Court—Stay of execution.*

It is not the practice of the Lahore High Court in all cases to order stay of execution of a decree for possession of immoveable property, pending appeal. (*Abdul Raoof, J.*) RAJINDRA SINGH *v.* UMRAO SINGH. **61 I. C. 827.**

———*High Court—Full Bench—Function of.*

Obiter. The province of a Full Bench ordinarily is to decide merely difficult questions of law or custom upon which conflicting opinions or decisions have been pronounced. (*Kensington, Rattigan and Chevis, JJ.*) ADWAR *v.* ALLAHI YAR.
10 P. L. R 1913 : 275 P. W. R. 1912: 16 I. C. 967 : 28 P. R. 1913.

PRACTICE—High Court.

———*High Court—Full Bench—Reference to Full Bench on point of law—Powers of Full Bench to deal with whole case.*

A Full Bench has power, where a reference is made to it on a point of law, to look into the circumstances of the whole case and deal finally with the appeal out of which the discussion has arisen. (*Reid, C. J., Kensington and Shah Din, JJ.*) EMPEROR *v.* KIRU **10 P. R. 1911 (Cr.) : 205 P. L. R. 1911 : 11 I. C 132 : 12 Cr. L. J. 364 : 24 P.W.R. 1911 Cr.**

———*High Court—Original Side—Order—Modification.*

Judge sitting on the Original Side of the High Court can modify the minutes of his order before the formal order is drawn up (*Wallis, C. J. and Napier, J.*) MAHBOOLI BI *v.* SHERIFA BI. **42 Mad. 269 : 24 M. L. T. 500 : (1918) M W. N 928 : 9 L. W. 217 : 49 I. C. 373: 36 M.L.J. 28**

———*High Court—Madras—Criminal appeals—Power to admit.*

A Division Bench hearing criminal appeals has power to admit criminal appeals presented through the Bench Clerk although a single Judge is sitting at the time as an admission Court. (*Oldfield, Seshagiri Iyer and Napier, JJ.*). THE PUBLIC PROSECUTOR *v.* KOTTAPARAMBATH. **39 Mad. 527 : 18 M. L. T. 95 : (1915) M.W N. 504 : 16 Cr. L. J. 593 : 30 I. C. 145 : 29 M. L. J. 101 (F.B.).**

———*High Court—Patna—Effect of Calcutta High Court rulings.*

With respect to matters regarding which there is a conflict of opinion between the Calcutta and other High Courts prior to the establishment of the Patna High Court, the latter will follow the Calcutta rulings, unless they are decidedly wrong. (*Jwala Prasad and Bucknill, JJ.*) AMRIT LAL *v.* MURLIDHAR. **3 Pat. L. T. 422 : 1922 Pat. 229 : 1922 P. 188 :**

———*High Court—Single Judge—Division Bench Judgment.*

A single Judge of the High Court doubting the correctness of the decision of a division Bench cannot do anything else than refer it to the larger Bench. (*Jwala Prasad, J.*) EMPEROR *v.* HEMAN GOPE. **58 I C 459 : 21 Cr. L. J. 779 : 1 Pat. L. T. 349.**

———*High Court—Patna—Calcutta decisions.*

The Patna High Court will not lightly depart from a general practice sanctioned by the decisions of the Calcutta High Court. (*Das, J.*) PADARATH SINGH *v.* RATAN SINGH. **54 I. C. 673 : 5 Pat. L. J. 23.**

———*High Court—Patna—Calcutta decisions.*

In matters of settled practice the Patna High Court follows the Calcutta High Court. (*Miller, C. J. and Mullick, J.*) MAHABIR PRASAD SINGH *v.* ANUP NARAN SINGH. **5 Pat L W. 327 : 1918 Pat. 246 : 46 I. C. 137 : 3 Pat. L. T. 377**

———*High Court—Patna—Procedents of the Calcutta High Court to be followed.*

Precedents of the Calcutta High Court in matters of procedure should be accepted by the Patna High Court as the pleaders have been all along following the Calcutta rulings (*Roe and Ali Imam, JJ.*) KHODDA BUKSH *v.* BAHADUR ALI. **3 Pat. L. J. 285 : 4 Pat. L. W. 324 : 45 I. C. 203 : 1918 Pat. 130.**

———*High Court—Patna—Calcutta decisions—Conformity to.*

The decisions of the Calcutta High Court which until recently exercised jurisdiction in Bihar and Orissa although they do not prevent the High Court from exercising an independent Judgment, are entitled to the greatest respect and should not be departed from without cogent reasons, (*Miller, C. J and Mullick, J*). KRISHNA LAL JHA *v.* NANDESWAR JHA **44 I C 146 : 4 Pat. L. J. 38.**

———*High Court—Patna—Decisions of Calcutta High Court.*

When a general practice is sanctified by concurrent decisions of the Calcutta High Court the Patna High Court should not depart from it. (*Sharfuddin and Roe, JJ.*) MAHAMAYYA PRASAD SINGH *v.* MUSST. SUKKHDIYA KUAR. **1 Pat. L.W. 759 : 40 I.C 517 : 1917 Pat. 191.**

———**High Court Rules.**

See HIGH COURT RULES, UNDER ALLAHABAD, BOMBAY ETC.

Inconsistent Pleas.

See also (1) C. P. CODE, O. 6 AND O. 7.
(2) EVIDENCE ACT, S. 115.

———*Inconsistent pleas—Alernative claims—Prescription and easement.*

A suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of land both rights of ownership and easement. 34 C. 511 foll. (*Kanhaiya Lal, J*) SRI RAM *v.* MANI RAM. **21 A. L. J. 569 : L. R. 5 A. 24 : 1924 A. 97.**

———*Inconsistent pleas—Effect of document—Duty of Court.*

Where a party takes up inconsistent positions regarding the effect of the instrument in controversy, it is the duty of Court to give effect to the real intention of the parties, subject to an order as to costs. (*Lord Macnaghten*) UMRAO SINGH *v.* LACHMAN SINGH. **33 All. 344 : 14 O. C. 133 : 38 I. A. 104 : 15 C. W. N. 497 : 8 A. L. J 465 : 13 C. L. J. 519 : 9 M. L. T. 507 : 13 Bom. L. R. 404 : (1911) 2 M W. N. 242 : 10 I. C 285 : 21 M. L. J 637 (P. C.)**

———*Inconsistent pleas—Main point cannot be overthrown and others set up instead.*

A person who has been trying his best to establish his main point of separation and has been supporting facts leading thereto cannot be allowed to turn his back to the point and to say that his point is jointness and adverse possession and not separation. (*Walsh, J.*) KUNDAN *v.* MOHANI CUNWAR. **3 U. P. L. R. (All), 69.**

———*Inconsistent pleas—Defence—Criminal trial.*

An accused cannot set up entirely inconsistent pleas in defence. The accused must be given the

PRACTICE—Inconsistent pleas.

benefit of the doubt if the case for the prosecution is doubtful and cannot be believed. (*Knox, J.*) RAGHUBAR DYAL *v.* EMPEROR. **38 I. C. 995 : 18 Cr. L. J. 435.**

———*Inconsistent pleas.*

A plaintiff, alleging that a certain agreement of relinquishment was not binding on him cannot, when the agreement is declared to be valid claim the benefit of its terms. (*Lyle, J.*) RAMESHWAR DAYAL *v.* SIKHDAR SINGH. **21 I. C. 64.**

———*Inconsistent pleas.*

An issue inconsistent with the case made out by the plff. should not be admitted. (*Macleod, C. J. and Fawcett, J.*) ANDANISWAMI *v.* TOTADSWAMI. **45 Bom 590 : 60 I. C. 907 : 23 Bom. L. R. 75.**

———*Inconsistent pleas—Denial of contract—Void as wager.*

Quaere : It hardly lies in the mouth of a person to say in the same breath "I did not make the contract, but if I did make the contract, I am sure it was a wager". (*Beaman, J.*) JOHARMAL *v.* CHETRAM. **39 Bom. 715 : 28 I. C. 538 : 17 Bom. L. R. 293.**

———*Inconsistent pleas.*

A claim of ownership and a right of easement can only be advanced in the alternative. (*Ghose, J.*) AMRITANATH BISWAS *v.* JOGENDRA CHANDRA BATTACHARJEE. **1924 C. 369.**

———*Inconsistent pleas—Not allowed.*

Where in pursuance of a compromise between the parties, the plaintiff got possession of the suit properties and the terms of the compromise were even subsequently enforced by courts of law as between them.

Held, that the defendants were precluded from disputing the title of the plaintiff to the lands by virtue of the compromise entered into by them with the plaintiff, and by virtue of which the plaintiff was put in actual possession of the lands and remained in possession for about 17 years. (*Walmsley and Ghose, JJ.*) JOGENDRA NATH BHOMICK *v.* DINANATH DASS. **1922 Cal. 313.**

———*Inconsistent pleas—Mortgage by husband and wife—Suit on.*

A Hindu father and mother executed a mortgage, the father took the loan and the mother furnished the security. On the father's death, the mortgagee sued the mother and the sons on the mortgage. During the pendency of suit the mother died and the Plff. asked the Court to note that the sons were also the legal representatives of the mother too. The sons objected on the ground that that their mother having had only a limited interest in the property, the transaction was inoperative against her property in their hands. *Held*, the contention cannot be raised in the present case and the sons being noted as legal representatives of their mother could not not raise a title hostile to that created by her. (*Mookerjee, A. C J. and Fletcher, J.*) HARIDOS ROY *v.* GIRINDRA MOHAN BAKSHI. **25 C W.N. 192: 63 I. C. 92 : 33 C. L. J. 301.**

———*Inconsistent pleas—Objection to jurisdiction.*

PRACTICE—Inconsistent pleas.

A party who objects to the jurisdiction of a court of small causes on the ground that it is cognizable only by a munsif's court, is estopped from pleading that the munsif has no jurisdiction. (*Mookerjee and Cuming, JJ.*) KSHETRA NATH BANERJEE *v.* KALI DASI. **21 C. W. N. 784 : 41 I. C. 929 : 27 C. L. J. 96.**

———*Inconsistent pleas—Parties if can take.*

Litigant parties cannot be allowed to take up inconsistent positions in court. (*Mookerjee and Beachcroft, JJ.*) SESHI BUSHAN MANDAL *v.* RAM SHELAK MANDAL. **24 I. C 181**

———*Inconsistent pleas— Litigation—Party cannot be allowed to take up.*

A litigant will not be allowed to take inconsistent positions in court. A party to a foreclosure suit stated that the present title to the property was in himself. He cannot subsequently be permitted to assert that he was entitled to succeed on the death of a widow who was in possession at the time. (*Mookerjee and Beachcroft, JJ.*) BHAGIRATHI DASI *v.* BALESHWAR BAGARTI. **41 Cal. 69 : 17 C. W. N. 877 : 19 I. C. 686 : 19 C. L. J. 155.**

———*Inconsistent pleas—Defence.*

A deft. can plead as many separate distinct and inconsistent defences as he thinks proper in the alternative in his written statement. 7 I. C. 166 Fol. 34 C. 51 Rel. on. (*Mookerjee and Carnduff, JJ.*) SRI RANG BEHARI LAL *v* RANCHAYYA LAL. **13 I. C. 128 : 15 C. L. J. 439.**

———*Inconsistent pleas—Trial finished—Effect.*

An issue whether the alleged *shikmi taluk* existed or not was framed in the first Court. Both parties went into evidence on that question and it was the subject of decision in both the lower Courts. *Held*, that the deft. could not raise any objection in the High Court to the trial of that issue by the lower Courts. (*Macpherson and Banerji, JJ.*) KALI CHANDRA *v.* RAM HARI DEY. **12 I. C. 462 : 14 C. L. J. 310.**

———*Inconsistent pleas.*

A Will declared to be invalid cannot be relied upon in a subsequent suit against the same opponent. (*Chevis and Dundas, JJ.*) BHOLA SINGH *v.* BABU. **2 Lah L J. 431.**

———*Inconsistent pleas—Suit on tenancy.*

In ejectment suit if a plff. while treating the defendant as tenant fails to prove the tenancy he cannot be allowed to prove his title for ejecting him as a trespasser. (*Ayling and Oldfield, JJ.*) CHENNAVARASAWMY *v.* CHINNA SATYANARAYANA MURTHY. **21 I. C. 560.**

———*Inconsistent pleas—Party not allowed to set up procedure successfully objected to by him.*

A party cannot be heard to say that a procedure, to which he himself successfully objected in a former proceeding in relation to the same subject-matter was the proper procedure to be adopted by the latter. (*Abdur Rahim and Sadasiva Iyer, JJ.*) GOVINDAPPA *v.* HANUMANTHAPPA. **38 Mad. 36 : 23 M. L. J. 513 : 17 I. C. 420 : (1912) M. W. N. 1152.**

PRACTICE—Inconsistent pleas.

———*Inconsistent pleas.*

The court while preserving sacred the rights of parties to frame their own pleadings, must see that they do not offend against rules of pleadings or tend to embarass, delay or prejudice the trial of the suit. (*Kanhaiya Lal and Kendall, A.J.Cs.*) FARID-UN-NISS *v.* MUHTAR AHMAD.
40 I. C. 488 : 4 O L. J. 230.

———*Inconsistent pleas—Duty of deft. and power of Court.*

A deft. can, as a matter of law, put forth inconsistent pleas and the Court must consider this fact in coming to the conclusion whether the pleas are well-founded. (*Das and Adami, JJ.*) RAMAN CHOWBEY *v.* BACHA MISER. **60 I. C 393 : 2 Pat. L. T. 285.**

———*Inconsistent pleas—Private and public way.*

A right to a private way and a right to a public way over the same soil cannot be pleaded together, as they are inconsistent. The private right, if pre-existing, can be relied on, for there is no compulsion in such a case to resort to the public right which might possibly be disputed by conflicting evidence. (*Das, J.*) RAMMANOHAR SAHI *v.* METHILA PRASAD SAHI. **57 I. C. 151.**

———*Inconsistent pleas.*

The defence ought not to be allowed in appeal to raise a plea inconsistent with their main defence. (*Parlett, J.*) MA MIN KYIN *v.* MAUNG WA. **31 I. C. 875 : 9 Bur. L. T. 53.**

———*Inconsistent pleas—Dismissal of suit on basis of evidence of a witness.*

Plff. sued the deft. to recover a certain sum of money for a breach of contract and contended that under a contract to deliver "China" or "Small" mills rice either the delivery of "China" or 'small' mills rice or the delivery of special big mills rice would be a good delivery. After issues were framed, the evidence of one of the plff's. witnesses was taken but it was unfavourable to plff He therefore intimated his wish to call several other witnesses in support of his contention. But the Court refused and dismissed the suit. *Held*, that the plff. did not take up any inconsistent positions and that the mere fact that the evidence of one witness was unfavourable to him was not a good ground for dismissing the suit without examining the other witnesses whom he wished to produce. (*Hartnoll, O. C. J. and Twomey, J.*) GOVINDASAWMY PILLAI *v.* KOOLLAYAPPA ROWTHER. **4 Bur. L. T. 260 : 11 I. C. 930 : 6 L. B. R. 17.**

———*Inconsistent pleas—Objection to jurisdiction.*

A defendant is precluded from raising the question of jurisdiction when the case is transferred to the higher Court according to his objection in the lower Court. (*Pratt, J. C. and Crouch A. J. C.*) KHAITOMAL LALCHAND *v.* FATEH MUHAMMAD. **32 I. C. 629 : 9 S. L. R. 164.**

———**Inherent Power.**

See C. P. CODE, S. 151.

———**Injunction.**

See C. P. CODE, O. 39.

PRACTICE—Issues.

Insolvency.

———*Insolvency — Right of Insolvent to appeal.*

If a party to a suit or proceeding is adjudged insolvent during its pendency, he is not debarred from appealing by reason of his insolvency. (*Spencer and Ramesam, JJ.*) KONDAPALLI TATI REDDI *v.* RAMACHENDRA RAO UPPALURU.
13 L. W. 616 : 62 I. C. 854 : (1921) M. W. N. 535.

Interest.

See also C. P. CODE S. 34.

———*Interest—Contract or usage.*

In the absence of a mercantile custom or usage, interest is not due for either the day on which money was advanced or on which it was repaid

Where there are conflicting rights as between subject and subject, a fraction of a day will be computed as a whole day. (1875) 10 Q. B. 346 Ref. (*Sadasiva Iyer and Moore, JJ.*) SUBBHAI GOUNDAN *v.* PALANI GOUNDAN. **34 I. C 825 : 30 M. L. J. 607.**

Issues.

See also (1) C. P. CODE S. 11.
(2) C. P. CODE S. 14.

———*Issues.*

In appealable cases the Courts below should as far as may be practicable, pronounce their opinion on all the important points so as to avoid remand, expense and delay. (*Sir John Edge,*) MAHOMED SULAIMAN *v.* KUMARA BIRENDRA CHANDRA SINGH. **32 M L. T. 115 : 50 C. 243 : 27 C. W. N 749 : 50 I. A. 247 : 37 C. L. J. 561 : 44 M. L. J. 388 : 1922 P. C. 405.**

———*Issues—Suit by reversioner.*

Where a person claiming to be reversioner sues for a declaration that the deceased did not execute a will it is necessary to determine first of all whether the party attacking the will has any title to raise the question : for unless he has title, he has no right to be heard. (*Lord Dunedin.*) PALCHUR SANKARAREDDI *v.* PALCHUR MAHALAKSHMAMMA. **31 M. L. T. 307 : 17 L. W. 1 : 27 C. W. N. 414 : 1922 P. C. 315 (P. C.).**

———*Issues—Necessity for defining at early stage.*

In this case the privy Council drew attention of the litigants in India to the importance of defining at the earliest moment in the simplest terms, the exact character and extent of the dispute which is going to be made the subject of the litigation through the court. (*Lord Buckmaster.*) BAWA MAG NIRAM SITARAM *v.* SHETU KASTURBAI MANIBHAI **46 Bom. 481 : 26 C. W. N. 473 : 30 M. L. T. 268 : 24 Bom. L. R. 584 : 20 A. L. J 371 : (1922) M. W. N. 319 : 35 C. L J. 421 : 49 I. A. 54 : 1922 P. C. 163 : 42 M. L. J. 501 (P. C.)**

———*Issues—Co-owners—Possession, suit for.*

In a suit by one co owner against another for possession the only question, as regards adverse possession, is whether the deft. could prove facts

PRACTICE—Issues.

which would amount to an ouster for twelve years and it is not proper to frame the issue as to whether the plaintiff was even in possession within 12 years next prior to the suit. (*Macleod C. J., and Shah, J.*) CHANDBHAI *v* HASANBHAI **23 Bom. L. R 1033 : 1922 Bom. 150.**

——*Issue—Not raised — Law governing parties*

In the absence of special evidence to show whether Mahomedan or Hindu Law governs the parties but where from the beginning it was made to appear that they were governed by Mahomedan Law, the High Court would not allow the parties in the second appeal to disturb that assumption. (*Batchelor and Rao, JJ.*) HIRA NAIKAN *v.* RADHA NAIKAN **37 Bom. 116 : 17 I C. 834 : 14 Bom. L. R. 1129.**

——*Issue—Frame of— Objection.*

The frame of an issue cannot be objected to by the parties for the first time in second appeal, where the issue is wide enough to cover all the grounds of attack and defence and all the the available evidence has been produced. (*Scott Smith and Broadway, JJ.*) NANDA *v.* JAI CHAND. **40 I C. 184 : 35 P. W. R. 1917.**

——*Issues—Additional issues—Framing or alteration of.*

Where the plea of invalidity of a mortgage bond due to want of proper attestation, was raised not in the pleadings, but at the trial the proper course for the court to judge its validity or otherwise is to raise a distinct and supplemental issue on the point and give the parties opportunity for adducing fresh evidence. (*Sadasiva Aiyar and Napier, JJ.*) RATNA NAIDU *v.* AIYANACHARIAR. **29 I. C. 991 : (1915) M. W. N 637.**

——*Issues—Duty of Court to raise.*

An issue should be raised and a finding given by the Court on every question necessary for the right decision of a suit. But where the pleadings raise an issue with sufficient clearness, it is immaterial that the plea was not put forward in a particular form. (*Sadasiva Iyer and Tyabji, JJ.*). RAMASUBBA IYER *v.* AVUDAI AMMAL. **25 I. C. 123 : (1914) M. W. N. 595.**

——*Issues— Not raised —Right of an appellate Court to adjudge on a question not raised in issue*

An appellate court has no power to adjudge on a question which is not included in the issue. It should frame an issue take evidence and then give the finding. (*Benson and Sundara Aiyar. JJ.*) MALAIKOLANDU CHETTIAR *v.* PERIA PILLAI **10 I. C. 351 : (1911) 2 M W. N. 393.**

——*Issue — No specific issue framed — Question of fact decided.*

If evidence is adduced by both parties on a question of fact and decision given, the decision is good even if the fact is not specifically put in issue provided neither party is prejudiced by the form of issue. (*Krishnaswami Iyer and Ayling, JJ.*) AYYALAMMAI SERVAIGARAR *v.* NALLASWAMI PILLAI. **10 I. C. 291 : 9 M. L. T. 407.**

PRACTICE—Judge.

——*Issue—Decision by analogy.*

A Judge is not bound to decide an issue of fact by analogy, *i. e.*, to follow the opinion of another Judge in some other similar case. (*Stanyon, A. J. C.*) BALU BAI *v.* TANU BAI. **24 I. C. 808 : 10 N. L. R. 51.**

——*Issues—Dispute as to court-fee payable.*

In case of a dispute as to the court-fee payable in a suit, the Court should frame an issue on the point and decide it at the beginning or along with other issues. (*Kanhaiya Lal and Lyle, A J.Cs.*) GANGA PRASAD *v.* BHAWANI BHIKH. **62 I. C. 853 : 8 O.L. J. 279.**

——*Issues—Points not raised may be tried if arising in the case.*

A Court can try a question arising in a case, though not specifically raised in the pleadings. (*Lindsay, J. C.*) SAIFU KHAN *v* DEPUTY COMMISSIONER, FYZABAD. **40 I. C. 456 : 4 O. L. J. 305.**

——*Issues— Omission to frame specific issues.*

The omission to frame a specific issue cannot prejudice the parties in the trial, if the issues framed already are wide enough, and the parties are not taken by surprise. 27 A. 634, Ref. to. The Court has power to amend an issue even after trial when a plea has been inadvertently ignored, and call for evidence on that issue. (*Stuart and Kanhaiya Lal, A J.Cs.*) SITA RAMJI *v.* JADUNATH SINGH. **24 I. C. 72 : 1 O. L. J. 204.**

——*Issues— Omission to raise— Evidence adduced—No prejudice or surprise.*

The master is entitled to drop the allegations of fraud and misconduct and rely entirely on negligence and breach of contract in an action for damages for wrongful dismissal. 22 C. 324, Rel upon. 1 H L. 324; 14 M. I. A. 53; 37 C. 856; 6 I. C. 472, Dist. The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued in order that each may bring forward evidence appropriate to the issues. No question of surprise arises if a point is covered by the pleadings and evidence is adduced by both sides regarding it, although no issue on the point has been framed by the Lower Court. (*Pratt, J. C. and Fawcett, A. J. C.*) JACOB ELIAS SASOON *v.* DOSSA CALIAN. **15 I. C. 757 : 5 S. L. R. 192.**

Judge

——*Judge—Cancelling order, mode of.*

The proper way for a Judge to cancel an order which he has already passed is by writing out a fresh order and not by scratching out or attempting to obliterate a previous order. (*Walsh and Gokul Prasad, JJ.*) PARSHOTTAM SARAN *v.* HARGU LAL. **18 A.L.J. 1121 : 60 I. C. 131 43 A. 198 : 2 U. P. L. R. (A) 424.**

——*Judge—Personal inspection by a Judge.*

A Judge can take a personal inspection of the site in dispute in an easement case, and decide the case on facts which he finds in his personal inspection and not inferences drawn from such facts. (*Chandavarkar and Heaton, JJ.*) LAKMIDAS *v.* BHAIJI KUSHAL, **35 Bom. 317 : 10 I. C. 914 : 13 Bom. L. R. 313.**

PRACTICE—Judge.

——*Judge — Magistrate absent during part of the case.*

A Magistrate who absents during a part of the trial, should not express an opinion on evidence which he has not heard. *Per Shah, J* :—A Magistrate who has heard the whole case, must give his opinion whatever it may be ; he should not hear the whole case and withdraw from the case only at the end. (*Macleod, C. J. and Shah, J.*) GANGAPPA *v* EMPEROR. **63 I. C. 151 : 22 Cr. L. J. 615 : 23 Bom. L. R. 833.**

——*Judge—Cannot adopt new form of procedure*

A court is not justified in applying its powers of inherent jurisdiction to introduce a new form procedure for which no provision is made by the Indian law. (*Newbould and Cuming, JJ.*) GOUR CHANDRA GOSWAMI *v.* CHAIDANYA GOSWAMI. **1922 Cal. 1 (1).**

——*Judge—Substance and form of procedure.*

The Court must look to the substance and not to the mere form of a proceeding (*Mookerji, A. C. J., and Fletcher, J.*) MAHENDRA NATH MONDAL *v.* SHAMSUDDIN. **33 C. L. J 198 : 62 I. C. 344 : 25 C. W.N. 279.**

——*Judge—Decision of another Judge on the Original Side of the same High Court.*

A Judge on the Original Side of the High Court must ordinarily respect the decision of another Judge on the Original Side, but if the decision is found to be erroneous, he is not then bound to follow it against his own judgment. (*Mookerji, A.C.J., and Fletcher, J.*) HARGOVIND VIRJI BUN DAS MOOLJI *v.* BISESWAR LAL. **48 Cal. 69 : 60 I. C. 406 : 24 C. W. N. 1032.**

——*Judge—Delegation of functions.*

A Judge cannot delegate to the Police his judicial function. (*Wilmsley and Greaves, JJ.*) JOGENDRA KUMAR NAG *v.* EMPEROR. **57 I. C. 940 : 21 Cr. L. J. 700**

——*Judge— Acting once as counsel in a cause.*

It is a long usage that a Judge would refuse to adjudicate on a case in which he was working as counsel before he was raised to the bench. But if he was acting in another case on behalf of one of the parties he, when raised to bench, may adjudicate a case in which that same person is a party. (*Mookerjee and Fletcher, JJ.*) JACOB AND Co. *v.* RASH BEHARY GHOSE. **57 I. C. 22 : 31 C. L. J. 313.**

——*Judge—Statement of—Events in trial.*

The statement of the Judge trying a case as to what happened before him is conclusive on questions of fact. (*Beachcroft, J.*) AMJAD *v.* HASRAT. **55 I. C. 628.**

——*Judge—Anonymous letters.*

Impropriety of addressing anonymous complaints to Court in connection with pending cases pointed out. (*D. Chatterjee and Beachcroft, JJ.*) PURANA CHANDRA ADDY, *In the matter of.* **20 C. W. N. 278 : 23 C L J. 237 : 32 I. C. 657 : 17 Cr. L. J. 65 : 43 Cal. 685.**

PRACTICE—Judge.

——*Judge—Reason of their existence.*

Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. (*Oldfield and Tyobji, JJ.*) AZHIMANILA VEDTHAL KANNU *v.* KAYINARIM GOPALAN NAIR. **26 I C. 337 : (1914) M W. N 883.**

——*Judge—Knowledge of, not to be imported.*

A Judge cannot without giving evidence as a witness, introduce into a case his own knowledge of particular facts. In such a case the Judge should decline to hear the matter. 3 I. A. 259, 11 M I A. 213, Rel. (*Mookerjee and Beachcroft, JJ.*) LAKSHMI NARAIN KHANNA *v.* GURU DATTA MEHRA. **16 I. C 859.**

——*Judge—Interested in case—Duty of.*

A Judge should not take up a case in which he could possibly have a personal interest or bais. (*Piggott and Gordon, JJ.*) KUNJ LAL BANERJEE *v.* DINABANDHU JHA. **14 I.C. 458: 15 C L.J. 162.**

——*Judge—Personal opinion.*

A magistrate cannot import into his judgment matters of opinion and inference based on circumstances not on record. (*Holmwood and Sharfuddin, JJ.*) ATIA RAI *v.* JHINGUR TEWARI. **39 Cal. 476 : 16 C. W. N. 426 : 13 I. C. 844 : 13 Cr. L. J. 156 : 15 C. L. J. 403.**

——*Judge—Duty of—Adjudication of claims.*

It is the duty of the Court to adjudicate on a claim as brought. It cannot direct parties to alter their claims. (*Shah Din and Chevis, JJ.*) GANESHI LAL *v* BANI PERSHAD. **1 P. R. 1911 : 47 P. L. R. 1911 : 9 I. C. 673: 22 P. W. R 1911.**

——*Judge—Demeanour—Pleader.*

Magistrates should not by their demeanour give room to the suspicion that one practitioner is favoured at the expense of the others. (*Sankaran Nair, Abdur Rahim and Ayling. JJ.*) *In re* VYASA RAO. **(1911 1 M.W.N. 327 12 Cr.L.J. 150: 9 I. C. 897 : 10 M. L. T. 84: 21 M. L. J. 283.**

——*Judge acting in two capacities.*

A Judge acting as sub-judge and additional District Judge exercises jurisdiction as two distinct courts. (*Stanyon, A. J. C.*) BISANDAYAL SITARAM *v.* BODILAL LADHURAM. **42 I. C. 746 : 13 N. L. R. 203.**

——*Judge — Local inspection—Magistrate, when to make*

A local inspection by a Magistrate must be held sparingly and only to understand the evidence in the case and it should never be substituted for evidence in the case. The party against whom the result of the inspection is used, is greatly prejudiced and is put to irreparable disadvantage in not being able to remove the wrong impression from the mind of the Magistrate and the danger is intensified by the Magistrate holding the local inspection *ex parte*. (*Jwala Prasad, J.*) RAMSAHAI *v.* DWARKA SINGH. **22 Cr. L. J. 424 : 61 I. C. 712 : 1 Pat. L. T. 569.**

——*Judge—Local inspection.*

A Magistrate making use of his knowledge derived from a local inspection without affording the accused an opportunity to the accused

PRACTICE—Judge.

to cross-examine or to explain the points against him, acts with material irregularity vitiating the trial. (*Jwala Prasad, J.*) MOINUDDIN *v.* EMPEROR. 61 I C 794 : 22 Cr. L. J. 442 : 2 Pat. L. T. 455.

——*Judge—Duty to protect witnesses harassed.*

It is for the Judge, when he sees that a counsel is harrasing or brow-beating a witness unduly or trying to suppress his answers, to interfere and protect the witness in the interests of justice. Duties of the Bench and the Bar to each other discussed. (*Chapman and Atkinson, JJ.*) NIBARAN CHANDRA CHATTERJI *v.* EMPEROR. 2 Pat. L. W. 83 : 40 I. C. 318 : 18 Cr. L. J. 670 : (1917) Pat. 230.

——*Judge—Delegation of authority.*

Judicial functions cannot be delegated without statutory authority. (*Pratt, J. C. and Boyd, A. J. C.*) MOTISINGH *v.* SOBLOMAL. 32 I. C. 634 : 9 S. L. R. 148.

——*Judge—Duties of.*

The Judge's duty is to decide what according to the best of his judgment the law is and not to declare what the law ought to be. (*Hayward, J. C, and Legatt, A. J. C.*) IMPERATOR *v.* DABUD. 9 I. C. 718 : 12 Cr. L. J. 119 : 4 S. L. R. 209.

Judgment.

——*Judgment — Court must find on all issues.*

In cases appealable to the Privy Council, the courts below should, as far as praticable, pronounce their opinions on all the important points at issue. (*Lord Phillimore.*) MAHOMED SOLAIMAN *v.* BIRENDRA CHANDRA. 5 O. C. 243 : 44 M L J 388 : 32 M. L. T. 115 : 27 C. W. N. 749 : 37 C. L. J. 561 : 1922 P. C. 405.

——*Judgment—Vague—Remarks.*

Where the lower appellate court reverses the judgment of the lower court on the ground that the plaintiff has failed to discharge the burden of proof which lay very heavily upon him, and dismissed the suit, without at all considering the evidence, *Held* in second appeal that the appellate trial was not proper. (*Gokul Prasad, J.*) BHAGWAN SAHAI *v.* GOPAL RAI. 1923 A. 412.

——*Judgment—Suspicion not a ground of decision.*

When there are circumstances which make the evidence suspicious, the Court must take care that its decision does not rest upon suspicion but on legal grounds established by legal necessity. (*Lord Phillimore.*) MANIKLAL MANSUKHBHAI *v.* BIJOY SINGH. (1921) M. W. N 80: 62 I. C. 356 : 25 C. W. N. 409 (P. C.).

——*Judgment—Statements in, as to admission of pleader—Value of—Rebuttal.*

The suggestion that the judges of the High Court might have misunderstood the conduct of the pleader in making certain admissions, could not be entertained in the absence of anything showing that the pleader called the attention of the court to the fact that the statement in the Judgment regarding his conduct was wrong while the matter was still fresh in the minds of the judges. An affidavit filed before the Judicial Committee long afterwards by a person who said he was present at the trial and the pleader made no admission as stated and the fact that the pleader was unable to recall whether in fact he made the admission or not, are wholly insufficient to prove that the statament in the judgment was erroneous. (*Lord Buckmaster*) MADHU SUDAN CHOWDHRI *v.* CHANDRABALI CHOWDHRAIN. 21 C. W. N 897 : (1917) M. W. N. 518 : 42 I. C. 527 : 6 L. W. 437 (P.C.)

——*Judgment—Suspicion — Decision based on.*

Suspicion though a ground for scrutiny cannot be made the foundation of a decision. (*Mr. Ameer Ali,*) MOHAMMAD MEHDI HASAN KHAN *v.* MANDIR DAS. 34 All. 511 : 12 M. L. T. 392 : 15 O. C. 278 : 14 Bom. L. R. 1073 : 10 A. L. J. 373 : 17 C. W. N. 49 : 16 C, L. J. 629 : (1912) M. W. N. 1052 : 39 I. A. 68 : 17 I. C. 396 : 23 M. L. J. 741 (P. C.)

——*Judgment—Findings of judge—To be specific.*

Judges, whatever reasons they may give in judgments must make specific and precise statements of their findings. (*Walsh and Stuart, JJ.*) BALAK *v.* ALEY HASAN. 37 I. C. 304.

——*Judgment—Remarks in, against stranger—Undesirability of.*

It is undesirable that a judge or magistrate should make remarks against the character of a person, who is neither a party nor a witness in the proceedings before him, (*Macleod, C. J. and Shah, J.*) HOLI BASEPPA PAREPPA *In re.* 45 Bom. 1127 : 22 Cr. L. J. 335 : 61 I.C. 63 : 23 Bom. L. R. 357.

——*Judgment—Conviction, Magistrate seeking advice of Dt. Magistrate as to jurisdiction, improper.*

Where a Magistrate before whom an accused was placed on trial became doubtful as to his jurisdiction, and thereupon sought the advice of the District Magistrate and on the receipt of the latter's opinion on the question of jurisdiction, proceeded to try the case: *Held*, that the Magistrate must have finished his inquiry, completed his record, by the reception of all evidence of relevent facts including the facts which bore upon the question of accused's amenability to his jurisdiction, and then as a Magistrate pass such order as seemed to him to be legal and proper. (*Batchelor and Rao, JJ.*) EMPEROR *v.* ABDUL RAHIMAN MOMIO. 37 Bom. 144 : 13 Cr. L. J. 786 : 17 I. C. 530 : 14 Bom. L. R. 891.

——*Judgment—Basis of.*

The basis of a decision should be the substance and real meaning of the parties to a transaction and not the form of expression and the literal sense of the transaction. (*Mookerjee and Panton, JJ.*) KUSUM KUMARI *v.* DASARATHI. 34 C. L J. 323 : 67 I. C. 210.

——*Judgment—Suspicion no ground.*

The decision of the Court should rest, not upon suspicion, but upon legal grounds proved

PRACTICE—Judgment.

by legal testimony. (*Mookerjee and Buckland, JJ*) BEPIN KRISHNA *v.* JOGESHWAR. 26 C. W. N. 36 : 34 C. L. J. 256

——*Judgment—Statement—In, Value of—Remedy—Suspicion, no ground.*

A statement in a judgment as to an admission before trial Court should not be doubted lightly by the Appellate Court. Where a litigant is aggrieved by such a statement, the most convenient way wherever practicable is to apply to the Judge without delay and ask for rectification or review of the Judgment.

The decision of a Court, should rest not upon suspicion but upon legal grounds established by legal testimony. (*Mookerjee and Panton, JJ.*) SAKAT CHANDRA *v.* BIBHABATI DEBI.
66 I.C. 433 (2) : 34 C L. J 302.

——*Judgment—Suspicion, no ground for.*

The Court's decision must rest, not upon suspicion, but upon legal grounds established by legal evidence. (*Mookerjee and Buckland, JJ.*) LUCHIRAM *v.* RADHACHARAN. 66 I. C 15 : 34 C. L. J. 107

——*Judgment—Relief—Grounds.*

The relief to be awarded to the plff. depends on the facts established by him and not upon the unfounded assertion of a claim by him which is negatived by the Court. (*Mookerjee, A. C. J. and Fletcher, J.*) SURENDRA NATH *v.* GIRDHARI SINGH. 62 I. C. 633

——*Judgment—Necessary party not on record—Effect.*

A person not a party to an appeal cannot be bound by the decision therein if his name was brought on the record after the judgment was pronounced. (*Mookerjee, A. C. J. and Fletcher, J.*) SURENDRA NATH *v.* AGHORE NATH.
62 I. C. 464 : 25 C. W. N. 525.

——*Judgment—Expunging from—Finding, if can be expunged on the ground that it is unnecessary.*

Where evidence is produced by both parties on all the issues and definite findings arrived at, it is not open to the party adversely affected thereby, to ask in appeal that a finding be expunged from the judgment on the ground that it was not necessary for the decision of the case. (*N. R. Chatterje and Panton, JJ*). BEJOY RATNA ROY *v.* BHABANI SUNDARI DASYA. 51 I C 392.

——*Judgment—Case not set up by plff. or deft.*

The Court cannot set up a case which is neither the plff.'s nor the deft.'s and where in such a case, an appeal is dismissed, the High Court remanded the case for re hearing. (*Chitty and Beachcroft, JJ.*) JNANENDRA MOHAN SEN *v.* HARI RAM RABHA. 40 I. C. 467.

——*Judgment—Extraneous matter.*

Where judgment of a trial judge on a question of fact was vitiated by extraneous matter, the appellate judgment was liable to be reversed as it must have been influenced by the finding of the trial judge on that question. (*Sanderson, C. J, and Smither, J*) CHANDRA KUMAR GHOSE *v.* MOHENDRA KUMAR GHOSE. 44 Cal. 711 : 25 C. L. J. 66 : 18 Cr. L. J. 477 : 39 I. C. 317 : 21 C. W. N. 549.

PRACTICE—Judgment.

——*Judgment—Conjecture.*

A contention on conjectural grounds as of no weight. (*Chaudhari, J.*) GHAZNAVI & CO *v.* BUDGE BUDGE JUTE MILLS 25 I. C. 955.

——*Judgment—Conjecture—Surmises independent of surrounding facts—Mis-carriage of justice.*

The practice of singling out one fact and making a surmises independent of the surrounding circumstances is very likely to mislead and lead to a mis-carriage of justice. (*D. Chatterjee and N. R. Chatterjee, JJ*) ABDUL GAFFUR *v.* SONA BIBI. 14 I. C. 95,

——*Judgment—Statements in—Court, if can go behind.*

A Court should not go behind any statement in the judgment of another court, 3 M L.T. 212 Rel. (*Carnduff, J.*) ENSAR ALI *v.* YAKUB ALI.
13 I. C. 311.

——*Judgment—Validity—Judgment on materials not evidence or on personal knowledge of the Judge.*

A judgment on materials that are no evidence or on personal knowledge of the judge is invalid. (*Woodroffe and Teunon, JJ.*) DURGA PRASAD SINGH *v.* RAM DOYAL. 12 Cr. L. J. 355 : 10 I. C. 955 : 38 Cal. 153.

——*Judgment—Court not to set up.*

The Court is not entitled to set up a case for plaintiff which not only he did not set up but on the contrary which he definitely repudiated through his counsel. (*Shadi Lal and Broadway, JJ.*) ANANT RAM *v.* BHARAT NATIONAL BANK, LTD. 56 I. C. 638.

——*Judgment—Not to be set up.*

The Court is not justified in setting up a new case for the plaintiff on grounds not raised by him in the plaint or pleadings. (*Wilberforce, J.*) NABI BAKSH *v.* SAJID ALI. 50 I. C. 160,

——*Judgment—Decision on point not raised by either party—Procedure.*

A Judge commits an error in ignoring the allegations of the parties and deciding the case on a point which found no place in the pleadings. (*Shadi Lal and Willberforce, JJ*) KANHAYA LAL *v.* MITHU LAL. 46 I C 646 : 136 P. W. R. 1918.

——*Judgment—New case not to be made.*

If a point is outside the pleadings, a court is not competent to decide on the point. (*Chevis and Rossignol JJ.*) NUR ALI *v.* BAHAWAL.
34 P. R 1916 : 31 I. C. 386 : 54 P. W. R. 1916.

——*Judgment—Validity of—District Judge following a finding of Divisional Judge in another case—Validity.*

Where a District Judge affirms a decree following a finding as to the customs arrived at by a Divisional Judge in another case, he does not apply his mind to the point and reasoning of the divisional judge and so his finding is a mere *obiter dictum.* (*Scott-Smith, J.*) THUMAN *v.* BASANTI. 221 P. W. R. 1915 : 27 I. C. 980 : 43 P. L. R 1915.

——*Judgment—Appellate Court—Grounds of appeal to be specifically dealt with.*

PRACTICE—Judgment.

An Appellate Court ought to dispose of specifically the grounds of appeal urged before it. Where the first court had recorded that a party has closed his case, it cannot be urged in appeal that that court had refused to receive further evidence, without conclusively proving that the record is wrong. (*Reid, C. J.*) BHIWANI DAS *v.* THANDA RAM.
3 P. W. R. 1914 : 23 I. C. 352 : 27 P. L. R. 1914.

———*Judgment—Not to be raised.*
Where in a suit for mere declaration challenging an adoption no objection was taken by the deft. as to the form of the suit and no issue was raised regarding the right to the property. *Held*, that it was not open to the court to take up the point *suo motu* in its judgment and decide it adversely to the plaintiffs. 94 P. R. 1913. (*Rattigan and Chevis, JJ.*) RULIA *v.* WARIAN SINGH.
287 P. L. R. 1913 : 177 P. W. R 1913 : 20 I. C. 454 : 94 P. R. 1913.

———*Judgment — Trial Court— Decision— Issues.*
A Trial Court should not after recording all the evidence confine its decision to the trial of one issue. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) KALIYAMMAL *v.* KOLANDAVELA GOUNDAR.
38 I. C. 188 : 5 L. W. 228.

———*Judgment — Preliminary point — No hearing on merits.*
An appellant is not entitled to a hearing on the merits if the appeal is liable to be dismissed on a preliminary ground. (*Ayling and Tyabji, JJ.*) KEEPILACHERI PARKUM *v.* VANNATHANKANDIVIL.
2 L. W. 999 : 18 M. L. T. 383 : 31 I. C. 74 : (1915) M. W. N. 817 : 19 M. L. J. 784.

———*Judgment—New case not to be set up.*
A decree should not be given on the basis of a claim not set up in the plaint or raised in the issues or even set up in the first appeal. 131 M. 531; 2 C. 418 Foll. (*Ayling and Hannay, JJ.*) MAIKAL SERVAI *v.* THAMBUSWAMI SERVAI.
1 L. W. 853 : 25 I. C. 934 : (1914) M. W. N. 784.

———*Judgment — Contents of— Appealable cases—Duty of Lower Court.*

In appealable cases, the Lower Court should as far as possible pronounce its opinion on all the issues raised. 5 W. R. P.C. 53 Foll. (*Tyabji and Spencer, JJ.*) PALANIANDI CHETTY *v.* KAMBARAYA CHETTY. **24 I. C 87 : 1 L. W. 416.**

———*Judgment—Additions to, before decree.*
Where a decree has not been drawn up and issued, the High Court can supplement its judgment with directions for carrying out the decision and to embody these in the decree. (*Bakewell, J.*) G. NARAYANIAH *v.* MRS. ANNIE BESANT.
21 I. C. 545 : (1913) M. W. N. 906.

———*Judgment—Decision different from the case of either party.*
The Court should not decide a suit in a way which is not the case of either party and on a matter on which no issue was raised. (*Benson and Miller, JJ.*) SAVIRIMUTHU MOOPAN *v.* SATTAN CHINNAPPAN SAVIRIMUTHU.
15 I. C. 185 : (1912) M. W. N. 177.

PRACTICE—Judgment.

———*Judgment— Delivery of judgment on holiday—Not illegal--Pemedy of aggrieved party.*
Delivery of judgment on a holiday is not illegal but if any person is injuriously affected thereby he is entitled to a redress for the grievances. The English rule as to Sundays being *dies non* does not apply to India. (*Sundara Aiyar and Spencer, JJ.*) VENKATESA IYENGAR *v.* KOMALAMMAL.
(1912) M. W. N. 65 : 11 M L. T. 84 : 13 I. C. 463 : 22 M. L J. 212.

———*Judgment — Pleadings — Finding of Court.*
When the plaintiff claimed a certain plot as their own and defendants claimed a right of way. *Held* that a finding of common ownership cannot be given by the lower court. (*Benson and Krishnaswami Aiyar, JJ.*) RANGASAWMI PILLAI *v.* ONDIA PILLAI. **9 I. C. 640 : 9 M. L. T. 350.**

———*Judgment—Finding on all issues in appealable cases to be given.*
In appealable cases an opinion should be expressed on all the important points, to avoid the necessity of a remand by the appellate Court. (*Batten, J. C. and Hallifax, A. J. C.*) LACHHMINARAYAN *v.* MOULVI ZAHIRUL SAID ALVI.
1923 Nag. 322.

———*Judgment— Redemption suit—Finding on a point not set up in defence.*
A finding that the transaction was in fact a sale is wrong when defendant only pleads that the transaction was a sham one to mask the real fact. (*Lindsay, J. C.*) SAHEB BAKSH SINGH *v.* MOHAMED ALI. **58 I. C. 115 : 7 O. L. J. 389.**

———*Judgment—Expunging from—Pleader's remarks against, by court.*
Where a pleader is justified in making a suggestion the court should not make any remarks describing the suggestion as a daring attempt to mislead the court. Such a remark should be expunged from the record. (*Lindsay, J. C.*) LACHCHU *v.* EMPEROR. **24 I. C. 156 : 15 Cr. L. J. 420 : 1 O. L. J. 141.**

———*Judgment—Judgment obtained by fraud.*
A judgment or decree obtained by fraud does not bind that court or any other, and its nullity may be alleged in a collateral proceeding though it has not been set aside or reversed. (*Miller, C. J., Mullick and Bucknill, JJ.*) HARE KRISHNA SEN *v.* UMESH CHANDRA DUTT. **2 Pat. L. T 528: 3 U. P. L. R. (Pat) 57 : 62 I. C. 962 : 6 P. L. J. 373: 1921 Pat. C. 209 (F.B.).**

———*Judgment—General issues--Judgment to be full.*
Where petitions raising important questions of law or fact are made to a court, it should proceed to deal with them fully as the failure in many cases involves remand which is undesirable (*Coutts and Das, JJ.*) BAIJ NATH GOENKA *v.* DALEEP NARAIN SINGH. **1 Pat. L. T. 582: 58 I. C 489: 1920 Pat. 261.**

———*Judgment—Decision—Duty of court if issue framed and evidence taken thereon.*
Where evidence on a point is given by both parties, it is incumbent on the Court to come to

PRACTICE—Judgment.

a conclusion on the express issue raised. (*Das, J.*) RAM NIRANJAN SINGH *v.* RAM GOBIND SINGH.
57 I. C. 524.

———*Judgment—Suit on easement—Decree on footing of natural right.*

A plaintiff who claims a right of easement but fails to establish the exercise of the right for the statutory period, cannot succeed upon his natural right. The Court cannot make out a case not set up in the plaint and then grant relief. (*Sultan Ahmad, J.*) RADHE MANDER *v.* FAKIR MANDER.
56 I. C. 970.

———*Judgment—Case to be based on pleadings.*

The court should never arrive at a conclusion in accordance with the case of neither side and each case must be based upon the pleadings. (*Sharfuddin and Roe, JJ.*) SUGHESWAR MISSIR *v* RAMESHWAR JHA.
34 I. C. 466.

———*Judgment—Case not set up in the plaint.*

A party is not entitled to a claim not set up in the pleadings nor consistent with it though the court sets forth such a claim for him. (*Pratt, A. J. C.*) CHIT *v.* KYAW.
57 I. C. 873 : 3 U. B. R. (1920) 201.

———*Judgment—Court's duty.*

The Court cannot make out a case not set up in the plaint, and not supported by plff.'s witnesses. (*Twomey, J.*) STEWART *v.* SIMON GONSALVES.
5 Bur. L. T. 167 : 17 I. C 900 : 6 L.B. R. 74.

———*Judgment—Pleading—Dismissal of suit.*

A suit cannot be dismissed on the finding on a point which is not raised either in the written statement or specifically raised in the issues. (*Crouch and Hayward, A. J. Cs.*) VISRAM *v.* BIHI SULTAN.
11 I. C. 25.

Judicial Order or Proceeding.

See also (1) JUDICIAL ORDER.
(2) JUDICIAL PROCEEDING.

———*Judicial order—Injunction.*

A court ought not to grant an injunction on the ground of nuisance unless the nuisance, which is a question of fact, is proved. (*Marten and Fawcett, JJ.*) SHA BULAKHIDAS JAMARDAS *v.* SHAH GANPATRAM.
1923 Bom. 281.

———*Judicial order—Irregularity.*

Where a small cause judge, after the case was closed and judgment reserved, sent for the parties and asked them to argue with each other in his presence about the merits of the case which they did and he decided the suit on the evidence and also on the statements by them when confronted in the above manner and which statements were not recorded ; *held* that the procedure was very irregular and that the trial should begin again. (*Huda, J.*) AYEMUDDIN BEWA *v.* ASIMUDDIN.
25 C. W. N. 599.

———*Judicial order—Successor if bound by that order.*

An order made by a judge is binding on his successor, till set aside in due course of law. 21 W.R. 199: 32 M. 218 Ref. (*Mookerjee and Beachcroft, JJ.*) MOHUNT GOPAL DAS *v.* RAMESWAR SINGH.
29 I. C. 966 : 21 C. L. J. 571.

PRACTICE—Jurisdiction.

———*Judicial order—Hearing parties—Omission of remand.*

If a court passes an order on application without hearing the objection of the other party, the appellate court must set it aside and remand the case for a fresh decision on the evidence of both parties. (*Chevis, J.*) NARPAT RAI *v.* DEVI DAS.
17 P. W. R. 1912 : 14 I. C. 379 : 240 P. L. R. 1912.

———*Judicial orders—Vacating of—Remedy by petition—Nullity.*

When the order and decree of a court is a nullity a party interested in showing it to be a nullity may apply to the court to vacate it and if the court is satisfied about the fact, it ought to do so. Such an application need not be filed under any section of the Code and the absence of a section does not render the application incompetent. (*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR *v.* KANDASAMI MUDALI.
32 M. L. T. (H. C.) 124 : 16 L. W. 330 : (1922) M. W. N. 674 : 1923 Mad. 58.

———*Judicial order—Order by predecessor in office—Whether successor can go behind.*

In one and the same Court a successor in office cannot go behind the order of his predecessor and cancel it as incorrect (*Baillie, S. M. and Tweedy, J. M.*) SARUPA *v.* KARAMULLA.
26 I. C. 872 : 1 O. L. J. 682.

Jurisdiction.

See also (1) C. P. CODE, Ss. 16—21.
(2) JURISDICTION.

———*Jurisdiction--Courts are not disciplinary bodies to punish parties.*

Courts do not sit as disciplinary bodies to punish parties for inapt procedure when their right is clear and no mis-understanding, surprise or prejudice can occur to the other side (*Walsh and Ryves, JJ.*) HANIFUNNESSA *v.* CHUNNI LAL.
19 A. L. J. 549 : 63 I. C. 184 : 3 U. P. L. R. (All.) 91.

———*Jurisdiction—Money paid into Court, how to be dealt with.*

Money paid into Court whether by a party or an outsider, is money paid in to the credit of the proceedings and can be dealt with by the Court only on an application made in the regular course by one of the parties. If there are any person in whose favour any interest in the money so lying in Court has been created by any of the parties they can then be heard (*Macleod, C. J. and Fawcett, J.*) ESMAIL ALLARAKHIA *v.* DATTATRAYA RAMACHANDRA GANDHI. **45 Bom. 967 : 61 I.C. 403: 23 Bom. L. R. 291.**

———*Jurisdiction—Death of party—Decree.*

It is illegal on the part of a court to continue to hear a suit against a dead person, whose death had been brought to its notice and to pass a decree against that person. (*Abdul Raoof and Campbell, JJ.*) DEBI PERSHAD *v.* MT. BHAGO.
5 Lah. L. J. 187 : 1924 Lah. 33.

———*Jurisdiction—New enactment.*

The Court competent to decide appeals filed before a new Act was introduced but pending in

the Court, is the Court which would dispose of them, had they been filed after the new Act. (*Johnstone, C. J.*) ASARAM *v.* BUDHU MAL.
43 P. W. R 1916 : 88 P. R 1916 : 35 I. C. 67 : 182 P L. R. 1916

——*Jurisdiction—Civil or Revenue Court—Case partly triable by each.*

In case cognizable partly by Civil Court and partly by a Revenue Court the Civil Court should dispose it off to the extent cognizable by it leaving the rest to the plaintiff to lodge a fresh suit in the Revenue Court if so advised. (*Chevis, J.*) MATHURA DAS *v.* HAKIM SINGH.
261 P. W. R. 1912 : 16 I.C. 752: 247 P. L. R. 1912

——*Jurisdiction—Civil or Revenue Courts—Difference of opinion—Matter to be referred to Chief Court.*

Where a difference of opinion arises as to whether a suit is cognizable by the Revenue Court or a Civil Court, the matter should be referred to the Chief Court. (*Chevis, J.*) HETA RAM *v.* CHANDAN.
49 P. W.R. 1912: 13 I. C. 447 : 101 P. L. R. 1912.

——*Jurisdiction—Court having no jurisdiction—If can go into merits.*

Where a Court finds it has no jurisdiction, it should not go into and dispose of the case on the merits. (*Chevis J.*) RUKMAN DEVI *v.* SAIN DAS. 45 P. W.R 1912 : 13 I. C. 401 : 73 P. L. R. 1912.

——*Jurisdiction—Want.*

No jurisdiction can be conferred by practice however long continued it may be (*Oldfield and Krishnan, JJ.*) ABDUL RAHIM SAHIB *v.* GANGADHARA IYER. 37 I. C. 436 : 4 L. W. 402

——*Jurisdiction—Irregularities in initial procedure—Effect.*

Where, in a case which a Court, is competent to try, the parties go to trial on the merits without objection, one of the parties cannot subsequently dispute the jurisdiction of the Court on the ground of irregularities in the initial procedure which if objected to at the initial stages would have led to the dismissal of the suit, 9 A.191 Foll. (*Mullick and Atkinson, JJ.*) MOHAN KRISHNA DAS *v.* HAR PRASAD. 40 I C. 2

Justice, equity and good conscience.

——*Justice, equity and good conscience.*

If the rules of English Law afford any ground for the application of the principles of equity, justice and good conscience that should be applied *mutatis mutandis*, without presuming to deduce a new rule from it. (*Seshagiri Aiyar and Moore, JJ.*) VITTAPPA KUDVA *v.* DURGAMMA.
11 L. W. 116 : 38 M. L J 190 : 55 I C 781 : (1920) M W. N. 188.

——*Justice—Equity and good conscience*

Courts of justice should not be bound by technicalities which prevent them from doing what seems to be clearly right. (*Batman, J.*) PEERBHOY *v.* EBRAHIM. 13 Bom. L. R. 717 : 12 I C. 225 : 36 B. 214.

Law governing.

——*Law governing.*

Per Teunon, J.:—The practice of a Court must give way to the law and to the rights conferred

thereby. Per *Choudhuri, J.*:—The practice of the Court forms the law of the Court and the Court should be reluctant to depart from the established practice unless it is convinced that it is grossly erroneous. (*Chaudhuri, J.*) BUDHU *v.* CHOTU.
21 C. W. N. 654 : 41 I. C. 313 : 18 Cr L J. 793 : 25 C. L. J. 401.

——*Law governing—Substantive law and adjective law.*

Where there is a direct provision of positive statutory law, that positive provision of substantive law cannot be overridden by the application of an adjective law. (*Kennedy J. C. Raymond and Kemp, A. J. Cs.*) MT. HURI *v.* R. KHUDABUX.
16 S. L. R. 112 : 1923 Sind 5.

——**Leave of Court.**

See (1) C. P CODE, O 1, R. 8, O. 40, R. 1
(2) PROV. INS ACT, SS. 16 AND 46

Legal representative.

See also C. P. CODE, S. 2 (11) AND O. 22

——*Legal representatives—Addition of.*

Where the representatives of a deceased party were substituted in the Chief Court on appeal from interlocutory order, no fresh substitution need be made again in the lower Court in the suit. (*Lord Dunedin.*) BRIJ INDER SINGH *v.* LALA KANSI RAM. 45 Cal 94 : 44 I. A. 218 : 22 M.L. T. 362 : 6 L. W. 592 : 126 P W R. 1917 : 15 A L J. 777 : 19 Bom. L. R. 866 : 3 Pat. L W. 313 : 26 C L J. 572 : 104 P. R 1917 : (1917) M W. N. 811 : 22 C W. N. 169 : 42 I. C. 43 : 127 P. L. R. 1917 : 33 M. L. J. 486 (P. C.).

——**Letters patent.**

See LETTERS PATENT.

Limitation.

——*Limitation—Proof of.*

The plff must prove from his own allegations that his suit is not barred by limitation. He cannot rely on defendants's allegations (*Johnstone and Chevis, JJ.*) MANSA RAM *v.* BEHARI.
6 P. R. 1912 : 218 P. L. R. 1911 : 12 I. C. 453 : 204 P. W. R. 1911.

——*Limitation—Time fixed by Court—Expiry of—Mode of calculation.*

Where time is given by a Court to a party to a suit for the performance of an act till a certain date, it is inclusive of that date. (*Oldfield and Seshagiri Aiyar, JJ.*) NAIDU *v.* SIVANJI NADACHI.
39 Mad. 583 : 2 L W. 729 : 30 I. C. 544 : 18 M. L. T. 199.

——*Limitation—Exemption from.*

When a suit or an application is in the face of it barred it is for the plaintiff or the applicant to satisfy the Court of the circumstances which prevent the statute from having its ordinary effect. *Daniels and Dalal, A. J. Cs.*) MIRZA YAQUB BEG *v.* MIRZA RASUL BEG
10 O. L J. 86 : 1923 Oudh 254.

Limitation—Defence.

See LIMITATION ACT, S. 3.

PRACTICE—Limitation—Mis joinder of Causes of Action.

Limitation—Plea.
See LIMITATION ACT, S. 3.

Local Inspection.
See C. P. CODE, O. 18, R. 18.

Local Investigation.
See C.P. CODE, O. 26 Rr. 9—12.

Minor.
See (1) C. P. CODE, O. 9, R. 13.
(2) C. P. CODE, O. 32.
(3) MINOR.

——— Mis-joinder of Causes of Action.
See also C. P. CODE, S. 99, O.1, R. 13 AND O. 2, R. 7.

———*Mis-joinder—Plea of, when not to be taken.*

A plea of misjoinder of causes of action cannot be taken for the first time in the High Court. (*Mullick and Walmsley, JJ.*) GIRISH CHANDRA *v.* KUNJA BEHARI KOWAR.
26 I. C. 781.

———*Mis-joinder—Causes of action—Form of suit on an award—If an alternative prayer to decide suit on merits can be asked for.*

There is no objection to a suit on an award being coupled in the alternative with a suit on the merits of the dispute between the parties. Such a combination is convenient and does not prejudice any party. (*Johnstone and Chevis, JJ.*) NATHUMAL *v.* MUHAMMAD SHAFI.
39 I. C. 349 : 12 P. R. 1917.

———*Mis-joinder—Cause of action—Amendment.*

A claim to future relief in respect of '*harra*' on the basis of a lease from the mortgagee cannot be joined with a claim for redemption. A suit bad for multifariousness is not to be dismissed without giving plff. opportunity to amend the plaint and restrict his claims. 26 B. 259 Ref. ; 23 C. 821 Con. (*Skinner, J.C*) BANSIDHAR *v.* RAGHUBIR.
10 I. C. 737 : 7 N L. R. 43.

———New Plea.
Appeal.
Appellate Court.
Change of Case.
Costs.
Formal defect.
Limitation.
Minority.
Pardhanashin Lady.
Question of Fact.
Question of Law.
Revision.
Second Appeal.
When can be raised.

New Plea—Appeal.

———*New plea—Appeal.*

Where the point of the insolvency of a judgment debtor was not specifically urged in the trial Court, it cannot be raised in appeal. (*Lord Phillimore.*) SRIPAT SINGH DUGAR *v.* HARI RAM GOENKA.
31 M. L. T. 38 : 26 C W. N. 739 : 4 U. P. L. R. (P. C.) 68 : 16 L. W. 447 : (1922) M. W. N. 671 : 1922 P. C. 51 (P. C.)

PRACTICE—New plea—Appeal.

———*New plea—Appeal—Point not raised in pleadings or issues.*

Where in a case of alluvion, the question whether the accretions were gradual, slow or imperceptible was not raised in the pleadings or issues, the Board doubted if it was open to raise the point in appeal. (*Lord Carson.*) THE SECRETARY OF STATE FOR INDIA IN COUNCL *v.* RAJA OF VIZIANAGRAM.
45 Mad. 207 : 26 C.W. N 348 : 15 L. W. 389 42 M L J 589 : 20 A. L. J. 438 : 49 I. A. 67 : L. R. 3 P. C. 105 : (1922) M. W. N. 381. 35 C. L. J. 463. 30 M. L. T. 112 1922 P. C. 105 (P. C.)

———*New plea—Appeal—Preliminary point.*

Where a deft. wants to raise a plea under O.2, R. 2, of the C.P. Code, which is not raised in the pleadings or issues, he should not be allowed to raise it for the first time on appeal, except on terms of the other side being fully indemnified by costs, etc. (*Lord Robson.*) MAUNG PE *v.* MA LON MA GALE.
38 Cal. 629 : 15 C W N. 766 : 8 A L. J. 739 : 13 Bom. L. R. 464 : 14 C. L. J 15 : 4 Bur. L. T. 153 : 6 L. B. R. 18 : 10 M. L. T. 479 : 11 I. C. 497 : (1911) 2 M. W. N. 397 (P.C.).

———*New plea—Appeal.*

A point not raised in the memorandum of appeal should not be allowed to be raised in argument. (*Ryves and Daniels, JJ.*) LALTA PRASAD *v.* DARSHAN SINGH.
1924 A. 149.

———*New plea—Appeal.*

Where in a suit to enforce the mortgage it was contended by a mortgagee of joint family properties that it was executed for necessity it is not open to him to set up on appeal a new case that the defendants being not born on the date of the mortgage could not dispute its validity. (*Piggott and Sulaiman, JJ.*) RAM RATAN MISIR *v.* KAPAIL DEO SINGH.
L. R. 3 A. 541 : 1923 All. 20.

———*New plea—Appeal.*

An appellate Court will not allow a new point to be raised before it for the first time when it involves the taking of fresh evidence. (*Ryves and Gokul Prasad, JJ.*) AJODHIA PRASAD *v.* MT. MAJIDAN.
L. R. 3 A. 49 : 20 A. L. J. 92 : 1922 All. 346.

———*New plea—Appeal—Objection not taken in Court below, if can be taken in—Proceeding under Land Acquisition Act.*

The High Court will not, in appeal, entertain an objection not taken before the District Judge in a proceeding under the Land Acquisition Act. (*Tudball and Sulaiman, JJ.*) LATCHMAN PRASAD *v.* SECRETARY OF STATE FOR INDIA.
63 I. C. 682 : 19 A. L. J. 672.

———*New plea—Appeal—Not raised before single Judge whether could be allowed in Letters Patent Appeal.*

The High Court on Letters Patent Appeal changed the decision altogether of the single Judge on second appeal on the ground that no second appeal at all lay, though the point was not

PRACTICE—New plea—Appeal.

brought before the single Judge. (*Knox, A.C. J. and Banerjee, J.*) RAMPAT RAI *v.* HARIHAR RAI. **17 A. L. J. 875.**

———*New plea—Appeal—Disposal on ground not urged.*

A Judge of the Lower Appellate Court cannot dispose of an appeal on a ground which was not urged by the defence and in respect of which plaintiff had not opportunity of giving evidence. (*Rafique, J.*) ABDUR RAZZAQ *v.* PARTAB SINGH. **35 I. C. 638.**

———*New plea—Appeal—Plea of improper attestation.*

A plea of improper attestation of a document cannot be raised for the first time in appeal. (*Richards, C. J. and Banerjee, J.*) BUDHA SINGH *v.* KUWALNAIN. **19 I. C. 430.**

———*New plea—Appeal—No materials on record.*

The appellate Court will not allow a point, not properly raised in the lower Court to be taken in appeal if the materials on record are too meagre for deciding the question satisfactorily (*Chandavarkar and Haywarb, JJ.*) PIROJSHAH *v.* MANIBHAI. **36 Bom. 53 : 12 I. C. 543 : 13 Bom L. R. 963.**

———*New plea—Appeal—Irregularity, objection as to cannot be taken in appeal for the first time.*

Any objection to an examination of a witness '*de bene esse*' or to an irregularity therein, must be taken in the trial Court and cannot be taken for the first time in appeal. (*Mookerjee and Fletcher, JJ.*) DINA NATH *v.* METHARAM. **64 I. C. 785 : 33 C. L. J. 577.**

———*New plea —Appeal not to be allowed in.*

The question of subrogation which is not determined without reference to facts, cannot be allowed for the first time on appeal. (*Chatterjee and Pearson, JJ.*) ALI MAHAMMAD KHAN *v.* MAHARAJ BEPARI. **64 I. C. 266.**

———*New plea—Appeal—Points to be raised.*

Plff. may be allowed to succeed on a title by adverse possession pleaded for the first time in appeal provided the deft. is not taken by surprise and his case arises on facts stated in the plaint. (*Mookerjee, A. C. J, and Fletcher, J.*) KASSIM HASSAN *v.* HAZRA BEGUM. **60 I. C. 165 : 32 C. L. J. 151.**

———*New plea —Appeal—Change of case.*

A party who in the trial Court fails to establish the case which he set up is not entitled to advance a new case in appeal for he is entitled to a remand to enable him to establish his claim on the new case set up. (*Newbould, J.*) DURGA CHARAN BISWAS *v.* KAILASH CHANDRA DAS. **54 I. C. 645.**

———*New plea—Appeal—Case not set up in pleadings but put forward in cross-examination—If can be raised in appeal.*

A case definitely put forward by a party in cross-examination of the opposite party's witnesses and not objected to by the opposite party can be put forward as a ground of appeal, though not specifically raised in the pleadings. (*Fletcher and Shamsul Huda, JJ.*) RAJLAKSHMI DASYA *v.* PRODYYOT KUMAR. **46 I. C. 184.**

PRACTICE—New plea—Appeal.

———*New plea— Appeal — Tenancy—New basis of claim in.*

The contention as to a new tenancy having been created by an amalgamation of occupancy holdings cannot be allowed in second appeal for the first time. (*Chatterjee and Walmsley, JJ.*) KRISHNADHAN GHOSE *v.* GOTAM MANDAL. **37 I. C. 862.**

———*New plea—Appeal—New issue, raising of.*

It is always dangerous to allow a new issue to be raised at the appellate stage. (*Richardson and Mullick, JJ.*) TEPU MAHAMMAD *v.* TEFAYIT MAHAMMAD. **29 I. C. 216 : 19 C. W. N. 772.**

———*New plea—Appeal— Waiver—Validity.*

There may be circumstances under which a court of justice cannot entertain a plea of waiver. as being contrary to public policy. So it cannot be raised on appeal for the first time, 6 C. L. J. 62: 6 C. L. J. 111 Rel. on. (*Mookerjee and Teunon, JJ.*) BASANTA KUMARI *v.* RAMKANAI SEN. **9 I. C. 698 : 13 C. L. J. 192.**

———*New plea—Appeal.*

Where the point is one of law and patent upon the face of the record it may be raised for the first time in appeal. (*Moti Sagar, J.*) JAINARAIN *v.* RAMJI LAL. **1923 Lah. 608 (2).**

———*New plea—Appeal cannot be allowed to be set up in.*

In the plaint the plff. set out that the property had been the subject of valid dedication for religious purposes and that it had only recently been trespassed upon by the defendants. *Held*, that on appeal the plaintiff cannot be allowed to set up a new case that as soon as the property ceased to be the subject of dedication for religious purposes it became shamilat or common property of the whole village and that, the possession of the defendants could not therefore be adverse. (*Broadway, J.*) DEOK RAM *v.* DULI CHAND. **5 L. L. J. 97 : 1923 Lah. 259 (1).**

———*New plea—Appeal—Not to be allowed in appeal.*

A new plea which is not raised in the trial court cannot be considered by the District Court. Where the members of a Hindu family put forward a claim to certain property on the ground that it belonged to them by partition and therefore not liable to attachment in execution and that plea was found against, they cannot on appeal put forward the plea that the decree was obtained against the manager in his individual capacity and therefore not executable against the family properties. (*Leslie Jones and Broadway, JJ.*) RAM CHAND *v.* RAMA NAND. **68 I. C. 227 : 3 Lah. L. J. 392.**

———*New plea—Appeal.*

It is wrong that the appellate court should allow a new point to be raised for the first time in appeal. (*Chevis, J.*) JIWAN SHAH *v.* FATEH BIBI. **3 Lah. L. J. 165.**

———*New plea — Appeal — Technical plea, wherer can be taken for the first time in appeal—Withdrawal of plea, if can be revived.*

PRACTICE—New plea—Appeal.

A technical objection cannot be raised for the first time in appeal. A party who has once withdrawn a plea in one Court cannot revive it subsequently in appeal or revision. (*Le Rossignol, J.*) FAKIRA SHAH *v.* BRIJ LAL. **8 P. W. R. 1917 : 39 I. C. 381 : 20 P. L. R. 1917.**

——*New plea—Appeal—New contention.*

Where parties in a suit go to proof only on the question whether the land involved is ancestral and whether a right of alienation exists, the plaintiff cannot for the first time in appeal be allowed to raise a new contention. (*Le Rossignol, J.*) AKBAR KHAN *v.* KHAN BAHADUR. **69 P. R. 1916 : 120 P. W. R. 1916 : 35 I. C. 335 : 131 P. L. R. 1916.**

——*New plea—Appeal.*

A point neither raised in the Court below nor mentioned in the memo. of appeal could not be allowed in appeal. (*Shadi Lal and Jones, JJ.*) BARKAT RAM *v.* ANANT RAM. **31 I. C. 632 : 185 P. W. R. 1915.**

——*New pea—Appeal—Not to be allowed.*

A plea if not raised before the 1st Court, cannot be raised for the first time in the appellate Court. 18 Cal. 24 Foll. (*Shadi Lal, J.*) FIRM OF ATTAR SINGH *v* HAKU. **84 P. W. R. 1914 : 24 I. C. 692 : 185 P. L. R. 1914.**

——*New plea—Appeal—Point not raised in the grounds.*

A point not raised nor even touched in the ground of appeal, cannot be raised for the first time in appeal. (*Rattigan and Beadon, JJ.*) GANGA RAM *v.* KAKA RAM. **53 P. W. R. 1914 : 22 I. C. 403 : 47 P. L. R. 1914.**

——*New plea—Appeal—Ground not put forward in lower Court.*

A ground of claim never put forward throughout the pleadings cannot be allowed in appeal to the chief Court. (*Kensington and Shah Din, JJ.*) MAHIDATTAR MAL *v.* MRS. NICHOLSON. **224 P. L. R. 1913 : 19. I. C. 770: 133 P. W. R. 1913.**

——*New plea—Appeal—New case not to be set up.*

An appellate Court cannot decide upon a question not raised in the pleadings or by the issues or the memorandum of appeal. (*Kensington, J.*) FAZAL ILAHI *v.* MUHAMMAD JAN. **79 P. L. R. 1913: 18 I. C. 795 : 76 P. W. R. 1913.**

——*New plea—Appeal—New grounds of attack.*

It is wrong to allow plaintiff to alter the nature of his attack for the first time in appeal. (*Chevis, J.*) NATHU *v.* MANJI RAM, **4 P. W. R. 1913: 18 I. C. 608; 138 P. L. R. 1913**

——*New plea—Appeal—Partial partition.*

A new plea that a suit is bad for partial partition or that the prepositus left a will could not be advanced on appeal. (*Robertson and Beadon, JJ.*) THAKAR SINGH *v.* UJAGAR SINGH **8 P. W. R. 1913: 18 I. C. 583 : 26 P. L. R. 1913.**

PRACTICE—New plea—Appeal.

——*New plea—Appeal—Revision*

It is not permissible to raise a new point in an appeal or revision, when it is not raised in the pleadings. (*Rattigan, J.*) MOHAN LAL *v.* BHAGA SHAH. **14 I. C. 513 : 252 P. W. R. 1912.**

——*New plea—Appeal—Objection going to the root of the case.*

It is a grave irregularity of an appellate Court to disregard a point utterly which goes to the very root of the case. (*Chevis, J.*) SEIVA RAM *v.* BALU RAM. **254 P. W. R. 1911 : 12 I. C. 623 : 8 P. L. R. 1912.**

——*New plea—Appeal.*

A plea should not be admitted in appeal if it was not raised in the written statement or any time in the first Court and no issue was framed covering it and the plaintiff had no notice or chance of meeting it. (*Ayling, A. C. J. and Odgers, J.*) IRULAPPAN SERVAI *v.* VEERAPPAN. **69 I. C. 918.**

——*New plea—Appeal—When allowed.*

The appellate Court may take up other grounds of appeal than those given in the memo if they are necessary for doing substantial justice and preventing litigation unless the decision of such grounds depends upon questions of fact not decided in the lower Courts. (*Sadasiva Aiyar and Spencer, JJ.*) VEMI REDDI SESHU REDDI *v.* NALLAPPA REDDI RAGHAVA REDDI. **57 I. C. 800 : 11 L. W 611.**

——*New plea—Appeal.*

A pleading not raised in lower Court and setting up a new case cannot be advanced in an appellate Court. (*Spencer and Krishnan, JJ.*) SINGARAJU VENKATASUBRAMANIAM *v.* RAJAH OF VENKATAGIRI. **56 I. C. 552 : 11 L. W. 523.**

——*New plea—Appeal.*

Objection having been for the first time taken in the appeal to the admissibility of a book of pedigree not mentioned in the list of documents, relied upon by the plaintiff, it was held that the original Court could have allowed leave to produce the document, if it were satisfied that the book was in existence at the time when the suit was instituted, and therefore the objection cannot be entertained for the first time in appeal. (*Drake-Brockman, J. C.*) LAHAND *v.* MOTIRAM. **63 I. C. 968 : 4 N. L. J. 33.**

——*New plea—Appeal—Question of fact.*

Where a will was never set up either in the pleadings, at the hearing or in argument in the Court below, nor put forward even in the ground of appeal, an appellate court would not entertain it, the question being one of fact which the respondents had no opportunity to meet. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD. **9 O. L J. 235 : 25 O. C. 189 : 1922 Oudh 236.**

——*New plea—Appeal—Setting up different story from that alleged in grounds of appeal.*

An appellant cannot bring forward, while arguing the appeal, a matter not alleged in the grounds of appeal. (*Holmes, J. M.*) MUHMMAD KHAN *v.* BECHAN KHAN. **30 I. C. 374 : 2 O. L. J. 371.**

PRACTICE—New plea—Appeal.

——— *New plea—Appeal.*

An objection in an appeal to a suit for partition of a house on the ground that another house was not brought into hotch pot is not sustainable. (*Sultan Ahmed, J.*) BIBI BASILA *v.* SHARAFAT HUSSAIN. **59 I. C. 176.**

——— *New plea—Appeal—Contention not contained in the memo. of appeal.*

The High Court would not entertain a contention of the hearing of an appeal which is not contained in the memo. of appeal and which was not brought before the lower court. (*Fawcett and Kennedy, A. J. Cs.*) LAL SINGH MUL SINGH *v.* GIRDHARI DAS. **60 I. C. 263 : 14 S L.R. 224.**

———*New plea—Appeal—New case of status and liability.*

Plff.'s case was that his vendors were co-owners with the deft. In the appellate Court he tried to make out that the deft. was constructive trustee for his vendors. This being entirely new case—concerning the status and liability to be sued of the deft. should not be allowed. (*Pratt, J. C. and Crouch, A. J. C.*) MUSSAMMAT ASSAT *v.* DHAMAN MAL. **19 I. C. 368 : 6 S. L. R. 135.**

——— **—New Plea—Appellate Court.**

New plea—Appellate Court.

A case not set up in the plaint should not be accepted in appeal. The case should be remanded for amendment of plaint and opportunity should be given to defendant to raise defences and let in evidence. (*Mr. Rafique and Piggott, JJ.*) BASDEO RAI *v.* JHAGROO RAI. **20 A. L. J. 464 : 44 A. 571 : 1922 A. 281.**

———*New plea—Appellate Court—Not allowable.*

A plea which is opposed to that put forward in lower Court cannot be allowed in second appeal. (*Beachcroft, J.*) EPASAN ALI *v.* RAM KUMAR DEI. **55 I. C. 375.**

——— *New plea—Appellate Court—Fresh pleas—Plea of fraud.*

An appellate Court ought not to allow a plea or fraud to be raised for the first time at the hearing of an appeal to the opposite party of rebutting the plea. (*Newbould, J.*) GIRISH CHANDRA CHAKRABARTY *v.* GIRISH CHANDRA ROY. **52 I. C. 501.**

———*New plea—Appellate Court—New point.*

An appellate Court ought not to permit a new point to be urged before it which is not founded on facts, and in respect of which no definite issue was raised in the lower Court (*Chaudhuri, J.*) GOHARADDI *v.* KARIKAR HASAIN. **52 I. C. 1.**

———*New plea—Appellate Court.*

The appellate Court will allow a new point to be raised in appeal if it goes to the jurisdiction of the lower Court or if a statute has been contravened. 13 A. 300: 25 A. 527 P. C. Rel. (*Richardson and Shamsul Huda, JJ.*) RAM NATH *v.* HARI MATI DASU. **50 I. C. 322.**

——— *New plea—Appellate Court.*

Where the plaintiff's plea is directly opposed to the entries in the record of rights of which they were aware, the appellate Court is justified in setting up a new case for the defendant and

PRACTICE—New plea—Appellate Court.

dismiss plaintiff's suit on the weakness of his own title. (*Fletcher, J.*) SHEIKH KASIM *v.* KASIMUDDIN. **50 I. C. 290.**

———*New plea—Appellate Court—New case not to be made.*

The determination of a cause must depend on the allegations made in the pleadings and the proof. An appellate Court is not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of those questions. (*Richardson and Beachcroft, JJ.*) TAHIL BASSAM DASSI *v.* BASSEMATI DASSI. **44 I. C. 416 : 31 C. L. J. 354.**

———*New plea—Appellate Court—New case not to be set up.*

An appellate Court is not entitled to accept and act upon a case made for the first time before it and not made in the trial Court. (*Sanderson, C. J. and Teunon, J.*) BIRENDRA KISHORE *v.* MAHOMED DOULATKHAN. **43 I. C 59 : 22 C. W. N. 856.**

———*New plea —Appellate Court.*

A plff. cannot be allowed to make a case that turns on the evidence which differs from the case set up in the plaint. A Court of appeal should not reverse the decision of the first Court on a point not set up in the plaint before the primary Court or in the grounds of appellate Court. (*Fletcher and Newbould, JJ.*) LOKENATH DEY *v.* HARA CHANDRA. **43 I C. 29.**

———*New plea—Appellate Court—New case based on facts, whether may be raised.*

An appellate Court ought not to allow a new case to be raised in appeal, when it depends for its determination on facts on which no evidence has been let in. Where the defence in the original Court was that a certain *Kabuliyat* was not executed at all by the defendants, they ought not in appeal allowed to change the defence and to plead to be that the *Kabuliyat* was not enforceable against them. (*Jenkins, C. J. and Chatterjee, J.*) KUNJI SINGH *v.* RAJ KUMAR SINGH. **11 I. C. 940.**

———*New plea—Appellate Court.*

It is not competent for an appellate court to base its decision upon a point which was neither asserted nor put in issue and about which evidence was not let in. (*Leslie Jones and Dundas, JJ.*) MANGAL SINGH *v.* MAKHAN SINGH. **5 Lah. L. J. 17.**

———*New plea—Appellate Court.*

Where a new point, raised before the appellate court is one of law to be decided without any further evidence it is the duty of the appellate court to entertain it. (*Broadway, J.*) YAKUB KHAN *v.* KARMAN. **66 I. C. 466.**

———*New plea—Appellate Court—New case—Not to set up.*

A Court of appeal cannot set up a case for any of the parties which they do not put forward in the pleadings. (*Scott-Smith and Martineau, JJ.*) MAULA DAD *v.* MUSSAMMAT BEGAM. **51 I. C. 751.**

PRACTICE—New plea—Appellate Court.

——*New plea—Appellate Court.*

An appellate Court cannot decide in favour of a person on a plea not raised by him before the first Court. (*Chevis, J.*) MURAD ALI *v.* CHIRAGH DIN. **104 P. L. R 1915 : 28 I. C. 550 : 40 P. W. R. 1915.**

——*New plea—Appellate Court—Prejudice.*

Where plaintiff's suit for declaration of title was dismissed on the ground of estoppel and the first appellate Court gave a decree to the plaintiff on the ground of adverse possession, *held*, that the appellate Court was wrong in deciding question of adverse possession without giving opportunity to defendant to adduce evidence on that point. (*Scott-Smith, J.*) KAISTH BANK, LIMITED *v.* EQIBAL HUSAIN. **21 P. L. R. 1915 : 28 I. C. 50 : 236 P. W. R. 1915.**

——*New plea—Appellate Court.*

An appellate Court should not allow a new case to be set up in appeal. (*Shah Din and Scott-Smith, JJ.*) MUSAMMAT THAKRI *v.* GURDIT SINGH. **57 P. W. R. 1913 : 19 I. C. 253 : 120 P. L. R. 1913.**

——*New plea—Appellate Court—Pleadings—Point arising out of—No issue.*

An appellate Court is competent to base its decision on a point arising from the pleadings if there is evidence in the record regarding it, although it was not expressly taken before the Court nor covered by any issues raised. (*Kanhaiya Lal, A. J. C.*) GAURI SHANKAR *v.* ABBAS BEG. **46 I. C. 12 : 5 O. L. J. 165.**

——*New plea—Appellate Court.*

A new case cannot be allowed to be set up on appeal. (*Lindsay, J. C.*) FARKHUNDI ALI *v.* MOHAMMAD SAHIB. **44 I. C. 624 : 4 O. L. J. 731.**

——*New plea—Appellate Court.*

In a mortgage suit where necessity is disproved, the creditor cannot be allowed to ask in appeal for a simple money decree inasmuch as the deft. had not been allowed to prove immorality. (*Lindsay, J. C.*) BUDHANLAL *v.* JAGGANNATH. **34 I. C. 757 : 3 O. L. J. 214.**

——*New plea—Appellate Court.*

When objections as to admissibility of documents are not raised in Court below they cannot be entertained in an Appellate Court. (*Coutts and Dass, JJ.*) RAM LOCHAN MISSRA *v.* HARI NATH MISSRA. **3 Pat. L. T. 397 : 1 P. 606 : 1922 P. 565.**

——*New plea—Appellate Court—Point of law.*

A point not urged in the Court below but which depends on the construction of a statute can be raised on appeal. (*Miller, C. J. and Adami, J.*) ALLAN MATHEWSON *v.* DT. BOARD OF MANBHUM. **1 Pat. L. T 269 : 5 Pat. L. J. 359: 58 I. C. 749 : 1920 Pat. 193.**

——*New plea—Appellate Court—New case not to be allowed.*

When the plaintiff makes a definite case of possession by himself in the plaint he cannot make in appeal an entirely new case of possession thro' co-sharers in order to save the bar of limitation. (*Sharfuddin and Roe, JJ.*) SINGHESWAR MISSIR *v.* RAMESHWAR JHA.) **34. I. C. 466.**

PRACTICE—New plea—Change of Case.

New Plea—Change of Case.

——*New plea—Change of case cannot be allowed in appeal.*

A plaintiff, basing his claim on an alleged gift, cannot in appeal be allowed to base his claim under an alleged contract not put forward in the Courts below, as it was a line of attack which the defendant had no opportunity to meet in the lower Courts. (*Sir Lawrence Jenkins, Viscount Cave, Sumner, and Sir John Edge.*) MALRAJU LAKSHMI VENKAYYAMMA RAO *v.* VENKATADRI APPA ROW. **19 A. L. J. 97 : 38 C. L. J. 171 : 13 L. W 256: (1921) M.W. N. 77 : 29 M. L. T. 164 : 25 C. W. N. 654 : 59 I. C. 767 : 23 Bom. L. R. 713 : 40 M. L. J. 144 (P. C.).**

——*New plea—Change of case.*

When a suit has been tried out on a certain basis in the Courts below the decision of those courts will not be allowed to be interfered with upon a plea which was not merely not raised by a party in those Courts but which is contrary to and inconsistent with the position there taken up by that party. (*Mears, C.J. and Piggott, J.*) IQBAL HAIDAR KHAN *v.* WASI FATIMA BIBI. **45 A. 53 : 1923 A. 358.**

——*New plea—Change of case—Not to be allowed to be made without giving opponent opportunity to meet it.*

In a suit for pre-emption, deft. resisted plff.'s claim on the strength of deed of gift which not being questioned in the trial, plaintiffs's suit was dismissed. On appeal, plff. challenged the validity of the gift deed on the ground of want of proper attestation and that attestation had not been proved. *Held*, that the plff. having by implication admitted the validity of gift at the trial ought not to challenge it in appeal. At any rate the appellate Court ought not to have entertained the objection without affording deft. opportunity of proving the due attestation. (*Tudball and Rafique, JJ.*) LALTA PRASAD *v.* NASIR KHAN. **56 I. C. 179.**

——*New plea—Change of case—Suit on mortgage executed by father—Personal decree against son, if proper,*

Where a suit for sale of the mortgaged property against the son of the executant was dismissed, *held*, that simple money decree could be given inasmuch as it would entirely change the cause of action. (*Richards, C. J. and Rafique, J.*) MUNSHI LAL *v.* MANGAT RAI. **31 I. C. 706.**

——*New plea—Change of case—Formal defect—Non-objection cures defect.*

Per *Marten, J.*—Where the issue was wide and both parties led evidence on a point not concerned by the pleadings, no party can object to the evidence as being not covered by the pleadings. (*Macleod, C. J., Marten and Crump, JJ.*) ALFRED WILKINSON *v.* WILKINSON. **47 Bom. 843 : 25 Bom. L. R. 945 : 1923 Bom. 321.**

——*New plea—Change of case—Mortgage challenged as fraudulent—Redemption.*

Where a plaintiff has sued for possession on the ground that a mortgagee of the property was fraudulent and void and fails in proving his case

PRACTICE—New plea—Change of Case.

he cannot turn round and change his case and claim redemption, on the footing that the mortgage is good and enforceable. 17 C. W. N. 219 : 5 C. L. J. 527 ; 5 C. L. J. 653 ; 3 C. W. N. 325 Ref. (*Chatterjee and Pearson, JJ.*) NITYA GOPAL TEWARY *v.* RAMSASI ROY. **1923 Cal. 296.**

———*New plea—Change of case—When allowed and when disallowed—Reason of the rule—Ejectment.*

Neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case. 11 M. I. A 7 and (1914) A. C. 461 Ref. The reason for the rule has been stated to be in substance that the parties might otherwise be seriously prejudiced. The plaintiff might have received no notice that the point would be raised by the defendant and would presumably be not prepared with the necessary evidence, and conversely, the defendant might be seriously embarrassed if the plaintiff were permitted to spring a surprise upon him in the shape of of a new case. Consequently when an objection of this kind is taken, the test to be applied is whether the party aggrieved has really been taken by surprise. (*Mookerjee and Panton, JJ.*) GONDLI BIBI *v.* JOYLAL ABDIN. **26 C. W. N. 294 : 35 C. L. J. 103 : 1922 Cal. 254.**

———*New plea—Change of case—Suit on title—Prescriptive title, relief on.*

Where a person sues for declaration of title alleging title and also possession for a long period, he can be given relief on the strength of a title by adverse possession, especially where defendants denied any sort of possession in plaintiff. (*Newbould and Panton, JJ.*) SATYENDRA NARAIN BAGCHI *v.* SASHI BHUSAN CHOWDHARI. **48 I. C. 448.**

———*New plea—Change of case—Suit on proprietary title—Right to management of Waqf.*

A suit on proprietary title cannot be allowed to be altered into one for ejectment on the basis of a right to the management of a waqf as it would be to alter the nature of the case. (*Rattigan and Chevis, JJ.*) RAM DAS *v.* DAULAT RAM **114 P. W. R. 1913 : 18 I. C. 807 : 225 P. L. R. 1913.**

———*New plea—Change of case.*

Suit for enforcement of lien for non-payment of purchase money directed to be paid to a third person was not allowed to be treated as a suit for an account on the basis of agency or a suit for damages for non-performance of a contract. (*Benson and Sundara Aiyar, JJ.*) SIVASUBRAMANIA *v.* GNANASAMBHANDA. **10 M. L. T. 71 : 10 I. C. 98 : 21 M. L. J. 359.**

———*New plea—Change of case—No allegation of title by prescription.*

A relief which is not based on the pleadings as they stand but on certain allegations which ought to have been made, but are not definitely set up cannot be granted where the suit as brought will be turned into another and a different sort of suit. The fact that the plaint contains a vague prayer to the effect that the Court may

PRACTICE—New plea—Limitation.

grant any other relief which it may deem proper, does not affect the question. (*Stuart, A. J. C.*) SITAPA BEGAM *v.* MUHAMMAD ISHAQ KHAN, **32 I. C. 365 : 2 O. L. J. 584.**

New Plea—Costs.

———*New plea—Costs.*

The objections founded upon Ss. 42 and 43, C. P. C. (O. 2, R. 2, C. P. C.) ought to have been raised in the lower Courts and the deft. was too late to raise the point in the Court of appeal except upon terms which would have indemnified the plff. for omission to raise it at a proper time. (*Lord Robson.*) MAUNG PE *v.* MA LON MA GALE. **38 Cal. 629 : 15 C.W.N. 766 : 8 A. L. J 739 : 13 Bom. L. R. 464 : 14 C. L. J. 15 : (1911) 2 M. W. N. 397 : 4 Bur. L. T. 153 : 6 L.B R. 18 : 11 I. C. 497 : 10 M. L. T. 479 (P.C.).**

New Plea—Formal defect.

———*New plea—Formal defect.*

Objection to a defect in signature on a petition cannot be raised in appeal for the first time. (*Jwala Prasad and Adami, JJ.*) BRAJA SUNDER DEB *v.* SIVARANJAN DEI. **59 I. C. 282 : 1 Pat. L. T. 647.**

New Plea—Limitation.

———*New plea—Limitation—Second appeal—Plea requiring fresh evidence on a question of fact.*

Per *Piggott, J.*—A plea even of limitation requiring for its determination fresh evidence on a question of fact cannot be properly put forward for the first time in the second appeal. (*Piggott and Lindsay, JJ.*) BABU LAL *v.* JALAKIA. **37 I. C. 343 : 14 A. L. J. 1146.**

———*New plea—Limitation.*

Although a plea of limitation can be raised at any stage of the suit and even for the first time in appeal a special plea of limitation ought to be taken in the written statement. The defendant must raise question of special limitation in the written statement where the determination of that question depends upon a finding of fact, e.g., the fact as to when service of the notice of the deposit was made on the landlord. (*Ghose, J.*) SADA KALI KHAN *v.* JANAKHINATH SINGHA ROY, **1924 C. 463.**

———*New plea—Limitation—Appeal.*

Points of limitation should not ordinarily be allowed to be raised for the first time in appeal where they involve a question of fact. (*Woodroffe and Cuming, JJ.*) SECRETARY OF STATE *v.* ANANDA MOHAN ROY. **66 I.C. 287: 34 C.L.J. 205.**

———*New plea—Limitation—Execution—Sale.*

A judgment-debtor having notice of an execution application and not objecting to it at the time of the issue of the sale proclamation, is not competent to challenge the validity of the sale, on the ground that the execution was barred by limitation. (*Mookerjee and Panton, JJ.*) GOVINDA NATH *v.* BASIRUDDIN. **64 I.C. 594: 34 C.L.J. 163.**

———*New plea—Limitation—Second appeal.*

A point of limitation can be taken in second appeal for the first time, if there are sufficient

PRACTICE—New plea—Limitation.

findings of fact on which it could be argued as a question of law. (*Walmsley and Buckland, JJ.*) PANCHANAN *v.* APORNA. 63 I. C. 785.

———*New plea—Limitation—Question of—Cannot to be raised in appeal.*

A question of limitation cannot be raised for the first time in appeal. It must be raised by the deft. in his pleading according to O. 8, R 2, C.P. Code. A new plea of limitation must be entertained only when on the face of the record there is evidence which was produced in the trial Court. (*Mookerjee, A. C. J. and Fletcher, J.*) BHUSAN CHANDRA PAL *v.* NARENDRA NATH KOER.
60 I. C. 280 : 32 C. L. J. 236.

———*New plea—Limitation—Pleadings.*

The plea of bar by limitation under a special Act must be specially pleaded and if the facts in support thereof are not apparent on the face of the record, the appellate Court cannot make an enquiry whether on certain facts he had found, the suit was barred by limitation. (20 I. C. 350 Rel on). (*Fletcher and Shamsul Huda, JJ.*) KEDER NATH MONDAL *v.* MOHESHCHANDRA KHAN. 46 I. C. 787 : 28 C. L. J 216.

———*New plea—Limitation—Not raised in Court below—Effect.*

New plea about point of limitation when not raised in Court below cannot be raised in appeal (*Schwabe J.*) PARA DEKKAN *v.* T. S. RAGHUPATHY AIYAR. 17 L. W. 169 : 1923 M. 306.

———*New plea—Limitation—Second appeal.*

A plea of limitation can be set up even in second appeal if it appeared in the face of it the plaint and on facts found. 34 C 941 ; 9 C. 635 ; 25 M 367 . 13 A 300 Foll. (*Sadasiva Aiyar and Napier, JJ.*) GRACE ROSAMUND RHODES *v.* PADMANABHA CHETTIAR.
1 L. W. 1033 : (1914) M. W. N. 921 : 26 I. C. 369 : 17 M. L. T. 18.

———*New plea—Limitation.*

A question of limitation can be taken at any time. (*Roe and Jwala Prasad, JJ.*) SHEOBUX SINGH *v.* DAYAL SINGH. 1 Pat. L. J. 221 : 36 I. C. 960 : 2 Pat. L. W. 374.

New Plea—Minority.

———*New plea—Minority—Not to be allowed Second appeal*

A plea of minority which was neither raised in the Courts below nor in the memorandum of appeal before the High Court, cannot be raised for the first time in argument in second appeal. (*Tudball and Rafiquc, JJ.*) DABI DAS *v.* TULSHI RAM. 19 I. C. 55 : 11 A. L. J. 202.

———*New plea—Minority.*

A point that certain agreement was not binding on the minors could not be taken up by the Court of appeal, *suo motu.* (*Shah Din and Scott-Smith, JJ.*) BASHESTAR NATH *v.* DEVI PERSHAD.
20 P. R. 1913 : 101 P. W. R. 1913 : 19 I. C. 411 : 185 P. L. R. 1913.

———*New plea—Minority—Plea of, not taken in trial Court—If can be taken in appeal.*

A plea of minority and incompetence not set up in the trial Court or in the petition of appeal

PRACTICE—New plea—Question of Law.

cannot be raised for the first time in arguments in appeal. (*Hallifax, A. J. C.*) HANSKUARBAI *v.* IMAM ALI. 59 I. C. 717 : 17 N. L. R. 126

New Plea—Pardhanashin Lady.

———*New plea*—Pardhanashin *lady — Plea, that executant was a* Pardhanashin *lady can't be allowed to be raised for first time before Privy Council.*

In a suit for specific performance of a contract of sale executed by a Hindu widow, the plea that the executant was a *Pardhanashin* lady could not for the first time be raised before the Privy Council. (*Lord Wrenbury.*) NAROTTAM DAS *v.* KEDAR NATH SAMANTA.
21 C. W. N. 665 : 41 I. C. 957 : 6 L. W. 68. (P. C.).

New Plea—Question of Fact.

———*New plea—Question of fact cannot be raised for the first time in appeal.*

Points involving issues of fact not specially raised in the Court of first instance ought not, in the absence of anything to show that the materials on the record are complete, or that the opposite party would not be taken by surprise, to be allowed to argue for the first time in appeal. (*Buckland and Cuming, JJ.*) MOHENDRA CHANDRA *v.* MUZAFAR. 63 I. C. 497.

———*New plea—Question of fact—Estoppel.*

Questions of estoppel which ultimately depend on questions of fact, cannot be raised in argument unless put clearly in issue. (*Sharfuddin and Coxe, JJ.*) SAFAR ALI *v* MOHESH LAL.
34 I. C. 956 : 23 C. L. J. 122.

———*New plea—Question of fact not challenged on appeal—Appellate Court cannot reverse finding.*

In a memorandum of appeal the finding as to the land being ancestral was not challenged but the District Judge took up this question and, holding that the land was not proved to be ancestral, accepted the appeal. *Held*, that to allow such a point to be raised in arguments long after the period of limitation for appeal had expired would practically amount to allowing a party to prefer a new appeal. (*Chevis, J.*) JIWAN SHAH *v.* FATEH BIBI. 67 I. C. 44 (1) : 3 Lah. L. J. 165.

———*New plea—Questions of fact.*

A plea involving questions of fact not raised or tried in the trial Court cannot be allowed to be raised on appeal for the first time. (*Simpson, J.*) MOHKAM *v.* BANSIDHAR. 90 L. J. 350 : 4 U. P. L. R. (O. C.) 93 : 1923 Oudh 14.

New Plea—Question of Law.

———*New plea—Question of law—Question affecting maintainability of suit—Duty of Court to raise and decide.*

Where in a suit in ejectment, the defect in the title of the plff. is apparent in the face of the documents on which he rests his case, it is the duty of the Judicial Committee to dismiss the suit although the point had not been clearly

PRACTICE—New plea—Question of Law.

raised in the Courts below. (*Lord Atkinson.*) BASANT SINGH *v.* MAHABIR PRASAD.
35 All. 273 : 40 I. A. 86 : 14 M. L. T 64 : 17 C. W. N. 669 : (1913) M. W. N. 481 : 11 A. L. J. 469 : 17 C. L. J. 566 : 15 Bom L. R. 525 : 19 I. C 340 : 16 O. C. 136 : 25 M. L. J. 301 (P. C.).

———*New plea—Question of law—Trial of suit—Plea not raised in the written statement.*

A plea raised on a *vakkar* drawn up at the first hearing though not raised by the written statement could be considered by the Courts. (*Richards, C. J. and Banerjee, J.*) KISHUN SAHAI *v.* GANGA BUX. 25 I. C. 408 : 12 A. L. J. 455.

———*New plea—Question of law—Appeal—Vakalatnama—Pleader's name left out by oversight—Whether presentable.*

Where in a vakalatnama the pleader's name has been omitted by oversight, there is no due appointment of the pleader and the appeal is not on that account properly presented. This objection can be taken at any stage of the case. (*Richards, C, J. and Banerjee, J.*) MUHAMMAD ALI KHAN *v.* JASRAM. 36 All. 46 : 23 I. C. 464 : 11 A. L. J. 1015.

———*New plea—Question of law.*

A pure question of law, though not raised in the primary Court nor mentioned intne memo. of appeal and is not one of jurisdiction of the Court to entertain the suit, can be raised in appeal, if it goes to the very root of the matter and raises the question whether the Court was competent to grant the relief claimed. (*Mookerjee and Fletcher, JJ.*) RAM KISSEN JOYDOYAL *v.* POORAN MULL. 56 I. C. 571 : 31 C. L. J. 259.

———*New plea—Question of law.*

An objection of clear law apparent on the face of the record should be given effect to even when not pressed. (*Richardson and Roe, JJ.*) GOVIND CHANDRA PAL *v.* KAILASH CHANDRA PAL. 40 I. C. 230 : 25 C. L. J. 354.

———*New plea—Question of Law—Appeal.*

The Court of Appeal may allow a question of law to be raised for the first time in appeal when it thinks necessary and expedient in the interest of justice, but not unless the Court is satisfied that the evidence establishes beyond doubt that the facts if fully investigated would have supported the new plea (*Mookerjee and Beachcroft, JJ.*) BASI MOHAN MALAKAR *v.* GOBINDA CHANDRA KARMAKAR. 22 I. C. 553.

———*New plea—Question of law—Waiver—When to be raised.*

As a question of waiver is a mixed question of fact and law it ought not to be allowed when the proceedings have gone a good way. (*Mookerjee and Teunon, JJ.*) BASANTA KUMARI *v.* RAM KANI SEN. 9 I. C. 698 : 13 C. L. J. 192.

———*New plea—Question of law—Appellate Court.*

Although the objection that the suit was barred by S. 66, C.P.C., had not been raised in the Court below or in the grounds of appeal, the question being one of law, it was allowed to be argued in appeal on the understanding that effect would be given to any defence that respondent might have set up had the matter been agitated in the Court below. (*Shadi Lal and Broadway, JJ.*) ABDUL HAMID *v.* MUHAMAD SHARIFF. 2 Lah. L. J. 353.

PRACTICE—New plea—Second Appeal.

———*New plea—Revision—Point not urged in the lower Court.*

A point not put forth in the Lower Court nor taken in the application for revision cannot be raised at the hearing of the application. (*Odgers, J.*) ATHIMULAM PILLAI *v.* PALANIANDI AMBALAM. 22 Cr. L. J. 270 : 60 I. C. 670 : 13 L. W. 266.

———*New plea—Question of law.*

The plea of *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined, the judgment which is pleaded in bar of this right must be strictly construed. (*Seshagiri Aiyar and Phillips, JJ.*) LAXMIPATHAYA *v.* RAMA CHANDRA. 20 M. L. T. 228 : 35 I. C. 421 : (1916) 2 M. W. N. 133 : 31 M. L. J. 311.

———*New plea—Question of law—Appeal—Decision on.*

An Appellate Court can decide questions of limitation, if no further facts than those before it are necessary for that purpose. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) RAMASWAMI PATTAR *v.* TIRUCHA MANNADIAR. 29 I. C. 36.

———*New plea—Question of law—Plea of bar of suit whether can be taken first in appeal.*

The plea of bar of suit under S. 41 of the Evidence Act can be taken for the first time in appeal. (*Halifax, A. J. C.*) NARAIN *v.* HARDATTRAI. 57 I. C. 612.

———*New plea—Question of law—Interpretation of document.*

A question depending on the interpretation of a cause in a deed is one of law and may be raised for the first time on appeal. (*Robinson, C. J. and Macgregor, J.*) KO THINE *v.* ISMAIL CASSIM MORAD. 1 Bur. L. J 117 11 L. B. R 356 : 1923 Rang. 61.

———*New plea—Question of law—Point of law depending on evidence—If can be raised at late stage of suit.*

A point of law depending on evidence cannot be raised for the first time at a late stage of the suit. (*Pratt, J. C. and Crouch, A. J. C.*) NUR MAHOMED *v.* KESSUMAL. 20 I. C. 523 : 7 S. L. R. 11.

New Plea—Revision.

New Plea—Second Appeal.

———*New plea—Second appeal.*

When a point is not taken in the lower Court that is a conclusive bar on an appeal in High Court. As soon as it is established that the point ought to have been taken in the Court of first instance the Court should refuse to allow it to be raised in appeal. (*Mears, C. J. and Banerji, J.*) SYED SAMASUL HASAN *v.* SYED HASAN. 1923 A. 430. [On appeal from 1923 A. 173 (2)].

PRACTICE—New plea—Second Appeal.

———*New plea—Second appeal—Point as to costs.*

It is a bad practice to allow an appellant who has taken no objection to an award of costs against him in the lower Court to go to the High Court and argue that point there. (*Grimwood, C. J. and Piggott, J.*) JAINI LAL *v.* FIRM OF DURGA PRASAD DAU DAYAL. **1923 A. 334.**

———*New plea—Second appeal—Jurisdiction, objection as to.*

An objection to jurisdiction not taken in the lower Appellate Court, cannot be entertained in second appeal. (*Rafique and Piggott, JJ.*) LALA *v.* RAM CHANDER. **63 I. C. 255.**

———*New plea—Second appeal.*

A suit for sale of property on a mortgage cannot in second appeal be turned into a suit for recovery of money charged on immoveable property. (*Ryves and Lyle, JJ.*) MUSOMA KHATUN *v* TAHIRA KHATUN. **19 I. C. 661 : 11 A. L. J. 580**

———*New plea—Second appeal—Cause of action—Absence of.*

The question whether the facts set out in the plaint show a cause of action is one which goes to the very root of the case and as such may be allowed to be raised for the first time even in the second appeal. (*Knox and Piggott, JJ.*) SHES DAYAL *v* JAGAN NATH. **12 I. C. 111 : 8 A. L.J. 922.**

———*New plea—Second appeal.*

If for the first time, in second appeal, various questions of law have been raised but in order to decide them evidence is required to be taken, such points of law are not admissible in second appeal. (*Macleod, C. J. and Shah, J.*) TRIKAM LAL *v.* NAGENDAS JETH LAL. **1922 B. 148.**

———*New plea— Second appeal —Not to be allowed.*

If a point which ought to be, but is not, taken in the trial Court and in respect of its direct evidence is given, it cannot be taken in second appeal especially when it involves a question of fact. (*Chaudhuri, J.*) ANWAR BEWA *v.* SURENDRA NATH RAHUT. **56 I. C. 844.**

———*New plea—Second appeal.*

The Second appellate Court will not allow a defendant to change the whole nature of his defence at the last moment and to set up a plea which he directly and fraudulently repudiated in the lower Courts. (*Walmsley, J.*) SARBESWAR BEZ MADAK *v.* GAGAN CHANDRA MANNA. **55 I. C. 631.**

———*New plea— Second appeal—Tenancy—Terms of.*

A question relating to the acquisition of right of occupancy by an under raiyat or to the rights of a tenant holding over, cannot be urged in the High Court in second appeal for the first time. (*N. R. Chatterjee and Duval, JJ.*) SHEIKH GAZARADDIN MANDAL *v.* GANGARAM MANDAL. **53 I. C. 12.**

———*New plea—Second appeal.*

The plff. brought a suit in the alternative, first of all to recover certain particular specified land on the footing that a legal partition had been made between the parties and, if the partition was not legal then he asked to be put in joint possession with the defts The case went to trial and was argued in both lower Courts without any objection, and now in second appeal defts. seek to put an end to the whole of the proceedings on the ground that contradictory causes of action ought not to be tried together. *Held*, the defts cannot in second appeal raise a matter which has not been considered by the lower Courts. (*Fletcher and Newbould, JJ.*) DWARIK BALA *v.* NIDHI RAM BALA **40 I.C. 462.**

———*New plea—Second appeal.*

The points not raised in the lower Courts cannot be heard in second appeal. (*Sanderson, C. J and Mookerjee, J.*) BENI RAI *v.* NATABAR SIRKAR. **33 I. C. 975.**

———*New plea—Second appeal—Objection to pecuniary Jurisdiction.*

Objections taken to the jurisdiction of a Court due to the increase in the value of the mesne profits is not allowed for the first time in second appeal. (*Jenkins, C. J. and N. R. Chatterjee, J.*) JAMIRUDDIN MOLLAH *v.* ASWINI KUMAR. **14 I. C. 34.**

———*New plea—Second appeal— Damages—Quantum of.*

A plea not raised in the lower Court to the effect that monetary compensation should have been awarded instead of the mandatory injunction and in the absence of proof of substantial injury cannot be raised for the first time in second appeal. (*Shadi Lal, C. J.*) NUR MAHOMED *v.* GAURI SHANKAR. **2 Lah. L. J. 463.**

———*New plea—Second appeal—Point not raised in lower Courts—Vague reference to the point in the plaint.*

A point not raised in the lower Courts can't be taken in the final Court of appeal where there is only a vague reference to it in the plaint. (*Shadi Lal and Jones, JJ.*) SHARAF DIN *v.* MOKHAN. **33 I. C. 748 : 86 P. W. R. 1916.**

———*New plea—Second appeal—Objection not raised in the written statement.*

Where a deft omits to raise an objection in his written statement, he cannot raise it in second appeal. (*Sadasiva Aiyar and Spencer, JJ.*) ANGAMUTHU *v.* RAMALINGA PILLAI. **60 I. C. 766 : 39 M L. J. 685.**

———*New plea—Second appeal— Notice to quit—Questions to be raised.*

Where in an ejectment suit the defts. did not plead expressly in their written statement any want of notice and there was no issue regarding the notice, the plea of insufficiency or invalidity of notice cannot be allowed to be raised for the first time in second appeal. (*Oldfield and Sadasiva Aiyar, JJ.*) MUTHU REDDI *v.* MUTHU VENKATAPATHI REDDI. **31 M L J. 354 : (1916) 2 M. W. N. 180 : 37 I. C. 1 : 4 L. W 168.**

———*New plea—Second appeal—Questions to be raised*

An appellant cannot raise for the first time in second appeal the contention that a decree obtained by the judgment debtor against the appellant's

father cannot be set off against a decree obtained by him in his own right (*Sankaran Nair and Ayling, JJ.*) RAGHUNATHASWAMI IYENGAR *v.* JANAKI AMMAL. 23 I. C. 923 : 1 L. W. 431.

——*New plea—Second appeal—Attestation—Absence of plea.*

If the fact of attestor's presence at the time of execution is not put in issue in the lower Court, it cannot be raised in second appeal. (*Benson and Sundara Aiyar, JJ.*) VEERAPPUDAYAN *v.* MUTHU KARUPPA THEVAN. (1913) M W. N. 400: 19 I. C. 589: 13 M. L. T. 463 : 24 M. L. J. 534.

——*New plea—Second appeal.*

Where a plea was taken in the first Court but was given up in the appellate Court and again urged in the High Court : *Held*, that the objection cannot be entertained in the second appeal, if it depends upon the decision of a question of fact. (*Kotwal, A. J. C.*) AMOLAKSAO *v.* EKNATH. 55 I. C. 481 (1) : 16 N L. R. 89.

——*New plea—Second appeal—Change of plea.*

When in a redemption suit, the defendant pleaded that the mortgagor had transferred the equity of redemption to the mortgagee but it was found against him, he cannot be allowed to change his ground in second appeal that there had been a foreclosure to which the parties had assented. (*Stuart, J.C.*) JAGAT PAL SINGH *v.* HARNAM SINGH. 3 O.L J. 244: 34 I. C. 745: 19 O. C. 166.

——*New plea—Second appeal—New case not to be set up.*

In second appeal a plff. cannot be permitted to resile from the position he took up in the plaint. (*Kanhaiya Lal, A. J. C.*) CHANHARJA BAKSH *v.* RAM HARKAH. 32 I. C. 740: 2 O. L. J 601.

——*New plea—Second appeal—Questions to be raised.*

A case not set up in lower Court cannot be raised in second appeal. (*Lindsay, J. C.*) SANWAL SINGH *v.* BHIKKARI. 23 I. C. 860. 1 O. L. J. 38.

——*New plea—Second appeal.*

Issue not raised in the written statement cannot be raised in second appeal. (*Das and Adami, JJ.*) KHUB LAL UPADHYA *v.* JUGDISH PRASAD SINGH. 1 P. 23: 3 P. L. T. 795 : 1922 P. 398.

——*New plea—Second appeal.*

Where a point taken in the Court of first instance, was not raised in the lower appellate Court it cannot be allowed to be raised in second appeal (*Miller, C.J. and Adami, J.*) PIRTHI MAHTON *v.* JAMSHED KHAN. 3 Pat. L. T. 403 : 1922 P. 289.

New Plea—When can be raised.

——*New plea—When can be raised.*

New plea is not to be allowed when it requires fresh evidence. (*Ryves and Gokul Prasad, JJ.*) AJODHIA PRASAD *v.* MT. MAJIDAN. L. R. 3 A. 49: 20 A. L. J. 92 :1922 All. 346.

——*New plea—When can be raised—Trial of suit—Late stage.*

A Court is well justified in disallowing the plff. to embark on a new case at a late stage of the

proceeding. (*Chitty and Cuming, JJ.*) GOVINDA RAM DAS *v.* AGENT, EAST INDIAN RAILWAY CO., LTD. 52 I. C. 47.

——*New plea—When can be raised—Failure to establish claim—Effect.*

Where in a suit for injunction the plff. set up his title as owner of a piece of land, but failed to establish ownership and it appeared that he was in possession of a portion of the land as tenant of the defts. on payment of the customary rate. *Held*, that having failed to establish title set up by him his suit must be dismissed. (*Shah Din, J.*) KIDAR NATH *v.* HARI SINGH. 36 I. C. 55: 75 P. L. R. 1916.

——*New plea—When can be raised—No allegation in pleadings.*

Prior agreement of partnership or family arrangement being not pleaded would not be gone into by Court. (*Miller and Abdur Rahim, JJ.*) ILLA SOMANNA *v.* MADDALA SEETAMMA. 18 I. C. 636: 13 M. L. T. 102.

——*New plea—When can be raised.*

When a party has a valuable piece of evidence to support his title which he produced and proved before the lower Court, the fact that he omitted to lay due stress on it in original proceedings does not prevent him from advancing the plea in appeal. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) NARAIN SINGH *v.* DEPUTY COMMISSIONER OF PARTABGARH. 55 I. C. 896: 7 O. L. J. 93.

——*New plea—When can be raised—Trial of suit.*

A fresh plea can be raised during the progress of the suit if it arises out of facts subsequently come to light, and not within the knowledge of the parties before. (*Lindsay, J. C.*) SHEODARSHAN LAL *v.* ASSESAR SINGH. 46 I. C. 52: 5 O. L J. 179.

——*New plea—When can be raised.*

In appeal, questions of law not raised at the trial were allowed to be argued as they required no further evidence and as they affected the status of a party to the suit. (*Miller, C. J. and Foster, J.*) RAJA MAKUND DEB *v.* SRI JAGANNATH, JENAMANI. 2 Pat. 469: 4 Pat. L. T 427: 1923 Pat. 97 : 1 Pat. L. R. 201: 1923 P. 423.

Non-Joinder of Parties.

See also C. P. CODE, S 99 AND O. 1, R. 13.

——*Non-joinder of parties—All heirs of the debtor not impleaded.*

Where a creditor omits to implead all the heirs of his debtor but sues only some of them, he can get a decree proportionate to the shares of those defts. only. (*Banerjee and Gokul Prasad, JJ.*) SARJU MISRA *v.* GHULAM HUSSAIN. 63 I. C. 87.

——*Non-joinder of parties—Objection as to.*

The word mis-joinder in S. 99 should include non-joinder, therefore it seems sufficient to dispose of the objection as to procedure. (*Spencer and Ramesam, JJ.*) THINA SHANMUGHA *v.* MONA CHUNA NANA SUBBAYYA. 15 L. W. 283 : (1922) M. W. N 106 : 31 M. L. T. 266 : 1922 M. 317 : 42 M. L. J. 183.

PRACTICE—Non-joinder of parties.

———*Non-joinder—Plea open to whom—C. P. Code, O. 1, R. 9.*

Plea of non-joinder of others as plffs. can be raised only by the defts. who have an interest in the subject-matter of the suit and not by those found subsequently not to have any interest therein. (*Sabonadiere and Kanhaiya Lal, A. J. Cs.*) CHHOTELAL *v.* BADRI SINGH. **22 I. C. 129.**

———*Non-joinder—Transferee* pendente lite.

A transferee *pendente lite* from person having neither title nor cause of action to sue is not a necessary party to an appeal (*Das and Bucknill, JJ.*) RAMRUPGIR *v.* LAL CHAND MARWARI. **3 P. L. T. 352 : 1 P. 475 : 1922 P. 243.**

Notice.

See (1) (C. P. CODE, S. 80 AND O. 11.
(2) JUDICIAL ORDER.
(3) JUDICIAL PROCEEDINGS.

Notice of Hearing.

———*Notice of hearing—*Ex parte *Judicial order—Power of court.*

A judicial order possibly affecting or prejudicing a party cannot be made without giving that party an opportunity to be heard. (*Mookerjee and Cuming, JJ.*) RAJENDRA LAL SUR *v.* ATAL BIHARI SUR. **44 Cal. 454 : 39 I. C. 969 : 25 C. L. J, 455.**

———*Notice of hearing—Judicial proceedings.*

Without an opportunity given to a person to say what he has to say, he should not be deprived of his property in any judicial proceeding. (*Mookerjee and Carnduff, JJ.*) MEN AJUDDI BISWAS *v.* TOAM MANDAL. **15 I. C. 176 : 39 Cal. 881.**

——— *Notice of hearing—Dismissal for default —Place of hearing.*

Where no intimation was given to the parties that the case will be heard in camp, the magistrate was not justified in dismissing the case for default while in camp. (*Shah Din, J.*) MEHR BAKHSH *v.* EMPEROR. **22 I. C. 495 : 15 Cr. L. J. 143 : 53 P. L. R. 1914.**

———*Notice of hearing—Setting aside order.*

An order in favour of a party got without fraud, should not be set aside without notice to the party. (*Sadasiva Aiyar and Moore, JJ.*) BASHYAM REDDI *v.* SOMASUNDARAM CHETTY. **32 I. C. 897 : 3 L. W, 250.**

———*Notice of hearing—Absence of statutory provisions—Natural justice.*

In all judicial proceedings where no specific rule as to notice exists the rule *audi alteram patem* applies as the principle of natural justice. (*Spencer and Seshagiri Aiyar, JJ.*) VENKATARAMA AIYAR *v.* KRISHNA AIYAR. **38 Mad. 1091 : 2 L. W. 200 : (1915) M. W N. 181 : 16 Cr. L, J 128 : 17 M. L. T. 164 : 27 I, C. 192 : 28 M. L J. 204.**

———*Notice of hearing — Objections to—Waiver.*

Whereby a party having notice of a motion contests it on the merits, he must be held to have waived objections as to irregularity in the issue or service of notice. (*White, C. J. and Oldfield, J.*) T. RUTHNA GRAMANY *v* N. VEERABUDRA AIYAR. **(1913) M. W. N. 751: 21 I. C. 96 : 25 M. L. J. 281.**

PRACTICE—Parties.

———*Notice of hearing—Retrial—Notice.*

Neither party is entitled as of right to a notice intimating the date fixed for the rehearing of the case, when a case is remanded for retrial to the first Court. This rule applies both to Berar and the Central Provinces. But in fixing a date for hearing the case, the Court should select such date as will give the parties a reasonable opportunity of ascertaining the date fixed. 17 W. R. 70 Ref. (*Batten, A. J. C.*) GOSAVI *v.* MALRAJ. **12 I. C. 807: 7 N.L.R. 172.**

———*Notice of hearing—Notice to counsel.*

Where notice of the adjourned date of hearing of a petition is given to the counsel who said at the hearing that he had no instructions and had returned the papers, it was held sufficient. (*Lindsay, J. C.*) BONI MADHO *v.* KANHAIYA LAL. **43 I. C. 481: 4 O. L. J. 561.**

———*Notice of hearing—Notice to parties is always necessary.*

No order to the prejudice of a party can be passed without giving him an opportunity of being heard. (*Jwala Prasad and Bucknill, JJ.*) GOWER CHANDRA ROY *v.* JANARDHAN PRASAD THAKUR. **68 I. C. 337.**

———*Notice of hearing—Transfer of an appeal to another Court for disposal—Procedure.*

Before an appeal is transferred by one Court to another the case should be called on and the parties informed as to the transfer and the order sheet should show that it is so transferred. Otherwise, a dismissal for default by the Court to which the appeal is transferred is irregular and will be set aside. (*Chamier, C. J. and Jwala Prasad, J.*) SUKHA SINGH *v.* BRICK UPADHYA. **39 I. C. 45 : 1 Pat. L, W. 245.**

Parties.

———*Parties—Same person if can be both plaintiff and defendant—Different capacities.*

The same individual even in different capacities cannot be both a plaintiff and defendant in one and the same action. The same persons being both executors and beneficiaries under a will, all possible conflicting interests should be represented and some should represent the executors while the others can argue for their individual rights. (*Heaton, C.J. and Marten, J.*) JAMSHEDJI NAOROJI GAMADIA *v.* SORABJI NAOROJI GAMADIA. **25 Bom. L. R. 1137.**

———*Parties—Mortgage—Plea of paramount title.*

The defendant cannot in appeal plead that the suit ought to have been dismissed on the ground that he claimed paramount title when the suit is decreed against him with costs. (*Sharfuddin and Chapman, JJ.*) BASDEO NARAIN *v.* BACHAN CHOWDHURANI. **32 I. C. 358.**

———*Parties—Additional Defendants—Whether can be struck off at any stage—Evidence of —Effect of.*

PRACTICE—Partition Suit.

Additional defendants brought on record on an application put in by them and allowed cannot be struck off the record and their evidence cannot be ignored at the stage of an appeal from a decree in their favour after the whole case has been decided. (*Piggot, J. C. and Lindsay, A. J. C.*) MIR SYED HASA *v.* TAIYABA BEGAM
26 I. C. 547 : 1 O. L. J. 591.

Partition Suit.

——*Partition suit—Procedure—Multiplicity of suits.*

It is not competent for a Court, in a partition suit to leave open questions of the negligence of the manager and recovery of outstanding balances, to separate suits. The proper procedure would be to deal with these matters in the partition proceedings themselves when accounts are being taken. (*Macleod, C. J. and Shah, J.*) GULAB CHAND *v.* RAMNATH.
64 I. C 995 : 23 Bom. L R. 1171.

——*Partition suit—Impossibility — Decree for sale.*

When there are actual difficulties in partition the Court may order sale; otherwise partition may be granted. (*Chamier, C. J. and Sharfuddin, J.*) LALIT KISHORE MITHRA *v.* GIRDHAR SINGH
20 C. W. N. 1206 : 1 Pat. L. J 441 : 35 I C. 861 : 2 Pat L. W. 383.

Plea—Limitation.

See (1) LIMITATION ACT, S. 3.
(2) PRACTICE—LIMITATION.
(3) PRACTICE—NEW PLEA—LIMITATION.
(4) LOCAL ACTS PLEADER.
See also (1) LEGAL PRACTITIONER.
(2) LEGAL PRACTITIONER'S ACT.
(3) PRACTICE— PLEADER'S FEES.

——*Pleader—Duties and powers of.*

When a Vakil is appointed under a power-of-attorney to argue a case, to inspect records, to execute documents and to deposit and withdraw monies and do all such other acts he is not endowed with power or authority to compromise the suit he is thus retained to argue. (*Lord Atkinson.*) SARAT KUMARI DASI *v.* AMULLYADHAN KUNDU.
32 M. L. T. 137 : 17 L. W. 481 : 27 C. W N 629 : 25 Bom. L. R 548 : 37 C. L J. 501 : (1923) M. W. N 392 : 1923 P. C 13.

——*Pleader—Right to be heard—Amicus curiae.*

It is the general practice to hear Pleaders on behalf of persons in Civil and Criminal matters and secure their assistance as *amicus curiae* though parties have no right to be heard either by pleader or personally. (*Richards, C. J.*) RAM NIHORE UMAR *v.* EMPEROR.
8 A L J. 237 : 10 I. C. 740 : 12 Cr. L. J. 231.

——*Pleader — Vakalatnamah in Execution proceedings —Sufficient for—Claim petition.*

Where a decree holder's pleader has put in his *Vakalatnamah* in a proceeding in execution it is not necessary that he should put in a fresh *Vakalatnamah* in a claim petition. (*Macleod, C. J. and Crump, J.*) DAGDU RAJARAM *v.* LAXMAN.
25 Bom. L.R. 462: 1923 Bom. 412 (1).

PRACTICE—Pleader.

——*Pleader—Admission.*

Per *Fawcett, J.* Parties are bound by their counsel's admission unless he has been induced or misled by some circumstances to make a statement under a mistake. (*Pratt and Fawcett, JJ.*) DODDAVA *v.* YELLAWA.
70 I. C. 417 : 1922 Bom 233.

——*Pleader—Retention of moneys.*

A solicitor is entitled to retain such moneys of his clients as in accordance with the rules of the Court he would be justified in claiming. (*Page, J.*) JADAB CHANDRA MITTER *v.* ROMESH CHUNDER BOSE.
27 C. W. N. 537 : 1923 C. 603.

——*Pleader—Am-muktear.*

Though an *am muktear* gives an assurance that a purchase of property by him would not be objected to, his principal and those claiming under him are not estopped from disputing the purchaser's title (*Chatterjee and Pearson, JJ.*) JOTI PRASAD CHATTERJI *v.* DASARATH GHOSH.
63 I. C. 109.

——*Pleader—Duty to disclose documents.*

An Attorney must be very careful to ascertain what exactly are the documents in the client's possession and if he finds that there are documents which have not been disclosed he must at the earliest moment bring them to the notice of the opponent and give him an opportunity of inspecting them. No step, however, need be taken against the attorney unless the question is of such a serious nature that it is in the interests of the profession as a whole and of the litigants in general that a full enquiry is to be made into it by a Special Bench. (*Greaves, J.*) AN ATTORNEY, *In re.*
61 I. C. 908 : 25 C. W. N. 99.

——*Pleader—Failure of, in duty—Whether fraud by client.*

The failure of a pleader in his duty by allowing essential points in the case to be overlooked, is not a fraud by his client (*Newbould, J.*) KIRAN CHANDRA *v.* BONO BEHARI DATTA.
59 I. C. 752.

——*Pleader—Original Side, High Court.*

A Vakil in the Original Side, is not entitled to refuse to take a necessary step in the case because his whole fees are not paid and at the same time refuses his consent to the transfer of the case to another Vakil. All that he can do is either to insist on the payment in advance or rely upon his lien on the papers or to file a suit for recovery of the fees. (*Wallis, C. J. and Krishnan, J.*) RAJAH MUTHUKRISHNA *v.* NURSE.
44 Mad. 978 : (1921) M. W. N. 562 : 69 I. C. 695 : 14 L. W. 154 : 41 M. L. J. 213.

——*Pleader—Witness.*

The rule as to exclusion of witnesses from Court until they have been examined does not apply to counsel who is cited as a prosecution witness. There may be circumstances which may make it desirable for counsel not to appear in a case in which he is a witness but they would not render his appearance illegal. (*Wallis, C. J. and Krishnan, J.*) VEMUREDDI BABU REDDI *In re.*
44 Mad. 916 : 13 L W 702 : 22 Cr. L. J 588 : 62 I. C. 828 : (1921) M. W N 440 : 41 M. L. J. 158.

PRACTICE—Pleader.

———*Pleader—Action of—How far binds client—Liability for action of clerk.*

In the eye of the law a pleader is responsible for any fraud practised by his clerk on his clients. He is completely responsible for the acts and defaults of his clerk if he relegates to the clerk the duties which he owes to his clients because he cannot be allowed to so relegate. Fraud or gross negligence, amounting in law to fraud, of a pleader is not binding on the client and a court can restore an appeal dismissed on account of such fraud on the part of appellant's pleader. (*Sundara Aiyar and Spencer, JJ.*) MURUGA CHETTY *v.* RAJA SWAMI.

14 I. C. 823 (2).

———*Pleader — Duty of pleader to court and client.*

Where a pleader received printing charges from his client, but did not deposit them in court and the appeal was dismissed for non-appearance, but his clerk informed the client after such dismissal that the appeal was decided against him and the pleader gave no explanation to the court nor did he inform the true facts to the client, *Held*, the pleader was guilty of unprofessional conduct. It was the duty of the pleader to inform the court as well the client of the true facts. (*White, C.J., Sankaran Nair and Ayling, JJ.*) G. KRISHNASWAMI AIYER, *In re.* **14 I. C. 965.**

———*Pleader*--Vakalatnamah—*Name of pleader intended to be engaged not filled up—Effect of.*

Where the name of the pleader was left blank and it was clear that none but Mr. Jatkar was intended to be employed and that he accepted the employment, the omission was a mere irregularity which does not vitiate his employment or the power of attorney. (*Kotwal, A. J. C.*) MUL CHAND *v.* RADHABAI. **6 N. L. J. 179 : 1923 Nag 281.**

———*Pleader — Delegation of authority — Pleader employing another to act jointly with him or for him.*

Pleader employing another pleader to act for or jointly with him must conform to O III, R 4, C.P.C., in case there is no exemption under Cl 3 of the rule. 36 A 46, Foll. (*Stanyon, A. J. C.*) DHANOOLAL *v.* BAJI.

37 I. C. 103 : 12 N. L. R. 189.

———*Pleader—Appearing for opposite side.*

A legal practitioner engaged from the beginning to appear for one party should not appear for the opposite side unless under extraordinary circumstances. (*Kanhaiya Lal and Kendall, A. J. C.* ALI MUHAMMAD, *In re.*

37 I. C. 142 : 19 O. C. 237.

———*Pleader—Advocate—Barrister--Authority to bind client by compromise.*

Barristers practising in Indian courts do so, not because they are members of the bar, but because they are entitled under rules for the admission of advocates of the court, and are subject to the same liabilities as other advocates of the Court. A barrister practising in Burma cannot bind his client by a compromise made, or consent given without the client's express authority. (*Rigg, J.*) M. HAROON *v.* M EBRAHIM.

64 I. C. 528 : 13 Bur. L. T. 224.

PRACTICE—Pleader's fees.

Pleader's Fees.

———*Pleader's fees—Allahabad High Court Rules, Rr. 457 and 461—Land acquisition case.*

Proceedings under the Land Acquisition Act in the District Court are not suits within rule 457 of the High Court Rules and so a pleader's fee in such proceedings should be calculated according to rule 461 and not rule 457. (*Griffin and Chamier, JJ.*) KANHAIYA LAL *v.* SECRETARY OF STATE.

14 I. C. 214.

———*Pleader's fees—Bombay High Court—Suit in ejectment—Valuation.*

In a suit to eject the defendant from a house, the property was valued at Rs 30 for purposes of jurisdiction and at Rs. 5,000 for pleader's fees. *Held*, that the pleader's fee was payable on 500 rupees. (*Macleod, C. J. and Crump, J.*) GULAM MOHIUDDIN *v.* DAYABHAI. **25 Bom. L. R. 447 : 1923 Bom. 398.**

———*Pleader's fees—Costs.*

In a suit for ejectment where the value of the property is, for the purpose of court-fees, assessed at the annual rental value, the pleader's fees should be assessed not on that value but on the value of the property which will be the value for purposes of jurisdiction. (*Macleod, C. J. and Shah, J.*) BAI MEHERBAI *v.* DADINA.

64 I. C. 1000 : 23 Bom. L R. 1183.

———*Pleader's fees—Taxing Master, opinion of.*

On a question of pleader's fees, the Court always allows the opinion of the taxing master to prevail, and it will not interfere with it unless it is wrong in principle or very clearly wrong in detail. (*Pratt, J.*) SADASUKH GAMBHIRCHAND *v.* BAIJNATH HARNANDRAI. **45 Bom. 1234 : 63 I. C. 37 : 23 Bom. L. R. 854.**

———*Pleader's fees— Basis of calculation—Suit for injunction.*

A suit for injunction valued for purposes of court-fees at Rs. 110 and for purposes of jurisdiction at Rs. 4,000 was dismissed with costs and the pleader's fees were awarded to the defendant upon the basis of the value fixed for purposes of jurisdiction. The plaintiff appealed. *Held*, (1) the suit being of the nature described in S. 7 (iv) (*d*) of the Court Fees Act, its value for purposes of court-fees as well as for purposes of jurisdiction should under S. 8 of the Suits Valuation Act, have been the same. (*Scott-Smith, J.*) AMIRCHAND *v.* HAKIM ALI. **1924 L. 364.**

———*Pleader's fees—Redemption suit.*

In a redemption suit the amount of redemption determines court-fees and jurisdiction and pleader's fees are to be calculated thereon. (*Scott-Smith, J.*) MANOHAR LAL *v.* KHUSHI SHAH.

61 P. W. R. 1917.

———*Pleader's fee—Land acquisition case.*

Pleader's costs can be allowed in land aquisition cases on the difference between the amount claimed and the amount awarded. (*Scott-Smith and Agnew, JJ.*) KUNWAR RAMZUR SINGH *v.* SECRETARY OF STATE **174 P. W. R. 1913 : 21 I. C. 270 : 309 P. L. R. 1913.**

PRACTICE—Pleader's fees.

———*Pleader's fee—Suit dismissed as having abated.*

In calculating defendant's costs in a case where the suit is dismissed as having abated on the death of the plf. the pleader's fee to be allowed is the same as in the case of suit dismissed for default of prosecution after framing of issues, *i.e.*, only one half of the full fee should be awarded. (*Spencer and Krishnan, JJ.*) DONTU PEDDA CHENCHAYYA *v.* MALLAM BALAYYA.
10 L. W 656 : 54 I. C. 118 : 43 M. 284 : 37 M. L. J. 596.

———*Pleader's fee—Counsel instructed by vakil.*

Where counsel appears instructed by the party in person the latter can claim as part of the costs decreed to him the reasonable fee paid to his counsel. Where counsel is instructed by a vakil the Taxing Officer of the Court may certify for his fee which is recoverable in addition to the *ad valorem fee* allowed for the vakil. (*Sankaran Nair, J.*) SRINIVASA IYENGAR *v.* KANNIAPPA CHETTY. **15 M. L. T. 411 : 24 I. C. 895 : 26 M. L. J. 56.**
[Overruled on appeal by 33 I. C. 906]

———*Pleader's fee—Declaratory suit.*

In a suit for declaration the fee to be fixed is in the discretion of the court, as R 31 of the rules under the Legal Practitioners' Act (18 of 1879) did not apply. (*Miller and Sadasiva Aiyar, JJ.*) TALUPULA CHINNA SUBBAYYA *v.* TALUPULA PICHAMMA. **21 I. C. 541 : (1913) M. W. N. 867.**

———*Pleader's fee—Certificate of fees received after arguments—Costs.*

Where a pleader's certificate of fees received by him was lodged in court after the arguments had commenced the amount of fee was not allowed as costs. (*Evans, J. C. and Lindsay, A. J. C.*) RAGHUBIR SINGH *v.* UMRAO SINGH. **13 I. C. 500.**

———*Pleader's fees—Dismissal for default—Withdrawal of suit.*

A withdrawal of a suit after several witnesses have been examined is not tantamount to a dismissal for default and pleader's fees should not be calculated as in the case of a suit dismissed for default. In the case of a withdrawal the opposite party is entitled to his full costs. (*Das and Adami, JJ.*) RAMKISHEN DAS *v.* BENI PRASAD. **3 P. L. T. 314 : 1923 P. 90**

———*Pleader's fee—Advocate or attorney—Personal appearance.*

An advocate or attorney who personally appears and acts in a suit as a duly constituted agent of a party, cannot, by the mere fact that he is a member of the legal profession entitled to practise in court, charge the other side with an advocate fee. (*Parlett. J.*) C. BURN *v* KEYMER. **6 Bur. L. T. 160 : 20 I C. 971 7 L. B. R. 56**

———*Pleader's fees—Rules of the Commissioner's Court—Sindh.*

Where the intricacy and length of the trial is due to the defts. having made the plff.'s suit a test case to decide important questions

PRACTICE—Pleadings—Cause of action.

bearing upon their right of disposal of waste lands the plffs were entitled to have the pleader's fee assessed under Cl. G of Appendix VI of the Rules of the Sindh Court. 4 S. L. R. 37, Dist. (*Pratt, J. C. and Crouch, A. J. C.*) THE KARACHI MUNICIPALITY *v.* SHAMOO LADHA.
30 I. C. 19 : 9 S L. R. 10.

Pleadings.

See also C. P. CODE, O. 6 AND O. 7.

Admissions.
Cause of action.
Defence.
False averments.
Fraud.
High way.
Liberal construction.
Object of.
Proof.
Redemption.
Relief.
Variation.
Verification.
What is.
Miscellaneous.

Pleadings—Admissions.

———*Pleadings—Admission—To be taken as a whole.*

It is permissible for a court to accept part and reject the rest of any witness's testimony. But an admission in a pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not at all. (*Lord Dunedin*). MOTABHOY MULLA *v.* MULJI HARIDAS. **39 Bom. 399 : 17 M L T. 402 : 13 A. L. J. 529 : 19 C. W. N. 713 : 21 C. L. J. 507 : 17 Bom. L. R 460 : 2 L. W. 524 : (1915) M. W. N. 522 : 29 I. C. 223 : 42 I. A. 103 : 28 M. L. J. 589 (P.C.).**

———*Pleadings—Admissions—Effect of.*

A statement in a pleading is not an admission so as to dispense with further proof. (*White, C.J. and Oldfield, J.*) KULLAPPA CHETTY *v.* SUBBARAYA CHETTY. **25 I. C. 22.**

———*Pleadings—Admissions—Procedure—Two sets of defendants.*

Where some defendants admit the plaintiff's claim and the others do not and no separate relief could be given as against those that admit the claim. *Held* that no decree could be passed against such defendants, unless the plaintiff fails to establish his case. (*Piggott, J.C. and Lindsay, A.J.C.*) MIR SYED HASAN *v.* TAIYABA BEGAM.
26 I. C. 547 : 1 O. L. J. 591.

Pleadings—Cause of action.

———*Pleadings—Cause of action.*

The plaint must be read before anything else done and if it discloses no cause of action, the suit dies without reaching the point when jurisdiction can be discussed, or rather there can be no jurisdiction unless there be a cause of action. (*Harrison, J.*) JAWAHAR SINGH *v.* N. D. SASSOON & CO., KARACHI. **1923 Lah. 290.**

PRACTICE—Pleadings—Cause of action.

———*Pleadings—Cause of action—Hundi.*

Where in a suit on a hundi, the hundi is not admissible in evidence for want of proper cancellation of the stamp the plaintiff can fall back on the original consideration for the hundi provided the terms of the plaint are wide enough to include the original consideration upon which the suit is based. 28 Bom. 432; 28 A. 221 Foll. 26 A. 178 Dist. (*Kensington, J.*) PEOPLES BANK OF INDIA *v.* ABDUL KARIM. **18 P. R. 1912 : 75 P. L. R. 1912 : 14 I. C. 512 : 65 P. W. R. 1912.**

———*Pleadings—Cause of action—Objection to.*

Plea of non-existence of cause of action should be taken at the first hearing and it should not be allowed to be raised for the first time in second appeal. (*Johnstone, J.*) BHUP SINGH *v.* JIVAN SINGH. **2 P. L. R. 1911 : 9 I. C. 385 : 28 P. W. R. 1911.**

Pleadings—Defence.

———*Pleadings—Defence—Point of limitation.*

Per *Walmsley, J.*—Where the written statement asserts that the suit is barred by limitation, it cannot be held that the plea ought to be stated more explicitly, as by reference to the particular article of the Limitation Act. (*Woodroffe, Walmsley and Suhrawardy, JJ.*) GNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA **26 C. W. N. 985 : 1922 Cal. 544.**

———*Pleadings—Defence -Eviction suit.*

A lessee can set up eviction by a person having title paramount in a suit by lessor for rent. (*Mookerjee and Beachcroft, JJ.*) SURENDRA NARAIN ROY CHOWDHURY *v* DINANATH BASU. **36 I. C. 33 : 43 Cal. 554.**

Pleadings—False averment.

———*Pleadings—False averments—Effect of.*

The effect of a false assertion in the plaint on a certain matter does not entitle the court in refusing the plaintiff another relief to which he is entitled. (*Benson and Sundara Aiyar, JJ.*) SUBRAMANIA REDDI *v.* RAMACHANDRA REDDI. **10 I. C. 498 : 9 M. L. T 476.**

———*Pleadings—False averments—Dismissal of suit.*

A Court should not dismiss a suit mainly on the ground of false averments in plaint. (*Stanyon, A. J. C.*) LOOLA *v.* PYARE. **33 I. C. 497 : 12 N. L. R. 57.**

Pleadings—Fraud.

See also EVIDENCE ACT, S. 44.

———*Pleadings—Fraud—Allegations.*

In suits on the basis of fraud definite and clear allegations must be made (*Banerjee and Walsh, JJ.*) LACHMI NARAIN *v.* KISHAN KISHORE. **14 A. L. J. 25 : 33 I. C. 913 : 38 All. 126.**

———*Pleadings—Fraud—Who can set up.*

A person cannot be allowed to plead fraud of his own predecessors to avoid the legal consequences of those transactions. (*Beaman and Hayward, JJ.*) NATHAMUNI *v.* SABINIBAI. **37 Bom. 217 : 12 I. C. 583 : 13 Bom. L. R. 1011.**

PRACTICE—Pleadings—Liberal construction.

———*Pleadings—Fraud—Proof.*

A plea of fraud must be specifically raised and clearly proved. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) LALIT MOHUN NANDY *v.* HARIDAS MOOKERJEE. **37 I.C. 707 : 24 C. L. J. 335.**

———*Pleadings—Fraud.*

A general allegation unaccompanied by particulars does not amount to an averment of fraud of which any Court would take notice. *Walingford* v. *Mutual Society*, 5 A.C 685 rel. (*Brett and Carnduff, JJ.*) RAJKUMARA MOHUN PAL *v.* GOBIND CHANDRA PAL. **14 I. C. 53 : 17 C. W. N. 524.**

———*Pleadings—Fraud—Undue influence—If consistent.*

Two pleas, in a plaint to set aside a document, of fraud and undue influence are not inconsistent, where there is a clear indication in the plaint that the plaintiff intended to plead undue influence; if there was any omission of any specific plea as to undue influence, it will be cured by the subsequent statement that undue influence was used. (*Scott-Smith and Broadway, JJ.*) MUHAMMAD IBRAHIM *v.* UMATUMAHJAN. **72 P. W. R. 1917 : 39 I. C. 798 : 90 P. R. 1917.**

———*Pleadings—Fraud—Plea of.*

A party relying on fraud ought to allege it specifically in the plaint. (*Scott-Smith and Shadi Lal, JJ.*) GHAMAN *v.* KANHIYA MAL. **15 P. W. R. 1915 : 26 I. C. 426 : 121 P. L. R. 1915.**

———*Pleadings—Fraud—Definite allegations.*

An allegation of fraud must be made in the pleadings definitely and categorically according to O 6, R. 10, C. P. C., and must in no circumstances be allowed to be made at a later stage of the suit. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) GOVINDASWAMI NAIDU *v.* ETHIRAJAMMAL. **34 I. C. 1 : (1916) 1 M. W. N. 180.**

———*Pleadings—Fraud—Proof of.*

The Court should not insist upon direct proof of fraud in every case since fraud could not be proved positively. (*Piggott, J. C. and Kanhaiya Lal, A. J. C.*) BALDEO SINGH *v.* PUTTU LAL. **21 I. C. 69.**

Pleadings—Highway.

———*Pleadings — Highway — Public and private rights of way—Allegations.*

In pleading a public right of way the *Termini* need not be set out because the public have a right to use the way for all purposes and at all times, but in pleading private rights of way, the *Termini* or the way and the course which it takes must be shown with reasonable precision. (*Das, J.*) RAMMANOHAR SAHI *v.* MITHILA PRASAD SAHI. **57 I. C. 151.**

Pleadings—Liberal Construction.

———*Pleadings—Liberal construction—Substance to be looked to.*

An erroneous description of the claim is not fatal. The law looks at the substance and not at the form. If a claim for money had and received by the deft. was described as damages, it does not much matter. (*Walsh, J.*) HER PAL *v.* RAM SARUP. **34 I. C. 173.**

PRACTICE—Pleadings—Liberal construction.

——*Pleadings—Liberal construction.*

Per *Macleod, C. J.*—It is not the duty of the High Court to read pleadings in the mofussil Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. The Indian Courts have a much larger range of vision, and the plff.'s case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed. (*Macleod, C. J. and Shah, J.*) DHARMADAS KAUSHALYADAS *v.* RANCHHODJI DAHYACHAI.

64 I.C. 517 : 23 Bom. L. R. 1009

——*Pleadings—Liberal construction—Strict accuracy, if expected.*

The High Court on appeal and dealing with pleadings in the mofussil will not be so strict as it would be in cases from the Original Side of the High Court. (*Holmwood and Chapman, JJ.*) ARABAR RAHAMAN *v.* ISMAIL EBRAHIM

27 I. C. 373.

——*Pleadings—Liberal construction.*

A court of justice should not refuse an application which on the merits it ought to grant, simply because the applicant asks the court to exercise its powers under a wrong provision of law. (*Abdul Raoof and Moti Sagar, JJ*) UTTAM SINGH *v.* MT. RUTTAN DEVI.

5 Lah. L. J. 217: 1924 Lah. 28.

——*Pleadings—Liberal construction— Plea that debt not binding.*

In a suit to recover from the properties of a mutt debts incurred by a deceased mata thipati, a plea that "the debts are not binding as they were not and could not have been contracted for its benefit" includes both the legitimacy of the purpose which the debt was borrowed and the necessity to borrow. (*Krishnan and Ramesam, JJ*) LAKSHMINDRA THIRTHASWAMIAR *v.* VIBHUDHAPRIYA THIRTHASWAMIAR

17 L. W. 274 : 44 M. L. J. 187 : 1923 Mad. 288.

——*Pleadings — Liberal construction — Mufassil.*

Pleadings which are loosely drawn and do not contain accurate and legal methods of founding and describing rights alleged or denied, could not be taken too literally and the substance of the averments should alone be looked into. (*Sadasiva Aiyar, Spencer and Bakewell, JJ.*) PRYAGA DOSS JEE VARU *v.* VENKAMA NAIDU.

23 M. L. T. 137 : 7 L. W. 477 : 44 I. C. 641 : (1918) M. W N. 346.

——*Pleadings—Liberal construction.*

Allowance must be made for the inaccurate mode of setting forth claims of persons and the answers or defences to them. The court must look not only to the mere wording of the plaint but to the issue which was settled for trial and to the manner in which the case was treated in the lower courts. (*Oldfield and Tyabjee, JJ.*) ATHIMANILA VEETHIL KANNU PILLAI *v.* KAYINARI GOPALAN NAIR.

26 I. C. 337 : (1914) M. W. N. 883.

PRACTICE—Pleadings—Proof.

——*Pleadings—Liberal construction.*

Mofussil pleadings should not be construed strictly. 28 Bom 567. Ref. (*Drake-Brockman, J. C.*) VISHWANATH *v.* SHANKER LAL.

34 I. C. 704 : 12 N. L. R. 90.

——*Pleadings—Liberal construction.*

Pleadings in India should not be too strictly construed. (*Chapman and Atkinson, JJ.*) KRISHNA CHANDRA MANDAL *v.* RAM SAHAI KATARI.

41 I, C, 577 : 2 Pat L. W. 46.

Pleadings—Object of.

——*Pleadings — Object of—Collision case—Plaint.*

The decision of a case should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. In collision cases, especially the plaint should be so framed that it sets out the circumstances of the collision, with clearness and accuracy, to enable his adversary to know the case he has to meet, and state the particular acts of negligence that according to him caused the collision. (*Mookerjee and Buckland, JJ.*) REES *v.* YOUNG.

25 C. W. N. 519 : 66 I. C. 745 : 34 C L. J. 178.

——*Pleadings—Object of—Court, duty of.*

The object of pleadings is that each side may be fully alive to the question about to be argued in order that they may have an opportunity of bringing forward evidence appropriate to the issues. When the pleadings are vague it is the duty of the court to have them clearly specified. 22 C. 324 (P. C.) ref. to. (*Piggott, J. C, and Lindsay, A. J. C.*) MIR SYED HASAN *v.* TYABA BEGUM.

26 I. C 547 : 1 O.L.J. 591.

Pleadings—Proof.

——*Pleadings—Proof—Case set up in plaint not proved—Effect.*

Adoption was alleged in a plaint but the plff. failed entirely to prove his case of adoption. In such a case his claim to one of the items of property cannot be decreed simply because one of the defendants admits his claim thereto and the alleged adoption cannot be considered valid to the extent of one such single item alone. (*Lindsay and Sulaiman, JJ.*) KUNDAN LAL *v* MAKUNDI KUNWAR.

45 All. 571 : 1924 A. 150.

——*Pleadings — Proof — Variance between —Rule against—Scope of*

As a general rule parties should be kept to their pleadings, but this is not of universal application and every variance between pleading and proof is not fatal. The rule that the pleading and proof must correspond is intended to serve a double purpose ; first to apprise the defendant distinctly and specifically of the case he is called upon to answer ; and secondly, to preserve an accurate record of the cause of action as a protection against second proceeding upon the same allegations. The test is whether the defendant will be taken by surprise if relief is granted on facts established by the evidence A variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. The Court will depart from the rule that proof must conform

PRACTICE—Pleadings—Proof.

to pleading where it is satisfied that justice will not be done between the parties if the suit were dismissed on a technical ground, with the prospect of a further litigation for the determination of a controversy then substantially ripe for settlement. (*Mookerjee and Chotzner JJ*) ANANDACHANDRA CHAKRABARTI *v.* BROJA LAL SINGH.
36 C. L. J. 356 : 50 C. 292 : 1923 C. 142.

———*Pleadings—Proof—Variance—Effect of part performance.*

When the case made in a plaint in a suit for specific performance, of a contract embodied in a certain document, is thoroughly broken down, the plff. cannot abandon the case and request the Court to decide from the correspondence resulting in the execution of the deed of contract. As a rule variance between pleading and proof cannot be permitted, especially when, if permitted, the other side would be taken by surprise, or be prejudiced. This rule is strictly applied to suits for specific performance, but in case of part performance, the Court may instead of dismissing the suit struggle with the apparently conflicting evidence. (*Mookerjee and Chotzner, JJ.*) GANESH RAM *v.* GANPAT RAI. **1924 C 461.**

———*Pleadings—Proof.*

A party need not prove an allegation of fact neither denied nor expressly admitted by his opponent. A Court is bound to accept a party's repudiation of his interest in the suit. (*Rattigan and Shah Din, JJ*) DHAN DEVI *v.* BALU KMOKAND.
101 P. W. R. 1912 : 16 I. C. 122 : 131 P. L. R. 1912.

———*Pleadings—Proof—Defective pleadings should be supplied by evidence and documents.*

A plff. ought not to be non-suited in other than absolutely plain cases ; in case of defective pleadings, the proper course is to hear the evidence and examine the documents. (*Spencer and Coutts Trotter, JJ.*) VENKATARAMA AIYAR *v.* RAJAGOPALA AIYAR. **31 I. C. 704 : 29 M. L. J. 786.**

Pleadings—Redemption.

———*Pleadings—Redemption—Mortgage not proved.*

Plffs. sought for redemption against persons alleged to be mortgagees and appellants who were purchasers in execution of a decree against some other persons. The mortgagees admitted the title of the plffs. but the deft. appellants denied the mortgage and the right of plffs. The lower Appellate Court, holding that the mortgage was not proved, dismissed the suit. *Held*, that the lower appellate Court having found that no mortgage was proved a single Judge of the High Court was not justified in sending down an issue as to the fact and nature of the possession of plffs within the statutory period. The plffs. having failed to prove the case set up by them, the suit was rightly dismissed. (*Chamier and Piggott, JJ.*) ANAND SARUP *v.* ASAD ALI.
13 A. L. J. 342 : 28 I. C 602.
[On appeal from 27 I.C. 35 : 12 A. L. J. 1233.]

———*Pleadings—Redemption suit—Mortgage set up but not proved—Dismissal of suit.*

PRACTICE—Pleadings—Relief.

A suit for redemption, in which the mortgage mentioned in the plaint is not proved, must fail on that mortgage. (*Sunder Lal, J.*) ANARAGI KUNWAR *v.* KASHI RAI. **25 I C 197.**

———*Pleadings—Redemption—Suit on foot of one mortgage—Relief on foot of another admitted by deft.*

Where the plff. fails to prove the mortgage set up by him he may be allowed to redeem on the basis of a different mortgage under which the deft. claims to hold. 30 M. 388 foll. (*Sadasiva Aiyar and Napier, JJ.*) DAMODARAN NAMBUDRIPAD *v.* THEYYANAKKAN. **32 I. C. 624 : (1916) 1 M. W. N. 171.**

———*Pleadings — Redemption — Variation—Proof.*

In a suit for redemption based on a specific mortgage to two persons a decree for redemption could not be had on prior mortgages in favour of the two separately, if the specific mortgage alleged is not proved. (*Jwala Prasad, J.*) GOVIND KHANDU *v.* WAJID ALI. **37 I. C. 976.**

Pleadings—Relief.

———*Pleadings—Relief—Alternative claims.*

Where a mortgage deed is found invalid, an opportunity may be given to establish the alternative claim for a personal decree for the mortgage debt, even if no such claim is made. (*Viscount Finlay.*) BISWANATH PRASAD *v.* CHANDRA NARAYAN. **48 Cal. 509 : 63 I. C. 770 : 43 I.A. 127 (P C.).**

———*Pleadings—Relief—Alternative case—Suit on tenancy—Decree on the strength of permissive possession.*

The failure of the plaintiff to prove the particular tenancy set up by him is not by itself a bar to his getting a decree if he shows that the possession of the defendant was permissive and not adverse as pleaded by him. 25 A. 256; 24 A. 90, Ref. (*Kanhaiya Lal and Sulaiman, JJ.*) BALKISHAN *v.* RAGHUBAR DAYAL. **L. R. 3 A. 485 : 45 A. 81 : 1923 All. 409.**

———*Pleadings--Relief—Alternatively claimed—Grant of one—If plaintiff can claim both in appeal.*

A plaint for declaration of title or in the alternative for joint possession was filed and the declaration was granted. *Held*, the plff. cannot be heard to claim that joint possession also should be decreed. (*Piggott, J.*) MT. SARJO KUAR *v.* SHEIKH ENAIT. **1924 A. 271.**

———*Pleadings—Relief—Alternative case.*

A claim of easement can be decreed where the plea of it is not substantiated where an alternative claim of easement has been made.

Per *Macleod, C. J.*—" It is not the duty of the High Court to read pleadings in the Mofussil Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. We have a much larger range of vision, and the plff.'s case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed." (*Macleod, C. J. and Shah, J.*) DHARAMDAS *v.* RANCHHODJI.
64 I. C. 517 : 23 Bom. L. R. 1009.

PRACTICE—Pleadings—Relief.

———*Pleadings — Relief — Claimed in the alternative - Grant of one Effect.*

Where the plaintiff asks for one of two alternative reliefs and he is granted one of them he cannot afterwards say he does not want the relief he has been granted but desires to have the other one. (*Sanderson, C.J. and Ghose, J.*) REAJUDDIN PATWARI *v.* SYED ABDUL JOBBAR. **1924 C. 445.**

———*Pleadings—Reliefs—Additional.*

Where the plaint contains charges putting material facts in issue, the pltf. can get the relief sought for, if it comes under the general prayer. But he cannot desert the special relief prayed for and ask for another, unless the facts in the plaint will consistently with the rules of the Court, maintain the relief. The test is, whether the deft. will be taken by surprise and there can be no surprise, if relief not specifically claimed is consistent with that specifically claimed as well as with the case raised by the pleadings. (*Jenkins, C. J., Mookerjee and Holmwood, JJ.*) HAMENDRA NATH *v.* UPENDRA NARAIN. **43 Cal. 743 : 20 C. W. N. 446 : 32 I. C. 437 : 22 C. L. J. 419.**

———*Pleadings—Relief—Reduction in claim —Court's power.*

No reduction can legally be made, when the sum sued for is considerably less than the sum legally due from defendant even after deducting all the items claimed by the defendant excluding the interest payable thereon. (*Shah Din and Chevis, JJ.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* LAL DAS. **68 P. W. R 1914 : 24 I. C. 669 : 166 P. L. R. 1914.**

———*Pleadings—Reliefs—Plaintiff must succeed in his own title.*

A plaintiff must succeed upon the strength of his own title and not upon the weakness of the deft.'s case. (*Agnew and Shadi Lal, JJ.*) IBRAHIM *v.* BARKAT. **201 P W. R. 1913 : 20 I C. 879 : 323 P. L. R. 1913.**

———*Pleadings—Reliefs—Plaintiff to succeed on the strength of his own title.*

The pltf. has to succeed by the strength of his own title and not by the weakness of the defendant's case. (*Shah Din, J.*) KANHAIYA LAL *v.* NARPAT RAI. **35 P. L. R. 1912: 14 I. C. 793 (1) : 168 P. W. R. 1912.**

———*Pleadings—Relief—Suit for possession—Decree for redemption cannot be given.*

A suit which is originally one for possession of immoveable property against the person in possession, who it is alleged is a trespasser cannot be changed into one for redemption, especially when the last stage of the trial is reached.

Obiter dicta—A suit cannot be framed so as to be a suit for possession against a trespasser or in the alternative a suit for redemption. (*Johnstone, J.*) KALA *v.* LACHHMI. **167 P. W. R. 1911 : 12 I. C. 576 : 1 P. L. R. 1912.**

———*Pleadings—Relief- Joinder of claims—Pro-note—Suit upon and in the alternative upon the original consideration.*

There is no reason why a claim for money due based on the original loan or dealings should not be combined with a claim for the same money as due under a pro-note. In case there is any difficulty in enforcing the note the party is entitled to fall back on the original consideration. (*Krishnan, J.*) SUNDARA AIYAR *v.* ARUMUGAM PILLAI. **17 L. W. 374 : 39 M. L T. (H. C) 118 (1) : 44 M. L. J. 361 : 1924 M. 520.**

———*Pleadings—Relief—Mixing up barred claims with reliefs not barred—Suit, if can be dismissed.*

A suit is not liable to be dismissed because a barred claim is set up along with other reliefs which are not barred. (*Ayling and Srinivasa Aiyangar, JJ.*) VENKAMMA *v.* NARASIMHAM. **4 L. W. 441 : 37 I. C. 642 : (1916) 2 M. W. N. 325.**

———*Pleadings—Relief.*

Decree for one share may be granted in a suit for the possession of whole estate. (*Wallis, C. J. and Srinivasa Aiyangar, J.*) VISVANATHASAMY NAICKER *v.* KAMULU AMMAL. **(1915) M. W. N. 968 : 2 L. W. 1214 : 19 M. L. T. 296 : 31 I. C. 833 : 30 M. L. J. 451.**

———*Pleadings—Reliefs—Powers of Court—Relief not claimed in the alternative.*

It is not competent for a court to give a decree for *quantum meruit* when there is no alternative claim in a suit for commission. (*Benson, O. C. J. and Sankaran Nair, J.*) IMMUDIPATTAM VIJAYA GANDIPPA *v.* ANNASWAMY IYER. **17 I. C. 106.**

———*Pleadings—Relief—Plaintiff to get relief on his own right.*

No relief ought to be granted to a plaintiff except to his own rights. (*Spencer and Sundara Aiyar, JJ.*) TEJ MAL SOWKAR *v.* JAGAPILA PAPAYAMMA. **11 M. L. T. 25 : (1912) M. W. N. 50 : 13 I. C. 788 : 22 M. L. J. 225.**

———*Pleadings—Relief to be given as at the date of suit.*

The general rule is that relief will be granted according to the state of things at the date of institution. Court is not precluded from granting the plaintiffs a declaration because that relief has ceased to be appropriate owing to events occurring after institution. (*Dalal and Simpson, A.J. Cs.*) FATEH SINGH *v.* JAGANNATH BAKHSH SINGH. **10 O. L. J. 132 : 1923 Oudh 242.**

———*Pleadings—Relief—Principal and ancillary.*

The claim for principal relief does not fail merely because the claim for ancillary relief is found not maintainable. (*Lindsay, A.J.C.*) RAMZAN KHAN *v.* MUHAMMED YAKUB KHAN. **11 I. C. 537.**

———*Pleading— Relief—Change of—Prayer for general relief.*

A prayer for general relief must be consistent with a specific claim and the case raised in the pleadings. A pltf. claiming only confirmation of possession cannot get a decree for recovery of possession. (*Ross, J.*) LAL DAS *v.* RAM NARAIN SUKUL. **63 I. C. 2.**

———*Pleading—Relief.*

A suit once framed as a suit for fair and equitable rent cannot be changed into a suit for

PRACTICE—Pleadings—Relief.

enhancement of rent and the court is competent only to pass a decree for rent for the year in suit, the rent of the holding being presumed to be a fair and equitable rent until the contrary is proved. (*Miller, C. J. and Mullick, J.*) DAYAL KUNDU *v.* MABHU PATHAK. **57 I. C. 558 : 5 Pat. L. J. 406.**

———*Pleadings—Relief—Several reliefs, claim for—Failure to prove some—Decree.*

If a plaintiff claiming two reliefs failed to prove one relief he can get a decree for the one which he proves only. If in a suit for possession and declaration of permanent and heritable right, plaintiff fails to prove the latter, but proves former he is entitled to a decree for possession (*Chamier, C.J. and Sharfuddin, J.*) DEHU GHUNVA *v.* BARABIHIRA DEBI. **38 I. C. 543 : 2 Pat. L. J. 15.**

——*Pleadings — Reliefs—Smaller relief—Contribution.*

The main principle of practice is that plff. can only recover according to his allegations and proofs 11 B.L.R. 391 (P C) ; 8 L B. R. 334, ref. If plaintiff claimed restitution of the whole amount of a decree on a pro-note which he was jointly liable with the defts. on the ground that he was only a surety for them, but it was found that he borrowed the money for partnership purposes the plff. could not be given a decree for contribution. (*Fox, C.J, and Twomey, J.*) WONG MUN KHEE *v.* TEONG SHAIN. **36 I. C. 464 : 10 Bur. L. T. 119.**

Pleadings—Variation.

———*Pleadings — Variation—Proof—When fatal to suit—Variance not affecting cardinal point in issue—Nature of the principle.*

Held that the High Court in relying for the dismissal of the suit on, amongst other grounds, that of variance between pleading and proof had applied that principle in an abstract and unsatisfactory way which had misled them in estimating the merits of the case. The question in ultimate analysis was one of circumstances and not of law. The evidence adduced in support of the transaction having been effected on the 7th Nov. was not necessarily perjured or fabricated when it appeared that the statements of witnesses and entries in account books might be due to *bona fide* mistake. (*Viscount Haldane.*) HAJIUMAR ABDUL RAHIMAN *v.* GUSLADI MUNCHERJI COOPER. **20 C.W N. 297 : 30 M. L. J 444 : 3 L. W. 308 : 34 I.C. 268: (1916) 1 M. W. N. 137 (P.C.)**

———*Pleadings — Variation—Evidence gone into—Effect of.*

Where evidence has been fully taken on a plea arising in the case it is not proper for the court to decide against a party on a strict construction of the pleadings without considering the evidence when such a technical view might have been obviated by a mere amendment of the pleadings. (*Lord Dunedin.*) MOTABHOY MULLA *v.* MULJI HARIDAS. **39 Bom. 399 : 17 M. L. T. 402 : 28 M.L.J. 589: 13 A. L. J. 529 : 19 C. W. N. 713 : 17 Bom. L. R. 460 : 2 L W. 524 : 21 C.L.J. 507 : (1915) M. W. N. 522 : 29 I. C. 223 : 42 I. A. 103.(P. C.)**

PRACTICE—Pleadings—Variation.

———*Pleadings—Variation—Proof—Relief.*

Where both parties understood the real point in issue and give evidence, the fact that the pleadings subsequent to the plaint and the evidence disclosed facts at variance with the plaint is immaterial (*Rafique, J.*) JUGAL KISHORE *v.* GOMTI KUAR. **25 I. C. 280.**

———*Pleadings—Variation—When permitted.*

The principle is well established namely, that the determination in a cause should be founded upon a case either to be found in the pleadings or involved and consistent with the case thereby made, 11 M.I.A. 7 ; 14 C 801 ; 33 C.L.J. 171; 18 C. W.N. 473 ; 34 C.L J. 178; 34 C L.J 319 ; 34 C. L. J. 529 referred to (*Mookerjee and Chotzner, JJ.*) ANNADACHARAN SIL *v.* HARGOBIND SIL. **27 C. W. N. 496 : 37 C. L. J. 552: 1923 Cal. 570.**

———*Pleadings—Variation—When fatal.*

As a general rule parties should be kept to their pleadings, but this is not of universal application and every variance between pleading and proof is not fatal. The rule that the pleading and proof must correspond is intended to serve a double purpose ; first to apprise the defendant distinctly and specifically of the case he is called upon to answer ; and secondly, to preserve an accurate record of the cause of action as a protection against second proceeding upon the same allegations. The test is whether the defendant will be taken by surprise if relief is granted on facts established by the evidence. A variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. The court will depart from the rule that proof must conform to pleading where it is satisfied that Justice will not be done between the parties if the suit were dismissed on a technical ground, with the prospect of a further litigation for the determination of a controversy then substantially ripe for settlement. (*Mookerjee and Chotzner, JJ.*) ANANDA CHANDRA CHAKRABARTI *v* BROJA LAL SINGH. **50 Cal. 292 : 1923 Cal. 142.**

———*Pleadings—Variation— Proof.*

Every variance between pleading and proof is not fatal. The objection must be one of substance. The rule is intended to safeguard the deft. against being taken by surpise and against a second proceeding on the same allegations. (*Mookerjee and Buckland, JJ.*) SATIS *v.* KALIDASI. **68 I. C. 577 : 34 C. L. J. 529.**

———*Pleadings—Variation—Proof.*

When a plff. sets up a prescriptive right, he cannot in fairness to the deft., be allowed to succeed on a customary right. (*Mookerjee and Panton, JJ.*) GOPALKRISHNA *v.* ABDUL. **66 I. C. 640 : 34 C. L. J. 319.**

———*Pleadings—Variation—New and inconsistent pleas—Test for allowing.*

Neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case. The plaintiff must be held to the state of facts alleged in his plaint or substantially consistent therewith. The defendant also must be held to the state of facts alleged in his written statement, or in harmony therewith. The reason for

the rule is in substance that the parties will otherwise be seriously prejudiced. The plff. might have received no notice that the point would be raised by the deft. and would presumably be not prepared with the necessary evidence, and conversely the deft. might be seriously embarassed if the plff. were permitted to spring a surprise on him in the shape of a new case. Consequently when an objection of this kind is taken, the test to be applied is whether the party aggrieved has really been taken by surprise. (*Mookerjee and Panton, JJ.*) GENDLI BIBI *v.* JOYNAL ABDIN SARKAR. **26 C. W. N. 294 : 64 I. C. 565 : 35 C. L. J. 103.**

———*Pleadings — Variation— Proof—Object of the rule against.*

Every variance between pleading and proof is not fatal ; the Court must carefully consider whether the objection is one of form or substance having in view the purpose which the rule that allegation and proof must correspond is intended to serve, *viz.*, first to apprise the defendant distinctly and specifically of the case he is called upon to answer so that he may properly make a defence and not be taken by surprise and secondly to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations (*Mookerjee and Panton, JJ.*) KUMAR SATISH KANTA KAI *v.* SATISH CHANDRA CHATTERJEE. **24 C. W. N. 662 : 55 I. C. 689 : 30 C. L. J. 475.**

———*Pleadings—Variation—Change of case.*

The determination in a cause should be based upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, although the Court is competent to determine that the rights of the parties litigant are really different from what is alleged either by the plff. or by the deft. (*Mookerjee and Beachcroft, JJ.*) ISHAN CHANDRA DUBI *v* NISHI CHANDRA DUBI. **22 C. W. N. 853 : 41 I. C. 378 : 29 C. L. J. 1.**

———*Pleadings—Variation—Proof—Relief.*

Every variance between pleadings and proof is not fatal, though the determination of the case should be founded upon the allegations in the pleadings or involved in or consistent with the case made thereby. The rule that the pleading and the proof must correspond is intended to serve a double purpose, (1) to apprise the deft. distinctly and specifically of the case he is called upon to answer and (2) to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. Where the plaintiff fails to make out the precise title set up in the plaint but the court comes to the conclusion upon the entire evidence that he is entitled only to one half of what he claimed, the court is entitled to give a decree therefor. (*Mookerjee and Beachcroft, JJ.*) HIRA LAL *v.* GIRI BALA DEBI. **34 I. C. 444 : 23 C. L. J. 429.**

———*Pleadings—Variation—Proof—Relief.*

Where a Mahomedan lady soon after her return from Mecca, impeached a deed of gift she had made to the deft. before her setting out on account of fraud and misrepresentation and sued for accounts, when there was a finding that she was entitled only to one-fourth of the properties. *Held*, that in spite of a general issue as to liability to account the deft. could not be called to render accounts as regards the one-fourth to which she was entitled. (*Hartnoll, Offg. C. J. and Twomey, J.*) HARDAN DOSS *v.* RANI MOHARI BIBI. **23 I. C. 322 : 17 C. W. N. 427.**

———*Pleadings—Variation—Erroneous statement—Whether can overcome an admitted fact.*

An erroneous statement in the pleadings cannot defeat an actual fact apparent on the face of the record and admitted by the plaintiff himself and his Counsel. (*Woodroffe, Coxe and Chatterjee, JJ.*) D. WESTON *v* PEARY MOHUN. **40 Cal. 893 : 23 I. C. 25 : 18 C. W. N. 185.**

———*Pleadings—Variation—Proof.*

It is not every variance between the pleadings and proof that justifies dismissal of the suit ; the variance must be in material respects. The object of the rule requiring that the proof must correspond with allegation is to apprise the deft. distinctly and specifically of what he is called on to meet and to preserve an accurate record of the cause of action as a protection against a second proceeding on the same allegations. (*Mookerjee and Beachcroft, JJ.*) NABADIPENDRA MOOKERJEE *v.* MADHU SUDAN MONDAL. **16 I. C. 741 : 18 C. W. N. 473.**

———*Pleadings — Variation — Proof—When material.*

A variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. (*Jenkins, C. J. and Woodroffe, J.*) JALIM SINGH *v.* CHOONEE LAL. **11 I. C. 540 : 15 C. W. N. 882.**

———*Pleadings—Variation—Proof.*

Where the plaint contained a wrong statement of facts but the plff.'s pleader in the course of the appeal put in a long application giving a correct narrative of the facts *Held* that it could not be treated as amounting to an amendment of the plaint, nor would amendment be allowed at such a late stage. (*Shah Din, J.*) NANU *v.* MOTI. **46 I. C. 411 : 119 P. W. R. 1918.**

———*Pleadings—Variation—Not permitted.*

A party cannot be allowed to retire fromt he position taken up by him on which pleas were recorded and issues drawn (*Robertson and Beadon, JJ.*) RAM DIWAYA RAM *v.* MILKHI RAM. **8 P. L. R. 1913 : 18 I. C. 553 : 270 P. W. R. 1913.**

———*Pleadings—Variation—Proof.*

The plff.'s suit should be dismissed if he is not able to prove his assertions. (*Kensington, J.*) PRITANE SINGH *v.* MUBARAK SINGH. **78 P. L. R. 1911 : 9 I. C. 591 : 74 P. W. R. 1911.**

———*Pleadings— Variation—Suit for rent—Lease not proved—Use and occupation.*

In a suit for rent, where the lease deed is for some reason not admissible in evidence, a decree

can be given on the basis of use and occupation (*Ashworth, J. C.*) AJODHYA SINGH *v.* KAIWAN BABU NAWAB KHUSRO BEGUM.
74 I. C. 582 : 9 O. & A. L. R. 321.

———*Pleadings—Variation—Proof.*
The principle of practice is that a plaintiff can only recover according to his allegations and proof. (*Fox, C. J. and Twomey, J.*) WONGMUM KHEE *v.* TEONG SHAIN. **36 I. C. 464 : 10 Bur. L. T. 119**

Pleadings—Verification.

———*Pleadings—Verification—Judges' duty.*
Judges must see that plaints are signed by authorised persons and that verifications are not treated as mere formalities. (*Fox, C. J.*) MATHA *v.* P. I. M. M. CHETTY FIRM.
26 I. C. 240 : 7 Bur. L. T. 310.

Pleadings—What is.

———*Pleadings—What is—Petition for leave to execute a decree—Whether.*
A petition for leave to execute a decree is not a pleading. (*Mullick and Atkinson, JJ.*) BALUK CHANDLAL *v.* NATHUNI SINGH.
38 I. C. 85 : 2 Pat. L. J. 24.

Pleadings—Miscellaneous.

———*Pleadings— Demurrer—Plea of—Allegation in plaint to be taken as true for purposes of agrument.*
Where the court is asked to decide a preliminary issue as to whether the plaint discloses a cause of action, the defendants must be taken to admit for the sake of argument that the allegations in the plaint are true *Modo of Forma.* In doing so they reserve to themselves the right to show that these allegations are wholly or partially false in the further stages of the action if the preliminary point be overruled, but so far as the preliminary point is concerned everything contained in the plaint must be taken to be true as stated. (*Lord Moulton.*) KANHAYALAL *v.* NATIONAL BANK OF INDIA, LTD. **40 Cal. 598 : 40 I. A. 56 : 17 C W N. 541 : (1913) M. W. N. 406 : 13 M L. T. 406 : 11 A. L. J. 413 : 17 C. L. J. 478 : 15 Bom. L. R 472 : 25 M L. J. 104 : 18 I. C. 949 : 184 P. L. R. 1913 (P. C.).**

———*Pleadings—Irrelevant points—Whether can be re-opened*
A point relevant to liability in a suit, which has been taken or may have been taken and abandoned, cannot be re-opened but this principle does not apply to points which are irrlevant before decree. (*Walsh, J.*) MAHFUZ HASAN *v.* MAZHAR ALI KHAN.
62 I. C. 273 : 3 U. P. L. R. (All.) 11.

———*Pleadings—Denial—Agent's authority.*
Where an agent's authority to bring the suit is questioned, the court ought not, on principle to grant a decree unless the authority is proved. 19 C. 678. Ref. If merely the form of the authority is questioned it is a question of practice and procedure and the lower court cannot dismiss suit on this ground without giving opportunity

of correcting the defect. (*Piggott and Walsh, JJ.*) RAMAN LALJI *v.* GOKUL NATHJI.
39 All 343 : 39 I. C. 462 : 15 A. L. J. 309.

———*Pleadings—Vague allegations.*
Where the parties make vague and loose allegations it is the duty of the court to ascertain the real controversy between the parties. (*Batchelor and Rao, JJ.*) RANCHAD LAL *v.* SECRETARY OF STATE. **35 Bom. 182 : 9 I. C. 765 : 13 Bom. L. R. 92.**

———*Pleadings—Waiver—Validity of plea.*
There may be circumstances under which a court of justice cannot entertain a plea of waiver as being contrary to public policy. 6 C. L. J. 62, 6 C. L. J. 111 Rel. on. (*Mookerjee and Teunon, JJ.*) BASANTA KUMARI *v.* RAMKANAI SEN.
9 I. C 698 : 13 C. L. J. 192.

———*Pleadings—Defect in—Dismissal.*
If the plaintiff cannot prove his allegations and the defendant denies the claim the suit should be dismissed, but if the defendant admits the claim partially, that part of the claim may be allowed to the plaintiff. (*Chevis, J.*) RAM RATTAN *v.* LABHU RAO. **50 I. C. 366.**

———*Pleadings—Claim—Reduction.*
Where plaintiff sues for a sum after giving up a portion to which he is entitled, the deft. will not be allowed any reduction if the net amount after deducting the reduction claimed, from the amount due, is still greater than the suit amount. (*Shah Din and Chevis, JJ.*) ADMINISTRATOR-GENERAL OF BENGAL *v* LAL DAS. **68 P. W. R. 1914 : 24 I. C. 669 : 166 P. L. R. 1914.**

———*Pleadings—Case not specific in plaint —Prejudice.*
Where in the plaint an allegation was made that the karnavan used tarwad money in effecting a transaction in favour of his daughter but it did not specifically say that the deed was benami or that it was meant to be a gift, the daughter is not prejudiced in her defence as she has at all events to show how the money came to her and if she knows of its character. (*Oldfield and Devadoss, JJ.*) MEENAKSHI NETHIAR AMMA *v.* CHERIYA PARVATHI NETHIAR. **(1923) M. W. N. 657 : 1924 M. 174.**

———*Pleadings—Custom,*
It is not desirable to pin down both the parties to the precise form of pleadings, though they should allege a custom with distinctness and certainty. But the parties cannot insist the courts upon admitting an obsolete custom. An issue in a case setting up a custom and the allegation in a plaint on which it is based ought to have contained particulars of the custom set up at the trial. (*Walis and Srinivasa Aiyangar, JJ.*) VISVANATHASWAMY NAICKER *v.* KAMULU AMMAL.
(1915) M.W.N. 968: 2 L.W. 1214: 19 M. L. T. 296 : 31 I. C. 833 : 30 M. L. J. 451.

———*Pleadings—Value of—Untenable pleading, if other side can avail itself of.*
An untenable pleading by one party cannot be availed of by the other party in support of his

case. (*Stuart, J. C.*) MIR MAHAMUD HUSSAIN *v.* MAHOMED ASGHAR. 3 U. L. J. 482 : 37 I. C. 23 : 19 O. C. 328.

——*Pleadings—Failure to prove plff.'s case.*

It is a principle of sound common sense and justice that a plaintiff who brings a case and fails cannot get a decree on the ground that the defendant has failed to prove the counter case set up in defence by him. (*Fox, C. J., Robinson and Parlett, JJ.*) MA HTWE *v.* MAUNG LUN. 9 Bur. L. T. 114 : 33 I. C. 163 : 8 L. B. R. 334.

——*Pleadings—Dismissal of suit on.*

To nonsuit a person because he has not sufficient legal advice to draw up the pleadings as fully and carefully as they might be, would invole great hardship on litigants. (*Eales, J. C.*) V. THONDAYA *v.* NGO NI. 18 I. C. 568 : (1912) 1 U. B. R. 141.

Precedents.

Application of.
Conflicting decisions.
Custom.
Discretion.
English or American.
Obiter Dicta.
Privy Council.
Stare decisis.
Uniformity in.
Value of.
Miscellaneous.

Precedents—Application of.

——*Precedents—Application of.*

General expressions found in a judgment do not expound general law but refer to facts actually decided. (*Kotval, A. J. C.*) KISANLAL *v.* NATHU. 56 I. C. 44 . 16 N. L. R. 131

Precedents—Conflicting Decisions.

——*Precedents—Conflicting decisions.*

The authority which is at once more recent and consistent with general principles is binding. But as far as possible the authority of all former decisions ought to be supported and later decisions must whenever possible, be treated as interpreting and limiting the application of the earlier cases. (*White C. J., Krishnaswami Aiyar and Ayling, JJ.*) TALLAPRAGADA SURYANARAYANA *v.* TALLAPRAGADA SARABAYA. 9 M. L. T. 251 : (1911) 1 M. W. N. 151 : 9 I. C. 173 : 21 M. L. J. 263 (F.B.).

Precedents—Custom.

Precedents—Discretion.

——*Precedents—Discretion—Judicial.*

Judicial limitations of a discretion imposed generally upon the courts by the statutes expressly is very undersirable. (*Coutts Trotter, J.*) RATNAM *v.* KOLANDAI RAMASWAMI CHETTY. 31 I. C 536 : 2 L. W. 1115.

Precedents—English or American.

——*Precedents—English or American decisions.*

The P. C. deprected the growing practice in India of referring largely to foreign decisions based on considerations and conditions totally

different from those applicable to or prevailing in India. (*Mr Ameer Ali*). IMAMBANDI *v.* MUTSADDI. 45 Cal. 878 : 16 A. L. J. 800 : 24 M. L T. 330 : 28 C. L. J 409 : 23 C W. N. 50 : 5 Pat L. W. 276 : 20 Bom. L. R. 1022 : (1919) M. W. N. 91 : 9 L. W. 518 : 45 I. A. 73 : 47 I. C. 513 : 35 M. L. J. 422 (P. C.)

——*Precedents—English or American.*

Per *Crump, J.*—The opinions of jurists, however eminent, are entitled to Indian Courts' respectful consideration but the Courts are not bound by those opinions, and the judgments of English Courts stand in the same category. *Macleod, C.J., Marten and Crump, JJ.*) ALFRED WILKINSON *v.* G. E. N. WILKINSON. 47 Bom 843 : 25 Bom. L. R 945 : 1923 Bom. 321 (F. B.).

——*Precedents—English or American.*

Per *Wallis, C. J.*—The prohibition against unnecessary resort to foreign decisions in I. L. R. 45 Cal. 878 P. C. is confined to American decisions. Per *Sadasiva Aiyar, J.*—The prohibition would equally apply to decisions of the English Court in matters of procedure for both are foreign systems of law. (*Wallis.C.J. Ayling and Sadasiva Aiyar, JJ.*) SEENI NADAN *v.* MUTHUSWAMY PILLAI. 42 Mad. 821 : 26 M. L. T 223 : 11 L W. 63 : (1919) M. W. N. 640 : 53 I C. 213 : 37 M. L. J. 284 (F. B.).

——*Precedents—English or American—Decision—Value of—Doctrine of Exemplary damages—If applicable to India.*

The doctrine of Exemplary damages should not be introduced into India. English decisions on the law of libel should not be accepted as precedents for Indian Courts unless they are in consonance with justice, equity and good conscience. (*Sadasiva Aiyar and Spencer, JJ.*) NAGANATH SASTRI *v.* SUBRAMANIA AIYAR. 5 L. W 598 . 21 M. L. T. 324 : 40 I. C. 126 : 32 M. L. J. 392.

——*Precedents — English or American—Decisions of Court of Appeal.*

Decisions of the English court of Appeal ought to be greatly respected in construing a branch of an Indian Act which is essentially based on English Law. (*White, C. J. and Sankaran Nair, J.*) MERCANTILE BANK OF INDIA, LTD., MADRAS *v.* OFFICIAL ASSIGNEE OF MADRAS. 35 I. C. 942 : 39 Mad. 250.

——*Precedents—English or American.*

The principle of *stare decisis* should be followed in doubtful cases. Great care should be exercised in applying to this country the rules laid down in English law with regard to equitable rights. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MUTHUKRISHNAN *v.* VIRARAGHAVA IYER. 12 M. L. T. 315 : (1912) M W. N. 919 : 16 I. C 601 : 23 M. L. J. 430.

——*Precedents — English or American — Applicability of—Justice, equity and good conscience.*

Where there is no prescribed law to which the decision of a court must conform and the Court must proceed according to justice, equity and

PRACTICE—Precedents—English or American.

good conscience, the Court may follow the principles of English law applicable to a similar state of circumstances. (*Kotval, A. J. C.*) KESHRIMAL *v.* KADHAI. **55 I. C. 152**

———*Precedents—English or American.*

Principles of English law are applicable in the absence of statute when they do not violate principles of justice, equity and good conscience. (*Das and Adami, JJ.*) JAGAT MOHAN *v.* KALIPADA GHOSH. **1922 Pat. 85 : 1 P. 371: 3 P. L. T. 276 : 1922 P. 104.**

———*Precedents— English or American — Applicability to India.*

The rules of the common law of England have no application to mofussil towns in India except as rules of justice, equity and good conscience (*Das and Adami, JJ.*) BRAHMANAND SINGH *v.* DUND BAHADUR. **1 Pat. L T. 229 : 2 U. P. L. R. (Pat.) 111 : 1920 Pat. 245.**

Precedents – Obiter Dicta.

———*Precedents—Obiter dicta.*

Obiter dicta of the majority of a Full Bench should not be usually departed from by a Division Bench especially if they are acted upon for a length of time. (*Sanderson, C. J. and Chatterjee, J.*) BEJOY SINGH *v.* KRISHNA BEHARI BISWAS. **45 Cal. 259 : 41 I. C. 561 : 21 C. W. N. 959.**

———*Precedents—Obiter dicta—Value of.*

An expression of opinion by the High Court which is not necessary for the decision in a case is not an authoritative ruling. 19 I. C 236, Rel. on. (*Rattigan and Beadon, JJ.*) GUJRI *v.* SAMANDAR KHAN. **20 I. C. 280 : 276 P. L. R. 1913.**

Precedents—Privy Council.

———*Precedents—Privy Council—Dicta.*

Though a decision of the Privy Council is only an authority for what it decides the general remarks of the Privy Council are ordinarily considered as having binding force in this country. (*Beachcroft, J.*) RAM SUBHAG SINGH *v.* EMPEROR. **16 Cr. L. J. 641 : 30 I. C. 465 : 19 C. W. N. 972.**

———*Precedents—Privy Council decision in appeals not from for Indian tribunal—How binding.*

A Privy Council decision is binding on Indian Courts though not given in an appeal from an Indian tribunal. (*Sadasiva Aiyar and Tyabji, JJ.*) KARIADAN KUMBAR *v.* B. I. S. N CO., LTD. **38 Mad. 941 : (1913) M W. N. 558 : 14 M. L. T. 137 : 20 I. C. 546 : 25 M. L. J. 162.**

———*Precedents—Privy Council—Mixed question of law and facts.*

Conclusions arrived at by the Privy Council on a mixed question of law and facts are entitled to great weight even where its judgment is not *res judicata*. (*White, C.J. and Phillips, J.*) ALAGARAYA GOUNDAR *v.* MINAKSHI NAIDU. **37 Mad. 22 : 10 M. L. T. 298 : (1911) 2 M. W N. 328 : 12 I. C. 389 : 24 M. L. J. 652.**

PRACTICE—Precedents—Stare decisis.

———*Precedents—Privy Council— Appeal to Death of respondent—Appeal heard in ignorance of death is binding.*

A decree passed by the Privy Council in ignorance of the death of a respondent pending the appeal is binding on all the Courts in India. (*Mullick and Ahmed, JJ.*) DEONANDAN *v.* JANKI SINGH. **5 Pat. L. J. 314 : 1 Pat. L. T. 325 : 2 U. P. L. R. (Pat) 108 : 56 I. C 322 : 1920 P. H. C. C. 266.**

Precedents—Stare decisis.

———*Precedents—* Stare decisis*— Particular plea being not raised in a series of cases, presumption is the plea was bad.*

When a long series of cases, extending over a long period of time when parties are represented by eminent counsel, are decided in a way where, if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. (*Lord Dunedin.*) RAJA BRIJ NARAIN RAI *v.* MANGALA PRASAD RAI. **21 A.L.J. 934: 19 L.W. 72 : 33 M.L.T. (P C.) 457 : 46 A. 95 : 51 I. A. 129 : L. R. 5 P C. 1 : 28 C. W. N. 253 : 5 P L. T. 1 : 2 Pat. L. R. (Civ.) 41 : (1924) M. W. N. 68 : 46 M. L. J. 23 : 1924 P. C. 50 (P. C.).**

———*Precedents—*Stare decisis*—High Courts when to be followed.*

Per Walsh, J.—In cases where no question of principle but only a question of practice or procedure arises the decisions of the High Court should be unanimous. (*Tudball and Walsh, JJ.*) PALLIA *v.* MATHURA PRASAD. **38 All. 280 : 32 I. C. 622 : 14 A. L. J. 204.**

———*Precedents—*Stare decisis*—Principle of —Applicability.*

A long series of decisions based upon a clearly erroneous construction of an Act is not to be followed, while a long series of decisions based upon a construction not free from doubt should not be disregarded. (*Scott, C. J, Batchelor, Beaman, Heaton, Macleod, Shah and Marten, JJ.*) ISAK AHMAD MOGRARIA *v.* ABHRAMJI MOGRARIA. **41 Bom. 588: 41 I. C. 761 : 19 Bom. L. R. 579 (F.B.).**

———*Precedents—* Stare decisis*—Not to be lightly unsettled.*

The Court should be reluctant to dissent from the view expressed in long established decided cases and thereby not only to unsettle the law but also to endanger the security of property and title, dangers which are not associated with changes brought about by legislative interventions. (*Mookerjee, and Panton, JJ.*) ISHAN CHANDRA BAKSHI *v.* SAFATULLA SIKDAR. **26 C. W. N 703 : 35 C. L. J. 36 : 1922 Cal 331.**

———*Precedents—*Stare decisis*— Applicability of.*

The doctrine that the authority of long-established decided cases is to be maintained, is not of universal application. It has no application where the decision does not embarrass trade or commerce nor affects transactions which may

PRACTICE—Precedents—Stare decisis.

have been adjusted, rights which might have been determined, titles which may have been obtained or personal status which may have been acquired. Great importance is to be attached to old authorities on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong and specially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based and practical injustice in the consequence that must flow from them it is the duty of the Court of ultimate appeal to overrule them if it has not lost the right to do so by itself expressly affirming them. (*Mookerjee, O. C. J., Fletcher, N. R. Chatterjee, Teunon, Richardson, Chaudhuri and Huda, JJ.*) CHANDRA *v.* ALA BUX. **48 Cal. 184 : 31 C. L J 510 : 58 I. C. 353 : 24 C. W. N. 818 (F.B.).**

——— *Precedents*—Stare decisis.

In the calculation of Court-fee the long standing practice is not to be departed from. (*Chapman and Atkinson, JJ.*) NANRATAN LAL *v.* WILFORD JOSEPH. **1922 Pat. 79 : 1922 P. 359.**

Precedents—Uniformity in.

——— *Precedents—Uniformity in.*

Policy requires that there should be uniformity, certainty and continuity in legal decisions so that titles supposed for many years to be sound and marketable might not be unsettled. (*Beaman, J.*) ADVOCATE GENERAL *v.* JIMBABAI. **41 Bom. 181 : 31 I. C. 106 : 17 Bom. L. R. 799.**

——— *Precedents—Uniformity in—Desirable.*

In matters of procedure consistency is the important thing and the preponderence of authority should be followed. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) RUKMANI AMMAL *v.* NARASIMHA AIYAR. **41 M. L. J. 54 : 14 L W. 85 : 63 I. C. 730 : (1921) M. W. N. 487 :**

Precedents—Value of

——— *Precedents—Value of.*

Per Richards, C J.—It is very dangerous to place too much reliance on expressions of learned judges used in giving judgment in other cases where the facts and circumstances were different. The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him. 13 Ch. D 696 ; (1901) A C. 495 : (1909) A.C. 25, Foll. *Per Banerjee, J.*—When the Judicial Committee of the Privy Council lays down a principle it is essential that it should be followed in India so as not to unsettle what has hitherto been understood to be the law on the point. (*Richards, C. J. and Chamier, J.*) RISAL SINGH *v.* BALWANT SINGH. **37 All. 496 : 30 I. C. 657 : 13 A. L. J. 594. [On appeal 40 All. 593 (P. C.)]**

——— *Precedents—Value of.*

Where a general rule of construction has once been laid down by authority, a decision arising from its application to a particular set of facts cannot operate as a precedent, for the very remote chance of any two sets of facts being absolutely similar may be excluded. (*Macleod, C J. and Heaton, J.*) GOVIND LAXMAN *v.* HIRACHAND MANCHARAM. **21 Bom. L. R. 1047 : 53 I. C. 805.**

PRACTICE—Precedents—Miscellaneous.

——— *Precedents—Value of.*

Every judgment is applicable to the particular facts taken as proved and assumed to be proved as general expressions found therein are not expositions of the whole law but are governed by particular facts of the case. (*Scott, C. J. and Batchelor, J.*) BAGAS UMAYAD *v.* NAHABHAI **36 Bom. 146 : 12 I. C. 737: 13 Bom. L. R 1057.**

——— *Precedents—Value of.*

Every judgment must be read as applicable to the particular set of facts proved and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found. A case is an authority for what it decides and not for what may seem to follow logically from it. (*Woodroffe and Cuming, JJ.*) MANINDRA NATH GHOSE *v.* ASUTOSH GHOSE. **25 C. L. J. 626 : 41 I. C. 525 : 21 C. W. N 1132.**

——— *Precedents—Value of.*

The language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts. 1901 A C. 495 at p. 506, Foll. (*Mookerjee and Beachcroft, JJ.*) SYEDUNNESSA KHATUN *v.* AMIRUDDIN. **45 Cal. 294 : 21 C. W. N. 847 : 41 I. C. 353 : 25 C. L. J. 629.**

——— *Precedents—Value of.*

A case is an authority for what it actually decided and not for a proposition that may seem to follow logically from it. (*Kotwal A. J. C.*) KISAN LAL *v.* NATHU. **56 I. C. 44 : 16. N. L. R. 131.**

——— *Precedents—Value of.*

Every judgment is applicable to the particular facts proved in the case and each case is authority only for what it actually decides. (*Drake Brockman, J. C.*) BEGMAL *v.* FIRM OF JAMNADAS POTDAR. **42. I. C 965.**

——— *Precedents—Value of—Hard case—Bad law.*

Hard cases must not be allowed to make a bad law. (*Lindsay, J. C.*) DRIGPAL SINGH *v.* SUKHANDAN LAL **7 O. L J. 164 : 56 I. C. 299 : 2 U. P. L R. (J. C.) 96.**

——— *Precedents—Value of.*

A judgment is authority only for what it decides, but not for what may seem logically to follow from it. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SURAJ BAKSH *v.* SUKHDEI. **32 I. C. 291 : 2 O. L. J. 502.**

Precedents—Miscellaneous.

——— *Precedent and principles to be conformed to.*

As a Sessions Judge is supposed to exact allegiance from those who come before him, just in that same manner he must not depart from precedents and must owe allegiance to and be guided by the principles laid down by higher authority. (*Walsh and Ryves, JJ.*) EMPEROR *v* PYARE. **3 U. P. L. R. (All.) 23.**

——— *Precedents—Decision of Judge on Original side of High Court.*

PRACTICE—Precedents—Miscellaneous.

A Judge on the Original Side of the High Court should follow the decision of another Judge sitting on the same side, but such decision is not binding on Judges hearing appeals from the Original Side. (*Jenkins C.J., Woodroffe and Mookerjee JJ.*) (CHAITRAM RAMBILAL *v.* BRIDICHANDS KESRICHAND. **42 Cal 1140 : 19 C. W N. 820 : 30 I. C. 681 : 21 C. L. J. 584.**

———*Precedents—Sudder court—Proceedings of—Value of.*

The Madras Sudder Courts' proceedings being always treated as authoritative, the absence of precedents does not lower its value. (*Benson and Sundara Aiyar, JJ.*) ACHUTHA MENON *v.* SANKARAN NAIR. **36 Mad. 380 : (1911) 2 M. W. N, 529: 12 I. C. 1007 : 10 M. L. T. 521 : 22 M. L J. 118.**

———*Precedents—Upper Burma Courts—Law applicable—Case law.*

The Upper Burma Courts are bound by Upper Burma Rulings. (*Shaw, J. C.*) NGA THAN KIN *v.* EMPEROR. **11 I. C. 792 : 12 Cr. L. J. 448 : (1911) 1 U. B. R. 87.**

Preliminary Decree.

See C. P. CODE, SS. 2 (2), 97 AND O. 20, RR. 12—18.

Privy Council.

See (1) PRACTICE—PRECEDENTS—PRIVY COUNCIL.

(2) PRIVY COUNCIL.

Professional Etiquette.

See also (1) LEGAL PRACTITIONER.
(2) LEGAL PRACTITIONERS ACT.

———*Professional etiquette—Pleader as witness—Professional obligations of pleader.*

It is an error of judgment and against the professional obligations of a pleader that he should accept the brief of a case where he has to appear as a witness on behalf of his client. (*Piggott, J.*) HEARSEY *v.* MR. EVA FORSTER. **24 I. C. 165 : 15 Cr. L. J. 429 : 12 A. L. J. 285.**

———*Professional etiquette—Counsel—Direct instructions.*

By long practice of the Calcutta High Court only in appeals from mofussil, counsel can be instructed directly by the client. In general Counsel and Attorney and not counsel and lay client should directly communicate. (*Mookerjee and Fletcher, JJ.*) JACOB & CO. *v.* RASH BEHARI GHOSE. **57 I. C 22 : 31 C. L. J. 313.**

———*Professional etiquette—Pleader—Witness in the case—Propriety.*

It is a rule of professional ethics that having taken up the position of an Advocate he should refrain from testifying on a trial which was being conducted by him. (*Fletcher, J.*) PEARY MAHOMED *v.* D. WARTA. **13 I. C. 721 : 16 C. W N. 145 : 13 Cr. L. J. 65.**

———*Professional etiquette—Accepting engagements.*

In modern times there is a tendency to expect from the legal profession a greater amount of care and conscience in accepting engagements than was done in the case of Lord Erskine or Lord Brougham. (*Sadasiva Aiyar and Spencer, JJ.*) NAGANATHA SASTRI *v.* SUBRAMANIA AIYAR. **5 L. W. 598 : 21 M. L, T. 324 : 40 I. C. 126. 32 M. L. J. 392.**

PRACTICE—Remand.

Promissory Note—Decree on original cause of action.

See (1) PROMISSORY NOTE.
(2) STAMP ACT, S. 35.

Receiver.

See (1) C.P. CODE, O. 40, R. 1.
(2) PROV INS. ACT, S. 16.

———*Receiver—Compromise—Sanction of court—Who to grant.*

The Court appointing the Receiver can say what action should be brought on behalf of the estate, what should be defended and what compromised and not the court trying an action between the estate and a third party. (*Marten J.*) BAPUJI SORABJI PATEL *v.* LAKHMIDAS RAVJI TERSI. **25 Bom. L. R, 1180 : 1924 B. 89.**

Record.

———*Record—Preparation of—Paper book—Document not printed—Contents of documents—Parties agreed as to.*

Where parties in both the lower courts proceed upon the view that there was a certain stipulation in a lease the High Court can go into the question even though the lease is not printed in the paper book (*Chapman and Newbould, JJ.*) NARAYAN SINGH *v.* AJIT LAL **20 I C. 294 : 17 C. W. N. 1068.**

———*Record—Loss of—Effect on conviction.*

The mere facts that the records of a case are lost at the time of conviction does not make the trial and conviction void or without jurisdiction, and hence no retrial is necessary especially as in this case, no appeal has been preferred by the accused. (*Sadasiva Aiyar, J.*) KAMAKSHAMMA *v.* EMPEROR. **38 Mad. 498 : 14 M. L. T. 317 : (1913) M.W.N. 862: 14 Cr. L J. 595 : 21 I. C. 467 : 25 M.L.J. 445.**

Remand.

See also C. P. Code, S. 107 AND O. 41 RR. 23 AND 25.

———*Remand—New issue.*

A remand by a Court of second appeal for trial of the case on new issues not raised in the pleadings or in evidence in the Courts below is improper. (*Lord Parker.*) RAMCHANDRA BHANJ DEO *v.* SECRETARY OF STATE. **43 Cal. 1104: 20 M. L. T. 235 : 20 C. W. N 1245 : (1916) 2 M.W N 175 : 4 L. W 251 : 14 A L.J. 1009: 18 Bom. L. R. 838 : 24 C. L. J 296 : 43 I. A. 172 : 37 I. C 223 : 31 M. L. J. 745 (P. C.).**

———*Remand—Trial of suit—Incomplete evidence.*

Where in a suit for possession the first Court after recording only plff.'s evidence dismissed the case on ground of want of jurisdiction, the appellate court cannot decide it on merits. (*Griffin, J.*) GANGA SINGH *v.* LACHMAN SINGH. **10 I. C. 441.**

———*Remand—Contradictory decrees.*

There cannot be two contradictory decrees existing side by side, and when there exists a

PRACTICE —Remand.

decree of a Subordinate Judge and also a decree of the District Judge one directly at variance with the other, the whole proceedings should be remanded to the District Judge for disposal after setting aside both. (*Mookerjee and Beachcroft, JJ.*) ASUTA MOHON GHOSE *v.* SHAH HABI BUR KASUL. **22 I. C. 801: 19 C. L. J. 9.**

———*Remand—Admission of defendant.*

Where a part of the consideration is found to be bogus the High Court on the admission of defendant that market value should have been determined remanded the case for finding the same. (*Le Rossignol, J.*) TARA SINGH *v.* JAWALA DAS. **1923 Lah. 308 (1).**

———*Remand—Grounds.*

Where the objection as to inadmissibility of the deed was taken in the first Court in written statement but was afterwards dropped and it was not taken in the grounds of appeal to the lower appellate court, *held*, no reason for remanding the case for an inquiry into the actual value of the property covered by the deed, was clearly made out. (*Broadway and Campbell, JJ.*) BASHESHAR NATH *v.* MEHR CHAND. **1923 Lah. 21.**

———*Remand—Order set aside—Effect of.*

When an order of remand by an appellate Court is set aside by the High Court the successor of the Judge in the Lower Appellate Court, can go into the whole case and come to a different conclusion. (*Shah Din, J.*) BRIJ LAL *v.* LOKU RAM. **136 P. L. R. 1912 : 14 I. C. 16 : 116 P. W. R. 1912.**

———*Remand—Fresh evidence.*

Request was declined where the taking of fresh evidence in a point on which proof ought to have been given in the lower court, is in the opinion of the appellate Court dangerous, it ought not to be allowed as it would result in the production of false evidence. (*Rattigan and Shah Din, JJ.*) KISHORE CHAND *v.* GURDITTA MAL. **165 P. L. R. 1911: 52 P. R. 1911 : 10 I. C. 315: 162 P. W. R. 1911.**

———*Remand — Disposal on preliminary point.*

Where an appellate court reverses the decree of the lower court and remands it for disposal on the merits, the lower court would be acting irregularly and unwisely if it disposes of the case on a so called preliminary point involving a mixed question of law and fact not raised or argued on appeal. (*Spencer and Devadoss, JJ.*) MULLAI THAYAMMAL *v.* SUBBARAYAN PILLAI. **(1922) M. W. N. 763 : 16 L. W. 802 : 31 M. L. T. 430 : 1922 M. 514.**

———*Remand—Decision on jurisdiction.*

Where the District Munsif gave his findings on issues but held that the suit ought to be brought in a Revenue Court but the appellate Court held that the munsiff had jurisdiction, *held* that the proper course was to leave the munsif free to decide whether to return the case or record findings or give judgment. (*Seshagiri Aiyar, JJ.*) THOPPA KATTU RAMAYA GOUNDAN *v.* SADAGOPA CHARIAR. **32 I. C. 759 : (1915) M. W. N. 784.**

PRACTICE—Revision.

———*Remand—Reconsideration of order.*

An order under O. 41, R. 23 cannot be reconsidered in a subsequent appeal from the decision on remand. (*Prideaux and Kotwal, A. J. Cs.*) SULTAN BEG *v.* CHUNILAL. **46 I. C. 922.**

Res-judicata.

See C. P. CODE, S. 11.

Restitution.

See also C. P. CODE, S. 144.

———*Restitution— Removal of crops by respondent pending appeal—Nature of order.*

Where during the pendency of an appeal the respondent removes the crops sued for, he should properly be directed to pay to the appellant only its *net* value. (*Ayling and Spencer, JJ.*) ANA PATTAR *v.* SWAMINATHA PATTAR. **12 I. C. 105: 10 M. L. T. 190.**

Retrial.

———*Retrial—Criminal case.*

Retrial under a new Act should not be ordered in a case where a person is convicted under a repealed law though such conviction is illegal if it has not done substantial injury to the accused. (*Benson, J.*) NARAHARI *v.* DT. MAGISTRATE OF GANJAM. **12 Cr. L. J 616 : 12 I. C. 992 : (1911) 2 M. W. N. 588.**

Revenue Court.

———*Revenue Court—Mutation cases in U. P.*

Where in mutation cases possession is with a Receiver, the Revenue Courts have simply to decide and that by summary inquiry who is the person best entitled to possession. (*Holms, S. M. and Campbell, J. M.*) NAGESHAR SAHAI *v.* MATA PERSHAD. **34 I. C. 496 : 30. L. J. 178.**

Review.

See also C. P. CODE, S. 151 AND O. 47.

———*Review—Criminal Case—Judgment.*

Generally, a Criminal Court cannot review its own decisions. (*Twomey, J.*) EMPEROR *v.* NGA KE MAUNG. **12 Cr. L. J. 473 : 12 I. C. 81 : 4 Bur. L. T. 211.**

Revision.

See also (1) C. P. CODE, S. 115.
(2) PUNJAB COURTS ACT, S. 70.

———*Revision—Court dismissing case after 5 p.m. without notice to litigants — Material irregularity.*

The usual court hours in the United Provinces have been fixed by the High Court to be between 10-30 a. m. and 4 p.m. and they cannot be altered without special sanction. This does not however fetter the discretion of subordinate courts, as for example to sitting after 4 p. m. to conclude the hearing of a particular case when it also suits the convenience of parties concerned. Where however without any special reason or notice to the parties, the court took up a fresh case after 5 p. m. and dismissed it because plaintiff was absent, *held* it was a fit case for the interference of the High Court in revision (*Piggott, J.*) BEVIS AND CO. *v.* RAM PRASAD. **20 A. L. J. 138 : 1922 All. 72.**

PRACTICE—Revision.

———*Revision—Order issuing notice to new cause.*

When a party applies for revision and obtains an order issuing notice to show cause, he should confine himself to the grounds on which the order was based. (*Walsh, J.*) RAJ BUNSI *v.* EMPEROR. **42 All. 646 : 22 Cr. L. J. 228 : 60 I. C. 420 : 18 A. L. J. 673.**

———*Revision—Appeal.*

A suit for profits was dismissed by the Assistant Collector directing "As the plff. has failed to prove his claim and to prosecute the case, ordered that his claim be dismissed for default" *Held* the Assistant Collector acted under R. 3 and not under R. 2 of O. 17, C.P.C., and as the order was appealable no revision would lie. (*Tudball and Rafique, JJ.*) CHUTTAN LAL *v* KANHAYA LAL. **17 I. C. 836 : 10 A. L. J. 478.**

———*Revision — Conversion into memo of appeal.*

Where no question of limitation or Court-fees arises a revision petition may be treated as a memorandum of appeal (*Mookerjee and Beachcroft, JJ.*) ARJUN DAS *v.* GUNENDRA NATH BASU MALLIK. **18 C. W. N. 1266 : 27 I. C. 294 : 20 C. L. J. 341.**

———*Revision—Conversion into appeal.*

A revision was converted into an appeal (*Coxe, J.*) JANARDAN PATHAK *v.* ANU RAM DUTTA. **10 I. C. 51.**

———*Revision—Preliminary and interlocutory orders—If High Court will interfere.*

Where an appeal will lie from a decree that may be passed in a suit the High Court will not interfere in revision with merely preliminary and interlocutory orders. 146 P. R 1908, Dist. (*Reid, C. J. and Kensington, J.*) UMAR ALI *v.* NASIBUN NISSA. **13 I. C. 800 : 82 P. R. 1911.**

———*Revision—High Court.*

A High Court having admitted a revision petition must decide it on its merits, after hearing the applicant for revision. (*Lindsay, J. C.*) SHEO SINGH *v.* EMPEROR. **26 I. C. 169 : 10 L. J. 541 : 15 Cr. L. J. 721.**

———*Revision—Interlocutory order revisable only when no appeal allowed and irreparable damage caused by refusal.*

The High Court has power to interfere in revision with interlocutory order when no appeal lies directly from the order impugned, and where grounds exist which peremptorily call for its interference but it should not interfere unless irreparable damage would be caused by its refusal. (*Heald and Lentaigne, JJ.*) THE JUPITER-GENERAL INSURANCE COMPANY, LTD *v.* ABDUL AZIZ. **1 Rang 231 : 1924 Rang. 2.**

Sanction.

See also C. P. CODE, S. 115 AND O. 32, R. 7.

———*Sanction—Cr. P. C., Ss. 195 and 476—Duty of Court.*

Per Piggott, J.—Where one of two Judges constituting a bench is clearly of opinion that the case under consideration is a proper one for the taking of further proceedings it would be improper for his colleague to refuse to concur. (*Piggott and Walsh, JJ.*) HANSRAJ SINGH *v.* BHAGWANA. **40 I. C. 328 : 18 Cr. L. J. 680.**

PRACTICE—Second Appeal.

Second Appeal.

See also C. P. CODE, S. 100, O. 41 AND O. 42.

———*Second appeal—Want of certificate.*

If there is no certificate that the finding of the Lower Appellate Court is based on no evidence, the finding cannot be reconsidered in second appeal. (*Piggott and Walsh, JJ.*) MUTASADDI LAL *v.* DAYA SHANKAR. **62 I. C. 103 : 2 U. P. L. R. (All) 417.**

———*Second appeal—Question of fact—Reasonable compensation.*

What is reasonable compensation is a question of fact and the High Court will not interfere with it in second appeal. (*Chamier, J.*) SAMPAT RAI *v.* RAM PERSHAD. **17 I. C. 517.**

———*Second appeal—High Court.*

The High Court in second appeal, will not remedy the defects in a party's case. (*Macleod, C. J. and Shah, J.*) CHANDBHAI *v.* HASANBHAI. **23 Bom. L. R. 1033 : 1922 B. 150.**

———*Second appeal—Finding based on evidence.*

A finding based on evidence arrived at by an Appellate Court cannot be challenged in second appeal. (*Mookerjee, A. C. J. and Fletcher, J.*) KRISTO DAS LAW *v.* ABDUR KARIM. **25 C. W. N. 328 : 62 I. C. 474 : 34 C. L. J 35.**

———*Second appeal—Findings of fact—Error.*

A High Court can and will interfere in second appeal with a wrong finding of facts by the Appellate Court. (*Richardson and Greaves, JJ.*) HEM CHANDRA ROY CHOUDHURY *v.* KRISTO CHANDRA SAHA SARDAR. **24 C. W. N. 800 : 58 I. C. 879 : 47 C. 1079.**

———*Second appeal—No new issue can be framed.*

Plaintiff must raise the question that he was not given the opportunity of meeting the case in the first appeal and get the case remanded for that issue but he cannot raise that point in second appeal. (*Teunon and Newbould, JJ.*) BANGA CHANDRA PAL *v.* KAILASH CHANDRA PAL. **58 I. C. 189.**

———*Second appeal—Question of law and fact—Reasonable cause.*

Whether there was reasonable and probable cause is a mixed question of fact and law and the High Court in second appeal is bound to accept the facts as found by the Court of appeal below, but High Court is entitled to examine whether the inference drawn therefrom is legitimate. (*Mookerjee and Carnduff, JJ.*) BISHUN SINGH *v.* A. W. N. WYATT. **16 C. W. N 540 : 11 I. C. 729 : 14 C. L. J. 515.**

———*Second appeal—Error of law—Judgment on document not admitted or proved.*

To base judgment on document not tendered in evidence or on record is an error of law. (*Bevan Petman, J.*) JOHRI *v.* JOWAHRA. **58 I. C. 67 : 91 P. L. R. 1919.**

PRACTICE—Second Appeal.

——Second appeal—Question of law—Inference from facts—Implied contract.

Where a particular conclusion is the only inference that a Court can draw and the Lower Appellate Court fails to draw that inference, the matter is one of law into which the High Court cannot enter. But where more than one inference is possible the fact that the Lower Appellate Court made one instead of another, is not a ground for interference in second appeal. The question of implied contract is one of fact. (*Krishnaswami Iyer and Ayling, JJ.*) MALLIKARJUNA PRASADA *v.* VASUDEVA RAO.
9 M. L. T. 329 : 9 I. C 169 : 21 M. L. J. 156.

——Second appeal—Finding of fact.

A finding on a consideration of evidence should not be disturbed in second appeal (*Kanhaiya Lal, A. J. C.*) DURGA *v.* FAKIRAY.
50 I. C. 195 : 6 O. L. J. 86

——Second appeal—Evidence not brought to notice of lower court.

The High Court will not entertain second appeal on the ground that the lower courts have overlooked evidence if it is found that it was not brought to their notice by the parties. (*Chapman and Roe, JJ.*) JANKI SAHU *v* RAN BAHADUR SINGH. **2 Pat. L. J. 231 : 39 I. C. 398 : 1 Pat. L. W. 658.**

——Second appeal—Finding of fact.

If the appellant did not challenge in the Lower Appellate Court a finding by the first Court that certain alienations by the guardian of a Hindu minor were not for legal necessity, he cannot challenge it in second appeal. (*Pratt, J. C. and Crouch, A. J. C.*) GEHIMAL DYALMAL *v.* KARMOOMAL KAROMAL SIROOMAL.
35 I. C. 551 : 10 S. L. R. 38.

Sentence.

——Sentence—Adjournment.

No court has an inherent power to adjourn the passing of a sentence for an indefinite time. An order convicting the accused and directing him to furnish security and to come up for sentence after a long time is really an adjournment of sentence and is therefore bad. (*Chandavarkar and Russell, JJ.*) EMPEROR *v.* KESHAV LAL GIRDHAR. **13 Cr. L. J. 288 : 14 I. C. 672 . 14 Bom. L. R. 144.**

Stare Decisis

See (1) MAXIM.
(2) PRACTICE PRECEDENTS—STARE DECISIS.

Stay of Proceedings.

See C. P. CODE, O. 41, RR. 5 AND 6.

Stay of Trial.

——Stay of trial—Criminal proceeding—Pendency of civil suit between the parties on substantially same issues.

Where the parties to, and the issues in, two proceedings, civil and criminal are substantially the same and the prosecution before the Magistrate is but a private prosecution, it is not ordinarily desirable that both the cases should go on at the same time and the prosecution should be stayed. (*Sanders, J. C.*) KALIMA BIBI *v* MACBUL AHMED. **15 Cr. L. J. 488 : 24 I. C. 576 : 7 Bur. L. T. 73.**

PRACTICE—Subordinate Courts.

Subordinate Courts.

——Subordinate Courts—Duty to follow decisions of its own High Court.

A subordinate Court is bound to follow the decision of a Bench of the High Court to which it is subordinate unless the decision of the Bench has been overruled by a subsequent decision of the Full Bench of the High Court or expressly or impliedly overruled by the Privy Council or the law has been altered by subsequent legislation. (*Sir John Edge.*) PUTTU LAL *v.* PARBATI KUNWAR:
37 All. 359 : 19 C. W. N. 841 : 13 A. L. J. 721 : 17 Bom. L. R 549 : 18 M. L. T 61 : 22 C. L. J. 190 : 2 L. W. 881 : 42 I. A. 155 : (1915) M. W. N. 514 : 29 I. C. 617 : 29 M. L. J. 63 (P. C.).

——Subordinate Courts—Duty of.

Courts subordinate to the High Court ought not to do more than try out the pleadings of the parties and on the facts raised and put in issue before them They are not to anticipate and meet beforehand any objection to a plaintiff's suit which the ingenuity of abler and better instructed counsel may find it possible to raise in second appeal. (*Mears C. J. and Piggott, J*). IQBAL HAIDAR KHAN *v.* WASI FATIMA BIBI. **45 A. 53 : 1923 A. 358.**

——Subordinate Courts—Duty to follow its own High Court.

A lower Court is bound to follow the ruling of that High Court to which it is subordinate in preference to the rulings of other High Courts where the two courts differ (*Gokul Prasad and Stuart JJ.*) BADRI PRASAD *v.* MOHAR SINGH.
1923 A. 231.

——Subordinate Courts—Ruling of a single judge.

A ruling by a single judge of the Punjab Chief Court, which has not been dissented from or overruled is as much binding upon subordinate Courts as the decisions of division benches. (*Rattigan, C. J.*) SHERKHAN *v.* MUZAFFAR KHAN
1 L. 25 : 55 I. C. 944 : 61 P. L. R. 1920 : 40 P. W. R. 1920.

——Subordinate Courts—Revenue Courts.

The Rev. Courts must follow the rulings of the Financial Commissioner until overruled by that officer himself (*Maynard, O. F. C.*) CHAILU *v.* MANSINGH. **3 P. R. (Rev.) 1911 : 258 P.L. R. 1911: 12 I. C. 442 : 5 P. W. R. (Rev.) 1911.**

——Subordinate Courts—Duty, of, to follow the majority of Full Bench of High Court.

A Subordinate Court should follow the opinion of the majority of the Judges of the Full Bench and not the dissentient judgment of a single judge of that Bench. (*Spencer and Seshagiri Iyer, JJ.*) BANGARAYYADU *v.* PERAYYA SASTRI.
1915) M. W. N. 810 : 30 I. C. 927 : 2 L. W. 1025.

——Subordinate Courts—Duty to accept decision of Superior Court.

The subordinate court is bound to accept the decision of court to which it is subordinate. They

act illegally, if they rely upon documents pronounced as not binding on the parties by the superior Court. (*Seshagiri Aiyar and Napier, JJ.*) PARASU PATTA *v.* VENKATACHALA PATTAR.
28 I. C. 982

———*Subordinate Courts—Bound by order of higher courts.*

A subordinate court has no right to question the order of an appellate court when the parties do not choose to question it. 21 M. 288, Foll. (*Oldfield and Seshagiri Iyer, JJ.*) NARAYANASWAMI NAIDU GARU *v.* KAMURI RAMAYYA.
16 M. L. T. 244 : 26 I. C. 475 : (1914) M W. N. 713 and 870.

———*Subordinate Courts — Duty to follow High Court.*

Subordinate courts must follow the decision published or unpublished of the High Court to which they are subordinate and cannot prefer the decision of some other court to that court (*Stanyon, A. J. C.*) PUHPI BAI *v.* ANSUYA BAI.
46 I. C. 902.

———*Subordinate Courts—Duty of, to follow decisions of High Court.*

A Court subordinate to Patna High Court is bound to follow the decisions of that Court no matter whether they are right or wrong or are in conflict with the decisions of the other High Courts in India. (*Mullick and Jwala Prasad, JJ.*) KAMLA PRASAD *v.* PANDEH RAM CH. PD. NARAIN SINGH. **4 Pat L. J. 565 : 51 I. C. 496 : 1919 Pat. 365.**

———*Subordinate Courts — Duty to follow decisions of superior tribunal.*

It is the duty of Subordinate Courts to follow the decision of the superior court, leaving it to the superior court to deal with conflicts of opinion. (*Young, J.*) MA THIN HTON *v.* MA HNIN THET. **29 I. C. 709.**

Subsequent Events.

———*Subsequent events—Courts if can take notice of later events.*

A court of law can take notice of subsequent events and adjust the matters between parties accordingly. (*Mukerjee and Buckland, JJ.*) DINANATH MAHISH *v.* NABAKUMAR HAJRA.
70 I. C. 542 : 35 C. L. J. 832.

———*Subsequent events—Cognisance.*

In exceptional cases, courts are justified in taking cognisance of events subsequent to the institution of suit when litigation is thereby shortened and justice rendered. On a declaration of title, possession may be granted when the lease of the deft. expires before the date of decree. (*Chatterjee and Nawbould, JJ.*) CHINTAI HARAN DAS *v.* RADHA CHARAN POTDAR. **37 I. C. 962.**

———*Subsequent events—Relief.*

Where it is shown that the original relief claimed at the date of the institution of the suit has by reason of subsequent change of circumstances become inappropriate or that it is necessary to base the decision of the court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a court of justice to take notice of

events which have happened since the institution of the suit and the court should mould its decree according to the circumstances as they stand at the time the decree is made. (*Sanderson, C. J. and Mookerjee, J.*) NURI MIAH *v.* AMBIKA SINGH.
44 Cal. 47 : 20 C. W. N. 1099 : 34 I. C. 869 : 24 C. L. J. 140.

———*Subsequent events—Suit to be tried on the original cause of action.*

A suit must be tried on the cause of action as it existed at the commencement. 7 C. L. J. 262, Foll. ; 2 W.R (P.C.) 19, Ref. to. A devolution of a plaintiff's interest in the subject-matter of the suit is not an exception to the general rule that a suit must be tried on the cause of action as it existed on the date of its commencement, and does not make the plaintiff incompetent to maintain the suit, there being no change in the cause of action (*Mookerjee and Beachcroft, JJ.*) RAI CHARAN MANDAL *v.* BISWANATH MANDAL.
26 I. C. 410 : 20 C. L. J. 107.

———*Subsequent events—Revision.*

Where the petitioners were convicted of rioting arising out of a dispute as to possession of certain lands the High Court in revision took in consideration the decision of the settlement officer after these riots, who held that the petitioners were in possession, and reduced the sentences as the petitioners could not have been the aggressors (*Imam and Chapman, JJ.*) ARAZ SARKAR *v.* EMPEROR. **15 Cr. L. J 473 : 24 I. C 561 : 18 C. W. N. 646.**

———*Subsequent events—If can be considered.*

Events *pendente lite* may be taken into consideration by the Court for the sake of justice. 6 C. L.J. 74 ; 6 C L.J 102, Foll. (*Mookerjee and Carnduff, JJ.*) HIDLOT KHASHI *v.* KA RAN KHASIM.
13 I. C. 377 : 15 C.L. J. 241.

———*Subsequent events—Decree on basis of.*

In a suit for money a decree may be given even though the cause of action has arisen during the pendency of suit. (*Martineau and Zafar Ali, JJ.*) KANSHI RAM *v.* JAIMAL SINGH.
6 L. L. J. 31 : 1923 Lah. 590.

———*Subsequent events.*

Events after suit can be taken into consideration and an injunction which would have been useless was refused. (*Shadi Lal, C.J. and Campbell, J.*) THE FIRM OF NARAIN DAS JAINI LAL OF DELHI *v.* THE FIRM OF JAI NARAIN BANI LAL OF DELHI. **5 L. L J. 210 : 1923 Lah. 24.**

———*Subsequent events.*

In exceptional cases Courts can take cognizance of events since the institution of the suit where the adoption of such a course tends to shorten litigation. But where plaintiff sued on a breach of agreement, the pleadings of defendant cannot be taken advantage of to furnish a cause of action on failure of plaintiff to prove the alleged breach prior to suit. (1918) M. W. N 199 ; 37 I. C. 962, Dist. (*Chevis and Abdul Qadir, JJ.*) ABDULLAH SHAH *v.* MAHOMED SHAH.
4 U. P. L. R. (Lah.) 42 : 1922 Lah. 437.

PRACTICE—Subsequent events.

——Subsequent events—Consideration of.

The rights of the parties must be adjudicated upon as they existed at the date of the suit. (*Drake Brockman, J. C.*) MADHO RAO *v.* GOVIND BHAT. **46 I. C. 794.**

Succession certificate.

See SUCCESSION CERTIFICATE ACT.

Summons.

See C. P. CODE, O. 5.

Third Party.

See (1) CONTRACT.
(2) CONTRACT ACT, S. 2.
(3) RIGHT OF SUIT.

Transfer of Case.

See also (1) C. P. CODE, Ss. 22—25.

——Transfer of case—Notice to parties essential.

Notice should be given to the parties or pleaders if an appeal is transferred from one court to another and some record should be maintained to show service of such notice. Absence of such record is a good ground for restoring the appeal when it had been disposed of in the absence of parties (*Miller, C. J., Chapman and Atkinson, JJ.*) RAMSUKUL PATHAK *v* KESHO PRASAD SINGH. **3 Pat. L. J. 218 : 4 Pat. L. W 75 : 43 I.C. 925 : 1918 Pat. 17 (F. B.).**

Trial.

See also C. P. CODE, O. 15—20.

——Trial—Discovery—Order for—Hearing of preliminary issues.

Where it is necessary before an order for discovery can be made that certain questions in suit should first be decided, the proper order is that the suit should be set down for the settlement of issues The Judge would then be in a position to decide which of the issues were necessary to be determined before the question of inspection or discovery could be decided. The same procedure should be followed when one party suggested that the suit could be decided on the hearing of a preliminary issue. (*Macleod, C. J. and Crump, J.*) THE EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO. *v.* DINANATH. **47 Bom. 509 : 25 Bom. L. R. 164 : 1923 Bom. 249.**

——Trial—Duty to adduce all the evidence.

Pleaders and parties must remember that the first court is not the final court, and that there are higher courts of appeal which might take a view different from that taken by the first court. Pleaders and parties take the responsibilities when they dispense with evidence. (*Russell and Chandavarkar, JJ.*) PANNALAL *v.* GANU BHAVAJI NHAVI. **12 I. C. 691 : 13 Bom. L. R. 1021.**

——Trial—Hearing of counsel.

Where in the hearing of an appeal, the respondent's counsel was stopped with the remark that he would be called, if the Judge was not with him on the points already heard, and the appeal was allowed without hearing the counsel, *held*, that the respondent's counsel was entitled to an opportunity of presenting his case and the order must be set aside. (*Batchelor and Rao, JJ.*) *In re* ANUPRAM KIRPARAM. **12 Cr. L. J 64 9 I. C. 350 : 13 Bom. L. R. 27.**

PRACTICE—Trial.

——Trial—Arguments—Submission of written arguments—Propriety of.

When a case has been fully argued before the Court it ought not to be necessary for the pleader to submit notes of their argument. It is the duty of the Court to take such notes of the arguments as it thinks fit when they are being submitted. If Judge feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further arguments may be presented in open court in the presence of the other side. If it becomes necessary, as in some exceptional case it may become necessary, for the Court either to require or to receive notes of the pleader's arguments, such notes ought not to be submitted to the Court by the pleader on one side without first submitting the notes to the pleader on the other side. If in any case a pleader desires to submit to the Court the notes of his argument, or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the pleader on the other side so that the latter may have an opportunity of making any remarks or any criticism in respect thereof. It is in any case highly undesirable for a Judge to accept notes of argument in the form of a draft judgment. (*Sanderson, C. J and Walmsley, J.*) AMJAD ALI *v.* SURESH RANJAN PAL. **73 I. C 706 : 37 C. L. J. 42.**

——Trial—Hearing of case—Right of junior to continue—Arguments begun by junior pleader.

A junior pleader is not entitled as of right to complete the argument, left unfinished by his senior. (*Chitty, and Walmsley, JJ.*) RAMGOPAL MANDAL *v.* KUMAR KOMALA RANJAN ROY. **53 I. C. 955 : 30 C. L. J. 522.**

——Trial—Batch of suits—Suits by landlord against several tenants—Evidence—Admissibility.

Several suits instituted by the landlord for additional rent against several tenants were tried together without objection by the tenants defendants One of the tenants did not produce the chitta which was in his possession. *Held*, that as the evidence given, so far as it was general in its character, applied to all the suits and all the defendants or sets of defendants were sailing in the same boat, and none of them dissociated himself from the defendant who did not produce the chitta or at any rate displayed any anxiety to forego any advantage that might accrue from his conduct, they were all alike affected by his conduct in the suit. (*Richardson and Walmsley, JJ.*) DHRUPAD CHANDRA KOLEY *v.* HARINATH SINGHA ROY. **27 C. L. J. 563 : 45 I. C. 660 : 22 C. W. N 826.**

——Trial—Experts—If arbitrator can take the assistance of.

An arbitrator is entitled to receive assistance in technical matters from experts in arriving at an independent judgment in the matter. (*Mookerjee and Roe, JJ.*) JUGGOBUNDHU SAHA *v.* CHAND MOHAN SAHA. **31 I. C. 33 : 22 C L J. 237.**

——Trial—Piece-meal trial—To be avoided.

As a piece-meal trial leads to protracted litigation and good deal of inconvenience and heavy

PRACTICE—Trial.

costs if the case is taken repeatedly on appeal it is advisable that in appealable cases the courts below should pronounce the opinion on all the points involved. (*Mookerjee and Beachcroft, JJ.*) YATINDRA NATH *v.* HARI CHARAN.
26 I. C. 954 : 20 C. L. J. 426.

——— *Trial of suit—Landlord and tenant—Disputes between—Notice to quit—Validity of.*

Where in an ejectment suit the principal question between the parties was as to the sustainability of the claim of occupancy rights set up by the tenants, and the Court below after taking evidence on all the issues in a protracted trial, decided the question as to notice to quit and disposed of the case on that ground only *Held*, that having regard to the longstanding disputes between the parties and the protracted trial of the case, the court below ought to have declared the rights of the parties so as to constitute a binding decision between them The mere fact that a question as to the sufficiency of notice has not been taken at the previous stages of a case does not prevent a party from urging it as a defence at the time of the final disposal of a claim for ejectment. (*Spencer and Devadoss, JJ.*) SARAVANA PERUMAL PILLAI *v.* SUBBAYYAN. **16 L. W 802 : (1922) M. W N. 763 : 1922 M. 514 : 31 M. L. T. (H. C.) 430.**

——— *Trial—Disposal of a suit—Manner not warranted by law—Consent of parties.*

No agreement between the parties to a case would enable a Court to dispose of a case in a manner not recognised by C.P.C. or by authority. (*Oldfield and Sadasiva Aiyar, JJ.*) POTLA SUBBARAYADU *v.* RAVI LAKSHMAYYA.
18 M. L. T. 93 : 30 I. C. 260 : 2 L. W. 605.

——— *Trial—Court's duty of—Raising of issues and adjudication.*

The duty of raising points arising upon the pleadings and the evidence and the proper adjudication of which is essential for the ends of justice rests on the court as much as on the parties or their pleaders. (*Oldfield and Tyabjee, JJ.*) AZIMANILA VEETHAL KANNU PILLAI *v.* KAYAMARI GOPALAN NAIR. **26 I. C. 337 : (1914) M. W. N. 883.**

——— *Trial—Evidence—Duty to consider—Finding of fact.*

Where the decision on a question of fact is final, the duty of examining the parties and thoroughly sifting the evidence ought to be better realised by the trial Court. (*Kanhaiya Lal, J.C.*) KANHAIYA *v.* ASIM-UL-LAH. **25 O. C. 69 : 1922 Oudh 122.**

——— *—Trial—Connected case—Joint trial.*

Two applications were made one for setting aside an *ex parte* decree and the other for setting aside the sale held in execution thereof on the ground of fraud. The two applications were heard together as the questions of fraud was closely interwoven in both. (*Roe and Jwala Prasad, JJ.*) SOHAGBATI *v.* BABU SURENDRA MOHAN SINGH. **44 I. C. 661 : 4 Pat. L. W 296.**

——— *Trial—Decision on some issues—Not binding on successor of Judge.*

PRACTICE—Witness.

A succeeding Judge is not bound by and may reconsider the judgment of his predecessor on certain issues of the case even though arrived at by the consent of parties. **47 I. C. 555 : 11 Bur. L. T. 97.**

——— *Trial—New evidence—Original Court.*

An original Court cannot entertain a new question requiring introduction of new evidence after it has finished taking evidence (*Pratt, J. C. and Crouch, A.J. C.*) MUSAMMAT ISAD *v.* DHANA MAL. **19 I. C. 368 : 6 S. L. R. 135.**

Vakalat.

See (1) HIGH COURT RULES.
(2) LEGAL PRACTITIONER.

Valuation.

——— *Valuation—Appeal.*

An appellant may value the appeal at a smaller value than the valuation of the original suit if he is interested only in a portion of the property in suit. (*Chamier and Piggott, JJ.*) MATHORA PRASAD *v.* RAMDORAN LAL. **37 All. 208 : 28 I. C. 261 : 13 A. L. J. 283.**

——— *Valuation—Objection to.*

A party cannot object in appeal, to a valuation not questioned by him at the trial of the suit and by virtue of which the suit had to be tried in a Higher Court. (*Drake Brockman, J. C.*) KOTHIRAM *v.* GANPATI. **17 I. C.886 : 8 N. L. R. 179.**

——— *Valuation—Under valuation of suit—Inquiry.*

To determine whether or not a suit has, for the purpose of Court-fees, been undervalued, evidence should be recorded on the point. A document in which the description of the value of the property, did not impose a corresponding obligation, as to the stamp duty, leviable on it, cannot be safely taken as a criterion as to the value of the property. (*Fawcett and Raymond, A. J. Cs.*) RAMDAS *v.* AJUDHIA DAS. **63 I. C. 685 : 14 S. L. R. 137.**

Witness.

——— *Witness—Credibility—Circumstances entitling—Appellate court to differ from trial court should be exceptional.*

Where the Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude and trustworthiness of the witness and of the effect of his whole demeanour in the witness box. (*Lord Parmoor.*) MA THAN THAN *v.* MA PWA THIT. **33 M. L. T. 361 (P. C.) : 2 Bur. L. J. 260 : 46 M. L. J. 334 : 1 Rang. 451 : 1923 P. C. 156 (P. C.).**

——— *Witness—Examination of witnesses on commission—Propriety.*

Examination of witnesses on commission should not be allowed except in exceptional circumstances as the judge is thereby prevented from seeing the demeanour of witness, etc. This is

specially so when he is accused of fraud. Long delay in submitting the report after the examination on commission is a grave irregularity. (*Lord Atkinson.*) SATISH CHANDRA CHATTERJEE *v.* KUMAR SATISH KANTHA ROY. **45 M. L. J. 363 : 33 M. L. T 325 : 1923 P. C. 73 (P C.).**

———*Witness—Credibility—Trial and appellate Court.*

When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box by the manner in which he answers questions, and how he seems to be affected by the questions that are put to him, and so on. No doubt there the trial Judge has an advantage which cannot possibly be shared by any Appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the court of Appeal is really in just as good a situation as the judge of first instance. (*Lord Dunedin.*) PALCHUR SANKARAREDDI *v.* PALCHUR MAHALAKSHMAMMA. **17 L. W. 1 . 31 M. L. T. 307 : 27 C. W. N. 414 : 1922 P. C. 315 (P. C.).**

———*Witness—Credibility.*

A trial Judge in India has not as a general rule the same opportunity of observing the demeanour of witnesses as a trial Judge in England. (*Richards, C. J. and Banerjee, J.*) MALADAD KHAN *v.* ABDUL PATAR. **39 All. 426 : 39 I C. 666 : 15 A. L. J. 349.**

———*Witness— Examination* de-bene esse—*Objection when to be taken.*

An examination *de-bene-esse*, just like that of a witness in a cause must take place either in Court or before a Commissioner. If, in such examination, any irregularity is discovered the party affected should give notice to the opposite side and move to discharge the order immediately on the service of it. It is too late to object to it at the hearing. (*Mookerjee and Fletcher, JJ.*) DINA NATH *v.* METHA RAM. **64 I C. 785 : 33 C. L. J. 577.**

———*Witness--Cross-examination — Fixing five minutes for.*

An order of Magistrate fixing arbitrary limit of time namely five minutes for the cross-examination of witness is illegal. (*Teunon and Suhrawardy, JJ.*) EMPEROR *v.* ASIRUDDIN SARKAR. **62 I. C. 412 : 22 Cr. L. J. 524.**

———*Witness—Document put into his hands—Right of cross-examination.*

Where a cross-examining counsel puts a document into the hands of the witness and asks him some questions about its general nature and identity the adversary will have no right to see the document but he will have such a right if any question are put respecting its contents or hand writing. (*Jenkins, C J, and Woodroffe, J.*) GOPESSUAR DUTT *v.* BISSESSUR DUTT. **39 Cal. 245 : 13 I. C. 577 : 16 C. W, N. 265.**

———*Witness—Place of giving evidence is the witness box.*

All witnesses, without distinction must give their evidence from the witness box and it is not desirable that any one should give his evidence on the dais, by the side of the Judge. (*Martineau, J.*) WADHAWA SINGH *v.* EMPEROR. **63 I. C. 461 : 22 Cr. L. J. 669 : 3 U. P. L. R. (Lah.) 78.**

———*Witness— Examination of witness—Caution.*

While it is unobjectionable for a judge to caution a witness to speak the truth it is wholly wrong to tell him that no matter what evidence is given by him no action would be taken against him. (*Kensington and Rattigan, JJ.*) EMPEROR *v.* MAHNA SINGH. **46 P W. R. 1911 Cr. : 12 Cr. L. J, 73 : 9 I, C. 436 : 63 P. L. R. 1911.**

———*Witness—Cross-examination of a witness—Serious imputation not substantiated—Whether should be withdrawn.*

Where in the course of cross-examination, certain suggestions were made which imputed dishonourable, if not dishonest conduct to the witness which however was not substantiated. *Held*, that there was no necessity of formally withdrawing the imputation, (*White, C. J. and Oldfield, J.*) CROMPTON & CO. *v.* SECRETARY OF STATE. **26 I. C. 610 : 20 M. L. J. 549.**

———*Witness—Citing opponent as.*

A party calling his opposite side as a witness is not bound by his statement. The practice though condemnable is not illegal and cannot be made a ground of revision. (*Tayabji, J.*) RANGASWAMI IYENGAR, *In re.* **21. I. C. 781 : (1913) M. W. N. 998.**

———*Witness—Citing opponent as.*

The practice of citing an opponent as a witness condemned. 31 A, 116; 32 A 101, Rel, (*White, C. J. and Tyabji, J.*) VENKATA SAMBHA SADASIVA DEWARA *v.* PAPAYYA DEVARA. **21 I. C. 737 : (1913) M. W. N. 828.**

———*Witness—Credibility —Relationship not sufficient to discredit.*

Relationship to the agent of a party or even to the party himself is not sufficient reason by itself for disbelieving a witness. (*Batten, J. C. and Hallifax, A. J. C*) LACHHMINARAYAN *v.* MOULVI ZAHIMAL SAID ALVI. **1923 Nag. 322.**

———*Witness--Cross-examination — Admission in.*

A party's counsel cross-examining a witness as to whether an event happened cannot thereby be held to commit himself to an assertion that such an event took place, (*Piggott and Lindsay, A. J. Cs.*) MIR SYED HASAN *v.* TAIYARA BEGAM. **26 I. C. 547 : 1 O. L. J. 591.**

———*Witness—Opponent cited.*

There is nothing to prevent a party from examining his opponent as his witness (*Kanhaiyalal, A. J. C*) BISHESHAR SHUKUL *v.* BIR INDRA KANTA SINGH. **20 I. C. 450: 16 O. C. 145.**

———*Witness—Court's duty to enforce attendance.*

It is the Court's duty to enforce attendance of the right witness when another appears in his stead (*Jwala Prasad and Bucknill, JJ.*) JADUNANDAN SINGH *v.* SHEONANDAN PRASAD. **3 P. L. T. 487 : 1 P. 644 : 1922 Pat. 200 : 1922 P. 276.**

PRACTICE—Witness.

——— *Witness—Credibility.*

The best way of testing the credibility of a witness is to see whether the probabilities of the case and the admitted circumstances corroborate their testimony. (*Das and Ross, JJ.*) ISMAIL ALI KHAN *v.* HAMIDI BEGAM **6 Pat. L. J. 218 : 62 I. C. 455: 2 Pat. L. T. 658.**

——— *Witness—Pleaders or Advocates—Examination—Chambers.*

There is nothing wrong in the pleader or advocate examining the witnesses in Chambers before they appear in Court as it is intended to find out what they have to say and conduct the case properly. (*Hartnoll, J.*) JORDAN *v.* EMPEROR. **14 I. C. 763 : 13 Cr. L. J. 299 : 5 Bur. L. T. 38.**

PREAMBLE.

See INTERPRETATION OF STATUTES.

PRECEDENTS.

See PRACTICE—PRECEDENTS.

PRE-EMPTION.

See also (1) LIMITATION ACT, ART. 10.
(2) OUDH LAWS ACT.
(3) PUNJAB PRE-EMPTION ACT.
(4) WAJIB-UL-ARZ.

Basis of claim.
Collusion.
Co sharer.
Custom.
Custom or contract.
Decree.
Joint vendees.
Lis Pendens.
Loss of right.
Mahomedan Law.
Nature of Right.
Notice.
Price.
Priority.
Re-sale to vendor.
Rival Pre-emptors.
Subject-matter.
Suit for.
Time for pre-emption.
Transfer, nature of.
Waiver of right,
Wajib-ul-arz.
Who can pre-empt.
Miscellaneous.

Basis of Claim.

——— *Basis of claim—Custom in the village.*

A person who was neither a co-sharer nor a relation of the vendor claimed pre-emption on the ground of residence in a village where there was a custom of pre-emption. *Held*, that that was a reasonable in such a claim and if the custom is proved, the right could be enforced. (*Lindsay, and Sulaiman, JJ.*) GAYAN SINGH *v.* BABU LAL. **21 A. L J. 822: L. R 4 A. 557 : 9 O. & A. L. R. 1019: 1924 All. 86.**

——— *Basis of claim—Effect of Division.*

The right of pre-emption is *prima facie*, based on the co-ownership of the parties in the same *Mahal* of a village and unless there is something to the contrary they have no right after a partition. (*Tudball and Rafique, JJ.*) BHAWANI DIN *v.* JADUNATH MISIR. **61 I. C. 89: 19 A. L. J. 141.**

PRE-EMPTION—Basis of claim.

——— *Basis of claim—Sale by Hindu father—Legal necessity—Right of sons.*

A man cannot pre-empt a sale in which a portion of his own property has actually been legally and validly transferred. The sons of a Hindu father cannot claim to pre-empt when the whole property has been sold by the father for a family necessity. (*Tudball and Rafique, JJ.*) PARTAP NARAIN SINGH *v.* SHIAM LAL. **42 All. 264: 18 A. L. J. 116: 55 I. C. 37: 2 U. P. L. R. (All.) 32.**

——— *Basis of claim—Custom, Contract or Mahomedan Law—Alternative.*

Where a pre-emption suit grounded on custom, contract, or Mahomedan Law in the alternative is not upheld by custom or contract, it may succeed under the Mahomedan Law if the formalities required by that law were duly performed. 7 I. C. 263, Dist. (*Richards, C. J. and Tudball, J.*) MUHAMMAD ASHAN ULLA *v.* SHAMS UNISSA BIBI. **36 All. 456: 24 I. C. 425 : 12 A. L. J. 681.**

——— *Basis of claim—Wanting— Effect.*

Pre-emption cannot be granted to one who was not and had never been in possession of the share on the basis of which his claim to pre-empt was founded where the person who was in possession of the share claimed title to the share adversely to the pre-emptor. (*Richards, C.J. and Tudball, J.*) SAFURAN BIBI *v.* SHAH MUHAMMAD. **19 I. C. 749.**

——— *Basis of claim—Contract—Rule against perpetuities.*

The creation of a right of pre-emption is subject to the rule against perpetuities. (*Mookerjee, A. C. J. and Fletcher, J.*) NABIN CHANDRA *v.* RAJANI CHANDRA. **63 I. C. 196: 25 C. W. N. 901.**

——— *Basis of claim—Ownership of property—Lease in perpetuity.*

The milkiat or ownership of the property is *sine qua non* for the exercise of the right of pre-emption must have the milkiat or ownership in the property on account of which he claims the right of pre-emption. No right of pre-emption arises in respect of property leased in perpetuity. 25 W R. 43; 5 P. L. J. 740, foll. The law of pre-emption was founded on the supposed necessities of a Mahomedan family arising out of their minute sub-division and interdivision of ancestral property. It is purely a creature of the Mahomedan Law, and as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Mahomedan Law or beyond the decision of the Courts. (*Das and Adami, JJ.*) DHIRAK SHAL SINGH *v.* TRILOKI PRASAD SINGH. **(1923) Pat. 22 : 1923 P. 217.**

——— *Basis of claim.*

The law of pre-emption has been evolved from three sources, *i. e.*, Mahomedan Law, the necessities of the existence of the racial communities and public and private convenience. Necessity for pre-emption discussed. (*Pipon, C. J.*) MAHOMED ALI KHAN *v.* MAKHAN SINGH. **73 I. C. 855.**

Collusion.

——*Collusion—Duty of Court—Mah. Law.*

Where a custom of pre-emption prevails the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same principle applies to cases of a pre-emption under the Mahomedan Law. Where an issue as to the nature of the transaction is raised by the plff the Court is bound to determine its real nature and if after considering all the circumstances, namely, the sum which was paid down, the smallness of the rent and the value of the property, it came to the conclusion that it was a sale, it must hold that the right of pre-emption arose and determine whether the demands were made or not. (*Richards, C. J. and Tudball, J.*) MOHAMAD NIAZ KHAN *v.* MOHAMMAD ADREES KHAN. **40 All. 322: 44 I. C. 227 16 A. L. J. 233.**

——*Collusion—Exchange—Right to pre-empt.*

The evasion of the law of pre-emption by resorting to an exchange instead of a sale not improper nor illegal. 104 P. R. 1918, Ref. (*Broadway and Abdul Raoof, JJ.*) NARAIN SINGH *v.* WARYAM SINGH. **4 Lah. L. J. 356.**

——*Collusion—Presumption—Onus—Right of a son.*

Unless the contrary is clearly established it is to be presumed that plaintiff sues for his own benefit. The mere fact that the plaintiff is a minor and the son of the vendor does not prove that the suit is for the benefit of vendor. The motive which led the plaintiff to institute the suit and the source from which funds are being derived do not prove that fact either and it is immaterial whether vendor is helping his son. The deft. has to prove strictly that the suit had been instituted for the benefit of the plaintiff's father. It did not lie on the plaintiff to prove that the suit was not for the benefit of his father. A son has a right to pre-empt apart from and independently of his father. 7 P. R. 1912, Rel. on. (*Broadway and Bevan Petman, JJ.*) NAZAR MUHAMMAD *v.* SARDAR MUHAMMAD. **2 Lah. L. J. 226.**

——*Collusion—Colourable transaction.*

N made a gift to a person as his near kinsman and as having rendered services to N. It was found that the donee was neither related to N nor had rendered any service to N. The transaction was held to be a sale and pre-emption was allowed. (*Johnstone, C. J. and Rattigan, J.*) CHIRAGHDIN *v.* ALLAH DIN **70 P. R. 1916 : 118 P. W R. 1916 : 35 I. C. 303: 129 P. L. R. 1916.**

——*Collusion—Dismissal of suit.*

To defeat a suit for pre-emption on the ground of collusion with the vendee strict proof that the plaintiff's object is really to secure the property for the vendee must be given. A motive to annoy and to defeat rival pre-emptors is not sufficient. (*Rattigan and Shadi Lal, JJ.*) AMAR SINGH *v.* KISHAN SINGH. **103 P. R. 1914 : 27 I. C. 93 : 202 P. L. R 1916.**

——*Collusion—Fictitious sale by vendee—Effect.*

A fictitious resale or gift by the vendee to another person with superior or equal right, cannot defeat the pre-emptor's claim. The alienee only stands in the shoes of the vendee. 138 P. R. 1884; 73 P R. 1898; 53 P. R. 1911, Dist. (*Shah Din, J.*) FAZL DIN *v.* LAL SINGH. **164 P. W. R. 1913 : 20 I. C. 843 : 282 P L. R. 1913.**

——*Collusion does not defeat right.*

Pre-emption can be defeated by lawful means. A fraudulent form given to a transaction of sale cannot prevent a party from asserting his right of pre-emption. Where in a joint family one member mortgaged his property to one brother and subsequently sold the equity of redemption to another brother this was held to be such a fraudulent transaction as could not defeat the right of pre-emption. (*Lindsay, J C.*) RAM DUT SINGH *v.* BALKARAN SINGH. **45 I. C. 231 : 5 O. L. J. 87.**

——*Collusion—Device to defeat.*

It is not a fraud to circumvent the law of pre-emption by taking a transfer which falls short of sale, but which may eventually have the same effect as a sale. (*Lindasay, J. C. and Rafique, A. J. C.*) MAJIDA *v* FAZAL KARIM. **19 I. C. 679 : 16 O. C 9.**

Co-sharer.

Amount of share.
Partition.
Priority.
Right to pre-empt.
Vendor's right.
Who is.

Co-sharer—Amount of share.

——*Co-sharers—Amount of share.*

When two or more persons are equally entitled to pre-empt a property each one of them is entitled to an equal share in the property pre-empted. (*Macleod, C. J., Heaten and Kajiji, JJ.*) VITHALDAS KA KAHANDAS SON *v.* JAMIETRAM MAHEKLAL. **44 Bom 887 : 58 I. C 279 : 22 Bom. L. R. 698 (F. B.).**

Co-sharer—Partition.

——*Co-sharers—Partition of mahals—Effect of.*

Where there is a perfect partition of a village which is split up into a number of mahals, there is thereafter no community of interest between the co-sharers of one mahal and those of another mahal and consequently the former cannot be regarded as co-sharers of the property of the latter. 22 A. 1, foll. (*Rafique and Lindsay, JJ.*) RUP SINGH *v.* BHULLAN SINGH. **L. R. 4 A. 15 : 20 A. L. J. 956 : 1923 A. 52.**

——*Co-sharer—Partition—Entry in Wajib-ul-arz—Division into mahals.*

A co-sharer in an undivided village was to pre-empt a sale by another co-sharer according to the Wajib-ul-arz. The village was partitioned into several *mahals. Held*, non-co-sharers in the new mahals are mere strangers and cannot claim pre-emption. (*Richards, C. J. and Rafique, J.*) DEOKI NANDAN *v.* MAHATAB RAI. **41 All. 426 : 50 I. C. 200 : 17 A. L. J. 467.**

——*Co-sharer—Partition—Effect.*

Where the vendee ceased to be the co-sharer with the vendor and the plaintiff became the co-sharer with the vendor under a partition, the

PRE-EMPTION—Co-sharer—Partition.

plaintiff has a right to sue for pre-emption. (*Richards, C. J. and Tudball, J.*) NAND KISHORE SINGH *v.* RAM BIRICH RAI. **15 I. C. 704.**

———*Co-sharer—Partition—Effect of.*

The pendency of a proceeding for the partition of a joint estate does not bar the claim of a co sharer to pre-emption. (*Sharfuddin and Roe. JJ.*) NURI MIAN *v.* AMBICA SINGH.

32 I. C 893.

Co-sharer—Priority.

———*Co-sharer—Priority.*

A zamina khewat provided — Any sharer wishing to transfer his rights can transfer first to *Rishtad Arkaribi* then to *Rishtad Arbaidi* and then to *Shurkain Deh.* If all of them refuse, the sharer may transfer his property to any one he chooses. Sharers (*Hissadars*) and sharers in the village (*Shurkain Deh*) shall have preference if they pay the same price as the stranger transferee. *Held*, that a near relative who was not a co-sharer of the vendor in the same mahal, had no right of pre-emption. (*Richards, C. J. and Tudball, J.*) MAHA BIR PERSHAD *v.* RAM LOCHAN TEWARI. **17 I. C. 521**

———*Co-sharer — Priority — Equal degree— Loss of preferential right.*

If a co-sharer of equal degree joins a co-sharer of an inferior degree in making a sale he loses his right as such and a suit for pre-emption can lie against him. (*Richards, C. J. and Tudball, J.*) GUPTESWAR RAM *v.* RATE KRISHNA RAM.

34 All. 542 · 15 I. C. 174 : 10 A. L. J. 70.

———*Co-sharer—Priority—Right.*

The right of pre-emption of a vendee, a co-sharer in land purchased by virtue of a previous sale cannot be affected by a suit to avoid and set aside the previous sale. Priority question must be decided with relation to the state of things existing at the time of the sale and not at any later period. (*Smith, J.*) HIRA *v.* BANSI LAL.

27 P. W. R. 1919 : 52 I. C. 557 : 90 P. R. 1919.

———*Co-sharers—Priority.*

The mere fact that the vendors and the vendees are co-sharers in some *shamilat* land appertaining to all the *patti* does not invest the vendees with any better right. Where a *khata* forms a subordinate and separate *entity* in a *patti* in which defendants vendees have no share and if the *patti* in which defendants vendees were co-shares formed a separate sub-division of the same mahal, the plaintiffs who are co-sharers in the same *patti* have a preferential right of pre-emption. (*Kanhaiya Lal, J.*) KANIZ ZOHRA *v.* NEPAL. **54 I. C. 632 : 22 O. C. 297.**

Co-sharer—Right to pre-empt.

———*Co-sharer—Right to pre-empt—Sale by official Receiver—Involuntary sale—Right of co-sharers.*

A sale in favour of the defendant, by an official receiver, does not stand on the same footing as a sale at a public auction and would not defeat the right of pre-emption. With regard to properties sold at court auction there is a mode of pre-emption prescribed which is to be found in Order 21, Rule 88. (*Rafiq and Lindsay, JJ.*) BRIJ NARAIN RAI *v.* KEDAR NATH. **45 A. 186 : 20 A. L. J. 918 : 1923 A. 57.**

PRE-EMPTION—Co-sharer—Right to pre empt.

———*Co-sharer - Right to pre-empt—Mortgage of entire share by conditional sale—Rights of co-sharer to pre-emption—Partial pre-emption.*

A co-sharer in a village though he has mortgaged his entire share of the properties by conditional sale does not cease to be a co-sharer and is not deprived of the right of pre-emption. Unless the pre-emptor claims to pre-empt the whole of the property sold, he will not succeed in his action. But if the vendor has included properties which the plaintiff has no right to pre-empt he can exclude them. 8 A. 462; 6 A 423, Ref. (*Kanhaiya Lal and Sulaiman, JJ.*) MOHINDRA MAN SINGH *v.* MAHARAJ SINGH. **L. R. 3 A. 600 : 20 A.L.J. 810 : 1923 All. 48.**

———*Co sharer—Right to pre-empt*

Where a village consisted of a *mahal* and a resumed *muafi* each held under separate engagements with Government and provided with separate Record of Rights but co-sharers of the *mahal* which formed the bulk of the village had agreed with Government in the Wajib-ul-arz that they "shall take the jama of the resumed *muafi* and pay it along with over jama," this agreement did not make them responsible for the revenue assessed on the *muafi*, in which they had no interest and therefore, no right of pre-emption could arise between the owners of the *mahal* and the owners of the *muafi*. (*Richards C. J and Tudball, J.*) MAHADEV PRASAD *v.* JAGAR DEO GIR.

38 All. 260 : 33 I. C. 23 : 14 A. L. J. 313.

———*Co-sharer—Right to pre-empt—Mahal—Resumed muafi.*

If the wajib-ul-arz of a village gives a right of pre-emption between co-sharers, there is no right of pre emption in respect of a resumed *Maufi* by a person who is not a co-sharer in the plot though he is a co-sharer in the *Mahal*. (*Richard, C. J. and Tudball, J.*) BATTU LAL *v.* BHOLA NATH. **19 I. C. 119.**

———*Co-sharer—Right to pre-empt—Person having it feasible title in patti.*

A defeasible title to a share in a patti acquired by a person does not give him the right to pre-empt another share in the same *patti* as a co-sharer. 32 A 45; 4 A. L. J. 351, Foll. (*Griffin and Chamier, JJ.*) ABDUL GHAFOOR *v.* GHULAM HUSAIN. **35 All. 296 : 18 I. C. 959 : 11 A. L. J. 297.**

———*Co-sharer—Right to pre-empt—Creation by contract—Failure to exercise right.*

One of several co-heirs has no right as against the other co-sharers to contract that a mortgagee of his share of property should have a right of pre-emption in the property. If the pre-emptor fails to enforce his right within limitation, his claim though barred is not extinguished. He could set up his equity by way of defence but he may be successfully confronted with pleas of laches, waiver, acquiescence and other forms of equitable estoppel. (*Scott Smith, J.*) KHANSHI *v.* GAURI SHANKAR. **49 I. C. 910.**

———*Co-sharer —Right to pre-empt — Value of possession.*

PRE-EMPTION—Co-sharer—Vendor's right.

Recent acquisition of possession by itself is not enough to support a claim to pre-empt as a co-sharer, though such possession is sufficient title against trespasser. (*Chamier, J. C.*) CHATARPAL SINGH *v.* KUSHAR SINGH.
37 I. C. 172 : 19 O. C. 190 Note.

Co-sharer—Vendor's right.

——Co-sharer—Vendor's right—Rights of—Effect of their refusal.

A vendor can sell his property to any one other than a co sharer and get his refusal. He is not however entitled to offer one price to the co-sharers and then sell to the strangers at a smaller value without informing them. (*Richards, C. J. and Tudball, J.*) NALHI LAL *v.* DHANI RAM.
39 I C 637 : 15 A. L. J. 315

Co-sharer—Who is.

——Co-sharer — Who is purchaser of share in village—Rights of.

A person who purchases a plot of land situate within the share in a village, he is a co-sharer and must be treated as such though his name does not appear in the revenue papers. (*Lindsay and Kanhaiya Lal, JJ.* RAM GOVIND PANDE *v.* PANNA LAL. **21 A. L. J. 763 : L. R 4 A. 507 : 46 All. 70 : 1924 All. 305.**

——Co-sharer—Who is—Rishtedargaribi.

Who is the grandfather's brother's daughter's son is a *rishtedargaribi.* (*Richards. C. J., and Tudball, J.*) SARJEE DUBE *v.* BADRI NARAIN.
40 I. C. 595.

——Co-sharer—Who is.

Where a person has been a recorded co-sharer in possession of property by virtue of a sale and no steps have been taken for three years to set aside the sale, or to oust him from possession, he must be regarded as co-sharer for the purposes of a pre-emption suit. (*Richards, C. J. and Tudball, J.*) MUNNA LAI *v.* RAM GULAM SINGH.
29 I. C. 549 (All.)

——Co-sharer—Who is—Owner of grove land unassessed to revenue.

The owner of an isolated plot of land to whose poroperty is liable for Govt. revenue can be a co-sharer and as such have a right of pre-emption. (*Richards, C. J. and Tudball, J.*) AMIR SINGH *v.* AKBAR. **11 I. C. 21.**

——Co-sharer—Who is—Shamilat land—Vendor Co-sharer in, but not in Patti—Effect.

A vendee who is not a co-sharer in the sub-division, in which the share ought to be pre-empted is situated, does not become one, because some land appurtaining to the village has been lumped together as belonging to all the pattis instead of being imperfectly partitioned The position of the Shamilat land appurtaining to each *patti* follows or forms part of the patti to which it belongs and no right of pre-emption can be claimed in respect of it. (*Kanhaiya Lal, A.J. C.*) KANIZ ZOHRA *v.* NEPAL, **54 I.C. 632 : 22 O.C. 297.**

——Co-sharer—Who is—Birtdars.

Birtdars holding on behalf of *Pakhladars* having no right of pre-emption in case of a sale of proprietary or under-proprietary rights except as members of the village community, are not co-sharers of a sub-division of a tenure. (*Kanhaiya Lal, A J. C.*) PATISHER *v.* CHEDDI. **20 I. C. 474.**

PRE-EMPTION—Custom—Applicability.

——Co-sharer—Who is—Oudh Laws Act (XVII of 1876)—Birt-holder in a Mahal, if a co-sharer,

A birt-holder in a Mahal which was sold by an under proprietor cannot be considered a co-sharer, as his rights are not superior to those of the under-proprietor. (*Rafique, A. J. C.*) RAMGOPAL *v.* JAGAMOHAN SINGH. **13 I. C. 631.**

Custom.

Applicability.
Partition.
Presumption.
Proof.
Variation between two wajib-ul-arzes.
Miscellaneous.

Custom—Applicability.

——Custom — Applicability of Mahomedan law to Hindus Cities and villages—Distinction.

There should be no extension of the Mahomedan law of pre-emption among Hindus beyond the limits established by proof of custom. The law of pre-emption which applies to villages does not necessarily apply to property in cities. 45 B. 604, Foll. A decree for pre-emption of the year 1865 in the locality would not be sufficient proof of the existence of the custom of pre-emption in the city. The absence of such instances after 1865 strongly militates against the existence of the custom. (*Rafiq and Lindsay, JJ.*) RAM CHAND KHANNA *v*, GOSWAMI RAM PURI. **45 A. 501 : 21 A. L. J, 385 : L. R. 4 A 430 : 1923 A. 513.**

——Custom— Applicability—A razidars.

Arazidars have no right of pre-emption according to custom. (*Rafiqe and Lindsay, JJ.*) SURWAN PRASAD TEWARI *v.* BASDEO NARAIN SINGH.
45 A. 237 : 21 A. L. J. 65 : L.R 4 A. 57 : 1923 A. 1 29.

——Custom—Applicability—Village held by one community—Subsequently held by another community—Effect.

The custom of pre-emption does not attach itself to a property; it is a, practice existing in a certain community and if the whole community has been blotted out from the village its customs die with it and a new community taking its place would, in no way be bound by the old customs. (*Tudball and Sulaiman, JJ.*) MAKUND SINGH *v.* GOPI PRASAD. **64 I. C. 110 : 19 A. L. J. 767.**

——Custom—Applicability—Sale of right to receive allowances of Zamindar.

Costom of pre-emption cannot be applied to the sale of the right of a Zamindar to receive certain allowances from the *Muafidars* of a village. (*Tudball and Rafique, JJ.*) ABDUL WAHID *v.* HALIMA KHATUN. **42 All. 262 : 59 I. C. 188 : 18 A. L. J. 210.**

——Custom — Applicability — Hindus in Surat.

Pre-emption has been adopted by the Hindus in Surat with regard to houses but not with regard to agricultural land. (*Macleod, C. J. and Fawcett, J.*) JAGJIVAN *v.* KALIDAS **45 Bom 604 : 60 I. C. 901 : 23 Bom. L. R. 81.**

PRE-EMPTION—Custom—Applicability.

———*Custom—Applicability—Ahmedabad.*

There exists a custom of pre-emption among Hindus in Ahmedabad. (*Macleod, C. J. and Heaton, J.*) MOTILAL DAYABHAI *v.* HARI LAL MAGAN. **44 Bom. 696 : 57 I. C. 590 : 22 Bom. L. R. 806.**

———*Custom—Applicability — Mohalla Rahmat-Ullah qureshi, Lahore.*

Pre-emption prevails in Mohalla Rahmat-Ullah qureshi, Lahore, (*Rattigan and Shah Din, JJ.*) KASIMBEG *v.* JHANDA. **33 I. C. 338 : 77 P. R. 1916.**

———*Custom—Applicability—Lahore City—Kuncha Dalo.*

The custom of pre-emption prevails in the region of the Lahore City of which Kuncha Dalo forms a part, whether it be called Wachhowali or Kanjar Phala. 2 P.R. 1903 and 68 P.R. 1906 Ref. (*Johnstone and Shadi Lal, JJ.*) GOVIND RAM *v.* BASHESHAR DAS. **9 P. R. 1915 : 28 I. C. 957 : 19 P. L. R. 1916.**

———*Custom—Applicability— Banga, Jallundur District.*

A well established custom of pre-emption exists in Jallundur District. (*Reid, C. J.*) PERTAB SINGH *v.* HAZARA SINGH. **73 P. R. 1913 : 21 I. C. 855 : 275 P. L. R. 1914.**

———*Custom—Applicability—Adhlapi tenure — Multan Tahsil.*

The custom of pre-emption exists in Mauza Fajja, Tahsil Multan in respect of a transfer of land upon an Adhlapi tenure. (*Rattigan, J.*) JESA RAM *v.* CHINKA MAL. **25 P. R. 1913 : 19 I. C. 739 : 213 P. L. R. 1913.**

———*Custom—Applicability—Dasuba.*

In the town of Dasuba the custom of pre-emption in the house property is prevalent. (*Shah Din, JJ.*) UDHO RAM *v.* RODA. **61 P. R. 1912 : 15 I. C. 934 : 185 P. W. R. 1912.**

———*Custom— Applicability — Mohalla and Kuchas.*

The custom of pr-emption prevails in the Mohalla Multani Darwaza in the Ferozepore District as well as in the Kuchas comprised therein. (*Reid, C. J.*) HARI SINGH *v.* BHOLI. **62 P. R 1912 : 69 P. W. R. 1912 : 13 I. C. 719 : 119 P. L. R. 1912.**

———*Custom—Applicability--Mohalla Sathan, Lahore city—Conversion of house into Dharmasala.*

There is a custom of pre-emption in respect of houses in Mohalla Sathan in the city of Lahore. The character of the property at the date of sale determines whether the Punjab Pre-emption Act, S. 13 (2) did exist in respect of disputed buildings. If at the date of the sale, the property sold is a house, it is immaterial whether subsequently to that date, the house was converted into and used as a Dharmasala. (*Shah Din and Chevis, JJ.*) KRIPA SINGH *v.* MAYA SINGH. **22 P. R. 1911 : 185 P. L. R. 1911 : 10 I. C. 848 : 52 P. W. R. 1911.**

———*Custom—Applicability—South Canara—Othi mortgage—Plea to action on* othi.

PRE-EMPTION—Custom—Partition.

An *othi* mortgage does not in South Canara by custom carry with it the right of pre-emption. Such a right even if it exists cannot be pleaded in defence to an action on the *othi*. (*Benson and Spencer, JJ.*) SUBRAMANIAN EMBRANDRI *v.* KRISHNAN EMBRANDRI. **12 I. C. 626 : (1911) 2 M. W. N. 486.**

———*Custom—Applicability of—Hindu vendor —Property in Behar—Sale in Delhi—Law applicable.*

Where the custom of pre-emption is judicially noticed as prevailing among non-Mahomedans in a certain local area, it does not govern non-Mahomedans who though holding land therein for the time being are neither natives of, nor domiciled in that district. 18 W. R. 441: 24 W. R. 95 : 32 C. 988 Foll. It cannot be said that Hindus of Bihar or other localities where the custom of pre-emption exists have adopted the law of pre-emption as part of their personal law. (*Coutts and Das, JJ.*) SAIYID FAZAL KARIM *v.* MT. BIBI FATMATUL KUBRA. **3 Pat. L. T. 556 : 1922 Pat. 360 : 1922 P. 567.**

Custom—Partition.

———*Custom—Partition—Effect of.*

Where there has been a partition of a village into separate mahals, a sharer in one of he new mahals who claims a right of pre-emption in respect of land in another mahal (of which he was not a sharer at the date of sale) must show either on the construction of the wajib-ul-arz or by other evidence that the custom of pre-emption survived the partition. From the fact that a fresh wajib-ul-arz has not been prepared at the partition, it does not follow as a matter of law or principle that the custom or contract in force before partition is no longer to have effect or operation ; the question must depend on the circumstances of each case and the inferences to be drawn from the evidence. (*Sir John Edge.*) DIGAMBAR SINGH *v.* AHMED SAYEED KHAN. **37 All. 129 : 42 I.A. 10 : 13 A. L. J. 236 : 19 C. W. N. 393 : 17 M. L. T. 193 : 2 L. W. 303 : 21 C L. J 237 : 17 Bom. L. R. 393 : 28 I. C 34.: (1915) M. W. N. 581 : 28 M. L. J. 556 (P. C.).**

———*Custom—Partition—Effect of.*

It was proved that in a village there was a custom of pre-emption among co-sharers in the same Mahal as against co-sharers in a different Mahal. The village was subsequently partitioned, the old mahals being broken up and new ones formed. *Held*, in the absence of any evidence to the contrary, the old custom would continue even after partition. 6 A. L. J. 80 Ref. 8 A. L. J. 1013 Foll. (*Rafique and Piggott, JJ.*) JOKHAN SINGH *v.* SABHAJAT SINGH. **L. R 3 A. 161 : 20 A. L. J. 223 : 1922 All. 182.**

———*Custom—Partition, effect of—Custom if changes.*

A custom cannot change but a person who is entitled to pre-empt under custom prior to partition of village may lose that right as result of the partition. After the preparation of wajib-ul arz which showed equal right of pre-emption, partition took place whereby the vendors and the vendee became proprietors of a different mahal in the

PRE-EMPTION—Custom—Presumption.

same village. It was beld that plaintiff was entitled to pre-empt. (*Richards, C. J. and Tudball, J.*) REM SINGH *v.* DHARAM SINGH.

12 I. C. 177 : 8 A. L. J. 1013.

Custom—Presumption.

———*Custom—Presumption— Wajib ul-arz—Mortgage by conditional sale—Ripening into complete transfer.*

A custom of pre-emption evidenced by a *wajib ul arz* as regards a simple sale only, cannot be taken to apply to the case of a mortgage by conditional sale ripening subsequently into a complete transfer. (*Richaras, C. J. and Tudball, J.*) KATTA PRASAD *v.* GULZAR SINGH.

25 I. C. 413 : 12 A. L. J. 611.

———*Custom—Presumption—Wajib-ul-arz.*

A court ought to hold that the custom of pre emption exists where the wajib-ul-arz is clear and distinct as to the existence thereof and there is no evidence to the contrary. 33 A. 196 (F. B.) Ref. to. (*Richards, C. J. and Tudball, J.*) FAZAL HUSSAIN *v.* MUHAMMAD SHARIF. **36 All. 471 : 24 I. C. 464 : 12 A. L. J. 800.**

———*Custom—Presumption—Shirista Nizamat noting only one proprietor if rebuts such presumption.*

A custom of pre emption is *prima facie* presumed to exist from a wajib-ul-arz dated 1833 of a village settled with birt-holders; such a presumtion is not rebutted by the mere fact of the existence of a Shirista Nizamat noting only one proprietor ever since 1802, especially when a number of birt-holders had signed the wajib-ul-arz of 1833. (*Richards, C. J. and Tudball, J.*) SARJU RAI *v.* BHUINLOT VISIR. **11 I. C. 258 : 8 A. L. J 947.**

———*Custom—Presumption—Rebuttal of.*

The production of a Kamat-Sarishta Nizamat as evidence to rebut the presumption of a pre-emption custom according to wajib-ul-arz was held to be insufficient. (*Bannerjee, J.*) CHHOTRI *v.* RUDRA PRASAD. **10 I. C. 323.**

———*Custom—Presumption—Wajib-ul-arz.*

Evidence of a patwari to rebut presumption of pre emption custom, according to wajib-ul-arz is altogether unworthy of credit. (*Tudball, J.*) HARNARAIN NATH *v.* TILAK TULIE. **10 I. C. 233.**

Custom—Proof.

———*Custom--Proof custom recorded in* wajib-ul-arz—*Former* Dastur Debi *and latter* wajib-ul-arz *silent.*

Where a *wajib-ul-arz* of 1880 recorded a custom of pre-emption but the *Dastur Debi* of 1843 was silent as to this and recorded entire freedom of transfer and the *wajib-ul-arz* of 1906 was silent as to the custom, *held* no custom of pre-emption was established. (*Tudball and Sulaiman, JJ.*) BHAGWAN *v.* BADRI.

64 I. C. 416 : 19 A. L. J. 861.

———*Custom—Proof of—Entry in wajib-ul-arz.*

Statements in wajib-ul-arz as to the existence of a right of pre-emption not in contravention of

PRE-EMPTION—Custom—Proof.

Hindu or Mahomedan law, are reliable *prima facie* evidence of a custom of pre emption (*Sir John Edge.*) DIGAMBAR SINGH *v.* AHMED SAYEED KHAN. **37 All. 129 42 I. A. 10 : 13 A L. J. 236 : 19 C. W. N 793 : 17 M. L. T. 193 : 2 L W 303 : 21 C. L. J. 237 : 17 Bom. L. R. 393 : 28 I C. 34: (1915) M. W. N. 581 : 28 M. L. J. 556 (P. C.).**

———*Custom—Proof of—Wajib-ul-arz—Construction of.*

The provisions regarding pre-emption in a village were contained in a wajib-ul-arz, Chapter II of which was headed thus :—" Mutual rights of the co-sharers, based on custom of particular contracts." Paragraph 14 of the Chapter was headed 'Custom relating to the right of pre-emption." The clause gave a right of pre emption first to a near co-sharer then to a co sharer in the patti, afterwards to a co sharer in the thok and lastly to a co-sharer in the mahal. *Held*, that the wajib-ul-arz clearly evidenced a custom of pre-emption in respect of the mahals to which it related. (*Mr. Ameer Ali.*) MATHURA PRASAD *v.* SHEIKH MUHAMMAD.

17 I. C. 844 : 17 C. W. N. 981 (P. C.).

———*Custom—Proof—Entry in Wajib-ul-arz—Interpretation.*

Prima facie entry in the Wajib-ul-arz is to be treated as an entry of a custom. That has been laid down in time and again and has the authority of their Lordships of the Judicial Committee of the Privy Council. It has however, always been held that the presumption is liable to be overth own either by external or internal evidence. In a wajib ul-arz, the pre-emption clause relied upon was to the following effect. In cases where a mortgage has been made by a co-sharer and where that co-sharer is unwilling to redeem the mortgage created by him at the time when a redemption may be sought, other co-sharers in certain order may come forward and demand and get redemption of the mortgage and may take over the property and keep it for themselves. *Held*, that the clause provided clearly that persons who are strangers to a mortgage have a right of redemption and have a right to recover the property from the mortgagee and hold for themselves after they have paid the mortgage. (*Lindsay and Sulaiman, JJ.*) SHEIKH MAHOMED ALI *v* SHEIKH SULTAN AHMAD.

L. R. 4 A. 339 : 1924 All. 123.

———*Custom—Proof—Entry in Wajib-ul-arz—Value of.*

A clause in a wajib ul-arz relating to the transfer of property by a co-sharer was to the effect that in case of a transfer by a co-sharer of his share by sale or mortgage he must give preference to his co-sharers over a stranger. It further went on to say that in case a mortgage given by a co-sharer had matured and the mortgagor was unable for want of funds to redeem the mortgage any of his co-sharers could pay off the mortgage and retain the share so redeemed until the original mortgagor is in a position to pay

PRE-EMPTION—Custom—Proof.

his co-sharer. *Held*, that the terms of the wajib-ul-arz did not show that they were a record of custom. (*Rafique and Lindsay, JJ.*) SHEO BADAN TEWARI *v.* SAHEBZADI KOER.

21 A. L. J. 378 : L. R. 4 A. 221 : 45 All. 459 : 4 L. R. All 221 : 1923 A. 523 (1).

———*Custom—Proof—Entry in Wajib-ul-arz—Rebuttal of.*

A claim for pre-emption based on an existing custom as proved by the entries in a wajib-ul-arz is not rebutted by a note in the settlement records that the land was waste or desolate. (*Rafique and Piggot, JJ.*) BANSI *v.* RAM BARAN.

45 A. 185 : L. R. 4 A. 305 : 21 A. L. J. 60 : 4 L. R. All. 305 : 1923 A. 150.

———*Custom—Proof — Evidence of—Entries in wajib-ul-arz.*

In pre-emption cases entries in wajib-ul arz constituting merely an expression of the wishes of the co-sharers as to certain practices which they approve, unsupported by any other evidence are utterly insufficient to establish the custom. (*Tudball and Sulaiman, JJ.*) CHAHAL *v.* DWARKA. **64 I. C. 484.**

———*Custom —Proof —Wajib-ul-arz, entry in.*

At the time of the Mutiny in 1857 a village was confiscated by the Government who held it for 21 years and then granted it to a stranger and not to the original proprietor. *Wajib-ul arz* prepared one year after this did not state the actual facts. In a suit for pre-emption the entry in the *Wajib-ul-arz* was relied on to prove the existence of a custom of pre-emption. *Held*. that the entry in *Wajib-ul-arz* was no proof of the custom of pre-emption but that, it was merely a record of the wishes of the Zamindars. (*Tudball and Rafique, JJ.*) RADHA KISHEN *v.* GULZARI DAL.

18 A. L. J. 569 : 56 I. C. 73 : 2 U. P L R. (All.) 156.

———*Custom—Proof of—Wajib ul-arz, entry in.*

The mention of the existence of the custom of pre-emption in two wajib-ul-arzes drawn up at a considerable interval of time, the admission of its existence by the co-sharers in the village and the fact that previous sales have been in favour of co-sharers are sufficient to establish the existence of the custom (*Tudball and Rafique, JJ.*) THAKUR ATRAJ SINGH *v.* MOOLOO SINGH.

54 I. C. 875.

———*Custom—Proof of— Wajib ul-arz—Property in possession of Government.*

The Government confiscated certain property in 1857. While it was in the possession of Government in 1860 an entry was made in the wajib ul-arz recognising a custom of pre-emption. The entry was repeated in 1870. *Held*, that the two entries were not good evidence of custom. (*Tudball and Rafique, JJ.*) RAM SARUP *v.* RAM DEVI.

18 A. L. J. : 118 : 54 I. C. 786 : 2 U. P. L. R. (H. C) 37.

———*Custom— Proof of — Wajib ul-arz — Wishes of co-sharers.*

PRE-EMPTION—Custom—Proof.

Where the wajib-ul-arz records the wishes of the co-sharers as to what should happen in the future in connection with pre-emption such entry is not binding on the co-parcenary body as a village custom. Nor is such entry sufficient to prove the existence of the custom of pre-emption. (*Tudball and Rafique, JJ.*) MAHRAJ SINGH *v.* PITAMBAR SINGH.

54 I. C. 768 : 2 U. P. L. R. (H. C.) 44.

———*Custom — Proof of — Wajib-ul-arz—Interpretation.*

When considering the existence or non-existence of a custom of pre-emption, the language of the particular wajib-ul- arz relied on in proof of the custom ought to be taken into consideration. (*Richards, C. J. and Tudball, J.*) SURAJBALI SINGH *v.* MOHAMMAD NASIR.

48 I. C. 220 : 16 A. L. J. 879

———*Custom—Proof of—Plaintiff within custom at the time of sale.*

Where a custom of pre-emption is proved a plaintiff who can show that, he comes within the custom at the time of the sale is entitled to the benefit of the custom. (*Richards, C. J. and Tudball, J.*) LALTA PRASAD *v.* GOKUL PRASAD.

40 All. 617 : 46 I. C. 125 : 16 A. L. J. 509.

———*Custom—Proof.*

Where wajib-ul-arzes differed materially regarding the rights of persons entitled to pre-empt, *held* that they did not establish a custom of pre-emption. (*Richards, C. J. and Tudball, J.*) MAHABALI *v.* SAHDEO. **40 I C 73.**

———*Custom—Proof of, nature of, wajib-ul-arz—Construction of.*

In cases of pre-emption where the issue is whether there exists a custom or not the decision is made on the facts and circumstances. The plaintiff is therefore to prove not only the prevailing custom but a custom under which he is entitled.

Where the evidence supporting the existence of such a custom was the wajib-ul-arz which provided that whenever a co-sharer, wishing to make an absolute sale of his share, or mortgage by a conditional sale, he must first offer it to the co-sharers.

Held, that the evidence was insufficient to establish the existence of a particular custom essential for the plaintiff to prove, and that the clause did not apply to the case of exchange. (*Richards, C. J. and Tudball, J.*) BHAGWAN SINGH *v.* RAJWANT KUNWAR. **38 I. C. 157 (All.)**

———*Custom—Proof of.*

The custom of pre-emption based on the wajib-ul-arz of 1865 applies only when a co-parcenary relation exists and not when perfect partition has taken place. In a suit for pre-emption it lies upon the plff. not merely to prove the custom of pre-emption but to prove the existence of a custom under which he himself has a right, that is to say, he has to prove existence of a custom which gives right to a person who is not a co-sharer with vendor. (*Richards, C. J and Tudball, J.*) MUHAMMAD MAHBUB KHAN *v.* RAGHUBAR DAYAL.

38 All. 27 : 30 I. C. 947 : 13 A. L. J. 951.

PRE-EMPTION—Custom—Proof.

——— *Custom—Proof of—Onus—Entry in the Wajib ul arz—Karibi and baidi.*

In a suit for pre-emption against another co-sharer the onus lies on the plaintiff to prove not only that the custom exists but that under it he has a right to pre-empt as against another co-sharer. In such a case the mere production of the wajib-ul-arz the meaning of which is doubtful, is not enough to discharge the onus. The terms karibi and baidi are ambiguous. They refer to nearness or distance in space or in relationship. (*Richards, C J. and Tudball, J*) DINDAYAL *v.* RAMDHAN. **28 I. C. 306**

——— *Custom—Proof of—Wajib-ul-arz.*

Where the Wajib-ul-arz provides for pre-emption only in case of simple sales usufructuary mortgages and mortgages by way of conditional sale, a suit based on custom pre-emption of the sale effected by a foreclosure decree in a mortgage by conditional sale will not lie. The issue in a pre-emption case is not the construction of the Wajib-ul-arz but the existence of the custom and the onus is on the plaintiff to prove the custom. 43 A. 605 Foll. (*Richards, C. J. and Tudball, J.*) HAMEED UDDIN *v.* RAGHUNATH PRASAD. **24 I. C. 271.**

——— *Custom—Proof of—Sales to strangers—Material evidence.*

In trying the existence or otherwise of a custom of pre-emption, every instance of a sale to a stranger is material evidence and a mere vague statement as to such sales without the sale deeds or certified copies thereof, is not sufficient. A W. N. (1905) 16. Not foll. (*Richards, C J. and Tudball, J.*) JANKI MISIR *v.* RANNO SINGH. **35 All. 472 : 21 I. C. 72 : 11 A. L. J. 759.**

——— *Custom—Proof of—Wajib-ul-arz—Construction—Muafi plots.*

A wajib ul-arz providing for pre-emption only in case of a sale by a co-sharer in the Zamindari, is not sufficient evidence of a custom of pre-emption in respect of *muafi* lands. (*Richards, C. J. and Tudball, J.*) ABID UELLAB *v.* AHMED HUSAIN. **21 I. C. 53**

——— *Custom—Proof—Wajib-ul-arz.*

Two wajib-ul-arzes recorded two contrary statements about the custom of pre-emption, the former in favour and the latter against. *Held*, as the latter negatived the inference of existence of any custom of pre-emption in a village, no custom exists there. (*Richards, C. J. and Tudball, J.*) RAMHIT *v.* CHANDI PRASAD DUBE. **16 I C. 411 (2).**

——— *Custom—Proof.*

A custom of pre-emption should, like any other custom, be proved by clear and sufficient evidence, (*Richards, C. J, and Karamat Husain, J.*) BIDHATA RAM *v.* RAM CHERI. **15 I. C. 251.**

——— *Custom—Proof—Onus.*

The existence or non-existence of a custom of pre-emption must be proved in the same manner as any other question. The onus of proof of existence of such a custom is on the plaintiff. 33 A. 605 Foll (*Richards, C. J. and Tudball, J.*) BECHU SINGH *v.* LACHMI NARAYAN SINGH. **15 I. C. 54.**

PRE-EMPTION—Custom—Proof.

——— *Custom—Proof—Wajib-ul-arz.*

Where a custom of pre-emption is alleged to exist, the Court should be satisfied by proper and sufficient evidence given by the parties that such a custom exists. A finding based merely on the construction of certain words in the wajib-ul-arz would not suffice. 12 I. C. 98 Ref. (*Richards, C J. and Tudball, J.*) DWARAKA DAS *v.* DEBI DAYAL. **14 I. C. 303.**

——— *Custom—Proof of—Wajib-ul-arz—Variation.*

In a pre-emption suit, plaintiff alleged that he was co-sharer with the vendor in the same *Kura* and that the vendee though a co-sharer was not a co-sharer in the same *Kura*, and that by custom plaintiff had the right to pre-empt. Three different Wajib-ul-arzes were produced which gave different versions. In such case plaintiff must prove not only that a custom of pre-emption prevailed as against the stranger but also the existence of a custom which gave him the right of pre-emption against the defendant vendee as soon as the nature of latter's position was ascertained. (*Richards, C. J. and Tudball, J.*) DIP NARAYAN *v.* BHAGWANT SINGH. **12 I. C. 179 : 8 A. L. J. 1070.**

——— *Custom—Proof—Evidence.*

The quantum of evidence necessary for proof of a custom of pre-emption, is one dependent upon the circumstances of each particular case. (*Richards, C. J. and Tudball, J.*) KHARATI KHAN *v.* UMLA. **11 I. C. 316.**

——— *Custom—Proof—Wajib-ul-arz—Doubtful-entry.*

A doubtful entry in wajib-ul-arz unsupported by any corroborative evidence is sufficient to establish custom, if custom on which the claim is based must be established. (*Richards, C. J. and Tudball, J.*) HARDWARI *v.* BALDEO SAHAI. **10 I. C. 448 : 8 A. L. J. 632.**

——— *Custom—Proof.*

A custom of pre-emption recorded in a wajib-ul-arz is not disproved by entries in register of transfers; the register is evidence only of tarnsfers. (*Karamat Husain, J.*) BADRI DAS *v.* DAJAM. **10 I. C. 225.**

——— *Custom—Proof of—Wajib-ul arz—Construction.*

A clause in wajib-ul-arz "*Dusturi-i-haq-ishufa* and providing that each co-sharer should first offer his share in a certain order to his co-sharers shows *prima facie* the existence of a custom. (1897) 3 A. W. N 3 Foll. 1 I.C 82 Ref. (*Tudball, J.*) MUKHA *v.* HAR SAHAI. **9 I. C. 810 : 8 A. L. J. 770.**

——— *Custom—Proof—Wajib-ul-arz.*

Where a clause in favour of pre-emption was contained in a wajib-ul-arz but another part of the settlement record showed that up to 1818 the land was uncultivated and also that there was hardly any transfer it was held that wajib-ul-arz recorded a contract of pre-emption, that the pre-emptive clause of the wajib-ul-arz raised a presumption in favour of custom but the

PRE-EMPTION—Custom—Proof.

presumption was sufficiently rebutted if the pre-emptive clause be read with the rest of the record. 7 A. L. J. 1040 Dist. (*Richards and Tudball, JJ.*) SARJU PRASAD RAI *v.* GAURI RAI.
9 I. C. 485 : 8 A. L. J. 381.

——*Custom—Proof— Mohala in a town—District Karnal—Sub-divisions of a town.*

Where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-divisions in which the property is situate and the *onus* is not discharged by proof of the custom in the neighbouring sub-divisions. A judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest a custom is held to be proved or negatived. One or two solitary instances of admission of the custom supported by a few instances in the neighbouring sub-divisions are not sufficient to discharge the *onus* of proving the existence of the custom in *Mohalla* Bagarian which lay heavily upon the plaintiffs. (*Moti Sagar, J.*) LEKH RAJ *v.* INDAR MAL. **4 Lah. 176 : 1924 L. 161.**

——*Custom— Proof— Town— Instances—Length of custom—Judgment based on compromise—Evidentiary value of.*

In suits for pre-emption in respect of property situate in a town, however probable and fair the paintiff's claim may seem, he should never be relieved from the burden of proving the existence of the alleged custom in the special locality in which the property is situate, proof of its existence in neighbouring *Mohallas* being at best only supplementary of the evidence required of the plaintiff. Where the instances cited are all of them more than 40 years old, they are not sufficient to prove the custom. (*Scott-Smith, J.*) RAMJI DAS *v.* MAM CHAND. **1922 Lah. 367.**

——*Custom—Proof of—Fatehbad—Compromise recognising custom.*

A judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived. *Held*, that a custom of pre-emption had not been proved in the town of Fatehbad. 2 Lah. 83 foll 116 P. R. 1908 Ref (*Abdul Raoof and Martineau, JJ.*) PIRBHU *v.* TOTA.
3 Lah. 136 : 20 P. W. R. 1922 : 1922 Lah. 286.

——*Custom—Proof*—Mohulla Mahian Ludhiana.

The custom of pre-emption does not exist in *Mohulla* of *Mahian* of *Ludhiana* city. (*Broadway and Abdul Quadir, JJ.*) GAINDALAL *v.* RODA. **63 I. C. 766.**

——*Custom—Proof—Sale of house property—Katra Amar Singh—Amritsar City—Instances in neighbouring sub-divisions.*

Held, on the evidence in the case, that the custom of pre-emption in respect of sales of house property by reason of vicinage in Katra Amar Singh of Amritsar City had not been established. 9 P. R. 1909 appr. Where the sub division in question is bounded on some sides by sub-divisions in which the custom of pre-emption does exist and on other sides by sub-division in which it does not exist, cases of pre-emption in adjoining mahallas are of little value. (*Chevis and Le Rossignol, JJ.*) VAISHNO DAS *v* HEM RAI.
4 Lah. L. J. 371.

——*Custom—Proof—Onus.*

Where a town is divided into sub-divisions the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division where the property is situate. (*Wilberforce, J.*) PRABH DIAL *v.* BHIKHOO MAL.
61 I. C. 822 : 3 Lah. L. J. 387.

——*Custom—Proof—Instances*

Pre-emption prevails in Mohalla Rahmatullah Qureshi Lahore Unchallenged sales do not prove that the pre-emption custom did not prevail in the locality. A vendee's admission of the custom is valuable as a precedent. Instances from adjoining Mohallas are relevant evidence when there is other evidence to prove it. (*Rattigan and Shah Din, JJ.*) KASIM BEG *v.* JHANDA.
33 I. C. 338 : 77 P. R. 1916.

——*Custom—Proof of—Instances in adjoining lands.*

To prove the custom of pre-emption instances of the enforcement of the right in the adjoining streets or mohallas are relevant. The circumstance that a particular bazaar is essentially a street of shops and prostitute lodgings is immaterial if pre-emption has been enforced as a matter of right in certain cases. Extra judicial compromises are valid instances of the existence of custom and each case must be decided on its own facts. *Held*, that in this case the custom of pre-emption was proved to exist. (*Johnstone, J.*) JHANDAMAL *v.* SARDAR BEGUM.
27 I. C. 778 : 168 P. W. R. 1916.

——*Custom—Proof—Town of Umrar.*

The custom of pre-emption is not proved to have existed in the town of Umrar at the time when the Punjab Pre-emption Act came into force. (*Chevis, J.*) AZIM KHAN *v.* MUSTAQIM.
28 P. R. 1912 : 14 I. C 782 (1) : 86 P. W. R. 1912,

——*Custom—Proof of.*

When a town is sub-divided the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division where the property is situate. Proof that the custom exists in neighbouring sub divisions is not sufficient. 100 P. R. 1892 ; 17 P. R. 1895 ; 70 P. R. 1899 ; 83 P. R. 1901 ; 16 P. R. 1902 ; 42 P. R. 1903 ; 99 P. R. 1906 Rel. Even if the locality in which the property in suit is included is not situate in any sub-division, the pre-emptor must prove that the pre-emption prevails in that locality irrespective of the fact that it does or does not prevail in other sub-divisions of the city. The right of pre-emption is a right of a very special kind, and as it hampers the free disposition of property it requires to be clearly and unequivocally shown to exist before it is enforced. 109 P. R. 1900 Rel. The custom of pre-emption does not exist in Baba Malak Sub-divi-

PRE-EMPTION—Custom—Proof.

sion of the town of Nakodar. (*Rattigan, J.*) MELLARAM *v.* BANDOO. **59 P. R. 1911 : 48 P. L. R. 1912 : 12 I. C. 859 : 198 P. W. R. 1911.**

——*Custom—Proof—Instances.*

Those cases in which the vendees admit the existence of a custom of pre-emption are as valuable as cases in which the Court finds the existence of such custom established. But between such cases and those in which the vendee after denying the existence of the custom is eventually induced to come to terms with the pre-emptor and to compromise the dispute, there is very substantial distinction. (*Rattigan and Shah Din, JJ.*) DURGA DEVI *v.* RAMZAN. **91 P. R. 1911 : 127 P L. R. 1911 : 10 I. C. 330 : 217 P. W. R. 1911.**

——*Custom—Proof—Wajib-ul-arz—Effect.*

An entry in wajib-ul-arz, that every co-sharer may freely alienate his own share, negatives the custom of pre-emption. (*Kanhaiya Lal and Daniels, A. J. Cs.*) BUNYAD HUSAIN *v.* ABDUL SUBHAN. **22 O. C. 20 : 50 I. C. 800 : 1 U. P. L R. (J. C.) 34.**

——*Custom—Proof—Consent decree.*

Suits decreed by mutual consent of the parties do not establish a custom of pre-emption in a village, if such a custom is not otherwise proved to exist therein. (*Kanhaiya Lal, A. J. C.*) HIRA LAL *v.* GANESH PRASAD. **36 I. C. 668 : 3 O. L. J. 415.**

——*Custom—Proof of.*

The recognition of a claim for pre-emption in the village in a previous suit when no defence as to the non-prevalance of a custom of pre-emption was put forward, will not establish the custom so as to disallow the contention as to its non-existence in a subsequent suit. (*Lindsay, J.*) ABDUL RAHMAN *v.* KALEKHAN. **1 O. L J 152 : 23 I. C. 943 : 17 O. C. 105.**

Custom—Variation between two Wajib-ul-arzes.

——*Custom—Variation between two* Wajib-ul-arzes—*Village partitioned into several mahals—Subsequent* wajib-ul-arz *giving right of pre-emption among the co-sharers of these mahals—Effect.*

Where a *wajib-ul-arz* of a village mentioned two categories of co-sharers and when subsequently the village was partitioned into mahals, a special provision was inserted in the wajib-ul-arz introducing a third class of co-sharers (after the two mentioned above) for purposes of pre-emption, *held* that such addition did not alter the original custom as it existed among this entire community who owned the village. (*Tudball and Sulaiman, JJ.*) PARBHU DAYAL *v.* JAMIL AHMAD. **64 I. C. 646 : 19 A. L. J. 911.**

——*Custom—*Wajib-ul-arz *— Presumption—Rebutting evidence—Nature of.*

Strong evidence is necessary to rebut the presumption of a custom of pre-emption raised in a *wajib-ul-arz* and the mere fact that the land in question was held revenue free for some period would not be enough to rebut the same. (*Richards, C J. and Tudball, J.*) BADRI NATH *v.* RAM SARAN. **11 I. C. 238.**

PRE-EMPTION—Custom—Miscellaneous.

Custom—Miscellaneous.

——*Custom—Origin of.*

Pre-emption in village communities in India had its origin in the Mahomedan law and was adopted after the moghul rule. In course of time customs of pre-emption grew up or were adopted among village communities, either in accordance with Mahomedan law or with a variation. A custom of pre-emption was in all cases the result of agreement among the share-holders of the particular village. The object is as far as possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend on a custom or upon a contract, the custom or contract as the case may be must, if disputed, be proved. (*Sir John Edge.*) DIGAMBAR SINGH *v.* AHMED KHAN. **37 All. 129 : 42 I. A. 10 : 13 A. L. J. 236 : 19 C. W. N. 393 : 17 M. L T 193 : 2 L. W 303 : 21 C. L. J. 237 : 17 Bom. L. R. 393 : 28 I. C. 34 : (1915) M. W. N. 581 : 28 M. L.J. 556 (P.C.).**

——*Custom—Contract set up in appeal—Remand how to be made.*

A pre-emption suit based on custom, was dismissed as alleged custom was not proved. In appeal, the claim was based on contract, and the appellate Court recorded a finding to the effect that a contract of pre-emption stood proved between the parties, and remanded the suit to be tried on the merits. *Held*, the proper procedure should be to remand the suits, directing the plff. to amend his plaint basing his claim on the ground of contract thus giving an opportunity to the defendants to urge their defence to the new plea and to give evidence if they think it necessary. (*Rafique and Piggott, JJ.*) BASDEO RAI *v.* JHAGROO RAI. **44 A. 571 : 20 A. L. J. 464 : L. R 3 A 350 : 4 U. P. L. R. (A) 80 : 1922 All. 281.**

——*Custom—Mixed question of fact and law—Interference in second appeal when justified.*

The question of custom of pre-emption is a mixed one of law and fact, and will be considered in second appeal if there is a clear error of law or misinterpretation of document. (*Mears, C. J. and Piggott, J.*) YAQUB ALI *v.* TAJJAMAL HUSSAIN. **L. R. 3 A 504.**

——*Custom—Village held by single proprietor.*

Once the village comes into the hands of a single proprietor the custom of pre-emption recorded in the wajib-ul-arz comes to an end. (*Richards, C. J. and Rafique, J.*) KULUSU MUNNISA *v.* KHASLAT HUSSAIN. **50 I. C 179: 17 A. L. J. 345.**

——*Custom—Offer.*

Where a custom of pre-emption is that a person should first offer to sell his property to a co-sharer before sale to a third party, he is not bound to offer it a second time after the agreement to sell to the third party. (*Richards, C, J. and Tudball, J.*) SHAMSER SINGH *v.* PEARY DUTT. **40 All. 690: 46 I. C. 761: 16 A. L. J. 683.**

PRE-EMPTION—Custom—Miscellaneous.

———*Custom—Individual.*

Custom cannot exist with respect to one individual. (*Richards, C. J. and Tudball, J.*) KAMERUNNISSA BIBI *v.* SUGHRA BIBI.

39 All. 480: 40 I. C. 427: 15 A. L. J. 422.

———*Custom—Share of Mahal confiscated by government—Custom already prevailing, effect of.*

The custom of pre-emption already existing in a mahal is not affected by the confiscation of a share of a mahal by the Government and the grantee of a confiscated share has a right of pre emption against a stranger. (*Richards, C. J. and Tudball, J.*) DURGA PRASAD PANDE *v.* FATEH BAHADUR SINGH.

36 All. 451 : 26 I. C. 494: 12 A. L. J. 725.

———*Custom — Agreement by co-sharers——Effect.*

Agreement by co-sharers not to recognise a local custom of pre-emption binds their successors in title. (*Kanhaiya Lal and Daniels, A. J. Cs.*) BUNYAD HUSSAIN *v.* ABDUL SUBHAN.

22 O. C. 20: 50 I. C. 800: 1 U. P. L. R. (J. C.) 34.

Custom or Contract.

———*Custom or contract*—Wajib-ul-arz—*Reference to extraneous matters.*

A *wajib-ul-arz* referred, besides pre-emption to other matters, namely, the manner of inheritance the powers of the widow in possession after her husband's death, the manner of succession when a deceased co-sharer left two widows and provisions for the exclusion of daughters and daughter's sons from inheritance. *Held*, that the *wajib-ul-arz* was a record of custom. 18 A. L. J. 879: 36 All. 471 Dist. (*Lindsay and Sulaiman, JJ.*) ALAMA CHAND *v.* CHHAJJU.

45 A. 559: 1923 A. 530.

———*Custom or contract* — Wajib-ul-arz—*Document containing extraneous matter.*

Where the record, which is relied upon for the purpose of showing custom, contains a number of extraneous matters some of which could only have relation to a contract entered into between the parties and which could not possibly be based upon custom then it ought to be taken that the whole *wajib-ul-arz* is not properly a record of custom at all. 16 A. L. J. 879, *Foll.* (*Rafique and Lindsay, JJ.*) SITA RAM TEWARI *v.* FAUJDAR RAI.

45 A. 490 : 1923 A. 525.

———*Custom or contract* — Wajib ul-arz—*Entry in.*

An entry was made in the *wajib-ul-arz* giving a right of pre-emption as regards a village which had been confiscated by government and then re-granted *Held*, it was a record of contract and not of custom. (*Rafique and Lindsay, JJ.*) SHIB DEI *v.* KANIZ FATIMA. **21 A. L. J. 99: L. R. 4 A. 362 : 1923 A. 282 (1).**

———*Custom or contract* — Wajib-ul-arz—*Birtdars—Contract.*

An entry in the *wajib-ul-arz* that among birtdars, the other birtdars must be given the first refusal in cases of transfer was later on changed, by introducing the preferential right of nearer co-sharers. *Held*, the whole record embodied

PRE-EMPTION—Custom or Contract.

only a contract which ended with the period of the settlement and a right of pre-emption based on custom could not be supported. (*Rafique and Piggott, JJ.*) JHINAK SINGH *v.* RAM BARAN SINGH.

21 A. L. J. 95: L. R. 4 A. 110: 1923 A. 414 (1): 1923 A. 260.

———*Custom or contract — Pleadings — Amendment.*

Where the plaintiff in a pre-emption suit is expressly based on the custom of the village and not upon a contract between the co-sharers, the suit should be dismissed if the alleged custom is not proved If the court thinks a contract of pre-emption is proved, the proper procedure is to allow the plaintiff to amend the plaint and give defendants an opportunity to meet the new case. On the facts, a prayer to amend the plaint in second appeal was refused. (*Rafique and Piggott, JJ.*) RAM CHARIB TEWARI *v.* SHANKAR TEWARI. **L. R. 3 A. 636: 20 A. L. J. 15 : 1922 All. 5.**

———*Custom or contract — Wajib-ul-arz — Saharanpur Dt.*

The entries in a *wajib-ul-arz* are *prima facie* to be regarded as referring to customs rather than to agreements. The Court however can take into consideration when considering the evidence as a whole, the language which is used in the wajib-ul-arz along with other evidence. If on a consideration of the entire evidence the Court is not satisfied that a custom exists, the finding is a finding of fact with which the High Court cannot interfere in second appeal. There is no law or decision to the effect that a custom of pre-emption does not exist in Saharanpur Dt. (*Richards, C. J. and Tudball, J.*) BARU MAL *v.* TANSUKH RAI.

37 All. 524: 29 I. C. 1001: 13 A. L. J. 717.

———*Custom or contract—Entries in wajib-ul-arz*

References in wajib-ul-arz to pre-emption are to be taken as references to customs rather than to contracts. The fact that a wajib-ul-arz is for a settlement for a certain number of years does not prevent co-sharers from recording their customs therein. (*Richards, C.J. and Tudball, J.*) GHANSAM *v.* BIRANCHI LAL. **25 I. C. 301:12 A. L. J. 527.**

———*Custom or Contract—Issue—Wajib-ul-arz—Evidence.*

It is the existence of a custom of pre-emption and not the construction of the *Wajib-ul-arz* based on custom that is the subject of issue. The *wajib-ul-arz* however, is a piece of evidence to be carefully considered. 33 A. 65 Relied on. (*Richards, C. J. and Tudball, J.*) ZULFIKAR HAIDAR *v.* DURGA. **24 I.C. 422 (All.).**

———*Custom or contract—Wajib-ul-arz—Construction—Value of.*

In pre-emption cases the wajib-ul-arz is in some cases, evidence of great importance. But the existence or non existence of a custom of pre-emption does not and cannot depend upon the construction of a wajib-ul-arz which is to be taken into consideration and carefully considered. There is no class of evidence which varies so much in its importance as does a *wajib-ul-arz.* (*Richards, C. J. and Tudball, J.*) ZALIM SINGH *v.* RADHA BAI. **17 I.C. 594.**

PRE EMPTION—Custom or Contract.

———*Custom or contract—Wajib-ul-arz—Evidence—Perfect partition.*

In a suit for pre-emption, the onus is upon the plff. to prove the existence of the custom of pre-emption. It is necessary for him not merely to establish the existence of some custom of pre-emption but he has to establish the existence of a particular custom which gives him the right to pre-empt as against the deft. No difference exists between the mode of proof of a custom of pre-emption and any other custom. The existence or otherwise of a custom of pre-emption cannot be said to depend upon the construction of a *wajib-ul-arz*. The wajib-ul-arz is not the custom. It is merely evidence of custom, and no class of evidence is more likely to change in value according to circumstances than that of the wajib-ul-arz. 32 A. 363 Ref. The main object of the custom of pre-emption is to prevent strangers coming into the co parcenary body. 22 A. 1. Ref. A co-sharer in one of the mahals transferred his share to another person, a mortgagee, in the same mahal. A co-sharer of the village who was a co-sharer in a different mahal, brought a suit for pre-emption. *Held*, that the suit should fail. (*Richards, C. J. and Tudball, J.*) AHMAD SAYED KHAN *v.* DIGAMBAR SINGH. **16 I. C. 361.**

———*Custom or contract — Wajib-ul-arz—Question of proof—Partition.*

After perfect partition of the village into three mahals, a wazib-ul arz was prepared which was a copy of the one before the partition. Plaintiff brought a pre-emption suit, in which he was a co-sharer in a *mahal* different from that in which the property was situate, *held* that if the suit was based on contract, plaintiff should fail as he was not a party to the wajib-ul arz, and if the suit is based on custom, plaintiff should fail as he had not proved the custom. It is for the plaintiff to prove that a particular custom prevails. The question to be decided is the proof of the existence of the custom and not merely the construction of the wazib ul-arz. (*Richards, C. J. and Tudball, J.*) GANGA SINGH *v.* CHEDI LAL. **33 All. 605 : 12 I. C. 98 : 8 A. L. J. 996.**

———*Custom or contract—Evidence.*

It is a question of evidence in each case whether a right of pre-emption exists by custom or contract. (*Richards, C. J. and Tudball, J.*) LALU RAM *v.* RAM GHULAM SAHU. **11 I. C. 46.**

———*Custom or contract— Wajib-ul-arz — Construction.*

The wajib-ul-arz of 1873 of a village gave the right of pre-emption, first to the own brothers of the vendor or nephews having a common ancestor ; second to a co-sharer in the patti, and the third to the co-sharer in another patti. The wajib ul-arz of 1873 which was headed " Right of co-sharers *inter se* based upon custom or contract " provided " If a share-holder wishes to transfer, he shall do so to his own brother, then to near relations, if they refused, then to the co-sharer of the *patti* and after them to the co-sharers in the village." After the preparation of this latter wajib ul arz the village was partitioned. The pre-emptor was a brother but not a co-sharer of the vendor, and had no right of pre-emption. (*Stanely, C J. and Banerji, J.*) JWALA SINGH *v.* SUMER CHAND. **10 I. C. 1003 : 8 A. L. J. 515.**

PRE-EMPTION—Decree.

———*Custom or Contract— Wajib-ul-arz—Construction.*

By the first wajib-ul-arz was conferred the right of pre-emption generally The second gave the right first to near co-sharers and secondly to co-sharers in the other *thoke*. The third one gave the right in order to near pattidars of the same *thoke* and pattidars of the village. It was held (*Banerjee, J. dissenting*) the documents recorded a contract. 7 A. L. J. 1040 Dist. (*Stanley, C. J. and Banerjee, J.*) DIP NARAIN SINGH *v.* BHAGWAT SINGH. **9 I. C. 911 : 8 A. L. J. 401.**

———*Custom or contract — Wajib-ul-arz — Construction.*

The following was found in the wajib-ul-arz of a village :—"No suit for pre-emption has yet been brought. We agree that the custom of the right of pre-emption should prevail in future." *Held* that this was evidence of contract and no of an existing custom. (5 A L. J. 470 ; 32 A. 201 Foll.) (*Stanely, C. J. and Banerjee, J.*) KALYAN RAI *v.* MUHAMAD MUSTAFA ALI KHAN. **9 I. C. 562.**

———*Custom or contract—Wajib-ul-arz—Construction.*

In the wajib-ul-arz of 1833 was a clause of pre-emption in favour of the co-sharers. That of 1860 contained preference of near co-sharers to other co-sharers and next of the cosharers in the same *thoks* to cosharers of other *thoks*. *Held*, these were evidence of custom and not of contract. (*Stanley, C. J. and Banerjee, J.*) RAGHUNATH PRASAD TIWARI *v.* LACHMI NARAIN TIWARI. **9 I C. 552.**

———*Custom or contract—Created by contract in Oudh.*

A clause, put in a deed prohibiting transfer of property in favour of any person other than one mentioned therein creates a right of pre-emption in favour of such person. (*Stuart, A. J. C.*) GERIBALA DEBI *v.* CHANDIKA SINGH. **2 O. L. J. 289 : 30 I. C. 285 : 18 O. C. 104.**

Decree.

———*Decree—Separate suits by plaintiffs having equal rights—Procedure.*

Where three suits for pre-emption are brought by three pre-emptors having equal rights of pre-emption the property consisting of shares in a village. *Held*, that the plaintiffs were each entitled to a 1/3rd share in pre-empted property. 21 M. 167 ; 28 A. 416 Ref. (*Lindsay and Sulaiman, JJ.*) HARGOBIND SINGH *v.* HUKUM CHAND. **45 A. 608 : 21 A.L.J. 551 : 1924 A. 94.**

———*Decree— Pre-emptor and vendee on same relation—Effect.*

Where in a claim for pre-emption, the vendee and pre-emptor stand in the same relation as regards the property, the latter can get a decree only as regards one half. (*Rafique and Lindsay, JJ.*). ZIA-UD-DIN *v.* ABDUL HASSAN. **45 All. 487 : 1923 A. 520.**

PRE-EMPTION—Decree.

——— *Decree - Compliance with terms.*

A decree for pre-emption provided that the money was to be paid within a certain time to the vendee and on his failing to receive it to be deposited in court. A deposit of the same to the credit of the vendee in the treasury without informing the court or directing issue of notice to the vendee is not a sufficient compliance with the decree. (*Rafique and Piggott, JJ.*) AJODHIA PRASAD *v.* GOBIND PRASAD. **45 A. 276 : 21 A. L. J. 63 : L. R. 4 A. 90 : 1923 A. 250.**

——— *Decree—Time fixed for deposit—Payment to vendee out of court and certified to court within time is proper.*

Where a pre-emption decree directs deposit of the purchase-money within a fixed time, the payment thereof to the vendee out of court and the certifying of such payment by the vendee to the court within the time fixed is a full compliance with the decree. (*Tudball and Rafique, JJ.*) SUKHPAL SINGH *v.* ABDUL RAHMAN. **19 A. L. J. 493 : 63 I. C. 889 : 3 U. P. L. R. (All.) 108.**

——— *Decree—Nature of—Money required if an antecedent debt.*

Payment under a pre-emption decree is not a necessity nor money required for such purpose constitutes antecedent debt (*Piggott and Walsh, JJ.*) CHATUR BHUJ *v.* GOBIND RAM. **67 I. C. 668 : 4 U. P. L. R. (A.) 43.**

——— *Decree—Payment not made—Appellant disentitled to hearing on merits.*

A pre-emption decree directed plaintiff to pay the pre-emption price within a specified time but without doing so he preferred an appeal against the amount fixed. *Held*, the fact that he had not complied with the terms of the decree as to payment is no ground for dismissing the appeal without going into the merits. (*Tudball and Rafique, JJ.*) JHANDHI LAL *v.* SHIAM LAL **54 I. C. 756.**

——— *Decree—Amount—Deduction of costs—Deposit of balance.*

A pre-emptor directed to pay into Court a specific sum of money is entitled to deduct the amount of the costs awarded from the sum he is directed to pay into Court. (*Lindsay, J.* RAM LAGAN BANDE *v.* MAHOMED ISHAQ KHAN. **1 U. P. L. R. (H. C.) 181 : 54 I. C. 395 : 18 A. L. J. 162.**

——— *Decree—Time for payment of purchase-money.*

A plaintiff in a pre-emption suit must be ready to pay the purchase money whenever he can get possession of the property but if he wants some more time, he should specially request the Court for it. (*Richards, C. J. and Tudball, J.*) CHITAN SINGH *v.* BALDEO SINGH. **46 I. C. 75 : 16 A. L. J. 506.**

——— *Decree — Condition of payment into Court—Money raised by mortgage on decreed property itself—If compliance with decree.*

Where plaintiff obtained decree for pre-emption conditional on payment into Court of the pre-emption money within a certain period, *Held*, it was sufficient compliance with the terms of the decree, if the account was raised by a simple mortgage of the decreed property itself and paid into Court. (*Richards, C. J. and Banerjee, J.*) LAKHPAT SINGH *v.* BABU RAM. **40 I. C. 35.**

——— *Decree—Withdrawal of deposit by vendee—Right to appeal.*

A vendee in a pre-emption suit, who applies but does not actually withdraw the money deposited in Court by the plaintiff as per terms of the decree to be paid to him is not thereby estopped from appealing against that decree. (*Knox, J.*) KHELAWAN KOERI *v.* ABDUL RAHIM. **29 I. C. 452 : 13 A. L. J. 677.**

——— *Decree—Appeal—Enhancement of price—No time fixed—Practice*

Where the Appellate Court in a pre-emption suit enhanced the amount decreed to be payable by the pre-emptor in the first Court but omitted to fix any time for payment of the enhanced amount. The pre-emptor paid it within one month and a day. *Held*, that the plaintiff pre-emptor was entitled to a reasonable time within which to pay the amount decreed and the time within which it was in fact paid was reasonable. (*Richards C.J. and Tudball, J.*) GUPTAR TEWARI *v.* SARAN TIWARI. **36 All. 514 : 26 I. C. 65 : 12 A. L. J. 842.**

——— *Decree—Money paid in Court—Decree set aside—Money attached and paid out to pre-emptor's creditors—Appeal—Decree confirmed—If pre-emptor can obtain possession without paying money deficient.*

When in pursuance of a pre-emption decree, money was paid into Court, but the decree was set aside and in the meanwhile, a part of the money was attached and paid out by the Court to one of the pre-emptor's creditors and on appeal, the original decree was confirmed, *held* that though the Court was wrong in paying out the money before a final decree had been made in the suit, the pre-emptor cannot obtain possession without repaying the amount drawn out, especially as the vendor had not committed any default and the pre-emptor had benefited by payment out to one of his creditors. (*Richards, C. J. and Banerjee, J.*) SHEO GOPAL *v.* NAJIB KHAN. **36 All. 398 : 23 I. C. 869 : 12 A. L. J. 732.**

——— *Decree—Deposit of money in Court—Decree-holder of pre-emptor drawing out money, Pendency of appeal—Pre-emptor entitled to possession with redeposit.*

Where the pre-emptor deposited money in Court and his decree holder removed a portion of it during the pendency of an appeal, *held* that on the appeal being allowed, the pre-emptor is entitled to possession without further deposit, since he had carried on the condition in the decree fully and had not removed the money wrongfully from Court. (*Tudball, J.*) NAJIB KHAN *v.* SHIVA GOPAL. **21 I. C. 67: 11 A. L. J. 668.**

——— *Decree—Deposit in Court—Cost deducted.*

Held, that there was a proper deposit in spite of the fact that he had taken out Rs. 314 towards

PRE-EMPTION—Decree.

costs out of the amount directed by the decree to be paid. (*Karamat Hussain and Tudball, JJ.*) ALI HUSSAIN *v.* AMIN ULLAH. **34 All. 596 : 15 I. C. 337 : 10 A. L. J. 153.**

——— *Decree—In favour of one pre-emptor—Suit by another—Maintainability.*

A pre-emption decree in favour of one as co-sharer is no bar to a subsequent suit by another not a party to the previous decree claiming by preferential right. 7 A. 91: 3 A.L.J. 94 Dist. (*Knox, and Karamat Hussain, JJ.*) NASIRAM BIBI *v.* RAHIM BUX. **9 I. C. 561.**

——— *Decree—Death of pre-emptor.*

Where the pre-emptor died after the decree and pending the appeal, and the original vendor himself is his legal representative, the suit need not be dismissed on appeal. 130 P. R. 1916 Foll. A pre-emption decree could not be affected by anything which happened after it was made. (*Campbell, J.*) GANDA SINGH *v.* BHAN. **1923 Lah. 3 10.**

——— *Decree not complied within time--Extension of time.*

The decree holder in a pre-emption suit must comply with the terms of the decree within the time fixed therein. Where the terms are clear he cannot get an extension of time. (*Broadway, J.*) KHAN MUHAMMAD *v.* AHMAN. **1924 L. 359.**

——— *Decree—Deposit of amount—Deduction of costs.*

In a suit for pre-emption plaintiff obtained a decree in his favour with costs, and deposited the amount specified in the decree less the amount of costs. On appeal the amount of the price was raised and each party was ordered to bear his own costs in both the Courts. The plaintiff failed to pay the amount of costs which he had deducted out of the decree amount in the first Court. *Held*, that the decree for pre-emption had not been complied with and that the suit should stand dismissed for non-deposit of the proper amount in time. 10 A. 400 ; 34 A. 596 distinguished. (*Abdul Raoof, J.*) ISHAR SINGH *v.* PESHAWRI RAI. **69 I. C. 516.**

——— *Decree—Not transferable.*

A decree for pre-emption is not capable of transfer so as to enable the transferee to obtain possession of the pre-emptional property in execution. (*Broadway and Harrison, JJ.*) MEHR KHAN *v.* GHULAM RASUL. **2 Lah. 282 : 1922 L. 300**

——— *Decree—Deposit—Deduction of decree amount and costs--Intention of parties—Immaterial.*

Plff.'s suit for pre-emption was decreed on payment of Rs. 99 and they were also allowed costs. *Held*, the plff. could deposit the decree amount deducting costs. 10 I. C. 454 Foll. It is immaterial what the decree holder intended to do. The test is whether he has sufficiently complied with the terms of the decree. (*Chevis and Scott-Smith, JJ.*) KAPURIA MAL *v.* WALI MAHOMAD. **4 Lah.L.J. 354: 2 Lah. 294 : 23 P. L. R. 1922 : 1922 Lah. 142.**

——— *Decree—Non-compliance with—Right of appeal as to price.*

PRE-EMPTION—Decree.

The mere fact that a pre-emptor has not complied with a pre-emption decree in the matter of the payment of the purchase money is no bar to his appealing against the decree so far as the price is concerned. 76 P. R. 1890 : F. B. 67 P. R. 1895 Foll. (*Martineau, J.*) MUHAMMAD KHAN *v.* GHULAM QADIR. **4 Lah. L. J. 397 : 1922 Lah. 36.**

——— *Decree—Time fixed for payment—Calculation of.*

On the 29th August 1919 the plff. was given a decree for possession by pre-emption on condition of payment of Rs. 500 within one month from the date of judgment. From that day onwards the Court remained closed until the 7th of October on which day the plaintiff appeared in Court and tendered the balance of pre emption money.

Held, that payment on the day on which the Court re-opened was all that could possibly be expected of the plff.

41 A. 47 Foll. (*Chevis, Broadway and Wilberforce, JJ.*) HIMMUM *v.* FAUJA. **67 I. C 772 : 3 Lah. L. J. 310 (F. B.).**

——— *Decree—Extension of time fixed for payment—Appeal.*

An order refusing to extend time fixed for payment of the decretal amount under a pre-emption decree is not appealable. (*Le Rossignoll, J.*) ABBAS KHAN *v.* NURKHAN. **60 I. C. 496 (Lah.).**

——— *Decree--Strict compliance—Essential.*

There must be strict compliance with all the terms of a pre-emption decree. Where after the pre-emptor had obtained possession of the property it was found that the pre-emption price had, by mistake been short paid to the extent of one rupee *Held*, the pre-emptors must restore the property to the vendee notwithstanding the fact that at the time of the original deposit they could have deducted much more towards their costs. (*Broadway, J.*) WALI MAHOMED *v.* KAPURIA MUL. **2 Lah. L J. 770.**

——— *Decree—Sale under court's decree—Punjab Pre-emption Act* (1913), S. 3 (5).

Sale, under the Court's decree, for the specific performance of a contract to sell is open to pre-emption. S. 3 (5) of the Punjab Pre-emption Act does not bar the suit as the sale is not under a money decree. (*Shadi Lal and Le Rossignol, JJ.*) RANGI RAM *v.* MEHR SINGH. **50 I. C. 241 : 111 P.R. 1919.**

——— *Decree—Basis of claim not to be altered.*

If a plaintiff sues for pre-emption alleging a superior title as collateral of the vendor under the Mahomedan law and that right is negatived the Court cannot give him a decree on the ground that he was an agriculturist and the vendee was not. (*Wilberforce, J.*) NABI BAKHSH *v.* SAJIT ALI. **50 I. C. 160 (Lah).**

——— *Decree—Costs awarded to pre-emptor—Deduction of amount from price.*

In a pre-emption decree the pre-emptor decree holder is entitled to deduct the costs allowed to him. Where costs were allowed to a successful vendee in the first Court but its order was reversed on appeal the pre-emptor is not obliged to

PRE-EMPTION—Decree.

apply under S. 144, C. P. C., for the refund of the amount realised by the vendee from the pre-emptive price paid by the pre-emptor in Court. (*Wilberforce, J.*) GIRDHARI LAL *v.* ATTAR.
47 I. C. 511 : 96 P. W. R. 1918.

——*Decree—Government notification taking away pre-emption right—Effect.*

A pre-emption decree obtained by the plaintiff before the issue of a Government notification takes away the right of pre-emption is not affected by such notification in spite of the decree being under appeal at the time of the notification, but the case is otherwise when no decree has been obtained at the time of the notification 16 I. C. 959 Dist. (*Johnstone, C. J. and Chevis, J*) NAIZ ALI *v.* MUHAMMAD RAMZAN. **37 I. C. 227 : 130 P. R. 1916.**

——*Decree—Successive pre-emptors—Uncertified payment.*

Payment to vendee by a superior pre emptor as against the inferior before the appointed date but certified later does not amount to proper payment into Court, if it does not put the Court in a position to issue a warrant of possession in favour of the decree holder till the appointed date. (*Johnstone, C. J.*) ABUL FATTEH *v.* FATTEH ALI. **73 P R. 1916: 121 P W R. 1916 : 35 I. C. 363 : 137 P. L. R. 1916.**

——*Decree—Appeal — Extension of time—Good faith.*

An Appellate Court is not bound to grant to a pre-emptor an extension of time for payment fixed by the original Court though it can and will probably grant extension to a pre-emptor whose conduct has been *bona fide*, and does not exhibit a contemptuous disregard of the order passed by the Court. But if the pre-emptor has paid no money into Court or made no tender of a sum to the Court or if the sum he has paid or tendered is unreasonably small, he cannot expect to be granted an extension of time. (*Kensington, C. J. and Rattigan, J.*) WARYAM SINGH *v.* MAHTAB SINGH. **21 P. R. 1915 : 26 I. C. 433 : 31 P. L. R. 1916.**

——*Decree—Money paid into Court—Paid out by Court to wrong person—Effect.*

The fact that a wrong person withdraws the pre-emption money paid into Court, will not affect the decree that the pre-emptor has got. (*Chevis, J.*) MAHOMED HAYAT *v.* NARSING DASS. **62 P. W. R. 1914 : 25 I. C. 717 : 158 P. L. R. 1914.**

——*Decree—Appeal—Withdrawal of money deposited by pre-emptor in Court.*

A vendee appellant in a pre-emption case can proceed with his appeal against the pre-emption decree though he withdraws from the Court the purchase money deposited by the pre-emptor under the pre-emption decree. 16 P. R. 1907 Foll. (*Rattigan and Shah Din, JJ.*) IFTIKHAR ALI *v.* THAKAR SINGH. **83 P. R. 1912 : 15 I. C. 347 : 170 P. W. R. 1912.**

——*Decree—Effect—Price overstated in the deed—Suit by vendor's sons—Pre-emptor if can assert real consideration.*

PRE-EMPTION—Decree.

Where sale consideration was overstated in the deed and the pre-emptor got a pre-emption decree on payment of market value and where the sons of the original vendors sued for possession *Held* that the pre-emptor was not debarred from the ascertaining the real market price and contending that this was for necessity and he cannot be considered as *Particeps Criminis* with the vendee simply because he is, by his pre-emption decree, identified in interest in many respects with the vendee. (*Rattigan and Chevis, JJ.*) DAN SINGH *v.* PHANGAN SINGH.
83 P. R. 1911 : 13 I. C. 796 : 216 P. W. R. 1911.

——*Decree — Othi mortgage—Right, when arises.*

Where before the right of pre-emption had been waived by the othi mortgagee, the mortgagor had created a second othi in respect of the property, part of the consideration for the second othi being a discharge of a previous kanom mortgage held by the second mortgagee, the second othi is a complete transaction and so the right of pre-emption could be exercised by the first othidar, and that as second othidar was not bound to surrender the lands held by him under kanom, unless he was put in possession of the suit lands, he could not be directed to make a conveyance but only a declaratory decree should be granted. (*Benson and Sundara Aiyar, JJ.*) PALAKUNNATH KOLAYI *v.* NARAYANA MANGAL NATH. **(1911) 1 M. W. N. 263 : 9 I C. 1010 : 9 M L. T. 495.**

——*Decree—Time if can be extended—Waiver of rights—Estoppel.*

The time for payment of purchase money in accordance with a pre emption decree cannot be extended by the trial court but should be paid in time. But if all the parties concerned agree to a deposit out of time, it amounts to a waiver of rights and all are estopped from resiling from that position. (*Dalal, A. J. C.*) SHAMSHER SINGH *v.* RAM KALI. **9 O & A. L. R. 424 : 1924 Oudh 153.**

——*Decree—Equitable relief—Power of Court to award.*

The Court need not attach any sanctity to the pre-emptor's right to be given possession nor is the Court in granting a pre-emption decree precluded from moulding the relief according to the justice of the case. The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases, where the party in possession has satisfied an encumbrance subsisting upon the estate at the time he came into possession, which otherwise the plaintiff himself will have to meet. There may be cases in which a Court would hold that the vendee had paid off encumbrances in bad faith or improvidently, and would refuse to add this payment to the money payable under the pre-emption decree. Only the interests of the third parties may be involved. But the general rule does apply to pre-emption decrees like other decrees for possession of property. (*Dalal and Simpson, A. J. Cs.*) BALDEO SINGH *v.* THE DEPUTY COMMISSIONERS OF KHERI.
10 O. L. J. 112 : 9 O. & A. L. R 587 : 1924 Oudh 1

PRE-EMPTION—Decree.

——Decree—Arbitration—C. P C., Sch II. Paras. 20 and 21 — Decree binding between parties.

Vendee must do one of two things within limitation; either he must institute a suit for pre-emption or he must obtain a conveyance. If he has stated that he possesses the right that he has approached the vendee, or that they have referred their matter to arbitration, will not prevent his being barred by limitation.

A pre-emptor who refers his matter to arbitration out of Court and then makes an application under paragraph 20 is proceeding by suit and not by private conveyance and his suit must be within time. Probably a decree even if the application was beyond time. But it holds good only between parties. Maula Baksh *v.* Bechan Khan. (*Simpson, A. J C.*) SHEO DUTT BAHADUR SINGH *v.* BISHUNATH SINGH AND OTHERS.

9 O. L. J. 546 : 1923 O. 91.

——Decree—Rights under—Loss of title—Pendente lite.

The plaintiff asking in the first Court or in appeal for the first time for pre emption must have an existing interest forming the basis of a decree in his favour. Once a decree on his favour has been passed subsequent events will not affect it (*Daniels, A. J. C.*) JAGANATH SINGH *v.* MATA PRASAD. **6 O. L J. 76 : 22 O. C. 3 : 50 I. C. 190 : 1 U. P. L. R. (J. C.) 30.**

——Decree—Appeal —Deposit of price, if a condition precedent.

Payment of the purchase money decreed by the trial Court in a pre-emption suit is not a condition precedent to the right of a person to file an appeal from the decree by which that payment is directed, if the appellant disputes either the method of payment or the amount payable. (*Kanhaiya Lal, A. J. C.*) LALTA BAKHSH SINGH *v.* GANGA BAKSH SINGH. **20 O. C 290 : 43 I. C. 219 : 5 O L. J. 135.**

——Decree—Payment in accordance therewith—Right fructifies into title.

A pre-emption right fructifies, after decree and payment in accordance with the decree into a title to the property, which title however, may be subject to the decision in an appeal by a defeated litigant in the case. (*Kanhaiya Lal and Kendall, A. J. C.*) RAMSAHAY *v.* JAGADAMBA SINGH.

19 O. C. 153 : 37 I. C. 163 : 3 O. L. J. 683.

——Decree—Deposit of money in Court—Attachment.

The respondent obtained a pre-emption decree and was put in possession of property after payment While the appeal was pending the magistrate recovered money in payment of fine due from the appellant who was convicted of a criminal offence. The pre emption decree was reversed in appeal. *Held*, the appellants were entitled to possession of property contrary to the Lower Court's order. Further, the Judge's action was highly improper in interfering with money before the disposal of the suit (*Chamier, J. C. and Evans, A, J. C.*) HAIDAR HUSSAIN *v.* GHASITI BIBI. **11 I. C. 227 (Oudh.)**

PRE-EMPTION—Joint Vendees.

Joint Vendees.

——Joint vendees.

In a purchase by several vendees, each purchased a separate specified and divided share. One of the vendees died and his representatives were not brought on record within the prescribed period. *Held*, that the suit for pre-emption for his share abated ; but that it did not abate in respect of the shares purchased by other vendees. 4 A. 145 Dist. (*Richards, C. J, and Tudball, J.*) HUKAM SINGH *v.* THAKUR DAS.

12 I. C. 738 : 8 A. L. J. 1135.

——Joint vendees—Suit against vendees one of whom was wrong person—Correct vendee brought on record after limitation—Effect on suit.

Where in a pre-emption suit against two joint purchasers one of them was first wrongfully named as vendee and the correct person was then brought on record but after limitation—*held* that as the sale in favour of the vendees was a joint one, the suit is barred in toto. (*Richards, C. J and Tudball, J.*) MAMRAJ SINGH *v.* HIRDAY RAM. **11 I. C. 938 : 8 A. L. J. 814**

——Joint vendees—Purchaser joining one having inferior rights— Effect of— Purchase money—Sale-deed—Intention of parties—Estoppel.

If a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of a pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase. 48 P R. 1907 Foll. Persons where by clothing their transaction in a particular form, induced a pre-emptor to come forward and claim pre-emption in respect of the transaction as a whole they cannot be allowed to turn round thereafter and claim to show that their real intention was something quite different, 5 P. R. 1914 Foll. Where the purchase money for a sale is paid by the various vendees in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed. (*Broadway, J.*) YAKUB KHAN *v.* KARMAN. **66 I. C. 466.**

——Joint vendees—Right to—Vendee joining stranger—Whether can resist.

A vendee associating himself with a stranger co-vendee in the purchase, loses his right to resist a pre emptor's claim. (*Shah Din and Chevis, JJ.*) BASAWA SINGH *v.* NATHA SINGH

60 P. R. 1914 : 128 P. L. R. 1914 : 23 I. C. 151 : 83 P. W. R. 1914.

——Joint vendees—Indivisible transaction—Purchase money expressed as a lump sum.

Where a sale deed specifies the shares to be taken by the several vendees, but the purchase money is expressed to be paid in a lump sum without specification, the sale transaction must be held to be indivisible. It would however be otherwise if the amounts to be paid by the several vendees were also specified. 19 A, 148 (F.B.) not

PRE EMPTION—Lis pendens.

followed. (*Rattigan and Smith, JJ.*) MAGHI *v.* NARAIN 256 P. L. R. 1913 : 165 P. W. R. 1913 : 20 I. C. 31 : 6 P. R. 1914.

Lis pendens.

———Lis pendens—*Sale to superior pre-emptor—Effect.*

Where pending a suit for pre-emption, a person having a superior right to that of plaintiff purchases the property within the prescribed period of limitation the suit for pre emption must fail. The fact that the third party purchased at a private sale does not make it any the less a purchase in the exercise of the right of pre-emption. (*Martineau, J.*) DHARAM SINGH *v.* KIRPAL SINGH. 1923 Lah. 31 (2).

———Lis pendens—*Transfer of property pending suit.*

Pending a suit for pre-emption the vendees transferred the property to a third person under an exchange. The transfer was not made in recognition of the superior right of pre emption. *Held*, that the transfer was effected by *lis pendens* and that the defendant could not resist the plaintiff's claim. (*Shadi Lal, C. J and Harrison, J.*) MUNSHI RAM *v.* MAGHAR MAL. 67 I. C. 304.

———Lis pendens—*Proprietor vendee—Joining with non-proprietor—Sale indivisible.*

A proprietor vendee joining with himself non-proprietors in the purchase is in no better position than that held by the latter, and cannot resist the claim even in regard to his own share, where the sale is indivisible and the deed does not specify the amounts to be paid by the several vendees. 100 P. R. 900. 41 P R. 1907, and 6 P. R. 1914 Ref. A resale by a non-proprietor to a proprietor having taken place after the suit had been instituted the rule of *lis pendens* applied and the re-sale by non-proprietor of his right after the institution of the suit cannot affect the plaintiff's claim, notwithstanding the fact that it (re-sale) took place before summonses were served on the defendants 29 A 339 P. C Ref. (*Shadi Lal and Martineau, JJ.*) PRABHI *v.* HAMIRA. 1 Lah. L J. 209

———Lis pendens—*Transfer of Property Act, S. 52.*

A house belonging to a Hindu lady was sold by her husband in her absence. A third person brought a pre-emption suit impleading the husband and his vendee. During the pendency of this suit, the lady obtained a decree cancelling the sale and possession of the house from the husband and his vendee Thereupon she was impleaded as a defendant in the pre-emotion suit, in which the house was proved to belong to the lady and her husband had no authority to sell it even in her behalf. Both of them acknowledged her to be the real owner without any rights of them in the house. *Held*, the pre-emption suit must fail, (2) that the doctrine of *Lis pendens* did not apply to the decree obtained by the lady against her husband and his vendee (*Rattigan and Shah Din, JJ.*) MUSAMMAT DHAN DEVI *v.* BALMOKAND. 191 P. L. R. 1912 : 16 I. C. 122 : 101 P. W. R. 1912.

PRE-EMPTION—Loss of right.

———Lis pendens—*T.P. Act, S. 52.*

The doctrine of *lis pendens* in S. 52 of the T. P. Act applies to an exchange effected during the pendency of a suit, in favour of a person who has a superior right of pre-emption, but those superior rights have been extinguished on the date of exchange by lapse of time (*Johnstone, and Chevis, JJ.*) KARAM ALI *v.* SULTAN. 30 P. R. 1911 : 10 I. C. 1007 : 187 P. L. R. 1911.

Loss of right

———*Loss of right—Plaintiff joining another person not entitled—Effect.*

Where the plaintiff in a suit for pre-emption joins with him another person having an inferior right to the vendee (defendant) the plaintiff loses the right. 34 A 592 Foll. (*Rafique and Piggott, JJ.*) RAHIMA *v.* RAZZAQ ALI. 21 A L. J. 184 : L. R. 4 A. 132 : 1923 A. 256.

———*Loss of right—Stranger as co plaintiff along with a co-sharer—Amendment cannot be allowed.*

Where a plaintiff having a right to pre-emptions joins with himself in a suit for pre-emption a stranger *i e.* a person who has no such right, he thereby forfeits his right to pre-empt and this disability cannot be overcome by amending the plaint by striking out of the name of the stranger. 19 All. 324 Foll. (*Lindsay and Rafique, JJ.*) BADRI SINGH AND ANOTHER *v.* GOBARDHAN AND OTHERS. 1923 All. 187.

———*Loss of right—Plaintiff joining a person having no right—Effect of.*

A widow of a deceased co-parcener in a joint Hindu family has nothing more than a right to maintenance and is not co-sharer. A plaintiff who has in himself a right to claim pre-emption loses the right by joining in a suit along with a person who is a stranger to the property and has no such right. 7 A. 860 foll. (*Rafique and Lindsay, JJ.*) UDIT NARAIN LAL *v.* RAM LACHMAN RAI. L. R. 4 A. 55 : 4 L.R All. 55 : 1923 A. 161 (1).

———*Loss of right—Co-sharer—Mortgage of entire share by conditional sale—Rights of co-sharer to pre-emption—Partial pre-emption*

Though a co-sharer in a village has mortgaged his entire share of the properties by conditional sale, he remains a co-sharer and as such entitled to pre-emption. Unless the pre-emptor claims to pre-empt the whole of the property sold, his action must fail. But if the vendor has included properties which the plaintiff has no right to pre-empt he can exclude them. 8 A. 462 ; 6 A. 423 Ref. (*Kanhaiya Lal and Sulaiman, JJ.*) RAJAH MOHINDRA MAN SINGH *v.* THAKUR MAHARAJ SINGH. 45 A. 72 : 20 A. L. J. 810 : 1923 All. 48.

———*Loss of right to—Stranger purchaser—Suit by persons having different rights inter se.*

In a suit for pre-emption against a stranger vendee the right as against him is not lost by the plaintiffs joining with themselves persons who have different rights *inter se* but superior to that of the vendee. 10 A L J. 70 Dist. (*Richards, C. J., and Rafique, J.*) SHEORAJ SINGH *v.* NAIK SAHAI. 41 All. 423 : 51 I. C. 153 : 17 A. L. J. 391.

PRE-EMPTION—Loss of right.

——— *Loss of right—Right to vendee becoming co-sharer in village before institution of suit—Effect.*

Where the vendee becomes a co-sharer in the village before the institution of a suit for pre-emption, by reason of a second sale in his favour which is not pre-empted, the suit for pre-emption must be dismissed (*Richards, C. J. and Tudball, J.*) CHABRAJ SINGH *v.* MAHESH NARAIN SINGH. **40 All. 572 : 46 I. C. 976 : 16 A. L. J. 627.**

——— *Loss of right—Wajib-ul arz—Mortgage by conditional sales—Foreclosure, if sale.*

A person whose right to pre-empt a mortgage by conditional sale arose in the date of the mortgage, cannot after failure to enforce it, revive it on the foreclosure of the property (*Richards, C. J and Tudball, J.*) SUNDAR KUNWAR *v.* RAM GHULAM. **40 All. 626 : 46 I. C 900 : 16 A. L. J. 561.**

——— *Loss of right—Pre-emptor acquiring right by imperfect partition.*

Plff. became a co-sharer by means of an imperfect partition of a village made in recent years. The wajib ul-arz gave the right to a *Hissadari karibi. Held*, if the plff, could prove that he came within the custom at the time of sale he was entitled to the benefit of the custom and the fact that he was not within the custom prior to partition will not prevent him from subsequently acquiring the right. 8 I. C. 867 diss. (*Richards, C. J. and Tudball, J.* LALTA PRASAD CHAUDHURY *v.* GOKUL PRASAD. **40 All. 617 : 46 I. C. 125 : 16 A. L. J. 509**

——— *Loss of right—Sale by vendee after one year to a person with right superior to plffs.*

Where pending a suit for pre-emption by A the vendee sold the property to B who had a superior right to that of A one year after the date of the first sale and B did not take steps for more than one year to enforce his rights *held* that he was in no better position than he would have been if the property had been expressly offered to him and he had refused to buy it, and that therefore the plff.'s right is inviolate. (*Richards, C. J. and Tudball J.*) KAMTA PRASAD *v* RAMJAG. **36 All. 60 : 22 I. C. 266 : 12 A. L. J. 9.**

——— *Loss of right—Defence—Not available if suit barred—Mortgage—Redemption.*

A mortgaged his estate to B a co-sharer in 1897 and in 1906 sold his equity of redemption to C. B allowed his rights to pre-empt the sale of 1906 to become time-barred. C then sued B for redemption. *Held*, that C was entitled to redeem the mortgage and B could not plead in defence that he had a right of pre-emption. (*Richards, C. J. and Tudball, J.*) WAJID ALI *v.* SAFQAT HUSAIN. **16 I. C. 219.**

——— *Loss of right—Partition after decree.*

A pre-emptor having a right on the date of sale and on the date of decree, does not lose it even if a partition is effected before a final decree after the appellate decision. (*Richards, C. J. and Tudball, J.*) BIDYA PERSHAD RAM *v.* ACHAIBAR RAM. **15 I. C. 865.**

PRE-EMPTION—Loss of right.

——— *Loss of right—Sale by some vendees—Transfer by vendees in favour of person having equal rights—Effect of.*

The claim of pre-emptor can be defeated by the transfer by vendees whose rights are inferior in favour of persons having equal or superior right to that of the plff. (*Martineau, J.*) HIRA *v.* SARDARA. **3 Lah. L. J. 117 : 59 I.C. 712 : 32 P. W. R. 1921.**

——— *Loss of right—Champerty or maintenance.*

The mere fact that a pre-emptor is suing not only for his own benefit but also for the benefit of persons not entitled to pre-empt but who assist the actual plff. does not disentitle the plff. from exercising his right of pre-emption, (*Scott-Smith and Wilberforce, JJ.*) NEKI *v.* CHAJJU RAM. **48 I. C. 137 : 111 P. W. R. 1918.**

——— *Loss of right—Lost by pre-emptor joining in a purchase with a person having an inferior title.*

A person having a preferential right of pre-emption joining in a purchase with a person having an inferior right, loses his right of pre-emption though the shares in the sale deed are specified : if the proportion of price paid by each vendee is not stated, the transaction is regarded as indivisible and the person having the preferential right loses the right of pre emption as regards a part 20 I. C. 31 Fo l. A person's right of pre-emption is not lost by sale of his land subsequent to a decree for pre-emption. 11 I. C. 708 Foll. (*Scott-Smith, J.*) HARBHAGAT *v.* KALA. **31 I. C. 635 : 186 P. W. R. 1915.**

——— *Loss of right—Suit jointly with person having no right—Plaintiff subsequently born.*

A plaintiff having a right of pre-emption, does not forefeit his right by suing jointly with one having no such right. A person not born at the date of a sale cannot claim a right of pre-emption in respect of that sale, except, perhaps, where he was *en ventre sa mere* at that date. (*Rattigan and Beadon, JJ.*) MANGLI *v.* SOBHA SINGH. **1 P. L. R. 1914: 20 I. C. 272 : 218 P. W. R. 1913.**

——— *Loss of right—Laches—Vendee's liability—Pre-emptor's right Pre-emption.*

The purchaser of property subject to the right of pre-emption, takes a title defeasible if a claim to pre-emption is made within the time limited by law. If the vendee or the transferee from him chooses to run the risk of dealing with the property upon the assumption that no claim to pre-emption will be made they do so with their eyes open. A pre-emptor can delay his suit for pre-emption up to the very last moment. The only risk is that of his losing his right if in the interval another, with equal or superior rights, has by the exercise of greater diligence forestalled him in securing the bargain. (*Rattigan, J.*) PALA *v.* MANGALAN. **182 P. L. R 1913 : 19 I. C. 649 : 132 P. W. R. 1913.**

——— *Loss of right—Pre-emptor denying vendor's title.*

Though the plff. in a pre-emption suit, has at some time prior to the suit, denied the vendor's

PRE-EMPTION—Loss of right.

title, he is not estopped from maintaining the suit. (*Lindsay, J. C*) ALI BANDI *v.* ALI HASSAN.
60 I. C. 706 : 23 O. C. 393.

———*Loss of right—Right to — Denial of vendor's title in previous mutation proceedings.*

The plaintiff had in mutation proceedings previous to the suit for pre-emption suit, denied the title of the vendor to a part of the property sold it does not deprive him of his right of pre-emption. (*Daniels and Lyle, A.J.Cs*) THEPAI *v.* MAHABIR PRASAD. **22 O. C. 144 : 6 O. L. J. 318 : 52 I. C. 621 : 1 U. P. L. R. (J. C.) 64.**

———*Loss of right—Right to pre-empt lost after decree—Effect.*

The loss of the property, qualifying a person to exercise the right of pre-emption after the decree does not take away his right under the decree unless the loss can be referred back to an antecedent date. 46 I. C 339 Foll (*Lindsay, J. C.*) WALI MUHAMMAD *v.* NABI HASAN.
46 I. C. 353 : 5 O. L. J 233.

———*Loss of right—Right not exercised in some cases, effect of—Estoppel.*

The fact that a man did not in some cases exercise his right of pre-emption does not prove the non-existence of custom of pre-emption and in a subsequent suit for pre-emption by him, that fact does not create any estoppel. (*Kanhaiya Lal, A. J. C.*) ATA HUSSAIN KHAN *v.* AGHA HADI.
33 I. C. 775 : 3 O. L. J. 7.

———*Loss of right—Conveyance taken after period prescribed by law for pre-emption—Effect.*

A right of pre-emption cannot be defeated by a person, who fails to exercise his right of pre-emption within the period prescribed by law, by taking a conveyance of the property after the time for a suit for pre-emption has expired. (*Lindsay, J. C.*) RAM SHANKAR *v.* NANIK PRASAD.
1 O. L. J. 187 : 24 I. C. 32 : 17 O. C. 150.

———*Loss of right—Presumption as to right of—Oudh Laws Act, S. 7.*

The presumption as to a right of pre-emption is, in the absence of a custom or contract to the contrary, a statutory one created by S. 7 of the Oudh Laws Act and an entry in a Wajib-ul-arz to the effect that every co-sharer is entitled to sell his share to whomsoever he pleased is sufficient to exclude the right of pre-emption. (*Lindsay, J.*) ABDUL RAHMAN *v.* KALE KHAN. **1 O.L.J. 152 : 23 I. C. 943 : 17 O. C 105.**

Mahomedan Law.

Applicability.
Demand.
Difference in caste.
Easement.
Formalities.
Law Applicable.
Miscellaneous.

Mahomedan Law—Applicability.

See also MAHOMEDAN LAW—APPLICABILITY.

———*Mahomedan Law—Applicability —Sale by Mahomedan to Hindu—Co-sharer's claim to pre-emption.*

Where one of two Mahomedan co-sharers agreed to sell his share to a Hindu, with a conditional right to his co-sharer to pre-empt, and the co-sharer, on notice claimed pre emption, *held*, he had a right of pre-emption in accordance with the intention of the parties. (*Viscount Haldane*). SITARAM KHAN RAO *v.* JIAUL HASAN.
45 Bom. 1056 : 48 I. A. 475 : 64 I. C. 826 : 14 L. W 604 (P. C.).

PRE-EMPTION—Mah. Law—Applicability.

———*Mahomedan Law—Applicability—Bihar Hindus—Joint liability of vendor and pre emptor for Government revenue. Bengal Court of Wards Act (IX of 1879), S. 40—Right of Manager to perform preliminary ceremonies.*

The Mahomedan Law of pre-emption is enforceable by and between Hindus in the province of Bihar, including the district of Champaran. B. L. R. F. B. R. 35 Appr. A manager appointed by the Court of Wards of the Estate of a distinguished proprietor is competent under S. 40 of the Bengal Court of Wards Act (IX of 1879) and also independently thereof to observe the formalities which by the Mahomedan Law are essential preliminaries to the claim of pre-emption. The validity of his action does not depend on the subsequent adoption of it by the Court of Wards. The fact that the vendor and pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the Mahal is sufficient to found a claim to pre empt. (*Mr. Ameer Ali.*) JADU LAL SAHU *v.* JANKI KOER.
39 Cal. 915 : 39 I. A. 101 : 16 C. W. N. 553 : 11 M. L. T. 361 : (1912) M W N. 486: 15 C. L. J. 483 : 9 A. L J. 525 : 14 Bom. L. R 436 : 15 I. C. 659 : 23 M. L. J. 28 (P. C)

———*Mahomedan Law—Applicability—Zamindari property.*

If there is a custom of pre-emption obtaining in a village it is not possible that there should be at the same time a right under the Mahomedan Law. On the other hand, if there is no custom of pre emption, and there was at one time an arrangement between the co-sharers which has come to an end with the settlement there is no reason why the co-sharers should not at the end of the settlement be allowed to re-assert their rights under the Mahomedan law, provided that they had such rights before the contract. The Mahomedan law of pre-emption is applicable to large estates including Zamindari property. (*Richards, C. J. and Rofique, J.*) MUSSAMMAT ILAHI JAN *v.* MOMAMMAD ISHAQ KHAN.
49 I. C. 976 : 17 A. L. J. 687.

———*Mahomedan Law — Applicability — Hindus of Godhra.*

The Hindus of Godhra are governed by Mahomedan Law of pre-emption. (*Batchelor and Shah, JJ*) GOKALDAS SURTI *v.* PARTAB KABAI BAROT.
35 I. C. 871: 18 Bom. L. R. 693.

———*Mahomedan Law—Applicability—Khandesh District.*

The Mahomedan rule of pre-emption is not operative in the Dt. of Khandesh, nor can it be accepted in that Dt. as a rule of justice, equity and good conscience. (*Batchelor and Shah, JJ.*) MAHOMED BEG *v.* NARAYAN MEGHAJI.
40 Bom 358: 32 I. C. 933 : 18 Bom. L. R. 81.

PRE-EMPTION—Mah. Law—Demand.

Mahomedan Law—Demand

——Mahomedan Law—Demand—Proof of—Talab-i-is—Testimony of witnesses—Joint demand—Legality.

In cases of pre-emption under Mahomedan Law, the statement of the plaintiff, if believed, is sufficient to prove the demand and it is not essential for him to bring witnesses in evidence in whose presence the *talab* was made. The fact that two demands were made at one and the same time regarding two separate transfers does not make them illegal (*Rafique and Lindsay, JJ.*) SAYAD AMJAD ALI v. SAYAD WAJID ALI.
4 L. R. All. 115 : 1923 All. 487.

——Mahomedan Law — Demand— Second demand—Validity.

Mahomedan Law requires that the second demand for pre-emption should be made either in the presence of the vendor or vendee or on the property that is the subject of pre-emption. The singular words 'vendor' and 'vendee' include the plural also. According to the interpretation of the Mahomedan Lawyers, if the demand is made neither in the presence of vendor nor on the property sought to be pre-empted but in the presence of the vendee then in case there are more than one vendee the demand should be made in the presence of all (*Rafique and Lindsay, JJ.*) ALIMAN BEGAM v. ALI HUSAIN.
45 A. 449 : 1923 A 355 (1).

——Mahomedan Law — Demand — Second demand—Absence of reference to first—Effect.

Under Mahomedan Law, the second demand or *talab i-muasibat* in a case of pre-emption must call the attention of the witnesses present to the first demand or *talab-i-ishtishad* which he had previously made. The fact that the same witnesses were present when the first demand was made is immaterial. (*Rafique and Piggott, JJ.*) SADIQ ALI v ABDUL BAQI KHAN.
45 A. 290 : 21 A. L. J. 109 : L. R. 4 A. 99 : 1923 A. 251.

——Mahomedan Law—Demand—Necessity for.

Under the Mahomedan Law a suit for pre-emption cannot succeed unless the demands for pre-emption of the property are made immediately after knowing of the sale of the property. (*Rafique and Piggott, JJ.*) ABDUL RAHIM v. MT. RAFIQ-UN-NISSA. **4 U. P. L. R 24 (A) : 1923 A 229.**

——Mahomedan Law—Demand.

In the absence of other circumstances a mere statement such as "I have a right to pre-emption and how will the vendees take it" does not amount to a valid first demand according to the strict Mahomedan Law. (*Tudball and Sulaiman, JJ.*) MANGRU v. PARSOTAM DAS.
58 I. C. 777: 18 A. L. J. 1037.

——Mahomedan Law—Demand—Delay in second demand—Zamindari.

The vendee is the person most concerned in the making of the second demand; hence this demand may be delayed for any reasonable time, in order to have it made in the vendee's presence, though the pre-emptor could do it in the presence of vendor or on the land itself. Law of pre-emption applies to Zamindari property and is not limited to houses, gardens and small plots of land. (*Richards, C. J. and Rafique, J.*) FAZAL AHMAD v. TASADDIQ HUSAIN. **17A. L. J 445 : 50 I. C. 92 : 41 All. 428.**

——Mahomedan Law—Demand.

Second demand (*talab-i-istishad*) by the pre-emptor is absolutely necessary for pre-emption under Mahomedan Law. (*Richards, C. J. and Rafique, J.*) MUHAMMAD AHMED SAID KHAN v MADHO PRASAD. **39 All. 133. 35 I. C. 911: 14 A. L. J 1141:**

——Mahomedan Law— Demand—Letter—Talab-i-ishtishad

A Mahomedan pre-emptor cannot validly make the talab-i-ishtishad by letter when he is in a position to do so in person (*Richards, C. J. and Tudball, J.*) MAHOMED KHALIL v. MUHAMMAD IBRAHIM. **38 All 201 : 33 I. C. 349 14 A. L. J. 148.**

——Mahomedan Law—Demand Right to pre-emption—Demand—Sale in lieu of dower debt.

A pre-emptor neednot necessarily make a second Talab or demand it at the time of *Talab maivasibat*, he had an opportunity of invoking witnesses in the presence of seller or purchaser or in the premises to arrest the immediate demand Even when property is sold by a husband to his wife in lieu of her dower a suit by a person for pre-emption can be maintained if he is entitled to a preferential right to purchase. (*Richards, C. J. and Tudball, J.*) NATHU v. SHADI. **37 All. 522 : 29 I. C. 495 : 13 A. L. J. 714.**

——Mahomedan Law — Demand Talab-i-ishtishad—Demand before vendor who was not in possession—Validity of demand.

A Talab-i-ishtishad, in the presence of witnesses before the vendor alone, who was not in possession of the property sold at the time of the demand, is not a valid demand. It should be made on the spot sold or before the seller or the vendee whichever of them is in possession. (*Banerjee, J.*) INAYAT KHAN v. MUHAMMAD YUSUF. **16 I. C. 485: 10 A. L. J. 92.**

——Mahomedan Law — Demand Talab-i-muasibat—Mera hug—Shufa hai, whether valid demand.

The pre-emptor immediately after a sale, said three times *mera huq shufa hai* to certain persons who were present at the spot and asked them to bear witness. Then, without any delay, he took the price and offered it to the vendee and claimed the property informing him that he had already made his demand. *Held*, that the words amounted to a valid demand. 8 A. L. J 270, dist. (*Richards, C. J. and Banerjee, J.*) MOHAMMAD NAZIR KHAN v MAKADAM BUX.
34 All. 53 : 11 I. C. 737: 8 A. L. J 1144.

——Mahomedan Law—Demand—Second demand on the Plff.'s own chabutra *situated in the village sold, if valid.*

PRE-EMPTION—Mah. Law—Demand.

A second demand with witnesses made on the pre-emptor's own *chabutra* situated on land common both to the pre-emptor and the vendor in the village sold, is a valid demand under the Mahomedan Law of pre-emption. (*Richards, C. J. and Tudball, J.*) MUHAMMAD USMAN *v.* MUHAMMAD ABDUL GAFFOOR.

34 All. 1 : 11 I. C. 319: 8 A. L. J. 950.

———*Mahomedan Law—Demand—Talab-i-mawasibat*

It is not a proper *Talabi-Mawasibat* under the Mahomedan Law if the pre-emptor said only "I am a pre-emptor and my right extends to the land," such a claim must be made in the proper form whether in express terms or by implication. A mere expression or declaration of his right does not show a person's determination to enforce it. (*Blair and Banerjee, JJ.*) MUHAMMAD RAHAMAN *v.* MUHAMMAD KHAN

10 I. C. 770: 8 A. L. J. 270.

[But *see* 1 I. C. 85 : 6 A. L. J. 15].

———*Mahomedan Law—Demand* — Talabi-Mawasibat.

The words "*Mera Shufal*" repeated twice do not by themselves consitute a valid *Talabi-Mawasibat* under the Mahomedan Law. (1897) A W N 93 and 23 A. L. J. 15, Dist. (*Karamat Hussain, J.*) MAKHDUM BAKSH *v.* MUHAMMAD NAZIR KHAN.

10 I. C. 143.

———*Mahomedan Law—Demand—Mention of price if necessary*

For *Talabi-Mawasibat*, an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase is necessary and not that he should at the time of the performance of the ceremony make any mention of the price. Under the Mahomedan Law a pre-emptor does not lose his right for pre-emption by failing to state, while making the immediate demand for pre-emption that he was willing to pay the price named in the sale deed or such a sum as a Court may award. (*Sharfuddin and Roe, JJ.*) NURI MIAN *v.* AMBICA SINGH.

32 I. C. 893.

———*Mahomedan Law — Demand* —Talab-i-istishad—*Talabi-mowasibat—Declaration of the performance of—Omission fatal.*

A person claiming the right of pre-emption while making a formal demand by *Talabi-i-istishad* before witnesses, must expressly declare that he has made the *talabi-mowasibat* or immediate claim as such a declaration is essential to the validity of the assertion of the right. (*Sir Lawrence Jenkins and Mr. Coxe, JJ.*) RATAN MANDAL *v.* AZIM MANDAL.

10 I. C. 352.

———*Mahomedan Law—Demand—Talabs Registration—Petition to stay is not compliance of law.*

A petition to the Registrar praying for stay of registration is not a sufficient compliance with the Mahomedan Law in the matter of the performance of the two talabs. The two ceremonies of *talab-i-mowasibat* and *talab-i-istishad* can be combined but it is essential that the latter should

PRE-EMPTION—Mah. Law—Formalities.

expressly refer to the former as having been duly made. (*Mullick and Roe, JJ.*) KHEYALI PRASAD *v.* NAZARUL ALUM.

20 C. W. N. 1048 : 34 I. C. 210 : 1 Pat. L. J. 174.

———*Mahomedan Law—Demand—Prompt assertion.*

Under Mahomedan Law, the right of pre-emption must be asserted with the utmost promptitude. (*Parlett, J.*) MI AMINA *v.* KARAM ALI.

8 Bur. L. T. 239: 32 I. C. 488: 10 Bur. L. T. 113.

Mahomedan Law— Difference in Caste.

———*Mahomedan Law—Difference in caste—Sale by Shia—Suit by Sunni.*

Where a Shia sells his property to a Hindu a Sunni cannot claim a right to pre-empt under the Shia law of pre-emption (*Richards, C. J and Tudball, J.*) PIR KHAN *v.* FAYAZ HUSAIN.

36 All. 413 or 488 : 25 I. C. 445 : 12 A. L. J. 813.

———*Mahomedan Law—Difference in caste of vendee.*

Where a vendee is in the same position as the pre-emptor, a *Sunni* who lose his right on the ground that he is a sharer in the appendages the pre-emptor cannot oust the vendee whether he is *Shiah, Sunni or Hindu.* The mere fact that two houses open on the same public lane or have a common drain, does not give owner of one a right of pre-emption over the other Where a property consisting of two enclosures communicating with each other by a door and entered in the tax register as one house, is sold as one house, *held*, that the property sold was really one house, for the purposes of pre-emption. (*Chamier, J.*) ROW KIYA BEGAM *v.* AHMADI KHANAM.

16 I. C. 109 : 9 A. L. J. 769.

———*Mahomedan Law—Difference in caste—Vendee a Hindu—Law applicable.*

A Mahomedan pre-emptor is entitled to pre-emption under the Mahomedan Law of pre-emption even though the vendee is a Hindu. (*Coutts and Bucknill, JJ.*) ACHUTANANDA PASSAIT *v.* RIKI BIBI.

1 P. L. T. 578 : 4 P. L. T. 277: 1922 P. 601.

Mahomedan Law—Easement.

———*Mahomedan Law— Easement— Share in appendages.*

Sunni sharer in appendages has no pre-emption right, if the vendee is also a sharer in appendage though the latter is Shia, Sunni or Hindu. A property having two enclosures connected by a door constitute only one house. Where two houses face the same public lane, or both discharge water in the same public lane there is no right of pre-emption. (*Chamier, J.*) ROKAYIA BEGUM *v.* AHMADI KHANAM.

16 I. C. 109: 9 A. L. J. 769.

Mahomedan Law—Formalities.

———*Mahomedan Law—Formalities not fulfilled.*

For two or three months before the demands were made the plaintiff had an intention of bringing a suit for pre-emption in respect of the sale deed. He made up his mind to bring a suit when

PRE-EMPTION—Mah. Law—Formalities.

he claimed pre-emption. *Held*, as the demands required by the Mahomedan Law were not made immediately after learning of the sale in question by the plaintiff, he cannot succeed in his present claim. (*Rafique and Piggott, JJ.*) ABDUL-RAHMAN *v.* MT. RIFFAQTUNNISSA.

1923 All. 229

———*Mahomedan Law — Formalities — Sale valid under Mahomedan Law.*

Under Mahomedan Law the right of pre-emption arises when there is an oral agreement to sell followed by the payment of the price and delivery of possession to the purchaser as such a sale is valid under the Mahomedan Law. (*Macleod, C. J. and Shah, J.*) ABDULLA *v.* ISMAIL

64 I. C. 913 : 23 Bom. L. R. 1079

———*Mahomedan Law—Formalities.*

To succeed in a suit to enforce a right of pre-emption bond on Mahomedan Law the plff. must strictly prove that the formalities according to that law have strictly been observed. (*Mookerjee A. C. J. and Fletcher, J.*) NANICHONDRA *v.* RAJANI

63 I. C. 196: 25 C. W. N. 901.

———*Mahomedan Law— Formalities—Performance of ceremonies— Delay.*

The right of pre-emption being one based on Mahomedan Law, the performance of certain ceremonies prescribed by that law immediately after hearing about the sale is absolutely necessary to create that right. Delay in performing the ceremonies is fatal to that right. (*Chapman and Roe, JJ.*) JAGAN BHAGAT *v.* ARJANI MANDAL.

4 Pat. L. W. 345: 45 I. C. 255: 1918 Pat. 3.

———*Mahomedan Law—Formalities—Conditions precedent.*

The right of pre emption cannot be claimed unless the pre-emptor has performed the ceremony of *talab i mowasibat* immediately on hearing of the sale. (*Mullick and Roe, JJ.*) KHEYALI PRASAD *v.* NAZARUL ALUM. **20 C. W. N. 1048: 34 I. C. 210 : 1 Pat. L. J. 174.**

———*Mahomedan Law—Formalities—Persons having equal rights.*

Assertion of a right of pre-emption before the completion of the sale is ineffectual. A pre-emptor under the Mahomedan Law must comply with the following formalities. (1) Assertion of right immediately after knowing of the sale. (2) Demand of the seller or buyer in the presence of witnesses. (3) Referring to the assertion of right already made. All persons having equal rights of pre-emption can divide the property equally *per capita*. (*Pratt J. C. and Hayward, A. J. C.*) PARUMAL *v.* MAHOMADALLY.

17 I. C. 39: 6 S. L. R. 107.

Mahomedan Law—Law Applicable.

———*Mahomedan Law—Law applicable—Sale—Application of Mahomedan Law of sale.*

It is against equity, justice and good conscience to apply to a pre-emption case, the Mahomedan Law of sale which is not now in force and to attach to a contract of sale an incident which Mahomedan lawyers intended to attach only to an actual sale. (*Mullick and Roe, JJ.*) KHEYALI PRASAD *v.* NAZARUL ALUM.

20 C. W. N. 1048: 34 I. C. 210; 1 Pat. L. J. 174.

PRE-EMPTION—Mah. Law—Miscellaneous.

Mahomedan Law—Miscellaneous.

———*Mahomedan Law—Contract of sale—Demands before registration—Validity.*

A right of pre emption arises not only when an out and out sale has been completed but also when a complete contract of sale (without any option in the vendor) has taken place. Hence a demand made after the execution of the sale deed but before registration is neither premature nor defective. (*Lindsay and Sulaiman, JJ.*) ZAWANI BEGAM *v.* KHAN MUHAMMAD KHAN.

21 A. L. J. 908 : 46 All. 142 : 1924 All. 251.

———*Mahomedan Law — Right to relationship—Aziz qarib and Azeez baeed.*

Death or divorce dissolves the tie and relationship between a woman and her husband under the Mahomedan Law, especially if the woman after the death of her first husband marries into another family. Consequently an uncle of the deceased husband of a Mahomedan widow cannot pre empt a sale by her as being "aziz qarib" or "aziz baeed" (*Rafique and Piggott, JJ.*) JAHANGIR KHAN *v.* SYED ABDUR RAHAMAN.

20 A. L. J. 56 : L. R. 3 A. 23 : 64 I. C. 943 : 1923 A. 128.

———*Mahomedan Law — Shafi Khalit—Shafijar—Rights inter se.*

Under the Mahomedan Law of pre-emption (1) a *Shafi-Khalit*, who is also *Shafi-jar*, has no preferential right to pre-empt the whole property as against a vendee who is himself a *Shafi khalit*, (2) where the vendee and pre-emptor belong to the same category of preferential purchasers, they have equal rights *inter se* and the property will be divided equally between them. (*Sulaiman, J.*) MUHAMMAD YAKUB *v* KANHAI LAL. **64 I. C. 673 : 19 A. L. J. 869.**

———*Mahomedan Law—Same class of pre-emptors—Nearness of degree—Co-sharer in same Mahal—Rights of.*

The Mahomedan Law of pre-emption does not recognise degrees of nearness within the same class of pre-emptors. In the case of a sale of zamindari property, to which the Mahomedan Law of pre-emption applies, the joint liability to pay the Government Revenue being the foundation of co-parcenery claimed by persons coming forward as *shafisharik*, all co-sharers in the mahal stand on the same footing, irrespective of whether they are or are not co-sharers in the same khata (within the mahal) in which the property sold is situate. (*Tudball and Sulaiman, JJ.*) SYEDUDDIN *v.* LATIFUNNISSA.

64 I. C. 456 : 19 A. L. J. 909.

———*Mahomedan Law—Zamindari village—Imperfect partition of mahal—Separate Pattis.*

The wajib ul-arz recorded a custom of pre-emption but set out none of its incidents. Admittedly the *rules of* Mahomadan Law applied. *Held*, that plaintiff as owner to one of the pattis was neither a *Shafi-i-sharik* nor a *shafi-i-khalit* under the Mahomedan Law. In respect of the other *pattis* and no right of pre-emption to a *Shafi-i-jar-*

PRE-EMPTION—Mah. Law—Miscellaneous.

existed in respect of this class of property (*Tudball and Rafiqw, JJ.*) MATHURA PRASAD *v.* HARDEO BAKSH SINGH. **42 All 477 : 56 I.C. 174: 18 A. L. J 518.**

——*Mahomedan Law—Shias—Co-sharers.*

Among *Shias* there is no right of pre-emption where the property sold are owned by two or more co-sharers. (*Richards, C.J. and Tudball, J.*) MUHAMMAD RAZIUDIN *v.* RAGHUBIR. **46 I. C. 82 : 16 A. L. J. 507.**

——*Mahomedan Law—Custom—Wajib-ul-arz.*

A *Wajib-ul-arz* provided that custom of pre-emption is in vogue among the owners of the khalsa separately and among the owners of the *milak* separately but gave no incidents of the custom. *Held*, that the right was co-extensive with that given by Mahomedan Law. (*Richards, C. J. and Tudball, J.*) ZAWIR AHMED *v.* ABDUL RAZZAK. **13 A. L. J. 704 : 29 I. C. 993 37 All 472.**

——*Mahomedan Law—Sale valid under Mahomedan Law.*

Under Mahomedan Law the right of pre-emption arises when there is an oral agreement to sell followed by payment of the price and delivery of possession to the purchaser ; as such a sale is valid under the Mahomedan Law. (*Macleod, C. J. and Shah, J.*) ABDULLA AVJAL MOMIN *v.* ISMAIL MUGAL FODA. **64 I. C. 913 : 23 Bom. L. R. 1079.**

——*Mahomedan Law--Survival of right*

The right of pre-emption under the Mahomedan Law, does not survive on the death of a person to his heirs and representatives who are neither executors nor administrators under the Probate and Administration Act. (*Beaman and Hayward, JJ.*) JIAUL *v.* SITARAM. **36 Bom. 144 : 12 I. C. 720 : 13 Bom. L. R. 1040**

——*Mahomedan Law—Co-sharers—Joint liability to Government revenue.*

When there is joint liability to pay Government revenue the joint liability for purposes of pre-emption does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue authorities. Under the Mahomedan Law not only is it necessary that the *talab-i-istishad* should be made in the presence of witnesses, but that they should bear testimony that the demand has been duly made. (*Mullick and Jwala Prasad, JJ.*) SARJUG SINGH *v* JAGMOHAN SINGH. **51 I. C. 40**

Nature of Right.

——*Nature of right—Right to—Right not in existence at date of suit—Subsequent accrual of right.*

In a suit for pre-emption, plff must show that he is entitled to pre-empt not only on the date of suit, but also on the date of the decree. Where the defendant became a co- sharer by gift during the pendency of the suit, the plff. must fail. (*Tudball and Rafique, JJ.*) BEHARI LAL *v.* MOHAN SINGH. **42 All. 268 : 18 A. L J. 220 : 55 I C. 71: 2 U. P. L. R. (All.) 48.**

PRE-EMPTION—Nature of Right.

——*Nature of right—Proof of vendor's title —Whole property not included.*

A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is bound to take the title which the vendee was ready to take. (*Richards C. J. and Tudball, J.*) SAHODRA BIBI *v.* BAGESHRI SINGH. **37 All. 529 : 29. I C 1000 : 13 A L. J. 711.**

——*Nature of right—Substitution for vendee.*

A pre emptor has got the right to be substituted for the vendee subject to the rights and liabilities created by the sale deed. 30 A. 130 Foll (*Karamat Husain and Tudball, JJ.*) CHEDDA LAL *v.* BASDEO SHAHAI. **14. I. C. 266.**

——*Nature of right —Personal right.*

Under Mahomedan Law the right is a personal right and does not descend to the heirs. (*Beaman and Macleod, JJ.*) DAHYABHAI MOTIRAM *v.* CHUNILAL. **38 Bom. 183 : 22 I. C. 289: 15 Bom. L. R. 1136.**

——*Nature of Right Liability of pre-emptor—Personal covenant--Pre-emptor whether bound by.*

The pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound. But these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document which does not create any interest in the lands sold. Where the sale was a complete transaction in itself any subsequent agreement (though entered into immediately after the execution of the sale deed) cannot be read into the conveyance so as to vary its terms and impose conditions or obligations which would be binding on the pre-emptor. (*Broadway, J.*) ALI BAKHSH *v.* GHULAM MAHOMED. **1924 L. 221.**

——*Nature of right—Loss of ownership—If forfeits right—What is.*

The mere fact that a vendee loses his ownership of the property under a decree for pre-emption, does not forfeit his right to pre-empt; a right to pre-empt is a *jus ad rem alienam acquirendaim* and not a *jus in re aliena.* (*Martineau, J.*) BELI RAM *v.* HARICHAND. **3 Lah. L. J. 205 : 59 I. C. 744 : 28 P. W. R. 1921.**

——*Nature of right—Right to—Existence of at the time of suit essential.*

To maintain a suit for pre-emption, plaintiff must show not only that he had a right of pre-emption at the time of the sale but that that his right subsisted at the date of the institution of the suit. (*Kensington and Shadi Lal, JJ.*) FATEH SINGH *v.* SANT SINGH. **47 P. W. R. 1915 : 125 P. L. R. 1915 : 27 I. C. 29 : 43 P. R. 1915.**

——*Nature of right — Village communities.*

The law of pre-emption as applicable to village communities was intended primarily at all events to protect the village against the intrusion of strangers, who might otherwise obtain a footing in it, contrary to the wishes of the community, who were bound to each other by ties of descent and would resent an intruder. This principle

PRE-EMPTION—Nature of right.

can obviously have no application when the village is of but a recent foundation and is composed of individuals whose sole connection *inter se* is that each has been selected by Government as a person, to whom a grant of land might fitly be made. (*Kensington, C. J. and Rattigan, J.*) WARYAM SINGH *v.* MAHTAB SINGH.

31 P. L. R 1916 : 26 I. C. 433: 21 P R. 1915 :

——— *Nature of right—Right in land*

The right of pre-emption is not a right in the land, but only a right to acquire land ; the right in land is not acquired till the money is paid in accordance with the decree of the Court recognising the right. (*Rattigan and Shadi Lal, JJ.*) UTTAM SINGH *v.* SUNDARSINGH.

218 P.L R. 1914: 24 I. C. 913 : 136 P. W. R 1914.

———*Nature of right — Transferee from vendee*

A right of pre-emption exists only in respect of a particular sale and the only parties against whom a cause of action arises are the parties to the sale. A sub-equent transferee from the vendee is not affected. (*Rattigan Shah Din and Beadon, JJ.*) KARAM DAD *v.* ALI MUHAMMAD.

28 P.W.R. 1913 : 31 P. R. 1913 : 18 I. C. 10 : 61 P. L. R. 1913.

———*Nature of right— Sale— Purchase by mortgagee—Right to set up mortgage.*

Where a mortgagee purchases a share of the property mortgaged there is a merger and the mortgage is extinguished to that extent. Consequently the mortgagee purchaser could not set up his own mortgage as still subsisting against a pre-emptor. (*Daniels, A. J. C.*) KALLOO SINGH *v.* BAKHTAWAR SINGH. **26 O. C. 289 : 9 O. & A. L R 113 : 9 O. L. J 657:1923 Oudh 121.**

——— *Nature of right—Loss of right of pre-emption after original decree—Effect.*

The right to enforce pre-emption must exist both at the time of the sale and on the date of suit. If it is lost after sale or after suit but before decree the plff is put out of Court. But nothing which may happen subsequent to the decree can affect the right under the decree unless the happening has the effect of invalidating the antecedent title held on the date of sale or date of suit. An appellate Court need not go beyond considering whether the right of pre-emption claimed by the plaintiff existed on the date of the sale or foreclosure and retained its enforceable character till the date of the suit and till a decree for pre-emption was obtained, which was the subject of appeal. (*Stuart and Kanhaiya Lal, A. J. Cs.*) KHERI SINGH *v.* DEO KUNWAR.

46 I. C. 339 : 5 O. L. J. 215.

———*Nature of right.*

The right of pre-emption is a right of substitution and not of re-purchase from the vendee. (*Evans, A. J. C. and Lindsay O. A. J C*) JADU NATH SINGH *v.* GANGABAKSH SINGH. **9 I. C. 58.**

———*Nature of right—When arises—Right when lost.*

The right to enforce pre-emption arises immediately a sale takes place. It is undoubtedly qualified by the restriction that the pre-emptor himself must maintain his quality as a pre-emptor upto the institution of his suit, but he

PRE-EMPTION—Price.

cannot be prejudiced by the vendee's action subsequent to the sale. There is, of course, one exemption to this rule, namely in certain cases where a vendee prior to the institution of the suit retransfers the property to a person who has equal rights with the plaintiff. But it is clearly understood that this exception rests upon one principle only and that this that the Law recognises claims for pre-emption brought privately and out of Court and that a vendee is entitled to satisfy such a private claim just as much as he is bound to satisfy a claim brought against him in a court of law. In such a case it is the plaintiff who has been prejudiced in respect of his pre emptive right by the vendee improving his own position but it is a person who is equally entitled with the plaintiff who has enforced his right out of Court, and unless a re-transfer by the vendee is proved to be in satisfaction of such claims a pre-emptor's suit is not affected by any transfer. For purposes of pre-emption the Court must ordinarily take the respective position of the plaintiff and the vendee as they stood at the time of the sale, and not as they stood at the institution of the suit. (*Pipon J., C.*) AYA RAM *v.* PARSHOTAM LAL. **71 I. C 145.**

Notice.

———*Notice—Failure to bid at auction sale—Effect.*

Where the auction sale was widely notified and the pre-emptor having knowledge did not choose to bid at the sale, *held* that his failure to bid was tantamount to a refusal to purchase it, and therefore it was not incumbent upon the official assignee to offer the property to the pre-emptor at the price which had been obtained from the purchaser 27 All, 670 not Foll. (*Tudball and Ratique, JJ.*) GHULAM MOHIUDDIN KHAN *v.* HARDEO SAHAI. **18 A. L J 413 : 58 I.C. 93 : 42 All. 402.**

———*Notice—Custom—Sale of property to strangers.*

A sale of property by a co-sharer to strangers, when the other co-sharers intimate their inability to purchase owing to want of means or some other ground, is good and does not violate the custom requiring a co-sharer to inform the other co-sharers of his intention to sell, but on a co-sharer expressing his readiness to buy at a price, the vendor must state the price and must not sell to strangers for lesser price. (*Richards, C. J and Rafique, J.*) NAUNIHAL SINGH *v.* RAM RATAN.

39 All 127 : 37 I. C. 511 : 14 A. L. J. 1138.

———*Notice—Offer—Necessity for.*

A formal offer to the pre-emptor is not necessary when it is obvious from the attendant circumstances, that the pre-emptor is neither willing nor able to pay the purchase money. (*Lyle and Ashworth, JJ.*) HANUMAN SINGH *v* ADIYA PRASAD. **54 I. C. 520 : 22 O. C. 323.**

———*Notice.*

A notice stating inaccurate area is not defective if all concerned know what the vendors propose to sell. (*Chamier, J. C.*) JAGAL *v.* BADRI.

12 I. C. 321 : 14 O. C 332.

Price.

———*Price—Vendee mortgaging back to vendor for portion of consideration is binding on pre-emptor.*

PRE-EMPTION—Price.

Part of the consideration for a sale was a mortgage of the property executed by the vendee to the vendor. The sale was pre-empted subsequently, and on a suit being brought on the mortgage: *held*, the sale and the mortgage formed part of the same transaction and hence the pre-emptor was bound by the mortgage. (*Ryves and Gokul Prasad, JJ.*) BECHAN SINGH *v.* KISHUN MAL.
44 All. 348 : 20 A. L. J. 164 : L. R. 3 A. 122 : 4 U. P. L. R. (A) 23 : 1922 All. 25.

——*Price—Mortgage-debt exceeding value of property—Mortgagee taking property in lieu of debt—Price payable by pre-emptor.*

Where the amount of a mortgage-debt exceeds the amount of the value of the property and the mortgagee takes the house in lieu of the mortgage amount, the sum that a pre-emptor is liable to pay is the market-value of the property. (*Tudball and Sulaiman, JJ.*) JAGAT SINGH *v.* BALDEO PRASAD. **43 All. 137 : 18 A. L. J. 974 : 59 I. C. 679 : 2 U. P. L. R. (All.) 373.**

——*Price—Exorbitant—Onus — Estoppel—Refusal of offer.*

If abnormal price is alleged to have been recited in the sale to defeat pre-emption, the vendee must prove actual payment of consideration and must explain the reason of such abnormal price. The refusal of the pre-emptor, when property was offered to him before sale according to a wajib-ul-arz clause, operates as an estoppel. (*Richards, C. J and Rafique, J.*) TODAR SINGH *v.* KEHARI SINGH. **50 I. C. 126 : 17 A. L. J. 290**

——*Price—Onus—Recitals—Value of.*

In pre-emption suits the consideration in the sale deed must *prima facie* be taken as true, and the onus of showing that it was actually given can be shifted to the vendee only where the plaintiff shows that the price is very excessive. Where the property is fully worth the amount recited, the vendee is not bound to prove all the details of consideration. (*Richards, C. J. and Tudball, J.*) MAKHAN SINGH *v.* JAHAN KUAR.
46 I. C. 97 : 16 A. L. J. 533.

——*Price—Fictitious.*

A pre-emptor in a pre-emption suit can show that the price stated in the sale deed was far above the market value, in spite of the fact that the money stated in the deed was paid before the Sub-Registrar and it is open to the vendee to show why he was ready to pay the price stated (*Richards, C. J. and Bannerjee, J.*) RAM SARUP *v.* KARAM ULLAH KHAN. **36 All. 464 : 25 I. C. 403 : 12 A. L. J. 692**

——*Price—Relinquishment of ex-proprietary rights—Pre-emptor not bound to pay.*

A Zamindari was sold, and for a certain consideration the vendor relinquished his *Sir* rights to the vendor; *held*, that the pre-emptor was not bound to pay the consideration for relinquishment. (*Richards, C. J. and Tudball, J.*) MEHDI HASSIN *v.* JAI RAM. **24 I. C 630.**

——*Price—Vendee selling property to another.*

The purchaser from the vendee takes the property subject to the right of pre-emption and the pre-emptor is bound to pre-empt only the first sale making the subsequent purchaser a party to the suit so as to bind him by the proceedings. The price payable by the pre-emptor is that paid by the first vendee to the vendor. (*Richards, C. J. and Tudball, J.*) KHETTAR CHANDRA BASU *v.* SRIMATI NABIN KALI DEVI.
35 All. 385 : 20 I C. 424 : 11 A. L. J. 527.

——*Price— Pre-emptor's duty —Vendee's rights.*

When a vendee, disregarding the covenant in a sale deed voluntarily pays off the prior mortgage debt on the property, the pre-emptor is not bound to recoup the same. (*Richards, C. J. and Tudball, J.*) MUSSAMAT NAJIBAI *v.* NIHAL SINGH.
19 I. C. 647.

——*Price—Onus—Fictitious price.*

The onus, in a pre-emption suit, is on the plaintiff to show that the consideration set forth in the sale deed is fictitious. He should prove either the actual contract price or give evidence to enable the Court to ascertain the market value of the property. (*Knox, J.*) SAKARRAJ DUBE *v.* UDIT DUBE. **14 I.C. 158.**

——*Price—Unreasonable—Effect.*

The refusal by pre-emptor to purchase at the price offered under the belief that the price was unreasonable, does not result in the loss of the pre-emption right. (*Richards and Bannerjee, JJ.*) SHRI BISHAM SINGH *v.* BACHA PANDE.
33 All. 637 : 10 I. C. 626 : 8 A. L. J. 700.

——*Price— Valuation for purposes of jurisdiction.*

Any compensation found to be payable by the pre-emptor to the vendee on equitable grounds and not as a part of the price paid by the vendee is not to be taken into consideration in determining the value of a suit in a pre-emption case. (*Le Rossignol and Harrison, JJ.*) CHIRAGH DIN *v.* SERAI DIN. **3 L. 386 : 5 L. L. J. 137: 1923 L. 107.**

——*Price—Vendor found to have had title only to part.*

A right of pre-emption is a right of substitution and the pre-emptor steps into the shoes of the vendee in respect of all his rights and obligations under the sale. When the vendor is found subsequently to the sale to have owned only part of land sold, the purchaser, if he acted *bona fide* cannot be compelled to surrender the remnant portion of his purchased property to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser selects to abide by his bargain and retain the residue at the amount paid for the whole. (*Shadi Lal, J.*) BISHON SINGH *v.* MUSSAMMAT BISHNI.
53 I. C. 566 : 103 P. R. 1919.

——*Price—Burden of proof—Want of good faith—Market value, when to be allowed.*

Where it is clear that the price of the pre-empted property is highly exaggerated the Court is justified in concluding that the price has not been fixed in good faith and in allowing only its market value. (*Johnstone, J.*) GOBIND RAM *v.* HAKIM. **76 P. W. R. 1914 : 24 I. C. 880 : 174 P. L. R. 1914.**

PRE-EMPTION—Price.

——— *Price—Proof.*

In order to prove the payment of consideration of a very large sum without receipt, in the sale of an immoveable property, subject to pre-emption, the vendor's mere oral testimony and that of the witnesses happening to be the vendee's friends, is not sufficient ; but a strong evidence is necessary. (*Rattigan, J.*) BHIKER MAL *v.* NANAK CHAND. **134 P. W. R. 1912 : 16 I. C. 495 : 9 P. L. R. 1912 Supp.**

——— *Price fixed in bad faith— Remedy—Market value to be ascertained.*

Where the sale price is not fixed in good faith the market price must be ascertained and taken as the price to be paid by the pre-emptor. (*Robertson, J.*) PATHANA *v.* NABA. **87 P. R. 1911 : 13 I. C. 802 : 245 P. W. R 1911.**

——— *Price—Pre-emptor if bound to pay more than the amount fixed in a decree.*

A pre-emptor is not bound to pay more than the amount fixed in a pre-emption decree as the price at which the sale took place. (*Rattigan, J.*) DEO RAJ *v.* GOVIND PARSHAD. **55 P. W. R. 1912 : 13 I. C. 647 : 91 P. L. R. 1912.**

——— *Price—Property sold subject to mortgage—Vendee discharging mortgage—Pre-emptor, if can redeem only equity of redemption.*

Where property had been sold subject to a mortgage and the vendee pays off the mortgage, a pre-emptor must pay the whole of the purchase money paid by the vendee before he can pre-empt the property ; he cannot pre-empt only the equity of redemption. (*Robertson and Shahdin, JJ.*) SHABHAZKHAN *v.* FAZALDIN. **74 P. W. R 1912 : 43 P. R. 1912 : 13 I. C. 430 : 97 P. L. R. 1912.**

——— *Price—Set off—Money left with vendee to discharge encumbrances.*

A pre-emptor cannot in a suit for pre-emption claim in reduction of the purchase money such interest to which he may become entitled by reason of the failure of the vendee to pay him and to the other creditors of the vendor moneys which had been left with him out of the sale consideration for discharging encumbrances on the property sold. (*Kanhaiya Lal, A. J. C.*) CHHATAR PAL *v.* HARDEO BAKHSH SINGH. **48 I. C. 744 : 21 O. C. 269.**

——— *Price—Reality of—Burden of proof.*

Where the pre-emptor *prima facie* proves that the price in the sale-deed is fictitious, the burden of proving that it represents the real price is on the vendee. (*Lindsay, J. C.*) NAKCHHED *v.* ANGAD. **48 I. C. 513.**

——— *Price—Duty of pre-emptor—Fraud.*

Where the purchaser agreed to pay the seller certain moneys under a compromise decree obtained by fraud, a pre-emptor must pay the price set out in the sale-deed unless he establishes *mala fides* on the part of the vendor or purchaser. (*Lindsay, J.*) BHARAT SINGH *v.* SURAJ BAKSH SINGH. **36 I. C. 739 : 3 O. L. J. 498.**

——— *Price—Liability of pre-emptor to pay actual price.*

PRE EMPTION—Priority.

The actual price paid by the vendee must be paid by the pre-emptor even though it be much above the market price and it be paid for the purpose of annoying the pre-emptor. (*Evans, A. J. C. and Lindsay, O. A. J. C.*) JADU NATH SINGH *v.* GANGABAKSH SINGH. **9 I. C. 58.**

Priority.

——— *Priority— Plaintiff and vendee — Co-sharers—Widow of vendor's husband's brother—If has preferential right*

The plaintiff, a Mahomedan sued for pre-emption on the ground that she was vendor's husband's brother's widow and co-sharer with the vendee and thus had a preferential right; it was held that plaintiff was not entitled to pre-empt as her connection merely by marriage is no relation. (*Richards, C. J. and Tudball, J.*) KURIA *v.* JAFRI. **33 I. C. 801.**

——— *Priority—Claim by preferential claimant brought after decree by remote claimants—Limitation.*

A remote pre-emptor obtained a decree, subsequent to which, a preferential claimant brought his suit for pre-emption against defendant who had obtained a decree, more than a year from the date of the sale but within a year of the decree. *Held*, the suit was barred by limitation. (*Richards, C J. and Tudball, J.*) HASAN *v.* BACHA PANDE. **28 I. C. 691 : 13 A. L. J. 383.**

——— *Priority*—Karibi wa Khandani—*Female related through female.*

A Hindu widow who is related to the vendor through a female is not a *Karibi wa khandani* and has no preferential right. (*Richards, C. J. and Tudball, J.*) DURGA PRASAD PANDE *v.* FATEH BAHADUR SINGH. **36 All. 451 : 26 I. C. 494 : 12 A. L. J. 725.**

——— *Priority— Death of plaintiff pending suit—Sons brought on record if can take advantage of their father's relationship at date of suit.*

Where a suit is filed for pre-emption by a near relation on the ground that he was more nearly related to the vendor then the vendee and he died pending suit and his sons who were brought on record as plaintiffs were with the vendee equally related to the vendor, the sons cannot take advantage of their father's relationship at the date of suit and claim the preferential right which their father had as a nearer relation. (*Richards, C. J. and Tudball, J.*) PARTAP SINGH *v* DAU LAT. **36 All. 63: 22 I. C. 678: 12 A. L J 18.**

——— *Priority—Vendee co-sharer by virtue of previous sale.*

Priority as between the pre-emptor and the vendee must be decided with relation to the state of things existing at the time of the sale and not at any later period. (*Scott-Smith, J.*) HIRA *v.* BANSI LAL. **90 P. R. 1919: 52 I. C. 557 : 27 P. W. R. 1919.**

——— *Priority—Heirs of occupancy tenant.*

The heirs of an occupancy tenant have a preferential right of pre-emption over the landlord in respect of a sale of the occupancy holding. (*Scott-Smith, J.*) MUHAMMAD HASAN *v.* YUSUFF. **11 P. L. R. 1915 : 27 I. C. 642: 246 P. W. R. 195.**

PRE-EMPTION—Priority.

———*Priority—Pre-emptor and vendee equally entitled to pre-empt—Division between vendee and pre-emptor.*

Where the pre-emptors and the vendee have equal right of pre-emption the pre-emptor can pre-empt one half and the vendee can retain the other half. (*Robertson, J.*) PATHANA *v* NABA.

87 P. R. 1911: 13 I. C. 802: 245 P. W. R. 1911.

Re-sale to Vendor.

———*Re-sale to vendor—After suit.*

Where after suit, the vendee re-sold property to the vendor who has ceased to be a co-sharer by the time. *Held*, that the plaintiff was entitled to a decree despite the re sale. (*Richards, C. J. and Tudball, J.*) TOTA RAM *v.* GOPAL SINGH.

46 I C. 76: 16 A. L. J. 505.

———*Re-sale—Re-sale by a purchaser to the pre-emptor—Co-sharer of the purchaser—Pre-emption suit by.*

Where a land is subject to a right of pre-emption vested in some person and after it has been sold to a third person, the right of the pre-emptor is recognised by such third person and the land is resold by him to the pre-emptor before the limitation to bring a pre-emption suit expires, a co-sharer of such third person cannot institute a pre-emption suit in respect of the property thus re-sold to the pre-emptor of the first seller. (*Richards, C. J. and Tudball, J.*) SHEO DAYAL PANDE *v.* MUSAMMAT ADHARI DUBAIN.

16 I. C. 409 (All .

———*Re-sale to vendor after suit—Effect of—T. P. Act, S. 52.*

A suit for pre-emption is not affected by a re-sale of the property in question to the vendor after the institution of the suit. (*Richards, C. J. and Tudball, J.*) KEDAR NATH *v.* BANKEY BEHARI LAL.

11 I. C. 645.

———*Re-sale to vendor-Purchase under sale by pre-emptors—Pre-emptor's, brother's suit.*

Where one of the four brothers as pre-emptor bought a property from the vendee but re-sold it to the vendee under a compromise:

Held, the other brothers could not after resale claim to pre empt which would be by enforcing pre-emption against their brother, and the sale in favour of vendee had ceased to exist. (*Abdul Raoof, J.*) KIDAR NATH *v.* DEVI SAHAI.

1923 Lah. 259 (2).

——— *Re-sale to vendor.*

Once a sale is affected, the right of pre-emption accruing in respect thereof cannot be defeated by a re-sale to the vendor. (*Le Rossignat, J.*) PAL SINGH *v.* JAMUN.

11 P. R. 1919 : 49 I. C 159: 3 P. L. R. 1919.

———*Re-sale to vendor—Before suit.*

A re-sale to vendor even before a suit for pre-emption does not defeat the right of pre-emption. *Scott-Smith, J.*) IMAMI *v.* ALLAHDIYA.

99 P. W. R 1917: 40 I. C. 767: 24 P. . 1918.

———*Re sale to vendor—Re-sale to co-sharer.*

When property subject to a right of pre emption in favour of co-sharer is sold to a stranger but is re-sold again to the co-sharer before a suit for pre-emption is brought, the suit cannot be maintained unless the person instituting the suit can establish his right as against the co-sharer if the former has a superior right to that of the latter. A purchaser may use a title acquired by him subsequent to the cause of action as a defence against a suit for pre-emption instituted after the acquisition of the title. 29 All. 125 Rel. (*Kanhaiya Lal, A. J. C.*) LALTA PRASAD *v.* RAGHUBAR SINGH.

4 O. L. J. 459: 41 I. C. 9: 20 O. C. 160.

PRE-EMPTION—Subject-matter.

———*Re-sale to vendor—Does not defeat right.*

A relinquishment or a release to the vendor does not defeat the right of a pre-emption that has already accrued. 11 I. C. 532 Dist. (*Stuart, J. C.*) MANNA SINGH *v.* BIHARI SINGH.

19 O. C. 183: 37 I. C. 181: 3 O. L. J. 720.

———*Re-sale to vendor—If defeats third person's rights.*

A person who has a claim of pre-emption is not to be debarred from claiming it by another person selling the property and then re-purchasing it before the suit for pre-emption. (*Chamier, J. C.*) CHATTARPAL SINGH *v.* KUSHAR SINGH.

37 I. C. 172: 19 O. C. 190 (Note).

———*Resale to vendor—Effect.*

Re-sale by vendee of property to original vendor before the institution of a suit for pre-emption defeats such claim for pre-emption. (*Piggott, A. J. C.*) SHEO CHARAN SINGH *v.* BHIKAI.

11 I. C. 532 : 14 O. C. 156.

Rival pre-emptors.

———*Rival pre-emptors—Withdrawal of some plffs.—Effect on the rights of others.*

Where a pre-emptor joins with him a person equally entitled to pre-empt as himself but where the person so joined withdraws his claim during the litigation either gratuitously or for consideration, the first plff. does not lose his claim but can carry on the litigation himself. (*Chevis, J.*) ALLAH DITA *v.* QAIM DIN.

60 I. C. 692.

———*Rival pre-emptors—Consent to sale by one set—Waiver.*

Consent to the sale by one set of rival pre-emptors is a complete waiver and lets in any rival pre-emptor who comes forward. 42 P.R. 1878: 25 P. R. 1903 : 48 P. R, 1912 Ref. 100 P. R. 1885 : 7 P. R. 1912 : 139 P. R. 1894 Dist. (*Johnstone, C. J. and Scott-Smith, J.*) SHIB DIAL *v.* INDAR SINGH.

36 I. C. 694 . 106 P. R. 1916.

———*Rival pre-emptors.*

In the case of rival pre-emptors the right of acquisition of property is determined by lot under S. 9, Oudh Laws Act. (*Lindsay, J.C. and Stuart, A. J. C.*) RAJ BAHADUR SINGH *v.* CHANDRA PAL.

37 I. C. 170 : 19 O. C. 185 Note.

Subject-matter.

———*Subject-matter.*

Partial pre-emption is forbidden by law. (*Tudball and Rafique, JJ.*) PUIECH *v.* FATIMA BIBI.

61 I. C. 30 : 19 A. L. J. 107.

———*Subject-matter— Vendor owning some property and being mortgagee of another—Duty o pre-emptor.*

PRE-EMPTION—Subject-matter.

Where a vendor who had proprietary rights in a portion of the property and mortagagee rights in the remainder was sued by the pre-emptor only in respect of the property in which the vendor had proprietary right: *Held*, that pre-emption should have been claimed in respect of the entire property sold with the result that the pre-emptor would have stepped into the shoes of the vendor in the entire property; but as the objection was not raised in the Courts below, it cannot be set up on second appeal. (*Mears, C J. and Piggott, J.*) IQBAL HAIDAR KHAN *v.* MT. WASI FATIMA BIBI. **L. R. 3 A 597.**

———*Subject-matter* — Haqiat— Mudfarriqa —*Application.*

In a suit for pre-emption relating to *haqiat Mudfarriqa* in a village, the court found that the *haqiat* once formed part of the 30 *biswas mahal*, but circumstances had altered and the said *haqiat* ceased to be a part of that *mahal*. *Held*, the provisions of the *wajib-ul-arz* relating to pre-emption did not apply to the property in suit. (*Tudball and Rafique, JJ.*) IZZAT HUSAIN KHAN *v.* RAM CHANDER. **18 A. L J 120 : 59 I. C. 366 (1) : 2 U. P. L. R. (All) 39**

———*Subject-matter—Whole property sold to be included.*

Plff in a suit for pre-emption must sue to pre empt the whole property sold or mortgaged and in respect of the whole transaction. (*Tudball, and Rafique, JJ.*) JWALA PRASAD *v.* MANNU SINGH. **18 A. L. J. 104 : 57 I. C. 10 : 2 U. P. L. R. (All.) 45.**

———*Subject-matter—Partial pre-emption.*

A pre-emptor is not entitled to pre-empt a part only of the property sold. (*Richards, C, J. and Rafique, J.*) BRIJ NARAYAN RAI *v.* RAM DHARI RAI. **40 I. C. 40.**

———*Subject-matter.*

If the pre-emptor does not seek to pre-empt the entire property the suit will be dismissed. (*Richards, C J. and Tudball, J*) SAHODRA BIBI *v.* BAGESHRI SINGH. **37 All 529 : 29 I C. 1000 : 13 A. L. J. 711.**

———*Subject-matter—Plot of land—Hakiat.*

A separate grove separately assessed to land revenue is *hakiat* and subject to pre-emption if sold. There is no objection to a plot of land being subject of pre-emption when sold. (*Richards, C J. and Tudball. J.*) AHAMADULLA KHAN *v.* ZAR MOHAMMAD. **24 I. C. 609 : 12 A. L. J. 690.**

———*Subject-matter— Basis of—Right—Zamindari.*

A pre-emptor must claim all that he is entitled to even where his right is partly on Mahomedan Law and partly on village custom (*Richards. C.J. and Tudball, J.*) ABDUR RAHMAN *v.* AIDAYANULLAH. **20 I. C. 367 : 12 A. L. J. 88**

———*Subject-matter—Sale of a portion.*

A suit for pre-emption of a portion of the property sold is not maintainable. (*Batchelor and Shah JJ.*) GOKALDAS MOTIRAM SURTI *v.* PARTAB KABHAI BAROT. **35 I. C. 871 : 18 Bom. L. R 693.**

PRE-EMPTION—Subject-matter.

———*Subject-matter—Claim must be for whole.*

A would be pre-emptor cannot claim pre-emption of the property sold but must sue to take another whole bargain. (*Campbell, J.*) ASA SINGH *v.* JAG JIT SINGH. **1923 Lah. 147 (2).**

———*Subject-matter—Contiguity—Three portions of house—If each should be adjacent.*

Where a house the subject of a suit for pre-emption consisted of 3 portions, the mere fact that all of them were part of a single house is not sufficient in law to claim pre-emption in respect of any particular portion if the latter is not independently subject to that right (*Moti Sagar, J.*) GENDA RAM *v.* RAM CHANDER. **1924 L. 163.**

———*Subject-matter—Land included in a Muncipal limit whether a part of the town.*

Land included in a Municipality for certain reasons does not necessarily mean that the locality in question is a part of the town. An owner of the estate is one who pays land revenue to the Government, howsoever small the revenue may be. He does not cease to be an owner simply because he has purchased it for building purposes or he has enclosed it with a wall and stocked iron therein (*Chevis, J.*) SALAMAT RAI *v.* KANSHI RAM. **30 P. L. R 1918 : 45 I. C. 887 : 106 P. W. R. 1918.**

———*Subject-matter— Trees on land—Easement.*

In a suit for possession of land by pre-emption, the trees standing on the land and all rights of easement appertaining to the land pass with it. (*Mitra, A. J. C.*) BALOBRAO APPA RAO *v.* ANAND RAO. **47 I. C. 654.**

———*Subject-matter—Sale of interest under a pre-emption decree.*

A person obtains a decree for pre-emption on depositing a certain sum of money in court, but sells his right in the decree and the purchasers deposit the money in court, a suit for pre-emption in respect of such sale brought thereafter by another person is maintainable (*Kanhaiya Lal, J. C*) THAKUR BIKRAM SINGH *v.* SURAJ BAKSH SINGH. **26 O. C. 295 : 1924 Oudh 125.**

———*Subject-matter—Sale—Entire property —Distinct interests of vendees.*

The rule that a suit for pre-emption must embrace the entire property sold, unless the plff. is entitled to claim pre-emption in regard to any portion thereof, is inapplicable where the interests of the vendees *inter se* are distinct or where they have since been separated or divided. (*Kanhaiya Lal, A J. C.*) NAU NEHAL *v.* DEPUTY COMMISSIONER, UNAO. **47 I. C 894 : 5 O. L. J 546.**

———*Subject-matter—Actionable claim—Described as sale of immoveable property—Estoppel.*

The fact that a sale of an actionable claim is falsely described by the vendor, as a sale of immoveable property, will not give rise to a right of pre emption. The doctrine of estoppel does not apply to the case. (*Stuart and Kanhaiya Lal, A. J. Cs.*) RAJ BAHADHUR *v.* JAGRUP PANDE **20 O. C. 249: 42 I. C 37 : 4 O L. J. 540.**

PRE-EMPTION—Subject-matter.

———*Subject-matter—Portion of property sold —Suit for—Maintainability of.*

A suit to pre-empt only a portion of property sold cannot be maintained even though the pre-emptor offers to pay full consideration money for that portion. (*Kanhaiya Lal, A. J. C.*) ATA HUSSAIN KHAN *v.* AGHA HADI.

33 I. C. 775 : 3 O. L. J. 7.

———*Subject-matter—Mukarari interest.*

The doctrine of pre-emption applies only to the sale of the proprietary interest and, therefore, does not apply to the sale of the mukarari interest. (*Coutts and Sultan Ahmad, JJ.*) SHEIKH MOHAMED JAMIL *v.* KHUB LAL RAUT.

2 Pat. L. T. 138 : 5 Pat. L. J. 740 : 58 I. C. 534 : 1921 Pat. 130.

———*Subject-matter—Partition into Mahals* —Shafi-i-Khalit—*Appurtenances.*

On partition, property was divided into several mahals, but a well, certain roads, a tank, a number of *brahmottar* and *fakirana* holdings, and two occupancy holdings were kept joint between the parties. A separate *touzi* formed by this partition was sold, and the owner of one of the *mahals* into which the parent estate had been divided claimed a right of pre-emption. *Held*, that the existence of the *touzi* holdings did not give him a right of pre-emption and that he had no right of pre-emption as *shafi-i-khalit*, as the roads, well, tank, etc., were not appurtenances. 15 All. 104 and 32 All. 128 Foll. "Appurtenances" mean facilities or amenities peculiar to the owner of an estate but derived not from the estate itself but by easement from the estate of another. (*Roe and Coutts, JJ.*) KESHAB SINGH *v.* BANSI SINGH.

52 I. C. 31 : 4 Pat. L. J. 420.

———*Subject-matter*—Serai—*Shop— Building —Liability to pre-emption.*

Where in order to defeat pre-emption the property conveyed is expressed to be a *serai* the Court must look outside the terms of the deed to ascertain its real character. It is never an easy question to determine the character of a building for the purpose of pre-emption inas much as the word *serai* has not been defined by the legislature. The essentials of a *serai* seen to be that there is general access to the interior by the public and that it is used for the temporary accommodation of travellers. A building containing rooms let out to different persons or extended periods is not *prima facie* a *serai*. The mere fact that an infinitely small portion of the building is used for a shop does not affect the question. A single building should not ordinarily be divided into pre-emptible and non-pre-emptible portions. It must follow the main characteristics of the whole. That is to say, if the principal use of the building is residential, the whole, building will be pre-emptible notwithstanding that a small portion may also be used as a shop. Conversely, if the main characteristics of the building are the use of a portion of it for a shop, then the whole building will be non-pre-emptible. As regards the passing of title to the property, it does not pass if there is an intention common to both the parties that ownership should not pass until payment of consideration. (*Pipon, J. C.*) AYA RAM *v.* PURSHOTAM LAL.

71 I. C. 145.

PRE-EMPTION—Suit for—Burden of Proof.

Suit for.

Benami.
Burden of Proof.
Cause of action.
Good Faith.
Parties.
Right to sue
Subsequent Events.
Value of claim.
Miscellaneous.

Suit for—Benami.

———*Suit for—Benami.*

A suit for pre-emption by the plffs. who sue not for themselves but for other persons is not maintainable. (*Scott-Smith and Leslie Jones, JJ.*) CHHAJJU RAM *v.* NEKI.

43 I. C. 177 : 17 P. W. R. 1918.

———*Suit for—Benami—Vendee—If can prove real nature of transaction.*

It is open to a vendee to prove the real nature of transaction against a third party in a pre-emption suit. (*Daniels, A. J. C.*) BANKE BEHARI LAL *v.* MANNA LAL.

9 O. & A. L. R. 79 : 1924 O. 136.

Suit for—Burden of Proof.

———*Suit for—Burden of proof—Witnesses, vendor and vendee.*

In a suit for pre-emption, the vendor and vendee are essential witnesses and their testimony should not be disregarded merely because they are interested parties. (*Lord Buckmaster, J.*) IDRIS *v.* JANE SKINNER.

82 P. R. 1919 : 56 I. C. 723 : 45 P. W. R. 1919 (P.C.).

———*Suit for—Burden of proof—Existence of right on three important dates material.*

A plff. pre-emptor in order to be able to maintain a suit for pre-emption must establish his right to pre-emption on three important dates. He must have a right of pre-emption at the time when the sale took place ; otherwise he would have no cause of action at all. He must also have the same right at the time when the suit is brought or else he would have no *locus standi* to sue. The subsequent loss of the share by the plff. can in no way affect the right he possessed at the time when the decree in his favour ought to have been passed by the first Court. (*Lindsay and Sulaiman, JJ.*) BALDEO MISIR *v.* RAM LAGAN SHUKUL.

45 A. 709 : 21 A. L. J. 648 : L. R. 4 A. (Civ.) 353 : 1924 A. 82.

———*Suit for—Burden of proof—Existence of right till decree—Necessary.*

A plaintiff in a suit for pre-emption must establish not only that the pre-emptive right claimed existed at the date of the sale and at the date of the institution of the suit but also that it existed up to and at the date of the decree of the first Court. (*Sanderson, C. J. and Mookerjee, J.*) NURI MIAH *v.* AMBIKA SINGH.

44 Cal. 47 : 20 C. W. N. 1099 : 34 I. C. 869 : 24 C. L. J. 140.

———*Suit for—Burden of proof— Conditions of success.*

The success of a pre-emptor depends on the superiority of his position at the date of sale and his retention of the status on which his suit is

PRE-EMPTION—Suit for—Barden of Proof.

based. (*Reid, C.J. and Beadon, J.*) AMIR SHAH *v.* JETHA. **26 P. R. 1914 : 23 I. C. 908 : 152 P. L. R. 1914.**

——*Suit for—Burden of proof.*

A deed of sale in favour of a Hindu lady, gives her full ownership till it is proved by a person contesting its nature, that the sale is benami and that the true owner is the lady's husband, who does not claim the property at all. (*Rattigan and Shah Din, JJ.*) DHAN DEVI *v.* BALAMOKAND DEVI. **101 P. W. R. 1912 : 16 I. C. 122 : 131 P. L. R. 1912.**

Suit for—Cause of Action.

——*Suit for—Cause of action—Contract—Right to sue on cause of action accrued during subsistence of the Contract—Termination.*

Where the plaintiff brings a suit for pre-emption basing his cause of action on a contract with the vendor, the mere fact that the time fixed in the contract had expired before the suit was brought does not affect its maintainability. (*Rafique and Piggott, JJ.*) RAM BHAROSE TIWARI *v.* PANDIT CHANDRA SHEKHAR PATAT PANDE. **L. R. 4 A. 85 : 1923 A. 135.**

——*Suit for—Cause of action—Sale—What is.*

Where one person is in possession of certain property and another person claiming title to it brings a suit and withdraws it on terms, the withdrawal cannot be considered as a sale of property in dispute so as to give a right of pre-emption. (*Stuart, J. C.*) LALA LACHHONAN PRASAD *v.* MUSAMMAT CHAMELA. **52 I. C. 170 : 1 U. P. L. R. (J. C.) 11.**

——*Suit for—Cause of action—Mortgage by conditional sale—Decree absolute.*

Where a *wajib-ul-arz* permitted pre-emption only in case of transfer, the cause of action begins on the date of mortgage and not on the day of the decree absolute as the act of the Court is no transfer. (*Richards, C.J. and Tudball, J.*) SUBA SINGH *v.* MAHABIT SINGH. **39 All. 544 : 40 I. C. 461 : 15 A. L. J. 514.**

——*Suit for—Cause of action—Landin possession of vendee at date of sale — Mutation of names.*

Vendor sold in 1906 three fields by three separate sale-deeds transferring by each one-third share in each of the three fields. The vendees were father and son. Out of the three fields sold the vendee (father) was already in possession of two fields as mortgagee and he was a tenant as regards the third before 1906, in 1907-08 and onwards. Mutation was granted only in 1912. *Held*, cause of action for pre-emption arose only when mutation was granted. (*Rossignol, J.*) IMAMI-UD-DIN *v.* KHUDA BAKSH. **39 I. C. 146 (1).**

——*Suit for—Cause of action—Limitation—Vendee already in possession.*

Plaintiffs brought a suit for pre-emption within a year from the date of the mutation in question but more than a year after the date of the alleged oral sale. The defendant-vendee had been in possession before the sale in the capacity of a tenant. *Held*, that limitation must run from the date of the mutation. 3 Lah. 261, 88 P. L. R. 1915

PRE-EMPTION—Suit for—Parties.

Foll. The question is really one of notice and as the potential pre-emptor received no notice whatever until the date of mutation, the limitation must be held to run from that date. (*Harrison and Zafar Ali, JJ.*) GYAN SINGH *v.* GYAN SINGH. **1923 Lah. 654.**

——*Suit for—Cause of action — Subsisting right of pre-emptor.*

The usual method of dealing with suits to enforce a statutory right of pre-emption should be to regard the state of affairs existing when the plaintiff cause of action arose. 3 Lah. 267, Foll. But there may be circumstances in which a court may be justified in refusing to enforce such right unless it is maintained intact throughout the progress of the suit. (*Campbell, J.*) LADHA RAM *v.* JIDHU RAM. **1923 Lah. 339.**

Suit for—Good Faith.

——*Suit for—Good faith—Pre-emptor not in a position to buy.*

An inference that the plaintiff's suit for pre-emption was not brought in good faith cannot be drawn though it is found that the plaintiff was indebted and was a minor. (*Kanhaiya Lal, J. C.*) ATHAR HUSSAIN *v.* IDU SHAH. **23 O.C. 85 : 2 U. P. L. R. (J. C.) 105 : 56 I. C. 691 : 7 O. L. J. 271.**

——*Suit for—Good faith.*

A pre-emption suit not instituted *bona fide* with the object of excluding of a stranger is not maintainable. 21 C. 496 P. C. Ref. to. (*Evans, J. C.*) MAHARANI *v.* RAMADHAR. **13 I. C. 508.**

Suit for—Parties.

——*Suit for—Parties—Joint Hindu family—Minor members.*

In a pre-emption suit against the sons of a vendee, a member of a joint Hindu family, where the superior right of the plaintiffs is not disputed and the genuineness of the price paid by the vendees is also admitted, the minor grandsons of the vendees are not necessary parties and the suit is not barred though these are made parties after the period of limitation. 33 A. 279 Foll. 85 P. R. 1915; 105 P. R. 1895; 105 P. R. 1917 Ref. (*Broadway and Abdul Qadir, JJ.*) RAM LUBHAYA *v.* RAM DAS. **3 Lah. L. J. 510.**

——*Suit for—Parties—Second vendee transferring property to another—Second vendee when must be brought on record.*

Where, before a suit for pre-emption has been instituted the vendee resells the property to another person, the second vendee must be brought on record within the time prescribed for the suit; otherwise the suit will be barred as against him. 25 P. R. 1903 Rel on. (*Johnstone and Chevis, JJ.*) SHAH MUHAMMAD *v.* PIARA MAL. **84 P. R. 1911: 13 I. C. 792: 255 P. W. R. 1911.**

——*Suit for—Parties—Mortgage effected by vendee.*

A pre-emptor is not bound by a mortgage effected by the vendee after the sale and the mortgagee is not a necessary party in a suit by pre-emptor against the vendee though the mortgagee will be bound by a pre-emption decree passed

PRE-EMPTION—Suit for—Right to sue.

against the vendee. 93 P. R. 1902 Foll (*Rattigan, J.*) DEO RAJ *v.* GOVIND PARSHAD.
55 P. W. R 1912: 13 I. C. 647: 91 P. L. R. 1912.

Suit for—Right to Sue.

——*Suit for—Right to sue*—Karabatdar Karibi.

A relation 7 or 8 degrees removed is not a relation and cannot pre-empt as *Karabatdar Karibi.* (*Tudball and Rafique, JJ.*) GANGA MAL *v.* RAM SARUP. **58 I.C. 87 : 2 U.P.L. R. (All.) 153.**

——*Suit for—Right to sue—Sale by vendee to a person entitled to pre-empt.*

Where property was sold to a person who in his turn sold it to a person who had the right to pre-empt, a suit is maintainable by a relation of the original vendee who had a right to pre-empt the sale by the vendee. (*Knox, J.*) ADBARI-DUBAIN *v.* SHIODIHAL PANDE. **13 I. C. 708.**

——*Suit for—Right to sueomission to include whole of the land void—Mistake—Rectification.*

If a man intentionally sues for less land than is covered by the sale, he loses his right of pre-emption but in cases where the error is merely accidental and relates only to the description of the property the pre-emptor is always allowed to amend his claim. If, of course, he refused to correct his error, when it was pointed out to him, he would be held to have forfeited his claim. It the vendee himself takes no objection to the error, or if he raises the objection too late, the right of pre-emption is not forfeited. 13 P. R. 1915 Foll. (*Chevis, J.*) ALLAH RAKHIA KHAN *v* KALA RAM. **67 I. C. 872.**

——*Suit for—Right to sue—Occupancy Rights—Sale of.*

An occupancy tenant, has no *locus standi* to challenge the sale of occupancy rights by another occupancy tenant to the landlord and he could not successfully maintain a suit to pre-empt. on such a suit. (*Shadi Lal and Le Rossignol, JJ.*) SUBA *v.* KUTBA. **52 I. C. 525: 95 P. R. 1919.**

——*Suit for—Right to sue—Landlord purchaser—Occupancy right—Punjab Tenancy Act, Ss. 6 and 8.*

Plff. collaterals of the vendor tenant cannot pre-empt against the landlord vendees the occupancy rights though the said rights came under Ss. 6 and 8 of the Punj. Ten. Act and not under S. 5. 31 P. R. 1896; 24 P. R. 1902 ; 19 P. L. R. 1907; 73 P. R. 1911. Ref. 36 P. R. 1912, Disappr. (*Johnstone, C.J. and Shadi Lal, J.*) AKBAR HUSSAIN *v.* ALI AHMAD. **38 I. C. 712: 116 P. R. 1916.**

——*Suit for—Right to sue—Pre-emptor agnate and co-sharer in* Khata--*Vendee agnate and co-sharer in* shamilat.

In a suit for pre-emption where the plaintiff was not only an agnate and also a co-sharer with the vendor in the *khata* sold and the vendee was also an agnate but only a co-sharer in the undivided shamilat of the village and the pre-emption was in both in respect of the *khata* and the *shamilat* appertaining thereto, the vendee could not on the basis of his share in the *shamilat* assert a right to take the *shamilat* appertaining to the *khata*. (*Rattigan and Beadon, JJ.*) KHAIR DIN *v.* GHULAM MOHIUDDIN.
52 P. L. R. 1914: 43 P. R. 1914: 22 I. C. 401: 142 P. W. R. 1914.

——*Suit for—Right to sue—Doubtful claim.*

In view of the decision of the Privy Council in 21 C. 496 P. C. a suit to enforce pre-emption in respect of a claim to what is really a doubtful title is not maintainable. (*Kanhaiya Lal J. C.*) BABU LAL *v.* ALI AHMAD KHAN. **25 O. C. 258: 9 O.L.J. 317: 4 U. P. L. R. (O. C.) 71 : 1922 Oudh 223.**

——*Suit for—Right to sue—Two vendees—One died—His legal representatives impleaded after limitation—Effect.*

Where, in a pre-emption suit, it appeared that one of the co-vendees died even before suit, and his legal representatives were impleaded after the period of limitation had expired ; *held* that the suit against the latter was barred by time, and that in their absence no relief could be given to the plff. even as against the other defendant inasmuch as the sale was a joint sale. (*Lindsay, J. C.*) JAI JAI RAM *v.* DARSHAN LAL.
63 I. C. 558 : 8 O. L. J. 320.

——*Suit for—Right to sue—Ex-proprietary tenant.*

An ex-proprietary tenant in Oudh is not a member of the village community and cannot pre-empt as such. (*Kanhaiya Lal, A.J.C.*) JANKI *v* BEHARI LAL. **25 I. C. 718 : 1 O.L.J. 405.**

Suit for—Subsequent Events.

——*Suit for—Subsequent events—Numerous sales and as many suits, effect of dismissal of last one.*

Where as the result of numerous sales, as many suits for pre-emption were filed and were all decreed, except the last which was dismissed for default, the dismissal does not affect the prior claims. (*Lindsay and Sulaiman, JJ.*) SRI THAKUR RADHIKA RAMAN BIHARIJI *v.* BOHRA SHIAM SUNDER LAL. **45 A. 561 : 21 A. L. J. 518 : L. R. 4 A. 257 : 1923 A. 526.**

——*Suit for—Subsequent events—Transfer by vendee to co-sharer after suit—Effect of*

The fact that the stranger vendee of a property, transferred that property, after the pre-emptor had filed his suit for pre-emption, to a co-sharer of equal degree with the pre-emptor, is enough to defeat the right of the pre-emptor. (*Rafique and Lindsay, JJ.*) HAR KESHI *v.* MEWA RAM.
L. R. 4 A. 347.

——*Suit for—Subsequent events--Gift of share in favour of vendee subsequent to suit.*

When during a suit for pre-emption the deft. vendees acquired some property by gift, in the same sub-division, the gift could not be used as a defence, to defeat plff.'s claim as it took place subsequent to the filing of the suit. 26 A. 389 ; 11 O.C. 290; 91 P.R. 1909 Foll. Case-law discussed. (*Kanhaiya Lal, A. J. C.*) SITLA BAKHSH SINGH *v.* JAGDAT. **20 O. C. 196 : 41 I. C. 909 : 4 O. L. J. 483.**

——*Suit for--Subsequent events—Title acquired after cause of action.*

PRE-EMPTION—Suit for—Subsequent events.

The purchaser may use a title acquired by him subsequent to the cause of action as a defence in a suit for pre-emption instituted after he acquired the title. 11 O. C. 290 ; 26 A. 889 Foll. (*Lindsay, J C.*) DURGA SINGH *v.* GAYA SINGH. **36 I. C. 55 : 3 O. L. J. 309.**

———*Suit for—Subsequent events—If Court can consider.*

In a pre-emption suit the appellate Court may consider any circumstances which have arisen during the pendency of the suit even if they have come into being, subsequent to the decree of the Lower Court. (*Kendall, A J. C*). ONKAR SINGH *v.* BHAGWAN DAT SINGH. **25 I C. 694 : 17 O. C. 242.**

Suit for—Value of Claim.

———*Suit for—Value of claim for purposes of jurisdiction.*

Any compensation found to be payable by the pre-emptor to the vendee on equitable grounds and not a part of the price paid by the vendee, is not to be taken into consideration in determining the value of a suit in a pre-emption case. (*Le Rossignol and Harrison, JJ.*) CHIRAGH DIN *v.* SERAJ DIN. **5 Lah. L. J. 137 : 1923 Lah. 107.**

———*Suit for — Value of claim—Right of vendee to compensation for improvements after the purchase and before suit.*

Where a pre-emptor has taken no steps to obtain an injunction against a vendee who has been carrying on building operations after purchase and before suit must pay Court-fee on the total value of the property as well as the improvements made and deposit in Court 1/5 of such total amount. (16 P. R. 1908, 19 P. R. 1908 F.) (*Kensington, J.*) KHIDMAT RAI *v.* ANANT RAM. **169 P.W.R. 1912 : 17 I. C. 245 : 184 P.L.R. 1912.**

———*Suit for—Value of claim—Appeal.*

To determine an appeal in a pre-emption suit, the value for the purposes of jurisdiction and not the amount which the pre-emptors will have to pay, must be looked at. (*Kensington and Chevis, JJ.*) GUJAR *v.* FATTEH JANG. **225 P.L.R. 1912 : 15 I. C. 407 : 201 P. W. R. 1912.**

———*Suit for—Value of claim.*

In a pre-emption suit the valuation given by the plff. in the plaint and not the price set out in the sale-deed upon which the suit for pre-emption is based, must decide the jurisdiction of the Court. 12 O. C. 31 Not Foll. 6 O. C. 255 Foll, 10 All. 524 ; 13 All. 320 ; 16 All. 286 Appr. (*Sunderlal, A.J.C.*) BALDEO PRASAD *v.* HAR RATAN. **9 I. C. 414.**

Suit for—Miscellaneous.

———*Suit for—Mortgagee vendee—Equities in favour of.*

The mortgagee prior to 1882 obtained a sale-deed of the equity of redemption from the mortgagor for his original money with interest and the Government revenue which he paid for his default. In a suit for pre-emption of the property the mortgagee vendee must get full amount in the sale deed as the principle of equity in S. 72, T.P. Act existed before. (*Richards, C. J. and Rafique. J.*) BHOJRAJ *v.* RAM NARAYAN. **38 All. 530: 35 I.C. 915 : 14 A. L. J. 717.**

PRE-EMPTION—Time for pre-emption.

———*Suit for—By a reversioner in respect of property alienated by widow—Whether admissible of its validity.*

A reversioner by bringing a suit for pre-emption in respect of an alienation by a widow must be taken to have admitted its validity and his sons are bound by such admission. (*Shah Din and Chevis, JJ.*) GUJAR *v.* AULIYA. **184 P. L. R. 1914 : 78 P. R. 1914 : 23 I. C. 835 : 119 P. W. R. 1914.**

———*Suit for—Portion of land exchanged by vendee—Transferee not impleaded in suit for pre emption—Effect of—Relief omitted—Subsequent suit.*

Where the vendee exchanges with a third person one of the plots purchased for another land, the pre-emptor is not entitled to the land so got in exchange. A relief which was claimable, but was not claimed against the vendee, in a suit for pre-emption, cannot be subsequently claimed in another suit against him. (*Rattigan and Beadon, JJ*) NARAIN SINGH *v.* DIT. **20 I. C. 442 : 285 P. L. R. 1913.**

———*Suit for—Mortgage money to be included in price—Compromise—Deposit of what money necessary.*

In a pre-emption suit parties compromised that mortgage money charged on the property in suit be included in the price fixed before the pre-emption and that each should pay half of it It was held that the pre-emptor must deposit half of the mortgage money (*Evans, A. J. C.*) ASHIK HUSSAIN *v.* MEHDI HUSSAIN. **12 I. C. 413.**

Time for Pre-emption.

———*Time for pre-emption—Right must exist also on date of decree.*

In a pre-emption suit the plaintiff must prove his right to pre-empt not only at the date of the suit but also at the date of the decree, whereafter the suit and before the decree, the vendee, a stranger sold the property to a co-sharer, the plaintiff's suit must fail. (*Rafique and Lindsay, JJ.*) HER KESHI *v.* MEWA RAM. **9 O. & A. L. R. 495 : 1923 A. 294.**

———*Time for pre-emption—Custom.*

In 1907, certain property was mortgaged by conditional sale and the foreclosure was made absolute in 1912 without any assertion of he right of pre-emption by any one. But when it was transferred in April 1914, the plaintiff brought a suit relying on an entry in the *wajib-ul-arz. Held*, if, the custom proved were sufficiently wide to include a mortgage, then the plaintiff's cause of action arose when that mortgage was made and the year of limitation would run from the date of the registration of the mortgage and the present suit would therefore be time-barred, (2) if, on the other hand, the custom is not sufficiently wide to include a mortgage then no right of pre-emption arose by reason of the fact that the mortgagee obtained a decree absolute upon that mortgage, (*Richards and Rafique, JJ.*) RAM BHAROSA *v.* KABUTRA. **50 I. C. 48 : 17 A. L. J. 452.**

———*Time for pre-emption—Nature of property—Ceremonies.*

PRE-EMPTION—Time for pre-emption.

There is no limit to the size of the property of which pre-emption may be claimed by a co-sharer but there is a limit in the case of those who have their claim on vicinage. The date of the conclusion of a bargain for the purpose of the performance of the *Talabs* should be ascertained from the intention of the parties. 35 Cal. 575 Rel. on. (*Scott, C. J. and Beaman, J.*) SITA RAM BHAU RAO DESHMUKH *v.* SIRAJUL KHAN.
41 Bom. 636 : 42 I. C. 32 : 19 Bom. L. R. 549.

———*Time for pre-emption—Right to pre-empt when arises.*

A Mahomedan pre-emptor's right of pre-emption does not arise until the transfer to the stranger has become complete by the registration of the deed. The right cannot be lost by any act or omission by him prior to that date. (*Carnduff and Richardson, JJ.*) BUDHAI SIRDAR *v.* SONAULLAH MRIDHA. **41 Cal. 943 : 18 C. W. N. 890 : 23 I. C. 385 : 19 C. L. J. 601.**

———*Time for pre-emption—Lim. Act, Arts. 120 and 10*

A sold certain property to *B* with a covenant to pre-empt in case of its sale by *B* to a third person, and himself remained in possession, under an oral agreement, for a certain period. While *A* was thus in possession, *B* sold the property to *C* and after one year of the execution of the registered deed of sale between *B* and *C*, *A* sued for pre-emption. *Held*, that the suit was governed by Art. 120 and was not barred, as possession had not been taken by the vendee, *i.e.*, *B*. (*Napier and Krishnan, JJ.*) VELAYUDHAM PILLAI *v.* THINA VELAYUDHAM PILLAI. **13 L. W. 268 : 29 M. L. T. 251 : (1921) M. W. N. 207 : 62 I. C. 27 : 40 M. L. J. 443.**

———*Time for pre-emption—Mahomedan Law—Sale when complete—When mousabat can be performed.*

A sale is not complete for purposes of pre-emption till legal ownership passes from the vendor to vendee by registration of the conveyance whether or not there has been payment and delivery in cases where the immoveable property is above the value of Rs. 100. 41 Cal. 14 Appr. The test to determine when the right to pre-emption arises is, (1) has there been a real sale, (2) at what date had the pre-emptor knowledge that the sale was complete, (3) if the sale is in the eyes of the contracting parties complete, it is not necessary for the pre-emptor to wait till registration before performing the ceremony of *mousabat* (*Mullick and Roe, JJ.*) KEYALI PRASAD *v.* NAZURUL ALUM. **20 C.W.N. 1048 : 34 I. C. 210 : 1 P. L. J. 174.**

Transfer, nature of

———*Transfer, nature of — Gift—Fictitious deed—Evidence of.*

The circumstances that the donor belongs to a different caste from the donee, that the gifted property was small and that the deed of gift was given after the institution of a suit for pre-emption do not show that the deed of gift was intended to be fictitious. (*Rafique and Piggott, JJ.*) SHIB LAL *v.* BIDHA SINGH. **21 A. L. J. 329 : L. R. 4 A. 375 : 1923 A. 508.**

PRE-EMPTION—Transfer, nature of.

———*Transfer nature of—Permanent lease—If sale.*

A permanent lease cannot be construed as a sale deed and can be given no right of pre-emption. 10. O. C. 348 Foll. (*D. Chatterjee and N. Chatterjee, JJ.*) ABDUL KADER *v* ALI MEAH.
15 C. L. J. 649 : 14 I. C. 715 : 16 C. W. N. 717.

———*Transfer, nature of,—Adhlapi transaction—If a sale if no consideration passes.*

The creation of an *adhlapi* tenure without any consideration is not a sale and does not give any rights of pre-emption. (*Broadway and Wilberforce, JJ.*) GHULAM MUHAMMAD *v.* TEK CHAND.
62 I. C. 932 : 2 Lah. 199.

———*Transfer, nature of—Exchange—Avoidance of the law of pre-emption.*

The law of pre-emption may be avoided by any legal means. There is nothing illegal in a man becoming a proprietor in a village under an exchange where there is reason to apprehend that a sale in his favour would be pre-empted. (*Broadway and Abdul Raoof, JJ.*) NARAIN SINGH *v.* WARYAM SINGH. **60 I. C. 576.**

———*Transfer — Sale—Compromise of Litigation.*

If a suit for the recovery of property is compromised, it does not amount to a sale of the land but to an abandonment by the plffs. of their rights to obtain a decision of the Court in a case which was genuinely contested. Therefore no claim for pre-emption was competent. (*Abdul Raoof and Bevan-Petman, JJ.*) MASIHUDDIN *v.* MATU RAM.
1 Lah. 109 : 55 I. C. 865 : 96 P. L. R. 1920.

———*Transfer—Sale or exchange.*

Pre-emption is not allowed when it is proved that the transaction is an exchange and not a sale. (*Broadway, J.*) PRABHU DIAL *v.* SHADI RAM. **50 I. C. 288.**

———*Transfer—Sale or exchange—Intention—Onus.*

Where a transaction which is apparently an exchange is alleged to be a sale, the onus is heavy on the party alleging to prove his case. (*Rattigan, C. J. and Le Rossignol, J.*) GUL MUHAMMAD *v.* SABZ ALI KHAN. **104 P. R. 1918 : 49 I. C. 275 : 140 P. L. R. 1918.**

———*Transfer—Sale or mortgage—Evidence of.*

Where a deed of sale absolute and unconditional is executed, the right of pre-emption immediately accrues and is not affected by the fact that later on an agreement to reconvey the property is entered into between the parties and registered. (*Scott-Smith and Le Rossignol, JJ.*) MUHAMMAD MIR *v* FAIZUL HASSAN.
74 P. R. 1918 : 47 I. C. 418 : 163 P. W. R. 1918.

———*Transfer—Sale or exchange—Purchase money—What is.*

A transaction of exchange does not cease to be such because a small sum of money is paid in addition for adjustment of values. The amount payable eventually by a purchaser of property in respect of mortgage charges on it, is not part of the purchase money when the property is sold for a definite amount. (*Rattigan, J.*) QURJA *v.* SHARFA. **100 P. W. R. 1913: 19 I. C. 301 : 199 P. L. R. 1913.**

PRE-EMPTION—Transfer, nature of

——— *Transfer to—Transfer by virtue of compromise decree in pre-emption suit.*

A right of pre-emption cannot arise upon a transaction effected by virtue of a compromise decree in a pre-emption suit. For its accrual, there must be a person acquiring property by a contractual relation of sale or transfer. 2 All. 334; 7 All. 917 Ref. (*Rattigan, J.*) KHEMAN *v.* ALADAD. **74 P. W. R. 1913 : 18 I. C. 957 : 195 P. L. R 1913.**

——— *Transfer, nature of—Lease or sale—Test of—Existence of right of re-entry- Under proprietary right.*

In the case of a sale there is a right of pre-emption but in the case of a lease there is not. The first distinction between a sale and a lease is that in a sale ownership passes while in a lease it does not pass; but this distinction fails where a superior proprietor carves out of his title an under-proprietary right and transfers that for a price paid. An under-proprietor may be a sharer under S. 9 of the Oudh Laws Act in such a way that a sale by him of his under-proprietary right will give rise to pre-emption. When a holder of a superior right carves out an under-proprietary right and sells it, this also amounts to a sale and gives rise to a right of pre-emption. Yet such a transaction falls under the definition of a lease for it is a transfer of a right to enjoy the property. 8 O. C. 121 ; 14 O. C. 41; 17 O. C. 299 Ref. (*Simpson, J.*) SAHIB BAKSH SINGH *v.* THAKUR DIN SINGH. **9 O L J 334 : 4 U. P. L. R (O. C) 85 : 1922 Oudh 229.**

——— *Transfer, nature of—Sale of property of a share in litigation—Property not in possession.*

It is not the law that no right of pre-emption arises in any case in which the vendor was out of possession and litigation would be necessary to recover possession of the property The question whether a sale is a genuine sale or a mere sale of a share in a law-suit is one to be determined on the facts of the case and it is not correct to say that no sale can be the subject of pre-emption where legal proceedings are necessary to obtain possession of the property, Where a sale-deed definitely purported to sell not a share in a law-suit but a two annas eight pies share in Zamindari property to which the vendor definitely and clearly stated his title, there is no reason or principle why a champertous purchase of this nature should be exempted from the liability to pre-emption to which other purchases are subject. (*Daniels, A J. C*) GAJADHAR PRASAD *v* MANRAKHAN. **4 U. P. L. R. (A.) 41 : 8 O. L. J. 403 : 1922 Oudh 156.**

——— *Transfer, nature of—Perpetual lease—Under-proprietary rights—Creation of.*

A perpetual lease granted by a superior proprietor conferring which under-proprietary rights are on the lessees. the rent reserved is substantially equivalent to the Government revenue assessed on the land and no right of re-entry is reserved to the lessors, amounts to a sale of under-proprietary right, and gives rise to a right of pre-emption. (*Daniels, A. J. C.*) ZULFAN KHAN *v.* SANT BAKHSH SINGH. **24 O.C 310 : 1922 Oudh 81.**

PRE-EMPTION—Transfer, nature of.

——— *Transfer—Sale or mortgage—Onerous terms.*

The onerous character of a mortgage does not necessarily lead to an inference that a sale was clothed in the form of a mortgage to defeat pre-emption. If on the evidence the lower appellate court finds that a transaction is a mortgage and not a sale its finding cannot be disturbed in second appeal. (*Kanhaiya Lal, J. C.*) MAHTA DIN *v.* KEWAL. **53 I. C. 892 (1).**

——— *Transfer—Sale—Genuineness of—How determined*

The question whether a sale is a genuine sale or a mere sale of a share in a law suit is to be determined on the facts of each case. The mere fact that legal proceedings are necessary to obtain possession of the property sold, is not enough for holding that the sale does not give rise to a right of pre-emption. (*Daniels, A. J. C.*) BALWANT SINGH *v.* LALLU RAM. **49 I, C. 462 : 6 O. L. J. 29.**

——— *Transfer—Sale*—Hiba-bil-ewaz.

Hiba-bil-ewaz is not a sale and confers no right of pre-emption. A transfer of property to a wife in lieu of dower is the *Hiba-bil-ewaz* and not sale. (*Stuart, A. J. C.*) RAM PRASAD *v.* RAHAT BIBI. **33 I. C. 622 : 18 O C. 367.**

——— *Transfer —Alienation — Operation of Law—Compromise.*

In a pre-emption suit in which the claim has been decreed as a result of a reasonable compromise in the course of the suit, it is not right to say that the vendee made any alienation of the property in suit. The transaction is cancelled by operation of law and not by any voluntary act of the vendee. (*Stuart, J. C. and Kendal, A.JC.*) SHEO DULARE MISRA *v.* BRIJ BUKHAN LAL. **25 I. C. 849 : 1 O. L. J 456.**

——— *Transfer—Sale or mortgage—Transfer, short of sale to circumvent pre-emption—No fraud.*

The onerous character of a mortgage cannot convert it into a sale. High improbability of redemption of a mortgage would not make it any the less a mortgage, for it is capable of redemption, however remote the chance. (*Lindsay, J. C. and Rafique, A. J. C.*) MAJIDA BIBI *v.* FAZAL KARIM. **19 I. C. 679 : 16 O. C. 9.**

——— *Transfer, nature of—Zur-i-peshgi lease is not a sale.*

A deed of permanent lease which gives a right of permanent possession to the lessee in consideration of Rs 150 as *Zur-i-peshgi* and of an annual rent of Rs. 2 cannot be construed as a deed of sale. (*Rafique, A.J.C*) TRILOKI NATH *v.* SHEO MANGAL. **14 I. C. 717.**

——— *Transfer — Sale or mortgage—When allowed.*

A document apparently one of mortgage cannot be construed as a deed of sale merely because its terms are such as to render it improbable that the redemption will ever take place. There can be no pre emption in a case of this type. 3 O. C. 213 Foll. (*Lindsay and Rafique, A. J. Cs.*) BADRI SINGH *v.* CHANDIKA BAKSH SINGH. **14 I. C. 8 : 15 O. C. 1.**

PRE-EMPTION—Waiver of right.

Waiver of Right.

———*Waiver of right—By one person—Suit by another co-sharer—Transfer* pendente lite—*Effect of.*

Where a person having a prior right to pre-empt, waives the right and another co-sharer brings a suit for pre-emption, a transfer *pendente lite* of the former, does not affect the right of the latter. (*Tudball and Rafique, JJ.*) ASA SINGH *v.* NANBAT SINGH. **61 I. C. 34: 19 A. L. J. 143.**

———*Waiver of right—Involuntary sale.*

A custom of pre-emption by a co-sharer does not refer to involuntary sales. Where other sharers having notice of an involuntary sale of property do not bid for it in an auction sale, their silence amounts to a refusal. Where the vendor offered the property for sale to a co-sharer who refused it, then he can sell to anybody at that or higher price without notice to that co-sharer. (*Tudball and Rafique, JJ.*) GHULAM MOHIDIN KHAN *v.* HARDEO SAHAI. **42 All. 402: 58 I. C. 93: 18 A. L. J. 413.**

———*Waiver of right—Acquiescence—Effect of.*

In a suit for pre-emption by the plaintiff as co-sharer and brother of the vendor, the vendee being only a co-sharer it was found that plaintiff was heavily indebted and had no money on hand and was willing to sell his own share to the vendee. *Held*, that this conduct of the plaintiff amounted to acquiescence in the sale and was a bar to the suit. (*Richards, C. J. and Tudball, J.*) ANCHAL *v.* DALIP SINGH. **47 I. C. 400: 16 A. L. J. 779.**

———*Waiver of right—Plaintiff present at sale—Absence of protest—Effect.*

Where a person was present at an auction and did not bid at all and the auction was withdrawn for insufficiency of price and was put up for auction a second time and sold to a third person. *Held*, that the conduct of the person amounted to a refusal to purchase, and that he was not entitled to maintain a suit for pre-emption. (*Richards, C.J. and Tudball, J.*) CHITHRU SINGH *v.* BHAGWANT SINGH. **46 I. C. 106 : 16 A.L.J. 492.**

———*Waiver of right not exercising right for an unduly long period.*

Not exercising right of pre-emption till more than a year after a sale, in spite of previous wide publication of the intention to sell, is tantamount to waiver of the right of pre-emption. (*Richards, C. J. and Rafique, J.*) NAUNIHAL SINGH *v.* RAM RATAN. **39 All. 127 : 37 I. C. 511 : 14 A. L. J. 1138.**

———*Waiver of right*—Bona fides *of vendor.*

Under a custom of pre-emption, a co-sharer wishing to sell should first offer the property to his other co-sharers. The vendor offered the property to plaintiff, who refused to give more than Rs. 160 He then sold the property for Rs. 135. In the circumstances the conduct of the plaintiff amounted to a refusal to purchase the property when offered to him. (*Richards, C. J. and Tudball, J.*) INDRAJ *v.* BROTHER CLEMAL. **37 All. 262 28 I. C. 272 : 13 A. L. J. 288.**

———*Waiver of right—Acquiescence—Acceptance of mortgage money from vendee is not.*

PRE-EMPTION—Waiver of right.

Where a person who is a mortgagee of the properties sold by the vendor accepts the mortgage money from the vendee, he does not thereby lose any right of pre-emption which he might have in respect of the property sold. Such acceptance of the mortgage money does not amount to waiver or acquiescence. 35 C. 402 followed. (*Broadway and Brasher, JJ.*) KANSHI RAM *v.* BHOJA RAM. **1924 L. 159.**

———*Waiver of Right—Acceptance of mortgage money from vendee—Delay.*

Acceptance of mortgage money from the vendee and the omission to assert or exercise the right for a considerable time, do not amount to a waiver of the right. (*Martineau, J.*) IMAM DIN *v.* JALAL **4 Lah. L. J. 204 : 1922 Lah. 42.**

———*Waiver of right—Refusal to purchase at fair price.*

The conduct of the plaintiffs in refusing to purchase the property except at a price far below its real value amounted to a waiver and they could not enforce their right of pre-emption. 37 All 262 ; 33 All. 637 Ref. Plaintiffs had no reasonable ground for entertaining the belief that Rs. 2,000 was an excessive price (*Shadi Lal and Martineau, JJ.*) MUKH RAM *v.* HARJAS. **1 Lah. 51 : 69 P. L. R. 1920 : 55 I. C. 879 : 42 P. W. R. 1920.**

———*Waiver of right—Sale of property by judgment—Debtor under O. 21, R. 83 (2), C. P. C.*

Where a judgment-debtor sells property under O. 21, R. 83 (2) of the C. P. Code and even though it does not become absolute until confirmed by the Court, it cannot be said to be a sale by a Court in execution of the decree and thus not liable to pre-emption. 49 P. R. 1911 Dist. The failure of a person entitled to pre-empt to outbid the purchaser at an auction sale does not amount to waiver. (*Scott-Smith and Dundas, JJ.*) AMAD JAN *v.* KISHON CHAND. **52 I. C. 337.**

———*Waiver of right—Second sale—Purchaser from vendee having superior right.*

A plaintiff in a pre-emption suit cannot successfully pre-empt a defendant who is the assignee of the original vendee on the ground that he had waived his right to pre-emption on the original sale. (*Le Rossignol, J.*) BOLA *v.* BHIKHA. **49 I. C. 147 : 8 P. R. 1919.**

———*Waiver of right—General assent to sale.*

The vendee went to the village in which the land in suit was situated and informed some o the villagers including the plffs. that he contemplated purchasing the land. A general assent was given to such purchase, but the agreement to purchase, was not at the time entered into between the vendor and vendee and no offer was made to the pre-emptors after the sale. *Held*, that the plffs. had not by their conduct waived their right of pre-emption and they were not debarred from exercising their right. 27 All. 670 Appr. (*Shah Din and Scott-Smith, JJ.*) BINDU KHAN *v.* INDAR NARAIN. **50 P. R. 1918 : 19 P. L.R. 1918 : 43 I. C. 1006 : 40 P.W.R. 1918.**

PRE-EMPTION—Waiver of right.

———*Waiver of right—Pre-emptor assisting in sale and demarcating land.*

A pre-emptor who assists in negotiating a sale and demarcating the field sold must be deemed to have waived his right to pre-empt. 8 I. C. 246 Foll. 37 P. R. 1908; 99 P. R. 1910; 100 P. R. 1885; 78 P. R. 1881; 185 P. L. R. 1905 Dist. (*Johnstone and Rattigan, JJ.*) FATEH CHAND *v.* KIRPASINGH.
76 P. W. R. 1912 : 48 P R 1912 : 13 I. C. 561 : 45 P. L. R. 1912

———*Waiver of right—Proof.*

Where the trustee of a temple executed an *othi* mortgage (containing a right of pre-emption, and subsequently called on the mortgagee to advance a further sum for temple purposes and the mortgagee expressed his readiness to advance the sum of the mortgagor would satisfy him that it was for temple purposes and the mortgagor undertook to satisfy him, provided he would deposit the sum with a third party, the mortgagee does not waive the right of pre-emption. (*Benson and Sundara Aiyar, JJ.*) PALAKUNNATH KOLAVI *v.* NARAYANA MANGALANATH.
(1911) 1 M. W. N. 263 : 9 I. C. 1010 : 9 M. L. T. 495.

———*Waiver of right— Former proprietor—Effect on other proprietor's right.*

The withdrawal by a former proprietor of his claim for pre-emption with regard to a portion of the property sold gives an opportunity to the person, who has the next best right, to enforce pre-emption in regard to the portion about which the former had withdrawn his claim. (*Kanhaiya Lal, J.*) DEBI DAYAL SINGH *v.* INDARPAL SINGH.
2 U. P. L. R. (J. C.) 61 : 55 I. C. 830 : 22 O. C. 373.

Wazib-ul-arz.

Construction.
Evidentiary value of.
Partition
Preferential claim.
Miscellaneous.

Wajib-ul-arz—Construction.

———*Wajib-ul-arz—Construction.*

The plaintiff in a suit for pre-emption relied on a *wajib-ul-arz* which put forth the existence of a right to pre-empt in the village in question and provided for the settlement of disputes. There were also some provisions which related to matters of contract. *Held*, it was also a record of custom on which the party could rely. (*Lindsay and Kanhaiya Lal, JJ.*) SHER MAHOMED KHAN *v.* PARBHU LAL.
21 A. L. J. 801 : 46 All. 47 : 1924 All. 274.

———*Wajib-ul-arz—Construction*—Jis se razi ho—*Meaning.*

A *wajib-ul-arz* provided that a co-sharer is at liberty to sell his share but that he must first offer it to co-sharers in his own *patti*, preference being given to near relations, that if none of the persons just mentioned were willing to take the property he is at liberty to sell to co-sharers in any other *thok* or *patti*. These words however were qualified by the addition of the words "*jis se razi ho.*" *Held*, that the plaintiff, pre-emptor cannot maintain a suit, unless he can show that

PRE-EMPTION—Wajib-ul-arz—Construction.

he is a person whom the vendor approved of as a purchaser of the property. Bearing in mind the unusual language of this document it is not proper to treat it as a valid record of an existing custom. (*Rafique and Lindsay, JJ.*) PANDIT NATHU RAM *v.* GHANSHIAM.
1923 A. 519.

———*Wajib-ul-arz—Construction.*

Under the custom of a village as recorded in the wajib-ul arz a co-sharer who wished to alienate his share was bound to offer it in the first instance to a "Qarib Ekjadi". *Held*, that on a proper construction of the wajib-ul-arz a great-grandfather's descendant could fairly be described as a "Qarib Ekjadi", *i. e.*, a near descendant of the same common ancestor. *Held*, further that the alienor was entitled to choose any co-sharer from amongst the whole body of persons who would fairly be descendants of the same common ancestor with himself. (*Rafique and Piggott, JJ.*) KUNDAN *v.* SOBHAN RAM.
1923 A. 375.

———*Wajib-ul-arz—Construction.*

Where in a Wajib-ul-arz the words '*haq-i-shufa-jaiz-hai*" occurred *held* that the words meant that the co-sharers could enforce the right of pre-emption according to Mahomedan Law, 28 A, 60 referred to. (*Rafique and Lindsay, JJ.*) SHYAM LAL *v.* PADAM SINGH.
L. R 4 A. 349 : 1923 A. 296.

———*Wajib ul-arz—Construction.*

A Paragraph in a *wajib-ul-arz* provided that in the case of a transfer by a co-sharer to a stranger some relations in the first instance and failing them co-sharers were to take the property in preference to the stranger. *Held*, this did not prove a custom of pre-emption in the village. (*Rafique and Piggott, JJ.*) ABDUL KARIM KHAN *v.* QASIM ALI KHAN.
21 A. L. J, 61 : L. R. 4 A. 82 : 1923 A. 254.

———*Wajib-ul-arz—Construction—'Bhai' and 'Beradarzadahi'—Meaning of.*

In a wajib-ul-arz bestowing right of pre-emption the words "bhai" and "biradarzadah" are wide in their application and include distant relations descended from a common ancestor, and are not limited to own brother or brother's sons. (*Rafique and Lindsay JJ.*) FAZAL HAQ *v.* AZIZ HASAN.
L. R. 4 A. (Civ). 23 : 1923 A. 163

———*Wajib-ul-arz—Construction—'Hissedar Karibi'—Meaning of.*

"Hissedar karibi" is an ambiguous expression and may mean either a co-sharer nearer in space or one nearer in blood relationship and therefore a plaintiff in a pre-emption suit placing reliance on that expression in the wajib ul-arz must show that it means a co-sharer nearer in space to the vendor. (*Lindsay and Sulaiman, JJ.*) BHOLAI PANDEY *v.* KHHIALI PANDEY.
L. R. 4 A. (Civ). 550 : 1924 A. 456.

———*Wajib-ul-arz—Construction*—Biradavan *quaribi ekjaddi—If includes uncle—Co-sharer.*

The pre-emption clause of a Wajib-ul-arz gave the first right to *biradavan quaribi ekjaddi* then to co-sharers in two different ways. In a suit for pre-emption by a co-sharer but not a relation against a vendee, an uncle, *held* that *biradavan*

quaribi ekjuddi included uncles, that they need not be co-sharers and that they had a right preferential to that of a co sharer. (*Tudball and Sulaiman, JJ.*) SHIB LAL *v* THAKUR DAMBER SINGH. 64 I. C. 617 : 19 A L. J. 889

———*Wajib-ul-arz—Construction—Classes of pre-emptors enumerated—Rights* inter se *not given.*

Where the wajib-ul-arz of a village provided that in case of a transfer of property the right to claim pre-emption would be as follows " first to *warisan ekjaddi quaribi*, then to *hissedar* of the *patti* and then to co-sharers in the village." *Held*, that the correct interpretation of the wajib-ul-arz was that the right of pre-emption arose only when there was a sale to a stranger, as it was not clear that the clause applied to the case of a sale to a co-sharer. (*Tudball and Sulaiman JJ.*) MATHURA SINGH *v.* RAM LAL SINGH. 64 I. C. 486 : 19 A. L. J. 903.

———*Wajib-ul-arz—Construction.*

The *wajib-ul-arz* of a village set out a list of sharers who owned an entire *mahal* and then a list of owners of *muafi* and resumed *muafi* lands. It also recorded a right of pre-emption in cases of transfer by co-sharer: *held* that upon the sale of a part of resumed *muafi* plot a co-sharer in that plot cannot claim pre-emption, as the clause as to pre-emption did not apply to them. (*Tudball and Sulaiman,JJ.*) RADHA KISHUN *v.* ABBASI BEGAM. 64 I. C. 480 : 19 A. L. J. 859.

———*Wajib-ul-arz—Construction.*

Where a wajib-ul-arz gave an *ek-jaddi* brother of a co-sharer a preferential right of purchase and if he did not purchase the co-sharer was entitled to sell to a co-sharer or to a stranger; *held* that wajib-ul-arz placed the other classes of co-sharers and a stranger on the same footing and that the co-sharers had no preferential right as against the stranger. (*Tudball and Rafique, JJ.*) SHEO BAKHSH *v.* MUKHTAR SINGH. 61 I.C. 894 (All.).

———*Wajib-ul-arz—Construction — Karabatmand Karibi.*

A person removed from the vendor by eleven degrees is not a *Karabatmand Karibi* and so where a wajib-ul-arz gives a right of pre-emption to a *Karabatmand Karibi*, a person removed by eleven degrees cannot pre-empt. (*Tudball and Rafique, JJ.*) TALIB HUSAIN KHAN *v.* DUKKHU KHAN. 60 I. C. 992 : 19 A. L. J. 108.

———*Wajib-ul-arz—Construction—Insolvent's property by Official Assignee.*

On the application of a creditor of a person adjudged an insolvent his property was sold by public auction by the Official Assignee. *Held*, that the village custom of pre-emption as recorded in the wajib-ul-arz referred to voluntary sales by co-sharers, and was not applicable to an involuntary sale by a Court through the Official Assignee. 27 All. 672 Dist. (*Tudball and Rafique, JJ.*) GHULAM MOHIUDDIN KHAN *v.* HARDEO SAHAI. 42 All. 402 : 58 I. C. 93: 18 A. L. J. 413.

———*Wajib-ul-arz—Construction—Bhatija — Meaning.*

A wajib-ul-arz gave a right of pre-emption first to "*bhai Bhatija Sarik Haqiyat.*" The plff. pre-emptor was the own brother of the vendor, the vendees were cousins, being the descendants of the great-grandfather of the vendor. *Held*, that the word "Bhatija" in the vernacular has a far wider meaning than the words " brothers " and nephews in English, and that the plff. had no preferential right over the vendees. (*Tudball and Rafique, JJ.*) SAMHER SINGH *v.* SHER SINGH. 18 A L.J. 454 : 56 I.C. 183 : 2 U. P. L. R. All. 158.

———*Wajib-ul-arz—Construction — Hissadar qaribi—Meaning.*

It is by no means clear that quaribi indicates a blood relation. (*Tudball and Rafique, JJ.*) BHAGWAN DAS *v.* TEJ RAM. 56 I. C. 148.

———*Wajib-ul-arz—Construction—Co-sharers.*

One Wajib-ul-arz recorded a right of pre-emption and another four years later referred to the first one. Both together mean that every co-sharer must offer his share to the co-sharers before sale. (*Richards, C. J. and Rafique, J.*) CHAND RAI *v.* BHAGAWANT RAI. 50 I. C. 90: 17 A. L. J. 461.

———*Wajib-ul-arz—Construction.*

On the construction of a Wajib-ul-arz, *held*, that even in cases of a sale in favour of a relation a nearer relative of the vendor is entitled to pre-emption. (*Richards, C.J. and Tudball, J.*) GULZAR ALI *v.* SIADAT HUSAIN. 43 I. C. 2.

———*Wajib-ul-arz—Construction.*

The son-in-law of a Hindu is not *qarabatdar Karibi.* (*Richards, C. J. and Tudball, J.*) MAHABIR PRASAD *v.* MAHADEO PRASAD. 33 I. C. 495: 14 A. L. J. 447.

———*Wajib-ul-arz — Construction — Rishtadar Karibi—Richtadar Baid*

A connection by marriage is not even Rishtadar Baid and cannot entitle a person to pre-emption against a Rishtadar Karibi to whom a prior right has been given by the wazib-ul-arz. (*Tudball, J.*) FAKHRANBABI *v.* NAGHESHARRAM. 13 I. C. 954: 9 A. L. J. 84.

———*Wajib-ul-arz—Construction of.*

Where a Wajib-ul-arz gives a right to a co-sharer to mortgage or sell his property provided he has first offered it to a select class of persons, the right to pre-emption arises, the moment the co-sharer mortgages or sells in contravention of the terms of the Wajib-ul-arz. (*Richards, C. J. and Tudball, J.*) RAJA RAM SINGH *v.* PARS RAM SINGH. 11 I. C. 628.

———*Wajib-ul-arz—Construction — Hissadar Shaik Milkiat—Meaning.*

Where in pursuance of a Wajib-ul-arz of 1833 granting a right of pre-emption to a co-sharer against strangers, the right was first given to a brother and secondly to a "Hissadar Shaik Milkiat" the latter ought to be treated as a co-sharer in the property sold. (*Richards, C, J. and Tudball, J.*) HANSRANI *v.* MUHAMMAD SADDIQ 11 I. C. 576.

———*Wajib-ul-arz— Construction — Shurka Deh,—Meaning of.*

The words "Shurkai Deh" mean and imply that the pre-emptor in question must be a

partner with the vendor in the same Mahal. (*Richards, C. J. and Tudball, J.*) GANGA NARAIN *v.* PARBHU KURMI. 11. I. C. 320.

——— *Wajib-ul-arz— Construction — "Sharik deh", meaning—Construction.*

The word "Sharik Deh" taken in their natural sense imply that the co-sharer in question shares with the vendor in the same unit of the village. (*Richards, C.J and Tudball, J.*) GANGA SAHAI *v.* INDARJIT SINGH. 11, I.C. 290.

——— *Wajib-ul-arz—Construction.*

Where by a wajib-ul-arz were given a right of pre-emption first to brothers or descendants from the same stock and secondly to *Hissadaran Patti Dip, held,* the expression meant co-sharers in the same patti. (*Griffin, J.*) KHUBI *v.* RAMJAS. 9. I. C 856

——— *Wajib-ul-arz— Construction — Entry in —Hissadar Karibi--Meaning of*

A *Wajib-ul-arz* contained the following recital-- "Each individual co-sharer has a right to transfer his property by sale or mortgage but while transferring it, he will offer it first to his brother and near co-sharers (Hissadar Karibi) and in case of refusal, he will ask the other co-sharer and if he too refuses to take the property then he will mortgage or sell it to a stranger" *Held,* that the words *Hissadar Karibi,* relate to nearness in space. (*Richards and Tudball JJ.*) KISHAN *v.* RAM SAHAI. 9 I. C. 494. (All.)

——— *Wajib-ul-arz—Construction.*

A wajib-ul-arz contained three classes of pre-emptors (1) Hissadar Karibi, (2) other hissadaran of the thoke (3) *hissadars* in other thokes. *Held,* nearness in space and not in blood was meant by Hissadar karibi.) 1 A. L. J. 272, 1 A L. J. 705; 2 A.L. J. 707 Ref.) (*Karamat Hussain, J.*) SURAJ BALI *v* NAKECHED TEWARI. 9. I. C. 276.

——— *Wajib-ul-arz—Construction.*

A wajib-ul-arz provided pre-emption in favour of *apna shafi Held* by "Apna Shafi" was meant co-sharer near in space *i. e.,* in the same patti and not co-sharer who is near in blood relationship. (*Richards and Tudball, JJ.*) LAKHAN SINGH *v.* BISHAN NATH.
33 All. 299: 9 I. C. 49: 8 A. L. J. 51.

Wajib-ul-arz—Evidentiary—Value of.

——— *Wajib-ul-arz—Evidentiary value of.*

The wajib-ul-arz of 1860 and 1886 allowed pre-emption among co-sharers but differed in the order of preference, but agreed that a near relation of the co-sharer was the first to be entitled to it *Held,* a suit based on such relationship could be maintained. (*Lindsay and Sulaiman, JJ.*) DHANRAJ MISIR *v.* RAMESHWAR MISIR.
46 All. 170: 21 A. L. J. 928: L. R 5 A 14 : 1924 All. 227.

——— *Wajib-ul-arz—Evidentiary value of— Evidence of custom.*

An entry as to the right of pre-emption recorded in a wajib-ul-arz is certainly good *prima facie* evidence of the existence of the custom unless there is internal evidence in the wajib-ul-arz itself or some other evidence or circumstance

to rebut it. If a wajib-ul-arz is of an unusual nature and in the very same clause in which reference is made to pre-emption, reference is also made to number of other matters which could not possibly have been matters of custom, the presumption would be rebutted. An entry, which lays down that a right exists which cannot be based on a custom having the force of law, is valueless as evidence to prove such custom. (*Lindsay and Sulaiman, JJ.*) BALWANT SINGH *v.* MARE SINGH.
21 A. L. J. 542 : L. R. 4 A. 281 : 1924 A. 52.

——— *Wajib-ul-arz—Evidentiary value of.*

Where a wajib-ul-arz recorded a custom of pre-emption in respect of sale and mortgage but in a later wajib-ul-arz the custom was said to exist in respect of *intikal* and the question was whether the custom applied to leases. *Held* that by the mere use of the word *intikal* lease was not included in the custom. (*Tudball and Rafique, JJ.*) MUKHLAL RAI *v.* HIRANAND SINGH.
19 A. L. J. 442: 62 I. C 884: 3 U. P. L. R. (All) 81.

——— *Wajib-ul-arz— Evidentiary value of— Custom of substitution.*

Where a wajib-ul-arz of a village recorded the right of pre-emption in case of transfer of any kind to a co-sharer in a particular order and laid down the procedure to be adopted in exercising the said right and also provided for the terms applicable to a pre-emptor borrowing money from the mortgagee creditor by mortgaging the same property, *Held,* that an extract from the wajib-ul-arz is evidence to be taken into consideration in considering the issue as to whether or not the custom exists; but the mere production of the extract is insufficient to prove the existence of the custom for substitution. (*Richards, C. J. and Tudball, J.*) KHURSHED ALI *v.* ABDUL MASJID. 38 All. 361: 35 I. C. 210: 14 A. L. J. 441.

——— *Wajib-ul-arz—Evidentiary value of— Owner of isolated plot.*

An owner of an isolated plot of land in a Mahal not assessed to Government Revenue cannot pre-empt. (*Richards, C. J. and Tudball, J.*) MAWARI *v.* MULCHAND. 34 All. 434: 14 I. C. 278: 9 A. L. J. 670.

——— *Wajib ul-arz—Evidentiary value of.*

Wajib-ul-arz as evidence varies in value according to circumstances. Where the Wajib-ul-arz was not a clear record of custom but of a number of arrangements between co-sharers it was held to be insufficient to establish the custom of pre-emption. (*Richards and Tudball, JJ.*) DHAIN KUAR *v.* DUAN SINGH. 10 I. C. 558: 8 A. L. J. 786.

——— *Wajib-ul-arz—Evidentiary value of— Presumption.*

The existence of a right to pre-emption is presumed by law, in Oudh and an inconclusive entry in the Wajib-ul-arz is not sufficient to rebut it. (*Kanhaiya Lal, A. J. C.*) KANDHAI *v.* JHABBA.
42 I. C. 50: 4 O. L. J. 452.

Wajib-ul-arz—Partition.

——— *Wajib-ul-arz — Partition — Perfect— Effect.*

PRE-EMPTION—Wajib-ul-arz—Partition

Where after the preparation of a wajib-ul-arz containing an agreement as to pre emption between co-sharers, the village was perfectly partitioned and no fresh contract was entered into, *held* that the wajib-ul-arz contract had ceased to be binding on the co-sharers. (*Richards C.J. and Tudball, J.*) PARGAS SINGH *v.* MANSAB ALI. **24 I. C. 416.**

——*Wajib-ul-arz — Partition— Perfect— 'Hissadar deh'—Meaning of.*

'Hissa Dar Deh', appearing in a wajib-ul-arz means a sharer in the village. and a perfect partition subsequent to the preparation of the wajib-ul-arz has not the effect of converting it to mean a co-sharer in the mahal.

Per Karamat Hussain, J.:—Deh and Mahal are two distinct conceptions. In one Deh there may be several Mahals and in one Mahal there may be several Dehs or portions of them. It however sometimes happens that a definite area of land is one Deh and also one Mahal. This is pure accident and must not lead to the erroneous notion that when the term Deh and Mahal may be predicated of one and the same area of land, they become synonymous. (*Knox and Karamat Hussain, JJ.*) JIVAN RAM *v.* TIVADI SINGH. **34 All. 13: 11 I C. 305: 8 A. L. J. 1072.**

——*Wajib-ul arz—Partition—Effect of.*

The right of pre-emption was conferred on the co-sharers in a village by the *wajib-ul-arz* of the village. Subsequently the village was divided in 3 mahals and separate *wajib-ul-arzes* were prepared incorporating bodily however the pre-emption clause in the original. *Held* the right of pre-emption continued to all co-sharers in the village as before and was not restricted to the co-sharers of the mahal in which the property is situated. (*John Stanley, C. J. and Bannerjee, J.*) CHIPHUR *v.* ABDUL HAKIM. **33 All. 296: 9 I. C. 23: 8 A. L. J. 23.**

Wajib-ul-arz—Preferential Claim.

——*Wajib-ul-arz — Preferential claims— Vendee and pre-emptor of the same category— Effect.*

Where the wajib-ul-arz divided persons entitled to claim pre-emption into three categories and the vendee and the pre-emptor belonged to the same category, a suit for pre-emption does not lie. (*Rafique and Piggott, JJ.*) RAGHUNANDAN SINGH *v.* MULAK RAJ SINGH. **21 A. L. J 84: L. R. 4 A. 87: 1923 A. 255.**

——*Wajib ul-arz—Preferential claim—Different mahals.*

A *wajib-ul-arz* prepared before the partition of a village into mahals gave rights of pre emption first to brothers and nephews, then to cousins who were co sharers, then to co-sharers in the *patti* and then to co-sharers in the village. *Held*, that a co-sharer in one *mahal* had no right to pre-empt property in another mahal where he was not a co-sharer. (*Richards C.J. and Tudball, J.*) KHAYALI RAM *v.* KALI CHARAN. **37 All. 573: 29 I. C. 1000: 13 A. L. J. 712.**

——*Wajib-ul-arz—Preferential right.*

The *Wajib-ul-arz* of 1860 and 1883 of a village recorded the fact that the co-sharers had a right of pre-emption, that after him the co-sharer in the same *thok*, and after him the co-sharers in other *thoks*, had the same right. *Held*, that the co-sharer in the same *thok* as the vendor had a preferential claim as against the vendee who was a co-sharer in a different thok. (*Richards, C. J. and Tudball, J.*) AUDH BEHARI PANDE *v.* JADUBANS MISIR. **29 I. C. 485.**

PRE-EMPTION—Wajib-ul-arz—Preferential claim.

——*Wajib-ul-arz—Preferential claim.*

Held, that under the terms of the wajib-ul-arz the *ek jaddi* co-sharer had a preferential claim to pre-emption over a co-sharer in the mahal. (*Richards, C. J. and Tudball, J.*) MUNNA LAL *v.* KALIKA BAKSH SINGH. **29 I. C. 425.**

——*Wajib-ul-arz—Preferential claim—Division into several Mahals — Suit on ground o nearness of relationship.*

Where a village had been partitioned into several *Mahals* and there was an arrangement of pre-emption to the effect that one co-sharer had to sell only to his near co-sharer and then to sharers in the *patti*, *mahal* or *village*, *Held*, the provision gave a preferential right of pre-emption to sharer in one Mahal who was a relation over sharer in another Mahal and not related. (*Richards, C. J. and Tudball, J.*) YAD RAM *v.* CHHEDLAL. **35 All 478 : 21 I. C. 628 : 11 A. L. J. 766.**

——*Wajib-ul-arz — Preferential claim— Hissadar karibi.*

A mere statement in a wajib-ul-arz that the right to pre-empt should in the first instance be given to a nearer co-sharer does not give a preferential right to a blood relation of the vendor who in other respects was on equal footing with the vendee, to pre empt. (*Richaras, C. J and Tudball, J.*) JAGDATT MISRA *v.* DALTHAMAN. **11 I. C. 286.**

——*Wajib-ul-arz—Preferential claim—Hissadar Karibi—Meaning of.*

There is no preferential right of pre-emption to a relation nearer in degree from the mere fact that a wajib-ul-arz mentions that the property is to be offered first to a *'hissadar thok'*; evidence of special custom indicating the above is necessary for the purpose of giving such preference. (*Richards, C. J. and Tudball, J.*) ATAULLAH *v.* SAMSHUDDIN. **11 I. C. 278.**

——*Wajib-ul-arz—Preferential claim—Qarabatdar Qaribi—Meaning of.*

The *Wajib-ul-arz* of a village gave a right of pre-empti n to three classes of people:—*First* near relatives (Qarabatdar Qaribi) *Secondly* near co-sharer in the same *Thok thirdly* co sharer in another *Thok*. Both the vendees and the pre-emptor were co-sharers in the same *Thok* but the latter was nearer in blood to the vendor than the former. *Held*, that the plff. had no preferential right, there being nothing in the wajib-ul-arz to explain the meaning of the words *Qarabatdar Qaribi* nor any other evidence of the custom. (*Richards, C. J. and Tudball, J.*) SADHO CHARAN *v.* BIRJ RAJ. **11 I. C 274.**

——*Wajib-ul-arz—Preferential claim.*

It is manifest in a *Wajib-ul-arz* different classes of pre-emptors were mentioned *Alatarjib* (*i.e*) one after another. *Held*, that the right of pre-em-

ption existed between the different classes of pre emptors *inter Se i.e.* one class of pre-emptors excluded another. (*Bannerji, J.*) SHEOBARAN SINGH *v.* NANUARI LAL. 10 I. C. 442.

———*Wajib-ul-arz—Preferential claim—Near relation—Member of the same caste.*

A *Wajib-ul-arz* provided "the right of pre-emption is given first to co-sharers or who are near in blood to the vendor and then to other cosharers of the same caste and lastly to the co-sharers of the village" *Held* that near relation had a preferential right over persons of the same caste. (*Karamat Husain, J.*) BHAGWAT DIN *v.* SHEO DIAL. 10 I. C. 40.

Wajib-ul-arz—Miscellaneous.

———*Wajib-ul-arz—Simple Mortgage—Rehan.*

Wajib-ul-arz of 1875 gave a right of pre-emption in the case of "rehan" (mortgage). *Held*, that the right could not be exercised if the transaction was a simple mortgage. (*Richards, C. J. and Tudball, J.*) MARRAM KHAN *v.* SAKHAWAT KHAN. 29 I. C. 554.

Who can pre-empt.

——— *Who can pre-empt—Mortgagee in possession—Rights of.*

A mortgagee in possession does not get a proprietary interest in the property and is not entitled to claim or resist a suit for pre-emption (*Lindsay and Sulaiman, JJ.*) PADAM SINGH *v.* UMRAO SINGH. L. R. 4 A. 272 : 21 A. L J. 527 : 1924 A. 48.

———*Who can pre-empt—Co-sharer—Patti—Imperfect partition.*

A plaintiff claiming to pre-empt as a co-sharer, must prove that he is one of the class of co-sharers within the meaning of the Mah. Law. In an imperfect partition of a village where there is complete separation of all rights, the owner of a *patti* in that village cannot be regarded as a co-sharer and consequently be has no right to pre-empt as co-sharer. (*Tudball, and Rafique, JJ.*) MATHURA PRASAD *v.* HARDEO BAKSH SINGH. 42 All. 477 : 56 I. C. 174 : 18 A. L. J 518.

———*Who can pre-empt—Zamindar's right to pre-empt house.*

A Zemindar owning a fractional share in the Zamindari in which a house is situate, cannot, under the Mahomedan law, thereby pre-empt the house. (*Richards, C. J. and Tudball, J.*) ABDUR RAHMAN *v.* HIDAYATULLAH. 20 I. C. 367 : 12 A L. J. 88.

——— *Who can pre-empt—Mahomedan Law—Classes of pre-emptors.*

Pre-emptors are of three classes *viz* :—co-sharers in the subject matter of sale, in its appurtenances and contiguous neighbours. (*Richards and Tudball, JJ.*) LAKHAN SINGH *v.* BISHAN NATH. 33 All. 299 : 5 I. C. 49 : 8 A. L. J. 91.

———*Who can pre-empt—Right of joint Hindu family— Sale by—Father — Necessity—Right of sons to pre-empt.*

In a joint Hindu family consisting of a father and his son, the father is presumably the managing member of the family and *prima facie* a sale

by him is binding on his sons. 42 A. 264 Ref. The sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of a joint family property made by the father as a manager and for legal necessity. (*Scott-Smith, J.*) SUKHA RAM *v.* KOTU RAM. 67 I C. 76.

———*Who can pre-empt—Joint family property—Sale by a member.*

When a joint Hindu family property is sold by one of the members of the family a suit for pre-emption by another member of the same family is maintainable in Oudh. (*Wazir Hassan, A.J.C.*) RAMADHIN SINGH *v.* SURAJPAL SINGH. 25 O. C, 57 : 8 O. L. J. 506 : 1922 Oudh 115.

———*Who can pre-empt—House—Vicinage.*

Under the law, the sale of Mokurari interest does not give right of pre-emption. Where a house is sold apart from the site for occupation, the right of pre emption accrues to the owner of the adjoining house on the ground of vicinage. (*Coutts and Sultan Ahmad, JJ.*) MAHOMED JAMIL *v.* KHUB LAL RAUT. 2 Pat. L. T. 188 : 5 P. L. J. 740 : 58 I.C. 534 : 1921 Pat. 130.

———*Who can pre-empt—Agriculturist—Sheikhs—Notification by local Government.*

A sheikh who bore the title of "sheikh" not by reason of conversion but by reason of his membership of some tribe of sheikhs domiciled in other part of India, could not claim to be a member of the agricultural tribe of sheikhs as notified by the local Government in the Peshawar and Kohat Districts. When a person claiming the privileges of an agriculturist of the Konat Districts is not even a member of any tribe of sheikhs but has merely received the application "sheikhs" by reason of conversion, it is inconceivable that he can thereby assume membership of the notified agricultural tribe. His title of sheikh however universally, conceded is nothing more than an honourific appellation. It can no more alter the legal status of the recipient than any other appellation which is conferred upon him by popular opinion. He does not become a member of unagricultural tribe and cannot without fulfilling the condition laid down in the proviso to S. 11 of Act II of 1905 sue for pre-emption in respect of agricultural land. (*Pipon, J. C.*) MUAZAM SHER *v.* FAZAL RAHMAN. 71 I. C. 312.

Miscellaneous.

———*Mesne profits— Right to—When arises—C. P. Code O. 20, R. 14.*

A pre-emptor cannot be regarded in the same light as an ordinary purchaser of an estate. His right to possession of the property and the consequential right to mesne profits arises only on the date when he pays the purchase price as finally decreed. (*Lord Chancellor*). DEONANDAN PRASAD *v.* RAMDHARI. 44 Cal. 675 : 1 Pat. L. W. 527 : 15 A. L. J 375 : 21 C. W. N. 786 : 25 C. L. J 573 : 19 Bom. L. R. 437 : 6 L. W. 65 : (1917) M. W. N. 470 and 811 : 22 M. L. T. 196 : 44 I. A. 80 : 39 I. C. 958 (P C.) : 32 M. L. J. 459.

———*Wajib ul-arz—Death of signatory—Enforceability of right against heirs.*

PRE-EMPTION—Miscellaneous.

The owners of a permanently settled village entered into a wajib-ul arz to evidence a contract of pre-emption and signed the same. After the death of the signatories the question arose whether a transfer was subject to pre-emption in the hands of their heirs. *Held* that the contract could no longer be enforced. 47 B. 191 applied. (*Rafique and Piggott, JJ.*) BALLI SINGH *v.* RAGHUBAR SINGH. **45 A. 492 : 21 A. L. J. 413 : L. R. 4 A. 231 : L R. 4 All. (Civ.) 231 : 45 All 492 : 1923 A. 511.**

——*Sale by a stranger to another stranger allowing a sale to him—Right of pre-emptor—Price to be paid.*

Where a property was sold to a stranger and by him to another stranger, the pre-emptor is entitled to buy the property, by paying the price which the first stranger paid. (*Richards and Tudball, JJ.*) KISHAN *v.* RAM SAHAI. **9 I. C. 494.**

——*Pre-emptor is not bound by recitals in sale deed.*

Recitals in deeds are evidence only against the parties to the deeds and persons claiming through them. A pre-emptor does not claim through the vendor or vendee and he is not bound by a recital of delivery of possession in the sale deed. (*Martineau, J.*) **1923 Lah. 31 (2).**

——*Compensation for pre-emptor for being kept out of the use of pre-emption money.*

The pre-emptor can claim reasonable interest for the period during which he is kept out of the use of the pre-emption money and the pre-empted property by any act or omission on the vendee's part. (*Johnstone, C. J.*) SARDAR BEGAM *v* JHANDA MAL. **37 I. C. 382 : 170 P. W. R. 1916.**

——*Suit by Reversioner challenging alienation of Hindu widow—Bound to pay amount advanced for necessity.*

A pre-emptor having purchased property alienated by a widow cannot call upon the reversioner challenging the alienation to pay more than what was advanced by him to the widow for a necessary purpose. (*Shah Din and Chevis, JJ.*) GUJAR *v.* AULIYA. **184 P. L. R 1914 : 78 P. R 1914 : 23 I. C 835 : 119 P. W. R. 1914.**

——*Involuntary sale—Right in respect of.*

In the case of involuntary sales in execution of decree for revenue there is no right of pre-emption unless specially conferred by statute 13 A. 224 ; 24 A. 670, Foll. (*Wallis, C. J. and Sadasiva Aiyar and Spencer, JJ.*) WASUDEVAN *v.* ITTIRARIGHIN. **41 Mad. 582 : 23 M. L. T. 302 : (1918) M. W. N. 318 : 7 L. W. 547 : 45 I. C. 46 : 34 M L. J. 412 (F.B.).**

——*Alienation by father—Suit to set aside by sons—Rights of pre-emptor.*

Where the sons sue to set aside an alienation by the father as not being supported by necessity a pre-emptor from the vendee stands in no better position than the vendee himself, except that less strict proof of enquiry into the necessity for the loan would be sufficient in the case of the pre-emptor. The onus of proving necessity is not however shifted to the son. (*Ashworth, J. C.*) JAMNA PRASAD *v.* BALBHADAR. **9 O. L. J. 601 : 25 O. C. 388 : 1923 Oudh 147.**

PRESIDENCY BANKS ACT (XI OF 1876). S. 23.

——*Right to—Remedy of pre-emptor—Procedure.*

A pre emptor is not confined to a suit in the Civil Court to enforce his right. He must do one of two things within limitation ; he must institute a suit for pre-emption or he must obtain a conveyance from the vendee. If he has done neither of these things, the mere fact that he has stated that he possesses the right, that he has approached the vendee or that they have referred their matter to arbitration, will not prevent the bar of limitation. A pre-emptor who refers the claim to arbitration and then makes an application under Sch. II, para. 20 is proceeding by suit and the case is governed by the limitation applicable thereto. (*Simpson, A. J. C.*) SHEO DUTT BAHADUR SINGH *v.* BISHUNATH SINGH. **1923 Oudh 91.**

——*Created by contract, in Oudh.*

A clause, put in a deed prohibiting transfer of property in favour of any person other than one mentioned therein creates a right of pre-emption in favour of such person. (*Stuart, A. J. C.*) GERIBALA DEBI *v.* CHANDIKA SINGH. **2 O. L. J. 289 : 30 I. C. 285 : 18 O. C. 104.**

——*Decree—Deposit of money in court—Attachment*

The respondent obtained a pre-emption decree and was put in possession of property after payment. While the appeal was pending the magistrate recovered money in payment of fine due from the appellant who was convicted of a criminal offence. The pre-emption decree was reversed in appeal. *Held*, the appellants were entitled to possession of property contrary to the Lower Court's order. Further, the Judge's action was highly improper in interfering with money before the disposal of the suit. (*Chamier, J.C. and Evans, A. J. C.*) HAIDAR HUSSAIN *v.* GHASITI BIBI. **11 I. C. 227.**

PREFERENTIAL HEIR.

See (1) HINDU LAW—SUCCESSION.
(2) MAH. LAW—SUCCESSION.

PREGNANCY.

See EVIDENCE ACT, S. 112.

PRELIMINARY DECREE.

See C. P. CODE, SS. 2 (2), 97 AND O. 20, RR. 12, 18.

PRESCRIPTION.

See (1) ADVERSE POSSESSION.
(2) EASEMENT ACT, S. 15.
(3) LIMITATION ACT, S. 28, ARTS. 142 AND 144.

PRESIDENCY BANKS ACT (XI OF 1876).

——S. 23— *Certificate— Right of person holding succession certificate—Transfer of shares.*

S. 23 does not prevent the Bank from accepting a succession certificate in lieu of Letters of Admn. and paying dividends of shares in the Bank to a person who has obtained the certificate and transferred the share to him. (*Macleod, C. J. and Heaton, J.*) KUMAR SHRI RANJIT SINGHJI *v.* THE BANK OF BOMBAY. **45 Bom. 138 : 57 I. C. 964 : 22 Bom. L. R. 869.**

PRESIDENCY BANKS ACT (XI OF 1876), S. 37.

——S. 37—*Scope of—Position of Directors.*

S. 37 must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. This section is only directory of the powers of the Directors and not mandatory. If the Directors act in disregard of these powers they are liable to the Bank for any loss that it may sustain by their unauthorised act but the section does not enable third parties with whom contracts have been entered into, to deny their liability to the Bank if the Bank chooses to act upon the contract of its Directors. The action of the Directors under such circumstances will not be *malum prohibitum*. In this particular case, the plaintiff was entitled to the decree he sought for. (*Wallis and Sadasiva Aiyar, JJ.*) PASUMARTI PAYDANNA *v.* GANTI LAKSHMINARASAMMA.

38 Mad. 1076 : 29 I. C. 314 : 28 M. L. J. 525.

——S. 37—*Scope.*

Contravention of the provisions of S. 37 renders directors liable for loss. S. 37 defines powers of directors. The action of the directors in excess of their powers is not void but voidable. Directors are not identical with the Bank They fill a double character as agents of the Bank and as trustees of the share-holders. (*Spencer and Seshagiri Aiyar, JJ.*) NAGAR DAMODAR *v.* GUDLIMAR RAM RAO. **39 Mad. 101 : 17 M. L. T. 326 : (1915) M. W. N. 316 29 I.C 192 : 28 M. L. J. 444.**

PRESIDENCY SMALL CAUSE COURTS ACT (X OF 1882).

——Ss. 9, 38—*Rules under* S. 9—*Rule* 92 *of the Calcutta High Court—Scope and object of.*

The object of the Rule 92 which runs :—"Provided that the Court may, if in its opinion no sufficient grounds are shown for the application, dismiss it without directing service on the party against whom the application is made", was to remove the difficulty by which a preliminary hearing was precluded for finding out whether there were grounds for the application as indicated in the rule. The rule is not *ultra vires* but as regards S. 38, the preliminary hearing must be made before a Bench of the Small Cause Court. (*Ghose, J.*) RAM CHANDRA SAGOREMAL *v.* AMARCHAND MURALIDAR.

47 Cal. 763 : 60 I. C. 917 : 24 C. W. N. 783.

——Ss. 9 and 38 — *Rules framed by High Court—O.* 41, R. 2, *if* ultra vires.

Order 41, rule 2 is *ultra vires* of the High Court though a condition similar to that laid down in the said rule may be taken advantage of, and imposed under s. 38 of the same Act. S. 9 of the Act empowers the High Court to make rules only with reference to matters of practice or procedure; no power is given to make sub-rules with regard to the matters of substantive rights. The right to apply for a new trial given by S. 38 of the Act is a substantive right. (*White* C *J. and Sankaran Nair and Oldfield, JJ.*) MADURAI *v.* MUTHU.

38 Mad. 823 : 15 M. L. T. 156 : (1914) M. W. N. 216 : 22 I. C. 775 : 26 M. L. J. 227 : 1 L. W. 172.

PRESIDENCY SMALL CAUSE COURTS ACT (X OF 1882), S. 31.

——S. 19 (f) (g) (h)—*Maintenance suit.*

A suit to recover arrears of maintenance does not fall under cl. (f) (g) or (h) of S. 19 of the Act. (*Abdur Rahim, J.*) KRISHNA DOSS *v.* FREDRICK WILLIAM. **10 M. L. T 331 : 12 I. C. 426 : (1911) 2 M. W. N. 341.**

——S. 19 (g)—*Suit for recovery of stones forming part of well alleged to be removed by deft.—Deft. setting up title—Small cause.*

A suit to recover stones forming part of a well alleged to have been wrongfully removed, or to recover their value, is a suit cognizable by a Court of Small Causes, though on the defendant's plea of title in the well, it may be necessary to determine the question of title in order to dispose of the suit. 20 Mad. 155, not Foll. 16 I. C 201, Foll. (*Ayling and Krishnan, JJ.*) KRISHNAMACHARI *v.* KOMALAMMAL. **43 Mad. 903 : 39 M. L. J. 490 : (1920) M.W N. 599 : 59 I. C. 532 : 28 M. L. T. 275.**

——S. 19 (h)— *Parsi husband and wife—Reference to arbitration as to amount of maintenance—Award—Suit on.*

Where a Parsi husband and wife agreed to live separately and on a reference by arbitrators the question of the amount of maintenance due to the wife, an award was passed, *held* that a suit to enforce the award and to recover arrears of maintenance is not barred from the cognisance of the Court of Small Causes by S 19 (h) of the Act, the suit not being one for specific performance of a contract. (*Macleod. C. J. and Fawcett, J.*) ERUCHSHAW DOSABHAI *v.* BAI DINBAI.

45 Bom. 318 :59 I. C. 189 : 22 Bom. L. R. 1293.

——S. 19 (S)—*Claim suit—Jurisdiction of—Small Cause Court.*

A suit to establish a right given to the unsuccessful party in claim proceedings under the C. P C. involves in every case a prayer for the setting aside of a summary order of a Civil Court. Such a suit cannot be regarded as a suit for a mere declaration and is not excluded from the jurisdiction of a Small Cause Court under S. 19 (S) (*Wallis C. J. Ayling and Sadasiva Aiyar, JJ.*) RAJAMMAL *v.* NARAYANASAMY NAICKER.

39 Mad. 219 : (1915) M W. N. 376 : 29 I. C. 908 : 28 M. L. J. 600.

——S. 22—*High Court—Scale of costs—Suit for account instituted in High Court.*

A suit for an account without claim to a specific sum which is within the competence of the Small Cause Court cannot lie in the Small Cause Court and even if it lies, it is a fit case to be certified to be brought in the High Court and costs will be awarded on the High Court scale. (*Imam, J.*) SUCKMARI GHOSH *v* GOPI MOHAN GOSWAMI.

43 Cal. 190 : 31 I. C. 662 : 19 C. W. N. 880.

——Ss. 31 (a) 47, 49—*Forum provided by Ss.* 47, 49—*Madras City Civil Court Act, S.* 12.

In the classes of suit provided for under Ss. 47 and 49, the High Court is the proper forum. By S. 12 of the City Civil Court Act the City Civil Court is substituted for the High Court only under S. 31 (*a*) (*Oldfield and Krishnan, JJ.*) ABDUR RAHIM SAHEB *v.* GANGADHARA AIYAR.

37 I. C. 436 . 4 L. W. 402.

PRESIDENCY SMALL CAUSE COURTS ACT (X OF 1882), S. 38.

——S. 38—*Questions of fact — Interference with.*

The powers conferred by S. 38 are not restricted to interference with only questions of law. The Small Cause Court has power to reverse a decree on a question of fact. (*Batchelor, A. C. J. and Shah, J.*) SONOO NARAYAN *v.* DINKAR JAGANATH MARATHE.

42 Bom. 80 : 43 I. C. 486 : 19 Bom. L. R. 944.

——Ss. 38 and 69—*Reference to High Court—Application under S 69—Reference by two of the Judges—Legality of—Form of reference to the High Court.*

The Small Cause Court is competent to make a reference under S 69 on an application under S. 38 of the Pres. Towns Ins Act.

S. 69 authorises a reference when two or more Judges of the Small Cause Court sit together in any suit and differ in their opinion as to any question of law or usage having the force of law or the construction of a document, which construction may affect the merits. The term "suit" is not defined either in the Presidency Small Cause Courts Act or in the Code of Civil Procedure, and its meaning cannot be determined apart from the context. Although S. 38 provides for a more extended jurisdiction than what would be technically called a new trial, a jurisdiction analogous to an appeal, yet there is no appeal on facts. But though the power of interference is thus restricted the application under S 38 is nevertheless an application in the suit and attracts the operation of S. 69, providing for a reference to the High Court. S. 69 requires a statement of the facts of the case drawn up by the Court, that is, by two or more Judges where the case is heard by more than one Judge. This cannot create any difficulty because when an application under S. 38 is heard, the Judges cannot disagree on the facts. There is no appeal on the facts and the facts as found by the trial Judge must be accepted, consequently, the first step, when a reference is to be made under S. 69 is to draw up a statement of the facts of the case to be signed by the Judges. They must then formulate the point on which there is a difference of opinion which is to be accompanied by the statements of the reasons assigned by each Judge in support of his view. (*Mookerjee and Rankin, JJ.*) M. L CHAKRABARTY *v.* OLOF BORIN.

50 Cal. 919 : 27 C. W. N. 883: 38 C. L. J. 275 : 1924 C. 446.

——S. 38— *Rules under — Rule 92 proviso—* Ultra-vires—*Composition of the bench.*

The proviso to R. 92 published in the 'Calcutta Gazette, of the 16th July 1917 is not *ultra vires*, but so far as applications under S. 38 of the Act are concerned, the preliminary hearing must be before a bench formed on the lines down in R. 95, 38 Mad 823 Ref.—*Quaere* Whether the jurisdiction conferred on the Small Cause Court under S. 38 is revisional or appellate. 34 Bom. 316 ; 21 C. W. N. 256, 21 Mad 232 Ref. (*Ghose, J.*) RAMACHANDRA *v.* AMARCHAND

47 Cal. 763 : 60 I C. 917 : 24 C. W. N. 783.

——S. 38—*Small Cause Court—Full Bench —Powers of.*

PRESIDENCY SMALL CAUSE COURTS ACT (X OF 1882), S. 38.

On a new trial the full Bench of a Small Cause Court can interfere with the finding of the original court on a question of fact. (*Fletcher, J.*) SHAMUL KISSORE *v.* GIRINDRA NATH,

22 I. C. 32 : 18 C. L. J. 594.

[The Madras view is different *See*—
40 Mad. 355 : 38 I. C. 346 : 5 L. W. 377 : F.B.]

——S. 38—*Power of Court to order retrial.*

The Court may order a new trial if the judgment is manifestly against the evidence ; the power of the Court is not limited to the question of law only. (*Harrington, J.*) K. JOHAN SCHMIDT *v.* RAMPRASAD.

38 Cal. 425 : 12 I. C. 11 : 16 C. W. N. 25.

——S. 38—*Full Bench, powers of—Question of fact if can be gone into.*

A Full Bench of the Presidency Small Cause Court sitting under the section cannot decide question of fact generally and especially when the question of fact first arises before it in consequence of its finding on another question of law or fact. (*Wallis, C. J. Abdur Rahim and Srinivasa Aiyangar, JJ.*) SIKANDAR ROWTHER *v.* GHOUSE MOHIDIN.

40 Mad. 355 : 21 M. L. T. 111 : (1917) M. W. N. 156 : 38 I.C. 346: 5 L. W. 377 : 32 M. L. J. 213 (F. B.)

——S. 38—*Full Bench—Power to allow—Withdrawal of suit.*

The Full Bench of Presy. Sm. C. Court acting under S. 38 is not an appellate court and thus can allow withdrawal of suit either to bring a fresh suit or to add a claim to those in the first suit. (*Srinivasa Aiyangar. J.*) KRISHNASWAMI *v.* DORAISAMI AMMAL.

36 I. C. 1003 : 5 L. W. 147.

——S. 38—*What reliefs can be claimed—Nature of proceedings under.*

An application under S. 38 need not be confined to the prayer for the relief of a new trial but may also include prayers for modifying or reversing the decree or order. An application under S. 38 is not an application by way of an appeal to an appellate court. If two or more judges of the Small Cause Court sit together for the purpose of exercising jurisdiction under S. 38 they sit 'in a suit' whithin the meaning of S. 69. Under S. 38 the suit is kept alive for eight days after decree for the purpose of empowering the court to exercise the appellate powers given to it by the section. Applications for new trials are therefore made 'in the suit' whether the claim has been allowed or dismissed. (*Sadasiva Aiyer and Napier, JJ.*) RAMASWAMY AIYAR *v.* MADRAS TIMES, PRINTING AND PUBLISHING CO., LTD.

19 M. L. T. 165 : 33 I. C. 929 : 30 M. L. J. 207.

——S. 38—*C. P. C., S. 115—Revision.*

S 38 does not confer Appellate powers : and hence a person against whom an order is passed may apply to the High Court for revision under C.P.C. S. 115. (*Oldfield and Sadasiva Aiyar, JJ.*) NAGOOR MEERA SAHIB *v.* SOOKULAL SOWKAR.

2 L. W. 719 : 18 M. L. T. 254 : 30 I. C. 488 : (1915) M. W. N. 907.

PRESIDENCY SMALL CAUSE COURTS ACT (X OF 1882), S. 38.

——S. 38—*Limitation—Reckoning of period of—Decree amended as to costs.*

Even when a decree is amended as to costs the eight day's period under S. 38 will be reckoned from the date of the original decree. (3 C. L. J. 188 : 22 M. 364 Fol. : 24 M. 25 Dist.) (*Hannay, J.*) KUPPUSAMY *v.* NARAYANA AIYANGAR.
1 L. W. 855 : 25 I. C. 647 : 16 M. L. T. 438.

——S. 38 — *Full Bench — Jurisdiction, to direct amendment of plaint.*

The full bench may on application for a retrial permit a plaint to be amended even though the suit was decided by a single judge, and though it changes the nature of the suit when its effect would be an avoidance of a multiplicity of suits and the determination of the suit itself or the questions at issue between the parties. (*Tyabji, J.*) GANGI SAIT *v.* AHMED HUSSAIN.
22 I. C. 241.

——Ss. 38 and 69—*Sitting in suit—Reference to High Court.*

Where two or more judges of a Presidency Small Cause Court sit to exercise jurisdiction under S. 38 they are sitting in a suit within S. 69 of the Act from which a reference lies to the High Court. (*Miller and Sankaran Nair, JJ.*) LODD GOVINDASS KRISHNA DASS *v.* RUKMANI BHAI. **38 Mad. 498 : 14 M. L. T. 310 : 21 I. C. 302 : 1 L. W. 529.**

——Ss. 41 and 43—*Writ of Possession—Force—Uses of by bailiff.*

In a writ of possession the order to give possession authorises and requires the removal by bailiff of all persons from off the premises by force if need be, to vacate the same. (*Sharfuddin and Teunon, JJ.*) H. MEREDITH *v.* SANJI BANI ASI. **19 C. W. N. 273 : 28 I. C. 1000 : 16 Cr. L. J. 424 : 42 Cal. 313.**

——S. 41—*Suit to eject tenant—Not small cause.*

A suit to eject a tenant is maintainable in City Civil Court, though an application is cognizable by the Small Cause Court. (*Coutts Trotter and Ramesan, JJ.*) M. DORAISAMI AIYANGAR *v* K. NARAYANA AIYANGAR. **16 L. W. 137 : (1922) M W. N. 462 : 32 M. L. T. 288 : 43 M. L. J. 288 : 1922 Mad. 445.**

——S. 41—*Ejectment—Rent of portion of house not exceeding Rs. 1,000—Jurisdiction—Question of title.*

A suit to eject a tenant of a portion of a house, the rent of which is less than Rs. 1,000 per annum, is cognisable by the Small Cause Court, though the annual rent of the whole building exceeds Rs. 1,000. If the Court goes into the question of title to enable it to exercise jurisdiction, its order cannot be set aside by the High Court as being without Jurisdiction. (*Krishnan, J.*) K. VENKATARAMA CHETTY, *In re.*
51 I. C. 512 : 7 L. W. 610.

——S. 41—*Madras City Civil Court Act.—Jurisdiction of City Civil Court, to set aside an order of Presidency Small Cause Court.*

It is not within the jurisdiction of the City Civil Court to set aside an order in ejectment made by the Presidency Small Cause Court. (*Oldfield and Krishnan, JJ.*) ABDUR RAHIM SAHIB *v* GANGATHAR IYER. **37 I. C. 436 : 4 L W. 402.**

PRESIDENCA SMALL CAUSE COURTS ACT (X OF 1882), S. 48.

——S. 41 and Chap. VI—*Court's order delivering possession before determination of tenancy is wrong.*

Chap. VI does not apply to S. 41. Under S. 41 the court can deliver possession only when the tenancy has determined and so, where the court has delivered possession before the tenancy has determined, its order is wrong and open to revision. (*Seshagiri Aiyar, J.*) RAMASWAMY NAIDU *v.* VENKATARAMANJULU NAIDU.
23 I. C. 572 : (1914) M. W N 368 : 26 M. L. J. 467.

——S. 43—*Order for recovery of possession—No extention of time.*

A Presidency Small Cause Court cannot grant an extension of time fixed in an order for recovery of possession made under S. 43 (*Macleod, C. J. and Shah, J.*) JAMSHEDJI HORMASJI *v.* GORDHANDAS GOCULDAS. **45 Bom. 1048 : 62 I. C. 45 : 23 Bom. L. R. 442.**

——Ss. 46 and 49—*Suit for superceding order under Chap. VII—Procedure.*

No suit can be brought in any court for superceding order under Chap. VII except in the manner provided by sections 46 to 49 of the Act. In the event of delivery of possession, S. 46 becomes applicable, and the suit for trying title, must be in the High Court according to S. 19. (*Oldfield and Krishnan, JJ.*) ABDUL RAHIM SAHIB *v.* GANGATHARA IYER. **37 I. C. 436 : 4 L. W. 402.**

——S. 47—*Stay of proceedings in ejectment suit Procedure.*

When proceedings of a summary nature are taken under S. 41 to eject an occupant, and the occupant applies for a stay of proceedings the court has no discretion to refuse it on the ground it was not supported by an affidavit. Ordinarily the statement of his vakil that he was going to file a suit in the High Court. and that he was willing to give the security bond is sufficient.

There is nothing in S. 47 to warrant the interpretation that the application for stay should be made at an early stage in the proceedings. (*Schwabe, C. J.*) KRISHNA AYYAR *v.* SUBRAMANIA AYYAR. **17 L. W. 179 : 32 M. L. T. (H. C.) 294 : 44 M. L. J. 386 : 1923 Mad. 323.**

——S. 48—*Order under—No—Review lies.*

A Presidency Small Cause Court has no power to review an order made in a proceeding under Chapter VI of the Act. (*Macleod, C.J. and Fawcett J.*) FRAMROZ DOSABHAI *v.* DALSUKHBAI.
45 Bom. 972 : 61 I. C. 567 : 23 Bom, L. R. 383.

——S. 48—*Ejectment order—Obstruction to carrying out of—Removal—Jurisdiction—O. 21, R. 98, C. P. C—Applicability to proceedings under Chapter VIII of the Act.*

S. 48 of the Presidency Small Cause Courts Act applies the provisions of the Code of Civil Procedure to proceedings under Chapter VII and the language of it is wide enough to include a power to act under O. 21, R 98, C.P. C. The Presidency

PRESIDENCY SMALL CAUSE COURTS ACT (XI OF 1882), S. 49.

Small Cause Court has jurisdiction to remove an improper obstruction to the carrying out of its order in ejectment. (*Krishnan, J.*) DAROGA MAHOMED GHOUSE SAHIB *v.* SHAIK MOHIDEEN SAHIB. **18 L. W. 135 : (1923) M. W. N. 882 : 45 M. L. J. 66 : 1924 Mad. 74.**

——S 49—*Meaning of 'suit for trying title.'*

A suit for trying title includes a suit where in any title which the party against whom an ejectment order is passed alleges 'has to be tried and decided.' (*Oldfield and Krishnan, JJ.*) ABDUL RAHIM SAHIB *v.* GANGATHARA AIYAR. **37 I. C. 436 : 4 L. W. 402.**

——S. 69—*Whether reference can be made when application under S. 38 is pending.*

The Judges of the Presidency Small Cause Court can make a reference to the High Court under S. 69 though an application under S. 38 has not been disposed of. (*Sadasiva Aiyar and Napier, JJ.*) RAMASWAMI *v.* MADRAS TIMES PRINTING & PUBLISHING CO. LTD. **19 M. L. T. 165 : 33 I C 929 : 30 M. L. J. 207.**

——S. 69—*Reference—Contents and form of.*

A reference by the Presidency Small Cause Court must state only the facts of the case as found by the Judges as shortly and concisely as possible and the questions on which they differ. (*Sadasiva Aiyar and Napier, JJ.*) RAMASWAMI *v.* THE MADRAS TIMES PRINTING & PUBLISHING CO., LTD. **32 I. C. 610 : (1915) M. W. N. 785.**

——S. 6 —*Scope of--Reference to High Court.*

S. 69 permits a reference to the High Court only when the referring Court entertains a reasonable doubt on the point referred. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KRISHNA DOSS *v.* FREDERICK WILLIAM EMERY. **17 I. C. 93.**

——Sch. II, Art. 35 (2)—*Applicability.*

Quare—Whether Art. 35 (2) of the 2nd Sch. to the Act should only apply to claims for compensation for doing the unlawful act itself and not solely for the deprivation or loss of any goods or articles. (*Seshagiri Aiyar, JJ.*) EGAPPA CHETTY *v.* SUBBARAYA CHETTI. **14 L. W. 235.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909).

——*Rules framed thereunder R.* 136—*Costs —Scale of in insolvency proceedings.*

In insolvency proceedings unless an order is made to the contrary only half the attorney's fees should be allowed as costs, whether or not the costs are made payable out of the estate. (*Schwabe C. J. and Wallace, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* DORAIAPPA AIYAR. **44 M. L. J. 411 : 17 L. W. 350 : 32 M. L. T (H.C.) 172 : (1923) M. W. N. 359 : 1923 Mad. 484 (1).**

——S. 1--*Applicability of Act.*

Where an adjudication has been made under the old Insolvency Act (11 and 12 Vic. C. 21) all questions, arising in the course of the insolvency except questions of pure procedure, will be governed by the old Act. (*Beaman, J.*) RD. SETTNA *v.* KALIANJI SANJIBHAI. **19 I. C. 57 : 15 Bom. L. R. 113.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 7.

——S. 2 (a)—*'Creditor', if includes his benamidar.*

The term creditor in the Act does not include his *benamidar.* (*Sanderson C. J. Woodroffe and Mookerjee, JJ.*) KETOKEY CHURAN *v.* SARAT KUMARI. **37 I. C. 71 ; 20 C. W. N. 995.**

——Ss. 4 and 36—*Judge of High Court sitting in insolvency—Jurisdiction is that of Civil Court.*

A judge of a High Court sitting in the insolvency court exercises original Civil Jurisdiction and therefore cannot determine any questions which are excluded from the jurisdiction of the Civil Courts bythe Madras Estates Land Act, which is a special Act. (*Kumaraswami Sastri, J.*) *In re* CHIDAMBARA CHETTY. **29 M.L.T. 112 : 13 L. W. 374 : 61 I.C. 991 : (1921) M. W. N. 188**

——Ss. 5 and 56—*Mortgage by insolvent—Good faith-Absence of intention to delay or defeat creditors—Mortgage, if an act of insolvency.*

As the official assignee claimed to set aside the mortgage affecting the property of the insolvent and this was a claim on a title higher than that of the insolvent the matter was properly brought by way of motion to the bankruptcy. The intention to delay or defeat other creditors not having been established the mortgage was not an act of insolvency under S. 9 (b) of the Pres. Towns Ins. Act. As there was no ground for disputing the good faith of either party the mortgage could notbe said to be a voluntary transfer under S. 55 of the Act and as it was not established that the mortgage was executed with the object of giving the mortgagee a preference over other creditors could not be said to be inoperative against the Official Assignee. (*Rankin, J.*) RAI MOHAN SHAW, *In re.* **53 I. C. 175.**

——Ss. 6 (d) (e) and S. 36 (1)—*Scope of.*

Under S. 6 (*d*) and (*e*) the Registrar in insolvency can deal with an application under S. 36 (1) (*Sanderson C. J. and Richardson, J.*) RAI SUKH LAL KARNANI *v.* THE OFFICIAL ASSIGNEE OF CALCUTTA. **66 I. C. 715 : 25 C. W. N. 750.**

——Ss. 7 and 36--*Jurisdiction--Suit by stranger for possession against the Official assignee.*

The Civil Court can try a suit for possession by a stranger against the Official Assignee of the insolvent who claims that the property is his. S.7 is an enabling section and S. 36 does not take away the jurisdiction of existing Court. 'In the course of insolvency' does not mean that Insolvency Court can decide questions of title. (*Chandavarkar and Hayward, JJ.*) NAGINLAL *v.* OFFICIAL ASSIGNEE. **35 Bom. 473 :12 I. C. 391 : 13 Bom. L. R. 900.**

——Ss. 7, 30 and 52—*Joint Family Manager —Insolvency—Official Assignees' right—Possession of joint property.*

On the insolvency of the managing member of a joint Hindu family the Official Assignee succeeds to (1) the undivided interest of the insolvent in the joint property and to his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of the other members although he can deal with them if the insolvent could

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 7.

lawfully have done so if there had been no insolvency. He can alienate the interest in the joint property of the minor sons of the insolvent for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not The Official Assignee is not an alienee but the representative of the insolvent and is entitled to all his rights including the right to possession of the joint property except such rights as are in their nature personal to a member of the family as such. (*Sir Walter Schwabe, C.J. and Coutts Trotter, J.* THE OFFICIAL ASSIGNEE OF MADRAS *v.* A N. RAMACHANDRA AIYAR. **43 M.L.J. 569: 68 I. C. 898: 16 L. W 559.**

——S. 7—*Powers of insolvency court—Questions affecting title to property of insolvent—Jurisdiction to determine—Effect of the decision of the Insolvency Court.*

A Hindu father sold some joint family property for discharging his debts and at the same time mortgaged other property of the family to the purchaser as a security against any loss which he the purchaser might sustain in case the vendor's sons, who were then minors, chose the sale. The father was subsequently adjudicated an insolvent and the Official Assignee in whom the properties of the insolvent vested, applied to the Court for a direction that the properties mortgaged be sold free of the incumbrances on the ground that the sale by the father was binding on the sons and the security was unnecessary. *Held*, (1) that the Insolvency Court had power under S. 7 of the Presidency Towns Insolvency Act, to enquire into and adjudicate on the validity and binding character of the sale as against the minor sons of the vendor; (2) that the decision of the insolvency Court to the effect that the sale was valid and binding would operate as res-judicata in any subsequent litigation by the sons against the purchaser; and (3) that on the finding as to the validity of the sale the mortgaged properties could be sold by the Official Assignee free of the incumbrance and the proceeds of the sale distributed among the creditors of the insolvent. (1872) 8 Ch. A. 83, 86 Rel. (*Schwabe, C. J. and Odgers, J.*) DORAIAPPA AIYAR *v.* OFFICIAL ASSIGNEE OF MADRAS **(1922) M. W. N. 77. 65 I. C 244 : 15 L. W. 368: 42 M. L. J. 141.**

——S. 7—*Order under—Suit to set aside.*

No suit lies to set aside an order passed under S. 7 of the Pres. Towns Insol. Act. The proper remedy for the party aggrieved is to appeal against the order. 40 Mad. 1173, Foll. (*Wallis, C. J. and Kumaraswami Sastri, J.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* MANGAYARKARASU AMMAL. **47 I. C 298 : 40 Mad. 1173 (Foot Note).**

——S. 7—*Insolvency—Claim to goods seized by the Official Assignee after adjudication—Order disallowing claim—Suit to set aside order.*

No suit lies to set aside an order made by the Insolvency Court disallowing a claim made to goods seized by the Official Assignee after adjudication. (*White, C. J. and Sankaran Nair, J.*) ABDUL LATEEF SAHIB *v.* OFFICIAL ASSIGNEE OF MADRAS; THE OFFICIAL ASSIGNEE OF MADRAS *v.* MANGAYARKARASU AMMAL. **44 I. C. 847 : 40 Mad. 1173.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 9.

——Ss. 7 and 36 (5)—*Jurisdiction—Property outside the ordinary original jurisdiction of the High Court—Power of the Insolvency Court.*

The Insolvency Court in Madras can adjudicate upon claims of third parties relating to immoveable properties which are outside the limits of the ordinary original jurisdiction of the High Court. ——S. 36 (5) of the Act providing summary procedure in undisputed cases does not curtail the wide jurisdiction conferred by S. 7 to deal with cases of disputed title under the ordinary procedure though that the jurisdiction is discretionary and the Insolvent Court would seldom try difficult questions of the title itself instead of referring the Official Assignee to an ordinary civil suit ——32 B. 198; Exparte Dicksion, in re Pollard 8 Ch. D 377 and Exparte Brown in re Yates II Ch. D. 148. Ellis v. Silber 8 Ch. App; 83 42 C. 109; 14 M. L. T. 51, Ref (*Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* VEDAVALLI AMMAL. **40 Mad. 810: 20 M. L T 311: 36 I. C. 524: 4 L. W. 425.**

——S. 8—*Adjudication of firm—Annulment—Re-adjudication.*

When adjudication has been annulled as against some partners, another creditor seeking for readjudication must get rid of the order of annulment, and proceed under S. 8 for review and not for an appeal by leave. (*Marten, J.*) *In Re* JOHARMAL PUNAJI. **50 I. C. 437: 21 Bom. L. R. 190.**

——S. 8—*Whether a creditor without decree is an 'aggrieved person'—Judicial order—Orders open to appeal.*

A creditor without a decree is an aggrieved person within S. 8 especially when he is made incapable of becoming a judgment creditor through the insolvent's opposition to the proceedings instituted by creditor for that purpose. An *interim* protection order made as an original order by judge exercising jurisdiction under the Act is appealable, as it is a judicial order. Legislature does not appear to impose any restriction on appeal from original orders of a judge except on orders regulating procedure. (*Scott, C. J. and Batchelor, J.*) MAHOMED HAJI *v.* ABDUL RAHMAN. **40 Bom. 461: 31 I. C. 507: 17 Bom. L. R. 989.**

——S. 9—*Application for adjudication of a firm as insolvent—Departure of partner from place of business—Intention to defeat or delay creditors.*

Under S. 9 of the Pres Town. Ins. Act, where one partner departs from his usual place of business, it is a matter personal to him and the firm cannot be adjudged insolvent. One man cannot as an agent for another depart from his usual place of business and the departure of one partner is not a constructive departure of the others. The departure from the usual place of business with intent to delay and defeat the creditors, must be a departure of both the partners and not merely the departure of one of them. (*Marten, J.*) MAHOMED HASSAM & Co *In re.* **24 Bom.L. R. 861 : 1923 Bom. 107.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 9.

——S. 9—*Amendment of petition by creditor.*

The act of insolvency need not be stated verbatim in the words of S. 9: it will be enough if the petition and affidavit read together sufficiently disclose the meaning of the section. Omission to state the fact that petitioner is a secured creditor and the value of his security is a defect curable by amendment of the petition. In the absence of a subsisting order of adjudication, the petitioner might be allowed to amend the petition within 3 months of the act of insolvency. (*White, C J. and Wallis, J.*) MAHOMED AYYAB SAHIB *v.* G. P. GUNNIS & Co **37 Mad. 555: 13 M. L. T. 275: (1913) M. W. N. 264 : 19 I. C. 19: 24 M. L. J. 562.**

——Ss. 9 (c) and 12—*Act of Insolvency by a co-judgment debtor if only by judgment debtor.*

An act of insolvent by a co-judgment debtor does not amount to one by the judgment debtor himself. (*Jenkins and Woodrofte, JJ.*) HARISHCHANDRA *v.* EAST INDIA COAL COMPANY, LTD. **14 I. C. 576: 16 C. W. N. 733.**

——Ss. 13 and 12 (1) (a)—*Right of Insolvent after petition by creditor is presented.*

An insolvent can question the right of the petitioning creditor to figure as creditor, and the official assignee after insolvency, can enquire and strike out his name if necessary from the creditor's list. (*Sanderson, J.*) CHURAN *v.* SARAT KUMARI DABEE. **37 I. C. 71: 20 C. W. N. 995.**

——Ss. 13 (3) and 118 (1)—*Omission to serve notice under, is only a formal defect—Waiver of notice—Onus.*

The omission to serve the notice contemplated by S. 13 (3) of the Presidency Towns Insolvency Act is a formal defect or irregularity within the meaning of S. 118. The burden lies upon the creditor to establish that the insolvent has waived the defect in the proceeding arising out of the omission to serve the initial notice required by S. 13. (*Mookerjee and Panton, JJ.*) NATHMULL *v.* GONESHMULL. **66 I. C 886 : 34 C. L. J. 349**

——S. 13 (6)—*Stay of proceedings.*

It is only when the petitioning creditor's debt is denied that the Court can stay proceedings under S. 13 (6) of the Presidency Towns Insolvency Act. (*Macleod, J.*) *In re* SHIV LAL RATHI. **40 I. C. 207 : 19 Bom. L. R. 365.**

——Ss. 13 (8), 15 (2), 21 (1)—*Adjudicated insolvent—If can withdraw petition.*

S. 13 (8 and S. 15 (2) apply to pending insolvency petitions before an order of adjudication is made, and therefore an adjudicated insolvent cannot be permitted to withdraw his petition on the ground that he has settled with the creditors. To bring the cases within S. 21 (1) the debts must have been paid in full and his antecedent conduct should justify the court to exercise its discretion in his favour. (*Macleod, J.*) *In re* SUBRALI MOHAMED. **38 Bom. 200 : 20 I. C. 859 : 15 Bom. L. R. 748.**

——Ss. 14, 15 and 21—*Adjudication when can be annulled—Rights of debtor to be adjudicated an insolvent.*

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 17.

An insolvency court can annul an adjudication order made by it if it thinks that it had been got by an abuse of the powers of court. *Per Mookerjee, J.* It is not that a court must pass an order of adjudication merely because the conditions mentioned in Ss. 14, 15 exist in the case of the applicant. It is its duty to see whether the application constitutes an abuse of powers of court. An adjudication order cannot however be legitimately annulled or refused on the ground that the applicant has shown undue preference to one creditor and is then guilty of misconduct. (*Sanderson, C. J. and Mookerjee, J.*) MALCHAND *v.* GOPAL CHANDRA. **44 Cal. 899 : 25 C. L. J. 83 : 39 I. C. 199 : 21 C. W. N. 298.**

——S. 15—*Abuse of process of court—Rejection of application.*

An order under S. 15 should be made in the ordinary course unless it is clear that there has been an abuse of the process of the court. (*Hartnoll and Young, JJ.*) *In the Matter of* S. BEADON. **18 I. C. 544 : 5 Bur. L. T. 290.**

——S. 15—*Fresh petition after discharge.*

The petitioner, Stevens, who filed an insolvency case in 1904 and had been granted his personal discharge, can again file a fresh petition of insolvency in respect of debts contracted subsequent to his personal discharge. (*Twomey and Parlett, JJ.*) *In the Matter of* CHARLES STEVENS. **10 I. C. 792 : 4 Bur. L. T. 87.**

——S. 17—*Scope of—Effect of, on limitation.*

S. 17 of the Act is not an absolute bar to the creditor's right to institute a suit so as to enable the creditor to claim a deduction of the time during which the insolvency proceedings were pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed. (*Macleod, C. J. and Shah, J.*) SIDHRAJ BHOJARAJ *v.* ALLI HAJI. **24 Bom. L. R. 509 : 1923 Bom. 33.**

——S. 17—*Adjudication order—Effect of—Leave to precede institution of suit against deft.*

The leave contemplated under S. 17, is leave which ought to be obtained before commencement of suit and cannot be granted after the same is filed. (*Davar, J.*) DWARKADAS TEJBHANDASA, *In re.* **40 Bom. 235 : 31 I. C. 948 : 17 Bom. L. R. 925.**

——S. 17—*Insolvent—Right of, to defend suit.*

No cause of action survives against a person regarding his property who becomes an insolvent and whose property vests in the Official Assignee. If the Official Assignee refuses to defend a suit affecting the property of the insolvent the latter cannot defend the suit independently of the Official Asignee. (*Beaman, J.*) TRIBHOVAN DAS *v.* ABDUL ALLY. **39 Bom. 568 : 28 I. C. 506 : 17 Bom. L. R. 209.**

——S. 17—*Proviso—Secured creditor—Suit to enforce rights under mortgage.*

The power of a secured creditor to realise his security under the proviso to S. 17 of the Presidency Towns Insolvency Act covers his suit to

enforce his right under the mortgage. The Official Assignee executing the decree assigned by the insolvent is a security in the position of the mortgagor selling his property and so until the mortgagee's claim is satisfied the official assignee has no right to the sale proceeds. 21 I. C. 689, Ref. (*Scott, C. J. and Batchelor, J.*) B. N. LANG *v.* HEPTULLABHAI ISMAILJEE.

38 Bom. 359 : 21 I. C. 714 : 15 Bom. L. R. 939.

———S. 17—*Proviso—Interpretation—"Deal with his security" Leave when to be obtained.*

The proviso to S. 17 refers to the powers which mortgagee and pledgee have to sell the property mortgaged or hypothecated and the words "Deal with his security" refer to their powers of transfer or assignment. The leave to sue must be obtained prior to the institution of suit. (*Davar, J.*) LAL CHAND *v.* BALAKRISHNA.

21 I. C. 689 : 15 Bom. L. R. 944 (note).

———S. 17—*Adjudication under—Vesting of property wherever situate.*

Under S. 17 of the Act the property of the insolvent situate in any part of British India vests in the Official Assignee on adjudication. (*Fletcher, J.*) JEWANDAS JHAWAR, *In the matter of.*

18 I. C. 908 : 40 Cal. 78.

———S. 17—*Hindu father—Insolvency—Vesting of sons interest in Official Assignee—Remedy of sons.*

On the insolvency of a father governed by the Mitaksbara law the whole of the joint family property including the interest of his sons, vests in the Official Assignee But the sons have their remedy on their establishing that the debts of the father were illegal or immoral and that their sharers would not be liable for the same. 48 I. C. 526 , 49 I. C. 848 not foll, 7 B. 438 ; 11 B. 37 ; 19 M. 74 ; 42 C. 225 Ref. (*Shadi Lal, C. J., Chevis and Abdul Raoof, JJ.*) BIHARI LAL *v.* SAT NARAIN.

3 Lah. 329 : 1923 L. 1.

———Ss. 17, 22 and 51—*Adjudication by different Courts—Priority of—Vesting—Effect of later adjudication—Balance of convenience—Order of adjudication—Specification of acts of insolvency.*

Where there are several adjudications by different courts all the properties of the insolvent vest in the Official Assignee of the Court which made the prior adjudication and will not be divested from him by the subsequent adjudication of another Court even though the later adjudication is based on earlier acts of insolvency. S 51 of the Act has not the effect of divesting property vested in an Official Assignee under a prior adjudication. Where it is found that the estate should be administered by the Court in which the later adjudication was made, steps should be taken to annul the previous adjudication. An order of adjudication should specify the acts of insolvency on which it is made, as the insolvency relates back to the dates of the acts of insolvency which are found to have been proved. (*Wallis, C. J. and Seshagiri Aiyar, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* OFFICIAL ASSIGNEE OF RANGOON.

42 Mad. 121: 24 M.L.T. 455: 49 I. C 210 :9 L. W. 36 : 35 M.L.J. 533.

———S. 17—*Remedy against insolvent—Leave from Insolvency side of the High Court.*

Any person wishing to seek any remedy against the insolvent who is so adjudicated should apply for leave to do so to insolvency side of High Court; hence a Small Cause Court has no jurisdiction to entertain an application for execution after adjudication without High Court's leave. (*Sadasiva Aiyar and Napier, JJ.*) ESWARA IYER *v.* GOVINDARAJULU NAIDU.

31 I. C. 192 : 39 Mad. 689.

———S. 17—*Adverse possession—Insolvent and Assignee—Official Assignee—After acquired property*

An insolvent, from the time of adjudication as an insolvent until his final discharge by the force of the statutory provisions of the Insolvency Act, holds the position of an express trustee for his creditors and he cannot plead adverse possession against the Official Assignee. On an application by the Official Assignee under S. 26 of the Indian Insolvency Act that the properties acquired by an insolvent in the name of his mother or wife after his adjudication are those of the insolvent and as such vest in him (the Official Assignee), the Insolvent Commissioner has jurisdiction to adjudicate the claim as that was the only and proper procedure to be followed. The after acquired property of the insolvent vests from the date of its acquisition on the Official Assignee and it is not necessary to have judgment entered up under S. 86, and the claim of the Official Assignee is not barred by limitation. The jurisdiction of the insolvency court is exclusive and the remedy in the Civil Court is barred as between the Official Assignee and the insolvent. (*Sadasiva Aiyar and Napier, JJ.*) RATNA BAI *v.* OFFICIAL ASSIGNEE.

29 I. C. 168 : 17 M. L. T. 347.

———S. 17—*Applicability—Suit against Official Assignee or agent—Leave of Court of Assignee—Suit to set aside distraint—Agreement for setting off rent and debt.*

S. 17 of the Act does not apply to a suit instituted in the Revenue Court to set aside an illegal distraint by the Official Assignee for rent due to the insolvent on the ground that under an agreement with the insolvent the plaintiff was entitled to apply the rent due by him by the latter. No leave of the Official Assignee on the Insolvency Court before any suit against the former is instituted. The insolvent's property vested in the Official Assignee is not in *custodio legis* and there is no contempt of court in instituting a suit against that officer with respect to that property. (*Benson and Sundara Aiyar, JJ.*) RAMALINGA CHETTY *v.* ANANTA CHARIAR.

(1913) M.W N. 287 : 13 M.L.T. 303 : 18 I. C. 722 : 24 M. L. J. 350.

———S. 17—*Effect of adjudication—Rights of Official Assignee.*

After an adjudication order all the property belonging to the insolvent vests in the Official Assignee appointed under S. 17 and it cannot thereafetr be controlled by any court except with the sanction of the Official Assignee. (*Mullick and Atkinson, JJ.*) ROSTAMJI DHAUJU MATHA *v.* MADAN MOHAN,

39 I.C. 884 : 3 Pat. L. W. 394.

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 17.

——S. 17—*Discharge suspended — Suit against insolvent—Leave of Court.*

The operation of an order suspending an insolvent's discharge is different from that of one refusing a discharge. The effect of the former is that permission of the insolvency Court is required to institute a suit against the minors. (*Maung Kin, J.*) ALLAPITCHAY *v.* S. S. A. S. CHETTY. **64 I.C. 54 : 13 Bur. L. T. 192.**

——S. 17—*Operation of.*

S. 17 does not contain an absolute prohibition against the filing of suits in respect of debts provable in insolvency. It merely requires the would-be plff. to obtain permission from the Insolvency Court, to sue the debtor. (*Maung Kin, J.*) GREENBURGH *v.* XAVIER.
64 I. C. 50 : 13 Bur. L. T. 197.

——S. 17—*Adjudication, order of—Application for arrest.*

The words "other legal proceedings" in S. 17 of the Pres. Towns Insol. Act include an application for arrest in execution of a decree and no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the court. (*Maung Kin, J.*) THAKURDEEN *v.* DUBAY.
55 I. C. 250 : 12 Bur. L. T. 218.

——S. 17—*Secured creditor—Right to sue without leave.*

A secured creditor of an insolvent can institute a suit to realise his securities without leave of the Court (*Pratt and Ormand, JJ.*) BADRI DAS *v.* THE CHETTY FIRM OF O. A. M. K.
45 I. C. 918.

——S. 17—*Discharge, refusal of—Effect*

The refusal of a discharge is a final disposal of the insolvency proceedings. The protection order is vacated by such refusal and no leave is necessary under the section for an application to arrest an insolvent under a decree. (*Young, J.*) KOSHWE GYA. *In the matter of.*
38 I. C. 519 : 9 Bur. L. T. 252.

——Ss. 17 and 99—*Adjudication—Firm—Rules of the Lower Burma Chief Court under the Insolvency Act.*

An order of adjudication can be made against a firm in the firm's name and will operate on the property of each partner. Rule 83 of the rules of the Lower Burma Chief Court under the Insolvency Act is *ultra vires.* (*Fox, C.J. and Hartnol, J.*) A. SOFER, *In the matter of.*
25 I. C. 222 : 7 Bur. L. T. 304.

——Ss. 17 and 127 (2)—*Order made before the new Act—Effect.*

A vesting order made before 1st January 1910 under the old Act is not an adjudication order under the new Act, (*Crouch, A. J. C.*) JAMES, FINLAY & CO. *v.* JUSHANMAL.
12 I. C. 188 : 5 S. L. R 4.

——S. 18—*Jurisdiction of commissioner in insolvency to stay proceedings in District Court—Practice—Procedure.*

S. 18 of the Pres. T. Ins. Act applies to the familiar case where the insolvency Court has power to stay some ordinary civil court which

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 21.

may be pending at the date of the insolvency against the insolvent, It is not applicable to some other insolvency pending in some other court of another province or in the District Courts of the province itself. The other insolvency is not a suit or other proceeding pending against the insolvent. The District Court is not subject to the superintendence of the commissioner in Insolvency and consequently the latter not stay Insolvency Proceedings, in the former. (*Martin, J.*) MANEKCHAND VIRCHAND PATNI, *In re.*
24 Bom. L. R. 872 : 1921 Bom. 390.

——S. 18—*Reference to Registrar—Application by mortgagee—Powers of Registrar.*

Where a reference is made to Registrar under S. 18, on the application by some persons who allege themselves to be mortgagee, the Registrar cannot deal with the question of validity of the mortgage though the parties consent. (*Greaves, J.*) LALBIHARI LAL, *In re.*
60 I. C. 889 : 47 Cal. 721.

——Ss. 18 and 53—*Execution sale—Subsequent insolvency of debtor—Purchaser's right—Official Assignee.*

According to C. P. Code, an auction-purchaser's title dates from the date of sale if confirmed by the court. Until confirmation however he has an inchoate right which can be recognised and perfected. An order of adjudication passed against the judgment-debtor does not affect such right, as the Official Assignee takes the estate only subject to the rights of third person affecting the same and cannot claim to have the sale cancelled on the ground of any equity possessed by the general body of creditors at the time of the adjudication order. (*Benson and Sundara Aiyar, JJ.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* PONNUSWAMI MUDALI.
26 I. C. 421 : 1 L. W. 1028.

——S. 18 (3)—*Stay of proceedings.*

The words of S. 18 (3) justify a stay of proceedings in an action which was not pending at the time of the order of adjudication. (Follg) (1887) 58 L. T. 85 Decided under S. 10 of the Bankruptcy Act. (*Scott, C J. and Heaton, J.*) MAHOMED HAJI *v.* ABDUL RAHMAN.
41 Bom. 312 : 33 I. C. 694 : 18 Bom. L. R. 198.

——S. 21— *Composition by insolvent — Creditor's right.*

Once an act of insolvency has been committed, the insolvent cannot by forcing a compromise or adjustment upon his creditors, escape the result of the adjudicating order and prevent the Court from enquiring into his affairs, unless he pays all his claims in full in cash since any composition or scheme of arrangement can be done only under the Act. A creditor is not entitled to use his petition for insolvency of his debtor as a means to secure preferential treatment for himself. (*Macleod, J.*) SHIVLAL RATHI *In re.*
40 I. C. 207 : 19 Bom. L. R. 365.

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 21.

——S. 21—*Annulment of adjudication — Abuse of the process of Court.*

On 22-2-1919 the insolvent was adjudicated on his own petition. On 12-5-1919 he filed a schedule but failed to apply for his discharge within the time provided by the Act and his adjudication was annulled on 9-5-1922. Subsequently on his own application he was adjudged an insolvent on 21-6-22 and a creditor applied to annul the order of adjudication. *Held*, that the order of adjudication ought to be annulled. 21 C. W. N. 298 ; 21 C. W. N. 497 Ref. (*Greaves, J.*) BALLAV CHAND SEROWGEE, *In re.*

27 C. W. N. 739 : 1923 Cal. 703.

——S. 21—*Application to annul adjudication—What must be proved.*

In an application to annul an adjudication the insolvent must satisfy the Court, that he has completely satisfied the debts as they stood before bankruptcy, *i.e.*, he must have paid the principal and interest also on the interest—bearing sums. (*Rankin, J.*) A. A. HAILES, *In re.*

60 I. C. 943 : 47 Cal. 914.

——S. 21—*Debts—Full discharge.*

A full discharge of debts by payment of four annas in the rupee is not a full payment within the section and does not entitle the insolvent for an order annulling the order of adjudication. (*Abdul Rahim, C. J. and Moore, J.*) BRIJ KESSOOR LAL *v.* OFFICIAL ASSIGNEE OF MADRAS.

43 Mad. 71 : 37 M. L. J. 244 : 26 M. L. T. 221 : 10 L. W. 640 : 52 I. C. 979 : (1919) M. W. N. 795.

——Ss. 24 (3), 33 and 34—*Bankrupt under examination as witness—Warrant of arrest, whether proper—C. P. C. S. 135 English Practice.*

It is not open to the Court either under this Act or under C. P. C. to issue a warrant of arrest against a bankrupt who is in attendance in court as witness, but the proceedings need not be set aside for this reason alone. The rules under English Bankruptcy Act under which a committal order should be made without a formal adjudication heard three days after notice to the insolvent is a good guide to regulate the procedure of courts in India. (*White, C. J. and Oldfield, J.*) LAINAB BEE *v.* OFFICIAL ASSIGNEE OF MADRAS.

24 I. C. 513 (Mad.).

——S. 25—*Application for protection.*

It must be judged on the merits where the insolvent on the day preceding his insolvency petition assigned a debt and property of considerable worth to creditors whom he had defrauded to cover defalcations, and where numerous facts falling within, a, b, c, d, f, and j, of S. 39 (2) of the Act, had been proved against him, it was held that there was good cause for the court to refuse an application for protection under S. 25. A creditor can furnish an insolvent, who have acted recklessly and dishonestly, by attachment and imprisonment according to law, even if the latter is unable to pay. (*Scott, C. J. and Batchelor, J.*) MAHOMED HAJI *v.* ABDUL RAHAMAN.

40 Bom. 461 : 31 I. C. 507 : 17 Bom. L. R. 989.

——S. 25—*Insolvency—Remedy of decree-holder.*

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 30.

The pendency of an insolvency proceedings under the Act does not of itself, in the absence of a protection order under S. 25, bar the remedy of a decree holder to execute the decree by arrest of the judgment-debtor. Limitation continues to run against the decree holder even during the pendency of the insolvency proceedings. (*Mullick and Thornhill, JJ.*) SHEO SARAN RAM *v.* BASUDEO PRASAD SAHU.

47 I. C 798 : (1918) Pat. 357.

——S. 27 (6)—*Insolvent—Public examination—Admissibility against him but not his creditor.*

The notes of the public examination of the insolvent, though admissible against him under S. 27 (6) are not admissible against a creditor who had no opportunity to cross-examine him. (*Sanderson, C. J. and Woodroffe and Mookerjee, JJ.*) JARWA BAI *v.* PITAMBAR NILAMBAR SHAH.

36 I.C. 689 : 24 C. L. J. 149.

——Ss. 28, 30—*Composition by Insolvent—Part-payment by surety—Contract Act, Ss. 134, 135.*

A creditor releasing a surety of an insolvent debtor is not liable to return the money received by him from the surety. Part payment of a surety is part preformance of the contract and a partial discharge thereof. As regards part payments he is no longer the surety but the principal debtor. The cause of action against the principal debtor is not affected by any composition which the principal creditor may accept from the debtor. In the case of part payments the surety is represented in the insolvency by the principal creditor who proves for the whole debt. The omission to embody the terms of a composition in the order of annulment under S. 30 of the Act does not make the order a nullity. The practice of insolvents directly dealing with creditors to such a composition, though irregular is not illegal. Where the composition is made after notice to the surety and is accepted by the Court it becomes an act of Court and Ss. 134 and 135 do not apply. (*Wallis, C.J. and Seshagiri Aiyar, J.*) BOMBAY CO. *v.* OFFICIAL ASSIGNEE.

44 Mad. 381 : (1921) M. W. N. 281 : 63 I. C. 173 : 40 M. L. J. 404.

——Ss. 29 (2) and 30—*Order without public examination.*

An order of adjudication passed without a public examination of the insolvent or without a an express grant of leave to dispense with such examination is bad in law and could not be pleaded in trial to regular suit by a creditor who was not a party to the adjudication proceedings. (*Fox, C. J and Parlett, J.*) A. K. A. M. FIRM *v.* AHMED SULEMAN MAPAN.

8 Bur. L. T. 259 : 33 I. C. 559 : 8 L. B. R. 258.

——S. 30 (2) — *Application by creditor against guarantor under composition scheme—Power to vacate order.*

It is a novel proposition, that a person who has made himself liable as a guarantor for the payment of a composition in insolvency, should be subject to the insolvency jurisdiction so as to be liable to be dealt with for contempt of Court, if he does not carry out any order made under such

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 31.

jurisdiction. Once a person is re-adjudged an insolvent there is an end of the composition and the liability of the guarantor also ends. A scheme of composition was made so long ago as the 10th of December 1910. By its terms the composition was to be paid within a month from the date, of the order annulling the adjudication order. The adjudication was annulled on the 14th September 1911 ; and it was not until 29th July 1922 that the respondents applied for the covenant to be enforced against the appellant. *Held*, that under these circumstances, the peculiar jurisdiction under S. 30 (2) of the Presidency Towns Insolvency Act should not be exercised against the appellant, in his capacity as guarantor, even assuming that the Court can deal with such a matter under that section. (*Sanderson, C. J. and Richardson, J.*) GOVIND DAS PITY *v.* JARDINE SKINNER & Co. **27 C. W. N. 908 : 1924 Cal. 176.**

——**S. 31 (b)**—*Decree, transfer of, to Munsif's court direct, legality—Clerical error in the decree, effect of.*

The transfer of a decree by the Presidency Small Cause Court direct to a Munsif's court for execution, without the intervention of the District court is valid under S. 31 (*b*) of the Act. 37 C. 574 Foll. A mere clerical error is of no consequence in the certificate of transfer, 'Das instead of Benode Behari Bose'. (*Walmsley and Greaves, JJ.*) KEDAR NATH MANA *v.* JOGENDRANATH DAS. **41 I. C. 815 : 28 C. L. J. 264.**

——**S. 33**—*Discharge —Suspension— Final order.*

An adjudicated insolvent obtained order of discharge in 1912 in the following form. "It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the second of October, 1913." No final order of discharge was made. The insolvent acquired the property in 1916-1917 and the Official Assignee claimed the property for division amongst the creditors. *Held*, that the order of discharge became operative by itself on the 3rd October 1913 ; and the claim of the Official Assignee should be negatived. The Act makes no further proceedings necessary after an order of suspension under S. 38 has been passed. The practice prevailing in the Bombay High Court which requires the insolvent whose discharge has been suspended, to appear and obtain the final and absolute discharge after the expiry of the period of suspension, has no warrant in law and cannot be upheld. (*Pratt, J.*) MURAOLALLY SHAMJI *v.* B. N. LANG. **53 I C 627 : 21 Bom. L. R. 980.**

——**Ss. 33 (2) (c)**—*Order under—If to be in writing—Contempt of Court.*

The Official Assignee's order to insolvent to attend his office in pursuance of S. 33 (2) (*c*) need not necessarily be in writing, even a verbal order is valid and there is a duty upon the insolvent to comply therewith. Non-compliance with such order will render the insolvent guilty of contempt of Court. Affidavits in support of the application for contempt may be served at the same time as the notice of application. *Per Curium.* In future if the Official Assignee intends to apply for

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 36.

committal order for contempt of Court he should put his order into writing and have it served on the persons intended to be proceeded against, with a notice that if the order is not complied with proceedings for contempt will be taken. Further it is eminently desirable that the procedure laid down by the rules should be strictly followed. (*Sanderson, C. J. and Woodroffe, J.*) CHURU MULL BANKA *v.* THE OFFICIAL ASSIGNEE OF BENGAL. **56 I. C. 337 : 47 Cal. 56.**

——**Ss. 36 and 56**—*Fraudulent preference—Application by Official Assignee—Depositions given before Registrar when admisssble—Burden of proof.*

Where a creditor of a person who was in pecuniary embarrassment knowing of the condition of his debts made repeated demands for payment and threatened him with legal proceedings. Such acts do not constitute *bona fide* pressure and do not prevent a transfer by the debtor to the creditor from being an undue preference over other creditors within S. 56 of the Pres. Towns Ins. Act. 19 Ch. D. 589 Ref. Once it is established that an assignment by the insolvent to a creditor was fraudulent and void as against the Official Assignee the onus lies upon the transferee if he desires to bring himself within S. 56 (2) of the Act to show that not only did he give consideration for the assignment but also that he acted in good faith. Where an Official Assignee applies to set aside an assignment on the ground that it was fraudulent and void within S. 56 of the Pres. T. Ins. Act and he intends to rely upon depositions which have been given by the parties before the Registrar in Insolvency, he should give notice of his intention to do so and such notice should specify the depositions on which he intends to rely. *Sanderson, C. J. and Richardson, J.*) MADHORAM RAGHUMULL *v.* THE OFFICIAL ASSIGNEE. **27 C. W. N. 611 : 1923 Cal. 631.**

——**Ss. 36, and 90**—*Witnesses residing more than 200 miles—Power to summon and examine —Civil Procedure Code, O. 16, R. 19.*

S. 36 (1) of the Insolvency Act provides that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order for adjudication has been made, summon before it the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property. The person to be summoned does not, at any rate in all cases, fall within the category of an ordinary witness to whom the provisions of O. 16 relate. It deals rather with the discovery and recovery of property than with the ordinary testimony which a witness can give, and the proviso to S. 90 (1) of the Insolvency Act makes it clear that it was not intended to fetter the Court in the exercise of its jurisdiction under S. 36 by any limitation imposed by the Code of Civil Procedure. (*Greaves, J.*) DINARAM SOMINA *In re.* **27 C, W. N. 370 : 1923 Cal. 427**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 36.

——S. 36—*'Any creditor who has proved his debt', meaning of.*

The words " any creditor who has proved his debt " in S. 36 mean not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the Official Assignee under the provisions contained in S. 25 of the second schedule to the Insolvency Act. The mere fact that a person's name was included in the schedule filed by the insolvent and that so far his claim has not been challenged does not assist him if his debt has not been admitted by the Official Assignee. (*Greaves, J.*) ABDUL SAMAD *In re.*

26 C. W. N. 744 : 1923 Cal. 305.

——S. 36—*Order for discovery—Wilful disobedience—Consequence of.*

An order for discovery made under S. 36 may if disobeyed, involve the person concerned, in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court. In view of such possibilities the Court should act with great caution and afford all possible facilities to the person concerned, to satisfy the Court that at the time of the order, the things ordered to be discovered, were either not in existence or were not under her control. (*Mookerjee and Panton, JJ.*) SUKHLAL *v.* OFFICIAL ASSIGNEE OF CALCUTTA.

34 C. L. J. 351.

——S. 36—*Section not applicable—Examination of insolvent—Admissibility in evidence.*

The general practice is to examine the accused under S. 36, but the Court can also examine though S. 36 does not apply. Examination of an insolvent under S. 36 of the Act and without any objection on his part, is voluntary and is admissible under S. 103 of the Act. (*Woodroffe and Walmsley, JJ.*) JOSEPH PERRY *v.* OFFICIAL ASSIGNEE OF CALCUTTA.

47 Cal. 254 : 24 C. W. N. 425 : 21 Cr. L. J. 522 : 56 I. C. 778 : 31 C. L J. 209

——Ss. 36, 103 and 104—*Deposition of insolvent under S. 36—Admissibility in proceedings under Ss. 103 and 104.*

The deposition of an insolvent examined under S. 36 of the Act and reduced to writing is admissible as evidence against him in a criminal charge. (1896) 2 Q. B. 260, 19 Ch. D. 580 Ref. (*Rankin, J.*) JOSEPH PERRY, *In re.*

54 I. C. 478 : 21 Cr. L. J. 78 : 46 Cal. 996.

——S. 36—*Witness—Examination of transferee—Costs of employing attorney or counsel.*

A witness examined under S. 36 of the Pres. Towns Insolvency Act is not entitled to the costs of employing attorney or counsel. This is so even if the witness was a mortgagee from the insolvent and his mortgage was sought to be impeached by his creditors. 6 Ch. D. 328 and (1905) 1 Ch. 749 Dis. (*Rankin, J.*) *In the Matter of* ANSHU PROKASH GHOSE.

24 C. W. N. 68 : 53 I. C. 362 : 46 Cal. 795.

——S. 36—*Application for examination—Grounds for refusal—Power of Court.*

S. 36 is very wide and there is nothing in the Act limiting the Court's powers thereunder, to the period before the discharge. But these powers should not be used unduly or unnecessarily long after the discharge. The official assignee when applying under S. 36 for the examination of a person should state shortly the nature of the information likely to be given and the dealings or properties of the insolvent to which such information will relate. A mere allegation that the witness is likely to give useful information is not enough for an order under this section. But an order cannot be refused on the mere ground that litigation might ensue between the party to be examined and the Assignee. (*Grieves, J.*) HARIPADA RAKSHIT *In re.*

40 I. C. 94 : 44 Cal. 374.

——S. 36—*Questions of title as between official assignee and stranger—Jurisdiction.*

The Court has no jurisdiction to determine questions of title as between the official assignee and a stranger to the insolvency, where *prima facie* the title is in the stranger. (*White, C. J. and Oldfield, J.*) SORNAMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS, **24 I. C. 239 : 27 M. L. J. 66.**

——S. 36—*Object of—Property belonging to Debtor.*

The object of S. 36 is discovery for the purpose of enabling the Official Assignee or a creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent so that he might take proceedings thereon to impeach the transactions which are voidable under the sections of the Act relating to voluntary transfers, fraudulent preferences, etc. Property transferred by the insolvent 4 months before the order of adjudication is not 'property belonging to the debtor' within S. 36 (5) of the Act, and no order under that section, on the examination of the transferee, can be passed declaring the transaction void under S. 55 and directing the delivery of the property to the Official Assignee. (*White C. J. and Oldfield, J.*) ABDUL KADHAR v. OFFICIAL ASSIGNEE.

14 M.L.T. 51 : 25 M.L.J. 398 : (1913) M.W.N. 876 : 20 I. C. 485 : (1914) M. W. N. 247.

——S. 36 (1)—*Application under, to be made ex parte—Cal. High Court Insolvency Rules, Rr. 17, 18, 19 and 30—Application.*

Applications under S. 36 (1) for examination of persons thereunder should be made *ex parte* under the rules framed by the Cal. High Court under S. 112 of the Act, R. 30 applies to such applications and not Rr. 17, 18, and 19 and this view is supported by the English Bankruptcy Act, (1914) 4 and 5 George V, ch, 39 and the rules thereunder. (*Greaves, J.*) KISSORY MOHAN ROY, *In re.*

44 Cal. 286 : 36 I. C. 990 : 20 C. W. N. 1155.

——S. 36 (4) and (5)—*Discovery of property—Procedure—Notice of motion—Suit—Costs—Form of order.*

If the Official Assignee applies under S. 36 (4) and (5) of the Presy. Towns Ins. Act for discovery of an insolvent's property he must take the examination of such person by itself and ask the Court for an order the admissions made or evidence given by such person and without looking to any further evidence at all. There are two

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 36.

courses open to the Official Assignee. The one is to start an action and the other is to proceed against the respondent by notice of motion in insolvency. But it is discretionary with the Court in the latter case to direct at the hearing or the motion that the matter be dealt with by an action. If the Official Assignee brings an unsuccessful motion, however, careful he may have been, has to pay the respondent's costs and he will have the right of indemnity given him by the previous order of the Court obtained from the creditor or other person in whose interest the motion is brought. The order for costs should not be directed to be limited to the assets in the hands of the Official Assignee when the respondent is not in any way in default for which he may be partially mulcted in costs. (*Rankin, J.*) SURESH CHANDER GOOYEE, *In re.*

51 I. C. 654 : 23 C. W. N. 431.

——— **S. 36 (4) (5)**—*Scope of—Continuous proceedings—Summary enquiry.*

An order under S. 36 can only be made if on examination of any person the court is satisfied that he has in his possession any property belonging to the insolvent. S. 36 (4) and (5) is included to provide a summary procedure for ordering payment of debts due and delivery of property belonging to an insolvent when there is no dispute. It is not intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment. (*Chitty, J.*) J M. LUCAS *In re.* **28 I. C. 469 : 42 Cal. 109.**

——— **S 36 (5)**—*Scope of order under.*

An order under S. 36 (5) should not be made in circumstances justifying the institution of a regular suit as for example where the matter involves difficult questions of title. (*Mookerjee and Fletcher, JJ.*) RASH BEHARY *v.* OFFICIAL ASSIGNEE. **68 I. C. 341 : 25 C. W. N. 852.**

——— **S. 36(5)**—*Order under, when to be made.*

Order under S. 36 (5) could only be made on a written application by Official Assignee and signed by him. The order can be based on examination under S. 36 (6) conducted by an officer delegated for the purpose. The person examined must get an opportunity to contest the order made. For it is a cardinal principle that no order should be made affecting a person's interest without giving him a sufficient opportunity of contesting the application against him. (*Fox, C. J. and Hartnoll, J.*) *In the matter of appeal of* ISMAIL MAWOON DAWOODJI, **5 Bur. L. T. 127 : 16 I. C. 87 : 6 L. B. R. 142.**

——— **Ss. 36 (1)**—*Rules (Calcutta) under the Act, Rr.* 17, 18, 19 *and* 30—Ex parte *order for examination of a person—Review.*

Applications under S. 36 (1) are intended to be made *ex parte.* To such a petition, R. 30 of the High Court Rules applies and not rule 17 or 19. An application to set aside an order under S. 36 (1) by the Registrar in Insolvency is not an application under S. 8, Cl. (2) but one under Cl. (1) for review of an *ex parte* order (*Sanderson, C. J, and Richardson, J.*) RAI SUKLAL KARNANI *v.* OFFICIAL ASSIGNEE. **66 I. C. 715 : 25 C. W. N. 750.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 46.

——— **S. 41**—*Registrar can make order of annulment.*

The Registrar in Insolvency has jurisdiction to make the order of annulment under S. 41. (*Greaves, J.*) *In re.* MEGHRAJ PUROHIT (INSOLVENT), **27 C. W. N. 916 : 1924 Cal. 83.**

——— **S. 43**—*Proceedings under—Nature of*

Proceedings under S. 43 of the Presy. Towns Insol. Act are in the nature of criminal proceedings and therefore a definite charge, a finding and a conviction are essential as a foundation for the sentence. 18 C. W. N. 692. Foll. (*Sadasiva Aiyar and Napier, JJ.*) RAMASWAMY CHETTY *v.* THE BANK OF MADRAS. **30 I. C. 839.**

——— **S. 45**—*Discharge, order of—Not binding in Foreign Court—Suit to recover debt from Insolvent's property in foreign territory will lie in Foreign Court.*

The Insolvency Court in Bombay has no jurisdiction to restrain a decree-holder from filing a suit against an insolvent who has obtained his discharge in the Insolvency Court in a foreign state, within whose jurisdiction the insolvent has his property, for recovering a debt in respect of which discharge has been obtained. The order of discharge granted by the Insolvency Court in Bombay would be recognised by all Courts in the British Empire but there is no obligation on the Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order. (*Macleod, C.J. and Fawcett, J.*) LAKHMIRAM *v.* PUNAMCHAND. **22 Bom. L R 1173 : 59 I C. 444 : 45 B. 550.**

——— **S, 45**— *Bankruptcy — Assets acquired after* bona-fide *discharge of debts—Third parties dealing with insolvent* bona-fide *and for value — Official Assignee not intervening.*

Until the Official Assignee or Trustee intervenes, all transactions by a Bankrupt after his Bankruptcy, with a person dealing with him *bona fide* and for value in respect of his after-acquired property whether with or without knowledge of the Bankruptcy, are valid against the Assignee or Trustee ; but apart from such transactions, the Bankrupt acquires property and contracts for the benefit of the Official Assignee. 29 I. C. 168, Foll. 8 C. 556, 24 C. 244 Not Foll. Where a member of a joint Hindu family becomes insolvent and his eatate consequently vests in the Official Assignee and there are subsequent joint acquisitions of the family including the insolvent the assignee is entitled only to the share of the insolvent in the said property. (*Abdur Rahim, C. J. and Phillips, J.*) MURALI DOSS BRIJARATNA DOSS *v.* OFFICIAL ASSIGNEE OF MADRAS. **43 I. C. 532 : 6 L. W. 663.**

——— **S. 46**—*Preference—Intention of the insolvent.*

It is the duty of the Court to find out whether the intention to give preference to any one of the creditors was dominant or not. That which has the natural effect of preferring a creditor is presumed to have been so intended to have that effect. (*Sadasiva Aiyar and Napier, JJ.*) NALAM VISWANATHAN *v.* OFFICIAL ASSIGNEE OF MADRAS, **32 I. C. 795.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 49.

——— S. 49 (1)—*Crown debts— Debts due to Govt. Soap Factory.*

It is not outside the statutory powers of the Government of India to conduct a soap factory for the purposes of education and demonstration to the people. A debt due to such a concern conducted by the Government from an insolvent is a debt due to the Crown and is recoverable in full in priority to other debts of the insolvent under S. 49 of the Pres. Towns Ins. Act. (*Coutts-Trotter, J.*) SUBRAMANIA CHETTI AND CO., *In the matter of.* **45 Mad. 156 : 30 M. L. T. 246 : 16 L W. 46 : 1922 Mad. 243.**

——— Ss. 52, 62 and 64—*Contract with Karta of joint family—Insolvency of Karta—Rights of Official Assignee.*

Where the Karta of Hindu Mitakshara family becomes an insolvent the Official Assignee's right are only to such portions of the joint family estate as the insolvent was entitled to in his own right. The Official Assignee requiring the completion of a contract for sale of goods ordered from the deft. by the insolvent before adjudication must elect within a reasonable time to take up the contract and should make a tender of cash before requiring performance. (*Fletcher, J.*) C. E. GREY *v.* WALKER GOWARD & CO. **18 I. C. 753 : 40 Cal. 523.**

——— Ss. 52 and 56—*Sale of stock-in-hand a few days before insolvency—Possession with insolvent—Validity of sale—If transaction fraudulent and void.*

Where goods sold by an insolvent prior to his insolvency are allowed to remain in his own shops until the date of his insolvency, they are in the "possession, order and disposition" of the insolvent within S. 52. A sale by the insolvent to a thick friend of his, the consideration for sale consisting of monies borrowed both by the insolvent and the vendee from a third person, must be looked upon with great suspicion and where the goods sold are not removed from the insolvent's premises till date of his insolvency, the sale must be deemed to be fraudulent and void under S. 56. *Quaere.*—Where the sale by an insolvent is for a sum already due to the vendee, whether the vendee could rank as a secured creditor ? (*Sadasiva Aiyar and Napier, JJ.*) AHMED ALLY & CO. *v.* OFFICIAL ASSIGNEE OF MADRAS. **29 I. C. 947.**

——— S. 52—*Insolvency of jeweller—Position of person entrusting sovereigns and gold to the jeweller.*

Where a jeweller entrusted by the claimant with gold and sovereigns to make certain jewellery became an insolvent after converting his gold and sovereigns into cash, the transaction amounts to a bailment and the jeweller became a trustee for the gold and sovereigns entrusted to him but inasmuch as the gold and sovereigns did not as such form part of the estate taken possession of by the Offiicial Assignee, the claimant is not entitled to the benefit of the doctrines of *tracing* and *quasi-charge.* Case-law discussed. (*Sadasiva Aiyar and Napier, JJ.*) MULRAZZU

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 52.

LAKSHMI *v.* OFFICIAL ASSIGNEE. **(1915) M. W. N. 262 : 2 L. W. 312 : 29 I. C. 37 : 17 M. L. T. 247 : 28 M. L. J. 403.**

——— S. 52—*After acquired property—Nature of —Possession of insolvent for more than 12 years—Official Assignee's claim, if barred.*

Acquisitions by an insolvent after the insolvency and before the discharge who has obtained a merely personal discharge are made as agent of the Official Assignee and as such the possession of the insolvent is not adverse to that of the Official Assignee and the latter's claim to such after-acquisition even after 12 years' possession by the insolvent is not barred. (*Wallis, J.*) OFFICIAL ASSIGNEE *v.* MOORLI DOSS. **22 I. C. 271.**

——— S. 52—*Hypothecation—Stock-in-trade—Possession, order and disposition—Meaning of.*

Held, that on the day of the bankruptcy, which related back to the day of absconding, the stock-in trade was in the possession, order and disposition of the insolvent so as to make him the reputed owner thereof under S. 52 of the Presy. Towns Insolv. Act. The possession which the petitioner (one of the creditors) had under an agreement of hypothecation accompanied by delivery of keys was not real possession. 10 Ch. D, 408, 7 Ch. Ap. 20, Appr. 11 C. 451 Dist. A deliberate arrangement, such as the above agreement, contemplated to deceive the public was a fraud upon the Act. *Hilton* v. *Tucker*, 39 Ch. 669 Dist. Under the agreement the goods were absolutely in the possession, order, disposition of the insolvent during the working hours of the day. The petitioner was not entitled to rank as a secured creditor. (*Wallis, J.*) GULAM ALI, *In the matter of.* **22 M. L. J. 441 : 15 I. C 371 : 11 M. L. T. 203.**

——— S. 52 (2) (c)—*True owner—If includes owner of equitable charge--Consent of garnishee--Withdrawal.*

The words "true owner" in S. 52 (2) (*c*) include the owner of an equitable interest in the property. Where the insolvent was in possession of a motor car with the consent of the garnishee but before the insolvency, the garnishee determined such consent by means of a letter demanding the car, the Official Assignee cannot claim the car, as the insolvent was not at that time in possession with the consent of the owner. (*Schwabe, C. J. and Krishnan, J.*) ABURUBAMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS. **45 M. L. J. 817 : 19 L. W. 54 : 33 M. L. T. 217 (H. C.): 47 Mad. 215 : 1924 M. 214.**

——— S. 52 (2) (c)—*Equity of redemption in goods pledged is not 'goods'*

The equity of redemption in goods pledged by the insolvent is not 'goods' within the meaning of that term in S. 52 (2) (*c*) of the Act and the fact that the pledgee or charge holder leaves the power to sell such goods with the insolvent does not render the pledge or charge invalid. (*Ayling, C. J. and Odgers, J.*) OFFICIAL ASSIGNEE MADRAS *v.* VELLIAPPA CHETTI. **14 L. W. 715 : 42 M. L. J. 155 : 45 M. 238 : 1922 M. 144.**

——— S. 52 (2) (c)—*Property hypothecated--Possession with insolvent with permission of creditor —When passes to Official Assignee.*

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 53.

Hypothecated property remaining in the possession of the insolvent with the permission of the creditor will pay to the Official Assignee on insolvency. But if the consent is withdrawn even in an informal manner he cannot be said to be in possession "with the owner's consent" and no title will pass to the Official Assignee. (*Robinson, C.J. and Beasley, J.*) OFFICAL ASSIGNEE *v.* MD. E. NAIKWARAH. **1 Rang. 153 : 2 Bur. L J. 248 : 1924 Rang. 27.**

——**Ss. 53 (1), 108 and 109**—*Order of Administration—Attachment by creditor prior to order—Sale after order—Rights of attaching creditor.*

S. 53 (1) of the Presy. Towns Ins. Act does not apply to an administration of the insolvent's estate of a deceased person under Ss. 108 and 109 of the Act. An attachment only prevents alienation and does not confer any title or create any charge or lien on the attached property. A creditor who has attached property in execution of a decree has no right therein prior to sale and, upon the making of an administration order before sale the property vests in the Official Assignee and the attaching creditor is relegated to the same position as the other creditors. (*Greaves, J.*) RE PREM LAL DHAR. **43 I. C. 348 : 44 Cal. 1016.**

——**Ss. 55 and 56**—*Application under, can be made only by Official Assignee.*

An application under the provisions of sections 55 and 56 of the Presidency Towns Insolvency Act can only be made by the Official Assignee in whom the property of the insolvents is vested and not by the creditor. If the Official Assignee refuses the creditor may make an application with the leave of the Court. (*Greaves, J.*) SURAJMUL MUNGLECHAND, *In re.* **70 I.C. 463 (1): 26 C. W. N. 803**

——**Ss. 55 and 36**—*Fraudulent transfer—Insolvency Court if can enquire into transfer—Transfer immediately before insolvency—Onus.*

An Insolvency Court can make an enquiry as to whether the transfer of the insolvent is fraudulent and void against the Official Assignee subsequent to the right of the party affected to bring a regular suit. An insolvent's examination is no evidence against the transfer. The onus of supporting a purchase from the insolvent just prior to insolvency lies on the person claiming that the purchase can stand. An assignment of an insolvent on the eve of the insolvency can only stand on proof that it was for the purpose of helping him to carry on the business. (*Greaves, J.*) A. F. C. SEEHASEA. *In re* **46 I. C. 196 : 22 C. W. N. 335.**

——**S. 55**—*Good faith—Burden of proof—Mortgage within two years of insolvency.*

Where a mortgagee seeks to enforce a mortgage executed within two years of the adjudication, the burden of proving good faith and consideration rests heavily on the mortgagee, although the Official Assignee has moved to expunge proof of the mortgage which he had admitted under S. 36 of the Pres. Towns Insol. Act, Sch. II as such admission is not an adjudication. (*Wallis, C.J. and Krishnan, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SAMBANDA MUDALIAR **43 Mad. 739 : 60 I. C. 205 : 28 M. L. T. 258 : 39 M. L. J. 345.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 56.

——**Ss. 55 and 56**—*Fraudulent preference—Test of—Voluntary transfer—'Good faith' in S. 55, meaning of.*

To constitute a fraudulent preference within the scope of S. 56 of the Presy Towns Ins. Act it must be shown that the transaction in question was entered into by the debtor with the dominant and substantial view of preferring a particular creditor. The mere fact that as a result of the transaction a particular creditor was preferred to the prejudice of the other creditors is insufficient. *Per Napier, J.*—A transfer cannot be said to have been made "in good faith" within the meaning of S. 55 of the Presy. Towns Ins. Act, if it is made in fraud of the bankruptcy laws. (*Wallis, C. J. and Napier, J.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* T. B. MEHTA & SONS. **42 Mad. 510 : 36 M. L. J. 190 : 25 M. L. T. 265 : 49 I.C. 968: (1919) M. W. N 293 :**

——**Ss. 55 and 56**—*Transfer by debtor on eve of bankruptcy—Validity—Onus—Transfer by husband to wife—Wife's money utilised by insolvent.*

Where a debtor transfers his properties on the eve of his bankruptcy, the onus is on the transferee to show that there was no fraudulent preference and that the transfer was *bona fide* in consideration of moneys really due. (1901) 1 K.B. 710 Rel.

Obiter.—Where an insolvent utilised his wife's money for trade purposes and in consideration of such utilization, transferred some of his property to her, the transaction may be looked upon as an attempt to repair the breach of trust or as a contractual obligation to repair the loss suffered by her. (*White, C. J. and Oldfield, J.*) ZAINAB BEE *v.* OFFICIAL ASSIGNEE OF MADRAS. **24 I. C. 513.**

——**S. 55**—*Transaction set aside—Remedy of party affected as to sums paid—Good faith—Onus.*

Where a transaction is set aside under the Act, the party affected by it is not entitled to payment in full out of Insolvent's estate, of the sums paid by him under the transaction, but he can prove them in the Bankruptcy The onus of proving good faith and valuable consideration is on the transferee, and if there is good faith on his part, it is not necessary that the party also should act in good faith. The fact the transferee was the wife, with notice of her husband's embarrassed circumstances, is not sufficient to prove bad faith. The question of, 'valuable consideration' is a question of fact. It is not open to a judge to pass an order under S. 55 of the Act under which the validity of the transaction is made to depend upon an uncertain event, *e.g*, on the vendee being compensated for the loss sustained by him by reason of the transaction. (*White, C. J. and Oldfield, J.*) OFFICIAL ASSIGNEE *v.* ANNAPURNA AMMAL. **20 I. C. 901 : 14 M. L. T. 150.**

——**Ss. 55**—*'Void', meaning of.*

'Void' in S. 55 of the Act means 'voidable' at the instance of the Official Assignee. (*White, C. J. and Oldfield, J.*) ABDUL KADHAR *v.* OFFICIAL ASSIGNEE. **14 M. L. T. 51 : (1913) M. W. N. 876 : 20 I. C. 485 : (1914) M. W N. 247 : 25 M. L. J. 308.**

——**S. 56**—*Creditor—Surety or guarantor of principal—Bankrupt—Position of surety.*

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 56.

An acceptor or endorser of a negotiable instrument which has not yet reached maturity is a creditor. Any surety or guarantor, who might, should a bankruptcy supervene before the debt of the principal were discharged be entitled to claim among the other creditors in bankruptcy, is regarded constructively as a creditor when the question is one of fraudulent preference. (*Beaman, J.*) R. D. SETHAN *v.* KALLIANJI SINGJIBHAI **19 I. C 57 : 15 Bom. L. R. 113.**

——S. 56—*Fraudulent preference—What constitutes—Motive.*

To find out whether a particular payment amounted to fraudulent preference, one must look to the mind of the bankrupt at the time and see if the dominant view was to give preference to a particular creditor. If his real object was only to continue his business and to save himself from serious consequences, the act does not fall within S. 56. But if the act was merely to stave off bankruptcy for a short time or to assist in reinstating him afterwards, it would be a fraudulent preference. (*Schwabe, C.J. and Wallace, J.*) SAMU PATTAR *v.* WILSON. **18 L. W. 696 : 1924 M. 180.**

——S. 56—*Good faith.*

A vendee who purchased property from a person shortly before that person's insolvency for a price appreciably lower than the real value of the property actuated by an intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor and conspired with the vendors to defraud or delay his other creditors, is not a vendee in good faith within S. 56 and the sale is void as against the Official Assignee. (*Sadasiva Aiyar and Napier, JJ.*) OFFICIAL ASSIGNEE *v.* BANGY ABDUL RAZAK SAHIB. **29 I. C. 204: (1915) M. W. N. 332.**

——S. 56—*Fraudulent preference—Test of—delay in making application, if ground for dismissal thereof.*

Where a payment to a creditor is impeached as a fraudulent preference, the question for the Court under S. 56 of the Act is what was the substantial effectual or dominant view with which the debtor made the payment. The fact that there was some pressure would not protect the creditor if it is also the fact that, but for the desire to perfer the creditor, the payment would never have been made. Delay in applying under S. 56 is not by itself sufficient ground for declining to make order. (*White, C. J. and Oldfield, J.*) ABDUL KADER *v.* OFFICIAL ASSIGNEE. **14 M. L. T. 48 : 20 I. C. 482 : 25 M. L. J. 320.**

——S. 56—*Fraudulent preference—Tests of presumption.*

If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving preference to that creditor over his other creditors. If it is found that the dominant motive was not to give preference, but to save his stock in trade from attachment and sale, the transaction cannot be annulled under S. 56. The burden of proving the intention of the debtor lies upon the Official Receiver who contests the payment, even if the debtor was insolvent at the time when he made the payment. 19. C. W. N. 157 Foll. (*Twomey, C. J and Pratt, J.*) THE OFFICIAL ASSIGNEE *v.* M. C. BHAM. **12 Bur. L. T. 85 : 51 I. C. 591 : 10 L. B. R. 8.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 61.

——S. 56—*Fraudulent and preference—Surety—Creditor.*

The word "creditor" in S. 56 includes a surety before he is called upon to pay and payment to him may be deemed fraudulent and void as against the Official Assignee. (*Hartnoll, C. J., and Young, J.*) ISMAIL MAWOON *v.* OFFICIAL ASSIGNEE. **6 Bur. L. T. 166: 21 I. C. 5 : 7 L.B.R. 44.**

——S 57—*After-acquired property of insolvent—Validity of transfer.*

A bankrupt can alienate all property, moveable and immoveable, acquired after the order of adjudication, provided the transactions by him are *bona fide*, for value and are completed before the intervention of the Official Assignee. (*Heaton and Shah, JJ.*) ALI MAHOMED ABDUL HUSAIN *v.* VADI LAL. **43 Bom. 890 : 53 I. C. 197: 21 Bom. L. R. 849.**

——S. 57—*Purchaser from* benamidar.

A purchaser of property from a *benamidar* for the dues subsequent to his adjudication in insolvency does not acquire any title to the property as against the Official Assignee even though the purchase was *bona fide* and for value and without notice. Such a purchaser can establish a good title and estoppel against the owner but not against the Official Assignee unless his conduct was such as would create an estoppel against him. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) LAKHI PRIYA DASSI *v.* RAI KISSORI DASSI. **20 C. W. N. 554 : 34 I.C. 435 : 23 C. L. J. 463.**

——S. 57—*Act of insolvency—Test.*

Intimation of insolvency to the creditor without leading to an inference that the debtor will suspend payments, is not an act of insolvency. It is such an act if such an inference can be drawn. It is to be determined from each notice. Creditor's action knowing the act of the debtor is not *bona fide* and will not be protected. The Court must see if the transaction is contrary to the Bankruptcy Law and not whether it is real and protected by S. 57. (*White, C. J. and Sankaran Nair, J.*) MERCANTILE BANK OF INDIA, LTD. *v.* OFFICIAL ASSIGNEE, MADRAS. **35 I. C. 942 : 39 Mad. 250.**

——S. 57 (c)—Bona fide *transferee for value after act of insolvency before adjudication is valid.*

Where a person *bona fide* and for value, takes a transfer of property from a person who has committed an act of insolvency of which the transferee is not aware, such a transfer is saved under S. 57 (*c*) and proviso, and the Official Assignee cannot get rid of the transfer. (*Ayling, C.J. and Odgers, J.*) OFFICIAL ASSIGNEE *v.* VELLIAPPA CHETTY. **42 M. L. J. 155 : 14 L. W. 715 : 45 M. 238 : 1922 M. 144.**

——S. 61—*After acquired property—Vesting of—Right to action.*

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 68.

It is well settled that a cause of action which accrues to a bankrupt subsequent to the adjudication in respect of after-acquired property, remains vested on him and does not vest in his Trustee in bankruptcy and he is the proper plff. to sue in respect thereof and that anything recovered by him remains in the bankrupt until the Trustee intervenes. A plff. will not be compelled to give security for costs merely because he is a pauper or a bankrupt (*Greaves, J.*) E. D. MURRAY *v.* EAST BENGAL MAHARAJAN FLOTILLA CO., LTD. **46 Cal. 156 : 48 I. C. 622: 22 C. W. N. 1018.**

——S. 68—*Contract with insolvent for sale of goods before adjudication—Powers of Official Assignee.*

The Official Assignee requiring the completion of a contract for sale of goods entered into by the defts. with the insolvent before adjudication must elect within a reasonable time to take up the contract and should make the tender of cash before requiring performance.

Obiter.—The leave of the Court which is referred to in S. 68 of the Act means a particular leave obtained to do a particular thing or things. The Official Assignee is not entitled to carry on the business of the insolvent for the purpose of winding up without the leave of the Court. (*Fletcher, J.*) C. E. GREY *v.* WALKER GOWARD & CO. **18 I. C. 756 : 17 C. W. N. 578.**

——S. 82—*Misfeasance, neglect or omission —Distribution of assets without disposing of claims—Personal liability of Official Assignee.*

A creditor who lodges his proof in statutory form is entitled that it should receive attention without closing anything more. In a case where the Official Assignee distributed the assets to some creditors, though at that time he had notice of the claims of others which were not disposed of, it amounts to misfeasance, neglect or omission within the meaning of the section and would be personally liable for the amounts the creditors who have been deprived of. It is impossible to pretend to distribute a bankrupt's estate with reasonable certainty unless the rules as to distribution are regarded by the Official Assignee as absolutely sacrosanct. (*Rankid, J.*) *In re* ARCHIBALD GILCHRIST PEACE. **70 I. C. 507 : 26 C. W. N. 653.**

——S. 86—*Person aggrieved—Meaning.*

S. 86 of the Act includes under person aggrieved by the decision, both a person applying for a decision and person brought before the Court to submit to a decision, when the decision is unfavourable to them. (*Sanderson, C. J.*) KATOKEY CHARAN *v.* SARAT KUMARI DABEE. **37 I. C. 71 : 20 C. W. N. 995.**

——S. 90—*Scope—Official Assignee—Taking possession of property.*

S. 90 provides that the Commissioner in insolvency shall have all the ordinary powers which he would have sitting as a Judge on the Original Side. So when the Official Assignee takes possession of an outsider's property and such outsider sets up paramount title, the Judge can inquire summarily and on motion similar to the procedure laid down in O 21, Rr. 58, 59 and 60, without compelling the person aggrieved to have recourse to the expensive remedy of a regular suit. (*Beaman, J.*) RASSUL HAJI CASSUN *In re.* **9 I.C. 344 : 13 Bom. L. R. 13.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S 103.

——S. 90—*Transfer of petition from High Court to District Court—Jurisdiction.*

When an Insolvency petition pending before the High Court was transferred to District Court, the latter could not try or dispose of the petition. The jurisdiction conferred by the Presidency Towns Insolvency Act and the Prov. Insolvency Act are quite distinct. (*White, C. J. and Oldfield, J.*) N. A. SRINIVASA IYENGAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **38 Mad. 472 : 14 M. L. T. 184 : (1913) M. W. N. 1004 : 21 I. C. 77 : (1914) M. W. N. 45 : 25 M. L. J. 299.**

——S. 94—*Power to stay proceedings—Sufficient reason—Pendency of appeal.*

Where a petitioning creditor's debt is founded on a judgment the pendency of an appeal from the judgment would if the appeal is *bona fide* be a sufficient reason for staying proceedings on an insolvency petition under S. 94 of Presidency Towns Insolvency Act. (*Rigg, J.*) MOOLLA DAWOOD AND SONS COMPANY, *In re.* **64 I. C. 546 : 13 Bur. L. T. 230.**

——S. 99—*Insolvency—Partnership—Insolvency of partner of creditor—Evidence—Irregularity of procedure.*

R. 47 of the Madras Insolvency Rules does not apply to a petition to declare that a given person is a partner in a firm against which a petition has been presented. In such a case the power is given by S. 99 of the Act. But such an order passed under R. 47 is not bad by the irregularity of procedure. (*White, C. J. and Oldfield, J.*) ABDUL RAHIMAN SAHIB *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **22 I. C. 14.**

——S. 101—*Limitation—Starting point.*

The period of 20 days provided by S. 101 runs from the date of the matter being completed and the report signed and not from the date of the findings being filed or signed. (*Greaves, J.*) LALBEHARI SHAH, *In re.* **60 I. C. 889 : 47 Cal. 721.**

——Ss. 103, 104 and 36—*Offences under the Insolvency Act—Notice of charges—Framing of charges—Discrepancy.*

S. 103 applies to offences committed both before and after the adjudication and also to cases of wilfully withholding the production of books even after they have come to possession of the Official Assignee. Though a charge under S. 103 cannot be maintained if not framed in pursuance of the notice under S. 104 this must be taken as subject to the principle which is embodied in S. 537, Cr. P. C., and in determining whether this is so the Court shall have regard to the fact whether the objection could and should have been raised in an earlier stage. (*Woodroffe and Walmsley, JJ.*) JOSEPH PERRY *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **47 Cal. 254 : 24 C. W. N. 425 : 21 Cr L. J. 522 : 56 I. C. 778 : 31 C. L. J. 209.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 103.

——Ss. 103 and 104—*Offence under the Insolvency Act—Trial of—Notice of charge and the charges framed, if must agree—Undue preference when creditor not admitted.*

A charge under S. 103 must be in pursuance of notice required to be issued under S. 104. (*Jenkins C. J. and Woodroffe, J.*) LUCAS *v.* OFFICIAL ASSIGNEE OF BENGAL. **21 Cr. L. J. 481 : 56 I. C. 577 : 24 C. W. N. 418.**

——Ss. 103 and 49—*Conviction—Essentials of.*

To constitute an offence under S. 103, the intent to give undue preference or diminish the divisible assets is essential and unless this is shown to be the material result of the accused's action, such an intent cannot be inferred. A transfer, by a person declared an insolvent, under S. 49 (4) of property to his wife in consideration of the private debts owned by him to her without the fraudulent intent being valid no conviction for an offence under S. 103 can stand. (*Ayling and Hannay, JJ.*) ABDUL RAHIMAN SAHIB *v.* OFFICIAL ASSIGNEE. **27 I. C. 753 : 16 Cr. L. J. 193.**

——S. 103—*Fraudulent preference—Separate arrangement with each creditor.*

There is no fraudulent preference where an insolvent arranges with each of his creditors for payment of a definite fraction of their dues where he alleges that others also have received the same but the creditors never acted upon it. (*Hartnoll, C. J. and Twomey, JJ.*) HUS AIN VALLY *v.* SULEMAN HADJEE. **11 I. C. 809 : 4 Bur. L. T. 200.**

——S. 104—*Report by Official Assignee, when evidence.*

The Official Assignee's report is evidence of the matter reported only when the matter is one with regard to which the Official Assignee is directed or empowered by the Act to make a report. It is not evidence in a criminal proceeding though the Assignee is authorised under Rule 104 to make a report for the purposes of prosecution. Rule 116 will be *ultra vires* if it is to be construed as making the report of the Official Assignee for any purpose and evidence of the facts stated therein. (*White, C. J. and Oldfield, J.*) ABDUL KADER *v.* OFFICIAL ASSIGNEE. **14 M. L. T. 48 : 20 I. C. 482 : 25 M. L. J. 320.**

——S. 106 (a)—*Refusal of leave to appeal—Appellate Court can grant special leave.*

Where the insolvency court refused leave to appeal under S. 106 (*a*) of the Act, it is open to the unsuccessful party to apply to the Court of Appeal for special leave to appeal. The appellate court can, if a question of principle is involved, hear the appeal, under its inherent power. (*Macleod, C. J. and Crump, J.*) PANA CHAND NARSEY *v.* STANLEY. **25 Bom L. R. 161 : 1923 Bom. 245.**

——S. 115—*Order in insolvency—Appeal by Attorney for Official Assignee—Stamp duty on copy of order.*

Where an Attorney acting for the Official Assignee files an appeal against an order in insolvency proceedings. S. 115 of the Presidency Towns Insolvency Act exempts from stamp duty the copy of the order appealed against. (*Wallis, C. J. and Moore, J.*) THE OFFICIAL ASSIGNEE *v.* RAMASAMI CHETTI. **43 Mad 747 : 12 L. W. 89 : 59 I. C. 475 : (1920) M. W. N. 424 : 39 M. L. J. 135.**

PRESS ACT (I OF 1910) S. 3.

——S. 121—*Attorneys—Right of audience before officer under S. 6.*

The Attorneys of the High Court have right of audience before the officer appointed by the Chief Justice under S. 6 of the Act. S. 121 of the Act preserves this right of audience possessed by Attorneys. (*Basil Scott, C.J. and Chandavarkar, J.*) *In re* ADVOCATE-GENERAL OF BOMBAY. **37 Bom. 464 : 19 I. C. 421 : 15 Bom. L. R. 217.**

——Sch. II, Cl. 18—*Proceedings, parties to Purchaser of part of insolvent's property—Cross-examination by such person—Effect—Evidence Act, S. 137.*

A purchaser from a person subsequently adjudicated an insolvent is not a necessary or proper party to the proceedings under Cl. 18, and he cannot intervene therein unless his purchase is challenged. He not being not adverse party, cannot cross-examine the applicant to establish the claim against the estate of the insolvent. The cross-examination in contravention should be eliminated from the record. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) JARWA BAI *v.* PITAMBAR NILAMBAR SHAH. **36 I. C. 689 : 24 C.L. J. 149.**

PRESS ACT (I OF 1910).

——*Scope of—All presses before and after the Act are included—Jurisdiction—High Court.*

All printing presses, whether before or after the Act, are within the purview of the Act. The question whether the contents of a newspaper specified in a Government Order of forfeiture under S. 4 of the Act is or is not of the description given in Cl. (1) of the Section is the only matter left to the consideration of the High Court sitting as a Special Tribunal under the Act. (*Abdur Rahim, C. J., Ayling and Seshagiri Iyer, JJ.*) MADAME ANNIE BESANT *v.* GOVERNMENT OF MADRAS. **39 Mad. 1085 : 5 L. W. 1 : (1916) 2 M. W N. 385 : 18 Cr. L. J. 157 : 37 I. C. 525 : 21 M. L. T. 124.**

——Ss. 3 and 23—*Deposit of security—Time for—Not specified.*

S. 3 of the Act does not provide for the specification of any time within which the deposit required is to be made and must be construed to mean that it must be made in a reasonable time. Where a person relieves himself of his obligation to deposit security in pursuance of a notice under S. 3 by disposing of the press and withdrawing his declaration he is not guilty under S. 23 (1). (*Batchelor and Heaton, JJ.*) FULCHAND BAPUJI *v.* EMPEROR. **15 Bom. L. R. 580 : 20 I. C. 608 : 14 Cr. L. J. 448 : 37 Bom. 555.**

——Ss. 3 (1) and 23—*Order cancelling exemption from security—Order relating to security for newspaper—Newspaper stopped but press used—Whether liable.*

Where a Magistrate, cancelling the exemption security ordered on the passing of the Act I of 1910 required security for newspaper from the

PRESS ACT (I OF 1910), S. 3.

accused, who owned a press and printed a newspaper and the accused stopped publishing the newspaper, but used the press a conviction under S. 23 of the Act cannot be upheld. (*Heaton and Shah, JJ.*) PANDURANG BALAKRISHNA PATHAK *v.* EMPEROR. **15 Cr. L. J. 297 : 23 I. C. 505 : 16 Bom. L. R. 87.**

——— **Ss. 3 (1) and 22**—*Order by Magistrate on keeper of press to deposit security—Revision by High Court.*

An order under S. 3 (1) is not a judicial but a ministerial act and cannot be questioned by the High Court 39 M. 1164 Rel on. (*Rattigan, C. J. and Wilberforce, J.*) GULZAR MUHAMMAD *v.* EMPEROR. **20 P.R. 1918 (Cr): 32 P.W R. 1918 (Cr) : 46 I. C. 516 : 19 Cr. L J. 740 : 136 P. L. R. 1918.**

——— **Ss. 3 (1) and 22**—*Security order for after once dispensing with same—Legality of.*

Per *Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J.*—The Chief Presidency Magistrate cannot demand security after having dispensed with it at the time of declaration. *Per Ayling, J.*—Under S. 3 (1) the Magistrate has the fullest discretion both as regards requiring security and determining the amount and this discretion is to be exercised not once for all but from time to time. The proviso to S. 3 (1) gives additional power to the Magistrate over and above those conferred by the first para. "Any order" in S. 3 (1) includes also an order dispensing with security. Proceedings under S. 22 includes proceedings under S. 3 (1). (*Abdur Rahim, Offg. C. J., Ayling and Seshagiri Aiyar, JJ.*) ANNIE BESANT *v.* EMPEROR. **39 Mad. 1164 : 4 L. W. 625 : (1916) 2 M. W. N. 497 : 21 M. L. T. 190 : 37 I. C. 607 : 18 Cr. L. J. 239 : 32 M. L. J. 151.**

——— **S. 3 (1) Proviso and Ss. 17 and 22**—*"Any order"—Revision—High Court—Jurisdiction.*

The expression "Any order" does not include an order dispensing with the deposit of security. The High Court under Ss. 17 and 22 of the Act has no revisional power over proceedings under S. 3 of the Act. (*Abdur Rahim, C. J., Seshagiri Aiyar and Ayling, JJ.*) ANNIE BESANT *v.* GOVERNMENT OF MADRAS. **39 M. 1085 : 5 L. W. 1 : (1916) 2 M. W. N. 385 : 18 Cr. L. J. 157 : 37 I C. 525 : 21 M. L. T. 124.**

——— **Ss. 3 (1) 2 and 23**—*Order under S. 3 (2) by District Magistrate if* ultra vires--*Requisites—Revision—Government of India Act, S. 107.*

An order under S. 3 (2) of Act I of 1910 could be passed only by a Local Government. As it did not appear on what ground the exemption from depositing security had been originally granted and on what ground the District Magistrate required security to be deposited at a later stage, the order of the District Magistrate was bad and liable to be set aside by the High Court under S. 17 of the Government of India Act, 1915. (*Roe and Sharfuddin, JJ.*) GANESH LAL *v.* EMPEROR. **44 I. C. 579 : 19 Cr. L. J. 355 : 4 Pat. L. W. 155.**

——— **Ss. 4 and 20**—*Scope of—"Government established by law", Meaning of.*

PRESS ACT (I OF 1910), S. 4.

An article may well be beyond the bounds of the Penal Code and yet be drawn into the net of the Indian Press Act. *Per Curiam*—The truth of the facts alleged in the article is no ground for taking the case out of the operation of S. 4 of the Press Act, and evidence is not admissible to prove their truth. Both the Crown and the accused may, under S. 20 of the Press Act, give in evidence other copies of the newspaper published after the commencement of the Act in aid of the proof of the nature and tendency of the matter contained in the offending article. *Per Woodroffe, J. (Fletcher J. agreeing)* :—When the words of a document are plain and unambiguous extrinsic evidence to explain it is not admissible even where the intention of the writer is rightly in issue. In judging of the question of intent, the publisher must be deemed to intend that which is the natural result of the words used. The words "Government established by law in India" in S. 4 are not to be construed as indicating only the supremacy of the British Crown in India and the British connection with it, as opposed to independence. (*Woodroffe, Mookerjee and Fletcher, JJ.*) "AMRITA BAZAAR PATRIKA" *In the matter of.* **23 C. W. N. 1057 :54 I. C. 578 : 21 Cr. L. J. 98 : 30 C. L. J. 289 (S. B.)**

——— **Ss. 4, 12, 17, 19 and 22**—*Onus under S. 4—Jurisdiction of High Court—Extent of scope.*

In an application under S. 17 of the Act to revise the order of forfeiture under S. 12 of the Act, the onus is on the petitioner to show that it was impossible for the pamphlet to come under S. 4 of the Act. The functions of the High Court are limited to considering whether the petitioner has discharged that onus. The High Court has no jurisdiction to pronounce on the wisdom or unwisdom of the order of forfeiture. The direction in S. 12 of the Act (stating the grounds of its opinion) is mandatory and mere citing of the words of the section without setting out the facts forming the basis of the opinion is not a sufficient compliance with that direction, but the High Court is barred by S. 22 from questioning the legality of the forfeiture on that ground. In an enquiry under the Act the question of the intention of the publisher or writer is not directly material. (*Jenkins, J.C., Stephen and Woodroffe, JJ.*) MAHOMED ALI *v.* EMPEROR. **41 Cal. 466 : 14 Cr. L. J. 497 : 20 I. C. 977 : 18 C. W. N. 1.**

——— **S. 4**—*Whether* ultra vires *of the Indian Legislature—Preaching Home Rule, if obnoxious—'Disaffection' 'hatred' 'contempt' Meaning—Reference to non-Indian element in Government of India—'Government established by law in British India'—Object of S. 4. Cl. (e)—S. 4 (1) Expl. 2—Intention of writer, how far relevant—Penal Code, Ss.* 124-A, 153-A--*Difference between these sections and S. 4, Press Act--'Tendency' explained—S. 4 of the Press Act is not* ultra vires *of the Indian Legislature.*

A publicist cannot be allowed to attribute improper motives to the Government, but otherwise the preaching of Home Rule for India consistent with the loyalty to the Crown is not by itself bad under S. 4 of the Act. The words "Government established by law in British India"

mean an established authority entitled and able to administer the public affairs of the country, and are not identical with any particular individuals administering the Government. They must be interpreted in the light of S. 3 of the General Clauses Act and so interpreted to include the Government of India and all local Governments. The Government in India, as well as the supremacy of the Crown and the British connection, is included in the expression "Government established by law in British India." All forms of ill-will towards the Government including hatred, contempt, enmity, dislike, hostility are included in the word 'Disaffection.' The words 'Hatred and contempt' mean something more than disapproval or dislike. Suggestions of replacing non-Indian elements in the Government by Indian elements with a view to securing greater efficiency and advantage are legitimate, but it is objectionable to speak of the foreign character and origin of the Government and thus arouse hatred and contempt against it. The intention of the writer or editor is not relevant except under Explanation 2 which protects comments on the Government's measures and actions which do not excite hatred or contempt against the Government. But the protection is afforded only to comments on the Government's measures and actions and not to attack on the Government itself. Articles other than those in question can be considered in aid of the proof of the general nature, tendency and policy of the news paper concerned; and the burden of disproof of any such bad tendency as is mentioned in the sub-clauses to S. 4 rests on the person forfeiting the security. The word 'tendency' simply signifies the natural effect on a normal understanding. Per *Ayling, J.*—There is nothing in the Act which throws the onus on the applicant. The words themselves form the main evidence in the case. No warning or explanation is necessary before the Government takes action under S. 4 of the Act; and the section covers also writings put in through mere carelessness. 41 C. 466 Ref. to. *Per Seshagiri Aiyar, J.*—S. 4, Clause (*e*) is aimed at language which is likely to render the co-operation between different races living in India impossible. The language must be such as to lead to the breaking of the peace. The language of S. 4 (1) of the Press Act is wider than the corresponding provisions in Ss. 124. A., 153 of the Penal Code. (*Abdur Rahim, C. J., Ayling and Seshagiri Aiyar, JJ.*) ANNIE BESANT *v.* GOVERNMENT OF MADRAS. **39 Mad. 1085 : (1916) 2 M. W. N. 385 : 5 L. W. 1 : 18 Cr. L. J. 157 : 37 I. C. 525 : 21 M. L. T. 124.**

——— **S. 4 (1)**—*Good faith not material—Individual officers not contemplated.*

If the words in their plain grammatical meaning are of the nature mentioned in S. 4 (1) it is immaterial whether the editor acted in good faith or otherwise. The operative portion of S. 4 (1) (*c*) does not make the motive or intention of the writer material to deciding the question. Where the article complained of referred only to the police officials at a certain place, they cannot be regarded as "the government established by law in British India." 22 Bom. 112 and 8 Bom. L. R. 421 referred to. (*Shadi Lal, C. J., Scott Smith and Martineau, JJ.*) RAJ PAL *v.* THE CROWN. **24 Cr. L. J. 167 : 3 Lah. 405 : (1923) Lah. 61 (S. B.).**

——— **Ss. 4 (1) (c) 17, 19 and 20**—*Disaffection—Intention of writer—Government established by law.*

The word 'disaffection' includes disloyalty and all feelings of enmity and the duty of the High Court under S. 19 is limited to a consideration of the question whether the order of forfeiture is justified by the words and tendencies of the articles. The intentions or motives of the writer are irrelevant, the possible results of the article are to be considered. Under S. 17, the petitioner should show that the article did not, as a matter of fact contain any word-signs or visible representations likely or having a possible tendency to excite disaffection towards His Majesty or the Government in India or the Cabinet in England. *Per Johnstone, J.*—The truth of a statement is not a sufficient justification. The time when the statement is made and the circumstances should also be considered in coming to the conclusion. (*Kensington, C. J., Johnstone and Rattigan, JJ.*) FAROQUE ALI *v.* EMPEROR. **21 P. W. R. 1915 Cr. : 16 Cr. L. J. 274 : 28 I. C. 322 : 19 P. R. 1915 (Cr.)**

——— **Ss. 4 (1), 3 (1)**—*Notice, essentials of.*

S. 4 does not require that the words complained of shall be stated *verbatim* in the notice but only that they shall be started or described. S. 4 of the Press Act is very comprehensive. It is not necessary that the words complained of should be in themselves seditious nor is it necessary that they would bring into hatred or comtempt His Majesty or the Government established by law in British India. It is sufficient if they have this effect with regard to any class or section of His Majesty's subjects in British India. It is not necessary that they should directly bring about this result. If they are likely or may have a tendency either directly or indirectly, and whether by inference, suggestion, etc., then they come within the *mischief* of the section. It is legitimate to advocate in writing a change in the system of the Government or in existing social conditions and to urge the community or any section thereof to combine for this purpose. It is also legitimate to compare unfavourably existing conditions with those of a by-gone age, but this can be done only if the method employed does not infringe S. 4 of the Press Act. Whatever the intention of the writer may be, he must take care to guard his language that it should avoid a tendency to bring into hatred or contempt the Government of any class of His Magesty's subjects in British India. (*Miller, C. J. Coutts and Manuk, JJ.*) PURUSHORIHAN NARAYAN PANDE *v.* CHIEF SECRETARY TO GOVERNMENT OF BIHAR AND ORISSA. **4 Pat. L. J. 174 : 49 I. C. 539 : 20 Cr. L. J. 177 : (1919) Pat 65 (F. B.).**

——— **S. 8**—*Order under, Revision.*

An order passed under section 8 is not revisable by the High Court, though the section under which the order was issued was not

PRESS ACT (I OF 1910), S. 9.

mentioned (*Imam and Chapman, JJ.*) JALALUDDIN *v.* EMPEROR. **22 I. C. 721 : 15 Cr. L. J. 145 : 17 C. W. N 1245.**

——Ss. 9 and 19—*Application for interference—Setting aside over of forfeiture.*

It is not open to the Court to do anything more than either reject the application, or set aside the order of forfeiture as a whole ; the Court cannot discriminate between the forfeiture of security and the additional forfeiture of the Press permitted by Sec. 9. (*Kensington, C. J., Johnstone and Rattigan, JJ.*) GHULAM QADIR KHAN *v.* EMPEROR. **211 P. L. R. 1914 : 37 P.W. R. 1914 Cr 15 Cr. L. J. 493 : 24 I. C. 581 : 28 P. R. 1914 Cr.**

——Ss. 17 and 4—*Forfeiture of security—Setting aside—Defect in notice—Seditious intent—"Intention" and "Tendency"— Evidence admissible—Justification by truth—Extrinsic evidence, if admissible—Evidence Act, ss. 92, 98 and 14—Onus of proving order of forfeiture wrong.*

Per Curiam:- Upon an application under S. 17 of the Press Act (I of 1910) to set aside an order of forfeiture of security, the Court has to see whether the article in question is obnoxious to the provisions of S. 4 of the Act Defect in the form of notice under S. 4, sub-sec. (1) is no ground for setting aside the order of forfeiture. It is Expln. II to S. 4 which imports consideration of the writer's intention. The explanation does not cover all the cases comprehended in cl. (c). The explanation does not apply where the words used have a tendency to bring into hatred or contempt, etc. The question of intention is only material if the Court has to deal with comments on the measures (meaning thereby the legislative measures or action of the Government or the administration of justice). These comments again are not protected if they, in fact, excite or attempt to excite hatred, contempt or disaffection. *Per Mookerjee J.*— Comments of the character mentioned in Expln. II to S. 4 of the Act may be permissible even though they are likely or may have a tendency to produce the corresponding result mentioned in cl. (c), but they must not excite or constitute an attempt to excite hatred, contempt or disaffection. The term "Measures" in the explanation was intended to apply to legislative measures. Upon an application under S. 17, the Court does not approach the case with the presumption that the order is erroneous. The burden lies upon the Petitioner to establish that the publication is not of the nature described in S. 4, Sub S. (1) of the Act. 39 Mad. 1085 Rel. (*Woodroffe. Mookerjee and Fletcher. JJ.*) THE AMRITA BAZAR PATRIKA. *In the matter of.* **23 C. W. N. 1057 : 30. C. L J. 289 : 54 I. C. 578 : 21 Cr. L. J. 98 (S. B.).**

——S. 17--*Limitation Act, S. 5, Applicability of—"Within two months from the date of such order."*

The words "within two months from the date of such order" should be construed strictly and literally and cannot be understood to mean "within two months from the date of receipt of such order." S. 5 of the Limitation Act has no application under S. 17 of the Press Act. (*Kensington C. J, Johnstone and Rattigan. JJ.*) ABDUL HUQ *v.* EMPEROR. **126 P. L. R 1914: 15 Cr. L. J 222: 16 P. R. 1914 Cr : 22 I. C. 1006 : 32 P. W. R. 1914 Cr. (S. B.)**

PRESS AND REGISTRATION OF BOOKS ACT (XXV OF 1867).

——Ss. 17, 18 and 19—*Government of India Act, S. 65 (2)—Jurisdiction of special tribunal under the former Act to consider if it contravenes the latter Act.*

The High Court sitting as a special tribunal under Ss. 18 and 19 of the Press Act is not entitled to consider the question of the contravention or otherwise of S. 65 (2) of the Government of India Act by the Indian Legislature in passing the Press Act.

Obiter--Nor does S. 17 ofthe Press Act authorize the High Court to question a Magistrate's proceedings under S. 3 of the Act though without jurisdiction. (*Abdur Rahim, C. J. Ayling and Seshagiri Aiyar, JJ.*) MRS. ANNIE BESANT *v.* GOVERNMENT OF MADRAS. **39 Mad. 1085 : 5 L W. 1 : (1916) 2 M W N, 385 : 18 Cr. L. J. 157 : 37 I. C. 525 : 21 M. L. T. 124.**

——Ss. 17 and 22—*High Court, power of—Order of forfeiture—Revision—Grounds for.*

The powers of the Court set in S. 19 are confined to setting aside of the order upon one ground and no other *viz.*, that the writing in question is not of the nature described in S. 4 (1). The result is that although the notification does not, under S 4, comply with the provisions of the Act, the High Court is barred from questioning the legality of the forfeiture which the notification purports to declare. (*Miller, C. J., Coutts and Manuk, JJ.*) PURSHOTHAM NARAYAN PANDE *v.* CHIEF SECRETARY TO GOVERNMENT OF BIHAR AND ORISSA. **4 Pat. L. J. 174 : 1919 Pat 65 : 20 Cr. L. J 177 : 49 I. C. 593 : 1919 Pat. 65 (F.B.).**

——Ss. 18 and 19—*Powers of special bench.*

The function of the special Bench constituted under S. 18 of the Press Act to hear and determine the application is circumscribed by the provisions of S. 19 (1) which empowers it to set aside the order of forfeiture if it appears to the Bench that "the words contained in the newspaper in respect of which the order in question were made were not of the nature decided in S. 4 (1)." (*Shadi Lal, C.J., Scott Smith and Martineau, JJ.*) RAJ PAL *v.* THE CROWN. **3 Lah. 405 : 24 Cr. L. J. 167 : 1923 L. 61 [S. B.].**

——S. 22—*Declaration under—Notice to all persons.*

A declaration under S 22 is notice to all persons of the fact of the Government having declared the forfeiture and not of the forfeiture having been legally made. (*Abdur Rahim, O. C, J. Ayling and Seshagiri Aiyar, JJ.*) ANNIE BESANT *v.* GOVERNMENT OF MADRAS, **39 Mad. 1085 : 5 L. W. 1 : 18 Cr. L. J. 157 : 21 M. L. T. 124 : 37 I. C. 525 : (1916) 2 M. W. N. 385.**

PRESS AND REGISTRATION OF BOOKS ACT (XXV OF 1867).

——Ss. 14, and 4—*False statement in declaration not subscribed—Effect.*

PRESUMPTION

Any false or untrue statement made in the course of making a declaration is made punishable under the Press Act. A false statement in a declaration, which is not made and subscribed before a Magistrate as provided by S. 4 cannot be said to have been made in making a declaration. (*Zafar Ali, J.*) EMPEROR *v.* INAYAT.
24 Cr. L. J. 657 : 1923 Lah. 440.

PRESUMPTION.

See also (1) EVIDENCE ACT, S. 114.
(2) GRANT.
(3) HINDU LAW, JOINT FAMILY.
(4) MAD. ESTATES LAND ACT, S. 3.

———*Bond by manager of family.*

When a bond is executed in the name of the manager, presumption arises that it is joint family property. (*Edge and Ameer Ali, JJ.*) BANDHU RAM *v.* CHINTAMAN.
26 C. W. N. 403 : 20 A. L. J. 495 : 3 P. L. T. 295 : 1922 P. C. 215.

———*Transaction offending legal principles.*

A presumption can be made only in case of a regular transaction and not in favour of that which violates legal principles.

Thus permanent tenancy cannot be presumed in case of *debutter* property, in as much as creation of new and fixed rent for all time would be a breach of duty in a *shebait*, and is not therefore presumable. (*Sir Jenkins, C. J. and Chatterjea, J.*) SATYA SRI GHOSHAL *v.* KARTIK CHANDRA DAS.
15 C. L. J. 227 : 13 I. C. 596 : 16 C. W. N. 418.

———*Delay in suit—Relinquishment of claim.*

Procrastination is the usual habit of litigants and where the parties are closely related there must be constant talk and hope of settlement with the interference of relations or neighbours who would like to get credit, if not money by taking sides. Consequently delay in filing a suit does not lead to an inference of relinquishment of rights to the plaintiff. (*Daniels, J. C. and Dalal, A. J. C.*) UMMESALAMMA *v.* AMJAD HUSAIN.
8 O. L. J 528 : 3 U. P. L. R. (J.C.) 89 : 1922 Oudh 165.

PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890).

———S. 1 (2)—*Extension of, does not repeal S. 62 of the Bombay District Police Act.*

The mere extension of S. 1 (2) to a certain district does not repeal S. 62 of the Bombay District Police Act within that district. (*Shah and Crump, JJ.*) EMPEROR *v.* BHAGWAN KRISHNA.
45 Bom. 203 : 63 I. C. 824 : 22 Cr. L. J. 696 : 22 Bom. L. R. 892.

———S. 3—*Public place, torture of cows in, offence.*

A torture of cows for getting 'piri' dye in a place where the animals' sufferings could be witnessed by persons from the streets falls within S. 3 of the Act. (*Sharfuddin and Coxe, JJ.*) MISIRI GOPE *v.* ABDUL LATIF.
18 I. C. 884 : 14 Cr. L. J. 132 : 17 C. W. N. 332.

PRINCIPAL AND AGENT.

———S. 6—*Liability—Act done in spite of reasonable precaution.*

If a man takes all reasonable precautions to prevent the doing of an act and such act is done in spite of his precaution, it cannot be said that he has permitted the doing of that act. (*Karamat Hussain and Tudball, JJ.*) BAINATH DEBE *v.* EMPEROR.
14 I. C. 658 : 13 Cr. L. J. 274 : 9 A. L. J. 262.

PRIEST.

See HINDU LAW.
(*a*) RELIGIOUS ENDOWMENT.
(*b*) RELIGIOUS OFFICE.

PRIMOGENITURE.

See HINDU LAW.
(*a*) IMPARTIBLE ESTATE.
(*b*) SUCCESSION.

PRINCIPAL AND AGENT.

See also CONTRACT ACT, Ss. 182 TO 238.

———*Liability of principal—Criminal Acts—Possession of agent.*

A man is not ordinarily liable for the criminal acts of his agent except when he puts his servant to do business for him and the servant acts outside his powers. If *mens rea* is relevant, it must be shown the principal had knowledge. Control may amount to criminal possession although actual legal possession may be with another. (*Walsh and Ryves, JJ.*) EMPEROR *v.* ZAWAR HUSAIN.
45 A. 541 : L. R. 4 A 99 (Cr.) : 21 A. L. J. 481 : 24 Cr L. J. 705 : 1923 A. 592.

———*Commission Agent — Duty to supply goods—Rate.*

A commission agent is not liable to supply goods at a particular rate or otherwise at the market rate at the time of supply. (*Lindsay and Kanhaiya Lal, JJ.*) BABU LAL KEDAR NATH *v.* NET RAM KHIALI RAM.
1922 A. 400.

———*Agent not entitled to treat himself as principal—Unreasonable custom.*

No agent can without the consent of his principal or without a term in his contract authorising him so to do, turn himself into a principal and use his own principal's money and the advantages which he has obtained from his position as agent and make a profit for himself. An agent in the true sense of the word is a medium of communication between the two contracting parties and it is imperative that he should not divest himself of his character as agent and become a principal to the transaction. A custom to the contrary is unreasonable and cannot be imported into a contract of agency. (*Piggott and Walsh, JJ.*) KISHORI LAL *v.* JIVAN LAL.
67 I. C. 231 : 4 U. P. L. R. (A) 59.

———*Ratification— Execution of mortgage by agent in excess of powers under power of attorney.*

A mortgage executed by a general agent holding a power of attorney which, however, did not authorise him to execute mortgages, is operative if acted upon and ratified by the principal, and cannot be treated as being void *ab initio*. (*Mears, C. J. and Banerji, J.*) MAHOMED HANIF *v.* ISRI PRASAD.
64 I. C. 768 : 19 A. L. J. 827.

PRINCIPAL AND AGENT.

———*Money had and received--Basis of action —Principles underlying.*

Where a sub-broker took money from plff. as advance and used it to settle his own account with defts. the broker and the advance was taken on deft's behalf, *held* the defts. was not liable for the money. (*Fawcett and Coyajee, JJ.*) MARARJI PREMJI GOKULDAS *v.* MULJI RANCHHOD VED AND Co. **25 Bom. L. R. 1014 : 1924 B. 232.**

———*Post office.*

Where a hundi is sent by post the post office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post but if there be no such authority the post office is the agent of the sender (*Mulla, J.*) THORAPPA DEVANAPPA *v.* UMEDMALJI. **25 Bom. L. R. 604 : 1924 Bom. 205.**

———*Authority—Construction.*

The defendant handed to a broker the following letter, "I authorise you to procure a buyer of my divided portion of the above premises for Rs. 45,000 and on your sending same, I shall pay you as remuneration at 1 per cent. on the purchase money". The offer was accepted by the plaintiff and the acceptance was communicated to the defendant:- *Held*, The offer contained in the said letter amounted only to an offer to be put into touch with intending buyers of the premises in question. It was in no sense an authority to the brokers to sell the plaintiff's property nor did it amount to an offer on the part of the vendor to sell the premises to whoever might be brought, into touch with the vendor by the broker. If an owner of land instructs a broker or an estate agent to place it on his books and to find a purchaser for him that does not authorise the agent to enter into an open contract for sale of the land or to make any firm contract for sale binding the principal. (*Ghose, J.*) PURNA CHANDRA DUTT *v.* INDRA CHANDRA ROY. **49 C. 389 : 1922 Cal. 397.**

———*Agent's liability.*

Where the act done or to be done by the agent is imposed by law, the employer is not liable. (*Scott, C.J. and Rosett, J.*) MERVANJI *v.* SECRETARY OF STATE. **16 I. C. 714 : 14 Bom. L. R 654.**

———*Fraud of agent—Liability of principal.*

In order that the fraud of the agent should involve the liability of the principal, the agent's act need not have benefited principal (*Chatterjea and Pearson, JJ.*) DINA BANDHU SHAH *v.* ABDUL LATIF. **27 C. W. N. 18 : 50 C. 258 : 1923 C. 157.**

———*Authority—Estate or house agent—Power to enter into contract.*

An estate or house agent authorised to procure a purchaser, has no implied authority to enter into an open contract of sale. There is a substantial difference between an authority to sell and an authority to find a purchaser. Authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser means less than that ; it means, to find a man willing to become a purchaser nor to find him and also make him a purchaser. (1900) 2 Ch. 267 Ref. (*Mookerjee and Cuming, JJ.*) DURGA CHANDRA MITRA *v.* RAJENDRA NARAIN SINHA. **36 C. L. J. 467 : 1923 C. 57.**

PRINCIPAL AND AGENT.

———*No suit for accounts by an agent.*

Obiter dictum. There can be no suit by an agent against the principal for accounts, there being no liability of a principal to render accounts. The agent can only sue for balance on an account. (*Mittra, A. J. C.*) GOPALKISAN *v* PADAMRAJ. **37 I. C. 510 . 12 N. L. R. 174.**

———*Liability to account—Agent of several principals.*

Where one agent has to account to more principals than one, they must all join in a suit against him and he is not liable to render separate accounts in separate suits to each of them to whom jointly he is liable to render account. (*Walmsley and Buckland, JJ.*) KADIR BUKSHA *v.* RAICHERNESA. **62 I. C. 766.**

———*Criminal liability of principal for acts of agent.*

There is no warrant for the proposition that if the agents of the petitioners broke the rule of law the petitioners are guilty. (*Moti Sagar, J.*) SHEO RAM *v*, EMPEROR. **1923 Lah. 603.**

———*Commission—Right to—Sale—Title not approved—Effect of.*

The question when under a contract of commission agency the commission is earned depends on the intention of the parties as deduced from the contract and the surrounding circumstances. If a contract bring about a sale when the agent says commission is due to him as soon as he introduces a purchaser irrespective of whether he becomes one or not there can be such a result only when there is clear evidence English Law considered. (*Schwabe, C. J. and Odgers, J.*) AYYANNAH CHETTY *v.* SUBRAMANIA AIYAR. **45 M. L. J. 409 : (1923) M. W. N. 675 : 18 L.W. 560 : 33 M. L. T. 3 : 1924 Mad. 212.**

———*Agent asked to pay money in his hands to principal's credit—Notice of it given to creditor.*

Where there are funds in the hands of an agent belonging to the principal and when the principal gives a mandate to the agent to deliver them in extinguishment of an obligation of the principal to a third party and when the mandate is communicated to the creditor, then there arises on the part of the agent an obligation on which he can be sued both in law and equity-in law as on a contract and in equity as upon implied assignment of such funds as there may be in his hands to satisfy *protanto* with those funds the claims of the creditor. (*Coutts Trotter, J.*) ANANTHACHARI *v.* MRS. RATNAM AND SARATHI. **45 M. L. J. 83 : 18 L. W, 674 : 1923 Mad 713.**

———*Payment by a debtor to agent--Subsequent misappropriation by agent—Debtor cannot recover the amount from the agent.*

Plaintiffs who owed first defendant a sum of money paid it to the second defendant, first defendant's agent, as such. The second defendant misappropriated it subsequently and did not account for it to the first defendant First defendant then obtained a decree against the plaintiffs for the amount as the latter did not appear or plead the discharge.

Held, in a subsequent suit by the plaintiffs to recover the amount from the second defendant

PRINCIPAL AND AGENT.

that they were not entitled to recover the amount. In the above case the second defendant received the amount as his principal's money, and plaintiffs who could have pleaded against the first defendant in the former suit that he did so receive, cannot, by their failure so to plead enable themselves to recover the amount from the second defendant In the absence of any mistake on the part of the person paying the amount to the agent, or duress or misconduct on the part of the agent at the time of the payment of the money, the person who pays the money is not entitled to recover it from the agent, although the agent might not have accounted for the same to his principal, *Ellis* v. *Goulton*, (1893) 1 Q. B. 350, *Bamford* v. *Shuttleworth*, II A & E. 926, *Stephens v. Badcock*, 3 B. and A. 354.

Obiter dictum In *Cary* v. *Webster* I Strange 480 not followed. *Pollard* v. *Bank of England*, L. R. 6. B 623. *Taylor* v. *Metropolitan Railway*, (1906) 2 K B. 55 Referred to. (*Olafield, J.*) KULANDAIVELU PILLAI *v.* RAMASWAMI NAICKER.

44 M. L J. 495 : 17 L. W. 448 : (1923) M W N. 235 : 1923 Mad. 551.

———*Authority* — Bona fide *act of agent—Principal bound.*

Where a secretary is authorised in general terms to lease premises and he acts *bona fide* and in the interest of the Society the lease is binding on the Society. Where the order of the principal is dubious, and the agent *bona fide* construes it in one way and acts upon it, the principal is bound by the action of the agent. (*Kumaraswami Sastri, J.*) SEETHALAKSHMI AMMAL *v.* CO-OPERATIVE DISTRIBUTIVE SOCIETY, MAYAVARAM.

70 I. C. 636 : 15 L W. 205.

———*Deed of transfer signed by agent not as such, if binding on principal.*

The question whether an agent has contracted on behalf of the principal or personally depends on the intention of theparties to be deduced from the surrounding circumstances. Where the agent is given power to execute deeds in his own name, a deed so drawn up by the agent without describing himself as agent is nevertheless binding on the principal. Where a principal entrusts his agent with securities and instructs him to raise a certain sum of money thereon and the latter raises a larger sum fraudulently, and misappropriates the difference (the lender acting *bona fide*) the principal cannot redeem the securities without paying the lender all that he has lent although the lender did not know that the agent had authority to borrow at all, and made no inquiry. (*Wazir Hasan, L A.J.C.*) JAGRUP SINGH *v.* RAM KISHAN DAS.

23 O. C. 353 : 59 I. C. 596 : 7 O. L. J. 705.

——— *Liability of agent—Discharge of agent by one of the principals—Effect of.*

The liability of an agent to account is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent. So far as the liability of an agent to account to joint principals is concerned the authorities are unanimous that an agent cannot get a discharge by accounting to only one of two co-principals. Co-principals may

PRINTING PRESSES AND NEWSPAPERS ACT (XXV OF 1867), S. 6.

jointly appoint an agent to act for them and in such case become jointly liable to him, and may jointly sue him. The agent is not bound to account separately to one of several co-principals and if he has done so he is not thereby discharged from liability to the other or others unless the co-principals are also partners. Where the moneys are received on behalf of joint principals, the agent is liable to account to them jointly, and not discharged by payment to one or more of them only, unless by authority of all. (*Das and Kulwant Sahay, JJ.*) JAGDIP PARSAD SAHI *v.* MT. RAJO KUER.

2 P. 585 : 4 Pat. L. T. 531 : 1923 Pat,177 : 1923 P. 464.

———*Death of agent—Liability of representatives to account—Extent of.*

It is well established that the representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs. This does not mean, however, that the heirs must necessarily escape liability altogether for the defalcation or breach of duty of the agent if the principal can prove that he had suffered loss thereby. The burden of proof that the representative have got assets of the deceased agent in their hands and that they are therefore liable is on the plaintiff. (*Miller, C.J and Foster, J.*) RAMESWAR SINGH *v.* NARENDRANATH DAS.

1923 P. 259.

PRINCIPAL AND SURETY.

See CONTRACT ACT, SS. 124 TO 147.

PRINTING PRESSES AND NEWSPAPERS ACT (XXV OF 1867).

———*Penal Code, Ss.* 124 *A. and* 7—*Printer's liability.*

The declared printer of a newspaper is responsible for seditious articles published therein unless he can establish that in fact he had nothing to do with them. And he is legally guilty of an offence under S. 124 A, Penal Code, (*D Chatterjee and Richardson, JJ.*) SURENDRA PRASAD *v.* EMPEROR.

10 I. C. 954 : 12 Cr. L. J. 354 : 38 Cal. 227.

———**Ss 1 and 3**—*'Book' meaning of—If includes a part of a book or a pamphlet.*

The word 'book' as defined in S. 1 of the Act includes also part of a book or pamphlet so that the printer of a pamphlet must print his name and place of printing as otherwise he commits a breachof the provisions of the Act. (*Russell and Chandavarkar, JJ.*) EMPEROR *v.* HARI.

13 I. C. 827 : 13 Cr. L. J. 139 : Bom. L. R. 40.

——— **S. 6**—*Declaration—Refusal of District Magistrate to authenticate—Revision.*

The proceedings of a Magistrate in refusing to authenticate a declaration under S. 6 of the Act is a purely ministerial act in which the High Court could not interfere (*Rattigan, C. J. and Wilberforce, J.*) AHAD SHAH *v.* EMPEROR

19 Cr. L. J. 621 : 27 P. W. R. 1918 Cr : 21 P. R. 1918 Cr : 45 I C. 155 : 137 P. L. R. 1918.

PRIORITY.

See (1) MORTGAGE.
(2) T. P ACT, SS. 76 AND 101.
(3) REGISTRATION ACT, S. 450.

PRISONS ACT (IX OF 1894)

——— S. 3—*Judicial lock-up is a prison—Person committed to custody—If a prisoner.*

A judicial lock-up is a prison within the meaning of S 3 of the Prisons Act and a person committed to custody in pursuance of a warrant, though not convicted is a criminal prisoner according to S 3 (*Shadi Lal, C.J. and Lumsden, J.*) EMPEROR *v.* KHANU. **4 Lah 448 : 25 Cr. L. J. 93 : 1924 Lah. 257 (1).**

——— S. 33—*Default of decree-holder.*

When a civil prisoner was released by the Jail authorities for non-supply of the clothing to be supplied to him under S. 33 but it was discovered that the requisition on the arresting creditor was wrongly addressed and did not reach him till four days after the petitioner was released *Held*, that A was released for a mistake of the Jail authorities and not for any default of the decree-holder under S, 33. (*Twomey, J.*) DURAI RAJAH MUDALIAR *v.* VADIVELU.
5 Bur. L. T. 159 : 17 I. C. 911 : 6 L. B. R. 61.

——— S. 42—*Communicating with a prisoner—If an offence—Assaulting constable.*

A person communicating or attempting to communicate with any prisoner is liable for an offence and if he assaults a constable who is authorised to prevent the commission of such an offence he can also be convicted under S 353, Penal Code. (*Shadi Lal, C. J. and Lumsden, J.*) EMPEROR *v.* KHANU. **4 Lah. 448 : 25 Cr, L. J.93 : 1924 Lah 257 (1).**

——— S. 42 (3)—*Communication with prisoner—Offence—Abetment.*

Where the first accused a prisoner in jail, secretly communicated with the second accused, another prisoner in the same jail, by means of a letter sent through a warder, and the second accused read the letter, wrote a reply thereto and handed it to the warder for transmission *Held*, that the first accused was guilty of an offence under S. 42 of the Prisons Act and the second accused under S. 42 of that Act read with S, 107, I. P. C. (*Venkatasubba Rao, J.*) SREENIVASA CHETTY *v.* EMPEROR. **(1923) M. W. N. 274 : 18 L W. 80 : 24 Cr. L. J. 449 : 44 M. L. J. 585 : 1923 Mad. 596.**

PRIVACY.

See (1) EASEMENT.
(2) EASEMENT ACT.

PRIVATE AWARD.

See CIVIL P. C., SCH. II.

PRIVIES

See (1) C. P. CODE, SS. 11 AND 47.
(2) EVIDENCE ACT, SS. 18 TO 21, 115, 116.

PRIVILEGE.

See TORT—DEFAMATION.

PRIVILEGE DOCUMENT.

See EVIDENCE ACT, SS. 123—129.

PRIVY COUNCIL—Concurrent findings.

PRIVITY.

See (1) CONTRACT.
(2) LANDLORD AND TENANT.

PRIVY COUNCIL.

Compromise.
Concurrent findings.
Criminal case,
Death of party.
Delay in Indian litigation.
Differing decisions of lower Courts.
Ex parte hearing.
Interlocutory orders.
New point.
Record.
Miscellaneous.

Compromise.

———*Compromise—Minor.*

In all cases where it is desired to bind a minor or persons under disability by a compromise, when the proceedings are before the Privy Council, there should be a clear expression of opinion by the proper Court in India that such a compromise is a beneficial one for those persons. (*Lord Buckmaster.*) GOBINDA CHANDRA PAL *v.* KAILASH. **48 I. A. 241 : 26 C. W. N. 105 : 66 I. C. 154 : 14 L. W. 396 (P.C.)**

———*Compromise—Minor parties—Leave to withdraw*

Applications to allow an appeal to be withdrawn on terms when there are parties concerned who are not *sui juris* are not granted without grave consideration. The Judicial Committee being assured by the counsel at their bar that the terms on which the appeal was proposed to be withdrawn were beneficial to a minor party thereto, and having before them the opinion of counsel who appeared in the High Court, to the same effect granted leave to withdraw the appeal on the proposed terms. (*Lord Shaw*). SAKINBAI *v.* SHRIMBAR. **11 L. W. 486 : (1920) M. W. N. 311 : 22 Bom. L. R. 552 : 18 A. L. J. 499 : 55 I. C. 943 : 38 M. L. J. 431 (P. C.).**

———*Compromsie—Minor parties—Certificate under O. 32, R. 7, of the C. P. Code.*

Where the Judges of the High Court had on a petition for compromise of an appeal pending before the Privy Council, to which certain minors were parties had certined under O. 32, R. 7, of the C P. Code that the compromise in their opinion was a proper one and beneficial to the minors, the Privy Council allowed the appeal to be withdrawn on the terms agreed,
47 I. A. 90 (Foot-note).

Concurrent findings.

———*Concurrent findings—Interference.*

Where both courts in India had come to the same conclusion on the question whether a certain *lanka* was formed by alluvion in contiguity with the plaintiff's land, the Board saw no reason for dissenting from the conclusion arrived at

PRIVY COUNCIL—Concurrent findings.

(*Lord Carson*). THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAJA OF VIZIANAGARAM
45 Mad. 207 : 20 A. L. J 438 : 49 I. A. 67. L. R 3 P C) 105 : 15 L W. 389 : 26 C. W. N. 348 (P. C.) : 35 C. L. J. 463 : (1922) M W. N. 381 : 30 M L T 112 : 42 M L. J 589 : 1922 P. C 105.

——— *Concurrent findings—Majority of Court of Appeal concurring with Original Court.*

The finding is concurrent, if the majority of the Court of Appeal concur in the view taken by the Original Court, although the minority of the Court of Appeal does not come to the same conclusion (*Lord Dunedin*. HABIBUR RAHMAN *v.* ALTAF ALI. 48 I. A 114 : 33 C. L. J 479 : 23 Bom. L. R 636 : (1921 M W. N. 366 19 A L J. 414 : 14 L. W. 175 : 29 M. L T. 354 : 26 C. W N. 81 : 60 I C. 837 : 40 M L. J. 510 P C)
[On Appeal from 49 I. C. 545 ; 46 Cal. 259.]

——— *Concurrent findings of fact—Interference.*

Concurrent findings of facts will not be interfered with by the Privy Council. (*Viscount Cave.*) ABDUL HAFIZ *v.* ABDUL ALIM.
24 C W. N. 494 : 28 M. L. T 135 : 12 L. W. 497 : 32 C. L. J. 447 : 59 I. C. 1 : (1920 M W. N. 324 (P. C.).

——— *Concurrent findings—Adverse possession—Inference from documents—Findings of Court below not binding.*

Concurrent opinions of the Courts in India that the possession of properties by a Hindu widow was for her life, merely in lieu of maintenance, and not adverse to the reversioners, was reversed by the Privy Council on the ground that the question being one of inference from documents and not one of fact, a wrong conclusion had been arrived at by the Courts below. The Privy Council held in reversal of the judgments of the Courts below that a widow in possession of properties of the family had acquired an absolute estate by prescription. (*Viscount Haldane, Lord Buckmaster and Lord Dunedin*) SATGUR PERSHAD *v.* KISHORE LAL 42 All. 152 : 46 I. A. 197 : 18 A L J. 235 : 11 L. W. 384 : (1920) M. W. N. 3 : 27 M. L. T. 200 : 24 C W N. 394 : 22 Bom. L. R. 451 55 I. C. 486 : 38 M. L. J. 259 (P. C.):

——— *Concurrent findings—Ryoti land.*

The concurrent findings of the Courts below as regards the lands being *ryoti* must be accepted in second appeal (*Sir John Edge.*) RAJA YERLAGADDA MALLIKARJUNA PRASAD *v.* RAJULAPATI SOMAYYA. 42 Mad 400 : 46 I. A. 44 : 17 A. L. J 233 23 C W. N. 626 : 21 Bom. L. R 627 : 26 M. L T. 1 30 C. L. J. 77 : (1919) M W N. 541 : 10 L. W. 400 : 49 I. C. 708 : 36 M. L J. 257 (P. C.).
[Affirming on appeal 27 I C. 77 : 39 Mad. 341.]

——— *Concurrent findings—Custom — Mixed law and fact.*

The rule as to the concurrent findings being binding on the Judicial Committee, does not apply to findings as to the existence of a custom, since

PRIVY COUNCIL—Concurrent findings.

that is a matter of mixed law and fact. (*Lord Atkinson*). PALANIAPPA CHETTY *v.* SREEMATH DEIVASIKAMANI PANDARA SANNADHI.
40 Mad. 709 : 44 I. A 147 : 21 C W N 729 : 15 A. L. J. 485 : 1 Pat. L. W. 697 : 19 Bom. L. R. 567 : 22 M. L. T. 1 : (1917) M. W. N. 507 : 26 C. L. J 153 : 6 L. W 222 : 39 I. C. 722 : 33 M. L J 1 (P. C.).

——— *Concurrent findings—Practice.*

Where there are concurrent findings on an issue of fact, it is an established rule of the Privy Council that it is not for their Lordships to consider what conclusion they would have arrived at if the matter had for the first time come before them but that it is for the appellant to establish that the judgments of the Courts below are clearly wrong. 12 A C. 101. Foll. (*Lord Atkinson*). SURJA KANTA ACHARJYA BAHADUR *v.* SARAT CHANDRA ROY.
18 C. W. N 1281 : 16 M. L. T 290 : 1 L W. 807 : (1914) M. W. N. 757 : 16 Bom. L. R. 925 : 20 C. L. J. 563 : 25 I. C. 309 : 27 M. L. J. 365 (P. C.).

——— *Concurrent findings—Principle of—Applicability—Question of Law.*

The principle of concurrent findings of fact does not apply to a case where there is no evidence to support the finding and it is possible for the Judicial Committee to hold from the conduct of the parties in not examining themselves as witnesses that the transaction was intended as a fraud on the registration law by the inclusion of a fictitious item so as to give jurisdiction to a particular Registration Officer. (*Lord Moulton*, HARENDRA LAL ROY *v.* HARI DASI DEBI.
41 Cal. 972 : 41 I A. 110 : 1 L. W. 1050 : (1914) M. W. N. 462 : 16 M. L T. 6 : 18 C W. N 817 : 19 C. L. J 484 : 16 Bom. L. R. 400 : 12 A. L. J. 774 : 23 I. C. 637 : 27 M. L. J. 80 (P. C.).

——— *Concurrent findings—No interference.*

Unless it appears that the Courts below have not drawn the proper conclusions from the documentary evidence, the Privy Council will not interfere in cases where there are concurrent findings of fact. (*Mr. Ameer Ali*). PARBATI DASI *v.* BAIKUNTHA NATH DAS.
15 M. L. T. 66 : (1914) M. W. N. 42 : 12 A. L. J. 79 : 19 C. L J. 129 : 18 C. W. N. 428 : 16 Bom. L. R. 101 : 22 I. C. 51 : 26 M L. J 248 (P. C.).

——— *Concurrent findings—Impartibility of estate.*

The Privy Council accepted the concurrent findings of the Courts below on the impartibility of an estate, especially as it was justified by the evidence. (*Lord Parker.*) VENKATA NARASIMHA APPA ROW *v.* PARTHASARATHY APPA ROW.
41 I. A 51 : 17 C. W N. 1221 : 14 M L T 259 : 18 C. L. J. 393 : (1913) M. W N. 791 : 15 Bom. L. R. 1010 : 21 I. C. 339: 25 M. L. J. 386 (P. C).

——— *Concurrent findings—Custom of adoption at variance with Hindu Law.*

PRIVY COUNCIL—Concurrent findings.

The Privy Council upheld the concurrent findings of the Courts below a to the proof of a custom of adoption at variance with the Hindu Law but held that having regard to the limited evidence adduced, the case was not to be taken as a precedent in future litigation among other parties. (*Sir John Edge*) CHIMAN LAL *v.* HARI CHAND. **40 Cal. 879 : 40 I A 157 : 17 C. W. N. 885 : 126 P. W R. 1913 : 187 P. L. R. 1913 : 18 C L. J. 70 : 14 M. L T 83 : 102 P. R. (1913 : 15 Bom. L. R. 646 : 19 I. C. 669 : (1913) M. W. N. 509 (P. C.)**

——— *Concurrent findings.*

The Board will not disturb the concurrent finding of fact by the Lower Courts. (*Lord Macnaughten.*) KRISHNA DAYAL GIR *v.* SECRETARY OF STATE. **18 I. C. 91 (P.C.).**

——— *Concurrent findings.*

Concurrent findings of fact by the Lower Courts cannot be questioned in an appeal to the Privy Council. (*Mr. Ameer Ali.*) PRATHIVADI BHAYANKARAM *v.* RANGAYYA APPA RAO. **13 M. L. T. 198 : (1913) M. W. N. 191 : 15 Bom. L R. 463 : 18 I. C. 13 : 17 C. L. J. 295. (P.C.)**

——— *Concurrent findings—Conclusive.*

The concurrent findings of two Courts on the question of the genuineness of a document which is a question of fact, are conclusive. (*Sir John Edge*) DHARANI KANTA LAHIRI *v.* GABAR ALI. **13 M. L. T. 185 : (1913) M. W. N. 157 : 17 C. W. N. 389 : 17 C L. J. 277 : 15 Bom. L. R. 445 : 18 I. C 17 : 25 M. L. J. 95 (P.C.)**

——— *Concurrent findings—Question of fact.*

The Privy Council is not sitting as a Court of first instance and cannot take into account even well-founded criticism and disturb the concurrent findings in effect of two Lower Courts purely on a question of fact unless it is satisfied that they are clearly erroneous, (*Lord Macnaughten*) SACHINDRA NATH ROY *v.* SECRETARY OF STATE. **17 I. C. 733 (P. C.)**

——— *Concurrent findings.*

The Privy Council accepted as conclusive concurrent findings of the Court below as to the necessity and the passing of consideration for an alienation of ancestral property by the father. (*Sir John Edge.*) KIRPAL SINGH *v.* BALWANT SINGH. **40 Cal. 288 : 13 M. L. T. 5 : 11 A. L. J. 1 9 P. W. R. 1913 : 17 C. L. J. 137 : 15 Bom. L. R. 79 : 17 C. W. N. 302 : 28 P. L. R. 1913 : (1913) M. W. N. 58 : 26 P. R. 1913 : 17 I. C. 6?6 : 24 M. L. J. 318 : (P.C.) [Affirming 2 P. L. R. 1909 : 4 I. C. 632 : 48 P. W. R .1909.]**

——— *Concurrent findings—No interference—Validity of finding—No reference to evidence at length.*

The Judicial Committee refused to disturb the concurrent findings of the Courts in India to the effect that the plaintiff had not discharged the onus which lay on him of proving that a deed of gift executed by a *pardanashin* lady was explained to and understood by her. And the transaction was real. It would be to misconstrue entirely the provisions as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid on them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that, if they failed to do so the absence from their mind of elementary considerations might be presumed (*Lord Shaw.*) SAJJAD HUSAIN *v.* ABID HUSAIN KHAN. **39 I. A. 156 : 16 C. W. N. 889 : 10 A. L. J. 364 : 16 C. L. J. 613 : 14 Bom. L .R. 1055: (1912) M. W. N. 976 : 15 O. C. 271 : 16 I. C. 197 . 34 A. 455 : 12 M. L. T. 361 : 23 M. L. J. 210 (P. C.)**

Criminal Case.

——— *Criminal case.*

The King in Council is not a Court of criminal appeal and the power to entertain criminal appeals is only exercised when there has been such a gross denial of the principles of natural justice as would require intervention. (*Viscount Haldane.*) MURUGA GOUNDEN *v.* EMPEROR. **26 C. W. N. 57 : 14 L. W. 558 : 30 M. L. T. 180 23 Cr. L. J. 743 : 1 Pat. L. R. Cr. 31 : 1922 P. C. 162 (P.C.)**

——— *Criminal case—Pardon granted to appellant pending appeal—If sufficient for not entertaining appeal—Application of law of sedition—Question of fact.*

A free pardon granted to the appellant in a criminal case, during the pendency of his appeal to the Privy Council is a sufficient reason for not entertaining the appeal. Where it appears that the principles of the law of sedition have been rightly understood by the Tribunal in India the question whether those principles have been properly applied to the facts of the case is so much in the nature of a question of fact and depends so largely upon local conditions that it is difficult for the Board to interfere with the conclusions of the Courts below. (*Viscount Cave.*) KALI NATH ROY *v* EMPEROR. **2 Lah 34 : 48 I. A. 96 : 19 A. L. J. 65 : 33 C. L. J. 124 : 13 L. W. 253 : (1921) M. W. N. 49 : 29 M. L. T. 142 : 22 Cr. L. J. 129 : 25 C. W. N. 701 : 59 I. C. 641 23 Bom. L. R. 709 : 40 M. L. J. 101 (P.C.)**

——— *Criminal case—When leave granted.*

Though the Privy Council is not a Court of Criminal Appeal the Board will grant leave to scrutinise whether there have been a miscarriage of the fundamental principles of justice within the meaning of the ruling in Dillet's case. (*Viscount Haldane*) BUGGA *v* EMPEROR. **(1919) M. W. N. 748 : 20 Cr. L J. 799 : 53 I. C. 703 : 2 U. P. L. R. (P.C.) 26 (P.C.)**

——— *Criminal case—Limitations on powers of interference—Press Act.*

The Judicial Committee when it sits to advise His Majesty in the exercise of his prerogative in criminal cases does so under constitutional limitations which preclude it from exercising the full

functions of a Court of Criminal Appeal. The Committee refused to interfere with an order of forfeiture of security under the Press Act, having found that the status applicable to the case had been properly constructed (*Lord Phillimore.*) ANNIE BESANT *v.* ADVOCATE-GENERAL OF MADRAS.

43 Mad. 146 46 I. A. 176 : 37 M. L. J. 139 : 17 A. L. J. 925 : 23 C. W. N. 986 : 21 Bom. L R 867 : (1919) M W. N. 555 : 10 L W 451 : 20 Cr. L. J. 593 : 26 M. L. T. 408 : (1919) 1 U. P. L. R. (P. C.) 74 : 52 I. C. 209 (P. C.) : [Affirming on appeal 39 Mad 1085 : 37 I C, 525 : and 39 Mad. 1164 : 37 I C. 607 35 T. L. R. 500.]

———*Criminal case—Jurisdiction—Powers of interference—Constitutional limitations on.*

The Judicial Committee is not a Court of review in criminal cases. It does not interfere merely on the ground that the Court below has not appreciated the evidence properly. But the Committee will interfere where there has been a disregard of the proper forms of legal process grievous and not merely technical in character or a violation of a fundamental principle amounting to a denial of justice. (*Viscount Haldane.*) DAL SINGH *v.* EMPEROR.

44 Cal. 876 : 44. I. A. 137 : 15 A. L. J. 475 : 1 Pat L. W. 661 : 19 Bom. L. R. 510 : 21 C.W. N. 818 : 26 C. L. J. 13 : 6 L. W 71 : 22 M L. T. 31 : (1917) M. W. N. 522 : 18 Cr. L. J. 471 : 86 L J. P. C. 140 : 11 Bur. L. T.54 39 I. C. 311 13 N. L. R. 100 : 33 M. L. J. 555 (P. C.)

———*Criminal case—Stay of execution—Practice.*

The Judicial Committee is not a Court of Appeal, and the stay of execution of a sentence of death pending an appeal to the Privy Council is a matter for the consideration of the Executive Government and not within the province of the Judicial Committee. (*Viscount Haldane,*) BALMUKUND *v* EMPEROR.

42 Cal. 739 : 42 I. A. 133 : 19 C. W. N. 674 : 17 M. L T. 441 : 21 C. L. J 522 : 17 Bom L. R. 487 : 2 L. W. 602 : 16 Cr. L. J. 494 : 29 I. C. 334 : 59 P. W. R. 1915 Cr (P. C.)

———*Criminal case—Leave to appeal when granted—Costs*

In criminal cases the Judicial Committee of the Privy Council does not lightly interfere with the decision of the Courts below ; it only does so where justice has been gravely and injuriously miscarried even although the proceedings taken are unobjectionable in form.

Held, quashing the judgment and sentence appealed against, that the Court below had lost sight of the distinction between a civil and a criminal liability for appropriation of another's money, and that the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of just rights as a citizen that their Lordships felt it their duty to interfere Looking to the exceptional nature of the case, their Lordships directed to Crown to pay the appellant's costs of the appeal in a criminal case (*Lord Shaw.*) LOUIS EDWARD LANIER *v*. THE KING.

(1914) A. C. 221 : 18 C. W. N. 98 : 26 M. L. J. 1 : 15 Cr. L. J. 305 : 23 I. C. 657. 83 L. J. P. C. 116 (P. C.)

———*Criminal Case—Leave to appeal when granted.*

Leave to appeal to the Privy Council in criminal matters is not granted save where there is a palpable violation of the principles which conduce to justice ; or where, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, material or serious injustice has resulted. Misdirection as such or even irregularity as such is no ground. There must be something by which in the particular case the accused is deprived of the substance of a fair trial and the protection of law or, which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future. The jurisdiction which the Privy Council exercises in appeals in criminal cases involves a general consideration of the evidence and of the circumstances of each particular case for placing the irregularities complained of if substantiated in their proper relation to the whole matter. Where there is a great preponderance of unquestioned evidence on a point, the Privy Council cannot in any view come to the conclusion that there has been any miscarriage of justice, substantial, grave or otherwise. Authorities reviewed. (*Lord Sumner.*) IBRAHIM *v*. EMPEROR.

18 C. W. N. 705 : 15 Cr L. J. 326 : 23 I.C. 678 : 1 L. W. 989 (P. C.).

———*Criminal case—Appeal against convictions—Functions of the Judicial Committee—Limits of interference.*

The power of the Privy Council to review proceedings of a criminal nature, unless such power and authority have in any local area been parted with by statute, is beyond doubt. But there are reasons, both constitutional and administrative, to show that this power should not be lightly exercised. The practice of the Judicial Committee with regard to appeals in criminal matters are laid down in *R.* v. *Joykissen Mookerjee*, (1862) 1 Moore. P. C. (N. S.) 72 and *Falkaland Isels Co.* v. *R.*, (1862) 1 Moore, P. C. (N. S.) 299 has not been altered or liberalised by the decisions in *In re* : Dillet, (1887) 12 App. Cas 459 and later cases.

The practice of the Committee in respect of criminal trials is to this effect :—It does not proceed upon its own doubts of the appellant's innocence or suspicion of his guilt It will not interfere with the course of criminal law if there has not been such an infringement of the elementary rights of an accused as has placed him outside the pale of regular law or if within that pale, there has not been so manifest a violation of the principles of natural justice that the Committee as well as the local tribunal would have come to the opposite conclusion in the absence of the irregularity complained of. The Privy Council dismissed an appeal from a conviction

PRIVY COUNCIL—Criminal Case.

on a trial by jury, of the offence of defamation or criminal libel, holding that there was no misdirection or improper exclusion of evidence. (*Lord Shaw.*) CHANNING ARNOLD *v.* EMPEROR.
41 Cal. 1023 : 41 I. A 149 : 18 C. W. N. 785 : 15 Cr L. J. 309 : 1 L. W. 461 : 7 Bur L. T 167 : 16 M L. T. 79 : 12 A. L. J. 1042 : 20 C. L J 161 : 16 Bom. L R 544 : 8 L B R 16 : 23 I. C 661 : (1914) M. W. N. 506 : 26 M. L. J. 621 (P. C.)

———*Criminal case—Leave to appeal, when given—Misdirection to jury—Sentence.*

The Judicial Committee is not a Criminal Court of Appeal entitled to go into questions of evidence and procedure. It exercises its functions under constitutional limitations and will interfere only, when what has been done has been grossly contrary to the forms of justice or violates fundamental principles. *In re* : Dillat, 12 App. Cas. 459 Rel. Leave to appeal from a conviction on the ground of misdirection to the jury (where there was evidence) and the severity of sentence was refused. (*Lord Chancellor.*) CLIFFORD *v.* EMPEROR.
41 Cal 568 : 40 I. A. 241 : (1914) M. W N. 11 : 16 Bom. L. R. 1 : 12 A. L. J. 75 : 15 M L. T, 84 : 19 C. L. J. 107 : 18 C. W. N. 374 : 22 I. C 496 : 15 Cr. L. J. 144 : 7 Bur. L. T. 37 (P C.)
[Affirming on appeal 22 I. C. 432 : 6 Bur. L. T. 201 (F. B)].

———*Criminal case—Interference when — Grave injustice—Inadmissible evidence—Want of proof.*

Where in the prosecution of a person "by some disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done," the Judicial Committee is bound to advise His Majesty that the conviction should not be allowed to stand. The Privy Council set aside the conviction of a person for abetment of murder, which was based mainly on inadmissible evidence and when that evidence was excluded, there did not exist any reliable evidence on which a capital conviction can safely be based. (*Lord Atkinson.*) VAITHINATHA PILLAI *v.* EMPEROR.
36 Mad. 501 : 40 I. A. 193 : 17 C. W. N. 1110 : 14 M. L. T. 263 : 11 A L. J. 881 : 18 C. L. J. 365 : 14 Cr. L. J. 577 : 15 Bom. L. R 910 : 21 I. C. 369 : (1913) M. W. N. 806 : 25 M. L. J. 518. (P, C.)
[On Appeal from 20 I. C. 721.]

———*Criminal case—Leave to appeal.*

His Majesty-in-Council will not review criminal proceedings unless it be shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. An applicant for special leave ought to show the materials upon which one of those propositions can be established, and ought fully to inform the Board of the Judicial Committee of the facts. (*Lord Chancellor.*) BIRCH *v.*

PRIVY COUNCIL—Delay in Indian Litigation.

EMPEROR. 13 C. L. J. 129 : 8 A. L. J. 147 : 13 Bom. L. R. 9 : 9 M. L. T. 200 : 4 Bur L. T. 33 : 12 Cr. L. J. 100 : 9 I. C 581 : (1911) 2 M. W. N. 159 : 21 M L. J. 374 (P. C.)

Death of Party.

———*Death of party—Death of respondent—Decree passed in ignorance of death—Effect of.*

A decree passed by the Privy Council in ignorance of the death of a respondent pending the appeal is binding on all the courts in India. (*Mullick and Sultan Ahmed, JJ.*) DEONANDAN *v.* JANKI SINGH.
5 Pat. L. J. 314 : 1 Pat. L. T. 325 : 2 U. P. L. R (Pat) 108 : 56 I. C. 322 : 1920 Pat. 266.

Delay in Indian Litigation.

———*Delay in Indian Litigation—Successful party deprived of costs.*

Where the long delay in setting down an appeal for hearing was due to the appellants' fault and they in the meanwhile were watching commercial events to see if it would be worth while for them to go on with the appeal, *held* the circumstances justified the Board in directing the successful appellants to bear their costs in appeal (*Lord Phillimore.*) BEHARI LAL BULAKI RAM *v.* KUNDUN LAL.
32 M. L. T. 115 : 27 C. W N. 509 : (1923) M. W N. 388 : 1922 P. C. 361 (P. C.)

———*Delay in Indian litigation condemned.*

In this case their Lordships condemned the delay in the litigation before them as a blot on the administration of justice. (*Lord Buckmaster.*) RAJA RAI BHAGWATI DAYAL SINGH *v.* RAM RATTAN SAHU.
20 A. L. J. 26 : 26 C. W. N. 257 : 35 C. L. J. 121 : (1922) M. W. N. 102 : 4 U. P. L. R (P. C.) 7 : 24 Bom L R. 336 : 3 Pat. L T. 229 : 15 L. W. 8 : 42 M. L. J. 243 : 1922 P. C. 91.

———*Delay in Indian litigation — Costs deprived.*

In a case in which the appellant finally succeeded, but all the delay was due to his wrong procedure and dilatoriness, their Lordships refused to grant him costs and to interfere with the order of the lower courts as to the same. (*Sir Lawrence Jenkins.*) MOHAMED SHER KHAN *v.* RAJA SETH SWAMI DAYAL.
44 A. 185 : 20 A L. J. 476 : 9 O. L. J. 81 : 30 M. L. T. 220 (P. C.) : 49 I. A. 60 : 25 O C. 8 : 4 U. P. L. R. (P. C.) 50 : 35 C. L, J. 468 : L. R. 3 P. C. 119 : (1922) M. W. N. 378 : 24 Bom. L. R. 695 : 42 M L. J. 584: 1922 P. C. 17 (P. C.)

———*Delay in Indian litigation.*

The tedious protraction for 12 years of Indian litigation was adversely commented on. (*Sir John Edge.*) MOTI CHAND *v.* IKRAM ULLAH KHAN.
39 All. 173 : 44 I. A. 54 : 15 A. L. J. 150 : 5 L. W. 388 : 21 M. L. T. 267 : 32 M. L.J. 383 : 21 C. W. N. 616 : 19 Bom. L. R. 433 : 26 C. L J. 24 : 39 I. C. 454 : (1917) M. W. N. 453. (P . C.)
[Affirming on appeal 11 I, C. 17 : 33 All. 695.]

PRIVY COUNCIL—Delay in Indian Litigation.

——— *Delay in Indian litigation—Condemnation of.*

The Privy Council condemned the inordinate delay in Indian litigation and observed that the successful party, if guilty of delay will be deprived of costs. (*Lord Chancellor.*) NANDLAL *v.* JAGAT KISHORE ACHARYA. **44 Cal 186 : 43 I. A 249: 20 M. L. T. 335 : (1916) 2 M. W. N. 336 : 4 L. W. 458 : 18 Bom. L R. 868 : 14 A. L J. 1103: 24 C. L. J. 487: 1 Pat. L. W. 1: 21 C. W. N. 225: 36 I. C. 420: 10 Bur. L. T. 177 : 31 M. L. J. 563. (P. C.)**

———*Delay in Indian litigation—Reprehensible.*

The Privy Council condemned the extra-ordinary delay in Indian litigation. (*Lord Atkinson.*) JHANDA SINGH *v.* WAHID UD-DIN. **38 All. 570: 43 I. A. 284: 31 M. L. J. 750: 21 C. W. N. 66: 20 M. L. T. 529: 14 A. L. J. 1189: (1916) 2 M W. N. 570 : 19 Bom. L. R. 1: 5 L. W. 189: 25 C. L. J. 524: 36 I. C. 38: 10 Bur. L. T. 131 : (P. C.) (2): [Affirming on appeal 9 I. C. 1013: 33 All. 585:]**

Differing decisions of Lower Courts.

———*Differing decisions of Lower Courts—Finding of fact—Judge examining witnesses not the judge for judgment.*

The Privy council entered into evidence in full detail where the High Court revised the finding of fact of the Subordinate Judge who had not himself examined the witnesses and where in the judgment of the High Court, there were certain number of misapprehensions or failures of appreciation on important points. (*Lord Phillimore.*) MERLA VENKANNA *v.* MERLA AGASTHIAH. **27 C. W. N. 725: 32 M. L. T. 86: (P. C.) 1923 P. C. 31.**

———*Differing decisions of Lower Courts—Interference with finding of Appellate Court in reversal of trial Court—Practice.*

An appellant who asked the Board to upset a carefully considered finding on a question of fact arrived at by Judges fully conversant with habits and practices of the country, takes a heavy burden on himself. The Privy Council refused to displace a carefully reasoned judgment of the Judicial Commissioner's Court on a question of fact merely in order to restore a judgment of the Subordinate Judge, which rested on a speculation of his own as to probabilities. (*Lord Sumner.*) JURAWAN LAL *v.* BALDEO SINGH. **5 O. L. J. 440: 48 I C. 225: 21 O. C. 104 (P. C)**

Ex-parte Hearing.

——— Ex-parte *hearing—Respondent not represented owing to fraud—Rehearing.*

After an appeal had been heard, *ex-parte* judgment given for the appellant and an order-in-Council drawn up, the respondents were allowed to have it re-instated and reheard on the ground that they had not been represented in England owing to the fraud of a person who falsely represented himself to be the agent of a Firm of London Solicitors and misappropriated the funds sent by the Respondents without giving instructions to any Solicitor. The respondents were ordered to pay the costs of the application

PRIVY COUNCIL—New point.

in any event the costs of the former hearing being reserved to be dealt with at the hearing (*Lord Parker.*) RAM NARAYAN SINGH *v.* ADHINDRA NATH. **44 Cal. 388: 44 I. A. 87: 21 M L. T 12: 15 A L. J 107: (1917) M. W. N. 94: 25 C. L. J. 121 21 C. W N 383 : 38 I. C. 932 : 19 Bom. L. R. 194 : 32 M. L. J. 39 (P. C.).**

——— Ex-parte *hearing—Review.*

The Privy Council is averse to reviewing considered judgments on *ex-parte* applications. (*Lord Macnaghten.*) ISWAR SHYAM CHAND JIN *v.* RAM KANAI GHOSE. **38 Cal. 526: 38 I.A. 76: 15 C. W. N 417: 9 M. L T. 448: 8 A. L. J. 528: 13 Bom L. R. 421: 14 C L. J. 238: (1911) 2 M. W N. 281: 10 I. C 683: 21 M L. J. 1145 (P. C.)**

Interlocutory Orders.

——— *Interlocutory orders—Special leave—Interlocutory matter.*

Their Lordships would be very slow to give leave to appeal to bring up a case at an interlocutory stage. The case should be allowed to proceed and be determined on its merits that will leave a final judgment to come up to the Board at the proper time. (*Lord Shaw.*) NAYANI VENKA RANGA ROW *v.* RAMAKRISHNIAH. **23 I. C. 396: (1914) M. W. N. 170 (P. C.) [On Appeal from 21 I. C. 842 : 38 Mad. 509]**

——— *Interlocutory orders—Preliminary order of High Court (Appellate.)— Admitted by Privy Council—Subsequent application to be added—Parties—Jurisdiction of High Court.*

An appeal to the Privy Council from the Preliminary order of the High Courts in its appellate jurisdiction remanding the case, having been admitted by the Privy Council, the High Court has no jurisdiction to entertain a subsequent application by the assignee trustees of the plaintiffs to be added as parties. (*White, C.J. and Phillips, J.*) SINGARAVELU PILLAY *v.* MURUGESA PILLAY. **12 I. C. 69.**

New point.

——— *New point—Practice—Issues abandoned—Effect.*

Where in the course of the trial certain issues were abandoned, they cannot be raised again in appeal (*Lord Sumner.*) ANNADA MOHAN ROY *v.* GOUR MOHAN MULLICK. **50 Cal 929: 45 M. L. J. 617: L. R 4 P. C. 164: (1923) M. W. N 803: 25 Bom L R. 1269 : 33 M. L T. 365 (P. C.) : 21 A. L. J 718: 4 Pat. L. T 609: 50 I. A. 239 : (1923 P. C. 189 (P C.).**

———*New point—Grounds not taken before.*

Where a party though he had opportunity to raise a particular ground in the courts below failed to do it, he should not be allowed to do it for the first time in the Privy Council. (*Lord Buckmaster.*) BALIRAM SINGH *v.* SETH NARSINGH DAS. **45 M. L. J 403: L R. 4 P. C. 197 : 18 L. W. 137: 1923 P. C. 93.**

———*New point—Whether entertained.*

The Privy Council cannot in appeal entertain a point not raised in the Lower Courts nor

PRIVY COUNCIL—New point.

presented upon the appeal (*Lord Buckmaster.*) IDRIS *v.* JONE SKIMMER. **82 P R. 1919 : 56 I. C. 723 : 45 P. W. R. 1919.**

———*New point—Based on rebuttable presumption—Not to be raised for the first time.*

Upon an appeal to the Privy Council a new contention based at best on a rebuttable presumption, cannot be raised for the first time. A general allegation in the memorandum of appeal in the Court below could not be construed as having raised it. (*Lord Phillimore.*) RAJA RAJESWARA DORAI *v.* SUNDARA PANDYASAMI TEVAR.
42 Mad. 581: 46 I. A. 64: 17 A. L. J. 153: 23 C W N. 549: 29 C L. J 551: 25 M L. T. 400 21 Bom. L. R. 885 : (1919) M.W. N. 511: 49 I. C 704: 10 L. W 322 : 36 M. L J. 164 (P. C.)
[Affirmed on Appeal 27 I.C. 283: 27 M L.J 694.]

———*New point—Limitation—Not allowed.*

Where there was no trace of a point as to limitation (based on the construction of a *Kabuliyat*) having been raised in the Courts below and it was obscurely suggested in the reason appended to the case of the appellant, the Privy Council refused to allow the point to be raised. (*Lord Sumner.*) TRICOMDAS COONERJEA BHOJA *v.* GOPI NATHJI THALUR. **44 Cal. 759: 44 I. A. 65: 1 Pat. L. J. 262: 15 A. L. J. 217: 25 C L. J. 279 21 M. L. T. 262: 21 C. W N 577 : 5 L. W. 654: 39 I. C. 156 : (1917) M.W N. 363 : 19 Bom. L. R. 450 : 32 M. L. J. 357. (P. C)**

———*New point.*

On appeal to the Judicial Committee unless there are any exceptional conditions, a party cannot raise a fresh point which though raised in the pleadings and in the reasons attached to his case lodged in the Privy Council, was neither raised at the hearing in the Original Court nor in the first appeal. 17 C. L. J 53. Affir. (*Lord Parmoor.*) MAHARAJA MANINDRA CHANDRA NANDI *v.* RAJA SRI SRI DURGA PRASAD SINGH.
32 M. L J. 559 : 22 M. L. T. 202 : (1917) M. W N. 448 : 6 L. W. 110 : 21 C. W N. 707 : 25 C L J. 567 : 19 Bom. L R. 493 : 15 A. L. J. 432 : 1 Pat. L. W. 627 : 10 Bur. L. T. 229 : 38 I. C. 929 (P. C.)
[Affirming on appeal 18 I. C. 545 : 17 C. L. J. 53.]

———*New point—Point not pressed in the High Court.*

The question whether assuming the authority to adopt to have been given, the adoption of the nephew's son born sometime after the death of the testator would make him a son of the testator capable of taking under the terms of the will, was raised in the trial Court and decided in favour of the adopted son and it was not urged in the Appellate Court. The Judicial Committee in the circumstances did not allow the question to be raised before them (*Viscount Haldane*). ADWAITA PRASAD *v.* BALDEO DAS.
20 C. W. N 650 : (1916) 1 M. W N. 377 : 33 I. C 852 : 4 L. W. 587 (P. C.)

———*New point*—Ex-parte *hearing—Not to be allowed.*

PRIVY COUNCIL—Record.

Where the hearing of an appeal was *ex-parte*, the Judicial committee refused to depart from the established practice of not allowing the appellant to make a new case based on grounds which were not urged in the Court in India nor specified in the application for leave to appeal, or even in the reasons contained in the "case" for the appellant. (*Sir John Edge.*) SONI LAL *v.* KANHAIYA LAL. **35 All. 227 : 40 I. A. 74 : 13 M.L.T. 437 : 17 C W. N. 605 : 11 A L J. 389 : (1913) M. W. N. 470 : 17 C. L. J. 488 : 19 I.C. 291: 15 Bom.L R. 489: 25 M.L.J. 131 (P.C.).**

———*New point—Not to be allowed.*

It is not usual to allow a point to be raised on appeal to the Privy Council which has not been discussed in the Court below, and upon which Their Lordships have not got the assistance of the Court below. (*Lord Macnaghten.*) JIT SINGH *v* MAHARAJ SINGH. **34 All. 57 : 10 M. L. T. 551 : 16 C. W. N. 122 : (1912) M W. N. 29 : 15 C L. J. 78 : 13 I. C. 257 : 14 Bom. L. R. 30 (P. C.)**

Record.

Record—Printing of—Unnecessary matter included.

Their Lordships characterised the printing of unnecessary matter and its inclusion in the record as a scandal and a hindrance to the proper administration of justice. (*Sir John Edge.*) RANI BIJAI RAJ KUNWAR *v.* THAKUR JAI INDRA BAHADUR SINGH **25 O. C. 260 : 31 M L. T. 69 : 9 O. L. J. 385 : 4 U. P. L. R (P. C.) 76 : 36 C. L. J. 511 : 49 I. A. 262 : 44 All. 435 : 43 M. L. J. 682 (1922) P C. 317 (P. C.).**

———*Record Official translation—Incorrect procedure.*

Where there is a doubt as regards the correctness of an official translation of a document in the vernacular, the case has to be sent back to India and there after recording evidence as to its correctness have the matter judicially corrected by the High Court (*Sir John Edge.*) MT. SASIMAN CHAWDHURANI *v.* SHIB NARAIN CHOWDHURY. **3 Pat. L. T. 133 : 15 L. W. 434 : 26 C. W. N 425 : 42 M. L. J. 492 : 30 M. L. T. 242 (P. C.) : 20 A. L. J. 362 : 24 Bom. L. R. 576 L. R. 3 (P C.) 97 : 49 I. A 25 : (1922) M. W. N. 368 : 35 C. L. J. 427 : 1922 P C. 63 (P.C.).**

———*Record--Printing of unnecessary matter.*

The Judicial Committee strongly condemned the practice of printing an enormous mass of wholly irrelevent and unnecessary matter in the preparation of record. (*Viscount Cave.*) SHEW DARSHAN SINGH *v* THE DEPUTY COMMISSIONER, PARTABGARH. **43 M. L. J. 167 : 35 C.L.J 593 : 1923 P. C. 44 (P.C.).**

———*Record—Preparation of.*

The printing of irrelevant and useless documents generally done in Indian Appeals to His Majesty adverted to and the unintelligent omission of necessary documents in the case commented on. (*Lord Atkinson.*) ATKIA BEGAM *v.* MD. IBRAHIM. **6 L. W. 26 : 21 C. W. N 345 : (1917) M. W. N. 261 : 36 I. C. 20 : 10 Bur. L. T. 79 (P. C.).**
[Reversing on Appeal 16 I. C. 597.]

PRIVY COUNCIL—Record.

——*Record—Printing of—Costs of unnecessary printing to be disallowed.*

It is the duty of practitioners in India and of the officials of the Court to see that wholly unnecessary matter is not printed so as to prevent encumbering the record. Where this was not done, the Board did not give the costs of the successful appellants as regards the matter unnecessarily printed. (*Lord Phillimore.*) GOPAL CHANDRA *v.* RAJANIKANTA. **47 Cal. 415 : 46 I. A. 299 : 24 C. W. N. 553 (P. C.).**

——*Record—Preparation—Translation and printing of documents — Application for—to be made to what Bench of the High Court.*

Applications for directions as regards the preparation of paper books in Privy Council appeals should be made to that bench of the High Court taking Privy Council business and not to the bench that decided the appeal in the High Court. (*Sanderson, C. J and Richardson, J.*) SHIVA PRASAD SINGH *v.* RANI PRAYAG KUMARI DEBI. **26 C.W N. 840 : 49 C 967 : 1922 Cal 479.**

——*Record— Printing of—Duty of appellant.*

Where an appellant relies upon certain documents in support of his arguments, it is his duty to have them printed and if in the hope that the respondent would do so, he omits to print them and the latter does not print, the appellant cannot rely on such documents. (*Daniels. J.C. and Dalal, A. J. C.*) MUMTAZ UNNISSA BEGAM *v.* WAZIR ALI. **65 I. C. 308 : 8 O. L. J. 569.**

Miscellaneous.

——*Additional evidence.*

There is no restriction on the powers of the Board to admit evidence for the introduction of which at the initial stage sufficient ground has been made out. (*Mr. Ameer Ali.*) RAJAH INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH. **2 Pat. 676 : 33 M. L. T. 233 (P C.) : 45 M. L. J. 578 : 18 L. W. 728 : 25 Bom. L. R. 1259 : 28 C. W. N 277 : 53 I. A. 183: 21 A.L J. 554 : 4 Pat. L. T. 447 : L R. 4 P. C. 123 : 1 Pat. L. R. 345 : 1923 P. C. 128 (P. C.).**

——*Practice—Pleadings—Construction.*

It is not the practice of their Lordships of the Privy Council to construe the pleadings too strictly or to exclude a plea, which was not embodied in the plaint from being made an issue in the case. (*Lord Salvesen.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* LAXMI BAI. **44 M L. J 471 : 17 L. W. 405: 47 Bom 327 : 28 C. W. N. 49: 32 M L. T. (P. C.) 111; 37 C. L. J. 464 ; 25 Bom. L. R 527 50 I. A 49 : 1923 P. C 6 P.C.)**

——*Decision of High Court as to rate of interest—Interference.*

The Board will not, except under unusual circumstances, vary the High Court's decision as to the rate of interest to be awarded to a party. (*Sir John Edge*) PERARAZU *v.* SUBBARAYADU. **44 Mad. 656 : 26 C. W. N. 1 : 19 A. L. J 621: 48 I. A. 280: 34 C. L. J. 56: 14 L. W 270: 23 Bom. L. R, 920 : (1921) M W N. 540 : 61 I.C. 690 : 3 U.P.L R (P.C.) 46: 41 M L.J. 33 (P. C.).**

PRIVY COUNCIL—Miscellaneous.

——*Additional evidence—Affidavit.*

When the case was before the Privy Council, the respondent's daughter who was a party to the suit and the date of whose birth was relevant to the enquiry in suit, put in an affidavit to the effect that, she had come of age on a particular date *Held*, it was very doubtful whether the affidavit was admissible at all for the purposes of hearing the appeal, but even if admitted was of little importance not having been tested by cross-examination. (*Viscount Haldane,*) GANNA BHATTULA VENKAMMA *v.* GANNA BHATTU VENKATARATNAMMA. **23 C W N. 961 : (1919) M.W.N. 544 : 10 L. W. 599 : 27 M.L T. 107. (P. C.).**

——*Objection to—Valuation—Interference.*

The Privy Council will not interfere with any question of valuation unless some item of valuation is shown to have improperly been excluded therefrom or there is some fundamental principle affecting the valuation which renders it unsound, but on the whole it is too late to assert for the first time at the hearing that a valuation has proceeded upon erroneous footing. (*Lord Buckmaster*) CHARAN DAS *v* AMIR KHAN. **7 I. A 255: 28 M. L. T. 149: 18 A. L. J. 1095: 22 Bom L. R. 1370: 57 I. C 606 : 48 Cal. 110: 2 U. P. L. R. (P C.) 124 : 25 C. W. N 289 : 13 L. W. 49 : 39 M. L. J. 195 (P C.).**

——*Double arguments—Important point.*

Having regard to the wide and general importance of the question involved, the Privy Council departed their usual course and allowed counsel to resume his argument after it had been concluded and the Junior had addressed the Board. (*Lord Chancellor.*) KEYMER *v.* VISWANATHAN REDDI. **40 Mad 112: 44 I. A. 6: 15 A. L J. 92: 21 M. L T 78: 5 L. W. 342: 19 Bom. L R 206: 21 C.W N. 358: 25 C. L. J. 233 : 10 Bur.L.T. 175: 38 I.C. 683 : 32 M. L. J. 35 (P. C.).**

[Affirming on appeal from 27 I.C 386 : 39 Mad. 95.]

——*Cross-appeal, special appeal to—Addition of party.*

In an appeal to the Judicial Committee by the plff. in a suit against three defts. upon a ground of action common to all the three defts. who had not appealed from the decree of the Court of first instance, but had been made a respondent to an appeal by another deft. and who was out of time for appealing to Judicial Committee was joined as a respondent and granted special leave to cross-appeal. (*Lord Shaw*) LAKSHMI VENKAYYAMMA *v.* VENKATANARASIMHA. **39 Mad. 509 : 20 C. W. N. 1054: 14 A. L.J. 797 : (1916) 2 M W. N. 23: 20 M. L. T. 137: 4 L. W. 58: 18 Bom. L R. 651: 24 C. L J. 279: 34 I. C. 921 : 31 M. L. J. 58 (P. C.).**

[Reversing on Appeal 7 M. L. T. 296: 5 I. C. 102 which is itself an appeal from 2 I. C. 316 : 5 M. L. T. 108.].

——*Stay of execution—Appeal admitted by special leave.*

The High Court has power to stay execution of a decree, an appeal against which, has been

PRIVY COUNCIL—Miscellaneous.

admitted by special leave to the Privy Council. (*Lord Macnaghten.*) NITYAMANI *v.* MADHUSUDAN SEN. **38 Cal. 335: 38 I. A. 74: 13 C. L. J. 529: 8 A. L. J. 449: 13 Bom. L. R. 419 : 10 M. L. T. 25: (1911) 2 M. W N. 124 : 11 I. C. 384 : 4 Bur. L. T. 123 (P C.).**

———*Leave to appeal—Income Tax Act, S. 51—Letters Patent, Cl. 39.*

The decision of a High Court on a reference from the Chief Revenue authority under S. 51 of the Income Tax Act, 1918, is a judgment within cl. 39 of the Letters Patent, Bombay, and an appeal lies to the Privy Council from the same. (*Macleod, C. J. and Shah, J.*) TATA IRON AND STEEL CO. *v.* CHIEF REVENUE AUTHORITY, BOMBAY. **64 I. C. 931 : 23 Bom. L. R. 1102 :**

PRIZE.

See SHIPPING.

PROBATE.

———*Will—Interpretation—Adverse possession—Jurisdiction.*

Probate may be granted, 12 years after the testator's death though during these 12 years, the legatees were in possession, provided there are no debts due to or from the estate, the will is genuine and the grant of probate is necessary. The Probate Court cannot decide whether the possession of thelegatees for 12 years was adverse. (*Chatterjee and Smither, JJ.*) ADVAITA CHANDRA MANDAL *v.* KRISHNA DAS SARKAR. **42 I. C. 933: 21 C. W. N. 1129.**

———*Grounds for refusal.*

Probate should not be refused on the ground that the testimony of the attesting witnesses (who are hostile) examined does not establish full compliance with the statutory requirements, when there is ample evidence on the record to show that the will was duly executed and attested. (22 W. R. 189 and 4 Moor P. C. 419 Foll.) Where the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Probate Court may, on consideration of the circumstances of the case or of other evidence, pronounce in favour of the will. (*Mookerjee and Beachcroft, JJ.*) BRAHMADAT TEWARI *v.* CHANDAN BIBI. **34 I. C. 686: 20 C. W. N. 192.**

———*Right of Reversioner to be heard—Application for probate—Contents.*

A reversioner is entitled to appear and be heard in probate proceedings though he has no alienable interest in the property left by the deceased since he is substantially interested in the protection and devolution of the estate. An application for probate must state only the relations of the deceased. (*Mookerjee and Chapman JJ.*) SHAYAMACHARAN BAISYA *v.* PRAFULLA SUNDARI. **21 C. L. J. 557: 30 I C 161: 19 C W. N. 882.**

———*Caveat, if can be entered by the widow of a predeceased son—Her right to maintenance—Effect on.*

The widow of a predeceased son of the testator has no sufficient interest to appear on probate

PROBATE AND ADMINISTRATION ACT (V OF 1881).

proceedings her rights to maintenance, being unaffected by anything taking place in the probate application. (25 Bom. 203 dissented from). (*Fletcher, J.*) GOBINDA CHANDRA, *In the good of.* **23 I. C. 539 : 17 C. W. N 1141.**

———*Will prepared under suspicious circumstances—Suspicion to be removed before order.*

The principle that whenever a will is prepared under suspicious circumstances, the Court should pronounce in its favour until the suspicion is removed, applies also to cases where the suspicion is inherent in the transaction itself and not arising from conflicting evidence. (*Jenkins, C. J. and Woodroffe, J.*) GOPESSUAR DUTT *v.* BISSESSUR DUTT. **39 Cal. 245 : 13 I. C. 577 : 16 C. W. N. 265.**

———*Essentials for the grant of.*

Before the applicants are entitled to probate or grant of letters of administration they must show that they are executors or that under the will the property has vested in them. (*Kotwal and Prideaux, A. J. Cs.*) AMBADAS *v.* KASHIBAI **1923 Nag. 27.**

———*Benares Hindu University, whether could get probate of a will.*

The Benares Hindu University is a corporation and is entitled to obtain probates of a will by which benefits are conferred upon it, and probate can be granted to a corporation aggregate, though the enactment creating it does not authorise it expressly to be executor, if it would not be repugnant to its functions. (*Stuart and Kanhaiya Lal A. J. Cs.*) BENARES HINDU UNIVERSITY *v.* SRI KISSENDAS. **23 O. C. 288 : 7 O L. J. 203 : 56 I. C. 335 : 2 U. P. L. R (J. C.) 81.**

———*Probate duty is stamp duty—Succession duty—English law.*

Probate duty is a stamp duty payable on what is supposed to be the value of the property at the time it is granted. The succession duty in England is a duty on the value of succession. In both cases it is the duty payable on the value of a benefit secured by or conferred on the applicant. (*Dass and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683 : 62 I. C. 513 : 6 P. L. J. 411.**

———*Legatee under will.*

A legatee can deal with the property bequeathed to him even before obtaining Letters of Administration. (*Hartnoll, J.*) FAKIR MAHOMED *v.* AGA MAHOMED ALI. **12 I. C. 831 : 4 Bur. L. T. 135.**

PROBATE AND ADMINISTRATION ACT (V of 1881).

———*Courts' Powers.*

A Judge of the Bombay High Court exercising testamentary and intestate jurisdiction cannot declare that a will is invalid owing to the testator's incapacity to make one and dispose of the bequeathed property according to the will. The High Court can do it in the exercise of its original civil jurisdiction. The Judge cannot adjust civil rights to the property, nor can he ignore the will and direct letters of administration to issue, when a competent Court has not pronounced as to its invalidity though executors named therein

PROBATE AND ADMINISTRATION ACT (V OF 1881).

are not willing to act. (*Davar, J.*) DHURAMSI MIRARJI GOKULDAS, *In re.*
17 I. C. 730 : 14 Bom. L. R. 1031.

——*Party interested to oppose—Adverse claim.*

A person denying the title of the testator to deal with certain property as his own and claiming adversely to him cannot be said to have an interest in the estate of the deceased as would entitle him to come in and oppose the grant of probate:—*Held*, also, any dealing with the estate by the wife of the deceased, not authorized by his will or in excess of the powers conferred upon her by the will, could not affect the rights of the petitioner. (*Chatterjee and Pearson, JJ.*) MOHADEB KUDU *v.* BENODE LAL PATRA.
1922 Cal. 181.

——*Executor—How long to remain in possession.*

So long as a person entitled to the estate has not taken it out of the possession of the executors, they are entitled to continue in possession of the estate. (*Mookerjee and Buckland, JJ.*) CHANDRA KUMAR CHAKRAVARTI *v.* PRASANNA.
25 C. W. N. 977 : 64 I. C. 997 : 33 C. L. J. 451

——*Powers of the Probate Court.*

No Court other than a Probate Court is competent to hold that the Letters of Administration had been imperfectly or inaccurately drawn up or that the letters have the same effect as if a copy of the terms of a will had been annexed thereto. (*Mookerjee and Beachcroft, JJ.*) SUKUMARI GUPTA *v.* BHARAT MANDAL.
26 I. C. 980 : 20 C. L. J. 148.

——*Indian Succession Act*, S. 187.

Where no probate is taken, the legal heir represents the estate of the deceased and can maintain a suit for the benefit of the estate. (*D. Chatterjee and N. R. Chatterjee, JJ.*) BASANTA KUMAR CHACKERBURTY *v.* GOPAL CHANDER DAS
26 I. C. 21 : 18 C. W. N. 1136.

——*Special citation—Failure to issue—Effect of knowledge of application.*

Where in proceedings to obtain letters of administration, a person who is entitled to have a special citation issued to him is not so served but in spite of other knowledge of the proceedings failed to intervene, the failure to serve the citation cannot form a ground for revocation of the grant of probate. (*Adami and Das, JJ.*) KANHAI ROUT *v.* JOGENDRA ROUT.
1 Pat. 86 : 1922 P. 406.

——*Relation to Mahomedan Law.*

The statutory provisions of the Probate and Administration Act override any rules of Mahomedan Law that are inconsistent with them. (*Fox, C. J. and Twomey, J.*) RAM DHON DHOR *v.* SHARFUDDIN. **34 I. C. 128 : 9 Bur. L. T. 236.**

——**Ss. 2 and 4**—*Executor, powers of.*

S. 2 does not enable an executor appointed before 1881 to claim powers which were for the first time granted by the Act of 1881. *Quaere* :—Whether S. 4 vests the property of the

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 3.

deceased in an executor under a well made before 1881. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) GANAPATHI IYER *v.* SIVAMALAI.
36 Mad. 575 : 12 M. L. T. 207 : 17 I. C. 4: (1912) M W. N 1112 : 23 M. L. J. 306.

——**S 2** *and Indian Succession Act of* 1865 S. 331—*Professing Hindu religion—Mixed parentage.*

Where an intestate professed the Hindu religion though he was of mixed parentage, *held* the Probate and Administration Act applied and not the Succession Act. (*Hartnoll, Offg. C. J. and Young, J.*) MAUNG CHIT MAUNG *v.* MA YAIT.
7 Bur. L. T. 133 : 24 I. C. 638 : 7 L. B. R. 362.

——**Ss. 3 and 6**—*Will by Shebait—Debutter—Grant of probate*

Where a Shebait executes a will purporting to give power to his successor to alienate certain specific properties in case of legal necessity, probate of the will could be validly granted. (*N. R. Chatterjee and Sheepshanks, JJ.*) AMRIT LAL SHAB *v.* GOSSAIN GANPAT GIR.
51 I. C. 884 : 23 C. W. N. 401.

——**Ss. 3 and 51**—*Letters of Administration—Transfer of case to Additional Judge—Bengal N. W. P. and Assam Civil Courts Act*, S. 8, C. 2.

It is competent to a District Judge to transfer an application for Letters of Administration to an Additional Judge for disposal. 41 C. 866 Overruled. (*Jenkins, C. J. Woodroffe, Mookerjee, Holmwood and Chatterjee, JJ.*) KUP KESHWAR LAL *v.* JAIJAI BAI. **42 Cal. 842 : 21 C. L. J. 437 : 29 I. C 935 : 19 C. W. N. 791.**

——**S. 3**—*Will—Document by* Mahant *appointing successor—Probate and Letters of Administration.*

A document executed by a *Mahant* purporting to appoint his successor to the *Gaddi* and making over to him as *Mahant*, all the properties of the *Asthal* and the right of performing the *debshebha* is not a will and therefore its probate cannot be granted. 32 Cal. 1082, F. Letters of Administration cannot be granted in respect of properties held by a person in his capacity of a *Mahant*. 16 C. W. N. 798 ; 17 C. L. J. 65. R. (*Chitty and Teunon, JJ.*) MADHUSUDHAN DAS *v* JAGADINDRA NATH ROY. **27 I C. 24 : 20 C L. J. 307.**

——**S. 3**—*Will.*

A document dedicating certain houses to the worship of Sri Thakurji and stating that the executant will himself manage the property for the worship during the life time and after his death, a committee of three persons be appointed, of whom petitioner is one, will become managers is not a will within the meaning of S.3 and cannot be admitted, to probate. (*Johnstone, J.*) BHAGAT RAM *v.* SIDU. **5 P. R. (1912) : 55 P. L. R. (1912) : 12 I. C. 595 : 142 P. W. R. 1911.**

——**S. 3**—*Will, validity and genuineness of—Proof.*

No distinction between a grant of probate and a grant of Letters of Administration can be drawn so far as the proof of the genuineness and validity of the will is concerned. Both are conclusive evidence of the factum and validity of the will-

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 3.

Whicker Hume 7 H. L. C. 124, Foll. (*Abdur Rahim, Offg. C. J and Krishnan, J.*) RALLABANDI VENKATARATNAM *v.* RALLABANDI RAJA RAM MOHANA RAO. **31 M. L. J. 277 : 35 I. C. 854 : 4 L. W. 248**

——S. 3—*Will—Authority to adopt.*

A document is not a will because it is styled a will. A document giving a widow authority to adopt with a provision that she was to have a life estate in the properties in case there was a quarrel between her and the adopted son is not a will but an authority to adopt. (*Miller and Sankaran Nair, JJ.*) SANTANA SOOKAMMA *v.* SANTANA MANGAYYA. **(1913) M. W. N. 199 : 18 I. C. 1006.**

——Ss. 4 and 90—*Mahomedan will—Executors—Sale of property—Probate not necessary.*

An executor may dispose of immoveable property without a grant of probate under S. 90 (2) of the Probate and Administration Act. An executor derives his title from the will and not under the probate which is only the authenticated evidence of the will itself. Where executors have been appointed they can sell such portions of the estate as are necessary for discharging debts without the consent of the heirs unless the will requires such consent to be obtained 8 B. 241 ; 37 C. 839; 32 I. A. 244 ; (1891) 2 Ch. 101 : 20 Ch. D. 455 Ref. (*Marten and Fawcett, JJ.*) SIR MAHOMED YASUF *v.* HARGOVANDAS JIWAN.

24 Bom. L. R. 753 : 47 B. 231 : 1922 Bom. 392

——Ss. 4 and 92—*Two executors' mortgagees—Payment to one.*

Though the money in question formed a portion of the estate of the deceased, it did not rest in the executors' asset under S. 4, but rested in them by virtue of certain bonds which were given to them by mortgagors and therefore an endorsement by one of them did not amount to a discharge. (*Fletcher and Teunon, JJ.*) CHANDRA MOHAN BANERJEE *v.* SATYA KRIPAL.

29 I. C. 139.

——S. 4—*Executor—Property when vests in—Acceptance of office—Vesting.*

Per *Kumaraswamy Sastri, J.* In the absence of the acceptance of the office by the executor or showing any indication that he took upon himself the duties of executor, the estate does not vest in him under S. 4 of the Act (*Schwabe, C. J., Coutts Trotter and Kumaraswamy Sastry, JJ.*) RAJA OF BADRACHALAM *v.* VENKATADRI APPA RAO.

43 M. L.J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H.C.) 46 M. 190 : 1922 Mad. 457.

——S. 4—*Application by executor for probate—Acceptance of office.*

An Executor applying for Probate must be taken to have accepted the office of executor and the property of the deceased vests in him as the legal representative of the deceased. (*Bakewell, J.,*) KANDASAMI CHETTY *v.* MURUGAPPA CHETTY.

26 I. C. 472 : 16 M. L. T 547.

——S. 4—*Vesting of the Estate—Time--Cases not coming under Hindu Wills Act.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 4.

The estate of the deceased vests in the executor from the time of the death of the testator. The right of an executor to sue in respect of the estate accrues from the time of the death of the testator ; the fact that probate is not taken before the suit does not affect the right.

In cases not governed by the Hindu Wills Act, S. 4 of the Probate and Administration Act and not S. 187 of the Indian Succession Act will apply. (*Wallis, J.*) BALAKRISHNUDU *v.* NARAYANASWAMI CHETTY. **24 I.C. 852 : 37 Mad. 175.**

——S. 4—*Scope of.*

S. 4 of the Probate and Administration Act vests the property of the testator in his executor excepting that which the testator has right to bequeath at the time of his death. Survivorship has the effect of rendering a will invalid only with respect to property which the testator could not dispose of at the time of his death All other dispositions are valid. (29 A. 82 Ref.) (*R. Benson and Sundara Aiyar, JJ.*) BODI ALIAS LAKSHMAKKA *v.* VENKATASWAMI NAIDU. **38 Mad. 369 : 14 M. L. T. 181 : 25 M. L. J. 363 : 21 I. C. 73 : (1913) M. W. N. 779.**

——S. 4—*Suit by executor—Plea of payment to third person—Not valid.*

The plaintiff who claimed the estate of Chandubhai under her Will, had applied for probate. Beharilal had sued the plaintiff for possession of Chandubhai's estate on the ground that he had been adopted by Chandubhai. Both these proceedings were compromised by Beharilal executing a sale on behalf of the plaintiff of whatever right he may have had. Probate was granted to the plaintiff. He then sued defendant on three bonds executed by him in favour of Chandubhai. The defendant pleaded that he had adjusted the claim by a payment to Beharilal before the compromise. *Held*, as the plaintiff had obtained probate of Chandubhai's Will he was *prima facie* the only person entitled to claim performance of the contracts made with the deceased and entitled to give a discharge The onus was on the defendant who pleaded a discharge by Beharilal to prove the latter's right to give it. The mere fact that Beharilal was making a claim did not give him a right to give a discharge or justify the defendant in making the payment to him. The adjustment having been made with a person not in possession of the bonds and whose title was, to the knowledge of the defendant, disputed, was not *bonafide.* (*Kotwal, A. J. C.*) RAMLAL *v.* DATTOO.

55 I. C 418.

——S. 4—*Succession by survivorship—No letters can be given.*

Where persons applying for letters of administration allege that the deceased testator was joint with them and that they had therefore taken the estate by survivorship the application for letters must fail. In that case the deceased had no estate whatever to which letters of administration could be granted. (*Das and Adami, JJ.*) KALI KUMAR *v.* MT. MUNABATI KUMARI.

1922 Pat. 240 : 1923 P 96 (1).

——Ss. 4, 35, 82—*Executor can sue for recovery of debt due to the estate after the death of the sole legatee.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 4.

An executor or administrator takes, by virtue of his office, an estate in the property of the deceased and a legal character vested in him. The estate vests in the legatee for enjoyment but it vests in the executor for administration and enjoyment is postponed to administration; and therefore an executor can sue for recovery of debt due to the family even after the death of the sole legatee. (*Das and Adami, JJ.*) KALLOO *v.* BIBI RAMZO. **60 I. C. 350: 2 Pat. L. T. 305.**

——S. 4—*Joint family property—Grant of probate.*

Under S. 4 nothing can vest in an executor or administrator which was joint family property and which would have otherwise passed by survivorship. The applicant gets nothing at all by the grant and it does not cause prejudice to any one. (*Das and Foster, JJ.*) DEBENDRA PD. SUKUL *v.* SURENDRA PD SUKUL. **5 Pat. L.J. 107. 1920 Pat. 83: 54 I. C. 807: 1 Pat. L. T. 19**

——S. 5—*Will—Deposit in Court of competent jurisdiction—Property—Authenticated copy.*

S. 5 does not require that the Will should remain in Court for all time, after it has been once deposited. It is quite sufficient if the will had in fact been deposited in a foreign court of competent jurisdiction and that the Court had before it the original Will at the time it made a judicial pronouncement on the validity of the Will. The copy of the Will, required by S. 5 of the Act does not necessarily mean a copy authenticated by the notarial seal of a notary as provided by the judicial process of a foreign court is a properly authenticated copy. (*Fletcher and Huda, JJ.*) SUSHILA BALA DASI *v.* ANUKUL CHANDRA CHOUDHURY. **44 I. C. 166: 22 C. W. N. 713.**

——Ss. 5, 62, and 64—*Form of application under—Distinction.*

An applicant under S. 5 need not state the particulars which must be stated by an applicant under Ss. 62 or 64; nor need the application be verified under S. 67. A court making a grant under S. 5, cannot require the applicant to give a bond under S. 78, or an inventory and account under S. 90. (*Duss and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683: 62 I. C. 513: 6 P. L. J. 411.**

——S. 6—*Foreign will—Probate of—Grant of in British India—Conditions.*

Probate of a Will by a testator domiciled abroad though not proved in the place of domicile will be granted in British India if it is valid according to the law of the place of domicile and if there are assets in British India. (*Lord Parker.*) SOONA MYANA KENA KOONA MAYAPPA CHETTY *v.* SOONA NAVENA SUPPRAMANIAN CHETTY. **20 C W N. 833: (1916) 1 M. W. N. 455: 18 Bom. L. R. 642: 43 I.A. 113: 35 I. C. 393: 85 L. J. (P.C.) 179: (1916) 1 A. C. 603: 114 L. T. 1002 (P.C.)**

——S. 6—*Will—Proof.*—

A will may be proved in any proceeding other than a probate proceeding though no probate of it has been taken under the Act. But unless a probate or letters of administration has been

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 6.

taken a will cannot prove the title of any person named therein by the testator. **41 C. 508 Foll.** (*D. Chatterjee and N. R. Chatterjee, JJ.*) BASANTA KUMAR CHUKERBURTY *v.* GOPAL CHANDAR DAS. **26 I. C. 21: 18 C. W. N. 1136.**

——S. 6—*Will—Document containing no testamentary disposition—Probate if may be granted for.*

A document purporting to be a Will, which merely reiterates the lines of a disposition of a trust made by a previous trustee but which contains no testamentary disposition properly so-called, is not an instrument of which probate may be granted. But a bequest to a legatee of all that the executant died possessed of contained in the said instrument would alter its character and then it may be admitted to probate as a whole. (*Holmwood and D. Chatterjee, JJ.*) BAISNAB CHARAN DAS *v.* KISHORE DAS. **11 I. C. 152: 15 C. W. N. 1014.**

——Ss. 6 and 50—*Will, proof of—Grant of probate or Letters of Administration—Duty of Court.*

A Probate Court is bound to determine whether a Will was as a matter of fact made and it cannot stay its proceedings and wait indefinitely for the decision of a suit subsequently instituted in regard to validity of the Will. The finding in the suit can only be binding on the parties to it. But the decision of the Probate Court operates as a judgment *in rem* and therefore the Probate Court must come to its own conclusion as to the due execution of the Will. In order to conclude whether a Will is genuine internal evidence is no doubt of great importance; but an improbability to prevail against direct evidence of disinterested persons must be clear and cogent. (*Shadi Lal, J.*) MAYA RAM *v.* MALAN DEVI. **145 P. L. R. 1915: 29 I. C. 687: 66 P. W. R. 1915.**

——Ss. 6 and 7—*Will—Death of minor legatee—Right of executor to probate.*

Where a testator died leaving a Will and a codicil, the principal beneficiary being his minor son, appointing the applicant guardian till the majority of the minor and gave all property to his charge with certain directions and during the pending of the probate proceeding taken out by the applicant, the minor died, *held*, that if the codicil did make the applicant executor, then he must have probate irrespective of the minor's death but that the direction in the Will making the applicant guardian of the minor beneficiary did not make him an executor and was not sufficient for grant of probate. (*Johnstone, J.*) ANUP SINGH *v.* SOHAN SINGH. **44 P. L. R. 1915: 27 I C. 749: 220 P. W. R. 1915.**

——Ss. 6 and 12—*Liability to take probate.*

There is nothing in the Act to prevent an executor from acting as executor and exercising the powers under the Act without obtaining probate (8 B. 241, 10 B. 468 F, 25 C. 103 Dist.) (*Sundara Iyer and Sadasiva Iyer, JJ.*) GANAPATHI IYER *v.* SIVAMALAI. **36 Mad 575: 12 M. L. T. 207: 17 I. C. 4: (1912) M W. N. 1112: 23 M.L.J 306.**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S 7.

——S. 7—*Probate application cannot be converted into one for letters of administration—Inquiry into testation title whether permissible.*

An application for probate cannot be converted into one for Letters of Administration. The Court must not inquire into the existence of title to or capacity of testator to dispose of property covered by the will, 19 A. 458; 26 B. 792 Foll. (*Chamier, C. J and Jwala Prasad, J.*) BEHARI LAL *v.* GANGA DAI. **41 I. C. 279: 1 Pat. L. W. 744.**

——S. 7—*Executor—Appointment by implication.*

The mere act that an elder son is appointed by Will as a trustee of the minor younger son he is directed to deal with a certain house as a trusee of the minor is insufficient to show that he was appointed executor of the Will (*Hartnol, C. J. and Ormond, J.*) *In re* JANNAT ALLY. **25 I. C. 820: 7 L. B. R. 266.**

——Ss. 8 and 9—*Probate, grant of, to some executors—Remedy of others.*

If some out of the several executors appointed under a will obtain probate without citation upon others, the latter are entitled to apply under S. 9 and obtain probate unless they are debarred under S. 8. (*Teunon and Newbould, JJ.*) PEARI LAL DAS *v.* BEPIN BEHARI DAS. **45 I. C. 336.**

——S. 8—*Executor — Conditional appointment—Death of executor—Letters of Administration.*

If a testator appoints the son of his executor to be an executor after the death of the latter if tha son is fit for the work, it simply means that the person named as executor is free from the legal disabilities named in S. 8. On the death of an executor appointed under a will a universal or residuary legatee may be admitted to prove the will. Letters of Administration with the will annexed may be granted to him of the whole estate or of such portion thereof as may be unadministered. Where such universal or residuary legatee is a minor, his mother may be appointed administrator during his minority. (*Miller, C. J. and Coutts, J.*) MUSSAMAT MANKI KOER *v.* MANRAKHAN KUER. **56 I. C. 841 : 2 U, P. L. R, (Pat.) 116**

——Ss. 8 and 90—*Minor—Letters to—Position of administrator.*

A grant of Letters of Administration to a minor has no effect in law. An administrator of the estate of a deceased is in no sense, the guardian of his minor heirs. If he sells their property as guardian, the sale is void and cannot be satisfied by the minor. (*Twomey, C. J, and Ormond, J.*) MA NYI MA *v.* AUNG MIAT. **9 L. B. R. 186 : 50 I. C. 324 : 12 Bur. L. T. 27.**

——S. 8—*Administrator-General.*

No Letters of Administration should be issued to the Administrator-General except on the application of that Officer or of any of the parties. (*Fox, C. J. and Parlett, J.*) MA PWA *v.* YULWAI. **9 Bur. L. T. 187: 34 I. C. 99: 8 L. B. R. 404.**

——S. 9—*Will—Probate—Grant to some executors—Application by remaining executor practice—Succession Act, S. 184.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 12.

The grant of probate to some of the executors does not debar others from applying therefor, but in such a case the probate should be granted to them jointly with those to whom it had been granted already. (*Shaw Din, J.*) AMRIK SINGH *v.* HARKISHEN LAL. **42 P. L. R 1913: 18 I. C. 16: 110 P W. R. 1913.**

——S 12—*Executor—Title of.*

An executor derives his title from the will of the testator and not from the probate. Probate is only evidence of title and the executor has the right to sue before grant of probate. (*Lord Parker.*) SOONA MAYNA KENA POONA MEYAPPA CHETTY *v.* SOONA NAVENA SUPPRAMANIAN CHETTY. **20 C W. N. 833· (1916) 1 M. W. N. 455: 18 Bom. L. R. 642: 43 I. A 113 : 35 I. C. 323 : 85 L. J. (P. C.) 179 : (1916) 1 A. C 603 : 114 L. T. 1002 (P. C.)**

——S. 12—*Brahmos—Right to apply for letters.*

Brahmos, if Hindus, have a right to apply for letters of administration under the Act. (*Greaves, J.*) JNANENDRANATH ROY, *in the goods of* **26 C. W. N. 799 : 49 Cal. 1069 : 1923 C. 265.**

——Ss. 12, 14 and 15—*Letters—Grant of—Relation back to date of death of intestate—Intermediate acts how far binding.*

Letters of Administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate although they entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted the moment after his death. 30 Cal. 1044 Ref. An administrator derives his title from the grant of letters only. A mortgage executed by an heir who afterwards becomes an administrator does not bind the estate of the intestate, but is binding on the estate of the executant. (*Choudhuri and Newbould, JJ.*) HIATU BAKSH JAMADAR *v.* DEBENDRA NATH SANYAL. **49 I. C. 532 : 29 C. L. J. 58.**

——S. 12 — *Executor — When represents estate.*

Executor's liability to be sued does not begin till he has intermeddled with the testator's estate or proved the will. Hence a judgment passed against him till then, does not bind the testator's estate. His liability ceases if he subsequently renounced his capacity as executor. (1894) A. C. 437 ; 14 C. W. N. 256 ; 4 Bom. L. R. 340 Rel. (*Mookerjee and Beachcroft, JJ.*) LAL BIHARI MITRA *v.* NAGENDRA NATH CHATTERJEE. **16 I. C. 690 : 22 C. L. J. 266**

——S. 12—*Probate—Effect of obtaining.*

Obtaining a probate of a will means that the will was executed by the testator and does not decide his power to make the will or the validity of the contents. (*Sharfuddin and Coxe, JJ.*) BHABANGANA DEBYA *v* HORENDRA NARIEN ROY. **16 I. C. 48 : 17 C. W. N. 445.**

——S. 12—*Power of the Court.*

A Probate Court after it has granted a probate has no power to give the grantee possession of

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 13.

any property without further proceedings. (*Shaw, J.*) NGA PWE *v.* MI CHAN TEE.
10 I. C. 993 : 1 U. B. R. (1910) 69.

——Ss. 13, 31, 33 and 41—*Letters of Administration—Manager of Court of Wards—Grant to a nominee of—Grant to a statutory person—Minor and disqualified proprietor.*

Letters of Administration cannot be granted to a minor. They may be granted to the legal guardian of the minor, provided the minor in a sole residuary legatee or a person who would be solely entitled to the estate of the intestate. Legal guardian means a guardian under the Guardians and Wards Act. The application for Letters of Administration must be on behalf of the guardian and not on behalf of the minor through the guardian and the guardian must, in the first instance, apply to be appointed the minor's guardian for the purpose of enabling him to obtain Letters of Administration for the use and benefit of the minor. Until he has obtained an order of the Court appointing him guardian he cannot be considered a legal guardian within S. 31. 34 Cal 708 Ref. The right of administration follows the right to the property. It is a good general rule to grant administration to the largest interest and that the rule ought not to be departed from except under urgent necessity for the protection and preservation of the estate. The Manager of a Court of Wards is not entitled by virtue of his office to apply for Letters of Administration to the estate of the deceased in which the disqualified proprietor may have a large interest. While the Probate Act makes special provision for a minor or lunatic there is no provision in the statute that takes away administration from a disqualified proprietor who is not a minor or lunatic and gives it to the Manager of the Court of Wards. The essential condition for the exercise of the Courts discretion under S. 41 of the Probate Act is the presence of such special circumstances in the case as render such a grant absolutely necessary not convenient merely as being as a saving of time or express to the applicant. The Court under no circumstances can grant letters of administration to a nominee of the Court of Wards by virtue of his office, but it may be granted to him "as some person" within S. 41. That power can only be exercised when the Court is of opinion that the estate is likely to be wasted or dissipated in the hands of the person entitled under the general provisions of the statute to the grant. 10 C. W. N. 241 Dist. (*Das and Adami, JJ.*) BABUI BHAGWATI KUER *v.* BAHURIA RAM SAKHI KOER **1 Pat. L. T. 304 : 5 Pat. L. J. 347: 57 I. C. 583: 1920 Pat. 187.**

——S. 13 — *Letters of Administration — Grant of—Interest, extent of.*

Where there is a conflict of unequal interests between the applicants for Letters of Administration, it should be granted to the applicant having the greatest interest. 3 I. C. 719 Foll. (*Twomey, C. J, and Ormond, J.*) MASEIO TIN *v.* MA PWA.
46 I. C. 875.

——Ss. 13, 23 and 41—*Letters of Administration—Minor—Sister—Adopted son.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 18.

Letters of Administration might be granted to a sister though an adopted son is put forward and his title is in dispute. Letters of Administration cannot be granted to a minor. (*Fox, C. J. and Ormond, J.*) MA SHAN MA BYU *v.* MA CHIT SAW. **44 I. C. 138 : 10 Bur. L. T. 184.**

——Ss. 14 and 15—*Executor—Administrator—Title of.*

The title of an administrator arises only from grant of Letters of Administration but the position of an executor is different. The latter derives his authority from the will of the testator and not from the grant of probate. (*Lord Parker,*) SOONA MAYNA KENA ROONA MEGAPPA CHETTY *v.* SOONA NAVENA SUPPRAMANIAN CHETTY.
20 C. W. N. 833 : (1916) 1 M. W. N. 455: 18 Bom. L. R. 642 : 43 I. A. 113 : 35 I. C. 323 : 85 L. J. (P. C.) 179: (1916) 1 A. C. 603: 114 L. T. 1002 (P. C.).

——Ss. 14 and 15—*Applicability of—Intestate—Letters of Administration.*

Ss. 14 and 15 of the Prob. and Admn. Act refer to cases where letters of administration have been granted to the estate of an intestate. Where on the other hand letters of administration have been granted not upon intestacy but with copy of the will annexed, the first portion of S. 12 is applicable. Probates and letters of administration with copy of the will annexed are conclusive evidence of factum and validity of the will in the same way as letters of administration are conclusive of the intestacy of the deceased. 28 C. 327 ; 31 M. L. J. 277 ; 7 H. L. C. 124 Ref. (*Mookerjee and Cuming, JJ.*) CHARU CHANDRA PRAMANIK *v.* NAHUSH CHANDRA KUNDU.
50 Cal. 49 : 36 C. L. J. 35 : 1923 Cal. 1.

——S. 16—*General citation to executor—Refusal of executorship.*

Where the executor to whom general citation has been issued to attend fails to attend and the validity of the will is established the court ought to issue special citation under S. 16, and should issue Letters of Administration if he fails or refuses to accept executorship. He is not however bound to renounce executorship till the will is established. (*Fletcher and Ghose, JJ.*) SAROJINI DASI *v.* RAJALAKSHMI DASI.
60 I. C. 974 : 47 Cal. 838.

——S. 17—*Renouncing of executorship—Effect.*

On an application put in by one of several executors for probate of the will, notice was issued to the others. Thereupon one of them renounced his executorship and contested the will. Later after the grant of the probate, he applied for withdrawing the renunciation and for being appointed executor. *Held*, he was too late as the grant had already been made. (*Woodroffe and Cuming, JJ.*) HARE RAM SINGH CHOUDHURY *v.* RAM SINGH CHOUDHURI.
27 C.W. N. 285 ; 1923 Cal. 444

——S. 18 — *Will — Probate — Executor—Letters of Administration.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 19.

An executor called upon by citation to accept or renounce is compellable if he accepts to take out probate within a limited time, otherwise, Letters of Administration with a copy of the will annexed may be granted to any competent applicant. (*Beaman and Heaton, JJ.*) KAVASJI SOBABJI AIBADA *v.* BAI DINBAI. **40 Bom. 666 : 36 I. C. 373 : 18 Bom. L. R. 766.**

——— **S. 19**—*Will—Legatee, when can obtain Letters of Administration—Rights of legatee.*

A legatee cannot be allowed to administer the estate of a deceased person if there are executors willing to act and the question of their fitness or otherwise cannot be considered ; but a legatee has a right to be made a party to such a proceeding for protecting his own interests in the property. 21 C. 195 ; 21 C. 539 Foll. (*Johnstone, J.*) KARIMAN *v.* MASITI.
29 P.W.R. 1912: 13 I. C. 171: 24 P. L. R. 1912.

——— **Ss. 19 and 45**—*Executor of an administrator—If can administer estate.*

The administrator of an executor is not a derivative executor. Where an executor dies without having fully administered the estate the duty of carrying on the administration of that estate does not devolve upon the deceased executor or administrator's personal representative but on a person appointed for the purpose under Ss. 19 and 45 of the Act. (*Kumaraswami Sastri, J.*) RAMANATHAM CHETTY *v.* RAGAMMAL.
27 I. C. 849 : 17 M. L. T. 61

——— **S. 20**—*Right of representative of residuary legatee—Letters of Administration.*

The right of the legatee to obtain a grant of letters of administration is a personal right and if he dies during the pendency of the application this right does not devolve on his heir. (*Greaves, J.*) HARI BHUDAN DUTTA *v* MANMATHA NATH DUTTA. **51 I. C. 76 : 45 Cal. 862.**

——— **S. 21**—*Legacy to purohit and residue to Idol—Purohit cannot apply for letters.*

Where a Hindu testator directed by his will the payment of a legacy of Rs. 50 to the priest of an idol and the residue was bequeathed to the idol itself, the proper person to apply for letters of administration is the shebait and not the priest. The shebait appoints the purohit but that does not transfer the management of the debutter estate from the shebait to the purohit. 16 W. R. 99 : 25 C. W. N. 201 Ref. (*Mookerjee and Rankin, JJ.*) KALI KRISHNA RAY *v.* MAKHAN LAL MUKHERJEE.
27 C. W. N. 411: 50 Cal. 233 : 1923 Cal. 160.

——— **S. 21**—*Letters of Administration—Grant of—Attorney.*

The Court cannot make a grant of Letters of Administration to an Attorney who is only authorised to produce to the court the confirmation of the trust, disposition and settlement for the purpose of having it resealed at Calcutta or to demand, recover or collect all sums of money, etc., due to the estate of the deceased. (*Fletcher, J.*) WILLIAM RENNIE, *In the goods of.*
18 I. C. 907: 40 Cal. 74.

PROBATE AND ADMINISTRATION ACT, (V OF 1881), S. 23.

——— **Ss. 21 and 23**—*Letters of Administration—Grant of—No estate to be administered.*

When there is no estate to be administered and no suggestion that any creditors have to be paid or any debts to be realised and the application is an obvious device to obtain a decision about title from the Probate Court, letters should not be granted. (*Mookerjee and Beachcroft, JJ.*) PROSONNA KUMARI DEBI *v.* RAM CHANDRA SINGHA. **17 I. C. 155: 17 C. L. J. 66.**

——— **S. 23**—*Hindu widow has preferential right to get letters as against reversioner—Letters of administration—Necessity for.*

Under S. 23 of the Act, a Hindu widow who has an interest in the whole estate of her husband is entitled to a grant of Letters of Administration of his estate, in preference to a reversioner who has only a contingent interest which may never vest. No grant of Letters of Administration is necessary in a case where the deceased leaves no debts or there is no difficulty in collecting the assets. (*Buckland and Cuming, JJ.*) SRIMATI LAKSHMI SUNDARI *v.* NITYANANDA DHUPI.
64 I. C. 61.

——— **S. 23**—*Letters--of Administration--Estate of deceased wife—What must be proved—Whether husband proper applicant.*

It is sufficient under the Act if the applicant for Letters of Administration is according to the rule for distribution of the estate of the deceased, entitled to the whole or part of the property and alleges that there is property of that nature, and a husband is therefore a proper applicant in regard to his deceased wife's estate. (*Fletcher, J.*) NISHIKANT CHATTERJEE *v.* ASUTOSH MOOKERJEE.
23 I. C. 296: 17 C. W. N. 613.

——— **S. 23**—*Letters of Administration—Ulterior object.*

Where the object of the litigation appears to be not to administer the estate left upon the death of the deceased but merely to obtain a declaration of heirship so as to fortify the position of the successful party in a regular suit that may be instituted, no grant of Letters of Administration ought to be made. 9 C. L. J. 116 Ref. (*Mookerjee and Beachcroft, JJ.*) PARSANIA *v.* HARI CHARAN DAS. **17 C.L.J. 65 : 16 I. C. 588 : also 16 I.C. 453: 16 C. W. N 798.**

——— **S. 23**—*Grant to creditor of insolvent debtor.*

Letters of Administration to the estate of a deceased insolvent may be granted to his creditor. (*Harington, J.*) MAKHAN LALL, *In re goods of.* **9 I. C. 916 : 15 C. W. N. 350.**

——— **S. 23**—*Question of title—Grant of Letters.*

The applicant can demand his appointment as administrator if he shows that he has a beneficial interest in the property of the deceased. It is not usual to go into complicated questions of title in granting Letters of Administration. When ownership or succession to the property can be determined only by a regular suit, Letters of Administration should not be granted. (*Broadway, J.*) MAN SINGH *v.* MUSAMMAT SANTI. **50 I. C. 964.**

PROBATE AND ADMINISTRATION ACT, (V OF 1881), S. 23.

——— S. 23—*Discretion of Judge.*

It is dicretionary with the Judge to grant Letters of Administration. (*Chevis, J.*) BUDHU *v* RAM SARUP. **42 I. C. 737 : 96 P. L. R. 1917.**

——— S. 23—*Probate—Person entitled to inherit.*

If the person making the application is according to the law of inheritance, entitled to the whole or a part of the property, and alleges the fact that this property is of that nature and there is no other application for Letters of Administration, the applicant is clearly entitled to the grant. (*Das and Foster, JJ.*) DEBENDRA PD. SUKUL *v.* SURENDRA PD. SUKUL.

1 Pat. L. T. 19 : 54 I. C. 807 : (1920) Pat. 83 : 5 Pat. L. J. 107.

——— S 23—*Letters of Administration—Rival applicants—Procedure.*

Where there are rival applicants for letters and the status of one of them is disputed while the other is entitled to a portion of the estate, the proper procedure is to ignore the question of status and grant letters to the other, who is entitled to a part of the estate. (*Twomey, C. J. and Robinson, J.*) MATHU DAW *v.* MA NGWE NU.

56 I. C. 764.

——— S. 23—*Letters—Rival applicants.*

If rival applicants apply for Letters of Administration one of whom is admittedly entitled to a share in the estate under S. 23 of the Act and the status of the others is disputed, the Court should grant Letters of Administration to the applicant who is entitled under Sec. 23. (*Twomey, C. J. and Ormond, J.*) SHWE YIN *v.* MA ON.

9 L. B. R. 174: 45 I. C. 935: 12 Bur. L. T. 39

——— S. 23—*Grant of letters—Adoption—Inquiry into*

A contest between the full sister and an adopted daughter whose adoption is in dispute in applying for Letters of Administration would justify the Court in enquiring into the factum and validity of the adoption. (*Twomey, C. J. and Ormond, J.*) AUNG MA KHAING *v* MA AH BON.

9 L. B. R. 163 : 45 I. C. 737: 11 Bur. L. T. 65.

——— Ss. 23 and 41—*Object of—Representation of estate—Question of adoption.*

The object of proceedings under the Act is to determine the question of representation of the deceased for the purposes of administering the estate and not to determine questions of inheritance. The Court should not enter into questions of adoption in such proceedings as the decision would not be final or operate as *res judicata* in a subsequent suit. (*Fox, C. J. and Ormond, J.*) MA SHAN MA BYU *v.* MA CHIN SAW.

44 I. C. 138 : 10 Bur. L. T. 184.

——— S. 23—*Caveator's claim as adopted son—Necessity to go into the question of adoption.*

Where a Caveator if he establishes his adoption totally excludes the applicant from inheriting, the questions of adoption must be gone into unless the Court thinks it is unnecessary to grant letters to any. (*Maccoll, J. C.*) NGA BASIN *v* NGA PO HAN. **33 I. C. 659 : U. B. R. (1915) II, 101.**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 34.

——— Ss. 23, 30 and 41—*Absent Sharer.*

A limited grant of letters should not be awarded to the attorney of an absent sharer if a sharer entitled to as much as the absent sharer is within the province and willing to act (*Fox, C. J.*) ESOOF EBRAHIM *v.* ESOOF SULAIMANABOO.

26 I. C. 743 : 8 Bur. L. T. 103.

——— Ss. 23 and 41—*Letters of Administration to persons other than heirs—When can be granted.*

S. 41 allows the grant of Letters of Administration to persons other than heirs in special cases. (*Hartnoll, Offg. C. J. and Young, J.*) MAUNG CHITA MAUNG *v.* MA YAIT.

7 Bur. L. T. 133 : 24 I. C. 638 : 7 L. B. R. 362.

——— S. 23—*Letters of Administration--Grant of.*

Letters of Administration were granted to A, admittedly a wife of the deceased and entitled to a portion of the deceased's estate. The grant was opposed by B, who also claimed to have been married to the deceased, but whose marriage was denied. The evidence on the record to prove the marriage of B, with the deceased was not sufficient. The question of B's marriage with the deceased should be fought out in a regular suit, and that the Letters of Administration were properly granted to A under S. 23. (*Hartnoll, Offg. C. J. and Twomey, J.*) DENGELTI NARAINAMAH *v.* GULTULA RAMANAH.

12 I. C. 883 : 4 Bur. L. T. 129.

——— Ss. 24 and 25—*Will lost.*

Ss. 24 and 25 of the Act lay down the rule of proof for cases where the original will may have been lost. (*Mookerjee and Beachcroft, JJ.*) SUKUMARI GUPTA *v.* BARAT MANDAL.

26 I. C. 980 : 20 C. L. J. 148.

——— Ss. 31, 32, 33 and 41—*Guardian of minor, grant of letters to —Moveable property—Probate proceedings—Contentious matters, enquiry into.*

None of the Ss. 31, 32, or 33 of the Act allows a grant of letters to the guardian of a minor when he is neither an executor nor a residuary legatee. If the estate is mainly moveable, Letters of Administration need not be obtained. Proceedings for Letters of Administration should not be lengthened by entering into questions difficult to determine in such proceedings, 5 L. B. R. 78, Ref. (*Fox, C. J. and Twomey, J.*) MA KYIN *v.* MA SHWE HMI.

36 I. C. 266 : 10 Bur. L. T. 107.

——— S. 34—*Administrator pendente lite—Power of Court to direct payment of money to widow contesting will.*

An administrator *pendente lite* in Probate proceedings is analogous to that of a receiver in a partition suit. S. 34 of the Act gives ample power to the Court to direct the administrator *pendente lite* to do such act as may be necessary in the interests of the several parties to the proceedings and direct him to advance to the widow opposing the will such sums of money as are reasonably necessary for the maintenance of herself and children. (*Teunon and Newbould, JJ.*) GOUR MONI DASSI *v.* BORADAKANTA JAVA

44 I. C. 657

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 34.

——Ss. 34 and 35—*Administrator* pendente lite—*Powers of the Court—Injunction.*

Where an injunction is necessary the aggrieved party should ask the court to appoint an Administrator *pendente lite* under S. 34 to take charge of the entire estate of the deceased. On such application by the party, the court may grant an injunction either in the exercise of its inherent jurisdiction or under O. 39, R. 7, C. P. C. (*Mookerjee and Beachcroft, JJ.*) NERODEBARARANI DEVI *v.* CHAMATKARINI DIVYA.
27 I. C. 617 : 19 C. W. N. 205.

——S. 34—*Administrator* pendente lite.

An administrator *pendende lite* should be appointed only when the court is satisfied that such appointment is necessary for the preservation of the estate there is something required to be done and there is no person empowered to do it and unless such necessity is made out, the estate ought not to be subjected to cost and incumbrance of such administration. 10 C. L. J. 263 and 13 C. L. J 34 Foll. (*Mookerjee and Teunon, JJ.*) BHUBAN MOHINI DEBI *v.* KIRAN BALA DEBI.
9 I. C. 215 : 13 C. L. J. 47.

——S. 37—*Letters of Administration—Mohunt—Property of.*

A Mohunt is not the owner of Mutt property. Hence on his death, his successor cannot apply for Letters of Administration. Letters should not be granted when the object of the applicant is only to fortify his position in a suit which is likely to be instituted. (*Mookerjee and Beachcroft, JJ.*) PARSAMI *v.* HARI CHARAN DAS.
16 I. C. 588 : 17 C. L. J. 65.

——S. 37—*Applicability—Mohunt of mutt—Letters of Administration—Estate—Mutt property.*

The word "estate" in the Probate and Administration Act, 1881, invariably denotes the property and credit of a deceased person. To administer the estate of the Mutt in succession to a deceased Mohunt, an application for Letters of Administration is outside the scope of the Probate and Aministration Act. S. 37 of the Act applies only to property in which person had ownership so as to constitute it a portion of his estate, although he held it in trust. (*Prinsep and Stevens, JJ.*) JIB LAL GIR *v.* JAGA MOHAN GIR. **16 I. C. 453 : 16 C. W. N. 798.**

——S. 41—*Minor whether can obtain grant of Letters of Administration—Application by legal guardian—Discretion of Court.*

Letters of administration cannot be granted to a minor. His legal guardian can get them if the minor is the sole residuary legatee or if the minor is a universal residuary legatee claiming the whole estate. An application for such grant must be made on behalf of the guardian and not on behalf of the minor through the guardian. S. 41 is not applicable where persons entitled to administration are not wanting. The

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 50.

Court has no arbitrary power to make selection from contending persons. As a rule the grant must be made to the person entitled by law to the property. The term "Legal guardian" means a guardian appointed under the Guardians and Wards Act. A grant of probate, though discretionary, would be improper if refused to a person having the largest interest in the estate, except where the estate is likely to suffer irredeemable loss at his hands (*Das and Adami, JJ.*) BABUI BHAGWATHI *v.* BAHURIA RANSACKBI KUER. **(1920) Pat. 187: 1 Pat. L.T. 504 : 57 I. C. 583 : 5 Pat. L. J. 347.**

——S. 41—*Guardian of minor—Grant of letters to—Moveables.*

Ss. 31, 32 and 33 do not authorise the grant of letters to the guardian of a minor who is neither an executor nor a residuary legatee. No letters are necessary when the estate consists of moveables. Proceedings under the Act should not be allowed to be protracted by entering into questions which cannot be finally determined in such proceedings (*Fox, C.J. and Twomey, J.*) MA KYIN *v.* MA SHWE HMI. **36 I. C. 266 : 10 Bur. L. T. 107.**

——S. 42—*Admission to probate, partial—When legal.*

A Will may, in part be admitted to probate if the Court shall be satisfied and in part may be refused, that a particular clause has been inserted in it by fraud without the knowledge of the testator in his life time but not otherwise. (*Holmwood and D. Chatterjee, JJ.*) BAISNAB CHARAN DAS *v.* KISHORE DAS. **11 I. C. 152 : 15 C. W. N. 1014.**

——S. 45—*Derivative executorship—Doctrine of.*

The right to Letters of Administration is personal and does not pass to the heir and legal representatives. If such heir claims Letters of Administration, it is to be considered as a new claim. The doctrine of derivative executorship does not apply to India and therefore on the death of an executor, the estate remains unadministered till a new executor is appointed. (*Head, A.J. C.*) MA PE PO *v.* MA LAT GYI.
57 I. C. 812 : (1920) 3 U. B. R 208.

——S. 47—*Payment of dues by Lambarder—Interest.*

A lambarder paying canal dues from his pocket is entitled to collect the same with interest from subordinate Zamindars including muafidar. (*Tudball, J.*) RAMKISHAN *v.* MAHESWAR PRASAD. **32 I. C. 556.**

——S. 48—*Scope of.*

S. 98 of the Pro. and Admn. Act does not bar a person whose claim to an interest in the estate is denied from taking legal steps to enforce it. U B. R. (1902-03) II Prob and Ad. 1 Expl. (*Rigg, J C.*) MA TAK *v.* MA CHIT. **(1917) 3 U. B. R. 23 : 42 I. C. 68 : 11 Bur. L. T. 229.**

——S. 50—*Revocation of probate—Application for—Will admitted and acted upon.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 50.

The sole heiress of a testator applied through her attorney for probate of the Will, the probate was granted and the will was acted upon for some years. Thereafter she applied for revocation of the probate on the ground that the Will was forged. *Held*, that having admitted the genineness of the Will and taken advantage of it, she could not get the probate revoked. (*Lord Macnaghten*) BABUI BACHA KUMAR *v.* BABUI SURAJ KALA KUMAR. **17 I. C. 763.**

——S. 50—*Revocation of an* ex-parte *order granting Letters—Power of Court—C. P. Code, Ss,* 114 *and* 115.

An order granting Letters of Administration to a particular person could not be revoked without giving him notice. It is open to the District Judge to reconsider an order granting Letters of Administration when the matter comes back before him either under S 114 or under S. 151, C. P. C. apart from S. 50 of the Probate and Admn, Act. A Court ought not to grant Letters of Administration to a person without having good *prima facie* evidence that he had such an interest in the estate of the deceased as would entitle him to the Letters. A person who satisfies the Court either that he is the heir or one of the heirs or that he is a creditor, has such an interest. (*Richards, C.J. and Piggott, J*) PARSRAM *v.* NEKRAM. **37 All. 380 : 29 I. C. 133 : 13 A. L. J. 44.**

——S. 50—*Revocation of probate.*

Revocation by Dist. Judge of a probate, which was never issued, is without jurisdiction. (*Scott. C. J. and Chandavarkar, J*) JAMSETJI NASARAWANJI *v.* HIRJI BHAI NAVROJI. **37 Bom. 158 : 19 I. C. 406 : 15 Bom. L. R. 192.**

——S. 50—Locus standi *to contest will.*

A purchaser from an heir has a *locus standi* to contest that the will is a forgery and to pray for revocation. The making of a grant without citing parties who ought to have been cited is sufficient cause. But in deciding this it must be decided whether a citation on such parties was compulsory under section 16 or discretionary as under S. 69 (*Scott, C.J., Batchelor and Rao, JJ.*) DIGAMBAR KESHAV *v.* NARAYANA VITTAL. **9 I. C. 354 : 13 Bom. L. R. 38.**

——S. 50—*Revocation of probate—Right to apply for—Remote reversioner.*

Where the immediate reversioner being a daughter, has rendered it impossible for herself by her own conduct, to maintain an application for revocation of a grant of probate the application for revocation may be made by the daughter's sons, who as the ultimate reversioners, are proper parties. (*Mookerjee and Panton, JJ.*) HARIDASI *v.* BIDHUMUKHI DASI. **35 C. L. J. 66 : 1922 Cal. 38.**

——S. 50—*Revocation of Probate—Service of citation on father of testator's minor widow.*

The mother of the testator as executrix applied for probate. Citation was issued upon the father of the testator's childless widow who was appointed guardian *ad litem* for the widow. The father refused to accept the citation and it was fixed on the door of his house. Probate was granted in 1912, The widow came of age in 1913, and in 1918 a petition for revocation of probate was filed. *Held* that the widow for several years having received benefits under the will, the proceedings could not be re-opened. 14 C.W.N. 1068; 19 C. W. N. 366 Ref. (*Richardson and Huda, JJ.*) RADHASHYAM DASYA *v.* RANGASUNDARI DASYA. **59 I. C. 664 : 24 C. W. N. 541.**

——S. 50 — *Revocation — Application on behalf of minor.*

A minor when properly represented can, under S. 50 of the Act, apply for revocation of the probate where the guardian was appointed without his consent and refused to accept the citation. (*Greaves and Newbould, JJ.*) SACHINDRA NARAIN SAH *v.* HIRONMOYEE DASI. **59 I. C. 435 : 24 C. W. N. 538.**

——Ss. 50 and 99—*Letters granted to widow —Not to be collaterally attacked—Remedy by revocation.*

Where Letters of Administration have been granted to a Hindu widow and she deals with the property under orders of Court, the remedy of the reversioner questioning the propriety or legality of the grant of Letters is to apply for revocation of the probate. He cannot question the propriety of the order granting Letters in a suit instituted to declare the invalidity of an alienation by the widow (*Chaudhori and Cuming, JJ.*) ANANDCHARAN MONDAL *v.* ATUL CHANDRA MALIK. **23 C.W. N. 1045 : 54 I. C. 197 : 31 C. L. J. 3.**

——S. 50—*Revocation of Probate—Application after long delay—Onus of proof.*

An application, made more than thirty years after the grant of Letters to call in the Letters and prove the will in solemn form, ought not to be entertained especially where the object of the application is to prevent the terms of the will, standing for so many years from being carried into effect. In any case, it is for the applicant to establish why the Letters should be called in and the will proved having allowed an undue length of time to elapse. (*Fletcher and Beachcroft, JJ.*) PRAFULLANANDA GOSWAMI *v.* BROJENDRA NANDAN GOSWAMI. **51 I. C. 593.**

——S. 50—*Revocation of Letters—Sufficient cause—Failure to file inventory.*

Where an application is made years after the grant of the Letters of Administration to revoke the letters, cause must be shown why this should be done. The mere fact that the inventory is required to be filed is not a sufficient cause, unless it can be shown that the inventory was withheld wilfully and unreasonably. (*Fletcher and Beachcroft, JJ.*) HEMLATA DEBI *v.* RADHARAMAN BANERJEE. **51 I. C. 561.**

——S. 50—*Grant continues till revocation.*

A general grant continues in force till the probate or letters of administration have been recalled or revoked by the Probate court on grounds mentioned in S. 50. (*Mookerjee and Panton, JJ.*) HEMANGINI DEBE *v.* SARAT SUNDARI. **50 I.C. 882 : 34 C. L. J. 457.**

——S. 50—*Suit for declaration, that will, of which prabate has been granted, is invalid and inoperative—Maintainability of.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 50.

A suit is maintainable in an ordinary Civil Court for a declaration as to the effect of the terms of a will of which probate has been granted. A probate cannot be revoked by the probate Court on the ground that the terms of a will are contrary to the provisions of Mahomedan Law. The Civil Court can question the validity of a will of which probate has been granted though effect may be given to its provisions. (*Newbould and Panton, JJ.*) MOHOMED REMIMEA *v.* SABIDI KHADUN. **23 C. W. N. 658 : 49 I. C. 128 : 29 C. L. J 37**

———S. 50—*Revocation of probate* - Locus standi *to apply.*

A legatee under a will which is superseded by a later will is entitled to apply for revocation of the probate of the later will, on the ground of non-service of citation, even before he has obtained probate of the earlier will. (*Chatterjee and Walmsley, JJ.*) DRAUPADI DASYA *v* RAJ KUMARI DASYA, **45 I. C. 760 : 22 C. W. N 564.**

———S. 50—*Time for revocation.*

There is no limit of time fixed for an application for revocation of probate, by a person on whom no citation had been issued. Where a will is found to be forged, probate could be revoked even after a delay of thirty-three years. (*Chatterjee and Mullick, JJ.*) SHYAM LAL *v.* RAMESHWARI BASU. **33 I. C. 273 : 23 C. L J. 82.**

———S. 50—*Purchaser when could apply to revoke the probate granted—Procedure.*

A person who has acquired an interest by purchase in the deceased's properties subsequently to death of deceased, is entitled to be heard in proceedings for grant of probate ; where a probate was obtained fraudulently by concealing from the Court the sale of the deceased's estate made to another, just before the grant of probate the purchaser has a "just cause" for revocation of probate under S. 50. After the granting of a probate, no question of genuineness of will arises for consideration till a "just cause" for revocation on one of the grounds mentioned in S. 50 is made out ; hence an application for revocation of probate could not be dismissed owing to the insufficiency of the evidence to throw doubt on the genuineness of the will. (*Mookerjee and Beachcroft, JJ.*) MOKASHADAYINI DASSI *v.* KARNADHAR MANDAL. **31 I. C. 702 : 19 C. W. N. 1108.**

———Ss. 50, 62 and 69—*Revocation of Probate—Duty of person applying for probate—Special citation Misleading statements as to relation—Burden of proof—Knowledge—Acquiescence.*

Although a Hindu reversioner has no present alienable interest in the property left by the deceased, he is substantially interested in the protection or devolution of the estate and as such is entitled to appear and be heard in a probate proceeding. 8 Cal. 570 : 21 Cal. 539 ; 6 C. W. N. 912 ; 10 C. L. J 263 Ref. If the applicant for probate chooses to make a statement as to the relations of the deceased, the information he gives to the Court must be correct and not misleading. Where a will is propounded, which alters the devolution of property, the District Judge should under S. 69 direct special citation to persons whose rights are immediately affected by the will. Where a statement as to the relation of the deceased was made and misled the Court so that it did not direct the issue of special citation on the person who was entitled to intervene, the proceeding to obtain the grant was defective in substance within S 50, Expln. Cl. (1). The rule that a person is bound by proceedings to which he is no party and of which he has received no notice depends on his full knowledge of the proceedings and his capacity to make himself a party. Where, in answer to an application for revocation by a person on whom citation should have been issued, it is pleaded that he did not intervene though aware of the proceedings, the burden of proof that he had full knowledge is on the person who alleges it , the party who applies for revocation need not prove that no special citation was served on him nor that he had no knowledge of the proceedings. (*Mookerjee and Chapman, JJ.*) SHYAMA CHARAN BAISYA *v.* PROFULLA SUNDARI GUPTA, **19 C. W N. 882 : 30 I. C. 161 : 21 C. L. J 557.**

———S. 50—*Revocation of probate—Grounds—Acquiescence—Waiver.*

Non-citation is not by itself a sufficient ground for revoking the probate of a will. Whether the petitioner for revocation has, by his conduct, acquiescence, waiver or ratification debarred himself from disputing the probate or the genuineness of the will is one of many other circumstances to be considered before revoking the probate. 14 C. W. N. 1068, Foll. (*Chitty and N. R. Chatterjee, JJ.*) NALINI SUNDARI *v.* BEJOY KUMAR **30 I. C 12 : 21 C. L. J. 555.**

———S. 50—*Revocation of Probate—Acquiescence.*

An application for revocation of a probate must give some reasonable and true explanation for the delay in bringing it where knowledge, acquiescence and lapse of time are shown. (*Holmwood and Chapman, JJ.*) MANORAMA CHOWDHRANI *v.* SOSHI MOHANDAS MAZUMDAR. **42 Cal. 480 : 28 I. C. 886 : 19 C. W. N. 366.**

———Ss. 50 and 69—*Revocation of probate—Party cognizant of proceedings—Citation—Minor—Sound and disposing mind.*

The principle that a party cognizant of the proceedings for probate or letters of administration is bound by their result has no application where the person affected by the will was the infant son of the testator the infant's mother being also an infant and his three uncles were named as successive executors in the will. All persons whose interests are or may be adversely affected by the decree of the Probate Court should have notice of the proceedings and an opportunity of intervening for the protection of their interests. This purpose is not achieved merely by issue of citations to infants. The proper course for the propounder of the will to follow is to have a guardian-*ad-litem* appointed for the infant concerned. The onus is on the executor to establish that the deceased had a sound and disposing mind at the time when he is said to have executed the will. 6 Moo. P. C. 355 Ref. The Court

before pronouncing for the will must be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents and was in a condition to exercise and did exercise judgment and reflection respecting the act he was doing. (*Mookerjee and Beachcroft, JJ.*) DWIJENDRA NATH *v.* GOLOK NATH. **19 C. W. N. 747 : 28 I. C. 574 : 21 C. L. J. 287.**

——S. 50—*Revocation of Probate.*

Absence of citation of failure to serve notice is insufficient for revoking a probate granted separate. The executor should be given an opportunity of proving the will in solemn form. (*Imam and Chapman, JJ.*) ABHOYA CHARAN *v.* SAROJA SUNDARI. **24 I. C. 27 : 41 Cal. 819.**

——S. 50—*Revocation of Letters--Applicant's claim barred—No locus standi.*

If an applicant has no right to claim his share of an estate from the administrator, he has no interest which would support an application for the revocation of the grant of the Letters of Administration. (*Twomey, C.J. and Ormond, J.*) ABDUL RAHAMAN *v.* MAUNG MIN.
12 Bur. L. T. 114 : 51 I. C. 355 : 9 L. B. R. 273.

——Ss. 50, 69 and 86—*Order that a party has* locus standi *to contest will—Appeal—Will disinheriting son—Son's creditor.*

An order of Dt judge holding that a certain party has a *locus standi* to contest a will is an interlocutary order and not appealable. A judgment creditor who would have a right to seize in execution of his decree the property which would descend to his judgment-debtor had there been no will bequeathing the property to another person and who alleges that the will is a forgery, set up for the purpose of defrauding the creditors, has a *locus standi* to make an application for the revocation of the probate of the will 10 Cal. 19: 28 C. 441. Foll. (*Chitty and Teunon, JJ.*) LAKHI NARAIN SHAW *v.* DHANADA KUMAR GHOSE.
16 C. W. N. 1099 : 15 I. C. 686 : 17 C. L. J. 230.

——S. 50, Expl. 4—*Just cause—Mal-administration—Joint administrators—Grant becoming useless and inoperative.*

The words "become useless" and "inoperative" in S. 50, Expl. (4) of the Act imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it *e. g.* the discovery of a later will or codicil, or the subsequent discovery that the will was forged or that the alleged testator was still living (26 B. 792 Foll.) Mal-administration or disagreement between joint administrators is not a just cause for annulling the letters. (26 B. 792 : 24 C. 95 Rel.) (*Brett and Chatterjee, JJ.*) GOUR CHANDRA DAS *v.* SARAT SUNDARI DASYA. **40 Cal. 50 : 15 I. C. 44 : 16 C. W. N. 880.**

——S. 50—*Revocation of probate—Minor—Right of, on attaining majority—Estoppel, if may arise by conduct.*

A minor on attaining majority has a right to apply for revocation of probate obtained by consent; but he may be barred from contesting its genuineness by acquiescence and delay for a long time or by subsequent ratification of the disposition of the will. (*Chitty and Chatterjee, JJ.*) NALINI *v.* BIJOY KUMAR ROY. **11 I. C. 277**

——S. 50—*Revocation of Probate—Partial.*

When an executor who is also a legatee before liquidating the testator's debts as provided in the will, appropriates the whole of the sale proceeds of a part of the estate, it is a sufficient reason for revoking the grant of Probate if the remaining assets far exceed the liabilities as shown in the schedule especially where the main creditor does not object to the manner of administration of the estate. (*Shah Din, J.*) ISHWAR SINGH *v.* HARKISHEN LAL. **84 P. W. R. 1915 : 29 I. C. 754 : 179 P. L. R. 1915.**

——S. 50—*Revocation of Probate.*

A Court is not bound to revoke a Probate on the ground that an inaccurate inventory is furnished, especially when an accurate one is not possible in the circumstances, because the power of revocation under S. 50 is a discretionary one. (*Sadasiva Aiyar and Moore, JJ.*) MADDALI VENKATASWAMY *v.* VELLAMPALLI SUBBRAYUDU. **34 I. C. 435.**

——S. 50—*Revocation of Probate—Absence of notice just cause.*

An applicant for revocation of probate though not cited, had parted with her interest by sale and was represented in the probate proceedings by her vendee. *Held*, that the mere absence of notice was not "just cause" within S. 50 of the Act for holding that the probate proceedings were defective in substance and liable to be set aside. (*Mitra, A. J. C.*) MANGLA GOURI *v.* SAMSON SHALOM. **51 I. C. 24.**

——S. 50—*Revocation of Probate—Estoppel.*

If a party being congnizant of proceedings for Letters of Administration or Probate stands by and allows the proceedings to be concluded in his absence, he cannot be allowed afterwards to come in to have the grant revoked. (*Chamier, J.*) SHEO GOPAL *v.* SHEO GHULAM. **10 I. C. 717 : 14 O. C. 77.**

——S. 50—*Letters—Grant for part of estate—Probate proceeding - Duty of Court—Illegal Acts of guardian—When minor can repudiate.*

There is no provision in the Act for granting letters in respect of only a part of the testator's estate. A Court cannot refuse administration of the whole estate and limit it to a fractional undivided portion thereof where the applicant is not an executor appointed for the administration of a particular fund (*Mullick and Atkinson, JJ.*) SARADA PRASAD *v.* TRIGUNA CHARAN.
3 Pat. L. J. 415 : 46 I. C. 117 : (1918) Pat 349.

——S. 50—*Revocation of grant of Letters—Surety not entitled to apply for.*

No one, who has no right to and is not willing to take a grant of Letters of Administration, is entitled to apply to revoke a grant. A surety as such is not entitled to a grant and therefore is not entitled to apply for a revocation. (*Twomey, C.J. and Young, J.*) GANY *v.* OMER.
61 I. C. 563 : 13 Bur. L. T. 111.

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 50.

——S. 50 (4)—*Revocation of Probate—Sufficient cause—Omission of executant to furnish additional security required by Court.*

No inelastic rule can be formulated to test the applicability of S. 50, cl. (4) ; the matter should be determined with regard to the events which have actually happened in each case. The clause is not only applicable to cases where the circumstances which have made the grant useless and inoperative, were in existence at the date of the grant though unknown to the Court and to the parties concerned, but to cases where the circumstances contemplated have happened since the date of the grant. 26 Bom. 794 and 40 Cal. 50 not foll. Where a Dt. Judge found that the security furnished by the executor had become worthless and called upon him to furnish additional security within a reasonable time and the executor defaulted, it was a sufficient ground for revoking the probate. (*Mookerjee and Walmsley, JJ.*) SURENDRA NATH PRAMANIK *v.* AMRITA LAL PAL CHAUDHURI. **47 Cal. 115 : 23 C. W. N. 763 : 51 I. C. 936 : 29 Cr. L J. 496.**

——S. 50 explanation (5)—*Probate, revocation of—Accounts untrue—Petitioner, duty of.*

A probate can be asked to be revoked on the ground that the accounts submitted by the executor are untrue in material respects. It should be specifically stated what accounts are untrue and in what way. (*Mookerjea and Buckland, JJ.*) CHANDRA *v.* PRASANNA. **25 C. W. N. 977 : 64 I. C. 997 : 33 C. L. J. 451.**

——S. 52—*District Delegate—Grant of probate by Additional District Judge.*

An Additional District Judge cannot grant probate unless he is appointed a District Delegate by the High Court or exercises powers as a District Judge. (*Kotwal, A. J. C.*) RAM SINGH RAJPUT *v.* MURTIBAI. **1923 Nag. 41.**

——S. 53—*Will—Probate—Adoption mentioned in Will—Whether can be tried.*

Although the question as to the alleged adoption may be considered with reference to the genuineness of the will, it would not be tried as a material and vital issue on an application for grant of probate, the necessary parties to such an issue not being before the Court. (*Sir John Edge.*) DULHIN GENDA *v.* HARNANDAN SINGH. **20 C. W. N. 617 : (1916) 1 M. W. N. 358 : 33 I. C. 790 : 4 L. W. 214 : 30 M. L. J. 624.**

——S. 54—*Title of testator—Enquiry—Jurisdiction.*

The probate Court cannot inquire into the title of the testator in the properties covered by the will. (*Atkinson and Kingsford, JJ.*) MUSSAMAT MAHASUNDER KOER *v.* BABU RATAN PRASAD SAHI. **35 I. C. 416 : 1 Pat. L. W. 370.**

——S. 55—*Interrogatories—Relevance.*

In matters of probate the strictest relevancy in the interrogatories may not be necessary but the Court should exclude whatever is offensive or improper. O. XI of the C. P. C. applies to proceedings in Probate and a party can therefore ask of the opposite party to make a discovery of the assets of the deceased after delivering interrogatories into the Court. (*Holmwood and Mullick, JJ.*) AMILABALA DASI *v.* RAJENDRA NATH DALAL. **43 Cal. 300 : 34 I. C. 227 : 23 C. L. J. 480.**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 58.

——Ss. 55, 64 and C. P. Code, O. 32, R. 3—*Discovery of minor—Procedure.*

In a probate proceeding as soon as the judge becomes aware of the existence of a minor heir, of the deceased, he must issue notice upon the minor and have a guardian *ad litem* appointed. (20 C. W. N. 200 Foll). (*Chatterjee and Chapman, JJ.*) NABA GOPAL GOSWAMI *v.* SRI GOPAL. **33 I. C. 14 : 23 C. L. J. 79.**

——S. 55—*Compromise.*

An application for Probate cannot be disposed of by compromise. The law imposes on the Court the duty of deciding whether the will is genuine or not. (*Chapman and Atkinson, JJ.*) JUGESWAR NATH SAHAI *v.* JAGAT DHARI PRASAD. **(1917) Pat. 192 : 2 Pat. L. J. 535 : 40 I. C. 345 : 5 Pat. L. W. 230.**

——S. 56—*Bifurcation of the district—Effect.*

The jurisdiction to grant probate cannot be taken away, because the properties dealt with in the probate are within the jurisdiction of another Court by reason of a bifurcation of the district. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) SUBRAMANIAN CHETTY *v.* RAMASWAMI CHETTY. **31 I.C. 499.**

——S. 56—"*Fixed abode*"—*Meaning of—Jurisdiction of Court.*

The expression "fixed abode" in S. 56 of the Probate and Administration Act does not mean permanent residence at one place in a man's life but residence for a considerably long time. Where the deceased has left some moveable property within the jurisdiction and where all the witnesses to the will reside within the jurisdiction the Court has power to entertain an application for probate. (*Batten, J.C.*) GOVIND *v.* ANANT. **6 N. L. J. 49 : 19 N. L. R. 54 : 1923 Nag. 145.**

——S. 57—'*District*'—*Application, where to be made.*

An application for Probate in the Pergana District Court cannot be dismissed on the ground that the major portion of the testator's properties are situated and all the witnesses live in Calcutta. An applicant for Probate is *dominus litis* and his choice should be given effect to in the absence of special reason to the contrary. *Quaere* whether the word "Districts" in the Act applies to High Courts. (*Woodroffe and Walmsley, JJ.*) ANANGA MOHAN *v.* BALAI CHAND. **63 I. C. 523 : 33 C. L. J. 386.**

——S. 58—*Letters of Administration, grant of—Government, if has* locus standi *to oppose—Confidential proceedings, legality of.*

Where an application by a person for grant of Letters of Administration was taken up as a contested case and meanwhile the Chairman of the Local Municipality made a report to the Sub-Divisional Officer that the will produced by the applicant in the suit was a forged one whereupon the latter took some confidential proceedings and sent in a record to the Collector asking him to

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 59.

oppose the grant of probate who opposed it accordingly on behalf of the Government, *held* that the "confidential proceedings" of the Sub Divisional Officer were not in accordance with law and that at the inception of the proceedings the Government had a *locus standi* in the matter but that as soon as it appeared that there were "heirs" in existence, the Government ought to have retired from the case. (*D. Chatterjee and Chapman, JJ.*) RAMANATH CHAKRAVARTHI *v.* COLLECTOR OF KHULNA. **29 I. C. 682.**

——S. 59—*Probate grant of—Effect on question of title or construction of will.*

S. 59 of the Probate and Administration Act expressly enacts that a probate when granted shall be conclusive as to the representative title of the grantee only in certain respects. The construction of a will or the determination of the rights of certain persons under it are outside the scope of the probate. (*Karamat Hussain and Piggott, JJ.*) RAJENDRA CHANDRA *v.* MANIK LAL.
11 I. C. 235 : 8 A. L. J. 1063.

——S. 59—*Assets in more than one province —Operation of grant of probate.*

If the assets left by a testator are situate in more than one province, the grant of Probate, in respect of all assets which are likely to come to executor's hands, shall have effect only over the property situate in the province in which the probate is granted (*Dass and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683 : 62 I. C. 513 : 6 P. L. J. 411.**

——Ss. 62 and 58—*Application for Letters—Duty of Court.*

Where an application is made for the grant of Letters of Administration with a will annexed, the Court should not refuse to grant the letters unless it finds (1) that the will is not executed by the deceased or (2) that he was not in a sound and disposing state of mind at the time of making it or (3) the will was not his own voluntary act. (*Scott-Smith, J.*) BABU MISAR *v.* UMBE PRASAD. **45 I. C. 974 : 110 P W. R. 1918**

——Ss. 62 and 64—*Object of, is to assess proper Court-fee.*

The object of requiring the applicant to state the amount of assets under S. 62 or S. 64, is to assess the proper Court-fee payable on the grant and not to furnish a basis for testing the accuracy of the subsequent inventory and accounts. (*Dass and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO.
6 P. L. J. 411: 62 I. C. 513 : 2 Pat. L. T. 683.

——S. 64—*Minor, not cited—Effect.*

A minor neither cited nor properly represented in a probate proceeding by which her interests have been affected can come in, even after great lapse of time and have the will proved in solemn form, in her presence. (*Chatterjee and Chapman, JJ.*) NABA GOPAL GOSWAMI *v.* SRI GOPAL.
33 I. C. 14 : 23 C. L. J. 79.

——S. 64—*Deceased and applicant members of joint Hindu family—Jurisdiction of Court to grant letters.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 69.

A member of a joint Hindu family with the deceased is not competent to apply for Letters of Administration under S. 64 of the Probate and Administration Act. 36 All. 380 Ref., 33 Mad. 93 Dist. (*Wilberforce, J.*) MUSSAMMAT UTTAM DEVI *v.* DINA NATH. **51 I. C. 651 : 56 P. R. 1919.**

——S. 67—*Verification — Provisions as to, are Directory.*

The provisions of S. 67 as to verification are directory and not mandatory and hence the omission can be cured. (*Kotval, A. J. C.*) RAM SINGH RAJPUT *v.* MURTIBAI. **1923 N. 41.**

——S. 69—*Absence of citation—Effect.*

When however the citation is discretionary, mere absence of such citation does not invalidate the grant, but is sufficient cause for inquiring into the genuineness of the will (*Scott, C. J, Batchelor and Rao, JJ.*) DIGAMBARA KESHAV *v.* NARAYAN VITTAL. **9 I. C. 354 : 13 Bom. L. R. 38.**

——S. 69—*Disputed will—Duty to examine all attestors and witnesses if required by parties.*

On an application for probate of a will, it was proved that the will had twelve witnesses, that the testator did not sign his own name, but that his name was written by his uncle. The trial Judge suggested that it was not necessary for the applicant to prove the signatures of attestors by citing them as witnesses. *Held*, that this was a defect in procedure. The will required to be carefully scrutinised and it was necessary to place before the Court all the available evidence so that the Judge could form a right conclusion having a free mind. (*Fletcher and Cuming, JJ.*) SRIMATI BASINI DASI *v.* KRISHNA LAL CHATTERJEE.
51 I. C 1007.

——S. 69—*Probate—Refusal of—Points not raised by parties.*

It is necessary that the court should satisfy itself on all points regarding a will when it grants probate of a will, and in coming to its conclusion it is bound to proceed on the evidence on the record and to pay due regard to the contentions of the parties. If the Court below refuses probate of a will on consideration of a point not raised in the written statement or in the issues, the High Court has power to set aside the order and direct the grant of probate to the petitioner. (*Chitty and Panton, JJ.*) NAGENDRA NATH MUKERJEE *v.* SARAT KUMARI DEBI. **51 I. C. 336.**

——S. 69—*Probate—Delay in application—Effect of.*

There is no rule of law that a will propounded very late is incapable of being proved. Long delay in propounding a will, will give room to much suspicion and the Courts are in such cases bound to scrutinize the evidence very carefully. (*Fletcher and Newbould, JJ.*) BENODINI DEBYA *v.* HERIDOY NATH GHOSAL. **45 I. C. 187 : 22 C. W. N. 424.**

——S. 69—*Caveat — Reversioners—Immediate and remote.*

In a testamentary suit where the immediate reversioner challenges the will but in the course of

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 69.

the proceedings enters into a compromise with the propounders of the will and gives up his contention, the next immediate reversioners have a *locus standi* to enter caveats. *Quaere.* — Whether any interest however slight or the bare possibility of an interest is sufficient to entitle a party to oppose a will? (*Sanderson, C. J. and Woodroffe, J.*) SATINDRA MOHAN TAGORE *v.* SARALA SUNDARI DEBI.

45 I. C. 59 : 27 C. L. J. 320.

——— **S. 69**—*Will—Special citation.*

The District Judge under S. 69 must order special citation to the person whose rights are affected when a Will alters the devolution of property. (*Mookerjee and Chapman, JJ.*) SHYAMA CHARAN BAISYA *v.* PRAFULA SUNDARI.

21 C. L. J. 557 : 30 I. C. 161 : 19 C. W. N. 882.

——— **S. 69**—*Notice of probate proceedings—"Interest of Estate of deceased"—Objection to probate—Person claiming independently of Will.*

A person who claims independently of a Will and disputes the testator's right to deal with the property, is not a person claiming an "interest in the estate of the deceased," and is not therefore entitled to notice of the probate proceeding and has no *locus standi* to apply for revocation of the probate. 1 C. L. J. 258; 34 B. 459; Rel. on 3 I. C. 178. Dist. (*Mookerjee and Beachcroft, JJ.*) GOPAL CHANDRA BOSE *v.* ASUTOSH BOSE.

20 I. C. 342.

——— **S. 69**—*"Interest"—Meaning of.*

The word "Interest" in S. 69 cannot cover the case of a mere reversioner; so the sisters of the deceased cannot object to the grant of a probate to the widow and the daughters of the deceased. 21 Cal. 539; 3 I. C. 178 Dist. (*Chevis, J.*) SHARKEY *v.* JERRY ALLARD.

78 P. W. R. 1912 : 13 I. C. 433 : 70 P. L. R. 1912.

——— **S. 69**—*Scope of enquiry—Legality of will—Legacy.*

A District Judge in Probate proceedings cannot question the testator's disposing power and so he cannot go into the question whether the requests in the Will are illegal and void. (*Batten, A. J. C.*) CULLEN *v.* MRS. ELKINS. **21 I C. 599 : 9 N. L. R. 152.**

——— **Ss. 69, 70 and 73**—*Title—Power of Court to go into question of caveat—Paramount title by Caveator—Applicant's interest—Proof of "Contention" in S. 73.*

A Court of probate is not merely entitled, but is bound to enter into questions of title if necessary in order to determine which of the two contesting parties is entitled to the grant of the Letters. But when the objector sets up a paramount title, *e. g.*, that he being an adopted son is entitled to the whole estate not by inheritance but by survivorship, the Probate Court is not entitled to go into the merits of the title set up by the objector and the nature of the estate left by the deceased (3 C. W. N. 277; 6 C. W. N. 345; 28 Bom. 644 Foll.) The objector is fully entitled to deny the right which the applicant for letters of administration claims. The objector

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 70.

cannot be allowed to raise in a Probate Court a separate case based upon a paramount title and not a preferential claim to Letters of Administration which if the objector has also applied for letters, would have been properly in issue to be decided by the Probate Court. Ss. 64, 69 and 70 do not authorise a Probate Court to discuss the question of paramount title set up by the caveator who puts forward title to the property for the purpose of preventing a grant to others. (17 C. W. N. 613 Foll.) "Contention" used in S. 72 does not empower the objector to oppose the proceedings on the ground that there was no estate at all to which Letters of Administration could be taken. (*Das and Foster, JJ.*) DEBENDRA PD. SUKUL *v* SURENDRA PD. SUKUL.

5 Pat. L. J. 107: 1920 Pat. 83: 54 I. C. 807 : 1 Pat. L. T. 19.

——— **S. 69**—*Probate—Application for—Delay—Term of will, natural—Genuineness.*

When an application for the Probate of a will was made, seven months after the death of the testator, probate should not be refused onthe mere ground of delay. If the will appears to be natural will and in accordance with the tenor of life of the testator, it should be maintained. 36 All, 93 (P. C.) Foll. (*Sharfuddin and Chapman, JJ.*) MAKUNDA *v.* BHOLANATH.

43 I. C. 195: 1917 Pat. 85.

——— **S. 69**—*Revocation of probate—Who can apply.*

Under S. 69, no application for the revocation of Probate lies unless the applicant can show that he has some interest in the estate of the deceased. An applicant claimed to be joint in estate with the deceased while he was living as a member of a joint family. *Held*, that as the interest of the deceased terminated with his death, the applicant could have no interest in the deceased's estate as required by S. 69. (*Chapman and Roe, JJ.*) KALAJIT SINGH *v.* PARMESHWAR SINGH.

39 I. C. 573 : 1 Pat. L. W. 308.

——— **S. 69**—*Probate, proceedings in—Scope of enquiry.*

The title of a testator to the properties covered by his will or the question whether or not a person was adopted by a testator are not matters which could be decided in Probate Proceedings. 20 B. 210 distinguished. (*Atkinson and Kingsford, JJ.*) MAHASUNDER KUER *v.* RAM RATAN PRASAD SAHAI. **35 I. C. 416 : 1 Pat. L. W. 370.**

——— **Ss. 69 and 90 (4)**—*Probate or Letters of Administration, grant of—Creditor's right to object.*

A creditor has no interest in the immoveable properties of the deceased debtor and has no *locus standi* to object to the grant of probate or Letters of Administration under S. 90 (4) which refer to immovable property only unless on the ground that the will is in fraud of creditors. (*Twomey and Ormand, JJ.*) MAEME *v* MAE.

7 Bur. L. T. 245 : 25 I. C. 48 : 7 L. B. R. 293.

——— **S. 70**—*Caveat—Meaning*

A caveat which is similar to a precautionary measure to assure that there shall be no proceeding in respect of the estate of the deceased without

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 70.

notice to the person who files a caveat is not necessary if the persons interested in the estate of the deceased appear upon a citation. (*Teunon and Chaudhuri, JJ.*) BHOBATARINI DEBI *v.* HARI CHARAN BANERJEE. **36 I. C. 38 : 20 C. W. N. 787.**

——S. 70—*Probate—Application for—Creditor when entitled to interfere.*

Semble:—Only where a will is put forward to defraud creditor, a creditor would have a *locus standi* to come in probate proceedings 17 C. L. J. 230 Ref. (*Chitty and Teunon, JJ.*) AKSHOY KUMARI BASU *v.* PROSONNO KUMARI GHOSE. **30 I. C. 538.**

——S. 70—*Proceedings, nature of—Scope of inquiry.*

A probate proceeding is not in the nature of a suit in which property is in dispute. The controversial point is the right to represent the estate of the deceased. The Court is not competent to investigate into questions of title of the deceased or the conflicting titles of the parties to the proceedings.(20 C. 888; 25 C. 324; 25 B. 644 Foll.) (*Mookerjee and Beachcroft, JJ.*) NIRODEBARANI DEVI *v.* CHAMATKARANI DEVYA. **27 I C 617: 19 C W. N. 205.**

——S. 70—*Probate—Caveat—Right to enter.*

The mere fact that in a probate application a certain party was stated to have applied for Letters of Administration to the estate of the testatrix, and the Court had issued a citation upon him, would not entitle him to oppose the grant of probate, if it was found that he had no interest in the estate of the deceased. (*Brett and Chatterjee, JJ.*) SASHI BHUSHAN LAHIRI *v.* RAJENDRA NATH JOARDHAR. **40 Cal. 82 : 15 I. C. 225 : 16 C. W. N. 1094.**

——S. 70—*Letters of Administration — Christian sister—Caveat—Questions to be gone into—Enquiry into extent of estate.*

The sister of a deceased Christian has no right to object to the application by the wife of the deceased for Letters of Administration. It is beyond the scope of an inquiry into an application for Letters of Administration to determine the extent of the estate of the deceased. (*Chevis, J.*) R. SHARKEY *v.* JERRY ALLARD. **78 P. W. R. 1912: 13 I. C. 433: 70 P. L. R. 1912.**

——S. 70—*Proceedings under—Questions to be decided by the Court granting probate.*

In proceedings under the Act, the Court is bound to grant a probate unless it finds that the will was not executed by the testator or that he was not in a state of mind to exercise his testamentary powers or that it was not the voluntary act of the testator. The Court has no concern to go into other questions such as testator's power to make the will and its validity on other grounds (*Ratigan, J.*) INDAR NARAIN *v.* ONKAR LAL. **141 P L. R. 1911 : 220 P. R. 1912 : 10 I C 130: 233 P. W. R. 1911.**

——S. 70—*Probate proceeding—Parties.*

Even the possibility of an interest is sufficient to entitle a person to become a party to a Probate proceeding. (*Mullick and Thornhill, JJ.*) HEMANGINI DEBI *v.* HARIDAS BANERJEE. **(1918) Pat 276: 5 Pat. L. W. 216: 46 I. C. 398: 3 Pat. L. J. 409**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 76.

——S. 70—*Probate proceeding—Court, duty of.*

In a Probate proceeding the Court has no concern with the devolution of the property, but only with the point whether the will has been proved to be genuine and duly executed. (*Mullick and Atkinson, JJ.*) SARADA PRASAD *v.* TRIGUNA CHARAN. **46 I. C. 117: 3 Pat. L. J. 415 : 1918 Pat. 349.**

——S. 70—*Probate proceedings—Caveator—Onus on applicant to prove a* prima facie *case—Death of one executor—Suit against survivor.*

The petitioner in a probate proceeding should *prima facie* prove that the caveator cannot possibly have any interest which he claims and then the caveator should be called upon to rebut the presumption arising from the evidence produced by the propounderThere is no rule in the Act for the discharge of caveat. The only rule of procedure governing such a proceeding is O. I R. 10, C.P.C., a caveat should only be discharged if caveator has no interest in the estate.If one oftwo executors dies, the representation of the estate of the deceased and of the interests of the beneficiaries vests in the remaining executor. It is open to the caveators to proceed against him alone. (*Sharfuddin and Roe, JJ.*) GAURI SHANKAR JOSHI *v.* MANRAJ SHUKUL. **41 I.C. 705 : 3 Pat. L. W. 198.**

——S. 70—*Scope and object—Title, question of.*

In proceedings under the Act on an application for Letters of Administration, the nature and contents of estate of the deceased need not be decided. Question of title can only be decided in a regular suit. (*Shaw, J. C.*) NGA PWE *v.* MI CHAN TEA. **10 I. C. 993 : (1910) 1 U. B. R. 69.**

——S. 73—*Letters of Administration—Question of title—Jurisdiction.*

It is not the practice of the High Court in its testamentary and intestate jurisdiction to go into questions of title so that in an application by a husband for grant of Letters of Administration to the estate of the deceased wife, an issue as to whether the property was her *Jantaka Shridana* should not be allowed to be raised. (*Fletcher, J.*) NISHIKANT CHATTERJEE *v.* ASHUTOSH MOOKERJEE. **23 I. C. 296 : 17 C. W. N. 613.**

——S. 76—*Date of grant—Which is.*

The date of grant of probate is the day on which the order granting it is passed and not the date of the order that probate should issue. (*Woodroffe and Cuming, JJ.*) HARE RAM SINGH CHOWDHURY *v.* RAM SINGH CHOUDHURI. **27 C. W. N. 285 : 1923 Cal. 444.**

——Ss. 76 and 98—*Accounts order for exhibiting.*

Ss 76 and 98 of the Act contemplate the submission of an initial inventory and final accounts after the completion of the administration. Orders purporting to fix the capital of the trust and

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 76.

making provisions for effecting repairs and submitting half-yearly accounts are outside their scope. (*Crouch and Hayward, A. J.Cs.*) NATANDAS *v.* KISHNIBAI. **47 I.C. 750 : 12 S. L. R. 27.**

——— **Ss. 76 and 82**—*General grant—Effect of.*

A general grant in terms of S. 76 of the Act is operative under S. 82 until probate shall have been recalled or revoked under S. 50 in an appropriate proceeding before a Court of competent jurisdiction. (*Mookerjee and Panton, JJ.*) RANI HEMANGINI DEBI *v.* SARAT SUNDARI DEBYA. **66 I. C. 882 : 34 C. L. J. 457.**

——— **S. 77**—*Letters, grant of — Practice outside India—Colonial Probates Act* (55 *and* 56 *Vic.* 6.)

Excepting in India, in other parts of the British Empire, the Colonial Probates Act applies and the practice is not to make a grant of Letters of Administration with a copy of the will annexed but to send an exemplification of the probate granted in any part of the United Kingdom and this is resealed by the Court to which it is sent. That practice and the Act have not been extended to British India and the practice here is to require administration with will annexed to the estate of the deceased British subject, who left property in India. (*Fletcher, J.*) *In the goods of,* WILLIAM RENNIE. **18 I.C. 907 : 40 Cal. 74.**

——— **S. 77**—*Executor not appointed—Grant of letters only to be made.*

Where no executor is appointed under the will, only letters of administration with the will annexed can be granted. (*Kotval, A.J.C.*) RAM SINGH RAJPUT *v.* MURTIBAI. **1923 N. 41.**

——— **S. 78**—*Administration Bond—Breach of condition—Liability of executant.*

Where there is a technical breach of the terms of an administration bond executed in favour of a Court, the whole of the amount of the bond is not recoverable and only reasonable compensation can be awarded. (*Sanderson, C. J. and Richardson, J.*) CHANDRA MOHAN KARKAR *v.* SRIMATI ROHINI DASI. **64 I. C. 366.**

——— **S. 78**—*Security—Power to call for additional security—Revocation of probate.*

Under S. 78 of the Act the Probate Court is competent to require a new bond or additional security from the executors where the interests of the estate require it, especially where there is an increase of assets or the unexpected breakdown of the original surety or sureties. If the order of the Court calling upon the executor to furnish security is not complied with, probate may be revoked. (*Mookerjee and Walmsley, JJ.*) SURENDRA NATH PRAMANIK *v.* AMRITA LAL PAL CHAUDHURI **47 Cal. 115 : 29 C. L. J. 496 : 51 I. C. 936 : 23 C. W. N. 763.**

——— **S. 78**—*Assignment of administration bond.*

A District Judge cannot assign an administration bond under S. 78 again while the first assignment is still in force. (*Coxe and Imam, JJ.*) KALIMUDDIN *v.* MAHURIN. **39 Cal. 563 : 15 C. L. J. 332 : 13 I. C. 690 : 16 C. W. N. 662.**

——— **S. 78**—*Administration Bond—Court can demand fresh security.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 82.

There is no provision in the Pro. and Admn. Act as to what is to be done or what the Court can do in the event of the death of the surety or his discharge. The Court of probate is competent to require a new bond or additional security where the interests of the estate require it and especially where some new situation arises such as an unforeseen increase of assets or the unexpected breakdown or death of one or both the sureties. 29 C. 68; 47 C. 115 foll (*Abdul Raoof and Martineau, JJ.*) BHAGWAN DEVI *v.* BANKA MAL. **66 I. C. 367 . 2 P. W. R 1922.**

——— **S. 78**—*Liability of Hindu widow under Administration Bond.*

Where a Hindu widow obtained Letters of Administration to the estate of her deceased husband and executed the usual administration bond under S. 78, her liability under the bond is confined only to such acts of waste and mismanagement as could be attributed to her as administratrix and not to any such acts attributable to her as the widow in possession of her husband's estate under the Hindu Law after administration is over. (*Kumaraswami Sastri, J.*) RAMANATHAN CHETTY *v.* RAGAMMAL. **27 I. C. 849 : 17 M. L. T. 61.**

——— **S. 79**—*Assignment of Bond—Procedure.*

The assignment of bond under S. 79 of the Act could be effected only on a petition to the Court which could be satisfied of the breach of the conditions of the bond. The Court may impose any conditions as to security, etc. The assignment to be legal must be completed under the signature of the judge. The assignee cannot sue merely to recover his own costs, but must sue in a representative character as trustee of all interested in the estate to recover the full amount of wastage. (*Mc Coll, A.J. C.*) MISAMMI *v.* NAGA NYAN HLAING. **21 I. C 297 : (1913) 1 U. B. R. 174.**

——— **S. 82**—*Suit for share.*

Where letters were granted to the widow of the deceased and the present plaintiff had sued for a declaration of his right to one-fourth share as legatee, his present suit to recover one-fourth share of rent from a tenant is maintainable. (*Brett and Carnduff, JJ.*) RAJANI KANTA SARKAR *v.* MAKHAN LAL GOSWAMI. **15 I. C. 542.**

——— **S. 82**—*Executors, one of several—Taking out probate—Others precluded from acting—Subsequent grant of probate, effect of*

Per *Wallis, C. J.*, (*Seshagiri Aiyar, J. contra*) Where one of the two executors takes out probate, the others are precluded from dealing in any manner with the estate and the subsequent grant of probate cannot validate acts done by them in disobedience of express provisions of S. 82 of the Act. (*Wallis, C. J. and Seshagiri Aiyar, J.*) CHIDAMBARA MUDALIAR *v.* KRISHNASWAMI PILLAI. **39 Mad. 365 : 28 M. L. J. 285 : 28 I. C. 221 : 2 L. W. 241.**

——— **S. 82**—*Executor—Right to sue on behalf of the estate.*

Under S. 82 of the Prob. and Admn. Act and O. 31, R. 1, C. P. Code no one but an executor is

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 82.

competent to prosecute a suit as representative of the deceased. (*Sultan Ahmad, J.*) SAKLI *v.* RAM KISAN DAS. **55 I.C. 504: 2 U P.L.R. (Pat) 31.**

——Ss. 82 and 90—*Muhammadan Law—Alienation by heirs for debts.*

It is doubtful whether the alienation of the estate of a deceased Muhammadan by some of his heirs in possession of the estate, for discharging the debts of the deceased, will bind even the proportionate shares of the alienees when it is made in contravention of Ss. 82 and 90 of the Probate and Administration Act. The Administrator is the only person who, by his acts, could bind the shares of the other heirs. (*Fox, C.J. and Twomey, J.*) RAM DHAN *v.* SHARFUDDIN. **34 I. C. 128 . 9 Bur. L. T. 236.**

——S 83—*Contentious probate proceedings.*

Contentious probate proceedings must take the form of a suit. (*Scott, C.J.*) *Batchelor andDavar, JJ.*) KALYANCHAND LALCHAND *v.* SITABAI DHANASA. **38 Bom. 309 : 23 I. C. 325: 16 Bom. L. R. 5.**

——S. 83—*Letters of Administration—Probate—Question of title.*

Obiter.—On a *bona fide* application for Probate or Letters of Administration, the Court will not go into questions of title with reference to the property, of which the deceased purported to dispose, or in respect of which he died intestate. (*Chitty and Teunon, JJ.*) MADHUSUDAN *v.* JAGADINDRA NATH, **27 I. C. 24: 20 C. L. J. 307.**

——S. 83—"*Defendant.*"

The mere citing of a person in a probate application does not make him a defendant. Under S. 83 of the Act, the case must be contentious and the person cited must appear to oppose the grant before he becomes a defendant. (*Imam and Chapman, JJ.*) ABHOY CHARAN *v.* SAROJA SUNDARI. **24 I. C. 27: 41 Cal. 819.**

——S. 83—*Rules and Orders of the High Court, Ch. VI. Rr. 36-A. 42-A.—Probate proceeding, pleader's fee*—Ad valorem *fee—Valuation.*

A proceeding under the Act is a miscellaneous proceeding and pleader's fee is Rs. 80, under rule 42-A. Chapter VI of the Rules and Orders of the High Court. The valuation of the property cannot be reasonably regarded as the valuation of suit and Rule 36-A does not apply and there is no other rule authorising assessment of *ad valorem* pleader's fee. (*Coxe and Chatterjee, JJ.*) BAIJ NATH PROSAD SINGH *v.* SHAM SUNDAR KUER. **41 Cal. 637 : 22 I. C. 402 : 18 C. L. J. 643.**

——S. 83—*C. P. C., O. 9, R. 9.—Scope.*

O. 9, R. 9 is applicable to the dismissal of an application for probate (*Oldfield and Seshagiri Aiyar, JJ.*) VEERAMMA *v.* SUBBA RAO. **52 I. C. 639.**

——S. 83—*Costs—C. P. C., S. 34.*

If an application for probate is strongly opposed and the petitioner is put to very heavy and needless expense, the Court has ample power to award his costs. (*Coutts and Das, JJ.*) SADHO CHARAN SINGH *v.* GANGESWAR KOER. **57 I. C. 739.**

——S. 83—*C. P. C., O. 23, R. 3—Divisions of testator's property before will is proved—Objector's right to resile from compromise.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 86.

Parties cannot be permitted by the Court to divide the testator's property before the will is proved. A compromise in a probate case only makes the case non-contentious, but does not take away the Court's duty to grant or refuse probate. An objector in probate proceedings may, despite his agreement to compromise, subsequently require the question of the execution of the will to be tried. (*Mullick and Kingsford, JJ.*) JANAKBATI THAKURAIN *v.* GAJANAND THAKUR. **20 C. W. N. 986: 1 Pat. L. J. 377 : 37 I. C. 12 : 1 Pat. L. W. 41.**

——S. 83—*Decision of Probate Court—Title to property—Decision not* res judicata.

In proceedings under S. 83 of the Probate and Admn. Act the Court decides the question of representation to the estate and not of distribution and it is only for the purpose of determining the former question that the Court decides the right of a party to the whole or part of the estate Consequently the decision come to by the Court as to the right of a party to inherit does not operate as *res judicata* in a suit for administration or possession of the property belonging to the estate. 5 L.B R. 78: 1918 P.R. 63 foll: 48 Cal. 694 dist. (*Pratt and Duckworth, JJ.*) MG. TUN YIN *v.* MA SEIN YIN. **11 L. B. R. 331: 1 Bur. L. J. 59 : 1923 Rang. 9.**

——Ss. 83 and 86—*Order setting aside dismissal for default—Right of appeal.*

An order setting aside the dismissal for default of appearance of an application made under the Act, is not an order made under any power given by that Act within S. 86. It is a matter of procedure governed under S. 83; the C. P. C. does not give a right of appeal from an order setting aside a dismissal for default of appearance. (*Fox, C. J. and Parlett, J.*) NGWE HMON *v.* MA PO. **6 Bur. L. T. 87: 20 I. C. 281: 7 L.B.R. 24.**

——S. 86—*Orders under—Whether appealable.*

By virtue of S. 86 all orders under the Act made by a District Judge are appealable and the procedure provided by the C. P. C. for appeals applies to such appeals. (*Chatterjee and Beachcroft, JJ.*) SARAT CHANDRA *v.* BENODE KUMARI DASSI **33 I. C. 143: 20 C. W. N. 28.**

——S. 86—*Order refusing to issue probate as no succession duty was paid.*

An order refusing to issue probate till a sum of money not legitimately leviable is paid as succession duty refuses in effect the application for probate and is therefore appealable under S. 86 of the Act. (*Mookerjee and Newbould, JJ.*) SWARNAMOYI DEBI *v.* SECY. OF STATE. **43 Cal. 625 : 20 C. W. N. 472 : 30 I. C. 394: 22 C. L. J. 370.**

——S. 86—*Order disallowing caveator to oppose grant of appeal—Caveator*—Locus standi—*Revision.*

No appeal lies against an order refusing to allow a caveator to oppose the grant of probate of a will on the ground that he has no interest sufficient to enable him to appear in the probate proceedings. 21 C. 539: 18 C. L. J. 612, Foll. The High Court in this case, however, interfered under S. 115 of the C. P. Code and held that the

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 86.

will in the particular case seriously affected the interests of the caveator and that he had sufficient interest to oppose the grant and directed the will to be proved in solemn form in the presence of the caveator as in a contentions case. (*N. R Chatterji and Beachcroft, JJ.*) INDUBALA DASI *v.* PANCHUMANI DASI. **19 C. W. N. 1169: 28 I. C. 578: 21 C. L. J. 292.**

——S. 86—*Order refusing permission to oppose if appealable.*

An order refusing to allow a party to oppose an application for probate, on the ground that he has no *locus standi* is not appealable (*Chatterjee and Walmsley, JJ.*) PROSAD NARAYAN *v.* DUHIN GENDA KOER. **22 I. C. 276 : 18 C. L. J. 612.**

——S. 86—*Procedure—What to accompany memorandum of appeal*

S. 86 of the Act with Or. XLI, R. 1 and Or. XLIII, R. 2 of C. P. C. renders it necessary that the memorandum of appeal should be accompanied by a copy of the decree appealed from. Otherwise such appeal cannot be entertained. (*Maclean, C. J. and Bannerjee, J.*) HEM CHANDRA BAKHSHI *v.* JADUB CHANDRA BAKSHI. **17 I. C. 99 : 16 C. L. J. 116.**

——S. 86—*C P. C. S. 105—Appeal.*

There is no appeal from an order assigning an administration bond. (*Coxe and Imam JJ.*) KALIMUDDIN *v.* MAHURNI. **39 Cal. 563 : 15 C. L J 332 : 13 I. C. 690 : 16 C. W. N. 662.**

——S. 89—*Death of party—Suit for damages for malicious prosecution abates.*

The expression "personal injuries not causing the death of the party" in S. 89 of the Probate and Administration Act does not mean injury to the body merely, but all injuries which do not necessarily cause damage to the estate of the person wronged. 44 M. 357 foll 31 C. 993 not foll. Consequently a suit for damages for malicious prosecution abates on the death of the plaintiff. (*Macleod, C. J, and Crump, J.*) MOTILAL *v.* HARNARAYAN. **47 Bom. 716: 25 Bom. L. R. 435: 1923 Bom. 408.**

——S. 89—*Pre-emption—Right to continue suit.*

Semble:—An administrator is not entitled to continue suit for pre-emption launched by the deceased. (*Scott, C J. and Beaman, J.*) SITARAM BHAU RAO DESHMUKH *v.* SIRAJUAL KHAN. **41 Bom. 636: 42 I. C. 32: 19 Bom. L. R. 549.**

——S. 89—*Pre-emption, right of— Survival.*

Under S. 89 of the Probate and Administration Act, the right of pre-emption survives only to executors and administrators. (*Beaman and Hayward, JJ.*) JIAUL *v.* SITARAM. **36 Bom 144 : 12 I. C. 720: 13 Bom. L. R. 1040.**

——S. 89—*No applicability to Criminal Proceedings.*

S. 89 of the Act has no application whatever to a criminal proceeding and therefore criminal proceedings once legally instituted do not abate on the death of the complainant or the person injured (*Chevis and Scott-Smith, JJ.*) HAZARA SINGH *v* EMPEROR. **59 I. C. 918: 22 Cr. L. J. 166: 2 Lah. 27.**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 90.

——S. 89—*No applicability to criminal proceeding.*

A criminal prosecution under S. 323 of the Code does not abate by reason of the death of the person injured. The words "to prosecute any proceeding" in S. 89 of the Act do not refer to criminal prosecution but to civil actions only. 40 I. C. 1008 and 52 I. C. 797 dis. (*Ayling and Coutts Trotter, JJ.*) MAHOMED IBRAHIM SAHIB *v.* SHEIKH DAWOOD. **44 Mad. 417: 13 L. W. 379. 65 I.C. 549: (1921) M. W. N. 227 : 40 M. L. J. 351.**

——S. 89—'*Other personal injuries.*'

'Other personal injuries' in the section refers to bodily injuries andalso to injuries like defamation or malicious prosecution. Defamation may safely be included in the class of injuries not causing death. The section divides personal injuries into two classes those causing death and those not causing death. The two personal injuries named defamation and assault are given as illustrations of bodily injuries and of those which are not bodily injuries. Assault and defamation will fall among injuries that do not cause death; the cause of action for damages for such injuries will not survive under the section. (*Abdur Rahim, O. C. J. and Krishnan, J.*) GADIGI MARREAPPA *v* FIRM OF MARWADI YANNAJI VAJANJEE. **20 M. L. T. 303: (1916) 2 M. W. N. 280: 38 I. C. 823 : 31 M. L. J. 772.**

——S. 89—*Cause of action—Malicious prosecution—No survival.*

S. 89 of the Act excludes from its operation all causes of action in respect of personal injuries not causing the death of the party, *e.g.*, a suit for damages for malicious prosecution (*Coutts and Das, JJ.*) PUNJAB SINGH *v.* RAMANTAR SINGH. **4 Pat. L. J. 676: 52 I. C. 348 : 1920 Pat. 52.**

——Ss. 90 and 90-A—*Executor—Power of executor to settle claims—Right of legatee to question.*

Executors acting *bona fide* can settle claims in respect of testator's estate and the legatees cannot dispute that power. (*Richards, C. J. and Banerjee, J.*) HERBERT ARCHIBALD *v* DELHI AND LONDON BANK, LTD. **36 All. 217: 23 I. C. 143: 12 A. L. J. 274.**

——S. 90—*Executor— Power to sell estate without obtaining probate—Effect of grant of probate.*

Sec. 90 gives full power to an executor to sell immoveable property as if he were the owner even where the probate is granted. (*Martineau and Fawcett, JJ.*) SIR MAHOMAD YUSAF *v.* HAR GOVINDA JIVAN. **24 Bom. L R. 753 : 47 B. 231 : 1922 B. 392.**

——S. 90—*Powers of Hindu widow as executrix.*

A Hindu widow, who was appointed an executrix, would be entitled to sell as executrix the property left by her husband, if no restriction was imposed on her powers of disposing of the property by the will which appointed her executrix. (*Kanga, J.*) MITHIBAI *v.* MEHERBAI. **64 I. C. 397: 23 Bom. L. R. 858.**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 90.

——————S. 90—*Hindu widow—Permission to sell, powers of—Collateral attack—Permissibility—Grounds.*

There is no difference between the powers of an Administrator who happens also to be a Hindu widow and heiress of her husband and those of any other Administrator under the Act. 9 C. L. R. 449 Foll. The validity of an order by Dt. Judge granting leave to an Administrator to sell property cannot be challenged collaterally in Land Acquisition proceedings. 46 C. 70 (Cal.) Ref. (*Chitty and Panton, JJ.*) CHUNI LAL HALDAR *v.* SRIMATI MAKSHADA DEBI. **52 I. C 309: 23 C. W. N. 652:**

——————S. 90—*Sanction of Dt. Judge—Fraud and misrepresentation of executor—Purchaser aware of but not party to the fraud.*

Where the sanction of Dt. Judge to an alienation is tainted by fraud and misrepresentation of facts on an *ex parte* application, it is void and inoperative, and the purchasers are not entitled to maintain their purchases, though they were not parties to the fraud. (*N.-R. Chatterjee and Sheepshanks, JJ.*) MOHESH CHANDRA *v.* GOSAIN GANPAT GIR. **51 I. C. 884: 23 C. W. N. 401.**

——————S. 90—*Executorship—Continuance of, doubtful—Mortgage by executor.*

Where under a will, the continuance of executorship is doubtful, a *bona fide* mortgage by the executor assented to by legatees binds the estate. (*Chatterjee and Panton, JJ.*) RADHA LAKSHMI *v.* JOGESH CHANDRA ROY. **50 I. C. 479.**

——————S. 90—*Executor—Duty to account for profits received as trustees for co-sharers.*

The rendering of accounts under S 90 of the Act as executor only does not exonerate him from the liability to render accounts showing how he has dealt with the property of his co-sharers, of which he is in possession as trustee. (*Newbould and Panton, JJ.*) MAHOMED RENU *v.* SRIMATI SABIDA KHATUN. **29 C. L. J. 37 : 49 I. C. 128 : 23 C. W. N. 658.**

——————S. 90—*Power of Executor—Hindu Wills Act.*

Under the Act, an executor under a Will has a statutory position and the estate of the testator vests in him. His position is not like that of a guardian of a minor or a *Shebait* or a widow succeeding to her husband's estate, but he is the legal representative of the testator for all purposes. An executor is personally liable for the payment of debts borrowed by him, though he is entitled to be indemnified out of the estate for such borrowings, if he shows that it was reasonably and properly made. This rule is applied to executors under Hindu Wills Act by the Calcutta High Court. In a suit for recovery from the estate, of money so borrowed, evidence of mismanagement on the part of executors should not be shut out, as the estate cannot be rendered liable without deciding the question of the propriety or impropriety of the executor's conduct. Such a suit should be decreed in the first instance against the executors personally subject to their right of indemnity against the estate. In such a suit, the executors cannot fully represent the estate, as their personal interests as executors are

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 90.

opposed to those of the estate. In India a business left by an owner may vest in the executor who may pledge the estate to raise money necessary to carry on the business. (*Chitty and Beachcroft, JJ.*) SUDHIR CHANDRA *v.* KAMAL CHANDRA DUTTA. **45 Cal. 538 : 41 I. C. 503 : 21 C. W. N. 1043.**

——————S. 90—*Sanction to sell obtained by Hindu ladies in possession—Effect.*

If a Hindu lady pretending to be administratrix, makes alienation with the sanction of the Dt. Judge under S. 90, the alienation does not precisely operate as a sale by the order of the Court in Admn. Proceedings. (*Sanderson, C.J., Woodroffe and Mookerjee, JJ.*) KALI DASEE *v.* NOBOKUMARI DASSEE. **20 C. W. N. 929 : 36 I. C. 655 : 23 C. L. J. 606.**

——————S. 90—*Order for sale.*

An order of the District Judge under S. 90 permitting the Administrator to sell property is analogous to a decree and is therefore appealable. (*Chatterjee and Beachcroft, JJ.*) SARAT CHANDRA PAL *v.* BENODE KUMARI DASSI. **33 I. C. 143 : 20 C. W. N. 28.**

——————S. 90—*Administrators—Powers of—Erroneous appointment—Acts done under.*

Under S. 90 of the Act an Administrator can validly execute a mortgage of the immoveable property vested in him but he can do this only with the previous sanction of the Probate Court. This implies a sanction by the Court to all the essential elements of the mortgage transaction. However he cannot stipulate to pay a high and unreasonable rate of interest. The interest stipulated in this case was 30 per cent. compound interest and it was held unreasonable by the Court. A mortgage granted by an Administrator who was erroneously appointed as such to satisfy a debt of the estate which the executor himself was compellable to pay is binding on the estate. All acts done by an executor or administrator in the due and legal course of Administration are binding even though the Letters of Administration are afterwards revoked or the incumbent discharged from his trust. (*Mukerjee and Beachcroft, JJ.*) SAILAJA PROSAD CHATTERJEE *v.* JADU NATH BOSE. **19 C. W. N. 240 : 27 I. C. 715 : 21 C. L. J. 88.**

——————S. 90—*Administrator, alienation by without leave, voidable.*

An alienation by an Administrator without leave of the Court the leave being necessary under S. 90 of the Act is not void, but merely voidable and the person setting aside such alienation must give up the advantage, he might have derived from the alienation. (*Mookerjee and Teunon, JJ.*) GHULAB CHAND *v.* BAHURIA RAM MURAT KOER. **10 I. C. 268 : 13 C. L. J. 432.**

——————S. 90—*Executor—Rights and Liabilities—When becomes a trustee.*

An executor is not an express trustee merely by virtue of the office in the absence of any trust imposed on him by terms of the Will. Mere assent to a legacy does not convert an executor into a trustee unless he has separated the fund and kept it

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 90.

it apart. It does not transfer the liability from the estate of the deceased and fasten it on to that of the executor so as to make it a debt payable by the executor, or Administrator in the usual course of administration. As soon as an Administrator has performed the duties imposed on him by the Act the administration must be deemed to be at an end. Subsequent acts and possession are attributable to him not as Administrator but as heir. (*Kumaraswami Sastri, J.*) RAMANATHAM CHETTY *v.* RAGAMMAL.
27 I. C. 849 : 17 M. L. T. 61.

——— **S. 90**—*Executor—Power of sale.*

An executor has the power to sell the estate for the purposes of administration and a *bona fide* purchaser from such executor is protected. (*Sundara Aiyar and Sadasiva Iyer, JJ.*) GANAPATHI IYER *v.* SIVAMALAI. **36 Mad 575 : 12 M. L. T, 207 : (1912) M. W. N. 1112 : 17 I. C. 4 : 23 M. L. J. 306.**

——— **S. 90**—*Sale by Administrator who is also a co-heir without court's sanction—Quantity of estate transferred.*

A sale by an Administrator, who is also a co-heir, though not described as such in the sale deed, is valid and binding on the estate, unless the sale is avoided under Section 90 of the Probate and Administration Act of 1881 by any person interested, within the period prescribed by the law of limitation. (*Robinson, C J. and Macgregor J.*) A. L. A. R. FIRM *v.* MAUNG THWE. **1 Bur. L. J. 133 : 1923 R. 69.**

——— **S. 90**—*Executor—Mortgage in excess of power.*

Where a will directs the executor to sell the property of the testator to pay debts, that is a restriction on the exercise of the power to mortgage the property for the payment of the debt. If the property is mortgaged by the executor, the mortgage is voidable, at the instance of any one interested in the estate. Similarly the powers of an administrator are also limited. (*Twomey, C. J, and Ormond, J.*) ZAINAB BIBI *v.* M. A. L. CHETTY FIRM. **12 Bur. L. T. 109 : 51 I.C . 568 : 10 L. B. R. 1.**

——— **S. 90**—*Sanction to sell—Grant of.*

Permission to sell immoveable property ought not to be granted to the Administrator without the fullest enquiry into the necessity for such a course and only when debts and other charges on the estate cannot be paid without selling the property. (*Fox, C. J. and Bartlett, J.*) ABOO *v.* MOOLLA. **49 I. C 302 : 11 Bur. L. T. 155.**

——— **S. 90** — *Powers of Administrator — Limits of such power—Order of sale does not include power to mortgage.*

An Administrator cannot alienate without the permission of the Court, and he will be strictly bound by the terms thereof A power of sale does not enable an Administrator to mortgage. (*Fox, C J. and Twomey, J.*) RAM DHON DHOR *v.* SHARF-UD-DIN. **34 I. C. 128 : 9 Bur. L. T. 236.**

——— **S. 90 (3)**—*Disposal of property by administrator contrary to Act is voidable.*

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 92.

A disposal of property by an administrator in contravention of S. 90 (3) of the Prob and Admn. Act is only voidable and not void. (*Woodroffe and Ghose, JJ.*) JANENDRA NATH SINGH ROY *v.* SHORASHI CHARAN MITRA. **49 Cal 626 : 1922 Cal. 23.**

——— **S. 90 (4)**—*Heir obtaining Letters of Administration—Property vests as Administrator—Sale by Administrator without leave of Court, if voidable—Rights of* bona fide *purchaser for value.*

An heir of a deceased obtaining Letters of Administration, gets the estate vested in him as an Administrator and a sale by him as an administrator should be made with the leave of the Court and if not so made is liable to be set aside at the instance of a person interested in the estate, no exception being made in favour of a *bona fide* purchaser for value. A creditor of the estate of a deceased debtor is a "person interested in the property" within S. 90 (4) and is entitled to oppose an unauthorised act of the Administrator. (*Young, J*) MANE *v.* ON HNI. **22 I. C. 925 : 7 L. B. R. 93.**

——— **S. 92**—*Joint executors—Suit for rent by one.*

Where probate of a will was granted to two executors named therein and one of them sued for rent joining his co-executor as defendant, *Held* that there was no flaw in the frame of the suit. (*Newbould, J.*) SOUDAMINI *v.* TENIRAM **54. I. C. 755.**

——— **S. 92**—*Supercession of provisions.*

Where a will provided that there should be at least six executors acting at a time *held* that its provisions have not superseded the general rule that the powers of the several executors may be exercised by those executors who have proved the will. (*Mookerji and Panton, JJ.*) HEMANGINI DEBI *v.* SARAT SUNDARI. **50 I. C. 882 : 34 C. L. J. 457.**

——— **S. 92**—*'Several,' meaning of—Debt barred—Power to renew—Renewal by two out of three executors—Validity of.*

Under the law prior to the passing of the Prob. and Admn Act an executor was competent to renew a barred debt of the deceased testator and the Act has not superseded the previous law. In the absence of a direction to the contrary contained in the will appointing executors, two out of three executors are competent to act alone in the matter of such renewal. The word "several" in S. 92 of the Prob. and Admn. Act does not mean "possessing powers to act severally." (*Oldfield and Venkatasubba Rao, JJ.*) ALAMURI SITARAMASWAMI *v* VENKATA RAGHAVA CHARYULU. **42 M. L. J. 559 : (1922) M. W. N. 278 : 30 M. L. T. 344 (H. C) 16 L. W. 52 : 1922 Mad, 214.**

——— **S. 92**—*Executors two or more—Provision in will that majority of executors should act—Contract by some executors if binding on the estate.*

S. 92 has no application where a will overrides it and provides that it is only the opinion

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 92.

of the majority of the executors appointed under it that should bind the estate. (34 M. 406, F.) A contract in such a case entered into by some of the executors only without reference to the others will not bind the estate of the deceased testator. (*Wallis, C. J. and Seshagiri Aiyar, J.*) ERA DODDA BASAPPA *v.* RAMA REDDI.

29 I. C. 505.

——S. 92—*Co-executors—Compromise of claim of executor against estate—Validity of.*

An executor cannot compromise the claim of his co-executor against the estate. Where on a petition for the grant of probate to an additional executor, the Court accepted a compromise between him and the other executor, by which the latter agreed to renounce his executorship on the former executing in his favour a mortgage for his alleged dues from the estate which in fact were not due. *Held*, that the compromise could not be regarded as a *bona fide* one. The mere fact that the Court, without the facts being properly brought to its notice sanctioned the compromise, could not give it a higher validity than it possessed. (*Wallis, C J. and Seshagiri Aiyar, J.*) CHIDAMBARA *v.* KRISHNASWAMI.

39 Mad 365 : 28 I. C 221 : 2 L. W. 241 : 28 M. L. J 285.

——S. 97 (Chap. VII)—*Executor—Administration of estate—Duties of executor.*

The duties of an executor are to administer the estate of the deceased, only so far and so long as to enable him to carry out the terms of the will of which he is the executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will the executor as such has no authority to manage the estate on his behalf. 31 Cal 89 Foll. (*N. R. Chatterjee and Smither, JJ.*) SANKAR NATH MUKERJEA *v.* BIDDUTLATA DEBI.

48 I. C 295: 28 C. L. J. 271.

——S. 98—*Inventory—Essentials.*

A full and true statement of all property in possession is essential for an inventory. (*Lord Shaw.*) RAJKUMARI BHUBANESHWARI KUMAR *v.* COLLECTOR OF GAYA.

41 Cal. 556 : 40. I. A. 236 : 18 C. W. N. 153 : 19 C. L. J. 136 : 15 M. L. T. 87 : (1914) M. W. N. 13 : 21 I. C. 975 : 12 A L J. 69 : 16 Bom. L. R. 95 : 26 M. L. J. 56 (P. C.).

——S. 98—*Account—Executor, duty of.*

Though under a will the executors are not liable to render accounts, still the accounts of the estate must be exhibited to the Probate Court. (*Teunon and Newbould, JJ.*) PEARI LAL *v.* BEPIN BEHARI.

45 I. C. 336.

——S 98—*Civil Procedure Code, S. 150.*

S. 98 is clear and imposes on the grantee of the Probate the duty of furnishing the inventory to the Court which issued the Probate. S. 150, C.P.C. does not take away the jurisdiction of the Court which granted the probate. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) SUBRAMANIAN *v.* RAMASWAMI.

31. I. C. 499.

PROBATE AND ADMINISTRATION ACT (V OF 1881). S. 112.

——S. 98—*Account by Executors and Administrators.*

S. 98 of the Act requires one initial inventory and one final account and not yearly accounts. The Court is not bound to see to the correctness of the account if the requirements of S 98 are *prima facie* satisfied. The legatee has a right to inspect accounts and if that is denied to him he can file an administration suit, (*Pratt, J. C.*) HEMANDAS *v.* CHELLARAM.

32. I. C. 554 : 9 S. L. R. 134.

——S. 98 (1)—*Account, when to be filed.*

The Act contemplates submission of one inventory and one account. The account must be filed within one year from the grant of probate showing the assets that came into the executor's hands and the manner of their disposal. But the Court may extend the time on his application. (*Mookerjee and Buckland, JJ.*) CHANDRA *v.* PRASANNA,

25 C. W. N. 977 : 64 I. C. 997 : 33 C. L. J 451.

——S. 98 (1)—*Accounts—Order directing to Executor to furnish annual accounts.*

An order directing an executor to furnish accounts annually is not in accordance with S. 98 (1) of the Act (*Teunon and Newbould, JJ.*) JAGAT DURLAV MAZUMDAR *v.* INDU BHUSAN MAZUMDAR.

44 I. C. 58.

——S. 98 (1) and (3)—*Accounts by Executor—Court, powers of.*

S. 98 (3) of the Act does not compel the Court to require an executor or administrator to exhibit an inventory or account but S. 98 (1) imposes the duty of doing this on the executor or administrator and the Court may require him to do it if he does not, but that is a matter of discretion. (*Fox, C. J. and Twomey, J.*) MULA KASIM *v.* MULA ABDUL RAHIM.

9 Bur. L. T. 148 : 35 I. C. 950 : 8 L. B. R. 422.

——S. 104—*Decree against estate of deceased executor.*

S 104 does not preclude the holder of the decree against the estate of the deceased person from applying for the execution of such decree. The section merely lays down a rule of procedure as to the equal and rateable payment of all the debts of an estate. (*Fox and Hartnoll, JJ.*) MA MIN DUE *v.* SHUNMUGAM CHETTY.

5 Bur. L. T. 288: 18 I. C. 510 : 6 L B. R. 158.

——S. 112—*Interpretation of.*

The strict interpretation of S. 112 would lead to the absurd result of a suit by legatee being unsustainable unless the executor gives consent. (*Bedman, J.*) HASANAB *v.* POPATLAL.

37 Bom. 211 : 17 I. C. 17 : 14 Bom. L. R. 782.

Ss. 112 and 116—*Legacy—Vested interest—Assent of executor—Effect of.*

As a protection to the executor the law ordains that every legatee, whether general or specified and whether of chattels real or personal must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect; before such assent however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 120.

case of his death before it be paid or delivered. Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title it merely perfects the title acquired under the will and if the legacy is void the assent avails nothing. It cannot be said that till the executor has signified his assent express or implied, legatee has no interest whatever in the subject-matter of legacy. The assent of the executor has relation back to the time of the testator's death and confirm an intermediate alienation by the legatee of his legacy (*Mookerjee and Cuming, JJ.*) KHAGENDRA NATH MOOKERJEE *v.* KSHETRA NATH PAL. **50 Cal. 171 : 36 C. L. J. 21 : 1923 Cal. 21.**

——**S. 120**—*Legatee—Mesne profits—Interest.*

The legatee of a specific legacy is entitled to mesne profits from the date of the testator's death. But the executor though guilty of delay in accounting is not liable to pay interest on arrears of mesne profits. (*Abdur Rahim and Oldfield, JJ.*) GAWRI *v.* NARAYANA MUCHINTAYA. **23 M. L. T. 353 : 45 I. C 664 : 7 L W. 513.**

——**Ss. 130 and 134**—*Scope of—Moneys to be paid out of profits of land—Interest.*

Ss. 130 and 134 of the Act relate to interest on annuities or legacies payable by the executor, and cannot apply to a sum directed to be paid out of the profits of the immoveable property which a legatee was entitled to as part of the properties obtained by him under a will and devolved upon his heirs. (*Chatterjea and Duval, JJ.*) PANCHAGOPAL *v* KALIDAS. **54 I. C. 140**

——**Ss. 146 and 147**—*Administration suit—Two successive executors—Second executor, whether liable for his predecessor's accounts—Sale of property in order to pay off liabilities—Executor, whether liable for dereliction of duty—Appointing of debtor as executor, effect of—Costs.*

If an executor, on coming into possession of the estate of a testator finds it in a condition of considerable embarrassment and has to sell a portion of it in order to meet certain liabilities, his failure to raise money, on interest with a view to save the property from sale does not necessarily amount to a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale. Where a testator appoints two persons as successive executors of his will, the second executor as such is not liable for the accounts of his predecessor or for his wrongful acts but he must call upon the representatives of his predecessor to render an account and respond in damages for *devastavit*, mismanagement or breach of duty whereby any property of the deceased testator is diverted from a due course of administration. Where a debtor of a testator is appointed executor, the debt due from him is considered to have been paid to him by himself and he is accountable for the amount of his debt as assets Directions given by a testator in respect of marriage expenses of his grand children are valid in law. The costs of all Courts must be paid out of the estate, in a suit for the construction of a will and for administration of the estate of a

PROMISSORY NOTE—Alteration.

testator. (*Mookerjee and Beachcroft, JJ.*) UPENDRA NATH NAG *v.* BUPENDRA NATH NAG. **32 I. C. 267 : 21 C. W. N. 280.**

——**S. 147**—*Mortgage—Omission to sue.*

Where the executors under a will lent a sum out of the estate on the security of a mortgage, but did not take any steps to recover the mortgage money for six or seven years though they knew the embarrassed financial condition of the mortgagor, *held* that since they did not protect the interest of the *cestui que trust* they were liable personally for breach of trust. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) DUPATI SRINIVASACHARULU *v.* ANDOOR PERINDEVIAMMA. **33 I. C. 604.**

PROCEDURE.
See PRACTICE.

PROCEEDINGS.
See JUDICIAL PROCEEDINGS.

PROCESSUAL LAW.
See (1) C. P. CODE.
(2) INTERPRETATION OF STATUTES.

PROCLAMATION OF SALE.
See C. P. C., O. 21, Rr. 66 AND 90.

PROFESSIONAL ETIQUETTE ETHICS AND MISCONDUCT.
See LEGAL PRACTITIONER.

PROFITS A PRENDRE.
See (1) EASEMENTS.
(2) EASEMEMTS ACT.

PROJECTION.
See ENCROACHMENT.

PROMISSORY NOTE.
See also (1) NEGOTIABLE INSTRUMENT.
(2) NEGOTIABLE INSTRUMENTS ACT.

Alteration.
Assignment.
Consideration.
Construction.
Execution by Manager.
Executor.
Liability.
Stamp.
Miscellaneous.

Alteration.

——*Alteration—Effect of.*

A material alteration invalidates a whole note and this is so even when there is no alteration after the note came into existence, where the note was *ab initio* created with a forged signature. (*Sadasiva Aiyar, J.*) AMIRTHAM *v.* NANJA. **26 M. L. J. 257 : 15 M. L. T. 204 : 1 L. W. 243 : 23 I. C. 464 : (1914) M. W. N. 250.**

——*Alteration—Signature by executants at different places.*

Anybody who signs a joint and several pro-note beneath the signature of the original makers would also appear to be a maker and such signature is a material alteration rendering the pro-note void if made without the consent of the parties to the note at the time of such alteration unless

PROMISSORY NOTE—Assignment.

it was made in order to carry out the common intention of the parties. (*Partett, J.*) MA SEING *v.* CHIDAMBARAM. **9 I. C. 463 : 4 Bur. L. T. 19.**

Assignment.

——*Assignment—Payee dying leaving a widow—Joint family - Suit by surviving members.*

Where a payee of a promissory note belonging to a joint family dies leaving a widow, the surviving members cannot bring a suit on the note, if it was not taken for the benefit of the family. (*Sankaran Nair and Ayling, JJ.*) GOPALA IYENGAR *v.* VENKATAKRISHNA IYENGAR. **23 I C. 612 : 26 M. L. J. 224.**

——*Assignment—Endorsement.*

A pro-note was executed in favour of A, as agent of B. It was endorsed to plaintiff signed merely A. The plaintiff cannot sue unless it is shown that A was the beneficial owner of the pro-note. (*Sundara Aiyar and Ayling, JJ.*) VEERIAN *v.* PONNUSWAMI. **36 Mad. 362 : 10 M. L. T. 328 : 12 I. C. 421 : (1911) 2 M. W. N. 340 : 24 M. L. J. 509.**

——*Assignment—Endorsement with notice—Failure of consideration.*

Where a pro-note was endorsed to one who knew that the consideration for it had failed and the endorser had no title to negotiate, there is no cause of action on the note against the maker thereof. (*Benson and Abdur Rahim, JJ.*) MUTHIA *v.* SOMASUNDRA. **10 M. L. T. 79 : 12 I. C 78 : (1911) 2 M W. N. 47.**

——*Assignment—Modes of.*

A promissory note may be transferred in one of three ways, *viz.*,(1) by indorsement and delivery as a negotiable instrument under S 48 of the Neg. Ins. Act (2) by written assignment under S. 130 T. P. Act ; (3) by transfer under the general law (*i. e.*) by delivery for value, or assignment of value just as a mere chattel may be delivered. 16 C. W. N. 666 ; 24 M. 674 ; 28 M. 544 ; 31 M. 534 ; 9 M. L. T. 169 Rel 3 L. W. 171 not foll. (*Duckworth, J.*) PALAWAN *v.* KANU. **66 I. C. 501 : 11 L. B. R. 174.**

Consideration.

——*Consideration—Suit on.*

A suit on the original consideration of a promissory note is maintainable though a suit on the promissory note itself has been dismissed on the ground of material alteration. The causes of action in the two suits are distinct, (*Lord Moulton.*) SAMINATHAN CHETTY *v.* PALANIAPPA CHETTY. **41 I. A. 142 : 18 C. W. N. 617 : 26 I. C. 228 : 17 New. L. R. 56 : 33 L. J. P. C. 131 : (1914) A. C. 618. (P. C.)**

——*Consideration, failure of—Burden of proof.*

In a suit on a promissory note, if the defendant pleads want of consideration the onus lies upon him. Nevertheless, if as a result of the plaintiff's evidence in the witness-box the court is satisfied that no consideration passed, the defendant can avail himself of that and get a decree. (*Mears, C.J. and Banerjee, J.*) KUNWAR MUHAMMAD SHAFI KHAN *v.* KUNWAR MUHAMMAD MOAZZAM ALI KHAN. **4 U. P. L. R. 46 (A) : 1923 All. 214.**

PROMISSORY NOTE—Consideration.

——*Consideration—Presumption as to passing of.*

The presumption of law contained in the Negotiable Instruments Act that a promissory note was passed for consideration is not applicable to a criminal trial. (*Gokul Prasad, J.*) SAKHAWAT HAIDAR *v.* EMPEROR. **59 I. C. 198 : 22 Cr. L. J. 54 : 18 A. L. J. 1151.**

——*Consideration—Suit on.*

It is only where a promissory note is invalid owing to some inherent defect therein, that the party suing is entitled to fall back on an action for money had and received to his use. (*Lindsay, J.*) MUNDAR BIBI *v.* BAIJNATH PRASAD. **54 I. C. 424 : 18 A. L. J. 81.**

——*Consideration—Suit on.*

When a plaintiff relies solely on a hundi, as the basis of his claim, he cannot be allowed, in appeal, to fall back upon the original transaction. When the consideration for the execution of a *hundi* forms part of the transaction relating to its execution the person in whose favour it is executed has no cause of action independently of the *hundi*. (*Shah Din, Offg. C. J.*) BHAG BHARI *v.* GUJARMAL. **40 P. W. R. 1917 : 38 I. C. 623 : 63 P. R. 1917.**

——*Consideration—Joint promissors.*

A promissory note executed by more persons than one, is enforceable against all of them, if there was consideration for the instrument as a whole. It is not necessary that consideration should move to each executant. (*Kumarasami Sastri and Krishnan, JJ, Odgers, J. dissenting.*) RAMA PATTAR *v.* VISWANATHA PATTAR. **66 I. C. 155 : 41 M. L. J. 567.**

——*Consideration—Suit on — Plaint alternative claim in—Procedure.*

The holder of a promissory note executed for an existing liability can include in his plaint both claims in the alternative. If he sues on one cause of action and the right to sue thereon is not free from doubt, the Court should direct the plaint to be amended so as to convert it into a suit on both causes of action or treat it as amended and decide the case finally. If in such suit the promissory note is not returned to the deft he is entitled to be indemnified against possible future liability thereunder. (*Sadasiva Aiyar and Spencer, JJ.*) DUGGEMPUDI NAGAMMA *v.* TIRUMALA REDDI. **59 I. C. 363 : 12 L. W. 147.**

——*Consideration—Suit on—Decree where to be given.*

When a promissory note is executed for money borrowed at the time of the execution of the note itself, the creditor cannot bring two separate suits or put forward two separate causes of action in the same suit on two independent heads of claim, one based on the borrowing of the money and the other on the note itself. He has only one cause of action on which a suit can be brought. 38 M. 600 : 26 M. L J. 19 ; 33 M. L. J. 644 ; (1915) M. W. N. 217 ; 40 M. 727 Rel. 39 B. 261 (P. C.) Expl. (*Sadasiva Aiyar and Spencer, JJ.*) THANKAMMAL *v* KUNHAMMA. **53 I. C. 878 : 37 M. L. J. 369. See also 22 M. L. T. 391 : 6 L. W. 722 : 43 I. C. 760 : (1918) M. W. N. 110 : 33 M. L. J. 631.**

PROMISSORY NOTE—Consideration.

——*Consideration—Suit on.*

Even apart from the pro nissory note, the plff. had a cause of action on the settlement of account on which the note was based. The fact that there may be an unsettled account between the parties is insufficient to restrain a suit on that cause of action. (*Phillips and Krishnan, JJ.*) SUNKARA RATHA DOSS *v.* EPARI KOPILS. **49 I. C. 191.**

——*Consideration—Suit on.*

Where a promissory note is executed for an existing antecedent debt, a suit on the note, failing an action on the debt would lie as also in the case where the advance of money and the execution of the note are simultaneous, though in the latter case it may be open to the parties to show that the debt was intended to be merged in the note executed for it. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) SHANMUGANATHA CHETTIAR *v.* SRINIVASA AIYAR. **40 Mad. 727 : 4 L. W. 27 : 20 M. L. T. 172 : 35 I. C 219 : (1916) 2 M. W. N. 14 : 31 M. L. J. 138.**

——*Consideration—Suit on—Effect of on the original debt.*

A bill or a note constitutes only one debt though it may give rise to different remedies or causes of action. 26 I. C. 228 (P C.) Foll. If a bill or a note is given for a contemporaneous debt, the bill merely suspends a remedy and does not discharge the debt The executant of a promissory note does not cease to be definite merely because the word "Ull toor" is added to his name; whether such addition is binding on the members of his family or not, the maker does not cease to be personally liable. (*Coutts Trotter and Srinivasa Iyengar, JJ.*) CHOCKALINGAM *v.* ANNAMALAI. **34 I. C. 417.**

——*Consideration—Suit on—Maintainable.*

The dismissal of a suit on a promissory note does not bar a fresh suit on the original cause of action. (*Kumaraswami Sastri, J.*) NATESA MOOPPAN *v.* RAMACHANDRA AIYAR. **1 L. W. 1070 : 27 I. C. 116 : 27 M. L. J. 728.**

——*Consideration—Suit on—Pro-note, invalid for want of stamps.*

Where a promissory note was invalid for want of stamp, a suit can lie on the settlement of accounts and the oral agreement to pay, that preceded the note. 21 M L. J. 462 Dist. 26 M.L. J. 19 Foll. (*Seshagiri Aiyar. J.*) SAMINATHA PATHAN *v.* RADHA KRISHNA PATHAN. **23 I. C. 85 : 15 M. L. T. 243.**

——*Consideration, suit on.*

A promissory note, executed for a previous debt, is only a conditional satisfaction of the debt. If the note is endorsed to a third person no suit can lie on the original debt. (*Benson and Sundara Aiyar, JJ.*) SUBRAMANIAN CHETTY *v.* MUTHIAH CHETTY. **17 I. C. 721 : 35 Mad. 639.**

——*Consideration—Suit on.*

Where a document which cannot be used in evidence is executed to prove a complete pre-existing right, a suit may be maintained on the original right itself unless it is shown that it was entitled to merge the right in the document. But when the document is executed as the evidence and record of that obligation, a suit to enforce it can lie only on the document itself. (*Benson and Sundara Aiyar, JJ.*) KODALI MALLAYA *v.* TRIGOPALA RAMAYA. **10 M. L. T. 55 : 10 I. C. 177 : 21 M. L. J. 462.**

PROMISSORY NOTE—Construction.

——*Consideration—Suit on—Payment of debt by, conditional discharge.*

A bill of exchange or Hundi given for a debt, operates only as a conditional discharge of the debt. An endorsement on the pro-note on which the debt was due does not rebut the presumption of conditional discharge. (*Benson and Sundara Aiyar, JJ.*) PALANIAPPA CHETTY *v* ARUNACHALLAM. **(1911) 1 M. W N. 318 : 9 M. L. T. 482 : 10 I. C. 118 : 21 M. L. J. 432.**

——*Consideration—Suit on.*

If the handnote (original cause of action) is a forgery executed after adjusting accounts between the parties, and the claim on the stated account fails, plff. is entitled to ask for a decree based on the original consideration. (*Mullick and Sultan Ahmed, JJ.*) SURAJ LALL *v.* ANANT LAL **55 I. C. 556 : 1 Pat. L. T. 203.**

——*Consideration—Suit on.*

Where there was no intention on the part of both parties that the taking of the promissory notes was to be the absolute discharge of so much of the debt, and the notes fail and no third party is endangered, the creditor is entitled to fall back on the original consideration (*Robinson, C. J. and May Oung. J.*) DAWSON'S BANK, LTD. *v.* C. R. V. V. CHETTY FIRM. **1 Rang. 121 : 1923 R. 254.**

——*Consideration—Decree on.*

Where money is lent and at the same time a promissory note is given for the loan, the creditor can sue for the money due as on the original contract if the pro-note cannot be proved. (*Twomey, C. J., Ormond, Maung Kin and Pratt, JJ.*) MAUNG KYI *v.* MA MA GALE. **10 L. B R. 55 : 54 I.C. 84: 12 Bur.L. T. 137 (F. B.).**

——*Consideration—Forbearance to sue.*

Where a promissory note is executed by 5 persons in respect of old dues by only 3 of them, a forbearance by the creditor to sue those three for the old dues may be a sufficient consideration for the note so far as the others are concerned. (*Twomey, J.*) MG. KYA YEIT *v.* KARUPAN CHETTY. **11 I. C. 773 : 4 Bur. L. T. 156.**

——*Consideration—Suit on.*

When a pro note is admissible in evidence, the holder can sue on the original consideration and if the debt is admitted by the deft. the pro-note need not be proved. (*Pratt, J C. and Kemp, A. J. C.*) LOKUMAL *v.* THE SIND BANK, LTD., **57 I. C. 386 : 13 S. L. R. 169.**

Construction.

——*Construction.*

Where a note contains the words "I promise to pay on demand at my convenience" the words import a condition and therefore there is no unconditional undertaking to pay and the

PROMISSORY NOTE--Construction.

writing is not a pro-note. Supposing the writing to be an agreement the plff. must show that the deft was not able to pay or that it was convenient for the deft. to pay, otherwise the suit will fail. (*Kanga, J.*) NATHUBHAI *v.* HIMATLAL.
23 Bom. L. R. 1231.

——*Construction — Question of identity of payee.*

Where in a suit to recover money due on a promissory note, the defts. alleged that the note was not executed in plff.'s favour but in favour of a firm of the same name and was his father's property. *Held*, that the question was one of identity of the person to whom the note was given and the plff. could not succeed till the matter was settled, and that the defts. having satisfactorily proved that before the plff's father died, he sent for the defts. discharged their liability under the note, the note was discharged. (*Mookerjee and Fletcher, JJ.*) ABDUL HAKIM *v.* EBRAHIM SOLAIMAN SALEHJEE & CO.
62 I. C. 210 : 38 C. L. J. 132.

——*Construction—'On demand'.*

The expression 'on demand' is not only a technical one, meaning payable at once but denotes a condition precedent to the right to claim the whole amount 20 M 245: 21 M. 139: 22 M. 20; 36 M. 66 Rel. (*Seshagiri Aiyar, J.*) SEETHARAMAYYAR *v.* MUNUSAWMI MUDALIAR.
(1919) M W. N. 185 : 9 L. W. 427 : 50 I. C. 87 : 37 M. L. J. 613.

——*Construction—Chit.*

If a chit contains a promise to pay it is a promissory note if the transaction fall within the meaning of a promissory note under the Stamp Act. (*Coutts-Trotter and Srinivasa Iyengar, JJ.*) CHOKKALINGAM CHETTY *v.* ANNAMALAI CHETTY.
34 I. C. 417.

——*Construction.*

The question whether an instrument is a promissory note or not should be judged by the words used. A document promising to pay on demand a sum for the price of cloth, is a promissory note. (*Sundara Aiyar and Phillips, JJ.*) KANUTHAPPA *v.* BAOA MOIDEEN SAHIB.
36 Mad. 370 : 10 M. L. T. 531 : (1911) 2 M. W N. 380 : 12 I. C. 542 : 24 M. L. J 513.

——*Construction—Negotiability.*

An instrument may be a pro-note without being negotiable according to the mercantile usage (*Pratt, J. C. and Boyd, A J. C.*) RAM SINGH *v.* PARUMEL. **32 I. C. 582 : 9 S. L. R. 150.**

Execution by Manager.

——*Execution by manager—Liability of other members.*

Although the members of a joint Hindu family are not liable in suit on a promissory note signed by one of the members of the family as manager in his own name, they would be liable in a suit for the debt which was due under the note. (*Macleod, J.*) VITHAL RAO SESHAGIRI RAO *v.* VITHAL RAO SONDEKAR. **25 Bom. L. R. 151 : 1923 B. 244.**

PROMISSORY NOTE—Executor.

——*Execution by manager— Liability of other members.*

All the members of a joint Hindu family carrying on a joint trade are liable on a promissory note executed by the manager for a debt due by it to the promisee or assignee (Dissenting from (1912) M W N. 1011 and following F.B 23 Mad 597 and 28 I. C. 345) (*Coutts-Trotter, J.*) AYASAWMY PILLAI *v.* GURUSWAMI NAICKEN.
33 I. C. 691 : 3 L. W. 463

——*Execution by manager — Karnavan— Not signed as such—Liability of Tarwad.*

In a suit based on a promissory note executed by a deceased *Karnavan* but not signed by him as such, a decree cannot be passed against the Tarwad property. (*Wallis, C. J., Ayling and Seshagiri Aiyar, JJ.*) GOVINDAN NAIR *v* NANU MENON. **(1914) M W N. 782 : 26 I. C. 750 : 27 M. L. J. 595.**

——*Execution by manager— Trustee and administrator of an estate.*

It is settled law that, upon a contract of borrowing made by an executor after the death of the testator the executor is only liable personally and cannot be sued as an executor so as to get execution against the assets of the testator. L. R. 7 Ch. 123 Foll. 24 Cal 77 Dist. An exception to the above rule is recognised in case there is a necessity to borrow money for the purpose of the estate, 7 C W. N. 104 and 31 Cal. 253 Ref to (*Daniels A. J C.*) P. ANANTA RAM *v.* NATIONAL BANK OF UPPER INDIA, LTD.
9 O. L. J. 94 : 1922 Oudh 20.

Executor.

——*Executor—Personally liable—Charge on the estate.*

Where an executor executes a promissory note in his capacity as executor for purposes of the estate to which he is appointed executor, the creditor is not entitled to a decree charging the estate with the amount due under the note. The executor is personally liable on the note. 33 M L J. 259. Foll. (*Sadasiva Aiyar and Spencer, JJ.*) CHIDAMBARAM PILLAI *v.* VEERAPPA CHETTIAR
22 M. L. T. 380 : 6 L. W 640 : 43 I C. 865 : (1917) M. W. N. 744.

——*Executor—Trustee, executor or agent executing pro-note—Creditor's rights—Subrogation—Pleadings—Amendment.*

In a suit on a promissory note executed by an executor for a debt borrowed by him *bona fide* in due course of administration of the estate the creditor cannot have any direct claim against the testator's estate and cannot have anything higher than a claim to be subrogated to the right of the executor to retain or receive amounts from the estate necessary to indemnify the executor against loss. This claim to be subrogated is, however, of no value if the executor had no such right to retain or receive any amounts from the estate ; in other words, if it could be shown that the executor has to account to the estate for a sum not less than that in respect of which he has the right to be indemnified. Per *Sadasiva Aiyar, J.*— The Court could not allow the creditor in his suit on the note a right of subrogation to the

executors to indemnify against the estate, for he had not made the necessary allegations in his plaint (*Sadasiva Iyer and Kumaraswami Sastri, JJ.*) AMMALU AMMAL *v.* NAMAGIRI AMMAL.
22 M. L. T 391 : (1918) M. W N. 110 : 6 L. W 722 : 43 I. C. 760 : 33 M. L. J. 631.

Inadmissibility—Suit.

See STAMP ACT, S. 35.

Liability.

———*Liability—Non-disclosure of principal's name.*

Executant is personally liable where he did not disclose principal's name at or before execution of a pro note. (*Piggott and Kanhaiya Lal, JJ.*) NASILE ULLAH *v* ANANDA SINGH **57 I. C 45 : 18 A. L. J. 831 : 2 U. P. L. R. (A.) 304.**

———*Liability—Company.*

Execution of pro-note by a person within the scope of his authority entails the liability of company. (*Macleod, C. J. and Coyajee, J.*) POONA CHITRASHALA STEAM PRESS *v.* GAJANAN INDUSTRIAL AND TRADING CO.
24 Bom. L. R. 355 : 1923 B. 29.

———*Liability—Construction— Note payable on demand—Overdue.*

Where a note payable on demand is negotiated, it is not overdue, for affecting the holder with defects of title, of which he had no notice, though a reasonable time for preserting it for payment, has passed after it is issued. (*Mookerjee and Chaudhuri, JJ.*) D. N. SHAH & CO *v.* BENGAL NATIONAL BANK. **47 Cal. 861 : 60 I. C. 940 : 33 C. L. J. 541.**

———*Liability—Payee—Village community—Enforceability.*

An agreement to pay a sum of money to a village community can be enforced in a suit (*Krishnan, J.*) BUDAVARAM *v.* NOVLA IBBUNDRAM.
(1923) M. W. N. 237 : 44 M. L. J. 240 : 1923 M. 434.

———*Liability—Note by guardian of minor.*

When it was described in the body of the note that the executant of that promissory note was the guardian of a minor and it was stated that the necessity for borrowing the money was arising from the minor's father's debt. the minor was not held responsible for the promissory note and was not liable to pay the money. (*Oldfield and Sadasiva Aiyar, JJ.*) RAMASWAMI MUDALIAR *v.* MUTHUSWAMI AIYAR.
30 I. C. 481 (1).

———*Liability—Conditional execution.*

A person signing a promissory note on the condition that another should join in the execution and be made jointly liable, is not liable, if the latter does not so join. (*Sadasiva Aiyar, J.*) AMIRTHAM PILLAI *v.* NANJAH GOUNDAN.
15 M. L. T. 204 : (1914) M. W. N. 250 : 23 I. C. 464 : 1 L. W. 243 : 26 M. L J. 257.

———*Liability—Covenant—Breach.*

A, as B's agent took in the name of a third party, a negotiable promissory note from C. B's debtor for the sum due. On settlement of

accounts betwen A and B in May 1905 it was settled that A should deliver to B the said promissory note duly endorsed. A failed to carry out this covenant and B sued in Decembar 1906 to recover from A the amount of the note. At the settlement of issues A consented to hand over the note. As B was unable to sue on the original note by A's default to hand over the note in time it could not be said that B sustained no damage and the offer to perform the contract now could not affect B's right of action. B can recover from A the note debt. (*Benson and Sundara Aiyar, JJ.*) SUBRAMANIAN CHETTY *v.* MUTHIAN CHETTY.
17 I. C. 721 : 35 Mad. 639.

———*Liability — Extinguishment of—Execution of fresh promissory note.*

A promissory note executed by a number of persons is extinguished as against all the executants by the holder accepting in lieu thereof of a fresh note from some of the executants of the old note, and a suit cannot be brought on the discharged note against those of the executants who have not joined in the second note. The case of a mortgage might stand on a different footing 39 All. 178 ; 22 All. 307 : 33 Cal. 812 ; 39 Mad. 409 Dis. (*Pratt, J.*) C. P. R. P. CHETTY *v.* K. MALLAVA.
12 Bur. L. T. 65 : 51 I. C. 577 : 10 L. B R. 4.

———*Liability—Joint executants.*

When two Chetty firms sign joint and several promissory notes they are both jointly interested in the moneys borrowed. (*Hartnoll and Twomey, JJ.*) BANK OF RANGOON, LTD. *v.* SOMASUNDARAM CHETTY. **8 Bu . L. T 1 : 26 I. C. 253 : 8 L. B. R. 168.**

Stamp.

———*Stamp—Not properly cancelled—Other evidence of loan*

Where in a suit upon a promissory note the note is inadmissible because the stamp on it is ineffectually cancelled the plaintiff may rely upon other evidence regarding the loan. 23 Cal. 851 ; 24 Com. 360 ; 28 Bom. 432 ; 6 I. C. 126 Appr. 26 All. 178 ; 7 Cal. 256 Dist. (*Richards, C. J. and Bannerjee, J.*) RAM SARUP *v.* JASODA KUNWAR. **34 All 158 : 13 I. C. 138 : 9 A. L J. 72.**

——— *Stamp—Want of—Effect.*

Nothing can be recovered on an unstamped pro-note which is inadmissible in evidence and which was passed on the settlement of accounts between principal and agent as no obligation is completely created. (*Benson and Sundara Aiyar, JJ.*) SUBRAMANIA CHETTY *v.* MUTHIA CHETTY.
17 I. C. 721 : 35 Mad. 639.

———*Stamp—Insufficient—Execution admitted—Whether suit lies.*

A plff. having no cause of action apart from an insufficiently stamped pro-note cannot succeed at all, even though he does not sue on the note and the deft admits execution thereof. 2 L. B R 333 Relied upon. (*Twomey, J.*) BALLY SINGH *v.* BHUGWAN DASS KALWAR. **7 Bur. L T. 95 : 23 I. C. 975 : 7 L. B. R. 101.**

PROMISSORY NOTE—Miscellaneous.

Miscellaneous.

———*Filed with plaint Missing from Court's Records—Suit if fails.*

A plaintiff's suit on a promissory note cannot fail by reason of his inability to produce the original document before the Court owing to its having been stolen or mislaid from the Court's Records. (*Fletcher and Teunon, JJ.*) HAR PRASAD DASS *v.* BAKSHI BENDESWARI PROSAD SINGH.
31 I. C. 30 : 19 C. W. N. 860.

———*Limitation Act, Arts. 69 and 80.*

The period of limitation for bringing the suit on promissory note was governed by Art. 69 or 80, the starting point of the limitation being six months after the date of the note. (*Seshagiri Aiyar and Moore, JJ.*) PONNUSWAMI CHETTY *v.* THE VELLORE COMMERCIAL BANK, LTD.
27 M. L T. 81 : (1920) M W. N. 75 : 56 I. C. 384 : 11 L. W. 28 : 38 M L. J. 70.

———*Suit on — Head of Mutt, executing—Whether personally liable.*

The head of a Mutt is personally liable on promissory notes executed by him unless he has contracted himself out of such liability. *Edabitter* v. *Farrow*, 17 R. R. 345 F ll. (*Wallis, Offg. C J. and Seshagiri Aiyar, J J*) KASIVASI SOMASUNDARA THAMBIRAN *v.* VENKATANARAYANA PILLAY. **26 I. C. 356.**

———*Suit on—Failure of consideration, a plea—Specific consideration set up by plaintiff found false—Effect on suit—Onus.*

Where in a suit on a promissory note the defendant admits execution but pleads want of consideration and the plaintiff then sets up a specific consideration both of which is found false, there should be a decree for the plaintiff inasmuch as the onus, where execution is admitted, is on the defendant to prove his case which he has not discharged (*Sundara Aiyar, J., contra.*) Where the only consideration put forward by the plaintiffs for the suit, a pro-note is found to be false, no question of onus arises; an admission by a party in his evidence unretracted and adhered to by him is as much binding on him as one in the pleadings or as his statement in the negotiable instrument itself (*Abdur Rahim and Sundara Aiyar JJ.*) VENKATARAGHAVALU CHETTY *v.* SABHAPATHY CHETTY.
10 M L. T. 269 : (1911) 2 M W. N 253 : 12 I. C. 250 : 21 M. L. J. 1013.

———*Pledge of.*

A pro-note can be the subject of a pledge. (*Young, J.*) MAMSA BROS. *v.* SALLAYJEE.
46 I. C. 609.

PROOF.

See (1) EVIDENCE.
(2) EVIDENCE ACT.

PROPRIETARY RIGHTS.

See (1) LANDLORD AND TENANT.
(2) LAND TENURE.
(3) LOCAL ACTS.

PROPRIETORS OF VILLAGE.

See (1) COMMUNITY.
(2) CO SHARERS.
(3) LOCAL ACTS.

PROVIDENT INSURANCE SOCIETIES ACT (V OF 1912, S. 2.

PROSTITUTE.

See HINDU LAW.

PROVIDENT FUNDS ACT (IV OF 1897).

———*Rules regulating General Provident Fund, R 10—Assignment in favour of illegitimate child in presence of widow and daughters.*

Where a person assigned the whole of his Provident Fund in favour of an illegitimate son in the presence of the widow and two daughters; *held* that the assignment was *ultra vires* and that the Fund must be divided between the widow and the daughters in accordance with R. 10 (2). (*Rigg, J.*) VAZ *v.* MADDOX. **64 I C. 62 : 13 Bur. L. T. 212.**

———S 4—*Provincial Insolvency Act, Ss. 16, 43—Disposal of, by insolvent—Whether fraudulent transfer.*

Under S 4, the Receiver or the creditor has no right to the provident fund of the insolvent and his disposal of it is not fraudulent and punishable under the Provincial Insolvency Act. Sec. 43, (*Shah and Crump, JJ.*) NAGINDAS BHUKHANDAS *v.* GHELABHAI, **44 Bom. 673.**
56 I. C. 450 : 22 Bom. L. R 322.

———S. 4 (1)—*Attachment of funds—Illegal—C. P Code, S. 115.*

Under S. 4 (1) of the Provident Fund Act money in such fund is protected, from attachment by creditors even after the death of the subscriber. If a Court attaches such property, it amounts to an usurpation of authority and the High Court will interfere in revision under S. 115, C. P. C. (*Rankin J.*) HINDLEY *v.* JOY NARAIN MARWARI,
46 Cal. 962 : 54 I. C. 439 : 24 C. W. N. 288.

———S. 4—*Interest, claim to—Oral evidence.*

Where a pro note is inadmissible in evidence, oral evidence is not admissible under S. 91 of the Act to prove the terms of the contract for payment of interest and therefore claim for interest under the document cannot be maintained, but the Court may allow damages in lieu of interest. (*Mookerjee and Beachcroft, JJ.*) RAM BAHADUR *v.* DASURI RAM. **19 I. C. 840 : 17 C. L. J. 399.**

———*Rules under—Rule 10—Scope of.*

Money standing to the credit of a retired employee is attachable. (*Richardson and Ghose, JJ.*) RAJ KUMAR MUKHERJEE *v.* W. G. GODFREY.
1922 Cal. 196.

PROVIDENT INSURANCE SOCIETIES ACT (V of 1912.)

———Ss. 2 and 21—*Insurance Company—Registration under the Act, if necessary.*

An Insurance Society whether it is already a corporate company or whether its share-capital is divided into shares or not, registration under the Provident Insurance Societies Act is necessary, before business can be carried on under the conditions laid down in the Act 40 Cal. 570 Expl. (*Holmwood and Chapman, JJ.*) THE DY. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* SITAL CHANDRA PAL.
42 Cal. 300 : 16 Cr. L. J. 149 : 27 I. C. 213 : 18 C. W. N. 1182.

PROVINCIAL INSOLVENCY ACT (III OF 1907).

———*Applicability—Proceedings under Agra Tenancy Act.*

After decrees for arrears of rent had been obtained under the Agra Tenancy Act against some tenants, they were adjudicated insolvents The decree-holder then brought a suit with the permission of the Insolvency court for a declaration that certain transfers by the insolvent were invalid, as being merely sham and collusive transfers. *Held*, as the Provincial Insolvency Act did not apply to govern or affect rights under the Agra Tenancy Act, the suit did not lie. 43 All. 510 (F B.) Foll. Per *Walsh, J.*—A decree holder, who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies, is not a creditor under the Provincial Insolvency Act in respect of his rent or decree. His decree is not a provable debt. (*Piggott and Walsh, JJ.*) PARBATI *v.* RAJA SHYAM RIKH. **44 A. 296 : L. R 3 A. 73 (Rev.) : 20 A L.J. 147 : 1922 All. 74.**

———*"Proceedings" explained—The stranger to bankruptcy if can be made to pay.*

Per *Walsh, J.*—Wherever the word "proceedings" occurs in the Insolvency Act, a proceeding in a Court is intended. The Act does not provide for a court calling upon a stranger to bankruptcy to show cause why a certain sum, which may or may not be due from him should not be paid by him. (*Piggott and Walsh, JJ.*) CHEDA LAL *v.* LACHMAN PRASAD. **39 All. 267 : 37 I. C. 830 : 15 A. L. J 253.**

———*Petition filed before Act V of 1920—Procedure—Which act to govern.*

Where the insolvency petition was filed under Act III of 1907, shortly before the new Act came into force, it has to be proceeded with under the provisions of the old Act. (*Macleod, C. J. and Shah, J.*) THE LAXMI BANK, LTD *v.* RAMACHANDRA NARAYAN APTE. **46 Bom. 757 : 24 Bom. L. R 292 : 1922 Bom. 80.**

———*Unsuccessful claimant—Suit—Receiver.*

There is nothing in the Provincial Insolvency Act (1907) expressly or impliedly precluding an unsuccessful claimant from bringing a regular action to establish his title to properties seized by the Insolvency Court or the Receiver (*Shadi Lal, C. J. and Wilberforce, J.*) RAM PIYARA *v.* BHANA MAL. **2 Lah 147 : 61 I C 332 : 3 U. P. L R. (Lah) 40.**

———*Adjudication under earlier law—Subsequent proceedings—Whether governed by the new Act.*

Where a firm was declared insolvent before the Act of 1907 all subsequent proceedings could not be regarded as orders under the old enactment. The new Act will govern all such subsequent proceedings (*Rattigan, J.*) CHUNI LAL *v.* BEHARI LAL. **33 I. C. 995 : 21 P. W. R. 1916.**

———(V OF 1920).

———*Decree against debtor—Not-binding on Receiver.*

The Receiver in insolvency is not bound by a decree obtained against the judgment-debtor. There is always the possibility of its having been

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 2.

collusive between the parties when the judgment debtor would not have cared what the amount of the decree against him was. (*Walsh and Ryves, JJ.*) SHAHAMAT ALI *v.* RAHIM BUX. **L. R. 3 A. 436 : 1923 All. 33 (1).**

———*Fraudulent transfer by Insolvent—Inquiry—Procedure.*

An Insolvency Court has to administer the law under its own procedure and to decide questions covered by the provisions of the Act. But the Court has also to apply and to decide all questions of general law including such questions as are raised by S. 53 of the T. P. Act. Where a sale by an insolvent is impeached as one made with intent to defraud and delay creditors, a full inquiry should be made as to the *bona fides* of the transaction and the provisions of the C. P. C are applicable to such inquiry ; there ought to be sworn testimony and the same care used with regard to documents and the admission or rejection of documentary evidence, as in a suit. (*Walsh and Wallach, JJ.*) SHIKRI PRASAD *v.* AZIZ ALI. **19 A L.J. 862 : 63 I. C 601 : 3 U.P.L.R. (A) 195.**

———*Receiver, attachment of property by—Property if belongs to insolvent—Burden of proof.*

Where the Receiver attaches certain properties as belonging to the insolvent and the person in possession objects to it. the onus is on the Receiver to show that the properties are those of the insolvent. The question of the objector's exclusive possession is not one for determination by an Insolvency Court. (*Walsh and Ryves, JJ.*) KHAZANO *v.* BANWARI LAL. **63 I. C. 519 : 19 A. L. J. 497.**

———*Old and New Acts—Procedure.*

Where the Act of 1907 was in force when the petition in insolvency was presented but the adjudication order was passed after the Act of 1920 came into force, the procedure under the new Act will govern. But orders passed under the old Act or rights obtained thereunder are not affected by the new Act. (*Kumaraswamy Sastry, J.*) RANGIAH CHETTIAR *v.* ANNASAMY ALWAR AIYANGAR. **(1923) M. W. N. 840 : 18 L. W. 836 : 1924 Mad. 368.**

———**Ss 2 (1), (8), 56, 80 (1) (a)—(1907) 2 (1), (8), 18, 52 (1) (a)**—*Order of adjudication—Effect—Vesting of property.*

Where an Official Receiver makes an order of adjudication under S. 52 (1) (*a*) of the Act the insolvent's estate does not thereupon vest in him under S. 18 of the Act ; it only does so in pursuance of an order of the Court, and in exercising the delegated powers, the Official Receiver is not a Court within S. 2 (1), (8) of the Act. (*Oldfield and Seshagiri Iyer, JJ.*) MUTHUSAMI *v* SOMOO KANDIAR. **43 Mad. 869 : 12 L. W 262 : (1920) M. W. N. 537 : 59 I. C. 507 : 39 M.L.J. 438.**

———**S. 2 (b)**—*'Property' share in the joint family property—Suit for partition by Receiver of Insolvent's share will lie.*

The insolvent's undivided share in the property of the joint family of which he is a member is 'property' within the meaning of the Insolvency Act and therefore the Receiver can

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 2.

sue for partition of the share of insolvent. 3 C. 198 (P. C.) (*Daniels and Dalal, A. J. Cs*) LAL BAHADUR *v.* PASPAT PRASAD.
10 O.L.J. 31 : 9 O. & A.L.R. 173 : 26 O. C. 384 : 1923 Oudh 154

——— **Ss. 2 (d), 28, 56—(1907) 2 (e), 16 and 18.** —*Vesting of property—Father of joint Hindu family adjudicated insolvent—Son's share if vests in Official Receiver.*

If the father in a joint Mitakshara family is adjudicated an insolvent he has a right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes. The son's share in the joint family property is 'property' within the Insolvency Act and vests in the Receiver on the making of the order of adjudication. 7 Bom. 438 ; 19 Mad. 74 and 26 Mad. 214. Ref. The plaintiff need not establish, that the debts of the father had been incurred for legal necessity but the onus is upon the deft. to show that the debts had been incurred for immoral purposes. 15 P. R. 1918 Fol. 39 All. 437 (P. C.). Ref. (*Broadway and Abdul Raoof, JJ.*) HARMUKH RAI MUNNA LAL *v.* RADHA MOHAN. **54 I. C 931 : 158 P. R. 1919**

——— **Ss. 2 (d), 21—(1907) Ss. 2 and 13**—"*Property*"—*Undivided share—Receiver.*

An insolvent's undivided share in the joint family property is not "property" as defined in S. 2 in respect of which a receiver can be appointed. (*Lindsay, J. C.*) ANANT SINGH *v.* KALKA SINGH. **48 I. C. 526 : 5 O. L. J. 665.**

——— **S. 2 (d)**—*Property—Undivided interest of sons is*

Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes and such interest therefore is "property" within the meaning of S. 2 of the Prov. Ins. Act, and on the father being adjudged insolvent vests in the Receiver. 54 I C. 931 : 158 P. R. 1919 Foll. 39 A. 437 P.C. Cons. & Dis. (*Raymond, A. J. C.*) CHELLARAM *v.* OFFICIAL RECEIVER. **1923 S. 20.**

——— **Ss. 2 (1) (d) and 28**—"*Property*"—*Joint family property—If vests in Receiver.*

Definition of property under Prov. Ins. Act includes property over which a man has disposing power for his benefit. Joint family property does not vest in the Receiver on an order of adjudication against a Hindu father (*Das and Kulwant Sahay, JJ.*) SANT PRASAD SINGH *v.* SHEODUT SINGH. **2 Pat. 724 : 1924 P. 259.**

——— **Ss. 3, 75—(1907) Ss. 3, 46**—*Insolvency—Matter—Order of Subordinate Judge—Appeal to High Court does not lie.*

An appeal lies to the District Court and not to the High Court, from an order made by a court subordinate to the District Court in the exercise of insolvency jurisdiction although in respect of such suits they have concurrent jurisdiction. (*Chatterjea and Newbould, JJ.*) NIDHON MULLICK *v.* RAMANI MOHAN GOSWAMI. **63 I. C. 848.**

——— **S. 3**—*Power of Dt. Judge—Transfer to Sub-Judge.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 4.

Under S. 3 of Prov. Ins. Act a District Judge cannot transfer a petition for disposal to a Sub-Court which only can deal with creditor's petitions. (*Spencer and Deva Doss, JJ.*) PREMCHAND INDOJI *v.* SOLETI GOPALAPPA.
45 M.L. J. 689 : 18 L.W. 685 : (1923) M. W.N. 754 : 1924 M. 398.

——— **S. 3**—*Adjudication of father of Hindu joint family—Son's shares if vest in Official Receiver—Procedure.*

Where in a joint Hindu family consisting of a father and his minor sons, the father was adjudicated an insolvent and the sons object to the sale of the whole family properties by the Official Receiver on the ground that they are not liable to the debts of their father, it is the duty of the Official Receiver to decide, before he puts up the property for sale, the question whether the son is liable for the father's debts. Notification of the son's objections to the bidders at the sale is not sufficient and proper. 41 M. 985 Ref. (*Spencer and Venkatasubba Rao, JJ.*) PANJA RAMACHANDRA RAO *v.* GURRAJU. **18 L. W. 282 : 1924 M. 147.**

——— **S. 4**—*Attachment of property—Decision of Insolvency Court—Finality of.*

Where certain property is attached by the Receiver in an insolvency as the property of the Insolvent, and a person claiming that property prefers an objection which is adjudicated upon by the insolvency Court under S. 4 of the Act such decision is final and binding upon the parties and cannot be reagitated in a suit in a Civil Court. (*Banerji, J.*) BASRA BEGAM *v.* SHEO NARAIN. **1923 A. 293 (2).**

——— **Ss 4, 75 (2)**—*Fraudulent transfer by Insolvent before Insolvency—Inquiry—Decision—Appeal lies.*

A decision on a question whether an insolvent sold his property three years before his insolvency with intent to delay or defraud creditors is a decision on a question of title within S. 4 of the Act and is appealable under S. 75 (2) of the Act. (*Walsh and Wallach, JJ.*) SHIKRI PRASAD *v.* AZIZ ALI. **19 A. L. J 862: 63 I. C. 601 : 3 U. P. L. R. (A) 195.**

——— **S. 4**—*Regular suit, if lies.*

Prior to the passing of the Insolvency Act, 1920, a claimant whose petition has been dismissed could establish his right to the property attached by bringing a regular suit. (*Shadi Lal, C. J. and Wilberforce, J.*) RAM PIYARA *v.* BHANA MAL. **3 Lah L. J. 233.**

——— **S. 4**—*Question of title—Right to decide—When not to be exercised.*

Though an Insolvency Court can adjudicate on questions of title, still if such adjudication by the Court will not remove a person from the possession of property because the insolvent himself has not a present right to remove him it should be not decided upon by that Court. (*Spencer and Davadoss, JJ.*) THE OFFICIAL RECEIVER SOUTH ARCOT *v.* PERUMAL PILLAI. **18 L. W. 884 : 33 M. L. T. (H. C.) 230 : 1924 M. 387.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 4.

——Ss. 4, 5 and 56—*Insolvency court—Purchaser of insolvent's property from Official Receiver can apply for order for delivery of possession.*

Under Ss 4, 5 and 56 of the Provincial Insolvency Act (V of 1920) a purchaser from the Official Receiver has the right to apply to the Insolvency Court for an order for delivery of possession of the property purchased by him as against a third party who resists him in obtaining possession. Clause (3) of S. 56 of the Act is not limited to the case of an application by the Receiver. Difference between the powers of the Court under the old Act III of 1907 and under the new Act pointed out. (*Ayling and Venkatasubba Rao, JJ.*) S. R. M. S. T. R. M. RAMASWAMI CHETTIAR *v.* T. S. RAMASWAMI AIYANGAR.

45 Mad. 434 : 42 M. L. J. 185 : (1922) M. W. N. 110 : 15 L. W. 273 : 31 M. L. T. 86 : 1922 Mad. 147

——S. 4—*Court can decide claim of third parties.*

Under S. 4 of the Act a Court has full power to decide the merits of the claim of third parties. (*Macnair, A.J.C.*) GANGADHAR *v.* SRIDHAR.

61 I. C. 589.

——S. 4 (1)—*Decision on question of title—Powers of insolvency court—Taking of evidence.*

Though the insolvency court has power under S. 4, Sub-S. (1) of the Provincial Insolvency Act to decide a question of title, it has also full discretion to follow the course laid down in S. 4, sub-S (3) (*i e*) to refuse to decide questions of title and to direct the sale of the insolvent's right, title and interest whatever that might be. It is enough of the court if it is satisfied on the report of the Receiver and of the answers given by the Insolvent that the debtor had some saleable interest in the property. (*Chatterjea and Cholzner, JJ.*) JITENDRA NATH BHATTACHARJEE *v.* FATEH SINGH NAHOR. **72 I. C. 320 : 26 C. W. N. 921.**

——S. 4 (2)—*Claim by strangers to property can be gone into by Civil Courts.*

Under the new Act if a question of title has been actually raised by a stranger to the insolvency and decided by the Insolvency Court the decision is final, and the question cannot be reopened in a separate regular suit. This however does not mean that exclusive jurisdiction has been conferred on the Insolvency Court, and that the only remedy open to the aggrieved stranger is to apply to that Court. Where a person has been made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as amounting to a decision within the meaning of sub-clause (2) of S. 4, he is at perfect liberty to have recourse to the ordinary Civil Courts. (*Lindsay and Sulaiman, JJ.*) MAHRANA *v.* DAVID.

21 A.L.J. 737 : L.R. 4 A. (Civ.) 483 : 46 A. 16 : 1924 A. 140.

——S. 4 (2) and (3)—*Attachment of stranger's property—Remedy of person—Question of title—Decision of Insolvency Court—Procedure.*

If the Receiver in an insolvency wrongly attaches a stranger's property as the insolvent's, the stranger may appeal to the Insolvency Court against the act of the Receiver or he may sue him in a Civil Court as a trespasser. If he elects the former course, he cannot afterwards turn round and litigate the matter afresh in a Civil Court; and under S. 4 (2) of the Pro. Ins. Act, a decision on a question of title by the Insolvency Court is final and binding as between the person asserting it and the insolvent's estate. If the Insolvency Court finds that serious and difficult questions of mortgage and other securities arise over the debtor's property which it does not deem expedient or necessary to decide itself, but prefers to leave to the contending creditors to fight out in an ordinary Civil Court, it may, if it has reason to believe that notwithstanding such securities the debtor has an interest, forth with direct the sale of such interest which would not affect the right of the contending creditors; and if it decides to exercise its jurisdiction under S. 4 (3), it ought to make it clear beyond question that it is doing so and the reason for the course it is taking. In deciding any question of title the claimant must be heard on the merits however weak his title may appear to be. (*Walsh and Ryves, JJ.*) MISRI LAL *v.* KANHAIYA LAL SHARMA. **L. R. 3 A. 285 : 1922 A. 128.**

——S. 4 (3)—*Question of title—Sale of the insolvent's property.*

An Insolvency Court has, no doubt, under S. 4 (3) full powers to decide a question of title but the court when it does not deem it necessary or expedient to decide any question of the nature referred to in sub-section (1) but has reason to believe that the debtor has a saleable interest in any property may, without further inquiry, sell such interest in such manner and subject to such conditions as it may think fit (*Chatterjee and Cholzner, JJ.*) JITENDRA NATH BHATTACHARJEE *v.* FATEH SINGH NAHAR. **26 C. W. N. 921 : 1924 C. 533.**

——S. 5—*Insolvency appeal—Powers of Court.*

S. 5 of the Act gives a District Judge when sitting as an appellate Court the same powers under the C. P. Code as he would have had, if he had been sitting to hear any ordinary appeal. (*Piggott and Walsh, JJ.*) MUNNU LAL *v.* KUNJU BEHARI LAL. **44 All. 605 : 4 U. P. L. R. (A.) 66 : L. R. 3 A. 295 : 20 A. L. J. 517 : 1922 A. 206.**

——Ss. 5, 47—*C. P. C., O. 21 R. 71—Scope of Sec. 47 Applicability of O. 21, R. 71.*

As regards the Court's powers and duties in connection with sale of property, the operation of S. 47 of the Insolvency Act, in connection with the Receiver's sale of the insolvent's property is not the same as the operation of O. 21 of the C. P. C. which deals with the execution of civil court decrees; and so R. 71, O. 21 of C.P.C. cannot be invoked by the Receiver for realising a loss sustained by the failure of the highest bidder at the auction sale of the insolvent's property to deposit one fourth of the purchase money. (*Piggott and Walsh, JJ.*) CHEDA LAL *v.* LACHMAN PARSHAD.

39 All. 267 : 37 I. C. 830 : 15 A. L. J. 253.

——S. 5—(1907) S. 47—*Attachment—Procedure.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 5.

Sec 47 lays down no procedure for effecting an attachment; so the Court must follow the same procedure as it would do in the exercise of its original civil jurisdiction. (*Ryves and Piggott, JJ.*) HASHMAT BIBI *v.* BHAGWAN DAS.
36 All. 65 : 24 I. C. 752 : 12 A. L. J. 24.

——— **S. 5—(1907) S. 47**—*Scope of.*

The powers referred to under S. 47 are powers to be exercised in proceedings which the Insolvency Court has power to entertain under other provisions of the Act. 7 I. C. 765 Foll. (*Richardson and Walmsley, JJ.*) NILMONY *v.* DURGA CHARAN. **46 I. C. 377.**

——— **S. 5—(1907) S. 47**—*C. P. C., Sch. II.*

A court cannot refer to arbitrators, a proceeding in Insolvency as Sch. II of the C. P. C. does not apply to proceedings under the Pro. Insolvency Act (1907). 88 P. R. 1887, Ref. (*Rattigan, J.*) LADHA SINGH *v.* BHAG SINGH.
50 P. R 1916 : 135 P. W. R. 1916 : 34 I. C 549 : 151 P. L. R. 1916.

——— **S. 5—(1907) S. 47**—*Limitation—Extension of time*

Section 5 of the Limitation Act (1908), can be applied to cases under the Pro. Insol. Act. (*Chevis, J.*) RAM KISHEN *v.* UMRAO BIBI
33 I. C. 730 : 80 P. W. R. 1916.

——— **S. 5**—*Insolvency Court can review its own order.*

Under S. 5 an Insolvency Court has the same powers and follows the same procedure as in the exercise of its civil jurisdiction and hence it has power to review its own order. (*Spencer and Venkatasubba Rao, JJ.*) OFFICIAL RECEIVER, TANJORE *v.* NATARAJA SASTRIGAL. **46 Mad. 405 : 44 M. L. J. 251 : (1923) M. W. N. 212 : 1923 Mad. 355.**

——— **S. 5—(1907) S. 47**—*Dt. Court, power of, to stay sale in the Sub-Court.*

The Dt. Judge has no jurisdiction to stay a sale proceeding in the Sub Court, either under S. 47 or S. 151, C. P Code. (*Sadasiva Aiyar and Moore, JJ.*) BASHYAM REDDI *v.* SOMASUNDARAM CHETTI.
32 I. C. 897 : 3 L. W. 250.

——— **S. 5—(1907) S 47 (2)**—*Vesting order—When abuse of process.*

A vesting order of a property to which the insolvent had only a very doubtful claim, would amount to an abuse of the process of the Court, but not so if the insolvent had a strong '*prima facie*' claim to the property, and the Court is not debarred from holding an inquiry as to such claims. (*Macnair, A. J. C.*) GANGADHAR *v.* SHRIDHAR. **61 I. C. 589.**

——— **S. 5—(1907) S. 47**—*C. P. C., O 39, R. 1—Injunction—Insolvency Court, when can issue.*

The insolvency Court cannot stay every pending litigation but can only issue an injunction, if circumstances enumerated in O. 39, R. 1, C. P. C are proved to exist. Since a Court cannot under O. 39, R. 1. issue an injunction upon a person not a party before it, the Insolvency Court also cannot issue an injunction against a person not a party before it. (*Mullick and Thornhill, JJ.*) RAM SUNDAR RAI *v.* RAM DHEYAN **3 Pat L. J. 456: 5 Pat. L. W. 250 : 46 I. C. 224 : (1918) Pat. 303.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 6.

——— **S. 5—(1907) S. 46**—*Leave to appeal—Order dismissing petition for fraud, etc.—When lies.*

No appeal lies from an order of dismissal of an insolvency petition made on the ground of fraud, etc., except with the leave of the District Court or the High Court. (*Fox, C J. and Hortnoll, J.*) RAMANATHAN PILLAI *v.* M. L. V E. R. M. FIRM.
7 Bur. L. T 53 : 24 I C. 438 : 7 L. B R. 257.

——— **S. 5 (1)—(1907) S. 47 (1)**—*C. P. C. S. 21—Applicability of.*

Section 21, C.P C., is not applicable to proceedings under the Pro Ins. Act by virtue of S. 47 (1) of the Act (1907, Objection to the jurisdiction of the Insolvency Court can be taken on appeal. (*Mookerjee and Beachcroft, JJ.*) MADHO PRASAD *v.* A. N. WALTON **20 I. C. 370 : 18 C. W. N. 1050.**

——— **Ss. 6, 25—(1907) Ss. 4 and 5 (1)**—*Adjudication, refusal of—Grounds.*

A Judge cannot dismiss a debtor's petition for insolvency saying that he is not satisfied that the debtor is unable to pay his debts. (*Jenkins C. J. and Coxe, J.*) KALI KUMAR DAS *v.* GOPI KRISHNA ROY. **12 I. C. 48 : 15 C. W. N. 990.**

——— **S 6—(1907) S 4**—*Single application against members of Hindu family—If will lie.*

A single application for adjudication may be filed against the members of a joint Hindu family if those members have been guilty of a joint act of fraudulent preference subject to the rule that if the application were to be treated as a suit it should not be bad for multifariousness. (*Sadasiva Aiyar and Napier, JJ.*) BOLISETTI MAMAYYA *v.* KOLLA KOTTAYYA. **44 Mad 810 : 29 M. L. T 288 : (1921) M W. N. 330 : 63 I. C. 916 : 14 L. W. 428 : 40 M.L.J. 570.**

——— **Ss. 6, 12—(1907), Ss 4, 6**—*Creditor's petition—Release by debtor anterior to debt—Petition does not lie*

Where a deed of release was executed by the debtor before the debt was incurred, the creditor is not entitled to present a petition for the adjudication of his debtor on the ground of the release deed being an act of insolvency. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) MUTHIA CHETTY *v.* LAKSHMINARSA CHETTY. **61 I. C. 756 : 13 L. W 141.**

——— **Ss. 6, 25—(1907) Ss. 4 and 15**—"*Unable to pay debts*", *Meaning of—Application if maintainable—Abuse of process of the Court.*

Under the Provincial Insolvency Act a debtor cannot be declared an insolvent merely because he has actually on hand an amount less than his debts on the ground that he has to realise his assets from others. Use of Bankruptcy law for a purpose foreign to its object *e.g.*) ask the Court to realise debtor's share of family property from a brother refusing to give it is an abuse of the process and cannot be granted. Where an application amounts to an abuse of the process of the

PROVINCIAL INSOLVENCY ACT (V OF 1920). S. 6.

Court it will not be granted. (*Benson and Sundara Aiyar, JJ.*) PONNUSAWMY CHETTY *v.* NARAYANASWAMI CHETTY. **14 M. L. T. 305 : 21 I. C. 293 : 25 M. L. J. 545.**

——S. 6 (a)—(1907) S. 4 (a)—*Third person.*

The words "third person" do not exclude conveyance to some of the creditors as trustees for the whole body of creditors. (*Sadasiva Aiyar and Moore, JJ.*) OFFICIAL RECEIVER OF TRICHINOPOLY *v.* SOMASUNDARAM CHETTIAR **34 I. C. 602 : 30 M. L. J. 415.**

——Ss. 6 (a), 28—(1907) Ss. 4 (a), 16—*Assignment to trustee.*

An assignment to trustees for the benefit of creditors operates as a revocable mandate to the assignees. No trust is created until at least some of the creditors have assented to the deed; before such assent the assignees are in the position of trustees *de son tort* and if the debtor is adjudicated insolvent before assent, the assets vest in the hands of the Official Receiver. Until all the conditions of the trust deed are fulfilled, remuneration should not be recovered by the trustee. (*Pratt, J. C. and Crouch, A. J. C.*) HASSOMAL *v.* KOTUMAL. **19 I. C. 443 : 6 S. L R. 183.**

——S. 6 (b)—(1907) S. 4 (b)—*Transfer of property—Collusive suit—Withdrawal.*

A collusive suit and subsequent withdrawal from or compromising of the same with the express object of putting another party in possession of immoveable property amounts to a transfer of property by an insolvent within the meaning of S. 4 (*b*). (*Richards, C. J. and Piggott, J.*) PURAN NATH SADHEK *v.* ATWARGIR. **29 I. C. 217 : 13 A. L. J. 434.**

——Ss. 6 (b), 27—(1907) Ss. 4 (b) and 16—*Transfer with intent to deprive creditors—Firm—Partner—Adjudication.*

A transfer of property with intent to delay or defeat creditors is an act of insolvency. A notice suspending payment of debts by one of the partners of a firm cannot be used for the purpose of getting an order of adjudication against the firm but the only conclusion is that they were made with intent to defeat or delay the creditors. (*Fletcher and Duval, JJ.*) DEBENDRA CHANDRA SARKAR *v.* PURUSOTTAM DAS. **55 I. C. 186.**

——Ss. 6 (b) 75—(1907) Ss. 4 (b) and 46 (1)—*Revision by Chief Court—Question of fact—Question whether transfer was made with intent to defeat or delay creditors.*

The Chief Court will not interfere under S. 46 (1) with an order, made by the Dt. Court in appeal unless some questions of law has been wrongly decided. 16 A. 476 ; 27 A. 192; 21 B. 250 Ref. The question whether a person transferred his property withintent to defeat or delay his creditors under S. 4 (b) of the Insolvency Act, is one of fact. 20 C. 93 ; 21 A. 496 : 19 C. 253 ; 81 P.R. 1908 Dist. 36 M. 453. Ref. (*Johnstone, C. J. and Scott-Smith, J.*) HAR PRASAD *v.* BHAGAT SINGH. **102 P. R. 1916 : 36 I. C. 594 : 85 P. L. R. 1917.**

——S. 6 (b)—(1907) S. 4 (b)—*Makes a transfer—Nominal or sham deed.*

PROVINCIAL INSOLVENCY ACT (V OF 1920). S. 7.

A nominal or *benami* deed of sale executed with intent to defraud creditors is an act of bankruptcy within the meaning of S. 4 (b) but a sham transfer not intended to be effective for any purpose and not affecting any right or property does not fall within the section. (*Ayling and Krishnan, JJ.*) SECRETARY OF STATE *v.* DADI REDDI NAGIAH. **25 M. L T. 12 : 9 L. W. 22 : 50 I. C. 593 : 36 M. L. J. 180.**

——S. 6 (b), (d) and (e)—(1907) S. 4 (b), (d) and (e)—*Act of Insolvency.*

If the property of debtor is only put up for sale but not actually sold that does not amount to an act of insolvency. Mere departure of the debtor from his dwelling house does not amount to an act of insolvency. His intention in departing must be considered. (*Fawcett, J. C.*) APPLICATION BY DHOLAM DAS, *In the matter of.* **56 I C. 158 : 13 S. L. R. 187.**

——S. 6 (e)—(1907) S. 4—"*Act of an agent is that of the principal*" *for constituting acts of bankruptcy.*

For the purposes of committing acts of insolvency the act of an agent may be act of the principal in India though English Law requires an act of bankruptcy to be a personal act or default. Departure of an agent from place of business becomes an act of insolvency of the principal. 2 C. W. N. 306 Foll. (*Spencer and Phillips, JJ.*) KALIANJI SINGJI BHAI *v.* BANK OF MADRAS. **39 Mad. 693 : 3 L. W. 13 : 31 I. C. 583 : (1916) 1 M W. N 12 : 29 M. L. J. 788.**

——S. 7—(1907) S. 5—*Member of joint Hindu family.*

Members of joint Hindu family desirous of getting declared insolvent, must apply separately. (*Chatterjee and Panton, JJ.*) KALICHARAN SHAH *v.* HARI MOHAN BASAK. **31 C. L J. 206 : 58 I. C. 531 : 24 C. W. N. 461.**

——Ss. 7, 10 and 69—(1907) Ss. 5 and 6—*Application for adjudication by debtor—Bad faith—Dismissa of application.*

Order of adjudication follows as a matter of course when the essentials under the Act are satisfied. Whether the debtor has committed acts of bad faith is to be determined at the time of discharge and not at the time of adjudication. (*Chatterjee and Panton, JJ.*) MOHIRUDDIN SARKAR *v.* SECRETARY NADAL GRAMYA RINDAN SAMITI. **57 I C. 977.**

——Ss. 7 and 27 (1)—*Petition for adjudication—Alienations of debtor cannot be cancelled.*

In a petition for adjudication of a debtor the Court has no power to cancel alienations of the debtor, as coming under S. 6 (*b*) of the Act. It is the Receiver who is empowered to take action for the cancellation under S. 53 of the Act. (*Ayling, O. C. J. and Odgers, J.*) GONTU APPIREDDI *v.* GONTU CHINNA APPIREDDI. **14 L. W. 639 : (1921) M. W. N. 816: 66 I.C. 271 : 41 M. L. J. 606.**

——Ss, 7 and 11—(1907) Ss. 5 and 6 (2)—"*Reside,*" *meaning of—Jurisdiction.*

The applicant in an insolvency case before the District Judge of Lucknow was found at the time to be residing at Lucknow with his relative but

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 7.

had, sometimes, previous to his application, been residing in the Central Provinces. *Held*, that the District Judge of Lucknow was wrong in refusing to entertain the application. (*Lindsay, J. C.*) VICTOR HT. *v* MUHAMMAD GUL KHAN.
39 I. C. 453 : 4 O. L. J. 106.

——— **S. 7—(1907) S. 5**—*Minor—Petition to adjudge.*

A minor cannot be declared a bankrupt or made party to a petition in insolvency. (*Lindsay, J. C.*) JANAKI PRASAD *v.* GIRDHARI LAL.
19 I. C. 704 : 16 O. C. 68.

——— **S. 7—(1907) S. 5**—*Dismissal for default—Res-judicata.*

A dismissal for default of an application for adjudication is no bar to a fresh application on the same facts. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD BHAGAT *v.* MAHADEB LALL.
61 I. C. 870 : 2 Pat L. T. 335.

——— **S. 7—(1907) S. 5**—*Heir of deceased debtor—Fraudulent alienation—Petition to adjudge heir—If maintainable.*

The petitioner and the person sought to be adjudicated insolvent must be in the position of a creditor and debtor and therefore a creditor of the deceased cannot adjudge the heir an insolvent. (*Crouch, A J. C.*) *In the matter of* AN APPLICATION BY SHIVAJI DHAMJI. **25 I.C. 930 : 8 S. L. R. 93.**

——— **S. 9—(1907) S. 6 (4) (c)**—*Presentation of petition in wrong court—No extension of time.*

The time during which an insolvency petition was pending in a Court not having jurisdiction cannot be deducted under section 6 of the Pro. Ins. Act. (*Oldfield and Tyabji, JJ.*) TRASI DEVA RAO *v.* PARAMESHARAYA. **39 Mad. 74 : 27 I. C. 144 : 29 M. L. J. 451.**

——— **S. 9 (1)—(1907) S. 6 (4) (c)**—*Application—Limitation—Limitation Act—Applicability.*

Where an application was presented first to one Court which had no jurisdiction to try it and then to the proper Court but by that time it was more than 3 months from the commission of the act of insolvency. *Held* that under S. 6 (4) (c) of the Insolvency Act of 1907, the application was barred and to such application under that Act, neither S. 5 nor S. 14 of the Limitation Act had application. Per *Spencer, J.*—The provisions contained in S. 6 (4) (c) of the Act is quite independent of the statute of limitation and is absolute. (*Spencer and Venkatasubba Rao, JJ.*) AIYAPURAJU *v.* VEERA VENKAT KRISHNAYYA.
44 M. L. J. 303 : (1923) M W. N. 195 : 18 L. W. 35 : 1923 M. 462.

——— **S. 9 (b)**—*"Debt due"—Meaning of.*

S. 9 prescribes the conditions which entitle the creditor to present a petition against a debtor. In these are included that there must be a debt due to the creditor aggregating not less than Rs. 500. (*Pratt and Duckworth, JJ.*) A.K.R. C. T CHETTY FIRM *v.* MAUNG AUNG BWIN. **68 I. C. 885 : 11 L. B. R. 354.**

——— **S. 9 (1) (b)—(1907) S. 6 (4) (b)**—*Debt—Liquidated sum—Rights in respect of mutual contract.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 10.

Where there are contracts of sale and of purchase between two merchants the practice is to set off the first transaction out of an excess of sales against the equivalent in purchase or *vice versa*. The difference between the contract rates does give an ascertained sum due in such cases by one party to the other. The difference is a liquidated sum. (*Fawcett, J. C.*) APPLICATION BY DHOLAN DAS, *In the matter of.* **56 I. C. 158 : 13 S. L. R. 187.**

——— **Ss. 10, 25 and 27—(1907) Ss. 6 (3) 15 and 16 (1)**—*Application for adjudication of debtor—Inquiry.*

Where a debtor's petition alleges facts entitling him to present his petition under S. 6 (3), the Court is bound after enquiry to come to a decision as the matters spoken of in S. 15 and to dismiss the petition under that section or to make an order of adjudication under S. 16 (1). (*Bannerjee and Piggott, JJ.*) LAKSHMI NARAIN *v.* KRISHNA LAL. **40 All. 665 : 46 I. C. 733 : 16 A L. J. 703.**

——— **Ss. 10, 25 and 5—(1907) Ss. 6 (3), 15 and 47**—*Adjudication—Power of Court—Order refusing adjudication—Petitioner able to pay his own debts—Cheating creditors—Irregularity—Revision.*

Where a debtor who fulfils either of the conditions laid down in S 6 (3) of the Prov. Ins Act presents a petition to be adjudged insolvent the Court cannot dismiss the petition on the ground that the debtor will be able to pay his debts and that the application was really made to defraud his creditors, (*Broadway, J.*) MEHR SINGH *v.* DAYANAND COLLEGE, LAHORE. **27 P. R. 1918 : 49 P. W. R. 1918 : 44 I. C 850 : 116 P.L R. 1918.**

——— **S. 10**—*Debtor—Right to present insolvency petition—Liability to pay debts—Proof of.*

Where a debtor applies to be adjudicated an insolvent on the ground that he is unable to pay his debt he need furnish only such proof as is sufficient to satisfy the Court that there are *prima facie* grounds for believing his allegation. (*Oldfield and Venkatasubba Rao, JJ.*) LAKSHMINARAYANA AIYAR *v.* SUBRAMANIA AIYAR.
45 M. L. J. 129 : (1923) M. W. N. 328 : 1923 Mad. 585.

——— **S. 10—(1907) S. 6 (3) (a)**—*Person jointly and severally liable for Rs. 500—It can apply.*

A person jointly and severally liable along with others for Rs. 500 or over under a decree against them all, is entitled to file an insolvency petition under S. 6 (3) (*a*) of the Act. (*Stanyon, A J. C.*) GANGARAM *v.* RAMACHANDRA. **20 I. C. 258 : 9 N. L. R. 91.**

——— **Ss 10, 25 and 27—(1907) S. 6 (3), 15 (1) and 16**—*Adjudication—Abuse of the process of Court—Fraud.*

The words for any sufficient cause, in S. 15 (1) are governed by words 'satisfied by the debtor' therein and the Court cannot refuse adjudication if the debtor is entitled to present his insolvency petition under S. 6 (3) unless such petition appears to be an abuse of the process of the Court. But nothing short of obvious fraud on the part of the debtor would make his position an

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 10.

abuse of the process of the court. (*Fox, Hartnoll, Parlett and Robinson, JJ.*) TUNYA *v.* SUBBAYA PILLAY. **5 Bur. L. T. 277 : 18 I. C 500 : 6 L. B. R. 146 (F. B.)**

——**Ss. 10, 25—(1907) Ss 6 (3) and 15**—*Sufficient cause.*

Quaere --In opposing a petition for adjudication by the debtor can the creditor allege and prove bad faith or misconduct or can he only show that the debtor has not proved his righ to petition under S 6 (3) (*Twomey and Parlett, JJ*) SUBBAYA PILLAI *v.* ABDUL RASHID. **9 I. C. 462 : 4 Bur. L. T. 18.**

——**S. 10—(1907) S. 6 (3) (a) and (b)**—*Application by debtor.*

The right of a debtor arrested in execution of a decree to present a petition of insolvency arises not under S. 6 (3) (*a*) but under S. 6 3) (*b*). (*Pratt, J. C.*) VITTALDAS KALIDAS, *In the matter of.* **9 I. C. 632.**

——**S. 10 (1)**—*Applicant bound to establish a* prima facie *case.*

A debtor is not entitled to be adjudged an insolvent without establishing to the satisfaction of the Court that the conditions specified in S. 10 (1) of the Insolvency Act has been fulfilled. The Court has to investigate and can only investigate such matter on such materials as are placed before the Court by the party making the application for adjudication of insolvency. (*Das and Adami, JJ.*) GOSHAIN GOVIND PRASAD GIR *v.* KISHAN LALL DHOKRI. **1924 P. 166.**

——**S. 10 (1) (a)**—*Rent decree is a 'debt.'*

Under S. 10 (1) (*a*), a decree of the Rent Court is a 'debt.' (*Piggott and Walsh, JJ.*) MUNNA SINGH *v.* KUMAR DIG BIJOY SINGH. **3 U. P. L. R. (All.) 144 : 60 I. C. 758 : 19 A. L. J. 273.**

——**S. 11—(1907), S. 6 (2)**—*Jurisdiction—Ordinary Residence--Insolvency petition—Forum.*

A petition by a creditor to adjudge his debtor insolvent, is not entertainable by a District Court within whose jurisdiction the debtor does not ordinarily reside or personally works for gain within S. 6 (2) of the Act. Mere temporary residence with a relative does not give jurisdiction. (*Mookerjee and Beachcroft, JJ.*) MADHO PRASAD *v.* A. N. WALTON. **20 I. C. 370 : 18 C. W. N. 1050.**

——**S. 11—(1907) S. 6 (2)**—*Jurisdiction of Court—Residence.*

A temporary residence of a petitioner for insolvency for a time and for a particular purpose within the jurisdiction of the Court will give the Court jurisdiction to deal with an application for insolvency (*Mookerjee and Teunon, JJ.*) ABDUL RAZAK *v.* BASIRUDDIN AHMED. **17 C. W. N. 405 : 14 I. C 980 : 15 C. L. J. 457**

——**S. 11—(1907) S. 6 (2)**—*Jurisdiction—Applicant, servant in one district and having a holding in another.*

A Court can entertain insolvency petition of a person working as a domestic servant within its jurisdiction though he has got property beyond its jurisdiction. (*Lindsay, J. C.*) KISHAN *v.* RAJ BAHADUR. **25 I. C. 41.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 13.

——**S. 11—(1907) S. 6 (2)**—*Jurisdiction—Insolvency—Insolvency debtor arrested or imprisoned—"Or", Construction of.*

A debtor arrested or imprisoned in execution of a decree has a right to present an insolvency petition to the Court having jurisdiction either in the local area where he is in custody or where he resides or carries on business. The word 'or' in S 6 of Prov. Insol. Act gives the debtor an alternative choice. It does not restrict the debtor to present his insolvency petition only to the Court within whose jurisdiction he is in custody. (*Crouch and Hayward, A. J. Cs.*) GHANSHAYAM DAS *v.* KISHENDEVI. **15 I. C. 830 : 5 S. L. R. 259.**

——**Ss 12, 24—(1907) Ss. 6 and 14**—*Act of Insolvency—Proof of—Statement of insolvent.*

The statement by a debtor in answer to an application by a creditor to have the debtor declared insolvent which shows that he has committed an act of Insolvency is ample proof thereof and of the right of the creditor to file the application. (*Tudball and Rafique, JJ.*) CHAINI RAM *v* HANNU. **18 I. C. 729.**

——**Ss. 13—(1907) S. 11 (1)**--*No difference between new and old Acts—Disposal of property—Effect.*

As to what has to be proved before it could be decided that a petitioner has a right to present his petition, there is no material difference between the old and the new Acts Under S. 11 (1) of the old Act the debtor has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation by the opposing creditor, the Court is satisfied that the statement is not correct, it can dismiss the petition. But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the court is not justified in holding that he is able to pay his debts, but should admit his petition, so that the interests of the creditors may be benefited by the special powers given to the Court while administering an insolvent's estates. (*Macleod C. J. and Shah, J.*) THE LAKSHMI BANK, LTD. *v.* RAMACHANDRA NARAYANA APTE. **24 Bom L. R. 292 : 46 Bom. 757 : 1922 B. 80.**

——**Ss 13 (1) (d), 25 (1907) Ss. 11 (d), 15.**—*Application to be declared insolvent—Unreal debts—Mention of--in schedule of—Liabilities—Effect.*

An application of an insolvent in fact cannot be dismissed merely because of the mention by him of some bogus debts in his schedule The insolvent can be suitably dealt with by the District Judge under the Act if the insolvent is guilty of any act of bad faith in drawing up his schedule. (*Chamier and Piggott, JJ.*) MUMI LAL *v.* BHAGWAN DAS. **26 I.C. 24.**

——**S 13 (1) (d) (e)—(1907) Ss 11 (d) (e), 15 (1)**—*Adjudication—Misstatement of amounts due—Value of property, etc.—Effect.*

The fact that an insolvent has misstated the amount and particulars of all the pecuniary claims against him and has not given a true account of the value and particulars of all his property in his petition does not disentitle him to

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 14.

an order of adjudication. (*Mookerjee and Beachcroft, JJ.*) KARIM BAKSH *v* MANABIR BARIA. **19 I, C 685.**

——— S. 14 – (1907) S. 7.

A petition for insolvency cannot be withdrawn after an order of adjudication has been made (*Pratt, J C.*) MESSRS. FLEMING SHAW & Co., *In the matter of.* **35 I. C. 539 : 10 S L.R. 47.**

——— S. 17 —Ex parte *decree — Deposit of amount mentioned in decree erroneously.*

Where a notice of an application for execution of an *ex parte* decree wrongly omitted the costs and the judgment-debtor deposited under S. 17 the amount mentioned in the notice and deposited the cost later on, *held* that the provisions of S. 17 of the Act were sufficiently complied with 28 A. 470, Dist. (*Banerji, J.*) LUCHI LAL *v.* MEWA RAM. **14 I. C. 242.**

——— Ss. 17, 33—(1907) Ss. 10 and 24 (3)—*Rights of representatives.*

Where the proceeding in insolvency are continued after the death of the insolvent in the name of his representatives, the Court must permit him to be present and cross-examine the creditors in respect of their claims according to S. 24 (3) read with S. 5 of the Act. (*Teunon and Chowdhuri, JJ.*) SRIPAT SINGH *v.* BODYAT KUMAR. **57 I. C. 810 : 48 Cal. 87.**

——— S. 17—(1907) S. 10—*Death of insolvent Legal representative need not be brought on record.*

The legal representative of the insolvent need not be brought on record in his place when a person who has been adjudicated as an insolvent dies. (*Scott-Smith, J.*) FAKIR MUHAMMAD *v.* AMIR CHAND. **66 I, C. 893 : 3 Lah. L. J. 5.**

——— Ss. 17, 5—(1907) Ss. 10, 47—*Death of debtor—Abatement of proceedings.*

Insolvency proceedings do not abate on the death of the debtor, and the Court can bring on record the names of the personal legal representatives of the deceased insolvent (*Abdul Raoof, J.*) RAM JAS *v.* KATHA SINGH, **9 P. L. R. 1921 : 59 I. C. 51 (1) : 14 P. W. R. 1921.**

——— Ss. 17, 28—(1907) Ss. 10 and 16—*Death of insolvent—Effect of.*

The death of an insolvent does not affect the power of the Official Receiver to distribute the assets of the insolvent vested in him by an order of adjudication. (*Pratt, J.C.*) IBRAHIM LALJI, *In re.* **9 I. C. 633.**

——— S. 18—*Receiver —Creditor cannot be appointed.*

A creditor of an insolvent cannot be appointed as Receiver for the purpose of realising the insolvent's property and paying the money into the Court. (*Walsh and Stuart, JJ.*) CHANDI PARSHAD *v.* JAGGU KUNBI. **L. R. 3 A. 85.**

——— Ss. 19 (1), (3), 75 (3)—(1907) Ss. 12 (1), 46 (3)—*Notice.*

There is nothing in S. 12 (3) of the Act to warrant the contention that notice is not necessary to other creditors in a petition by one creditor to adjudge his debtor insolvent and an appeal

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 21.

against an order of adjudication passed on the petition of one creditor will be under S. 46 (3) to the High Court at the instance of another creditor if the Court declined to add him as a party. (*Oldfield and Tyabji, JJ.*) MUTHUKARUPPAN CHETTIAR *v.* MUTHURAMAN CHETTIAR. **1 L. W. 1012 : 26 I. C. 282 : (1914) M. W. N. 899.**

——— S.19 (2)—(1907) S. 12 (2)—*Private notice.*

An order of adjudication passed after private notice to all the creditors (without a general notice as required by law) is of no avail and should be set aside. (*Sadasiva Aiyar and Moore, JJ.*) NACHIAPPA CHETTY *v.* THANGAVELU CHETTY. **34 I. C. 696 : 3 L. W. 495.**

——— S. 20—Interim *Receiver—When to be appointed.*

An *ad interim* receiver should ordinarily be appointed in cases where the property of the insolvent has to be preserved from destruction or disappearance. (*Sadasiva Aiyar and Moore, JJ.*) BASHYAM REDDI *v.* SOMASUNDARAM CHETTY. **32 I. C. 897 : 3 L. W. 250.**

——— S. 20—(1907) S. 15—*Insolvency proceedings—Petition intended to be abuse of the process of Court—Finding necessary for rejection.*

For rejecting a petition in insolvency on the ground that it was merely an attempt at getting the estate of the debtors managed by the Court and was thus an abuse of the process of the Court, there must be distinct finding that on the evidence before the Court the assets exceeded the liabilities and that the debtors are in a position to pay up their debts from out of their assets. (*Sadasiva Aiyar and Spencer, JJ.*) KOPPURAVURU SUBBARAYADU *v.* GUNTUR C. J. AND P. Co. **14 M.L T. 587: 22 I. C. 276 : (1914) M. W. N. 153.**

——— S. 21—(1907) S. 13—*Petition by debtor—Insufficiency of evidence—Inability to pay debts—Dismissal.*

A petition by a debtor to be declared insolvent should not be dismissed simply because he is unable to satisfy the Court that he is unable to pay his debts. 7 I.C. 39 ; 7 I. C. 394 ; 12 I. C 48 Foll. (*Karamat Hussain and Tudball, JJ.*) BIDHATA DIN *v.* JAGANNATH. **14 I. C. 570 : 9 A. L. J. 699.**

——— S. 21 (2)—(1907) S. 13 (2)—*Jurisdiction of Court under—Receiver, appointment of.*

An order appointing an *ad interim* Receiver and vesting the properties of the insolvent in him while sale proceedings were going on in execution is illegal. The jurisdiction given to the Insolvency Court under S. 13, cl (2) should ordinarily be exercised only in cases where the property of an insolvent alleged to be absconding has to be preserved from destruction or disappearance and not in order to vest in the *ad interim* Receiver the properties attached by the other courts in execution. (*Sadasiva Aiyar and Moore, JJ.*) BASHYAM REDDI *v.* SOMASUNDARAM CHETTY. **32 I. C. 897 : 3 L.W. 250.**

——— S. 21 (3)—(1907) S. 13 (3)—*Attachment under S. 13 (3)—Objection—Duty of Court—Whether alleged owner bound to wait for appeal under S. 22.*

PROV. INSOL. ACT (V OF 1920), S. 22.

A Court is bound to investigate an objection of an alleged owner of the property attached, under S. 13 (3). An attachment under S. 13 (3) is analogous to an attachment before judgment under C.P.C., O. 38, Rr. 5—12. It is open to an objector of the attachment under S. 13 (3), to wait and appeal under S. 22 but he is not bound to do so and can question the order of attachment itself. (*Ryves and Piggott, JJ.*) HASHMAT BIBI *v.* BHAGWAN DAS. **24 I. C. 752 : 36 All. 65 : 12 A. L. J. 24.**

——— **Ss. 22, 69—(1907) S. 43**—*Receiver not an aggrieved party.*

Receiver of an insolvent's estate is not an aggrieved party and cannot appeal against an order refusing to take action under S. 43 of the Act. His position is that of representative of the creditors. (*Bannerjee, J.*) BHAGWANT KISHORE *v.* SANWAL DAS. **61 I. C. 802 : 19 A.L.J. 701.**

——— **Ss. 22, 69 and 75—(1907) Ss. 43, 46**—*Order refusing application by a creditor to take action against the insolvent—Neither appealable nor subject to revision.*

An application by a creditor to the Dt. Court for taking action against the insolvent (the respondent) under S. 43 of the Insolvency Act was rejected by the Court and the order of rejection was appealed to the High Court: *Held*, that an order refusing an application by a creditor to take action under S. 43 of the Act against the insolvent is neither appealable nor subject to revision because : (*a*) the application is not one which the Insolvency Act entitles a creditor to make and the applicant is therefore not a person "aggrieved" by the order refusing the application within the meaning of S. 46 and the order is not one under S. 43 (2) which makes the provision only for an order sentencing the debtor. 40 Mad. 630; 39 All. 171 Ref. (*Martineau, J.*) GUJAR SHAH *v.* BARKAT ALI SHAH. **61 P.W.R. 1921.**

——— **Ss. 22. 69--(1907) Ss. 43**—*Provident fund—Disposal of, by insolvent, whether fraudulent.*

The disposal of the Provident fund by insolvent is not fraudulent and punishable under S. 43 of Pro. Insolvency Act. (*Shah and Crump, JJ.*) NAGANDAS *v.* GHELABHAI. **44 Bom. 678 : 22 Bom. L. R. 322 : 56 I. C. 450.**

——— **S. 24— (1907) S. 14 (2), (3), (4)**—*No observance of proper procedure—Order of adjudication whether valid.*

An order of adjudication passed without conforming to the procedure laid down in S. 14, sub-sections (2), (3), (4) is inoperative. (*Shahdin, J.*) RALA MAL *v.* JAFAR ALI. **22 P. W. R. 1916 : 33 I. C. 1008.**

——— **S. 24—(1907)—S. 14**—*Power of Court under.*

Under S. 14 a court is bound to do only two things. It must satisfy itself on the points (*a*), (*b*) and (*c*) in Sub-S. (1) and it must examine the debtor in the presence of the creditors and allow the latter to cross examine the debtor. The court need not inquire whether all the debts entered in the schedule are real or fictitious or whether the debtor has concealed his properties by omitting

PROV. INSOL. ACT (V OF 1920), S. 25.

them from his schedule. Under S. 14 the court can grant time for the production of evidence. The court has power in rare cases to take evidence on and determine other points than those indicated. Such power is inherent and may be based on S. 47 of the Act. *Per Sundara Iyer, J* :— The debtor or creditor asking for time under Sub-S. 3 of S. 14 must show sufficient cause to induce the Court to extend time. The debtor may show that in a short time he would satisfy all his creditors. It may also be shown by a creditor that the application for adjudication is really a bogus or sham proceeding. (*Sundara Aiyar and Ayling, JJ.*) BAWAJEER CHETTY *v.* BAWA RANGASAWMI CHETTY. **36 Mad. 402 : 22 M. L. J. 52 : 10 M. L. T. 433 : 12 I. C. 618 : (1911) 2 M. W. N. 480.**

——— **S. 24 (2), (3)—Act (III of 1907) S. 14 (2) (3)**—*Examination of debtor--Absence of witness--Further time.*

A court must examine a debtor who has applied to be declared insolvent whether the witnesses are present or not. It is only after examining the debtor in the presence of the creditor that the question of granting further time to produce additional evidence and sufficient cause for the same must be considered. (*Knox and Griffin, JJ.*) BANARSI DAS *v.* BANARSI DAS. **14 I. C. 416 : 9 A. L. J. 233.**

——— **S. 24—(2) (1907) S. 14 (2)**—*Mandatory or directory.*

The decisions of S. 14 (2) are mandatory and a debtor must be examined before he is adjudicated whether anything will be gained by such examination or not. If the adjudication order is passed without examining the debtor the entire proceedings are vitiated. 33 I. C. 1008 Fol. (*Broadway, J.*) DIAL SHAH *v.* MIRAN BUKSH. **21 P. W. R. 1917 . 39 I. C. 745 : 23 P. L. R. 1917.**

——— **Ss. 25, 27—(1907) Ss. 15 and 16**—*Insolvency—Right of, to adjudication—Misconduct—Debtor's petition.*

On an application under S. 5 of the Act, by a debtor to be declared an insolvent, where all the conditions prescribed by the Act have been satisfied he is entitled to an order of adjudication. This does not depend on the discretion of the court, but is a statutory right of which he cannot be deprived by the court on the ground that his petition is an "abuse of the process of court." Misconduct on the part of the debtor is to be dealt with upon the debtor's application for discharge and is not ground for refusing an order of adjudication. (*Sir Lawrence Jenkins.*) CHITRAPAT SINGH *v.* KHARAJ SINGH. **44 Cal. 535 : 21 M.L.T. 36: 15 A.L.J. 87 : (1917) M. W N. 100 : 19 Bom. L R. 174 : 25 C. L. J. 215 : 21 C W. N. 497 : 10 Bur. L. T. 25 : 44 I.A. 11: 39 I C. 788. 32 M. L. J. 1. (P.C.)**

——— **Ss. 25, 27, and 69—(1907) Ss. 15, 16, and 43**

If there is reason to think that an applicant for adjudication in insolvency has committed an offence under Insolvency law the proper course is to proceed under S. 43 of the Provincial Insolvency Act, after adjudication. Mere suspicion that

a petitioner for adjudication is guilty of criminal misappropriation is no ground for dismissing the petition of the debtor. 44 Cal. 535, P. C; 36 All. 250. Foll. (*Richards C. J. and Bannerjee, J.*) JAGANNATH *v.* GANGA DUTT DUBE. **41 All. 486: 50 I. C. 192: 17 A. L. J 565:**

——Ss. 25, 27—(1907)—Ss. 15 and 16—*Adjudication, refusal of—Grounds.*

An application to be adjudicated as an insolvent can be rejected only in cases provided by S. 15 (1) of the Prov. Ins. Act and the fact that the brother of the applicant has not joined in the application is not a valid reason for rejecting it. 36 All. 250 Ref. (*Richards, C.J. and Bannerjee, J.*) NET RAM *v.* BHAGIRATH LAL. **40 All, 75: 43 I.C. 160: 15 A. L. J. 885.**

——S. 25—(1907) S. 15—*Adjudication, petition for omission to disclose dismissal of previous application—Effect.*

Dismissal of application for mere omission to disclose in an application for adjudication that a previous application by the same applicant has been dismissed, is not proper. (*Tudball and Rafique, JJ.*) MUHAMMUD SHIS *v.* MAHABIR PRASAD. **40 I. C. 445: 15 A. L. J. 572.**

——S. 25—(1907) S. 15—*Dismissal of petition—Power of Insolvency Court—Dishonest conduct of debtor.*

An insolvency court can refuse adjudication on the ground of an abuse of the process of the court; but adjudication cannot under the Act be refused if there are considerable debts, and dividend can be paid by due administration of assets. The fact that a debtor is a dishonest man is not itself a ground for refusing adjudication under the Act, but disclosure of such fraudulent conduct, as carrying on business through the aid of Insolvent Court should be seriously considered by court at the time of the application for his discharge. (*Walsh and Stuart, JJ.*) CHIRUNJI LAL *v.* AYODHYA PRASAD. **37 I. C. 391.**

——S. 25—(1907) S. 15 (1)—*Applicability to—Debtor's Petition.*

S. 15 (1) deals only with a creditor's petition and does not apply in any way to a debtor's petition. The court is bound to adjudicate a debtor insolvent on his own petition unless it amounts to an abuse of the process of the court. 12 C. L. J. 400; 15 C. W. N. 990, 32 All. 645, Ref 32 All. 547; 25 M L. J. 545, Dist. (*Richards, C. J., Ryves and Piggott, JJ.*) TIRLOKI NATH *v.* BADRI DAS. **36 All 250: 23 I. C. 4: 12 A. L. J. 355.**

——S. 25—(1907) S. 15 (1)—*Adjudication—Petition for—Dismissal—Ground.*

An endeavour on the part of an applicant to be declared insolvent to keep back a portion of his property or to pretend that property belonging to him is not his, is not a good ground for dismissing an application for insolvency. 15 C. W. N. 990, 32 All. 645 Fol. (*Chamier, J.*) MUHAMMAD HUSSAIN *v.* BAKHSH. **17 I. C. 92. 10 A. L. J. 188.**

——S. 25—(1907) S. 15—*Insolvency petition—Dismissal—Grounds for.*

An application by a judgment-debtor to be declared an insolvent cannot be dismissed simply because the evidence on the other side shows him to be a man of sufficient means. 32 All. 645. 7 I. C. 691, F 1 (*Karamat Hussain and Tudball, JJ.*) KHADIN HUSAIN *v.* BISHUN SINGH. **14 I. C. 224.**

——S. 25—(1907) S. 15—"*Sufficient reason.*"

The fact that the mother of the applicant is possessed of large property to which he is sole heir is not sufficient reason for dismissing the application. (*Stanley, C.J. and Bannerjee, J.*) KHADIM HUSAIN *v.* BISHEN SINGH. **9 I. C. 633.**

——S. 25—(1907) S. 15—*Inquiry under Issue as to full and true disclosure—Not pertinent.*

The issue whether the petitioner has made a true and full disclosure of his property would not be pertinent at the inquiry under S. 15, provided the petitioner has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner has made a true and full disclosure. (*Macleod, C. J. and Shah, J.*) THE LAXMI BANK, LTD. *v.* RAMCHANDRA NARAYAN APTE. **46 Bom. 751: 24 Bom. L R. 292: 1922 Bom. 80.**

——S. 25—(1907) S. 15—*Adjudication, petition for—Dismissal of petition for default—Fresh application.*

The dismissal of an application for restoration of an application for adjudication dismissed for default does not bar the presentation of a fresh application for insolvency. (*Woodroffe and Huda, JJ*). SHEIKH ABDUL AZIZ *v* HABID MISTRI **49 I. C. 229.**

——S. 25—(1907) S. 15—*Discretion.*

It is a matter for consideration when a Judge finding from the facts before him that the applicant is not insolvent, ought to declare him an insolvent. (*Brett and Sharfuddin, JJ.*) GOLAM RAHAMAN *v.* WAHED ALI. **16 I.C. 470: 16 C. W. N. 853.**

——S. 25—(1907) S. 15—*Adjudication, object and scope of—Dismissal of petition—Grounds to be indicated in judgment.*

An adjudication in insolvency ensures the distribution of the assets, if there are any, according to the equitable arrangement for which provision is made in the Insolvency Act. If there are considerable assets, it would be most disadvantageous to the general body of creditors that there should be an adjudication. A Judge in dismissing a petition for adjudication should indicate the grounds set forth in S. 15 of the Act on which he purports to act. (*Jenkins, C. J. and Chatterjee, J.*) PREONATH ROY *v.* NIBARAN CHANDRA SARKAR. **15 I. C. 870: 15 C. L. J. 631.**

——S. 25—(1907) S. 15 (1)—*Dismissal of petition—Grounds.*

Where the debtor establishes a *prima facie* case the Court must pass an order of adjudication. The refusal to interfere in the debtor's behalf is justified only when it is satisfied that to grant the petition would be an abuse of the functions of the Court. 32 All 645 Foll. (*Barton, J. C.*) TULSI RAM *v.* GHULAM MUHIDDIN. **82 P. L. R. 1916.**

PROV. INSOL. ACT (V OF 1920), S. 25.

——Ss. 25, 27—(1907) Ss. 15, 16—*Petition of Insolvency by debtor—Rejection—Grounds.*

The mere fact that an insolvency petitioner has transferred his property to his son is no ground for refusing to declare the petitioner an insolvent. (44 Cal. 535 (P. C) Fol.) (*Shah Din, C.J.*) RAM RAKHAMAL *v.* NAZARMAL. **52 P. R 1918. 46 I. C. 435 : 127 P. L. R. 1918.**

——S. 25—(1907) S. 15 (1)—*Ability to pay debts—Effect of petition.*

The concluding portion of S. 15 (1) which mentions the ability to pay the debt as a ground for refusing the application applies only to an insolvency petition presented by the creditor and not by the debtor 32 All. 645 ; 28 I. C. 361 Ref. (*Shadi Lal, J.*) RAJ KAUR *v.* TIRATHRAM. **39 I. C. 590 : 13 P. W. R. 1917.**

——S. 25—(1907) S. 15 (1)—*Adjudication Petition by debtor—Dismissal without enquiry—Illegal.*

The concluding portion of S. 15 (1) refers only to cases in which the application has been made by the creditor and is opposed by the debtor. A Court acts with material irregularity in dismissing an insolvency petition presented by a debtor under S. 15 (1) on the ground that the petitioner has been guilty of bad faith in having given undue preference to some of his creditors. 32 All. 645 : 12 C. L. J. 400 : 12 C. L. J. 445, Foll. (*Shah Din, J.*) RATTAN MALIK *v* TIRATH RAM. **28 P.R. 1915 : 29 I. C. 361 : 34 P. L. R. 1916.**

——S. 25—(1907) S. 15—*Notice—Court, duty of.*

When the petition is by a creditor under S 15, the Court must be satisfied of notice on the debtor and of the alleged act of *insolvency.* After proving these facts the debtor can show that an adjudication ought not to be made as he can pay his debts, or for any other sufficient cause. (*Sundara Aiyar and Ayling, JJ.*) BAWA CHETTI *v.* BAWE RANGASWAMI CHETTI. **36 Mad. 402 : 10 M. L. T. 433 : (1911) 2 M. W. N. 480 : 12 I. C. 618 : 22 M. L. J. 52.**

——S. 25—(1907) S. 15—*Order of adjudication if bars question of final discharge.*

An order of adjudication under the Pro. Insolv. Act will not bar the question whether the petitioner shall have his final discharge. (*Abdur Rahim, J.*) GOPAL KRISHNA *v.* A. M. MUTHUSWAMI. **12 I. C. 403 Mad.**

——Ss. 25, 27—(1907) Ss. 15 and 16—*Adjudication, order of—Grounds, value of debtor's statements.*

In Insolvency proceedings an order of adjudication based on the debtor's denying statements alone is not proper without an opportunity to a creditor to prove his assertion that the insolvent and his sons possessed large properties not shown in the schedule as members of a joint Hindu family. (*Stuart, J. C.*) PRAG *v.* RAM LAL. **37 I.C. 109: 3 O. L. J. 507.**

——S. 25—*Questions of limitation—Revision—Scope.*

S. 25 does not give any right of appeal in law or fact and the powers conferred by it are discretionary and not to be exercised unless there has been miscarriage of justice. Revision does not lie against an erroneous decision on the question of limitation. (39 C. 473, 15 A 139 Con. 13 A. 277 Full.). (*Stuart, J. C.*) RAGHURAJ SINGH *v.* SAHIB DIN. **17 I. C. 470 : 15 O. C. 319.**

PROV. INSOL. ACT (V OF 1920), S. 25.

——S. 25—(1909) S. 15 (1)—*Grounds for dismissing petition.*

The following grounds were held to be not vaild grounds for dismissing the petition to be adjudicated as insolvent : (1) That the applicant had allowed a register containing the names of pilgrims allotted to him on partition to remain with his brothers, (2) that he changed his residence ; (3) that he gave false account of his income and that he included false sums as debts. (*Jwala Prasad and Ross, JJ.*) MUNILAL *v.* SHASHI BHUSHAN RAI. **60 I. C. 848 : 2 Pat. L. T. 166.**

——S. 25—*Applicability of.*

The High Court can exercise the power under this section of the Act only when the case is tried by a Small Cause Court. (*Das, J.*) JAGARNATH GUA *v.* RAGNATH SAHAI. **57 I. C. 551 (Pat.). 2 U. P. L. R. (Pat.) 191.**

——S 25—(1907) Ss. 15, 16—"*Act of bad faith*" *if ground for refusal of adjudication.*

An order of adjudication cannot be refused on the ground that the debtor has committed acts of bad faith. (*Mc Coll, A. J. C.*) NGA NAING *v.* MI BUX. **11 I. C. 745: 1 U. B. R. (1911) 86.**

——S. 25—(1907) S. 15—'*Any other sufficient reason*'—*Interpretation.*

The words 'any other sufficient reason' must be taken along and read with the words is satisfied with the 'debtor' and refer to petitions presented by creditors. (*Mc Coll, A. J. C.*) MI BU *v.* NGA PO SAUNG. **11 I. C. 743: 1 U. B. R. (1911) 84.**

——S. 25—(1907) S. 15—*Bad faith—Proof.*

Where a large portion of the debt was incurred for litigation undertaken on behalf of the wife to recover property left by her former husband and the creditors lent money with eyes open it could not be said the petitioners had no reasonable prospect of being able to re-pay the loan. (*Twomey and Parlett, JJ.*) SUBBIAH PILLAI *v* ABDUL KASHID. **9 I. C. 462 : 4 Bur. L. T. 18.**

——S. 25—(1907) S. 15—*Sufficient cause.*

Allegation by a creditor that the debtor has ample means wherewith to pay his debts is 'sufficient cause' for dismissing the petition at the hearing. (*Fox, C. J. and Hartnoll, J.*) ARUNACHALLAM CHETTY *v.* MAUNG PO THEIN. **9 I. C. 461: 4 Bur. L. T. 17.**

——S. 25—(1907) S. 15—*Adjudication—Power of Court—Petition for insolvency not* bona fide—*Inherent power of court to dismiss.*

A Court has inherent power to dismiss a petition for insolvency if it is found that it is not presented with the *bona fide* view of obtaining an adjudication, but for an unequitable and collateral purpose. 32 All. 645, Ref. (*Pratt, J. C.*) PAMANMAL HEMAN-MAL, *In the matter of.* **35 I. C. 541: 10 S. L. R. 28.**

PROV. INSOL. ACT (V OF 1920), S. 25.

——Ss. 25, 27—(1907) Ss. 15 and 16—*Conditions of order of adjudication—Right of debtor to order adjudication.*

The expression 'for any other sufficient reason' in S. 15 (1) of the Act applies only to the case of an insolvency petition presented by a creditor. Irregular accounts is not relevant to the question of adjudication. It is material only when an application for discharge is made. When the Court finds that a person has a right to present a petition under S. 6 (3), (4), and that he has committed an act of insolvency in presenting it, and that he is unable to pay his debts, an order of adjudication should be made. (*Pratt, J. C.*) VITTAL DAS KALIDAS, *In the matter of.*

9 I. C. 682.

——S. 27—(1907) S. 16 (1)—*Debtor's petition—Court bound to adjudicate him insolvent.*

On presentation of a petition by a debtor to be declared an insolvent, the Court is bound to adjudicate him as such, unless the petition amounts to an abuse of the process of the Court: S. 15 (1) deals only with a creditor's petition. 32 All. 547 ; 25 M. L. J. 545 Dis. (*Richards, C.J., Ryves and Piggot, JJ.*) TIRLOKI NATH *v.* BADRI DAS. **36 All. 250: 23 I. C. 4: 12 A. L. J. 355:**

——S. 27—(1907) S. 16—*Adjudication—Firm—Administration of joint and separate estates.*

At the time of making an order of adjudication against the partners of a firm the Court need not make any order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estates of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings. (*Fletcher and Duval, JJ.*) DABENDRA CHANDRA SARKAR *v.* PURUSHOTTAM DAS. **55 I. C. 186.**

——Ss. 24 and 16—*Schedule of creditors not prepared—Suit to recover debts.*

A firm being adjudicated insolvent, no schedule of creditors was prepared nor notice of insolvency proceedings served on the creditors. A suit by one of the creditors against the insolvents is maintainable though no permission had been obtained from Court under S. 16 of the Act. (*Broadway, J.*) DES RAJ *v.* DUNI CHAND.

60 I. C. 588.

——Ss. 27, 56, 58, 59—(1907) Ss. 16, 18, 20 and 23—*Power of Court to direct debtor of insolvent to pay money into Court before adjudication.*

On a debtor presenting a petition for adjudication as an insolvent, the court must first make an order for adjudication, then appoint a receiver, and then order a debtor of the insolvent to pay into Court any money which he owes to the insolvent. (*Stanyon, A. J. C.*) GANPAT WANJARI *v.* AMRITA. **44 I. C. 537 (Nag.)**

——Ss. 27, 69, 22—(1907) Ss. 16, 43—*Order of adjudication—Duty of Court.*

A Court is bound to make an order of adjudication if it is satisfied that the applicant is insolvent and that the provisions of S. 6 are complied with. (*Mc Coll, A J. C.*) NGA NAING *v.* MI BU.

11 I. C. 745 : 1 U. B. R. (1911) 86.

PROV. INSOL. ACT (V OF 1920), S. 28—Applicability.

——Ss. 27 and 28—(1907) S. 16—*Provable Claim—Damages—Forward contract—Proof before Official Receiver.*

Damages may be claimed before the Official Receiver on the insolvency of a party, they being in the nature of contingent debts, contingent on the non-performance of the contract by the Official Receiver, and on the rates at the date of delivery being lower than the contract rate. The Receiver should act as a Court assessing damages on the expected rates of a future date in the case of an anticipatory breach and the same principles of assessment apply in either cases. In arriving at the rates of the future date of delivery an important factor will be the rate at which at the time of the Receiver's valuation a future contract for that date could be made. (*Pratt, J. C.*) JIWANJI PER SHOY, *In re.*

19 I. C. 653 : 6 S. L. R. 187.

——S 28—(1907) S. 16.

After-acquired property.
Applicability.
Date of adjudication.
Effect of order.
Exemption from vesting.
Jurisdiction.
Proceedings against Insolvent.
Proceedings by Insolvent.
Reputed ownership.
Suit against Receiver.
Vesting of property.
Vesting order, Absence of.
Miscellaneous.

After-acquired Property.

——S. 28—(1907), S. 16—*After acquired property—Suit for recovery—If insolvent can maintain—Share in partnership—If vests.*

An insolvent has a right to maintain a suit for the recovery of "after-acquired" property, subject to the right of the Receiver to intervene at any stage. The defendant cannot plead that such an action is not maintainable by the insolvent. The share of an insolvent in a partnership business vests in the Receiver. (*Krishnan and Odgers, JJ.*) KUPPU RAMANADHA AIYAR *v.* NAGENDRA AIYAR. **45 M. L. J. 827 : 18 L. W. 868 : 1924 M. 223.**

——S. 28—(1907) S. 16—*After-acquired property—Right of insolvent.*

Failing intervention by the Court or the Receiver in which or in whom an insolvent's property has vested, the insolvent has the same power of acting in respect of after acquired property as he had before the insolvency. (*Drake Brockman, J. C.*) BALIBHADRADAS *v.* MIRCHILAL.

48 I. C. 236.

Applicability.

——S. 28—(1907) S 16 (5)—*Applicability—Mortgage before adjudication.*

Where a person executes a mortgage before adjudication, the mortgagee can sue on his mortgage and realise his security though the equity of redemption has vested in the Receiver, who cannot transfer the property free from the mortgagee's claims. (*Piggott, J.*) MOHAMMAD MUNIR-UD-DIN KHAN *v.* MAHMOOD BAKSH. **63 I. C. 91.**

PROV. INSOL. ACT (V OF 1920), S. 28—Applicability.

——S. 28—(1907) S. 16—*Applicability—Agra Ten. Act* (1901), S. 193 (*a*)—*Suit for arrears.*

The Prov. Insol. Act does not apply to any suit or proceeding under the Agra Ten. Act and therefore S. 16 of the former Act does not bar a suit against an occupancy tenant who has been declared insolvent for arrears of rent of the holding which therefore cannot be dealt with by an Insolvency Court. (*Tudball, Rafique and Ryves, JJ.*) KALKA DAS *v.* GAJJU SINGH.

43 All. 510 : 19 A. L. J. 439 : 62 I. C. 897 (F. B.): 3 U. P. L. R. (All.) 73.

——S. 28—(1907) S. 16—*Applicability—Mortgage—Grant of personal decree is not a grant of a remedy—Application for personal decree is not new proceeding.*

The issue of a personal decree against a mortgagor is not a grant of a remedy to the mortgagee under S. 16 of the Act and an application for a personal decree is not a new proceeding but a continuation of the original suit and is not barred by S. 16 of Pro. Ins Act. (*Le Rossignol and Wilberforce, JJ.*) KISHEN CHAND *v.* SOHAN LAL.

2 Lah 95 : 3 Lah L. J. 126 : 59 I. C. 710 : 48 P. W.R. 1921.

——S 28—(1907) S. 16—*Applicability—Joint Hindu family—Adjudication—Creditor's petition—Right of suit.*

Where the father of a joint Hindu family which includes minor sons as well as himself seeks the protection of the Insolvency Court, he must place all his property at the disposal of the Court. The members of a joint Hindu family can be adjudicated insolvents in a single petition by a creditor if they are liable on a joint debt or have been guilty of a joint act of insolvency. Where therefore the adult members of a joint family have been declared insolvents the creditor must prove the whole debt in the Insolvency Court. He cannot split up the debt and sue the minor members in respect of a portion thereof. (*Prideaux, A.J.C.*) VITAL *v.* RAM CHANDRA.

19 N. L. R. 128 : 1923 Nag. 257.

——S. 28—(1907) S. 16—*Applicability of—Arrears of rent accruing after adjudication—If provable—Suit for—Sanction.*

Rents which fall due from an insolvent after the making of the order of adjudication cannot be deemed to be a debt existing on the date of the order and to such a debt S. 28 of the Provincial Insolvency Act does not apply. And as the debt is not provable in insolvency, a suit for such arrears does not require the sanction of the Insolvency Court. (*Kanhaiya Lal, J. C.*) KUER BEHARI LAL *v.* KALKA.

9 O. L. J. 157 : 1922 Oudh 73.

——S. 28 (2)—(1907) S. 16 (2)—*Applicability—Prohibition—Effect of*

The prohibition in S. 16 (2) applies only to creditors to whom notice of the Insolvency proceedings have been given and not to persons having claims against the Insolvent to whom no notice has been given. (*Lindsay, J. C.*) FIDA HUSAIN *v.* COLLECTOR OF SHAHJAHANPUR.

25 I. C. 708 : 17 O. C. 267.

——S. 28—(1907) S. 16—*Applicability—Right to sue for debt due since adjudication—English Law.*

PROV. INSOL. ACT (V OF 1920), S. 28—Effect of Order.

The right to sue for personal injuries does not pass to the trustee under English Law while it passes to the trustee in bankruptcy. But even there a bankrupt can bring a suit to claim the proceeds subject however to the claim of the trustee. In India the case is covered by sec. 28 of the Provincial Insolvency Act. But there is a conflict of opinion among the various High Courts. (*Mullick and Macpherson, JJ.*) UMAR BAHADUR *v.* KHAJA MOHAMMAD KARIM.

1923 Pat. 287.

Date of Adjudication.

——S. 28 (7), 55—(1907) Ss. 16 (2), (6) and 38—*Date of adjudication—Relation back to presentation of petition—Transfer of,* ipso facto—*Scope of* S. 38

It is the making of the order of adjudication which vests the property in the Receiver and only upon such an order being made can any vesting take place at all but once the order is made the effect created by it is by a legal fiction taken to relate back to the presentation of the insolvency petition. An insolvency petition was presented by a creditor on 3rd March, 1919 and the debtor sold his immoveable property on 12th March 1919, and the order of adjudication was passed on 21st March 1919 *Held*, that the sale was void under S. 16 and the property vested in the Receiver. The protection given by S. 38 of the Prov. Ins. Act is not available to a transferee where the circumstances show that the transfer which he had taken is in itself an offence against the Bankruptcy Law, *e.g.*, as giving an undue preference to some creditors or as being a transfer of the whole of the debtor's property with the intention of defeating or delaying some of his creditors. (*Piggott and Walsh, JJ.*) SHEONATH SINGH *v.* MUNSHI RAM.

18 All L. J 449 : 55 I C. 941 2 U. P. L. R (All.) 122.

——S. 28—(1907) S. 16—*Date of adjudication—Right to receive debt—When vests—Relating back.*

The right to receive money due is property within the meaning of S. 16 (2) and by reason of relation back under S. 16 (6) the right to receive the debt vests in the Receiver from the date of the application in insolvency. (*Kotwal, A. J. C.*) ONKARSA *v.* BRIDICHAND.

6 N. L J. 213 : 19 N. L. R 144 : 1923 Nag 290.

——Ss. 28 (7), 51—(1907) Ss. 16, 34—*Date of adjudication, date of operation of—Decree-holder's rights to assets realised before order of adjudication.*

S 34 controls S. 16 of this Act and though an order of adjudication relates back to date of application, the decree holder has greater rights than Receiver in respect of assets realized before date of adjudication. 42 Cal. 289, 34 All 628, Rel., 6 I. C. 95 Expl. As soon as a sale is held in an execution and money deposited for the *benefit* of the decree-holder the assets are considered as realized and at the disposal of the decree-holder. (*Mullick and Jwala Prasad, JJ.*) PALI RAM *v.* SHEO NATH PRASAD.

2 Pat. L. J. 235 : 1 Pat. L. W. 463 : 39 I C. 463 : 1917 Pat. 111.

Effect of order.

——S. 28—(1907) S. 16 (2)—*Effect of order—Vesting of property—Suit for declaration.*

PROV. INSOL. ACT (V OF 1920), S. 28—Effect of order.

All property such as may be acquired by or devolve on the insolvent after the passing of an adjudication order and before his discharge, immediately vests in the Court or Receiver and becomes divisible among the creditors under S. 16, Sub-S. (2) (a), of the Pro. Ins. Act of 1907. The Receiver in whom the property so vests can ask for a declaration without suing for possession of the property as the declaration would enable the Receiver to sell or mortgage the property for the benefit of the creditors. (*Lindsay and Gokul Prasad, JJ.*) MAHOMED FATIMA *v.* MAHAMED MASHUQ ALI. **L. R. 3 A. 406 : 20 A. L J. 569 : 44 All. 617**
4 U. P. L R. (A) 181 : 1922 All 448.

——— S. 28—(1907) S. 16—*Effect of order—Attachment.*

Upon a vesting order being made all the properties of the insolvent passes to the Official Assignee and all decrees and other proceedings against the insolvent are ordinarily stayed. After a vesting order has been made, any subsequent attachment of the property of the insolvent is, for all legal intents and purposes, a nullity in itself and does not confer any advantage thereby under any of the sections dealing with ordinary execution proceedings under the C. P. Code. (*Beaman, J.*) JETHA BHIMA *v.* LADY JANBAL.
15 I. C. 950 : 14 Bom. L. R. 511.

——— S. 28—(1907) S. 16—*Effect of order—Limitation.*

A debt does not become time-barred, if it was not so barred at the commencement of the insolvency proceedings and the bar ceases to run after adjudication. (*Mookerjee and Panton, JJ.*) BARANASHI *v.* BHABADEB
66 I. C. 758 : 34 C. L J. 167

——— Ss. 28 and 38 - (1907) S. 16 —*Effect of order—Private arrangement between creditors and insolvent - Duty of Court.*

Where, after an order of adjudication, the creditors and the insolvent made a private arrangement; *held*, that the transactions could not be recognised in the insolvency proceedings and that the creditors, notwithstanding the arrangement, are entitled to prove their claims. It is the duty of the Court to frame a scheme of creditors and debts referred to in S. 24 of the Act. The Court should decide each claim on evidence and not on the report of the Receiver, and in cases of contest, after hearing necessary parties (*Teunon and Newbould, JJ.*) BEHARI LAL *v.* HARSUKH DAS. **61 I. C. 904 : 25 C. W. N. 137.**

——— S. 28—(1907) S. 16 (2) —*Effect of order—Father insolvent—Son's interest not vested.*

The estate of the sons cannot be dealt with by the Receiver where their father is adjudicated an insolvent. 49 I.C. 348. Foll. (*Chevis. A. C.J.*) SHIB CHARAN *v.* SHEIKH MAHOMED ISMAIL.
68 I. C. 179 : 2 Lah. L. J. 401.

——— S. 28—(1907) S. 16 —*Effect of order—Pending application to set aside* ex parte *decree got by Insolvent.*

An order setting aside an *ex parte* decree, where, the plff. pending the application is declared an insolvent, is not illegal as the Provincial Insolvency Act contains no such prohibition. (*Martineau, J.*) ASHGHARO BEGUM *v.* MUHAMED YUSUF. **61 I. C. 534.**

PROV. INSOL. ACT (V OF 1920), S. 28—Exemption from vesting.

——— S. 28—(1907) S. 16—*Effect of order--Suit against his property--Decree--Execution--Effect of.*

Appellant sold a house to K on 12th May 1914 for the unpaid portion of the purchase-money. He instituted a suit against K on 22nd March 1916 and obtained a decree on 11th July 1916 establishing his vendor's lien over the house. Meanwhile K had applied on 19th November 1915 to be adjudicated insolvent; an adjudication was made on 29th February 1916, and on 15th July 1916 his property vested in the Official Receiver. The Official Receiver sold the house to the respondent on 17th August 1916. The appellant executed his decree and purchased the house himself on 22nd December 1916. The Receiver was not impleaded as a party to the suit or to the execution proceedings. In a suit by the appellant for the recovery of house from the respondent *held*, hat the decree in the appellant's favour wasa nullity as also the sale held in execution thereof and that the respondent's title was not affected thereby. 25 M. 406 Rel. (*Sadasiva Aiyar and Spencer, JJ.*) MOKSHAGUNAM SUBRAMANIA AIYAR *v.* RAMAKRISHNA AIYAR
16 L. W. 43 : 42 M L. J 426 : 1922 Mad 335.

——— Ss. 28, 56—(1907) Ss. 16 and 18—*Effect of order—Court sale after adjudication—Invalid—Jurisdiction of Court.*

The two sections read together confer jurisdiction on the Insolvency Court to direct that property in the hands of a third person may be delivered to the Insolvent or Official Receiver. The Insolvency Court has exclusive jurisdiction to deal with claims of persons holding adversely to the insolvent. A sale of the insolvent's estate, after an adjudication order, at a Court auction, without notice to the Receiver, gives no right to the auction purchaser. (*Oldfield and Seshagiri Aiyar, JJ.*) KOCHU MAHOMED ASAN *v.* SANKARALINGA. **44 Mad. 524 : 40 M. L. J. 219 : 62 I. C. 495 : (1921) M. W. N. 236 : 14 L. W. 505.**

——— S. 28—(1907) S. 16 (2)—*Effect of order—Heirs possessing deceased debtor's assets—Effect of their insolvency.*

If, before the execution but after the passing of the decree against the assets of a deceased debtor in the hands of heirs, the latter becomes insolvent the deceased's estate vests in the Official Receiver and the creditor must prove his debts like other unsecured creditors. (*Oldfield and Sadasiva Aiyar, JJ.*) GADI LAKSHMI NARASIMHAM *v.* PILLALAMARRI JAGANNADHA ROW. **30 I.C. 256 : 18 M. L. T. 147.**

——— S. 28—(1907) S. 16—*Effect of Order.*

The property of an insolvent vests in the Receiver from the date of adjudication and after that date the insolvent is not entitled to sue on a chose in action belonging to him. (*Ayling, J.*) RAMASWAMI AIYANGAR *v* RAMALINGAM MUDALIAR. **22 I.C. 687 (Mad.).**

Exemption from Vesting.

——— S. 28 (5)—(1907) S. 16 (2) (a)—*Exemption from vesting.*

Under the section the insolvent's property exempted from attachment or sale in execution of a decree does not vest in the Receiver. (*Bannerjee and Piggott, JJ.*) HANUMAN PRASAD NARAIN SING *v.* HARASCH NARAYAN. **42 All. 142 : 18 A. L. J. 59: 58 I. C. 551 : 1 U. P. L. R. A, 992.**

PROV. INSOL. ACT (V OF 1920) S, 28—Exemption from vesting.

——-S. 28 (5)—(1907) S. 16 (2)—*Exemption from vesting—Attachment of salary of insolvent—Salary not sufficient for his maintenance, C.P. Code*, S. 60.

When an aporopriation of the income of an insolvent is made for the benefit of the creditors, the Court usually acts on the principle of giving to the creditors the surplus after allowing a sufficient portion thereof for the maintenance of the insolvent according to his position in life. The statute law of this country fixes this amount by S. 60 of the C. P. Code, read with S. 16 (2) of the Prov. Ins. Act. Consequently an order rejecting the creditor's application praying for an attachment of half the salary of an insolvent on the mere ground that his pay is not large enough to allow half of it being attached, is illegal. 18 C. W. N. 1052 Foll. (*Rafique, J.*) DEVI PRASAD *v.* J. A. H. LEWIS. **40 All. 213 : 43 I. C. 984 : 16 A. L. J. 107.**

——— Ss. 28, 53, 69—(1907) Ss. 16, 36 and 43—*Exemption from vesting—Insolvent agriculturist—Lease of occupancy holding ordered to be surrendered - Order illegal.*

An agriculturist by occupation was adjudicated an insolvent shortly after he had granted a lease of his occupancy holding. *Held*, that the order to sell the house and surrender the land to the Zamindar is unsound because the occupancy holding and the house were property, the transfer or attachment of which being forbidden by law could vest neither in the Court nor in the Receiver. (*Richards, C J. and Rafique, J.*) SAGAR MAL *v.* GIRRAJ SINGH. **39 All. 120 : 38 I. C. 171 : 14 A. L. J 1031.**

——S. 28 (5)—(1907) S. 16—*Exemption from vesting.*

The only property which is exempted from the scope of adjudication is property of the insolvent which is exempted by any enactment from liability to attachment and sale in execution of a decree. (*Daniels and Dalal, A. J. Cs.*) LAL BAHADUR *v.* PASPAT PRASAD. **10 O. L. J. 31: 9 O. & A L. R. 173 : 1923 O. 154.**

Jurisdiction.

——S. 28 (3)—(1907) S 16 (3)—*Jurisdiction—Delegation to Receiver—Power of Court to order enquiry by Receiver.*

The Insolvency Court cannot refer to the Receiver, for final adjudication, the question as to the title to certain promissory notes alleged to be held *Benami* for the insolvent. (*Walmsley and Greaves, JJ.*) SATYA KUMAR *v.* MANAGER, BENARES BANK. **46 I. C. 335: 22 C. W. N. 700.**

——Ss. 28 and 53 (1907) Ss. 16 (6) and 36—*Jurisdiction—Transfer more than two years prior to adjudication—Annulment.*

The transfers in question were effected six and a half months before the petition for insolvency was presented, and more than two years before the order of adjudication was passed. The Court below considered that S. 36 of Act II of 1907 was governed by S. 16 (6) of the same Act and that, consequently, the transactions could be annulled since they took place within two years of the date of the presentation of the petition. *Held*, that the decision was erroneous and ought to be set aside. S. 36 of the Provincial Insolvency Act (III of 1907) provides that a transfer of property may be annulled if the transferor is adjudged insolvent within two years after the date of transfer. Under S. 16 (6) an order of adjudication shall relate back to and take effect from the presentation of the petition on which it is made, but this cannot mean that for all purposes the date of adjudication is to be taken as identical with the date of presentation of the petition. If there were any doubts on the subject it would be removed by the difference in the phraseology employed in Ss. 36 and 37 of the Act. S. 37 allows the annulment, in certain cases, of transfers in favour of creditors "where the transferor is adjudged insolvent on a petition presented within three months after the date of the transfer." If the framers of the Act intended that the period provided by each section should terminate on the date of the presentation of the petition for insolvency it is obvious that the words "once a petition presented" which occur in S. 37 either should have been inserted also in S. 36 or on the supposition that S. 16 (6) would apply, should have been omitted altogether. (*Brasher and Scott Smith, JJ.*) GHULAM MAHOMED *v.* PANNA RAM. **1924 L. 374.**

——S. 28 (2)—(1907) S. 16 (2)—*Jurisdiction—Small Cause Court, If can act under.*

A Judge sitting in the Small Cause Court, cannot immediately divest himself of his Small Cause Powers and proceed to act under S 16 (2) of the Prov. Ins. Act. (*Seshagiri Aiyar, J.*) SESHAIYANGAR *v.* VENKATACHALAM CHETTIAR. **31 I. C. 15 : 5 L. W. 220.**

Proceedings against Insolvent.

——S. 28—Ss. 16 and 18 — *Proceedings against Insolvent—Receiver—Vesting of property and rights of action—Suit by private creditor—Effect of.*

Where a firm is adjudicated insolvent all his property vests in the Receiver and if any part of it has improperly got into the hands of another, the right to recover it is in the Receiver and it is only by its coming into the hands of the Receiver that its rateable distribution among the general body of creditors can be secured. A suit by the creditor of an insolvent against a certain person alleged to be in possession of assets of the insolvent without impleading the Receiver in insolvency is misconceived and unsustainable. (*Sir Lawrence Jenkins*) SANYASI CHARAN MANDAL *v.* KRISHNADHAN BANERJI. **43 M. L. J. 41 : 20 A. L J. 409 : 24 Bom. L. R. 700 : 49 I. A. 108 (P. C.) : 49 Cal. 560 : 30 M. L T. 228 : 16 L. W. 536 : (1922) M. W. N. 364 : 26 C. W. N 954 : 97 I C. 124 : 35 C. L. J. 498 : L. R. 3 P. C. 133 : 1922 P. C. 237.**

—— S. 28—(1907) S. 16 (2) — *Proceedings against Insolvent—Suit against son—Insolvent father party.*

A father was joined as a necessary party, but no relief was actually sought against him but only against sons. The plff. did not seek relief against any of the property which had come into the hands of the Receiver under the insolvency

proceedings. *Held*, the suit was maintainable. Further the joining of the Receiver as a party would have been sufficient to cure any irregularity. (*Stuart, J.*) SHAMBHU DIYAL SINGH *v.* ISWAR SARAN. **1923 All. 306.**

——**Ss. 28 (6), 51—(1907) Ss. 16 (6) and 34**—*Proceedings against Insolvent — Execution of decree—Assets realised Order of adjudication —Right of decree-holder.*

S 16 (6) of the Prov. Insol. Act cannot control S. 34 (1) of the Act. Where after the filing of an application by a debtor to be adjudged an insolvent, but before the making of the order of adjudication, two houses belonging to him were sold in execution of a money decree against him and purchased by the decree-holder. *Held*, that the execution sale having taken place and the assets having been realised before the order of adjudication the ownership of the houses vested in the decree-holder and not in the Receiver. 34 All. 628. Foll. ; 11 I. C. 433. Appr. (*Tudball and Rafique, JJ.*) DIN DAYAL *v.* GURUSARAN LAL. **42 All. 336 : 59 I. C. 67 : 18 A. L. J. 287.**

——**Ss. 28, 58—(1907) Ss. 16 and 23**—*Proceedings against Insolvent —Attachment of property —Adjudication of judgment debtor—Effect of*

After an adjudication in an insolvency, an attachment of property though made before the adjudication ceases to have any effect, as the property of the insolvent vests in the Receiver who is the person to maintain all proceedings. (*Richards, C. J. and Bannerjee, J.*) GOBIND DAS *v.* KARAN SINGH. **40 All. 197 : 43 I. C 672 : 16 A. L. J. 32.**

——**S. 28 (2)—(1907) S. 16 (2)** —*Proceedings against insolvent.*

A suit by creditor of an insolvent with leave of Court under S. 16 (2) for a declaration as to the priority of his mortgage is not barred. (*Richardson, C J. and Bannerjee, J.*) BALMUKAND *v.* BIRJLAL. **36 I. C. 1004.**

——**S. 28 (2), 51—(1907) Ss. 16 (2) and 34**—*Proceedings against Insolvent — Execution of decree—Proceeds of property attached and sold—Money attached before order of adjudication—Rights of decree-holder*

While proceedings in insolvency were pending, certain immoveable property of the insolvent was attached and sold in execution of a decree against him and the proceeds deposited in Court for the benefit of the decree holder. The decree-holder also attached certain money which had been paid into Court to the credit of the insolvent but up to the date of the order of adjudication, had taken no further steps to possess himself thereof. *Held*, that the decree-holder was entitled as against the Receiver to the benefit of the proceeds of execution of his own decree, but not to the money of the insolvent which he had attached. 29 Cal. 428, Foll. (*Rafique and Piggott, JJ.*) SRICHAND *v.* MURARI LAL. **34 All. 628 : 16 I. C. 183 : 10 A. L. J. 252.**

——**S. 28 (2)—(1907) S. 16 (2)**—*Proceedings against insolvent—Leave of Court.*

In an ordinary suit for rent against an insolvent the landlord is in the same position as any other creditor. But he can distrain for his rent in spite of the insolvency of the tenant. A suit for a years of rent against a tenant declared insolvent and against whom such declaration is in full force and effect, is not maintainable without the leave of the Court. (*Richards, C. J. and Bannerjee, J.*) RAGHUBIR *v.* RAMACHANDER. **34 All 121 : 12 I. C. 927 : 8 A L. J. 1287.**

——**Ss. 28 (2) and (1), 44—(1907) Ss. 16 (2) and 45**—*Proceedings against insolvent—Execution of decree—Judgment-debtor declared insolvent—Right of appeal*

A judgment-debtor who has been adjudicated an insolvent cannot maintain an appeal against an order in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors. The only person who can appeal against such a decision is the Official Receiver. (*Fletcher and Huda, JJ.*) BONOMALI DUTTA *v.* LALIT MOHAN GHOSAL. **47 I. C. 152.**

——**Ss. 28, 75—(1907), Ss. 16, 46**—*Proceedings against insolvent—Permission to creditor to execute his decree against concealed property of insolvent.*

It is within the jurisdiction of the District Judge to grant permission to a creditor who has proved his debt and got a decree, to execute that decree at his own risk and costs against any concealed property of the insolvent on condition of the creditor handing over to the Receiver all sums got by such execution, for the benefit of the general body of creditors. (*Fletcher and Richardson, JJ.*) KAILAS CHANDRA SARKAR *v.* KANTIRAM DAS BAMA. **37 I C. 993.**

——**Ss. 28, 51—(1907 Ss. 16 and 34**—*Proceedings against insolvent—Attachment of property before adjudication—Right of attaching creditor —Receiver, appointment of.*

An interim Receiver is appointed for the protection of estate of the debtor for the benefit of the entire body of creditors. (1886) 17 Q B. D. 4 Ref. Cl. (1) of S. 34 of the Prov. Ins. Act restricts the operation of S. 16, cl. (6) thereof. A creditor, who had attached a sum of money due to the insolvent before his estate vested in the Receiver appointed after the adjudication order, is entitled to it exclusively in satisfaction of his debt. (*Mookerjee and Beachcroft, JJ.*) MADHU SARDAR *v.* KSHITISH CHANDRA BANNERJEE **30 I. C. 82 : 42 Cal. 289.**

——**S. 28 (2)—(1907) S. 16 (2)**—*Proceedings against insolvent—Receiver —Necessary party—Appeal against order of Receiver.*

Held, that an appeal by the insolvent against an order refusing to release a house for his residence without impleading the Official Receiver as party must fail, inasmuch as the Official Receiver being in possession of the property of the insolvent was a necessary party. (*Rattigan, C. J.*) GHULAM MAHOMED *v.* KARTA RAM. **51 I.C. 971.**

——**Ss. 28 and 44 —Ss. 16 and 45 (1907** —*Proceedings against insolvent—Creditor not scheduled cannot execute decree without leave.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Proceedings against Insolvent.

Where a person has been adjudicated an insolvent under Act III of 1907, the protection given by S. 45, Cl. 2 (b) of the Act applies and a creditor is not entitled to proceed against an insolvent in execution without the leave of the Court even though his name has not been entered in the schedule. (*Spencer and Venkatasubba Rao, JJ.*) NATESA CHETTIAR *v.* ANNAMALAI CHETTIAR.
17 L. W. 319 : 32 M. L. T (H. C.) 157 : 1923 Mad. 487 (1).

——S. 28—(1907) S. 16—*Proceedings against insolvent—Receiver—Position of.*

The principle of S. 16 (2) of the Prov. Ins. Act should be invariably observed in insolvency proceedings and the Official Receiver or Receiver appointed should have the carriage of them, not merely in the lower Court but also on appeal. (*Oldfield and Venkatasubba Rao, JJ.*) NARASIMHAM *v.* HANUMANTHA RAO NAIDU.
(1922) M. W N 717 1922 Mad. 439

——S. 28 (2)—(1907) S. 16—*Proceedings against insolvent—Suit by creditor under S. 53 of the T. P. Act to set aside transfer—Leave of Court.*

After the order of adjudication is made it is not open to a creditor of the insolvent to sue under S 53 of the T P. Act to set aside a transfer made by the insolvent without first obtaining the leave of the Court under S. 16 (2) of the Prov Ins. Act. (*Wallis, C.J. and Ayling, J.*) T.K. VASUDEVA KAMATH *v.* N LAKSHMINARAYANA RAO.
42 Mad 684 : 9 L. W. 475 : 26 M. L T. 90 : 52 I. C. 442 (1919) M. W. N 612 : 36 M L. J. 453.

——S 28 (2)—(1907, S 6 (2)—*Proceedings against insolvent—Limitation.*

An adjudication of the deft. as an insolvent does not extend the period prescribed for a suit against him for it is open to the plf. to sue the deft. in time with the leave of the Insolvency Court 8 Mad. 229; 35 Mad. 822, Dist. (*Seshagiri Aiyar and Phillips, JJ.*) RAMASWAMI PILLAI *v* GOVINDASWAMY NAICKER.
42 Mad. 319 25 M L. T. 247 : 49 I. C 625 : (1919) M. W N. 698 : 36 M L. J. 104.

——S. 28 (2), (4)—(1907) S. 16 (2) and (4)—*Proceedings against insolvent—Receiver—Necessary party*

The defendant purported to have purchased the property of the insolvent in execution of a mortgage-decree which had been fraudulently and conclusively assigned to him without consideration. *Held*, (1) that the purchase of the defendant was not a *bona fide* one and gave him no title to the property; (2) that all the property of judgment-debtor having vested in the Official Receiver before the sale to the defendant, the Official Assignee was a necessary party to all proceedings affecting that property, and a sale held without his being brought on the record did not convey any title (*Abdur Rahim and Ayling, JJ.*) DEVARAJA IYENGAR *v.* THIRUMALASWAMI NAIDU.
32 I. C. 489.

——Ss. 28 (2), 69—(1907) S. 16 (2) (b) and 43—*Proceedings against insolvent—Notice to show cause for arrest.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Proceedings aginst Insolvent.

Before the immunity given by the Ins. Act to an insolvent is taken away from him by an order of his arrest a notice must be served upon him to show cause why he should not be arrested. (*Seshagiri Aiyar, J.*) SESHAIYANGAR *v.* VENKATACHALAM CHETTIAR.
31 I. C. 15 : 5 L. W. 220.

——S. 28 (2) (1907) S. 16 (2) (b)—*Proceedings against insolvent—Leave of Court.*

Once a person is adjudicated an insolvent and his estate vested in the Official Receiver no creditor can apply for any remedy against him without leave of the Court. (*Oldfield and Tyabji, JJ.*) LINGAPPA CHETTIAR *v.* W. P. NARASIMHACHARIAR
27 I. C. 6.

——S. 28 (2)—(1907) S. 16 (2)—*Proceedings against insolvent—Suit for specific performance—Defendant insolvent—Execution of document by Official Receiver.*

Where pending a suit for specific performance the defendant was declared an insolvent, the Official Assignee was a necessary party and he has to execute a deed in pursuance of a decree, because on insolvency the legal estate vests in the Official Assignee subject to the equities of third persons. *White C.J and Oldfield, J.*) P. PURUSHOTAM NAIDU *v.* L. PONNURANGAM NAIDU.
(1913) M. W N 897 : 21 I. C. 576: 15 M.L.T. 92.

——S. 28—(1907) S. 16 (2)—*Proceedings against insolvent—Permission of Court is necessary.*

Under S. 16 of the Prov Ins. Act (1907) the Court making the order of adjudication is vested with the whole property of the insolvent and no creditor to whom the insolvent is indebted in respect of any debt provable under the Insolvency Act has any remedy against the property of the insolvent person in respect of that debt nor can he commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. The permission of the Court is contingent to the suit being brought and cannot be given afterwards. *Prideaux, A. J. C.*) TRIMBAK *v.* SHEORAM.
5 N. L. J. 144 : 1922 Nag. 108.

——S 28—(1907. 16 (2)—*Proceedings against insolvent—Arrest under Act of 1920.*

A person who was adjudicated insolvent under the Provincial Insolvency Act of 1907 and has not been discharged is not liable to arrest in execution of a decree in accordance with the provisions of the Act of 1920 even if he does not take out a protection order. (*Daniels, A. J. C.*) RADHEY SHIAM *v*, HAKIM SAIYED MOHOMMAD TAQI.
9 O. & A. L. R. 37 : 1923 Oudh 36.

——S. 28 (2)—(1907) S. 16—*Proceedings against insolvent—Leave of Court.*

A suit against an undischarged bankrupt in respect of a debt mentioned in the list attached to his application and of which notice was duly served on the creditor is not maintainable without the leave of the insolvency court. (*Lindsay, J. C.*) MOHAMMED YAKUB *v.* BIJAI LAL.
43 I. C. 262 : 20 O. C. 304.

——S. 28—(1907) S. 16—*Proceedings against insolvent—No attachment and no suit for declaration after judgment-debtor's insolvency.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Proceedings against Insolvent.

Neither an attachment of the judgment-debtor's property nor a suit for adeclaration in respect thereof is permissible without the sanction of the adjudicating court, after the judgment-debtor's insolvency. (*Ormond, J.*) RAMAN CHETTY *v.* MA HMU. **9 L. B. R 47 : 37 I. C 803: 10 Bur. L. T. 116.**

——— **S. 28 (2)—(1907) S. 16 (2)**—*Proceedings against insolvent—Leave of Court after institution of suit whether can be granted—Insolvency—Pendency of.*

S. 16 (2 of Prov. Insol. Act is a bar to a suit for which leave of the Insolvency Court has not been obtained prior to its institution. An insolvency proceeding is not terminated when the insolvent has not appeared to claim his discharge and the record has been sent to the record room. A legal proceeding is pending as soon as commenced and until it is, concluded *i. e.*, so long as the original court can make order in the matters in issue or to be dealt with thereon (*Pratt, J. C. and Crouch, A. J. C.*) JIVANJI MOMOOJI *v.* GHULAM HUSSAIN. **47 I. C. 771 : 12 S. L. R. 20.**

——— **S. 28 (2)—(1907) S. 16 (2)**—*Proceedings against insolvent—Leave of Court after suit or application—Pendency of insolvency proceedings—Order suspending discharge—Execution proceedings.*

Under S. 16 (2) (b) of the Prov. Insol. Act, leave for commencing a suit or application against an adjudged insolvent can be granted even after such suit or application has been filed and it will relate back to the date of the filing of the suit or application 8 Cal. 442 (P C) Ref. 38 Bom. 365. 367. Not Foll. When a final dividend is declared and all available assets distributed, the insolvency proceedings is no longer pending so as to operates as a bar under S. 16 (2) (b) of the Prov. Insol. Act. The fact of the postponement of discharge of the insolvent by order of the court does not constitute a pendency of such proceedings. (*Prat, J. C.*) FIRM OF GOPAL DAS *v.* PAHLUMAL. **30 I. C. 37: 9 S L. R. 34.**

——— **S. 28—(1907) S. 16**—*Proceedings against insolvent—Defendant's insolvency—Official Receiver, if necessary party—Decree how far binding on Official Receiver.*

Where defendants are adjudicated insolvents on their application, after plaintiff's suit against them for recovery of money due, the insolvency does not affect the devolution of any interest upon the Official Receiver under O. 22, R. 10 and the Official Receiver is not a necessary or even proper party to the suit. Under S. 16 of the Prov. Ins. Act no interference in pending proceedings is contemplated; but the decree could not be executed against the estate of the insolvents nor be binding on the Official Receiver. (*Hayward, A. J. C.*) JETHALAL KALIANJI *v* GANGARAM NAOOMAL. **29 I. C. 30: 8 S. L. R 325.**

——— **S. 28—(1907) S. 16 (2) (b)**—*Proceedings against insolvent—Mortgage decree—Execution after adjudication—Prohibition.*

A mortgagee can execute his mortgage decree even after the adjudication of the mortgagor. (*Crouch and Boyd, A. J. Cs.*) MIR HAJI NUR MAHOMED KHAN *v.* KADIR BUX. **24 I. C. 830: 7 S. L. R. 184.**

PROVINCIAL INSOLVENCY ACT V OF (1920), S. 28—Reputed ownership.

——— **S. 28 (2)—(1907) S. 16 (2) (b)**—*Proceedings against Insolvent—Leave of Court.*

The creditors under S. 16 (2) (*b*) must apply to the court exercising jurisdiction in the matter, for leave to commence a suit against the insolvent for the property fraudulently transferred. (*Pratt J. C. and Crouch, A. J. C.*) ISMAILJEE *v.* MANGHAN MAL. **12 I. C. 622 : 5 S. L. R. 80.**

Proceedings by Insolvent.

——— **S. 28 (2)—(1907) S. 16 (2)**—*Proceedings by insolvent—Vesting order—Suit by undischarged insolvent.*

After adjudication the property of the insolvent vests in the Official Receiver. A suit by an undischarged insolvent after the vesting order is not maintainable in respect of the property involved in the Insolvency Proceedings. Nor can the insolvent appeal from a decree passed in a suit instituted by him. It is the Official Receiver alone that can sue to enforce the rights possessed by the insolvent on the date of the order of adjudication. (*Ayling and Phillips, JJ.*) SUBBARAYA CHETTIAR *v.* PAPATHI AMMAL. **(1918) M. W. N. 289 : 45 I. C. 239 : 7 L. W. 516.**

——— **Ss 28, 41—(1907) Ss. 16 and 14**—*Proceedings by insolvent—Pro-note suit on negotiable instrument by insolvent.*

An adjudicated insolvent who has not obtained either his personal or final discharge may even if all his property has vested in the Official Assignee, sue on a pronote in his favour unless the Official Assignee interferes. (*Fox, C.J. and Hartnoll, J.*) RAM BULLAB BHIRKAWALA *v.* BICKRAJ. **6 L. B. R. 174 : 19 I. C. 88 : 6 Bur. L. T. 81.**

Reputed Ownership.

——— **S. 28 (3)—(1907) S. 16 (3)**—*Reputed ownership—Railway Receipt—Pledge of—Charge holder.*

A Railway receipt is a mercantile document of title to goods, and lawful possession as pledgee of such receipt enables the holder, by virtue of local custom, to get possession of the goods from the carrier. The insolvent's right to get possession under S. 16 (3) of the Prov. Insol. Act ceases with the pledge. 15 Bom. L. R. 890 Foll. (*Sadasiva Aiyar and Spencer, JJ.*) FAKEERAPPA *v.* THIPPANNA. **30 I. C. 950 : 38 Mad. 664.**

——— **S. 28 (3—(1907) S. 16 (3)**—*Reputed ownership—Machinery—Oil press—Goods—Receiving of.*

An oil press worked by kerosine oil engine is not "goods" within the meaning of S. 16 (3) of the Act, though it is capable of being removed without damage to the building. 25 Bom. 659 Foll. (*Hartnoll, Offg. C. J. and Twomey, J.*) ON PE *v.* KUNTI. **14 I. C. 447 : 6 L. B. R. 44.**

——— **S. 28 (3) (6)—(1907) S. 16 (3) and (5)**—*Reputed ownership, doctrine of—Applicability to secured creditor—Receiving order, effect of.*

S. 16 (5) excludes secured creditors from the doctrine of reputed ownership. A receiving order under English Law does not divest the property of the insolvent. The property of the

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Reputed ownership.

insolvent is only divested by the adjudication order. The failure on the part of a mortgagee to object to the sale of the mortgaged goods does not deprive him of his interest which is transferred to the sale proceeds. (*Pratt, J. C.*) *In re* WYSE, *Ex parte* CHOWKSEY.

17 I. C. 31 : 6 S. L. R. 97.

——S. 28 (3)—(1907) Ss. 16 (3) 2 (a) 13 (2)—*Reputed ownership—Insolvent in possession of goods as commission agent—Power of Receiver to take possession.*

Goods entrusted to a commission agent for sale are his property for purposes of the Provincial Insolvency Act and a Receiver is entitled to take possession of the same ; but in cases where circumstances point out the agent is not the "reputed owner" the principal is entitled to a restoration of the same. (*District Court Jurisdiction.*) *In re* MESSRS. KADIRKHOR ISMAILJI LOTIA.

11 I. C. 14 : 5 S. L. R 78.

Suit against Receiver.

——S. 28 (2)—(1907) S. 16—*Suit against Receiver—Leave not necessary.*

There is no statutory provision under which leave is necessary to file a suit against Official Receiver. On the other hand whatever provision there is in the Act relating to the grant of such leave is confined to claims of creditors. Reference may be made to S. 28, sub-cl. 2. (*Lindsay and Sulaiman, JJ.*) MAHRANA *v.* DAVID.

21 A L. J. 737 : L. R 4 A. (Civ.) 483 : 46 A. 16 : 1924 All. 40.

——Ss. 28, 56—(1907) Ss. 16 and 18—*Suit against Receiver — Decision against— If* Res judicata.

The Official Receiver is not a mere representative of the creditors of the estate but an officer of Court. A decision against him necessarily does not operate as *res judicata.* Where an Official Receiver was not in fact impleaded as representing the general body of creditors and he did not defend the suit on their behalf and an *ex parte* decree was passed against him, it does not operate as *res judicata* in a subsequent suit by the creditors.

The words "any suit or other legal proceedings" in S. 16 of the Provincial Insolvency Act Cover a case where the object of the suit or other legal proceedings is to obtain any remedy against the property of the person of the insolvent in respect of a provable debt. (*Fawcett, A. J. C.*) MESSRS. LOUIS DREYFUS & CO *v.* JAN MAHOMED.

49 I. C 421 : 12 S. L. R. 61

——S. 28 (2)—(1907) Ss. 16, (2) (b)—*Suit against Receiver—Leave of Court.*

Leave of Court is not generally necessary for a plaintiff to sue the Receiver in insolvency and a person who claims adversely to the insolvent is not affected by the provision of S. 16, cl. (2) (b) of the Pro. Ins. Act and is not therefore bound to obtain leave of the Court before suing the Receiver. (*Hayward, J. C. and Crouch, A. J. C.*) HALIMA *v.* MATHRA DAS RAMCHAND.

40 I C. 122 : 10 S. L. R. 179.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Vesting of property.

Vesting of Property.

——S. 28 (2)-(1907) S. 16--*Vesting of property —Adjudication of father in joint Hindu family—Share of son in joint family property vests in the Official Receiver.*

Where the father of a joint Hindu family which includes minor sons as well as himself is adjudicated an insolvent, the Receiver takes over all rights in the insolvent's property which the insolvent himself possessed including the right to alienate co-parcenery property belonging to the father and the sons in satisfaction of antecedent debts incurred by him provided they are not tainted with immorality. 7 B. 438 ; 19 M. 74 Ref. (*Piggott and Walsh, JJ.*) BAWAN DAS *v.* O. M. CHIENE.

44 A. 316 : 20 A. L. J. 155 : 1922 All. 79.

——S. 28—(1907) S 16 (4)——*Vesting of property—Insolvent heirs of deceased Mahomedan—If, can consent to a bequest of the deceased to another heir.*

Where a Mahomedan bequeathed some of his properties to one of his heirs and the other heirs, who were insolvents, consented to the bequest after the death of the testator ; *held* that the principle of Mahomedan law ought to be applied and that the bequest will be held valid in preference to the rights of the Official Receiver claiming to be entitled to the properties vested in the insolvent heirs on the death of the testator and before giving their consent to the bequest. (*Piggott and Walsh, JJ.*) AZIZ-UN-NISSA BIBI *v.* CHIENE.

42 All. 593 : 18 A. L. J. 745 : 59 I. C. 296 : 2 U. P. L. R. (All.) 251.

——S. 28 (2) — (1907) S. 16—*Vesting of property.*

The mortgagee of a factory obtained a mortgage decree and the factory was about to be sold in execution, when the judgment-debtor applied to have a Receiver to work for the decree-holder. The Receiver worked for two years when the judgment-debtor was adjudged insolvent The factory was sold in execution of the plaintiff's decree. The profits had been paid to a certain association. This money was attached by holders of money decree against the judgment-debtor. The plaintiff sued to recover the amount from the creditors and impleaded the Receiver as a party. *Held*, that S. 16 had no application to the case, as the money claimed by the plaintiff was not a debt provable under the Act but was the property of the plaintiff and never the property of the insolvent. The plaintiff was not seeking any remedy against either the person or property of the insolvent. (*Richards, C. J. and Banerjee, J.*) JHUNKOO LAL *v.* PEARY LAL.

39 All. 204 : 38 I. C. 613 : 15 A. L. J. 49.

——S. 28 (3) and (6)—(1907) S. 16 – *Vesting of property – Goods—Possession with mortgagor—Rights of trustee in bankruptcy.*

If the goods have been mortgaged the mortgagee is the true owner and if the mortgagee allows the mortgagor to continue in possession of the goods until his bankruptcy the goods pass to the trustee. (*Chatterjee and Pearson, JJ*). SHAMAL DAS *v.* PHANINDRA NATH.

1923 Cal. 532.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Vesting of property

——S. 28 (2)—(1907) S. 16 (2)—*Vesting of property—Receiver—Leave of court if essential to suit against.*

A Receiver is exactly in the same position as the trustee in bankruptcy and the whole property of the insolvent is vested in him and he is the owner of the property until he is discharged. The rule that a suit should not be instituted against a Receiver without a previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed, only applies to cases where the Receiver is appointed in an action and does not apply to a Receiver as mentioned in Prov. Insolvency Act. *Fletcher and Cuming, JJ.*) AMRITA LAL GHOSE *v.* NARAIN CHANDRA CHAKARAVARTHI. 53 I. C. 973 : 30 C. L. J. 515.

——S. 28—(1907) S. 16—*Vesting of property—Partner of firm insolvent—Position of receiver.*

When a partner is adjudged an insolvent the receiver appointed under S. 16 merely replaces the insolvent partner and cannot claim to take exclusive possession of the entire assets of the firm. (*Mookerjee and Beachcroft, JJ.*) SANYASI CHARAN MANDAL *v.* ASUTOSH GHOSH. 26 I. C. 836 : 42 Cal. 225.

——S. 28 (2)—(1907) S. 16 (2) (a)—*Vesting of property—Salary.*

Salary is property of the insolvent within S 16 (2) (*a*) of the Act. (*Mookerjee and Beachcroft, JJ.*) RAMCHANDRA NEOGI *v* SHAMA CHARAN BOSE. 19 C. L. J. 89 : 21 I. C. 950 : 18 C. W. N. 1052.

——S. 28—(1907) S. 16—*Vesting of property—Ancestral property—Vesting in Official Receiver—Death of insolvent—Effect of.*

According to S. 16 of the Prov. Ins. Act on the adjudication of person as an insolvent the whole of the property of the debtor vests in the Court or the Receiver. The death of a debtor does not put an end to an insolvency proceeding initiated on an application by the debtor. There is nothing in the Act to show that after an order of adjudication has been made and the property has vested in the Receiver the death of the debtor would divest the Receiver of the property. Under the customary law a father has the right to dispose of ancestral immoveable property including the interest of his son under recognised circumstance and a vesting order made under S. 16 of the Act vests that right in the Official Receiver, who can, therefore, give a good and complete title to such ancestral estate to a purchaser. 7 Bom. 438 Rel. (*Abdul Raoof and Martineau, JJ.*) LACHMAN DAS *v.* JAI SINGH. 4 Lah. L. J. 262 : 1922 Lah. 389.

——S. 28—(1907) S. 16 (5)—*Vesting of property—Meaning of charging property.*

Where a person is adjudicated as an insolvent by his own act, the whole of his property becomes vested in the receiver and charged for payment of his debts. (*Scott-Smith, J.*) FAKIR MUHAMMAD *v.* AMIR CHAND. 66 I. C. 893 : 3 Lah. L. J. 5.

——S. 28 (2)—(1907) S. 16 (2)—*Vesting of property—Father insolvent—Sons' interest not vested.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Vesting of property.

The Receiver has no authority to deal with the estate of the sons in the joint family in an adjudication of the father. (*Chevis, A.C.J.*) SHIB CHARAN *v.* SHEIK MUHAMMAD ISMAIL. 2 Lah. L. J. 401.

——S. 28 (2)—(1907) S. 16 (2)—*Vesting of property—Debts due to insolvent—Interest.*

An insolvent's solvent debtors cannot be absolved from the liability to pay interest on the ground that the insolvent has filed his petition in insolvency. (*Beadon, J.*) KANHAYA LAL MOHAN MAL *v.* RADHA KISHEN. 112 P. L. R. 1913 : 18 I. C. 205 : 92 P. W. R. 1913.

——S. 28 (1907) S. 16—*Vesting of property—Adjudication of one member of Joint family*

Where only one member of a family firm is adjudicated insolvent and the adjudication of the remaining members is refused, an order making liable the shares of the latter in the family trade and property for the debts of the insolvent is premature as the Receiver may deal with the assets other than those of the insolvent. (*Oldfield and Seshagiri Aiyar, JJ.*) SATHIVASAGAM PILLAI *v.* MEENAKSHISUNDARAM AIYAR. 69 I. C. 485 : 14 L. W. 361.

——Ss. 28, 56, 53—(1907) Ss. 16, 18 and 36—*Vesting of property—Sale by three members of a joint Hindu family—Subsequent insolvency of one member.*

Where one of three members of a joint Hindu family who executed certain sale deeds was adjudicated an insolvent and steps were taken to have the sales cancelled as not being *bona fide* transactions. *Held*, that the sales could not be set aside in their entirety that the shares of the other two members could not vest in the Official Receiver as they never applied to be declared insolvents and that the District Judge cannot deal with their shares under Ss. 16, 18 and 36. The court can deal with the estate of the insolvent only and the sale in respect of the share of the insolvent alone can be annulled. (*Seshagiri Aiyar and Phillips, JJ.*) PALANIAPPA MUDALI *v* THE OFFICIAL RECEIVER OF TRICHINOPOLY. 20 M. L. T. 334 : (1916) 2 M. W. N. 123 4 L. W. 51 : 35 I. C. 610 : 32 M. L. J. 84.

——S. 28—(1907) S. 16—*Vesting of property—Onerous property.*

Though according to S. 16, the whole of the insolvent's property vests in the insolvency Court, as regards onerous property such as leases, the Official Assignee may elect whether he would accept or repudiate it. If he refuses to accept, the property does not vest in him but continues to vest in the insolvent, as under the Act the insolvent is not debarred from holding separate property provided that the persons dealing with him are aware of his insolvency. (*Dhobley, A. J. C.*) MAHADEO *v.* JAINARAYAN. 62 I. C. 850 : 4 N. L. J. 61 and 207.

——S. 28 (2)—(1907) S. 16 (2)—*Vesting of property—Ordinary and occupancy holdings.*

The ordinary and occupancy holdings of an insolvent tenant in the Central Provinces

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Vesting of Property.

do not vest in the Court or Receiver under S. 16 sub-sec. (2) of the Provincial Insolvency Act. (*Batten, A. J. C.*) SETARAM *v.* SHAIKH SARDAR.
42 I. C. 710 : 13 N L. R. 215.

——S. 28 (4)—(1907) S. 16 (4)—*Vesting of property—"Property," meaning of*

Property in S 16 (4) does not include personal earnings over and above what is properly necessary for the debtor's support. (*Batten, O. J C.*) JAMNADAS *v.* VINAYAK. **10 I. C. 698 : 7 N. L. R. 19.**

—— S. 28 (2)—(1907) S. 16 (2)—*Vesting of property—Hindu father, adjudication of—Son's heir, if vests.*

In case of the insolvency of the father who is a Hindu the shares in the joint property belonging to the sons are not responsible for his debts and cannot be sold for their satisfaction The sale ought to be limited to the father's share alone in the joint property. (*Roe and Coutts, JJ.*) SAHAJ NARAYAN SAHI *v.* WAJID HUSSAIN. **49 I. C. 848.**

——S. 28 (2)—(1907) Ss. 16 (2) and 40 (2)—*Vesting of property—Salary of insolvent.*

Under S. 16 (2 read with C. P Code S. 60 half the salary of an insolvent vests in the Receiver and the Court cannot prevent it from so vesting under S. 40 (2). (*Maccoll, A. J. C.*) TULSILAL *v.* H. GIRSHAM. **38 I. C 410 : 2 U B. R. (1916) 132.**

Vesting Order—Absence of.

——S. 28—(1907) S 16—*Vesting order, absence of—Attachment after adjudication of insolvency—Validity.*

An attachment in execution is ineffective, if the properties had become vested in the Court or the Official Receiver as soon as the judgment-debtors were adjudicated insolvents The absence of a vesting order is immaterial. (*Oldfield and Sadasiva Aiyar, JJ.*) RAMASWAMI NAIDU *v.* MUTHUSAMIA PILLAI. **41 Mad 923 : 35 M L J. 581 : 48 I C. 756 : (1918) M.W. N. 796.**

—— Ss. 28, 56, 82—(1907) Ss. 16, 18 and 55 (1) (a)—*Vesting order, absence of—Effect—Sale by Official Receiver—No title passes.*

Where an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under S. 55 (1) (*a*) of the Provincial Insolvency Act, the insolvent's estate does not vest in the Official Receiver under S. 18 or any other provision and will not so vest unless an order vesting it in him is passed by the Court 30 M.L.J 415 Foll. Consequently a sale without such order by the Receiver will not pass any title (*Oldfiled and Seshagiri Aiyar, JJ.*) MUTHUSWAMI IYAR *v.* SOMOO KANDIAR. **43 Mad. 869 : 12 L.W. 622 : 59 I. C, 507 : (1920) M W. N. 537 : 39 M. L. J. 438.**

Miscellaneous.

——S 28 (6) (1907) S. 16—*Secured creditor—Charge—Rights of.*

Where a creditor has a registered mortgage over certain moveable property of the insolvent, he is a secured creditor holding a legal charge. If the Receiver realise the property, the debt constitutes a charge of the amount so realised. (*Piggott and Walsh, JJ.*) MOTI RAM *v.* RODWELL. **21 A. L. J. 32 : 9 O. & A. L. R. 216 : 1923 A. 159.**

——S. 28—(1907) S. 16 (5)—*Mortgage by insolvent—Payment of a mortgage—Validity of.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Miscellaneous.

A mortgage effected by a person after he has been adjudicated an insolvent is not invalid under S 16 (5) of the Act, if consideration was employed in paying off a prior mortgage and the insolvency thereby terminated proceedings. (*Rafique and Stuart, JJ.*) SHIAM SARUP *v.* NAND RAM.
43 All. 555 : 63 I. C. 366 : 19 A. L. J. 511.

—— Ss. 28, 67, 35—(1907) Ss. 16, 41, 42—*Transfer by insolvent of property abandoned by Receiver.*

A transfer by the insolvent after his discharge of property abandonded by the Receiver of the Insolvent's Estate is good and enforceable by the vendee. (*Piggott and Walsh, JJ.*) SHEONANDAN *v.* KASHI **39 All. 223 : 37 I.C. 878 : 15 A. L. J. 79.**

S. 28—(1907) S. 16—*Judge acting as Receiver, duty of.*

When under the Act, Judge himself is Receiver he must in case of dispute appoint a creditor as the representative and the general body of creditors. (*Walsh and Stuart, JJ.*) JHABBA LAL *v.* SHIB CHARAN. **39 All, 152: 37 I.C. 76 :15 A.L.J, 1.**

——S. 28—(1907), S. 16 (2) (a)—"*As hereinafter provided*" *whether qualifies 'Receiver' or 'vest.'*

The words "as hereinafter provided" in S. 16 (2) (*a*) of the Act, qualify only the word 'receiver' and not the word 'vest.' (*Spencer and Ramesam, JJ.*) OFFICIAL RECEIVER, COIMBATORE *v.* KANGA.
30 M. L T. 152 : 45 M 167 . 14 L. W 655 : (1921) M. W. N. 858 : 42 M. L. J. 53 : 1922 M. 50.

—— Ss. 28, 56, 57—(1907) Ss. 16, 18, 19—*Presidency Towns Insolvency Act III of* (1909), Ss. 17, 61, 83—*Official Receiver, position of.*

The position of an Official Assignee in Madras differs from that of an Official Receiver in the moffusal in that the Official Assignee may sue and be sued as such without mentioning his own name under S. 83 of the Presidency Towns Insolvency Act, whereas there is no such corresponding section under the Provincial Insolvency Act. (*Sadasiva Aiyar, J.*) RAMA AIYAR *v.* OFFICIAL RECEIVER, TINNEVELLY.
5 L. W. 507 : 40 I. C. 170 : 32 M. L. J. 520.

——S. 28 (2)—(1907) S. 16 (2)—*Omission of creditor to prove debt in insolvency proceedings—Liability of surety.*

A creditor wilfully omitting to prove his debt against his principal debtor in insolvency proceedings against him can nevertheless proceed against the surety of the insolvent for recovery of the same ; in such a case the contingent liability of the surety is a debt provable by him in insolvency proceedings of the principal debtor. (*Dracke Brockman, J. C.*) GOPAL *v* GANPAT
11 I. C. 911 : 7 N. L. R. 122.

——S. 28—(1907) S. 16—*Adjudication order after sale in execution of decree—Effect.*

The Receiver of the insolvent's estate is not entitled to rateable distribution on behalf of the other creditors, where property is sold in execution of a decree pending the disposal of an application for an order of adjudication but the order is passed before the sale is confirmed. Whether the money was paid to the creditor by set off or was lying in Court awaiting the confirmation of

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28—Miscellaneous.

the sale, is immaterial. (*Stuart and Kanhaiya Lal, A. J. Cs.*) ACHAMCHAT LAL *v.* CHANGAMMAL.
18 O. C. 268 : 32 I. C. 429 : 3 O. L. J. 566.

——— **Ss 28 (6), 47—(1907) Ss. 16 (2) and 31**—*Secured creditors—Right of—Mortgages effected during attachment—Procedure—Assets, realised by sale.*

An insolvent judgment-debtor during an attachment by certain decree-holders executed mortgages and the decree-holders contended in the insolvency proceedings that the mortgages were void under S. 64, C. P. Code. *Held*, that according to S 16 (2) of the Pro. Insol. Act, the claims which the creditors were able to enforce under the C. P Code ceased to be enforceable upon the making of the order of adjudication. The creditors could only work out their remedy under the conditions laid down in the Insolvency Act and they could not therefore claim that the mortgages were void against them. If the property were sold up, the mortgagees would have the same remedy against the assets realised by the sale as against the property itself ; and in all such cases where claims were set up by the mortgagees the provisions of S. 31 of the Insolvency Act must be strictly complied with. An attaching creditor has no lien or charge upon the debtor's property which he attaches and is not entitled to rank as a secured creditor. It is expedient in the interest of all the creditors that the Court should be allowed to bring the insolvent's mortgaged property to sale and give the mortgagee the same remedy against the sale proceeds as he had against the property itself. The right of secured creditors are not affected in any way by the passing of an order of adjudication. (*Lindsay, J. C. and Rafique, A. J. C.*) GOPINATH *v.* GUR PRASAD. **15 I. C. 860.**

——— **Ss. 28 (6) and 47**—*Secured creditor—Election—Order for sale—Propriety of.*

If the secured creditor does not elect, under S. 47 of the Act, the Court will direct the Receiver to take the possession of security and sell it. (*Das and Kulwant Sahay, JJ*) SANT PRASAD SINGH *v.* SHEODUT SINGH. **2 Pat 724 : 1924 P. 259**

——— **Ss. 28 (7), 51—(1907) Ss. 16, 34**—*Date of adjudication, date of operation of—Decree-holder's rights to assets realised before order of adjudication.*

S 34 controls S. 16 of this Act and though an order of adjudication relates back to date of application, the decree-holder has greater rights than Receiver in respect of assets realized before date of adjudication. 42 Cal. 289, 34 All. 628, Rel 61 C. 95. Expl. As soon as a sale is held in an execution and money deposited for the *benefit* of the decree-holder the assets are considered as realized and at the disposal of the decree-holder. (*Mullick and Jwala Prasad, JJ.*) PALI RAM *v.* SHEO NATH PRASAD.
2 Pat. L. J. 235 : 1 Pat. L. W 463 : 39 I. C. 246 : 1917 Pat. 111.

——— **S. 28—(1907) S. 16 (2)**—*Insolvent guarantee brokere Claim for damages—Suit to recover guarante—Deposit—Arbitration.*

A suit by an Official Receiver of the property of an insolvent guarantee broker against the employer for the balance of the guarantee deposit after setting off the amount of damages settled in insolvency proceedings as due to the employer cannot be referred to arbitration under S 19 without leave of the Court under S. 16 (2) of the Prov. Ins. Act. (*Hayward, J. C.*) JAMES FINLAY & Co. *v.* RAYMOND. **27 I. C. 138 : 8 S. L R. 60.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 33.

——— **S. 28 (6)—(1907) S 16**—*Secured creditor Remedies—Restrictions imposed.*

Under the Prov. Ins Act, a secured creditor is not exempted from the restriction imposed by S.16 (2) (*b*) barring any remedy against the person and the property of the debtor and is subject to all disadvantages arising when the insolvent debtor cannot carry on his promises. The Official Receiver takes the property free from any personal undertaking of the insolvent. (*Crouch and Hayward, A. J. Cs.*) MESSRS DAVID SASSOON & Co. *v* THE NATIONAL BANK OF INDIA, LTD., KARACHI. **21 I. C. 520 : 7 S. L. R. 61.**

Ss 28, 56—*Obstructing a Receiver appointed by Court.*

Obstructing a Receiver appointed by Court in taking possession of the property of a person against whom insolvency proceedings are pending is contempt of Court. The proper procedure is to move the Court against the action of the Receiver. (*Pratt, J. C.*) E. D SASSOON *v.* MOOSAJI. **9 I. C 485.**

——— **S. 33—(1907) S. 24**—*Inherent power—Application made after insolvency proceedings closed—No jurisdiction to entertain*

An insolvency Court has the same inherent power as ordinary Courts to correct clerical mistakes, etc. Where a creditor in insolvency proceedings has exhausted all the remedies open to him for rectifying an error in the statement of the debt due to him, the Insolvency Court becomes *functus officio* and has no jurisdiction to entertain an application under S. 24 of the Act. (*Walsh and Stuart, JJ.*) RAM CHANDER SARUP *v.* MAZHAR HUSSAIN. **51 I. C. 55 : 1 U. P. L R (H. C.) 69.**

——— **S. 33—(1907) S. 24**—*Schedule of creditors not prepared—Effect of.*

No creditor of an insolvent can enforce his claim as a schedule creditor against the property acquired by the insolvent after discharge, unless a schedule of creditors has been prepared before discharge. (*Knox and Rafique, JJ*) AMINUDDIN HYDER *v.* SHEORAJ SINGH. **35 All 402 : 20 I. C. 316 : 11 A. L. J. 559.**

——— **S. 33 - (1907) S. 24, Proviso A** - *Application for adjudication—Inability to pay debts—Test of—Joint application.*

Where an application is made for adjudication as an insolvent on the ground that the debtor is unable to pay his debts the Court must enquire into the present value of the property and decide whether having regard to proviso A to S. 24 of the Act the debtor has proved his inability to pay his debts. Where the debtor is a firm the application for adjudication must be made in the name of the firm and the manner in which such application is to be signed is laid down in Rr. 22 & 24 of the Rules framed by the High Court. (*Chatterjee and Cuming, JJ.*) SATISH CHANDRA *v.* FIRM RAJ NARAYAN PAKHIRA. **1924 C. 436.**

PROVINCIAL INSOLVENCY ACT (V OF 1920) S. 33.

——S. 33—(1907) S. 24—*Barred debt not provable.*

A time-barred debt is not provable in insolvency proceedings. (*Mookerjee and Panton, JJ.*) BARANASHI *v.* BAHABADEB. 66 I. C 758 : 34 C L. J. 167.

——Ss. 33, 50, 44—(1907) Ss. 24, 26 and 45—*Undetermined liability—Deferred dower—Conditional discharge*

It is unfair to suspend the discharge of an insolvent on account of an undetermined liability which might never arise and the Court is not competent to make it a condition of the discharge that the insolvent should furnish security for the amount of his liability. The amount of deferred dower should not have been entered in the Schedule having regard to S. 24 proviso. (*Wilberforce, J.*) MIRZA ALI *v.* QADARI KHANAM. 50 I C. 774 : 21 P. L. R. 1919.

——S. 33—(1907) S. 24 (3)—*Proof of debt—Bar by limitation*

There is nothing in S. 24 (3) of Act III of 1907 making it obligatory on a creditor to tender proof of his debt before the discharge of the insolvent. The law of insolvency allows proof of debts at any time during the administration so long as there are assets to be distributed. An order of discharge of an insolvent on condition that he should, subject to his right to an allowance of Rs. 25 per month, for the maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire does not amount to such a discharge as is referred to in S. 24 (3) of Act III of 1907. Where a person had a decree which was executable against the insolvent on the date of adjudication, the mere fact that during the pendency of the insolvency proceedings the period of twelve years prescribed by S. 48, C.P. C. had expired, does not prevent the decree-holder from proving his debt in insolvency. In bankruptcy a debt does not become barred by lapse of time if it was not at the commencement of the bankruptcy (*Oldfield and Venkatasubba Rao, JJ.*) SIVA SUBRAMANIA PILLAI *v.* THEETHARAPPA PILLAI. 45 M L. J. 166 · 18 L. W. 636 : (1923) M. W. N. 895 : 1924 M. 163.

——S. 33—(1907) S. 24—*Voluntary—Payment—Test.*

'Voluntary payment' is one made spontaneously by a person of his own accord and not (1) under a pressure of demand by creditors or (2) special agreement or (3) a possible danger of prosecution. A payment made in the ordinary course of business is not voluntary. (*Munro and Abdul Rahim, JJ.*) RAMSAY & CO. *v* OFFICIAL ASSIGNEE OF MADRAS 35 Mad. 712 : 10 M. L. T 124 : 11 I C. 769 · 21 M. L. J 920.

——Ss. 33 and 16—(1907) Ss. 24 (1) (a) and 9—*Petition by creditor—Proof of debt.*

When a petition in insolvency is put in by the creditor to adjudge his debtor an insolvent, the court must allow him under S. 24 to prove his debt and not require him to prove it in a regular suit. (*Pratt and Duckworth, JJ.*) A. K. R, M. C. T. CHETTY FIRM *v.* MAUNG AUNG BWINT. 11 L.B.R. 354 : 1 Bur. L.J. 239 : 1923 Rang. 21.

PROVINCIAL INSOLVECNY ACT (V OF 1920), S. 34.

——Ss. 33. 44 (2)—(1907) Ss. 24 and 45 (2)—*Proof of debt.*

Under the Act a creditor can deprive an insolvent of the remedies intended to be provided to him by the simple expedient of refraining from proving the claim and of thus excluding it from the schedule framed by the Court. (*Crouch and Hayward, A, J. Cs.*) DHANJI G. DESHMANAY *v.* H. A. TAYLOR. 19 I. C. 385 :6 S. L. R 163.

——Ss. 33, 49—(1907) Ss. 24, 25—*Composition before adjudication.*

As according to the Act the composition should be approved by the majority in number and three-fourths in value of the creditors *whose debts are proved*, the court can approve only compositions after adjudication under Ss. 24, 25. (*Hayward, J. C.*) ASSOMAL, *In re.* 9 I. C. 724 : 4 S. L. R. 222.

——S. 33 (3)—(1907) S. 24 (3)—*Application by a creditor—Rights of other creditors.*

When an application is made by a creditor of an insolvent debtor to be included in the schedule of creditors, the other creditors have a right to be heard against the application. (*Karamat Husain and Chamier, JJ.*) ALLAHABAD BANK LTD. *v.* MURLIDHAR. 34 All. 442 : 14 I. C. 589 : 9 A. L. J. 577.

——Ss 34, 49, 50—(1907) Ss. 24, 25 and 26—*Provable claim—Claims on forward contracts.*

Claims on forward contracts are demands, in the nature of unliquidated damages arising out of contract. They are contingent debts capable of being fairly estimated and capable of being proved under the Insolvency Act before the dates on which they are contingent. 13 A. C. 351, 358, Ref. Where the Official Receiver receives affidavits from different creditors in proof of such debts it is his duty to inquire into the matter and to determine a uniform rate for the purpose of making a fair estimate or valuation of these debts. The creditors' affidavits should not be accepted without question, as the affidavits can only disclose the chance of liability and are nothing but the creditors' estimate and no part of the proof of such a debt. 25 Q B. D. 529, 533 Ref (*Pratt, J. C.*) MOSSAJI ISMAILJI LOTIA. *In re.* 15 I. C. 825 : 5 S. L. R. 249.

——S. 34—*Provable debts—Meaning of—Obligation incurred.*

A debt to be provable under S. 34 of Act V of 1920 must be a debt to which the insolvent has become subject by reason of an obligation incurred before the date of adjudication as an insolvent. The words "obligation incurred" in the section refer to an obligation incurred by the insolvent himself. (*Hallifax, A. J. C.*) KESHEO-RAO *v.* GOVINDARAO. 6 N. L. J. 279 : 1923 Nag. 142.

——S. 34—(1907) S. 26—*Debt provable—Obligation incurred after adjudication.*

A suit on an obligation incurred by an insolvent after adjudication is maintainable as it is not a debt provable in the insolvency under section 28 of the Act. The suit is not governed by S. 16 (2) of the Act. (*Findlay, Offg. A. J. C.*) GANGA PRASAD *v.* FIDA ALI CHANDABHAI. 48 I. C. 913.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 34.

——— S. 34—(1907) S. 28— "*Date of such adjudication*" - *Meaning of.*

The words "date of such adjudication" in S. 28 of the Act mean the date on which the actual adjudication is made and not the date on which the petition is presented and a creditor can prove a debt subsequent to the presentation but before adjudication. (*Twomey, C. J and Ormond, J*). K. N. K. I. CHETTY *v.* BA TIN. **61 I. C. 640 : 13 Bur. L T. 117.**

——— S 34—(1907) S. 28—*Provable debt.*

Obiter :—Maintenance ordered to a wife by a decree of the court is not a debt provable under the Act. (*Pratt, J. C.*) PAMANMAL HEMANMAL, *In the matter of.* **35 I. C. 541 : 10 S. L. R. 28.**

——— S. 34 (1) (1907) S 28—*Vesting of property --Claim by Official Receiver against attachment of money in the hands of judgment-debtor-insolvent —If comes under C. P. C., O. 21, Rr. 58—63—Limitation Act, Arts. 11, 13.*

The Official Receiver's claim to any property where the vesting was after the attachment of that property, is a statutory claim and not a claim under O. 21, Rr. 58-63, and the Court dealing with such claims acts under S. 151, C. P. C. and not under O. 21. Arts. 11 and 13 have no application to orders on such claims. (*Sadasiva Aiyar and Spencer, JJ*) BALAKRISHNA MENON *v.* RANGAN PATTAR **14 L. W. 334 41 M. L. J. 334 : (1921) M. W N. 775 : 30 M. L. J. 77 : 45 M. 70 : 1922 M. 189**

——— S. 35—(1907) S. 42—*Annulment of insolvency—Suit by Receiver commenced before—Effect on.*

A suit instituted by the Receiver of an insolvent's estate against a debtor of the insolvent does not cease to be maintainable by reason of the annulment of the adjudication *pendente lite* (*Richards, C. J. and Banerji, J.*) MANNU LAL *v.* NELIN KUMAR MUKERJI. **41 All 200 : 48 I. C. 443 : 16 A. L. J. 938.**

——— Ss 35, 27—(1907) Ss. 42 and 16—*Annulment—Refusal of adjudication.*

An adjudication under S. 16 can be set aside only upon proof by the applicant under S. 42 of the existence of one or more of the circumstances specified in S. 42 (1). It is doubtful whether under the Indian Law, the Court could refuse to make an order of annulment where one or more of the circumstances specified in S. 42 (1) were proved to exist. (*Mookerjee and Newbould, JJ.*) MOTI LAL RADHA KISHEN *v* GANPAT RAM. **23 C. L. J. 220 : 34 I. C. 792 : 21 C. W. N. 936.**

——— Ss. 35, 28 (5)—(1907) Ss. 42 (1) and 16 (2) (a)—*Insolvency application—Adjudication—Condition imposed—Annulment of order, if valid.*

Where on an insolvency petition the Court passed an order imposing a condition on the non-fulfilment of the condition, annulled the order it could not be so annulled if the condition was itself illegal, *e.g.*, condition as to payment of one-fourth of the insolvent's salary to the Receiver pending realisation of assets. Salary is the property of the insolvent within S. 16 (2) (*a*) of the Provincial Insolvency Act and the District Judge could arrange for payment to the Receiver of one-half of the salary earned by the insolvent. (*Mookerjee and Beachcroft, JJ.*) RAMCHANDRA NEOGI *v.* SHAMA CHARAN BOSE. **19 C. L. J. 53 : 21 I. C. 950 : 18 C. W. N 1052.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 35.

——— S. 35—(1907) S. 42—*Absence of available assets no ground of refusal by Court.*

A Court cannot refuse to make an order for adjudication or for annulling any adjudication already made, merely on the ground of there being no available assets. (*Scott-Smith, J.*) SHIRA *v.* GANGA RAM. **37 I. C. 214 : 171 P. W. R. 1916.**

——— S. 35—(1907) S. 42—*Annulment of adjudication.*

An adjudication can be annulled only under S. 42, when the conditions mentioned therein are fulfilled A Court while annulling an adjudication must find that the adjudication could not legally or properly have been made on the facts as existing at the time of adjudication. Subsequent misconduct on the part of the petitioner should not lead to annulment of the adjudication. An adjudication could not be annulled because the debtor has paid his debts in full out of his assets or a part of his property is subject to the alienation of Land Act. (*Johnstone, C. J.*) JAMKHAN *v.* DEVI DITTA. **152 P. L. R. 1915 : 29 I C. 888 : 77 P. W. R. 1915.**

——— S. 35—(1907) S. 42—*Annulment of Insolvency—Payments of debts, proof of.*

Where an adjudicated insolvent applies for annulment of the adjudication on the ground that his debts have been paid in full, the fact that such payments were not made through the Official Receiver is no justification for refusing to grant the annulment. The petitioner should be put to proof of the allegations made by him. (*Abdur Rahim and Oldfield, JJ.*) VELAYUDHAM PILLAY *v.* THE OFFICIAL RECEIVER OF TINNEVELLY. **26 M. L. T. 139 : 52 I. C 689 : (1919) M. W. N. 622.**

——— Ss. 35, 69, 41, 44—(1907) Ss. 42, 43, 44 and 45—*Annulment of adjudication—Procedure.*

The fact that proceedings are contemplated under S 43 is not enough to annul adjudication, unless the procedure laid down in Ss. 42, 44 and 45 is adopted. (*Seshagiri Aiyar, J.*) SESHAIYANGAR *v.* VENKATACHALLA CHETTIAR. **31 I. C. 15 : 5 L. W. 220.**

——— Ss. 35, 25—(1907) Ss. 42, 15—*Adjudication annulment of—Grounds.*

S. 42 of the Act is subject to S. 15 and if the Court acts under S. 42 for reasons untenable under S. 15 for refusing the adjudication the order annulling the adjudication is bad. An order of adjudication cannot be annulled on the ground that the petitioner did not make a true statement of his property, as the question about the extent of his property is immaterial. 15 C. W. N. 213, Rel. (*Sharfuddin and Roe, JJ.*) BEHARI SAHU *v.* JUTHER MALL. **38 I. C. 822 : 1 Pat. L. W. 227.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 35.

——— **S. 35—(1907) S. 42**—*Object of Act—Failure to keep proper accounts—Reckless debts.*

The benefit of Insolvency Acts, is intended for traders who act honestly and straightforwardly and according to the recognised proper mode essential to knowing their position but who through misfortune incur loss. The benefit should not be extended to those traders who fail to keep proper accounts or who deal extravagantly and contract debts recklessly without any reasonable prospect of being able to pay them. (*Fox, C. J. and Hartnoll, J.*) S. R. M. C. T. CHETTY *v.* KO AUNG GYI. **15 I. C. 276 : 5 Bur. L. T. 80.**

——— **S. 38—(1907) S. 27**—*Composition.*

When an application under S. 27 of the Act is made before a proposal for composition is finally accepted, no creditor is entitled to note whose debt has not been proved and whose name has not been admitted on to the schedule by the Judge. In insolvency cases the meaning of 'proof of debts' is that the creditor shall have proved his debt in some of the ways prescribed by the Act and that his name shall have been put by the Court in the schedule of creditors. (*Richards, C J. and Banerji, J.*) CHANDANLAL *v.* KHEMRAJ. **40 I. C. 156 : 15 A. L. J. 538.**

——— **S. 38—(1907) S. 27**—*Schedule, when to be settled.*

In all insolvency matters schedules ought to be settled as soon as possible before a composition is finally accepted. (*Richards, C. J. and Banerji, J.*) TOHARMAL UTTAM CHAND *v.* SURAJ BALI **39 I. C. 953**

——— **S. 38—(1907) S. 27**—*Composition—Secured creditor.*

A secured creditor is unaffected by any composition scheme unless it is approved of by the Court and consented to by him. (*Chatterjea and Suhrawardy, JJ.*) JUGMOHAN BADHANI *v.* INDRA CHANDRA. **63 I. C. 895.**

——— **S. 38—(1907) S. 27**—*Annulment of adjudication—Consent of creditors.*

The consent of all the creditors is not of itself necessarily sufficient to justify an order for annulment of an adjudication. (*Mookerjee and Newbould, JJ.*) MOTI LAL RADHA KISHEN *v.* GANPAT RAM. **23 C. L. J. 220 : 34 I. C. 792 : 21. C W. N. 936.**

——— **S. 38—(1907) S. 27**—*Objects of—Payment of debt to insolvent before--Adjudication—Effect.*

S. 38 is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency and its benefit must be given to persons who pay their debts after application but before adjudication. (*Kotval, A, J. C.*) ONKARSA *v.* BRIDICHAND. **6 N. L. J. 213 : 19 N. L. R. 144 : 1923 Nag. 290.**

——— **S. 38—(1907) S. 27**—*Scheme of arrangement—Rejection of.*

Scheme of arrangement proposed by an insolvent can be rejected by the Court, although three-fourths of creditors are in its favour. (*Lindsay, J.C. and Stuart, A. J. C.*) SHAFIQ-UZ-ZAMAN *v.* DEPUTY COMMISSIONER. **30 I.C. 694: 18 U.C. 125.**

——— **S. 38—(1907) S. 27**—*Composition before adjudication.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 41.

Though S. 27 of the Act allows composition before or after yet composition is impossible before adjudication as the debts are not proved before. In sanctioning a composition a Court has a direction under S. 27 (*b*). It should sanction the composition if it is reasonable and calculated to benefit the general body of creditors, and is not against commercial morality. (*Pratt, J. C.*) FLEMING SHAH AND CO. *v.* SADI RAM JAMNADAS. **32 I. C. 565 : 9 S. L. R. 181.**

——— **S. 38—(1907) S 27**—*Scope.*

S. 27 does not contemplate enquiry into debts by trustees instead of by the Court nor stay instead of *ipso facto* disposal of the petition. (*Hayward, J. C.*) ASOOMAL, *In re.* **9 I. C. 724 : 4 S. L. R. 222.**

——— **S. 41—(1907) S 44**—*Foreign Bankruptcy—Order of discharge—Effect in British India.*

A discharge from debt or liability under the Bankruptcy laws of a foreign country or one of the British Colonies such as Ceylon, where the debt or liability has been contracted or has arisen is a valid discharge therefrom in British India. The fact that the parties intended the debt to be paid in British India does not affect its validity. 31 M. L. J. 386, Foll. (*Phillips and Krishnan, JJ.*) MAGADHU PILLAY ROWTHER *v.* UAHMMADHU ROWTHER. **26 M. L. T. 88 : 51 I C. 38 : 9 L. W. 535.**

——— **S. 41—(1907) S. 44**—*Court's power to vary its order.*

The Court cannot set aside or vary its order made by it under insolvency jurisdiction. (*Pratt, J. C.*) HENRY ROBBERT SMITH, *In re.* **32 I. C. 575 : 9 S. L. R. 132.**

——— **Ss. 41 (2) (b), 42—(1907) S. 44 (2) (b) and (3)**—*Scope of.*

S. 44 does not restrict the discretion of a Bankruptcy Court with regard to his period of suspension under S. 44 (2) (*b*) or the condition to be laid down with respect to any earnings or income which may hereafter become due to the insolvent. Under S. 44 (5) the power of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently. (*Piggott and Walsh, JJ.*) DEBI PRASAD *v.* ALLEN GRANT. **39 I. C 916.**

——— **Ss. 42 (2), 69—(1907) Ss. 44 (4) and 43**—*Receiver's report—Admissibility as evidence.*

The report of a Receiver of an insolvent's property that the insolvent had fraudulently transferred his property to his wife before declaration of insolvency is not admissible in evidence to convict the insolvent under S. 43. 36 All. 576 ; 32 All. 547 ; 15 Q B. D. 213 Rel. (*Piggott, J.*) NAND KISHORE *v* SURAJ MAL. **37 All. 429 : 29 I. C. 998 : 13 A. L. J. 642.**

——— **S. 41 (2) (c)—(1907) S. 44 (2) (c)**—*Power of Court.*

The Court when giving an order of discharge may, under the section, make the conditions as to future earnings and it can make an order as to earnings after adjudication but before discharge. (*Batten, O, J. C.*) JAMNADAS *v.* VINAYAK **10 I. C. 698 : 7 N. L. R 19.**

——— **S. 44—(1907) S. 45**—*Aggrieved person—Receiver if.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 44.

A Receiver appointed under the insolvency law is not an aggrieved person within S. 46 and he cannot apply for revising the order annulling adjudication. "Person aggrieved" is not a man who is disappointed of a benefit which he might have received if some other order had been passed but must be a man who has a legal grievance; a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongly affected his title to something. (*Shadi Lal, J.*) RADHA MOHAN *v.* GHASI RAM. **93 P. R. 1917 : 41 I. C. 96 : 38 P. W. R. 1917.**

——S. 44 (2)—(1907) S. 45 (2)—*Order of discharge—Operation of.*

An order of discharge frees debtors only from the debts entered in the schedule. (*Lindsay, J. C.*) FIDA HUSAIN *v.* COLLECTOR OF SHAHJAHANPUR. **25 I. C. 708 : 17 O. C. 267.**

——S. 46—(1907) S. 30—*Joint debt cannot be set off against separate debt—"Mutual dealings."*

A joint debt cannot be set off against a separate debt under the Act, since the debts are of a different character and do not come within the term "mutual dealings" (*Macleod, C.J. and Shah, J.*) TRIMBAK GANGADHAR GOKHALE *v.* RAMA CHANDRA TRIMBAK KIRTANE. **63 I. C. 906 : 45 Bom. 1219 : 23 Bom L. R. 537**

——S. 46—(1907) S. 30—*Doctrine of set off—How applied—Fraudulent claim—English law.*

The equitable doctrine of set-off has for its object not merely avoiding cross-actions but doing substantial justice and would apply to prevent the great injustice arising from the same persons being the insolvent's creditor under one account and debtor under another and thereby compelled to pay 16 annas in the rupee on what he owed and received less on what was due to him. But it could not cover cases where a debtor of the insolvent fraudulently buys up a third person's claim against the insolvent with a view to relieve himself in the matter of his debt. (*Rattigan and Beadon, JJ.*) RADHA KISHEN *v.* FIRM OF GANGA RAM RADHA KISHEN. **95 P. L. R. 1914 : 23 I. C. 927: 53 P. R. 1914 : 118 P. W. R 1914.**

——S. 46—(1907) S. 30—*Aggrieved person—Insolvent—Admission of debt—Right of insolvent to appeal.*

Any person aggrieved by any order made in the exercise of insolvency jurisdiction by a subordinate Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final. (*Oldfield and Venkatasubba Rao, JJ.*) SIVA SUBRAMANIA PILLAI *v.* THEETHIAPPA PILLAI. **45 M.L.J. 166 : 1924 M. 163.**

——Ss. 47, 48—(1907) Ss. 31 and 32—*Secured creditor—Interest at contract rate.*

A mortgagee is not a person proving in the bankrupt's estate. He is a secured creditor and is entitled to look to his security to realise the amount of the debt secured thereon, with interest at the contractual rate up to the date of payment. (*Richards, C J. and Rafique, J.*) JUGAL KISHORE *v.* BANKIM CHANDRA. **41 All. 481 : 51 I. C. 192 : 17 A. L. J. 480.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 50.

——Ss. 47, 51—(1907) Ss. 31 and 34—*Secured creditor—C. P. Code, S. 63 (2)—Rateable distribution of assets.*

P. obtained a decree for money against E and attached certain moveables of his judgment-debtor. Subsequently B sued E, and obtained an order for attachment before judgment of a portion of the same property which P had attached. In B's suit an *ex parte* decree was passed against E. B asked for action being taken under S. 63 of the C. P. Code after putting his decree into execution He consented to the sale being held in execution of P's decree and the assets being rateably distributed. This being done, E applied to have the *ex parte* decree set aside and it was ordered that the proceeds of the sale should be "security" for the satisfaction of the decree which might ultimately be passed. E then applied to be adjudicated an insolvent *Held*, that P was entitled to rateable distribution, the sale in execution of his decree being neither illegal nor invalid having regard to S. 63, Cl (2) of the C. P. Code, that B was a secured creditor within Ss. 31 and 34 of the Act the money set apart for him as a condition precedent to the setting aside of the *ex parte* decree being a security to him which he might draw out and appropriate to his own use. (*Tudball and Rafique, JJ.*) PARSOTAM DAS *v.* DAVID. **13 A. L. J. 893 : 30 I. C. 779.**

——S 47—(1907) S. 31—*Secured creditor—Meaning of.*

When under an agreement with a debtor one of his creditors was appointed sole agent for the sale of all books published and to be published by the debtor on condition that the sale proceeds after deducting the commission were to be credited towards the debt. *Held*, that the creditor was a secured creditor. A secured creditor is one holding a mortgage, charge or lien upon the property of the debtor or any part thereof as security for the debt due to him. (*Chamier and Piggott, JJ.*) ALLAHABAD TRADING AND BANKING CORPORATION *v.* GULAM MUHAMMAD. **37 All. 383 : 29 I. C. 263: 13 A. L. J. 521.**

——S. 50—(1905) S. 26—*Inquiry under—Delegation by Dt. Judge to Receiver other than Official Receiver—Not valid.*

A Dt. Judge cannot delegate the power of recording evidence under S. 26 of the Act to a Receiver other than the Official Receiver. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) SATRASALA HANUMANTHU *v.* RECEIVER OF ESTATE OF INSOLVENT TALISETTI SUBBAIYAR. **13 L. W. 145 : 61 I. C. 767 : (1921) M. W. N. 109.**

——Ss. 50, 53, 80—(1907) Ss. 26, 36, 52—*Schedule of creditors—Preparation of—Power of Official Receiver.*

The power delegated to the Official Receiver under S 52 of the Act is to frame a Schedule of creditors after an *ex parte* enquiry and he does not decide judicially or finally upon contested claims. The entering of the name of a creditor in the Schedule by the Receiver does not preclude the Court from entering applications for enquiry under Ss. 26 and 36. (*Oldfield and Bakewell, JJ.*) MOHIDEEN KADIRSHAW MARAIKAR *v.* OFFICIAL RECEIVER, TINNEVELLY. **45 I. C. 67 : 41 Mad. 30.**

PROVINCIAL INSOLVENCY ACT, (V OF 1920), S. 51.

——S 51—(1907) S. 34—*Execution of decree —Attachment of decree — Money realised—Order directing decree holder to pay amount realised to Receiver—Legality of.*

In execution of a decree obtained in 1912 against certain persons the decree-holder attached a decree passed in favour of those debtors. In 1914 an application was filed in insolvency against the judgment debtors and in 1915 an interim Receiver was appointed. The money due to the debtors under the decree was deposited in Court to the credit of the decree-holder who obtained an order for payment and received a certain amount from Court in July 1915. In September 1915, the debtors were adjudicated insolvents, and in November 1917 the decree-holder assigned his rights under the decree. The whole of the decree not having been paid off the assignee applied to the Official Receiver in February 1918 to be allowed to prove his claims to the balance of the decretal amount. His claim was rejected and he was ordered by the District Judge to pay to the Receiver whatever sums he had received under the decree. *Held*, that the order directing payment of the amount realised was illegal. (*Piggott and Walsh, JJ.*) MAHOMED SHARIFF *v.* RADHA MOHAN. 17 A. L. J. 89 : 57 I. C. 760 : 41 All. 274.

——Ss. 51, 52 — (1907) Ss. 34, 35, 47—*Applicability—Attachment—Injunction to stop sale —Power of Court.*

Ss. 34 and 35 only apply when there has been an adjudication or the appointment of a Receiver. Even on the assumption that an Insolvency Court had jurisdiction to issue an injunction to prevent one of the creditors executing his decree in another Court against the judgment-debtor pending disposal of the Insolvency application, it is not a case in which an injunction ought to or could legally have been issued. (*Richards, C. J. and Banerji, J.*) ANURUDHA KUNWAR *v.* KESHEO DAS. 39 All. 547 : 39 I. C. 783 : 15 A. L. J. 473.

——S. 51—(1907) S. 34—*Execution of decree, money realised in—Court, if can retain, before adjudication.*

When no order of adjudication is made, the Court is not at liberty to retain any money that has come to its hands in execution of a decree but must dispose of it according to law. (*Tudball, J.*) PARMER *v.* COWASJEE. 33 I.C. 723 : 14 A. L. J. 236.

——S. 51—(1907) S. 34—*Execution of decree —Property attached but not sold before adjudication—Rights of Receiver.*

A property of the insolvent attached by the creditor but not sold till the date of adjudication is still the property of the insolvent and as such it is available to the general body of the creditors. (*Chamier and Piggott, JJ.*) KASHI NATH *v* KANHAIYA LAL SHARMA 37 All. 452 : 29 I. C. 990 : 13 A. L. J. 700

——S. 51—(1907) S. 34—*Execution of decree —Sale before adjudication—Right to proceeds.*

A sale was held in execution of a decree and the Court ordered that the sale proceeds should be paid to the decree-holder. But before the actual payment was made the judgment-debtor applied to be declared insolvent and the Court appointed an *interim* Receiver of his property. *Held*, that the sale proceeds having been realised before the judgment-debtor was declared insolvent, the Receiver could not claim them. (*Chamier J.*) BADRA DAS *v.* SHEO NATH SINGH. 28 I. C. 816 : 13 A. L. J. 359.

——S. 51—(1907) S. 34—*'Realised'—Date of realisation.*

Attachment of money does not mean realisation unless the money reaches the Court. Retention of an officer's pay by a Treasury Officer under attachment is not realisation and the date of realisation is the date on which the money reaches the Court. (*Chamier, J.* DEBI PRASAD *v.* CHIENE. 16 I C. 84 : 9 A.L.J. 707.

——S. 51—(1907) S. 34—*Execution of decree —Assets realised before adjudication—Right of decree-holder.*

Where the assets have been realised in the course of execution by sale or otherwise, as mentioned in S. 34 before the date of the order of adjudication an execution creditor is entitled to them (*Fletcher and Walmsley, JJ.*) GOUR CHARAN GANGA CHARAN SAHA *v* FOYEBUDDIN AHMED 49 I. C. 480: 23 C. W. N. 461.

——S. 51—(1907) S. 34 (3)—*Execution of decree—Purchaser of insolvent's property from bona fide Court auction-purchaser thereof.*

A purchaser of an insolvent's property, even with notice of insolvency, from a *bona fide* purchaser under a Court sale, has a good title to it under S. 34 (3) against the Receiver and the purchase cannot be set aside. (*D. Chatterjee and Newbould, JJ.*) MADHU SUDAN PAL *v.* PARBATI SUNDARI DASYA. 35 I. C. 643.

——S. 51—(1907) S. 34—*Applicability—Attachment before judgment if creates lien on money deposited to have attachment withdrawn.*

Where deft.'s properties attached before judgment in plff.'s suit were released on the deft.'s paying Rs. 500 as cash security and thereafter the deft. was adjudged an insolvent; but before the plff.'s suit was decreed, *held*, that the plff. acquired no lien or charge upon the money deposited and that the Receiver in insolvency was entitled to have the money paid to him and that the money not having been realised in execution of a decree prior to the adjudication order S. 34 did not apply. (*N. R, Chatterjee and Mullick, JJ.*) PROMOTHO NATH CHAKRAVARTHI *v* MOHINI MOHAN. 31 I. C. 573 : 19 C. W. N. 1200.

——S. 51—(1907) S. 32 (b)—*Interest.*

The rate of interest for the purpose of dividend cannot exceed 6 per cent per annum under the provisions of S. 32 (b) of the Act. (*Shadi Lal, J.*) MOHALLA KHAJUKANWALA BANK *v* MAMU. 3 P. W. R. 1917 ; 39 I. C. 373. 19 P. L. R. 1917.

——S. 51 Proviso—(1907) S 34—*Proviso—Applicability—Purchaser's knowledge of adjudication.*

The protection afforded by proviso (3) to S. 34 of the Act is only to a purchaser of the property of a debtor and not to a purchaser of property which

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 51.

is no longer in law the debtor's property. The protection is not applicable where the purchaser had knowledge or means of knowledge of the adjudication of the debtor in insolvency prior to the sale. A sale held in execution of a decree after notice to the Court that the judgment debtor was adjudged insolvent is irregular and confers no title on the auction-purchaser, the property being already vested in the Recevier (*Sadasiva Aiyar and Moore, JJ.*) ANANTARAM *v.* VETTATH KUTTI MALU KOVILAMMA. **19 M. L. T. 357 : 3 L. W. 504: 34 I. C. 829: 30 M. L. J. 611.**

——— **S. 51—(1907) S. 34**—*Suit against insolvent—Leave of Court.*

Insolvency proceedings remain pending till the insolvent obtains his order of discharge. An undischarged bankrupt cannot without the leave of the Court be sued in respect of a debt mentioned in the schedule but which the creditor failed to prove (*Lindsay, J. C.*) MOHAMMAD YAKUB *v.* BIJAI LAL. **43 I. C. 262: 20 O. C. 304**

——— **S. 51—(1907) S. 34**—*Execution of decree—Realisation of assets before adjudication—Rights of judgment-creditor.*

Where before an order of adjudication of a judgment debtor as an insolvent, the decree against him has been executed and the assets realised by the Court the judgment-creditor is entitled to the money in Court in preference to any *interim* Receiver that may be appointed. (*Pratt, J. C.*) BASARMAL *v.* KHEMCHAND. **11 I. C. 433**

——— **S. 51 (1) (1907) S. 34**—*Exception—Rateable distribution—Amount credited to attaching decree holder—Amount ordered to be rateably distributed—Payments not made—Effect of.*

The exception to S 51 (1) of the Provincial Insolvency Act, 1920, applies not only to the amount credited in favour of the attaching decree-holder, but also to the amounts rateably distributed to the other decree-holders under S. 73, Civil Procedure Code Where moneys have been allotted to various decree holders by an order for rateable distribution and stand to the credit of their respective suits, those moneys are no longer the property of the judgment-debtor, but they remain the properties of the various decree-holders, even though the amounts have not been paid out to them. (*Ayling, Off. C. J. and Odgers, J.*) THE OFFICIAL RECEIVER OF TANJORE *v.* M. R. VENKATARAMA AIYAR. **42 M L. J. 361 : (1922) M. W. N. 51 : 15 L. W. 37: 1922 Mad. 31.**

——— **S. 53—(1907) S. 36—**

Burden of Proof.
Construction.
Enquiry under.
Fraudulent Preference.
Fraudulent Transfer.
'Good faith'.
Jurisdiction.
Order of adjudication, date of operation.
Valuable consideration.
Miscellaneous.

Burden of Proof.

——— **S. 53—(1907), S. 36**—*Burden of proof—Good faith—Presumption.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Burden of Proof.

Good faith may be presumed if a transfer is supported by consideration. (*Piggott and Walsh, JJ.*) KUNJ BEHARI LAL *v.* MADSODAN LAL. **50 I. C 117.**

——— **S. 53—(1907) S. 36**—*Burden of proof Transfer—Benami— Onus—Antecedent debts—Claim for dower.*

The onus of proving that a transaction impugned under S 36 of the Prov. Ins. Act was carried out in good faith and for valuable consideration is on the transferee. Antecedent debts might constitute a good consideration. So also claims for dower due to the wife from the husband. Where an insolvent transferred property to his wife in lieu of dower within two years before adjudication and continued in possession of the property along with his wife and it was found that the dower debt was genuine and the value of the property not in-commensurately large, the transfer is valid and cannot be impugned. (*Richardson and Beachcroft, JJ.*) BASIRUDDIN *v.* MOKIMA BIBI. **44 I. C. 915: 22 C. W. N. 709.**

——— **S. 53—(1907) S. 36**—*Burden of proof—Transfer by Insolvent.*

S. 36 lays the onus upon the transferee to prove that the transfer made by an insolvent was made in good faith and for valuable consideration. (*N. Chatterjee and Beachcroft, JJ.*) NILMONI CHOWDHURI *v.* BASANTA KUMAR BANERJEE **29 I C. 814: 19 C. W. N. 865.**

——— **Ss. 53, 54—(1907) Ss. 36 and 37**—*Burden of proof - Mortgage by insolvent*—Bona fide *transfer for value.*

S. 37 has no application where the mortgagee of the insolvent is not a previous creditor. The mortgagee is entitled to show under S. 36 that he was a *bona fide* transferee for value. (*Scott-Smith, J.*) GIRDHARI LAL *v.* SARAB KISHEN. **46 I. C. 667 : 138 P. W. R. 1918.**

——— **S. 53—(1907) S. 36**—*Burden of proof Mortgage within two years of insolvency.*

Where a mortgagee seeks to enforce a mortgage executed within two years of the adjudication, the burden of proving good faith and consideration rests heavily on the mortgagee, although the Official Assignee has moved to expunge proof of the mortgage which he had admitted under S. 36 of Pres. Towns Insol. Act, Sch. II, as such admission is not an adjudication. (*Wallis, C. J. and Krishnan, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SAMBANDA MUDALIAR. **43 Mad. 739: 39 M. L. J. 345: 60 I. C. 205: 28 M. L. T. 258.**

——— **S. 53—(1907) S. 36-A**—*Burden of proof—T. P. Act, Ss. 59 and 100 — Invalid mortgage Charge.*

Under S, 36 Prov. Insol. Act the mortgagee must prove that a mortgage was executed by an insolvent within two years of his being adjudged as such, in good faith and for valuable consideration and therefore it binds on the Receiver. (*Sadasiva Aiyar and Moore, JJ.*) ANANTARAMA AIYAR *v* YUSSUFJI OOMER SAHIB. **31 M L. J. 133 : 36 I. C. 903: (1916) 2 M. W. N. 236.**

——— **S. 53—(1907) S. 36**—*Burden of proof—Transfer of Insolvent.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Construction.

The only proof that is necessary when a transfer by an insolvent is impeached under S. 36, is that it was effected within two years prior to the act of insolvency or the declaration of insolvency. If this is done the onus is shifted upon the transferee to establish the *bona fides* and good faith of the transaction. The Receiver is the only person who can set the Court in motion under S. 36 and if he refuses creditors may apply on their own behalf. (*Mullick and Atkinson, JJ.*) HEMRAJ CHAMPALAL *v.* RAMKISHEN RAM. **2 Pat. L. J. 101 : 1 Pat. L. W. 752 : 38 I. C. 369 : (1917) Pat. 303**

Construction.

——S. 53—(1907) S. 36—*Construction—T. P. Act*, S 53.

The scope of S. 36 of the Insolvency Act is wider than that of section 53 of the T. P. Act the former section does not require the intent to defeat or delay creditors required by the latter but requires only proof of the transfer being made within two years of the adjudication of the debtor as an insolvent. (*Walsh, and Sunder Lal, JJ.*) MUHAMMAD HABIBULLAH *v.* MUSHULUQ HUSSAIN. **39 All. 95 : 37 I. C. 684 : 14 A. L. J. 1183.**

——S. 53—(1907) S. 36—*Construction—Transfer to a person not a creditor.*

S. 53 as well provides for the case of a transfer by insolvent to a person other than a creditor and the Receiver is the proper person to move in the matter of getting the transfer annulled. (*Martineau, J.*) ISHAR DAS *v.* LADHA RAM. **62 I. C. 924.**

——S. 53—(1907) S. 36—*Construction—Purchaser—Meaning—Void.*

The word 'Purchaser' means a person who has given valuable consideration and is used in the general sense. The word 'void' means voidable. (*Sadasiva Aiyar and Moore, JJ.*) OFFICIAL RECEIVER OF TRICHINOPOLY *v.* SOMASUNDARAM CHETTY. **34 I. C. 602 : 30 M. L. J. 415**

Enquiry under.

——S. 53—(1907) S. 36—*Enquiry under—Procedure—Annulment of transfer—Notice to transferee.*

Before setting aside a sale deed executed by an insolvent under S. 36 the transferee must be given full notice not only that the transfer in his favour is being challenged; but also upon the grounds upon which it is challenged. Proceeding ought to be taken in the name of the receiver and no such proceeding should be commenced until after the appointment of Receiver. (*Richards, C. J. and Banerjee, J.*) KAULESHAR RAM *v.* BHAWAN PRASAD. **42 I. C. 845.**

——S. 53—(1907) S. 36—*Enquiry under—Procedure.*

An application by a Receiver under S. 36 should be like an ordinary written statement and the transferee should put in a reply and the Court should try it much like a suit and not dispose of it summarily. (*Richards and Rafique, JJ.*) CHINOO LAL *v.* LACHMAN SONAR. **39 All. 391 : 42 I. C. 841 : 15 A. L. J. 279.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Enquiry under.

——S. 53—(1907) S. 36—*Enquiry under—Matters for consideration.*

In an enquiry under S 36 of the Act, when a dower debt is alleged to be fraudulent, the important relevant matters for consideration are :—(*a*) the exact amount of the dower due, (*b*) the nature of the dower debt, (*c*) the reality and good faith of the transfer, (*d*) the value of the property transferred. (*e*) the delay in the discharge of the dower debt. As regards good faith the transferee must prove his good faith. (*Walsh and Sundar Lal, JJ.*) MUHAMUD HABIBULLAH *v.* MUSHLAQ HUSSAIN. **39 All. 95 : 37 I. C. 684 : 14 A. L. J. 1183.**

——S. 53—(1907) S. 36—*Enquiry under—Scope of—Duty of Court—Creditor challenging another's debt.*

In a list of debts filed by an insolvent, a certain person was shown as mortgagee of certain property and one of the other creditors challenged the mortgage. *Held* that the judge was bound to enquire into the validity of the mortgage in insolvency proceedings without driving the parties to a separate suit. (*Chamier and Piggott, JJ.*) KHUSHALI RAM *v.* BHOLAR MAL. **37 All. 252 : 28 I. C. 573 : 13 A. L. J. 270.**

——S. 53—(1907) S. 36—*Enquiry under—Power to delegate.*

The District Judge must himself decide whether or not action should be taken to annul a transfer under the section and cannot delegate an enquiry under S. 36 to a Subordinate Court. (*Chamier and Rafique, JJ.*) JAGANNATH *v.* LAKSHMAN DAS. **36 All. 549 : 26 I. C. 32 : 12 A. L. J. 889.**

——S. 53—(1907) S. 36—*Enquiry under—Procedure—Annulment of transfer—Notice to transferee, essential—Notice to prove debt.*

When a question arises whether a transfer should or should not be annulled under S. 36 it is requisite that transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity was given to put his case before the Court. The question of a proof of debt under the Prov. Ins. Act is different from the question of annulling a mortgage under S. 36. (*Richardson and Beachcroft, JJ.*) JUGAL PADDA DUTT *v.* GANESH CHANDRA PAL. **44 I. C. 168.**

——S. 53—(1907) S. 36—*Enquiry under—Duty of Court—Evidence should be allowed—Procedure.*

When a transfer is impeached as being fraudulent transfer the Court ought not to decide that the document is invalid on a mere perusal of the same without giving the parties an opportunity to adduce evidence. (*Chatterjee and Richardson, JJ.*) ABDUL AZIZ *v.* KHIROD CHANDRA DAS. **41 I. C. 411.**

——S. 53—(1907) S. 36—*Enquiry under—Transfer to Munsif.*

When there has been a report by the receiver that certain transfers by the insolvent are void under S. 36 the Dist. Judge has no jurisdiction to send the case for enquiry to a Munsif. (*Chatterjee and Beachcroft, JJ.*) UPENDRA MOHAN *v.* BRINDABAN BEHARI. **33 I. C. 188.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Enquiry under.

——Ss. 53.41—('1907) Ss. 36 and 44—*Enquiry under—Statements recorded by Official Receiver.*

Omission to object to evidence going on record The Official Receiver's report is evidence only for S 44 Statements recorded in an enquiry by the Official Receiver cannot be treated as evidence by a Court in proceedings before it under S. 36. 36 All. 549. Appr. The burden of proving that a document is in fraud of creditors is on the party pleading fraud. 19 All 76 P. C. foll. Such statements cannot be affidavits of the persons making them. (*Oldfield and Krishnan, JJ.*) CHINNA MEENA ROWTHER *v.* KUMARACHAKKARAVARTHI IYENGAR. **36 I. C. 906.**

——Ss. 53, 41 (4)—(1907) Ss 36 and 44 (4)—*Enquiry under—Power of Court to delegate to Receiver.*

The Act does not empower the Court, to leave the duty of judicial enquiry under S. 36 to be done by the Official Receiver who, in fact, should be made a party to such proceedings. (*Oldfield and Sadasiva Aiyar, JJ.*) SIMIL ROWTHER *v* KUMARAPPA CHETTY. **35 I. C. 875 : (1916) 2 M. W. N. 182.**

Fraudulent Preference.

——Ss 53, 54—(1907) Ss. 36 and 37—*Fraudulent preference—Right to avoid—Official Receiver—Exclusive jurisdiction of insolvency Court.*

The expression "the Court" in S. 36 or 37 of the Provincial Insolvency Act signifies the Court exercising jurisdiction under that Act. The special statutory provision investing Courts under S. 3 (1) of the Provincial Insolvency Act with the power, among other powers, of invalidating certain defined transactions of insolvents, should not be extended to all Courts of original jurisdiction, whether notified under the Act or not The word "void" in S. 36 or S. 37 means voidable. 30 M. L. J. 415 : 25 M. L. J 308 : 35 M. L. J. 290 Foll. No Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of an adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. It is only the Official Receiver who can set the Court in motion to annul a transfer under Ss. 36 and 37 of the Prov. Ins. Act. 2 Pat. L. J. 101. Foll. (*Sadasiva Aiyar and Spencer, JJ.*) MARIAPPA PILLAI *v.* RAMAN CHETTIAR **42 Mad. 322 . 52 I. C. 519 : 10 L. W. 59.**

——Ss. 53, 54—(1907) Ss. 36 and 37—*Fraudulent preference—Sale of debtor's whole property—Presumption.*

Where a son-in-law of a debtor purchases the whole, or substantially the whole of the property of a person in insolvent circumstances he cannot be said to be acting in good faith. The repayment of a debt not yet due, to a near relative by a person in insolvent circumstances amounts to undue preference. Where the effect of a conveyance of the whole of the debtor's property is to defeat and delay the creditors it can be presumed that the debtor acted with intent to defeat and delay the creditors. (*Mitra, A. J. C.*) DAOLAT *v.* PANDURAM. **55 I. C. 57.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Fraudulent Transfer.

——Ss. 53, 54—(1907) Ss. 36 and 37—*Fraudulent Preference—Pressure of creditors—Effect.*

The pressure of a creditor excludes preference which is voluntary act on the part of the debtor. (*Pratt, J. C.*) THE FIRM OF MITHOMAL DWARKA DAS, *In re.* **31 I. C. 50 : 9 S. L. R. 65.**

Fraudulent Transfer.

——S. 53—(1907) S 36—*Fraudulent transfer—Transfer more than two years old—Rights of creditors—Decision of insolvency Court.*

Where a transfer is several years old and therefore cannot be set aside under S. 36 of the Act, the remedy of the creditors is to sue under S. 53 of the T. P. Act and if the Insolvency Court declines to pronounce on the validity of the transfer, it does not operate as res judicata. (*Piggott and Walsh, JJ.*) MUSSAMMAT GAURA *v.* HON. NAWAB MAHOMED ABDUL MAJID. **1922 All 443.**

——S. 53—(1907) S. 36—*Fraudulent transfer—Transfer to wife within two years.*

A transfer by an insolvent of a portion of his property within two years of his insolvency, to his wife, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, is *ipso facto* void as against the Official Receiver and the property comprised in that transfer is liable to be distributed amongst the general body of creditors. (*Fletcher and Shamsul Huda, JJ.*) BHUT NATH CHATTERJEA *v.* BIRAJ MOHINI DEBI. **49 I. C. 87 : 28 C. L. J. 536.**

——S 53—(1907) S. 36—*Fraudulent transfer—Application for adjudication that property belongs to insolvent.*

An application for an adjudication that certain property alleged to have been gifted away by him was still the property of the insolvent and in his possession is not governed by S. 36 of the Prov. Ins. Act 1907. (*Shadilal and Wilberforce, JJ.*) SOBHA RAM *v.* WARYAM SINGH. **4 Lah. L. J. 444.**

——Ss. 53 and 75—(1907) Ss. 36—*Fraudulent transfer—Annulment—Appeal.*

There is no right of second appeal from an order under S. 53 of Act V of 1920 annulling a transfer. (*Broadway, J.*) MT. ILAHI JAN *v.* HARI KISHEN DAS. **67 I C. 887.**

——Ss. 53, 54—(1907) Ss. 36 and 37—*Fraudulent transfer—Annulment—Rights of transferee.*

Alienees, the transfers in whose favour have been annulled under Ss. 36 and 37 of the Prov. Ins. Act., may prove as unsecured creditors in the insolvency of the alienor to the extent of just antecedent debts. (*Le Rossignol, J.*) DEVI DIAL *v.* SUNDAR DAS. **51 I. C. 720 : 65 P. R. 1919.**

——Ss. 53 and 54—(1907) Ss 36 and 37—*Fraudulent transfer—Sham transaction—Power of Insolvency Court to annul Provincial Insolvency Act (V of 1920), S. 4.*

Ss. 36 and 37 of the Provincial Insolvency Act (III of 1907) are only rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent and apart from the provisions of these sections the Court

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Fraudulent Transfer.

has power to enquire into the real existence of an alleged secured debt in favour of a particular scheduled creditor of the insolvent. In cases not falling within Ss. 36 and 37 of the Provincial Insolvency Act, the mere fact that a transfer by way of a mortgage is found to be voluntary, does not entitle the Insolvency Court to set it aside.

Per *Venkatasubba Row, J.*—The preponderance of authority is in favour of holding that under Act III of 1907, the Court in the exercise of its insolvency jurisdiction cannot decide questions relating to adverse claims by or against third parties. Cases reviewed. (*Oldfield and Venkatasubba Rao, JJ.*) DRONADULA SRIRAMULU *v.* PONAKAVIRA REDDI.
18 L.W. 426: (1923) M. W. N. 306: 45 M L. J. 105: 1923 Mad. 641.

——— **S. 53—(1907) S. 36**—*Fraudulent transfer—Intention—Onus.*

Where an insolvent sells property to near relatives to defraud creditors and retains possession of some part thereof an intent to defraud should be imputed to the vendees also (16 Mad. 397, Dist. A sale with intent to defraud creditors is wholly void even if there has been a part consideration. 30 Mad. 6 Foll (*Hannay, J.*) PALANIAPPA MUDALI *v.* OFFICIAL RECEIVER OF TRICHINOPOLY. **25 I. C. 948.**

——— **S. 53—(1907) S 36**—*Fraudulent transfer—Power to annul transfer—Proceedings in the name of receiver.*

A fraudulent transfer can be avoided only by the Receiver under S. 53 of the Prov. Ins. Act and the proceedings should be taken only in his name. If no receiver is appointed for the insolvency then the Court itself can move or the creditors can move the Court to annul the transfer. (*Prideaux, A. J. C.*) BANSILAL *v.* RANGALAL.
6 N. L. J. 47 : 19 N. L. R. 32 : 1923 Nag. 97.

——— **S. 53—(1907) S. 36**—*Fraudulent transfer—Property situate in foreign territory—Power of British Court to annul transfer.*

A British Indian Court exercising insolvency jurisdiction has no power to annul the transfer by an insolvent of his property situate in a foreign territory. The foreign Court may refuse to recognise the annulment of a transfer of immoveable property situate therein by the British Indian Court. (*Kotwal, A. J. C.*) DRAUPADI BAI *v.* GOVIND SINGH. **18 N. L. R. 93 : 1922 Nag. 221.**

——— **S. 53—(1907) S. 36**—*Fraudulent transfer—Voidable by Official Receiver.*

A transfer of property falling under S. 36 of the Act remains valid until it is set aside at the instance of the Official Receiver and the only Court having jurisdiction to annul the transfer so voidable is the Insolvency Court. 42 M. 322 foll. 19 O. C. 192 ; 28 C. L. J. 536 ; 21 C. 266 Ref. (*Ashworth and Simpson, A. J. Cs.*) SHARFUZZAMMAN *v.* SIR HENRY STANYON.
25 O. C. 291 : 1923 Oudh 80.

——— **Ss. 53, 55—(1907) Ss. 36 and 38**—*Fraudulent transfer—Transfer in lieu of dower in favour of his wife—Indebtedness of husband.*

Where a Mahomedan wife obtained in lieu of dower debt from her husband who was heavily

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Jurisdiction.

indebted a transfer of his house the transaction could not be declared fraudulent solely because shortly after the transfer, the husband put in an application for being adjudicated insolvent. (*Stuart, A. J. C.*) NASIMMUNNISSA *v.* ABDUL KADIR. **43 I. C. 280 : 20 O. C. 295.**

——— **S. 53—(1907) S. 36**—*Fraudulent transfer.*

S. 36 does not prevent an Official Receiver from recovering any immoveable property supposed to have been transferred by the insolvent for protecting it against his creditors. (*Pratt, J.C. and Crouch, A. J. C.*) ISMAILJEE *v.* MANGHAN MAL. **12 I. C. 622 : 5 S. L. R. 80.**

'Good Faith'.

——— **S. 53—(1907), S. 36**—*Good faith—Transfer prior to insolvency—Absence of consideration—Tranferee paying part of consideration to mortgagee—Effect.*

A transfer was made shortly prior to insolvency but no consideration passed. The transferee agreed to pay off some mortgagee of the insolvent. The order of adjudication was cancelled but pending an appeal from the same, the transferee paid off the mortgagee *Held*, the transfer was voidable under S. 53, Insolvency Act, and the payment pending appeal was not *bona fide* as he had knowledge of the insolvency proceedings. (*Spencer and Devadoss, JJ.*) KOLLURI VENKATARATNAM *v.* OFFICIAL RECEIVER, GODAVARI DISTRICT. **18 L. W. 610 : (1923) M. W. N. 780 : 1924 M. 358.**

——— **S. 53—(1907) S. 36**—*Good faith—Burden of proof.*

If a person transfers his property within two years prior to his adjudication, the transferee has to prove that the transaction was for valuable consideration and in good faith. Good faith cannot be inferred from the fact that valuable consideration has been paid. (*Kotwal, A J. C.*) GOPAL *v.* RAMKRISHNA. **62 I. C. 289 : 17 N. L. R. 69.**

——— **Ss. 53, 54—(1907) Ss. 36 and 37**—*Good faith—Test—Lender's intention.*

The real test of the 'good faith' referred to in S. 36 is whether the lender intended that the advance should enable his debtor to carry on his business and whether he had reasonable grounds for believing that it would enable him to do so. (*Pratt, J.C.*) FIRM OF MITHOMAL DWARKA DAS, *In re.* **31 I. C. 50 : 9 S. L R. 65.**

Jurisdiction.

——— **S. 53—(1907) S. 36**—*Jurisdiction—Transfer made more than two years before insolvency.*

Under this Act an Official Receiver has no jurisdiction to finally decide claims to the insolvent's properties basedon transfers made more than two years before the adjudication. (*Teunon and Newbould, JJ.*) AMEENA KHATUM *v.* NAFAR CHANDRA PAL CHOWDHURY. **45 I. C. 180.**

——— **S. 53—(1907) S. 36**—*Jurisdiction—Official Receiver.*

S 36 does not empower an Official Receiver to set aside a mortgage executed by a person within two years of his presenting an insolvency petition

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 53—Jurisdiction.

to a Court which had no power to entertain it, but more than two years before its presentation to the proper Court. (*Oldfield and Sadasiva Aiyar, JJ.*) MOHAMMAD MARAIKAR *v.* OFFICIAL RECEIVER, TINNEVELLY. **5 L W. 123 : 36 I. C. 828 . (1917) M.W. N. 103.**

——S. 53—(1907) S. 36—*Jurisdiction—Two years.*

Under S. 36 of the Act a Judge has jurisdiction only in regard to transfers made within two years of the order of adjudication and not even those made within two years preceding the date of presenting the Insolvency petition. (*Piggott, J. C.*) JOHAN SINGH *v.* DEPUTY COMMISSIONER OF FYZABAD. **23 I. C. 924.**

Order of Adjudication, date of operation.

——Ss. 53, 28—(1907) Ss. 36 and 16 (6)—*Order of adjudication—Date of operation of—Transfer more than two years before adjudication but within two years of application—Void.*

S. 36 of the Pro. Ins. Act should be read along with the S. 16 (6) of the Act and an order of adjudication relates back to and takes effect from the date of the presentation of the petition of insolvency. A transfer made by an insolvent more than two years before the date of the adjudication order but within two years of the date of the presentation of the petition for insolvency may be void against the Receiver and may be annulled by Court. (*Chatterjea and Panton, JJ.*) RAKHAL CHANDRA *v.* SUDHINDRA NATH BOSE. **46 Cal. 991 : 52 I. C. 747 : 24 C. W. N. 172.**

——Ss. 53, 28—(1907) Ss. 36, 16—*Order of adjudication—Date of operation of.*

A voluntary transfer by a person adjudged insolvent more than two years after the date of the transfer but on a petition of a creditor within two years is voidable under S. 36 of the Prov. Ins. Act. The adjudication as insolvent referred to in S. 36 has to be treated as made on the date of the presentation of the petition in which the insolvency proceedings originated. 23 I. C. 924 Not. foll, 42 Cal. 289 ; 38 I. C. 369 Doubted (*Oldfield and Sadasiva Aiyar, JJ.*) SHANKARA NARAYANA AIYAR *v.* ALAGIRI AIYAR. **24 M. L. T. 149 : (1918) M. W. N. 487 : 49 I. C. 283 : 8 L. W. 281 : 35 M. L. J. 296.**

——Ss. 53, 28—(1907) Ss. 36 and 16 (6)—*Order of adjudication—Date of operation of.*

Whether for purposes of S. 36 the date of adjudication can, with reference to S. 16 (6) be that on which the insolvency petition was presented. (*Oldfield and Sadasiva Aiyar, JJ.*) MOHAMAD MARAIKAR *v.* THE OFFICIAL RECEIVER, TINNEVELLY. **5 L. W. 123 : 36 I. C. 828 : (1917) M. W. N. 103.**

Valuable Consideration.

——Ss. 53, 54—(1907) Ss. 36 and 37—*Valuable consideration.*

When a transfer is sought to be annulled in insolvency proceedings the transferee must be given a chance of defending his legal position. *Prima facie* old debts are good consideration into the adequacy of which the Court will not enter. (*Piggott and Walsh, JJ.*) KUNJ BEHARI LAL *v.* MADSOODAN LAL **50 I. C. 117.**

——S. 53—(1907) S. 36—*Valuable consideration—Dower debt.*

A dower debt stands on the same footing as an ordinary debt and a transfer to the wife to satisfy the claim for dower is a transfer for valuable consideration. A transfer made before and in consideration of marriage under S. 36 of the Prov. Ins. Act does not include an insolvent's transfer of his property to his wife long after marriage in view of dower settled at marriage. (*Walsh and Sunder Lal, JJ.*) MAHOMED HABIBULLAH *v.* MUSHTAQ HUSAIN. **39 All. 95 : 37 I. C. 684 : 14 A. L. J. 1183.**

——Ss. 53, 33—(1907) Ss. 36 and 24—*Valuable consideration—Transfer by Mahomedan to wife for dower debt- Setting aside—Proof of debt.*

When the Receiver of a Mahomedan insolvent got set aside a transfer by the latter to his wife in lieu of her dower debt of Rs. 25,000 the wife could not subsequently prove that her dower was Rs. 25,000 but she could prove the true amount due to her. (*Tudball and Rafique, JJ.*) UMRAD BEGUM *v.* AHMAD ALI KHAN **20 I. C. 641 : 11 A. L. J 614.**

——S. 53, 55 (c)—(1907) Ss. 36 and 38 (c)—*Valuable consideration.*

A transfer by a debtor of most of his properties to a few of his creditors for distribution among all the creditors *pro rata* made more than three months anterior to the presentation of his petition in insolvency, is a transfer for valuable consideration within Ss. 36 and 38 (c) of the Prov. Insol. Act 1907), the consideration for the convevance being the undertaking by trustees to distribute the assets. (*Sadasiva Aiyar and Moore, JJ.*) OFFICIAL RECEIVER OF TRICHINOPOLY *v.* SOMASUNDARAM CHETTIAR. **34 I. C. 602 : 30 M. L. J. 415.**

Miscellaneous.

——Ss. 53 and 75—(1907) Ss. 36 *Insolvency—Gift of money by insolvent—Annulment.*

Where a few months before his adjudication an insolvent made a gift of Rs. 4,400 to his mistress for purchasing a motor car for her and she purchased a car with that money. *Held*, that the gift of the money was a transfer within S. 53 of the Prov. Ins. Act and it was liable to be annulled even though the money had been converted into a motor car in the meanwhile. (1899) 2 B 57 Ref. (*Broadway, J.*) MT. ILAHI JAN *v.* HARI KISHEN DAS. **67 I. C. 887.**

——Ss 53, 54—(1907) Ss. 36 and 37—*Alienation in fraud of creditors—Who can move to set aside*

Generally the Official Receiver alone should move the Court in the matter of setting aside an alienation in fraud of creditors. On the matter being taken to his notice by any of the creditors he must set the law in motion under Ss. 53, and 54, if necessary after obtaining an indemnity for costs from the creditor who impugns It he fails before the District Court, he should in the same way carry it in appeal. But if the Official Receiver in spite of funds being placed at his disposal,

PROVINCIAL INSOLVENCY ACT (V OF 1920) S. 53 —Miscellaneous.

refuses to move in the matter or to appeal, the creditor can take action in the matter. (*Spencer and Devadoss, JJ.*) PANNAI ANANTANARAYANA AIYAR *v.* RAMASUBBA AIYAR.
18 L. W. 857 : 1924 M. 345.

——S. 53—(1907) S. 36—*Limitation Act does not apply.*

The limitation under Art. 181, Lim. Act is confined to applications under C. P. Code and does not extend to applications under S. 36. Prov. Insol. Act and so such applications may be made at any time during the pendency of insolvency proceedings. (*Ayling and Krishnan, JJ.*) DURAIYA SOLAGAN *v.* VENKATRAMA NAIKER.
60 I. C. 123 : 12 L. W. 535.

——Ss. 53, 54—(1907) Ss. 36 and 37—*Transfer by transferee—Right to avoid vests with Official Receiver—Transferee necessary party—Enquiry—Procedure*

It is not competent to a Court to institute an enquiry under S. 36 or 37 of the Prov. Ins. Act on a report by the Official Receiver but where such proceedings are taken without objection they are not invalid *in toto*, and may be validated by the Official Receiver converting his report into a properly stamped petition. The Court has jurisdiction under S. 36 of the Prov. Ins. Act to enquire into a petition by the Official Receiver for the avoidance of a transfer by the debtor's transferee, where the second transfer is only a colourable transaction and debtor's transferee is only a benamidar for his subsequent transferee. In such an enquiry the second transferee is a necessary party. *Quaere*: Whether Ss. 36 and 37 of the Act contemplate action being taken against the transferees from the first transferee. (*Oldfield and Seshagiri Aiyar, JJ.*) JAGANNATHA AIYANGAR *v.* NARAYANA AYYENGAR.
52 I. C. 761.

——Ss. 53, 75—(1907) Ss. 36 and 46—"*Persons aggrieved by order,*" *meaning of—Right of appeal against adverse order.*

Per Krishnan, J.:—A creditor respondent impeaching a sale by the insolvent as sham, can appeal against an adverse order of Court under S. 36. A person is aggrieved by an order under S. 36 when :—1. He is a party to an order, or if he is not when he is bound by the order and it affects his person or property, injuriously ; 2. He is a party to an order and has suffered a "legal grevance" thereby as something was wrongfully refused which he could demand or something was wrongly granted to some one which he had a right to object to, though he was not beneficially interested in the result.—A person not a party to an order and bound by it at all and whom the order does not touch though it may directly affect him or disappoint him of a benefit which he might have received if the order had been otherwise and a person who, though a party, has suffered no grievance by the order, legal or beneficial is not a person aggrieved by the order *Ex parte* Sidebotham, (1879) 14 Ch. D 458 ; *Ex parte* Official Receiver, (1887) 19 Q B D. 174 ; *Ex parte* Ellis, (1876) 2 Ch. D. 797; *In re* Webb, (1876 2 Ch. D. 326 ; Ref. *In re* Langtry, (1894) 63 L. J. Q. B. 570 ; *Ex parte* Ditton, (1879) 11 Ch. D. 56 Foll. 18 C.L.J. 359 ; 39 Mad. 479 : Dist. (*Oldfield and Krishnan, JJ.*) KUMARAPPA CHETTIAR *v.* MURUGAPPA CHETTIAR.
36 I. C. 771.

PROVINCIAL INSOLVENCY ACT (V OF 1920) S. 54.

——Ss. 53, 55 (c)—(1907) Ss. 36, 38 (c)—*Time of vesting.*

Properties of an insolvent conveyed by him for consideration under Ss. 36 and 38 (c) to a few of his creditors, as trustees for its distribution *pro rata* among the general body of creditors do not vest in the Official Receiver on the adjudication. (*Sadasiva Aiyar and Moore, JJ.*) OFFICIAL RECEIVER OF TRICHINOPOLY *v.* SOMASUNDARAM CHETTY.
34 I. C. 602 : 30 M. L. J. 415.

——S. 54—(1907) S. 37—*Receiver—Powers.*

A decree obtained against the judgment-debtor is not binding against the Receiver in insolvency. There is always a possibility of its having been collusive between the parties, when the judgment debtor has nothing in the world to bless himself with and does not care whether he has decrees or an unlimited amount against him or not. (*Walsh and Ryves, JJ.*) MIR SHAHAMAT ALI *v.* RAHIM BUX.
1923 A. 33 (1).

——S. 54—(1907) S. 37—*Creditor, meaning—Fraudulent preference—Motive.*

A person who becomes a creditor only in respect of the transaction sought to be impeached as a fraudulent preference, is a creditor within S. 54. Where the chief motive of a debtor in transferring his property is to benefit himself rather than any of his creditors, the transfer does not amount to fraudulent preference within S. 54. (*Piggott and Walsh, JJ.*) MESSRS. BHAGWAN DAS & CO. *v.* CHUTTANLAL.
43 All. 427 : 19 A. L. J. 240 : 62 I. C. 732 : 3 U. P. L. R. (All.) 158.

——S. 54—(1907) S. 37—*Lease for consideration.*

Lease of occupancy holding granted for reasonable rent shortly before filing petition of insolvency is not fraudulent under S. 37. If transaction is only colourable, it is void and the property can be placed in the hands of the Receiver. (*Richards, C. J. and Banerjee, J.*) DESRAJ *v.* SAGAR MAL.
38 All. 37 : 31 I. C. 716 : 13 A. L. J. 1064.

——S. 54—(1907) S. 37—*Fraudulent preference—Preference—Implication of.*

The word 'Preference' in Section 4 (c) of the Act implies freedom of choice and free will. Where money is paid to a creditor under a prior arrangement, there is no question of fraudulent preference. (*Knox and Rafique, JJ.*) MAULA BAKHSH *v.* TAJA MAL.
20 I. C. 395 : 11 A. L. J. 545.

——S. 54—(1907) S. 37—*Secured creditor—Sale in favour of—Not fraudulent preference.*

Where the purchasers from the insolvent were secured creditors and they were entitled to be paid to the full extent of their debts so secured in preference over other creditors, the case may not fall within S. 37 of Act III of 1907. There is a distinction in the Act between a creditor and a secured creditor and the purchasers in the above case do not come within the expression "creditor" as contemplated in S. 37. S. 37 does not

apply to these purchasers. (*Walmsley and Ghose, JJ.*) JADUNATH HALDAR *v.* MANINDRA NATH CHANDRA. **27 C. W. N. 816 : 1923 Cal. 689**

———S. 54—(1907) S. 37—*Fraudulent preference—Test of.*

The question of fraudulent preference depends, not upon the mere fact that there has been a preference but also on the state of mind of the transferor. S. 37 requires four conditions for its operation—(1) the debtor must be unable to pay his debts as they become due. (2) the transfer must be in favour of a creditor, (3) the debtor must have acted with a view to giving that creditor a preference over other creditors,(4) the debtor must be adjudged insolvent on a petition presented within three months from the date of the transfer Where in the case of a transferor for a fair value the first,second and fourth conditions stated above are present the transfer does not become void under S. 37 merely because the transferee did not believe that it was possible for the debtor to pay off all his creditors with the money obtained by the transferor or did not see to the disposal of the money by the debtor. Where a transfer in favour of a creditor has been made under pressure it is not done with the view of giving preference to the creditor. (*Beachcroft and Walmsley, JJ.*) KALI NATH CHAKKARAVARTHY *v.* AMBICA PROSAD DASS. **41 I. C. 399.**

———S. 54—(1907) S. 37—*Fraudulent transfer— Intention of transfer — Transfer under pressure—Transfer under threat of Civil or Cr. Proceedings.*

Mere suspicion that the transfer was a fraudulent preference is not enough to invoke the provisions of S 37. Whether a transfer comes within S. 37 depends upon the state of mind of the transferor. Intention here does not mean legal intention but the real intention working in the mind of the transferor. A previous oral agreement to mortgage sufficient property may remove a mortgage given later out of the scope of S. 37. Transfer in favour of a creditor which is the result of real pressure brought to bear on him by the creditor or in performance of a previous enforceable agreement does not come under S. 37 A transfer by a debtor brought out by threats of Civil suits or criminal proceedings is an act to be impugned under S. 37. (*Holmwood and Newbould, JJ.*) NRIPENDRA NATH SAHU *v* ASHUTOSH GHOSE. **43 Cal. 640 : 33 I. C. 548 : 20 C. W. N. 420.**

——S 54—(1907) S. 37 (1)—*Fraudulent Preference—Good faith, how far a protection to creditor.*

Four conditions, that have to be fulfilled before a transfer by a debtor of any interest in his property is avoided under S 37 (1), are laid down. The onus of proving a fraudulent preference is on the Receiver even if debtor was insolvent at time of payment and knew himself to be so. To determine the question whether a person is able or unable to pay his debts as they become due a transaction in favour of a creditor will be set aside if the dominant view is proved to be to give that creditor a preference over other creditors. The proper test to ascertain whether the dominant view is " was the act done voluntarily". The state of debtor's mind is the prominent consideration in every case under S. 37. Good faith of the creditor affords him protection if the intention of the debtor to give him a preference is established, although under Sub-S. (2) of S. 37 good faith will be a protection to a purchaser from the creditor of an insolvent Case law considered. (*Mookerjee and Beachcroft, JJ.*) NRIPENDRA NATH SHAHOO *v.* ASHUTOSH GHOSE. **19 C. W. N. 157 : 29 I. C. 128 : 21 C. L. J. 167.**

——S 54—(1907) S. 37—*Fraudulent preference—Act done to save himself from exposure.*

Where the debtor in order to save himself from exposure and from proceedings in Court and in order to appeal the Ludhiana Mills Company, one of the creditors, made equitable mortgage in favour of the company. *Held*, under these circumstances the mortgage cannot be said to be created with a view of giving preference to the company over the other creditors. 3 Lah. L. J. 44 Foll. (*Abdul Raoof, J.*) PURANCHAND *v.* PURANCHAND. **1923 Lah. 652 (2).**

——S. 54—(1907) S. 37—*Order of Court—Separate suit to cancel, not maintainable.*

An order passed under S. 37 of Provincial Insolvency Act is not a summary order but a considered order passed after the alienee has had an opportunity of leading all the evidence that he might lead in a regular suit. The order of the Insolvency Court is not final, but is subject to appeal and the Legislature could not have contemplated the possibility of the alienee maintaining a separate suit to cancel the order of the Insolvency Court and that of the Court of appeal. No separate suit lies. I. L R. 42 Mad. 322 and 39 All. 626 Foll. 22 P. C. 1917 overruled. (*Le Rossignol and Abdul Qadir, JJ.*) RANA ALLAH BAKSH & CO. *v.* KARIM BAKSH. **1922 Lah. 214.**

——S. 54—(1907) S. 37—*Transfer—Annulment of—Limitation.*

An application by the Official Receiver to have a transfer annulled is one that could be made at any time during the pendency of insolvency proceedings the right to do so being one that accrued from day to day. *Quaere* whether Art. 181 of the Lim. Act applies to the case. (*Le Rossignol and Abdul Qadir, JJ.*) PIRTHI NATH *v.* BASHESHAR NATH. **1924 Lah. 331.**

——S. 54—(1907) S. 37—*Object of—Company.*

The object of S 37 of the Act is to protect the interests of the whole body of creditors,over whom an undue preference has been given in favour of other creditors and the same principles apply to a transaction by a Company. (*Chevis and Raoof, JJ.*) RAM SARUP *v.* JAGAT RAM **59 I. C. 977 : 2 Lah. 102.**

——S 54—(1907) S. 37—*Fraudulent transfer —Transfer obtained under pressure*

The test to find out whether a transfer or payment is a fraudulent preference, or not is

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 54.

whether the transfer or payment is voluntary. The law however only regards the motive of the debtor and if the dominant motive of the debtor in making the transfer is to save himself from exposure or criminal prosecution it cannot be said that the transfer is voluntary or amounts to fraudulent preference. (*Wilberforce, J.*) PURAN CHAND *v.* PUNJAB NATIONAL BANK, LTD.
3 U. P. L. R. (Lah.) 6 : 59 I. C. 578 : 3 L. L. J. 44

——— **S. 54—(1907) S. 37**—*Fraudulent preference—Payment to creditor on the eve of bankruptcy—Presumption.*

To avoid a payment as a fraudulent preference it must be shown that the dominant view of the insolvent was to prefer a particular creditor over the others. If it is established that the payment is made of the debtors' own accord and not in the ordinary course of business and without any sort of pressure being brought to bear upon him and that the debtor was on the eve of bankruptcy, the onus shifts on to the creditor to show that the payment was not made with a view to prefer him. (*Rattigan, C. J.*) LABHU RAM *v.* PURANCHAND.
53 I. C. 421 : 130 P. R. 1919.

——— **S. 54—(1907) Ss. 37 and 20**—*Application to avoid sale—Official Receiver—Creditor—Rights of*

An insolvent Estates Court is not only competent to entertain an application under S. 37 of the Prov. Ins Act but must enquire judicially into the matter when it is made known to it The proper procedure is for the Receiver to make he application or at least to be a party to it 42 I. C. 845 and 35 I. C. 875 Foll. If the Receiver does move in the matter, a creditor makes the application. An application under S. 37 of the Prov. Ins. Act is competent when two conditions are fulfilled, firstly, the application for insolvency must be made within three months of the transfer which is to be avoided, and, secondly, the debtor must be adjudged an insolvent. The limitation for such an application is three years from the date when the right to apply accrues, *i. e.*, from the date of the adjudication. (*Bevan Petman, J.*) NIKKA MAL *v.* THE MARWARI BANK, LTD., LAHORE. **52 I. C. 188 : 151 P. R. 1919.**

——— **S. 54—(1907) S. 37**—*Fraudulent preference—Effect of—T. P. Act, S. 53—Difference between.*

Where a debtor being unable to pay his debts mortgaged his whole assets to some of his creditors by which the debts were discharged, some of them being upon Hundies which had not become due and the other creditors applied for ad judging the debtor insolvent. *Held*, that the act of the debtor amounted to a fraudulent preference and that the transfers should be set aside. In a case under S. 53 of the T. P. Act actual fraud must be proved but in a case under S. 37 of the Insolvency Act it is enough to show that there was a preference by the debtor of one creditor over another. (*Robertson, J.*) BALMOKHAND *v.* AYA SINGH. **18 P W. R. 1912 : 13 I. C. 68 : 26 P. L R. 1912.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 54.

——— **S. 54—(1907) S. 37**—*What must be proved.*

Under S. 37 of the Act it must be proved not only that the transfer had the effect of giving preference to a creditor but also that there existed the intention to give the preference. (*Sadasiva Aiyar and Napier, JJ.*) BOLISETTI MAMAYYA *v.* KOLLA KOTAYYA. **44 Mad 810 : 29 M. L. T. 288 : (1921) M. W. N. 330 : 14 L. W. 428 : 63 I. C. 916 : 40 M. L. J. 570.**

——— **S. 54—(1907) S. 37**—*Fraudulent preference—Tests of—Onus of proof.*

Where a transaction is impugned as amounting to fraudulent preference within S. 37 of the Act it is not sufficient to prove that it took place within three months of the insolvency and that in fact it had the effect of giving preference to the transferee, but it must be shown positively that the transfer was made with a view to prefer the creditor to whom it is made. The Receiver or the creditors who impugn the transfer must make out that the transfer was made with a view to give preference. 42 Mad. 510 : 42 Cal. 640 Rel. (*Abdur Rahim and Oldfield, JJ.*) BAPPU REDDIAR *v.* THE OFFICIAL ASSIGNEE, TINNEVELLY. **10 L. W. 354 : (1919) M. W. N 576 : 53 I. C. 642 : 37 M. L. J. 246.**

——— **S. 54—(1907) S. 37**—*Fraudulent preference.*

A surety for the payment of a debt by the insolvent is a creditor within S. 37 and a sale to him is a fraudulent preference under S. 39. By the Division Bench.—A creditor can move the Court to set aside a sale by the insolvent. But the Court should not bear the application unless due notice is given to the Official Receiver. (*Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) RODRIGUES *v.* RAMASAMI CHETTIAR **40 Mad. 783: (1917 M. W. N. 238: 21 M. L. T. 225 : 5 L. W. 830 : 38 I. C. 783 : 32 M. L. J. 253 (F. B).**

——— **S. 54—(1907) S. 37**—*'Void', meaning of.*

The Official Receiver cannot object to the execution of a decree by a transferee under O. 21, R 16, C P.C unless he has obtained an order of Court under S. 37. The term 'void' in the section means only voidable. (*Ayling and Kumaraswamy Sastri, JJ*) USSAM KASIM SAIT *v.* PALAT MAMMAD KOYA. **38 I. C. 231.**

——— **S. 54—(1907) S. 37**—*Preference—Transfer for consideration to all the body of creditors except one.*

A sale of land for consideration even though made with a view to exclude the particular creditor in favour of the other creditors is not bad as intended to defraud creditors generally. (*Sadasiva Aiyar and Moore, JJ.*) PELLUR MASTEN REDDI *v.* KUNAM REDDI. **33 I. C. 695.**

——— **S. 54—(1907) S. 37**—*Creditor—Surety or Accommodation acceptor.*

A surety or an accommodation acceptor is a contingent creditor ; but he is not a creditor who can be fraudulently preferred under S. 56. (*Sadasiva Aiyar and Napier, JJ.*) NILAM VISWANATHAM *v.* OFFICIAL ASSIGNEE OF MADRAS. **32 I. C. 795.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 54.

——S. 54—(1907) S. 37—*Sale before Adjudication—Evidence at Insolvency proceedings—If can be used against purchaser.*

In impugning a sale under S. 37 of the Act evidence given at the insolvency proceedings can be used against the purchaser, though he was not a party thereto. (*Seshagiri Aiyar, J.*) GANGALA RAMAKOTTAYYA *v.* BHIMAVARAPPA GURUVA REDDI **23 I. C. 597**

—— S. 54—(1907) S. 37—*Purchase made in view of balance due*

Where the purchase is made in view of the balance of the account due since over two years to the purchaser who himself is a creditor, the transaction may be void. (*Kotwal, A. J. C.*) VITHAL *v.* GOPAL. **1922 Nag 260.**

—— S. 54—(1907) S. 37—*"Creditor" includes a secured creditor.*

A secured creditor is a creditor within the meaning of S. 37 of the Act. (*Hallifax, A J. C.*) SETH JARKARAN *v.* GOBIND PRASAD. **1922 Nag. 235.**

—— S. 54—(1907) S. 37—*Companies Act, VI of 1882, S. 213—Fraudulent preference explained—Plea not to be set up except in Insolvency Court.*

To support the plea of fraudulent preference it must be shown that the object was to give preference to same particular creditor for preventing rateable distribution amongst all the creditors and no such inference can be drawn where a creditor presses his debt and payment is made to avoid the pressure. A plea of fraudulent preference set up by a debtor, not in the interests of the creditors in general, but to avoid his own obligation is of no avail except perhaps in Insolvency Court (*Hayward, A J. C.*) MOHANDAS THAKURDAS *v* TIKAMDAS HOTCHAND. **37 I. C. 250 : 10 S. L. R. 123.**

——S. 54—(1907) S. 37—*Fraudulent transfer—Surety is a creditor.*

A surety as such is clearly a creditor of the Insolvent. He is clearly a creditor as soon as he pays the money on his behalf. Where the insolvent was unable to pay his debts in full as they become due from his own money and the person in whose favour the transfer was made was a creditor and the effect of the agreement to transfer was to pay the transfer or the major portion of the debt due to him by the transfer or so that the properties might not go into the general fund to be divided rateably amongst all his creditors. *Held* the transfer is void as a fraudulent preference. (*Robinson, C. J. and Macgregor, J.*) SIDDIK AHMED *v.* M. K. M. FIRM AND ANOTHER **2 Bur. L. J. 52 : 1923 Rang. 149.**

—— S. 54—(1907) S. 37—*Fraudulent preference—Predominant motive of debtor.*

In deciding under S. 37 whether a transfer by the insolvent was made with a view to give preference to one creditor over the others, the predominant motive of the debtor at the time of the transfer is the thing to be considered. (*Pratt, J. C.*) *In re.* FIRM OF MITHOMAL DWARKA DAS. **31 I. C. 50: 9 S. L. R. 65.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 56.

—— S. 55—*Section protects* bona-fide *transactions.*

The section protects all transactions, unless they amount to acts of insolvency or fraudulent preference, entered into with the insolvent by third persons for valuable consideration and *bona fide, i. e.*, the person had not at the time of entering into the transaction, notice of presentation of any insolvency petition by the debtor. (*Piggott and Walsh, JJ.*) MESSRS. BHAGWAN DASS & CO. *v.* CHUTTAN LAL. **43 All 427: 19 A. L J. 240: 62 I. C. 732: 3 U. P. L. R. (All.) 158.**

——S. 55—*Assignment by insolvent of surplus remaining after distribution of dividend—Rights of assignee.*

It is possible for an insolvent to assign to a purchaser the prospective surplus that may remain over after his estate has been administered in insolvency. The Receiver in insolvency is a mere trustee for the bankrupt in respect of the surplus. But neither the insolvent nor his assignee could interfere with the administration of the estate by the Receiver. (*Macleod, C. J. and Crump, J.*) RAM CHANDRA NARAYAN DATAR *v.* NIPUNGE. **25 Bom. L. R 499 : 1924 Bom. 49.**

—— S. 56—(1907) S 18—*Decree—Attachment of before insolvency—Decree-holder if can execute decree Vesting order.*

Where in execution of a decree, a decree obtained by the judgment-debtor against another is attached, the attachment does not confer on the attaching decree holder any right of property, but gives him the right to execute the decree. The subsequent insolvency of that person vests the decree in the Receiver and in effect cancels the attachment and the Receiver alone can execute the decree. (*Richards, C.J. and Banerji, J.*) DAMBAR SINGH *v.* MUNAWAR ALI KHAN. **40 All, 86: 43 I. C. 129: 15 A. L. J. 877.**

——S. 56—(1907) S. 18—*Duty of Receiver and Court.*

The Receiver and Court should preserve the estate of the insolvent while administering his estate. (*Richards, C. J. and Banerji, J.*) DESRAJ *v.* SAGARMAL. **38 All. 37: 31 I. C 716: 13 A. L. J. 1064.**

——S. 56—(1907) S. 18—*Power of Court to dispossess third persons' property belonging to insolvent.*

S 18 empowers a Court where it appoints a Receiver, to remove any person who is found to be in possession of some of the properties of the insolvent from the possession thereof provided the insolvent has a right to remove him. (*Chamier and Piggott, JJ.*) BANSIDHAR *v.* KHARAGJIT. **37 All. 85: 26 I. C. 926: 12 A. L. J. 1273.**

—— S. 56—(1907) S. 18—*Sale by Receiver, Effect of—Manner of holding.*

A sale by Receiver in whom property has vested under S. 18, is in fact a sale by the owner, and may be held privately or by public auction but it need not necessarily be held in the manner prescribed for sales in execution of decrees. (*Teunon and Newbould, JJ.*) ENTAZUDDI SHEIKH *v.* RAM KRISHNA BANIK. **60 I. C. 745: 24 C. W. N. 1072.**

PROVINCIAL INSOLVENCY ACT (V OF 1920) S. 56.

——— S. 56—(1907) S. 18—*Suit for arrears of rent against Insolvent—Party—Receiver—Position of.*

A Receiver in a Mofussil Insolvency stands in much the same footing in this respect as the Official Assignee in the Presidency. Towns The Receiver is not a necessary party to a suit for arrears of rent against the insolvent. (*Chitty and Smither, JJ.*) AMRITA LAL GHOSE *v.* NARAIN CHANDRA. **46 I. C. 395.**

——— Ss. 56, 22 and 69—(1907) Ss. 18 and 45—*Jurisdiction—Power of Court to hold summary enquiry for—Discovering properties of insolvents—Remedy of creditor—Bankruptcy Act, S. 27.*

An Insolvency Court has no jurisdiction to hold summary proceedings for the purpose of summoning before it and examining persons in order to discover whether any portion of the insolvents' property has been concealed by him by having vested it in a *benamidar* and thereby directing the benamidar to transfer to the Official Receiver the property so vested in him. When a scheduled creditor in an insolvency proceeding has a *prima facie* case that a portion of the insolvent's property has been concealed by the insolvent by having vested it in a benamidar, his remedy is to apply to the Court to direct the Official Receiver to institute a suit against the *benamidar* to recover the property in question on condition that the creditor so applying shall put the Official Receiver in funds and properly indemnify him against the costs in the suit. (*Fletcher and N. R. Chatterjea, JJ.*) JOY CHANDRA DAS *v.* MAHAMAD AMIR. **44 I. C. 143: 22 C. W. N. 702.**

——— S. 56—(1907) S. 18—*Suit to establish right to property—Sale by Receiver—Receiver whether a necessary party.*

Receiver is not a necessary party to a suit to establish title to property which has already been sold by him and therefore his being a deft. is not sufficient to defeat the claim of the plff. though permission of the Insolvency Court was not obtained for the prosecution of the claim. (*Johnstone, C. J. and Shahdin, J.*) KUNDAN LAL *v.* SHADI RAM. **55 P. R. 1917: 130 P. W. R. 1917: 41 I. C. 809: 134 P. L. R. 1917.**

——— S. 56—(1907) S. 18—*Receiver—Suit to establish right in property vested in Receiver—Receiver whether a necessary party—Permission of Court.*

To an insolvent's son's suit to establish his right after his objection was disallowed by the Court, the Receiver is a necessary party. Permission of Court is necessary for suing the Receiver but such permission is not a condition precedent to the maintainability of the suit (*Johnstone, C. J. and Shaw Din, J.*) MUHAMMAD UMAR *v.* MUNSHI RAM. **54 P. R. 1917: 41 I. C 802: 132 P. W. R. 1917.**

——— S. 56—(1907) S. 18—*Insolvency Court Can delivery of possession to purchaser.*

Insolvency Court can grant an order for delivery to a purchaser of property of insolvent from Official Receiver. Under the Act Insolvency Court has ample powers to remove obstructions by third party. (*Ayling and Venkatasubba Rao, JJ.*) RAMASWAMI CHETTIAR *v.* RAMASWAMI IYENGAR. **45 M. 434 : 1922 M. W. N. 110 : 15 L. W. 273 : 31 M. L. T. 86 : 42 M. L J. 185 : 1922 M. 147.**

PROVINCIAL INSOLVENCY ACT (V OF 1920) S. 56.

——— S. 56—(1907) S. 18—*Insolvency Court—Can order delivery of possession to purchaser.*

S. 18 is comprehensive enough to confer jurisdiction on a Court of Insolvency to direct that possession of the insolvent's property be given to the Receiver. The proviso refers to cases where, owing to the act of the insolvent, the property is under a lease, or usufructuary mortgage or the like. (*Oldfield and Seshagiri Aiyar, JJ.*) KOCHU MAHOMED ASAN *v.* SANKARALINGA MUDALIAR. **44 Mad. 524 : 14 L. W. 505: (1921) M. W. N. 236 : 62 I. C. 495: 40 M. L. J. 219.**

——— Ss. 56 and 59—(1907) Ss. 18 and 20—*Insolvent's application transferred to Official Receiver—No separate vesting order—Sale by Receiver is valid.*

Where an application to be adjudged an insolvent was transferred by Dt. Judge to the Official Receiver without a separate vesting order, and the Receiver passed the order of adjudication and sold a portion of the property thus vested in him; *held*, that the sale was valid although there was no separate vesting order. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) SUBBA AIYAR *v.* RAMASWAMI AIYANGAR. **44 Mad. 547: 13 L. W. 227 : (1921) M. W N. 135 : 62 I. C. 346: 29 M. L. T. 233 : 40 M. L. J. 209.**

——— S. 56—(1907) S. 18—*Time of vesting—Vesting order.*

Before the properties can become vested in the Official Receiver the Court should formally pass an order appointing a Receiver under S. 18. The properties do not vest in him by the mere act of passing an adjudication order. The practice of treating the properties (of an insolvent) as vesting in the Official Receiver after the order of the adjudication without a formal order appointing him as a Receiver under S. 18 of the Prov. Ins. Act is illegal. (*Sadasiva Aiyar and Moore, JJ.*) OFFICIAL RECEIVER OF TRICHINOPOLY *v.* SOMASUNDARAM CHETTIAR. **34 I. C. 602 : 30 M. L. J. 415.**

——— S. 56—(1907 S. 18 — *Receiver—Proceedings against—Leave of Court.*

The Receiver in insolvency and in suit have different position. The permission of Court is not necessary for instituting proceedings against him. (*Das and Kalwant Sahay, JJ.*) SANT PRASAD SINGH *v.* SHEODAT SINGH. **2 Pat. 724 : 1924 P. 259.**

——— Ss 56 and 53—(1907) Ss. 18 and 36—Ad-interim *Receiver.*

An *ad-interim* Receiver is inferior to one appointed on an adjudication. The latter is vested with some rights and is liable to all the creditors of the insolvent to the extent of the estate. Among the body of rights conferred upon him by Statute, the right to make an application under S. 36 of the Act is one which cannot be taken away by an order in a proceeding to which he is not a party. His right to apply under S. 36 of

PROVINCIAL INSOLVENCY ACT (V OF 1920) S. 56

the Act is not debarred on the ground of *res judicata* when an order as to the validity of a transaction is passed upon an application impleading in it only the debtor and the creditors, while the estate is in the hands of the *ad interim* Receiver. (*Coutts and Sultan Ahmed, JJ.*) RAM SARAN MANDER *v.* SHIVA PRASAD.

58 I. C. 783.

——S. 56 (3)—(1907) S. 18 (3)—*Receiver's right to possession of Insolvent's property—Sale Benami.*

Under S. 18 (3), the property of the insolvent should be placed in the possession of the Receiver. Where sale of the insolvent's property is a benami transaction, neither the insolvent nor the Receiver need set aside or cancel the sale in order to maintain his possession over the property. 35 Cal. 551, P. C. Fol. (*Bannerji and Ryves, JJ.*) JAGRUP SAHU *v* RAMA NAND SAHU.

39 All. 633 : 40 I. C 373 : 15 A. L. J 738.

——S. 56 (3)—(1907) S. 18 (3)—*Applicability—Appeal—Suit by Receiver—Creditor to supply funds.*

S. 18, Cl. (3), does not cover the case of a person in possession claiming adversely to the Insolvent. An appeal from an order under S. 18 (3) is subject to the leave of the Dist. Court or the High Court A Receiver in insolvency is not a judicial officer and cannot make anything in the nature of a judicial enquiry. A claim of a creditor or Receiver that a property really is the Insolvent's can only be enforced by suit, and not by the Insolvency Court, where the alleged *benamidar* is in possession and claims adversely to the Insolvent Where at the instance of a creditor the Court directs a suit to be filed by the Receiver it should make an order directing the creditor to put the Receiver in funds and indemnify him against the costs of the suit. 37 All. 65, Not fol. (*Richardson and Walmsley, JJ.*) NILMONY CHAUDARI *v* DURGA CHARAN CHANDRA. **46 I.C. 377**

——S. 56 (3) and S. 28 (1907) S. 18 (3) 16 *Property vesting in Official Receiver—Subsequent sale in Court auction—Direction to deliver back—Jurisdiction.*

Under S. 18 (3) of the Act read with S. 16, the Insolvency Court has jurisdiction to direct that the property which has vested in the Official Receiver but has since been sold in a Court-sale in execution of a money decree without notice to the Official Receiver, be delivered over to the Receiver. (*Olafield and Seshagiri Aiyar, JJ.*) ASAN THARAGAN *v.* SANKARALINGA.

(1921) M W. N. 236 : 14 L. W. 505 62 I. C. 495 : 44 M 524 : 40 M. L. J. 219

——Ss. 56 (3) 59, 5—(1907) Ss. 18 (3), 20 and 47—*Jurisdiction—Power of Court, to order delivery under—O. 21, Rr. 97 and 98, C P. C.*

S. 18 (3) of the Act enables the Receiver to take possession of the insolvent's property. It does not provide for the determination of complicated questions of title as between the insolvent and third parties An insolvency Court cannot institute an inquiry under O. 21. Rr. 97, 98. C. P. C. if a purchaser from the Receiver is obstructed by a stranger ... where property of a stranger was

PROVINCIAL INSOLVENCY ACT (V OF 1920) S. 57.

sold by the Official Receiver as belonging to the insolvent, and the purchaser being obstructed, in taking possession applied under O. 21, Rr. 97 and 98 and the Court passed an order for delivery.—*Held*, that the order of the Insolvency Court was without jurisdiction. Ss. 18, Cl. (3) and 47 of the Act had no application to such a case and the Rules of the C. P. Code relating to the sale of the property in execution of a decree do not apply. (*Bakewell and Krishnan, JJ.*) MADDIPOTI PERAMMA *v.* GANDRAPU KRISHNAYYA.

24 M. L. T. 106 : 8 L. W. 136 : 47 I. C. 308 : (1918) M. W. N. 479.

——Ss. 56 (4), 68 (1907) Ss. 18 (4) and 22—*Right to apply for instructions.*

A Receiver appointed under the Act can apply for instructions to the Court. 19 Bom. 660 Foll. (*Pratt, J. C.*) *In re.* TIRTHADAS NATHUMAL.

19 I. C. 920 : 6 S. L. R. 286.

——S. 57—(1907) S. 19—*Official Receiver—Status.*

The Status of an Official Receiver is that of an officer of the Court. (*Le Rossignol and Abdul Qadir, JJ.*) PIRTHI NATH *v.* BASHESHAR NATH.

1924 Lah. 331.

——S. 57—(1907) S. 19—*Removal of Official Receivers—Powers of Court.*

There is nothing in S. 54 of the Provincial Insolvency Act or in R. 11 and of the Rules framed by the High Court under the Act, to prevent the Court from removing an Official Receiver from his position as Receiver in a particular insolvency and appointing a special Receiver in this place. The Court may not only at the initial stage appoint a special Receiver for valid reasons but it may, if good grounds are shown, remove the Official Receiver originally appointed at any time whatsoever. It is desirable that the Official Receiver should be given the control of all insolvencies in the District unless very exceptional reasons, such as those connected with the personality of the Receiver, are put forward. (*Spencer and Venkatasubba Rao, JJ.*) OFFICIAL RECEIVER, TANJORE *v.* NATARAJA SASTRIGAL

46 Mad. 405 : (1923) M W. N. 212 : 44 M. L. J 251 : 1923 Mad. 355.

——S. 57—(1907) S. 19—*Receiver for an area—Vesting order, necessity for.*

A mere adjudication order does not vest the property in the Official Receiver, appointed under S. 19, for the district in which the property is situate. There must be an express vesting order before which a purchaser from the Receiver does not get a good title. (*Abdur Rahim and Odgers, JJ.*) VYTHIALINGAM PADAYACHI *v.* PONNUSWAMI PADAYACHI. **(1921) M. W. N. 243 : 62 I. C. 396 : 41 M. L. J. 78.**

——Ss 57, 59—(1907) Ss. 19 and 20—*Official Receiver to conduct proceedings on behalf of creditors.*

Official Receiver should conduct the proceedings on behalf of the general body of creditors. (*Oldfield and Kirshnan, JJ.*) CHINNA MEERA ROWTHER *v.* KUMARA-CHAKRAVARTI IYENGAR.

36 I. C. 906.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 57.

——— **Ss. 57, 59—(1907) Ss. 19 and 20**—*Official Receiver—Powers of.*

An Official Receiver appointed under the Prov. Ins. Act has, when duly authorised by the High Court the same powers as the Dt. Court as regards dismissal of petition and adjudication of insolvency. His order of dismissal of a petition is open to appeal to the Dt. Court under S 22, Cl. (2) read with S. 52 of that Act. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) CHIDAMBARAM CHETTY *v.* NAGAPPA CHETTY. **38 Mad. 15 : 16 I. C. 820 : 24 M. L. J. 73.**

——— **S. 58—(1907) S. 23**—*Functions of Court under.*

Where the Court acts under S. 23 it exercises the functions of a Court and not a Receiver. (*Kotwal, A. C. J.*) MANAKCHAND *v* IBRAHIM. **62 I. C. 307 : 17 N. L. R. 49.**

——— **S. 53—(1907) S. 23**—*Receiver—Court.*

Where no Receiver is actually appointed the Court is the Receiver under S. 23 of the Prov. Ins. Act. (*Richards, C. J. and Banerjea, J.*) GOBIND DAS *v.* KARAN SINGH. **40 All. 197 : 43 I. C. 672 : 16 A. L. J. 32**

——— **S. 59—(1907) S. 20**—*Official Receiver—Conveyance by, essential to pass title.*

There is nothing to exempt a conveyance by an Official Receiver in Insolvency from the operation of S. 54 of the T. P. Act. (*Fletcher and Cuming, JJ.*) ABDUL HASHIM *v.* AMAR KRISHNA SAHA. **53 I. C. 121 : 46 C. 887.**

——— **S. 59—(1907) S. 20**—*Receiver--Powers of.*

A Receiver under the Insolvency Act can be authorised by the Court to ascertain facts and report them to it with a view to the adoption of such step as may be deemed necessary in the interests of justice such as paying a surprise visit to the insolvent's house to see if he has concealed properties. (*Mookerjee and Richardson, JJ.*) MONMOHAN ROY *v.* HEMANTA KUMAR. **34 I. C. 777 : 23 C. L. J. 553.**

——— **S. 59—(1907) S. 20**—*Suit by Official Receiver—Defence of absence of leave of Court not valid.*

The obtaining of leave is a matter between the Receiver and the Court and the fact that leave of the Insolvency Court is not obtained, is not a valid defence to a suit by the Official Receiver. (*Spencer and Ramesam, JJ.*) OFFICIAL RECEIVER OF COIMBATORE *v.* KANGA. **14 L. W. 655 : (1921) M.W.N 858 : 42 M. L. J. 53 : 30 M. L. T. 152 : 45 M. 167 : 1922 M. 50.**

——— **S. 59—(1907) S. 20**—*Discretion to contest suit—Costs of Receiver.*

The Official Receiver from the moment of receiving the insolvent's estate represents the body of creditors and must protect their interests. If in his discretion he thinks it unnecessary to appear but finds that a particular creditor desires an appearance necessary, the proper practice is to obtain an indemnity from such creditor and to carry on the contest recovering his costs from him in case of failure. (*Oldfield and Krishnan, JJ.*) KUMARAPPA CHETTIAR *v.* MURUGAPPA CHETTIAR. **36 I. C. 771.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 59.

——— **S. 59—(1907) S. 20**—*Power of Court to enquire into debts due to insolvent's estate—Jurisdiction.*

A Court exercising insolvency jurisdiction has no power to inquire into and judicially ascertain the existence or the amount of debt. (*Mittra, A.J. C.*) GOVIND *v.* GOPAL. **22 I.C. 69 : 9 N.L.R. 182.**

——— **S. 59—(1907), S. 20**—*Sale by Receiver—Provisions of C. P. Code do not apply.*

The provisions of the C. P. Code do not apply to a sale of an insolvent's property by an Official Receiver under S. 59 of the Act. (*Dalal, A. J. C.*) MT. HUSAINI *v.* MUHAMMAD ZAMIR **26 O. C.319 : 9 O. & A. L. R. 440 : 1924 Oudh 294.**

——— **Ss. 59 (a), 75 (3)—(1907) Ss. 20 (a) and 46 (3)**—*Order directing the sale of insolvent's property—Contention that it is exempt from sale—Not decided—Order if proper.*

A District Judge cannot pass an order directing the sale of certain occupancy holdings belonging to an insolvent without deciding the contention of the judgment-debtor that the property was not liable to attachment. It is open to doubt whether the Dt. Judge should direct the sale of an insolvent's property in view of the fact that the sale of the property lies within the discretion of the Receiver under S. 20 (*a*) of the Act. (*Coxe and Ray, JJ.*) ARMAN SARDAR *v.* SATKHIRA JOINT STOCK CO. LTD **20 I. C. 273 : 18 C.L.J. 564.**

——— **Ss. 59 (c), 66 (1)—(1907) Ss. 20 (c) and 40 (1)**—*"Pilgrim business" if business or trade—Winding up.*

The "Pilgrim business" of a hereditary priest attached to a temple is not business within S. 20 (c) nor is it a trade within S. 40 (1). The Court cannot appoint an insolvent priest to carry on pilgrim business for the benefit of his creditors. The insolvent's business can be carried on by the Receiver for the purpose of winding up but not for making a profit. (*Mookerjee and Beachcroft, JJ.*) ANAND MAHANTI *v.* GANESH MAHESHWAR. **21 I C. 969 : 40 Cal. 678.**

——— **S. 59 (d)—(1907) S. 20 (d)**—*Receiver—Power to continue—Suit* in forma pauperis.

Where a person obtains leave to sue *in forma pauperis* in a suit commenced before his insolvency the Receiver is entitled to continue the suit in the same way. (*Richards, C. J. and Banerjee, J.*) MAHOMED ZAKI *v.* THE MUNICIPAL BOARD OF MAINPURI. **47 I. C. 577: 16 A. L. J. 440.**

——— **S. 59 (d)—(1907) S. 20 (d)**—*Rights of Insolvent to sue.*

An insolvent can institute, defend or continue any suit or other legal proceeding to set aside a decree against him. (*Knox, J.*) RAM NARAIN *v.* BEHARI. **27 I. C. 876: 12 A.L.J. 925.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 59.

——— S 59 (d)—(1907) S. 20 (d)—*Suit by insolvent to recover deferred dower—Maintainability of.*

An adjudicated insolvent whose estate is in the hands of Receiver cannot maintain a suit in his own name for the deferred dower of his daughter even though the Receiver has refused to bring such suit. (*Coutts and Adami, JJ.*) SYED KHELLAFAT HUSSAIN *v.* AZMAT HUSSAIN. **54 I. C. 699.**

——— S. 59 (f)—(1907) S. 20 (f)—*Leave of Court—Receiver entering into arrangement without leave—Sale by Officers of Court—Contract Act.*

The purchaser of property belonging to an insolvent cannot impugn the sale on the ground that the Receiver, who sold the property, entered into an arrangement with the purchaser for deferred payment of the purchase money without leave of the Court. The Contract Act has no application to sales by Officers of Courts. 36 Cal 323 (P. C) Ref. (*Fox, C. J. and Hartnoll, J.*) SHWE WA *v.* SULLIVAN. **15 I. C. 368 : 5 Bur. L. T. 79.**

——— S. 59 (5)—(1907) Ss. 20, 47—*Official Receiver acting under S. 2, 20—If Court.*

The Official Receiver acting under S. 20, Pro. Ins. Act does not act as a Court and S. 47 has no application to the acts so done. S. 47 only lays down the procedure of a Court's proceedings, and does not authorise an Insolvency Judge to summarily decide questions of titles with respect to property claimed by third persons. 21 Cal. 479 ; 6 I. C. 300 Dist. ; 39 All. 267, Rel (*Abdur Rahim and Bakewell, JJ.*) GANTAPALLI NARASIMHAYYA *v.* MALAPATHI. **41 Mad 440 : 6 L. W. 694 : 42 I. C. 525 : (1917) M. W. N. 857.**

——— S. 60—(1907) S. 21—*Application of—Punjab.*

The first clause of S. 21 of the Act is not applicable to the Punjab and the second clause does not require that the Receiver or the Court should proceed through the Collector. (*Shadi Lal, C. J. and Wilberforce, J.*) MANJI *v.* GRIDHARI LAL. **61 I. C. 664 : 2 Lah. 78.**

——— S. 60, Cl. (2)—(1907 S. 21—*Decree against tenant—Insolvency—Execution of decree—Procedure—Agra Tenancy Act, II of* 1901.

There is nothing in the Prov. Ins. Act to bar a suit by a landholder against his tenant in the Revenue Court or a proceeding in execution of a decree for rent in the Revenue Court. The landholder who has obtained a decree against the tenant is not a creditor under the Insolvency Act and his proper remedy is to take out execution of the decree in the Revenue Court against the property of his judgment-debtor. If the Revenue Court finds that the property was the subject of a transfer by the judgment-debtor and therefore not available for execution, the remedy of the decree-holder is to institute a fresh suit. (*Piggott and Walsh, JJ.*) PARBATI *v.* RAJA SHYAM RIKH. **20 A. L. J. 147 : L. R. 3 A. 73 (Rev.) : 44 A. 296 : 1922 All. 74.**

PROVINCIAL INSOLVENCY ACT (V OF 1920) S 68.

——— Ss 61, 62—(1907) Ss. 33 and 39—*Proved debts—If can be excluded.*

A creditor proved only one out of two decrees reserving the other for settlement after the discharge of the debtor. The order of exclusion of the proved decree as a punishment was incompetent in view of the provision for equal division of assets under Ss. 33 and 39 of the Act. (*Crouch and Hayward, A.J.Cs.*) DHANJI G. DESHMANAYA *v.* H. A. S. TAYLOR. **19 I. C. 385 : 6 S. L. R. 163.**

——— S. 66, Sub-S. 2—(1907) S. 40 (2)—*Allowance for insolvent—Reasonable allowance—Discretion of Court.*

S. 66, Cl. 2, of the Prov. Ins. Act is taken from the English legislation on the subject and the Insolvency Courts in this country, in spite of the fact that they cannot attach the half salary which is removed from the grasp of creditors by S. 60, C. P. Code, have an absolute discretion to make a further reasonable allowance appropriate to the condition and the circumstances of the insolvent out of the remaining half which is otherwise divisible among the creditors. Trades people who either in the stress of business, or out of kindness, encourage persons in a humble condition of life to go on purchasing on credit in a way which they must know is beyond their means, have only themselves to thank if, in the end they lose their money altogether and if they are merely delayed in payment. They suffer no loss because the ordinary risks of trade which occurs through bad debts and unwilling payers, fall as a rule, upon the honest consumers who pay promptly and whose charges must include the loss of the tradesman who would otherwise have to close business. A tradesman who continues to supply goods after it is obvious that the customer is unable or unwilling to pay for the arrears which are due brings upon himself such losses as he may suffer, and a Judge sitting in Insolvency has to consider these matters, that is to say the conduct of the creditors as well as the conduct of the debtor in the general public interest to serve which bankruptcy law has been devised. (*Walsh and Ryves, JJ.*) RADHA MOHAN *v.* M. C. WHITE. **45 A. 364 : 21 A. L. J. 216 : 1923 A. 466.**

——— Ss. 66 (2), 28 (2)—(1907) Ss. 40 (2), and 16 (2)—*Salary of insolvent—C. P. Code, S.* 60.

Under S. 16 (2) (*a*), Prov. Insol. Act read with S. 60, C. P. Code, only half the salary is exempt from attachment and the other half vests in the Receiver and becomes divisible among his creditors and a Court cannot under S. 40 (2) Prov. Insol. Act allow the insolvent to retain the whole amount. (*Mc Coll, A. J. C.*) TULSILAL *v.* GIRSHAM. **38 I. C. 410 : 2 U. B. R. (1916) 132.**

——— S. 68—'*May does not mean must*'—*Jurisdiction of Civil Court not barred.*

The word "May" in S. 68 does not mean "Must." S. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 68

open to him. It is open to a third person who does not claim title through the insolvent to treat the receiver as a trespasser and maintain his claim in a Civil Court. (*Lindsay and Sulaiman, JJ.*) MAHRANA *v.* DAVID.
21 A. L. J. 737 : L. R. 4 A. (Civ.) 483 : 46 All. 16 : 1924 A. 40.

——S. 68—(1907) S. 22—*Scope of.*

If the plaintiffs do not elect to pursue their remedy under S. 22 and inasmuch as there is no determination on the merits before a suit is instituted, they are within their rights in seeking their remedy by a regular suit. (*Gokul Prasad and Stuart, JJ.*) KUNDAN LAL *v.* KHEN CHAND.
44 All. 620 : 1922 All. 407.

——S. 68—(1917) S. 22—*Trespass by Receiver—Application under S. 22—Order on—Finality of.*

Where in proceedings in insolvency a trespass is committed, whether by the Official Receiver or by anybody else, upon the property of a stranger he can seek redress in the ordinary Civil Court, and is not bound to apply to the Insolvency Court. If, however, he does so apply under S. 22 of the Provincial Insolvency Act, he must comply with the terms of the section. If he obtains a decision upon the merits, the decision is final. (*Rafique and Walsh, JJ.*) BHAIRO PRASAD *v.* S. P. C. DASS.
17 A. L. J. 787 : 51 I. C. 113 : 1 U. P. L. R. (H. C.) 118.

——Ss. 68, 75—(1907) Ss. 22 and 46—*Objection to attachment—Dismissal by insolvency Court*—Res judicata.

Plff. objected to the attachment of a house by the Receiver of an Insolvent's estate as the property of the insolvent. The objection was dismissed and the order upheld on appeal. *Held*, that a subsequent suit by the plff. for declaration of his title was barred by *res judicata*. (*Richards, C. J. and Banerji, J.*) IRSHAD HUSAIN *v.* GOPI NATH.
41 All. 378 : 49 I. C. 590 : 17 A. L. J. 374.

——S. 68—(1907) S. 22—*Applicability of—Attachment of property in execution.*

S. 22 of the Act has no application to a case where the plaintiff's property is attached in execution of a decree against a certain person who subsequent to the attachment became insolvent, and the plaintiff brings a suit for a declaration of his title to the property impleading the Receiver as a party. (*Richards, C. J. and Banerji, J.*) MOHNI *v.* BAIJ NATH.
40 All. 582 : 46 I. C. 394 : 16 A. L. J. 456.

——Ss 68, 75—(1907) Ss 22 and 46—*Attachment by Receiver—Application for release—Dismissal—Subsequent suit*

A stranger to the bankruptcy whose property is wrongfully ceased by the Receiver can either apply under S 22 of the Act or sue in a Civil Court for a return of his property. If he chooses the remedy provided by S. 22 and fails, he cannot again raise the same issue in a Civil Court. (*Piggott and Walsh, JJ.*) PITARAM *v.* JUGHAR SINGH.
43 I. C. 573 : 39 All. 626.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 68.

——S. 68—(1907) S. 22—*Applicability.*

The section applies only to matters which the Receiver has done in the course of insolvency matter in respect of the insolvent's estate. (*Richards, C. J. and Banerjee, J.*) JHUNKOO LAL *v.* PEARY LAL.
39 All. 204 : 38 I. C. 613 : 15 A. L. J. 49.

——S. 68—(1907) S 22—*Attachment of property by Receiver—Rival claimants—Insolvency Court adjudging in favour of one—Suit by other in Civil Court*—Res judicata.

Where a Receiver attached certain timber as belonging to the insolvent and two persons claimed it, the Judge in insolvency awarding it to one, on which the other brought a suit, *held*, that the suit was maintainable and the principle of *res judicata* did not apply as the Insolvency Judge could only decide whether the attachment could be maintained and that he had no jurisdiction to hear the subsequent suit based on title. (*Richards, C. J. and Banerji, J.*) HUKUMAT RAI *v.* PADAM NARAIN
39 All. 353 : 38 I. C. 151 : 15 A. L. J. 188.

——Ss 68, 75—(1907) Ss. 22, 46—*One, out of a body of creditors, right of—Application for attachment, procedure.*

In the case of an application made against the insolvent's estate by an adverse claimant, one, out of a body of creditors has no place, nor any right to appeal against the decision in the matter. A creditor cannot in the first instance move the Insolvency Court for attachment of the Insolvent's property represented by the Receiver, the proper course being to move the Receiver and if he refuses to act, or gives an adverse decision, then to move the Court under S. 22 of the Act for the proceedings under which the Receiver must be made a party. (*Walsh and Stuart, JJ.*) JHABBA LAL *v.* SHIB CHARAN.
39 All. 152 : 37 I. C. 76 : 15 A. L. J. 1.

——Ss. 68, 58—(1907) Ss 22 and 23—*Application under S. 22—Decision by Insolvency Court*—Res judicata.

An application under S. 22 is in the nature of a suit. An adjudication by an Insolvency Court operates as *res judicata* and has a subsequent suit in the Civil Court for the same relief. (*Walsh and Piggott, JJ.*) PITARAM *v.* JHUJHAR SINGH.
33 I. C. 798 : 15 A. L. J. 661.

——Ss 68, 58—(1907) Ss. 22 and 23—*Orders under—Seizure and release of goods—Appeal—Leave to.*

After an adjudication in insolvency orders passed by the District Judge under S. 22 read with S.23 cannot be appealed against except with leave obtained under S. 46 (3). (*Piggott and Walsh, JJ.*) BALLI *v.* NAND LAL.
33 I. C. 773.

——S. 68—(1907) S. 22—*Limitation Act, S. 5. applicability of.*

S. 5 of the Limitation Act does not apply to applications under S. 22 of the Provincial Insolvency Act and no extension of time can be granted in respect of such an application (*Tudball and Rafique, JJ.* THAKUR PRASAD *v.* PUNNO LAL.
35 All. 410 : 20 I. C. 673 : 11 A. L. J. 603.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 68.

——— S. 68—(1907) S 22—*Aggrieved person—Attachment of property as Insolvent's.*

When a Receiver attaches property of the insolvent for the benefit of the creditors a third person claiming the property becomes aggrieved and he must apply under the section within 21 days of Receiver's taking possession. (*Teunon and Newbould, JJ.*) CHARU CHANDRA BHATTACHARJEE *v.* HEM CHANDRA MOOKERJEE. **47 I. C. 62.**

———S. 68—(1907) S. 22 — *Receiver, position of—Court's power to review conduct of Receiver—Person aggrieved—Meaning of.*

A Receiver in insolvency is an officer of the Court and if he is about to act in excess of his authority, even a stranger can bring the fact to the notice of the Court, which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by the unlawful act of its own officer The Court may hold a summary inquiry for this purpose. 9 I. C. 344 Appr. Where a mortgagor was declared insolvent after the mortgaged property was sold in execution of the mortgage decree, and the Receiver in insolvency thereupon sent to the Court a notice of proclamation for sale of the insolvent's property including the property sold. *Held*, that the purchaser in execution is not a "person aggrieved"; by the act o the Receiver and his application to the Court objecting to Receiver's act, is not subject to the period of limitation prescribed by the proviso. The Court must inquire into the application. (*Mookerjee and Beachcroft, JJ.*) HANSESWAR GHOSH *v.* RAKHALDAS GHOSE. **18 C. L. J. 359 : 20 I. C. 683 : 18 C. W. N 366.**

———S 68—(1907) S. 22—*Error of Official Receiver—Jurisdiction.*

A Court of itself can rectify or reverse or modify the acts or decisions of the Official Receiver and S. 22 of the Act is no bar thereto. The conduct of the Official Receiver can be brought to the notice of the Court by any person. (*Ratligan, C. J.*) DATA RAM *v.* DEOKI NANDAN. **1 Lah. 307 : 58 I. C. 6 : 3 P. L. R. 1921.**

——— ———Ss. 68. 75—(1907) Ss. 22 and 46—*Appeal—Parties—Order confirming sale—Appeal by insolvent—Auction-purchaser, if necessary party.*

The auction-purchasers are necessary parties to an appeal of an insolvent against an order confirming the auction sale of the property. If they are impleaded beyond the period of limitation, the appeal not only as against them but against the other parties as well will be time barred. 188 P. R. 1892, Foll. (*Ratligan, C. J. and Dundas, J.*) KHAIRA *v.* SALEM RAJ, **51 I C. 935.**

———S. 68—(1907) S. 22—*Official Receiver refusing to take action—Remedy.*

The word "act" in S. 68 cannot mean a mere omission or refusal to take steps at the request of a creditor. Where an Official Receiver refuses to take action under Ss 53 and 54, the creditor's only remedy is no by way of appeal under S. 68 He can at any time himself apply and move the court under Ss. 53 and 54. (*Spencer and Devadoss, JJ.*) PANNAI ANANTANARAYANA AIYAR *v* RAMASUBBA AIYAR. **18 L. W. 807 : 1924 M. 345.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 68.

——— ———S. 68—(1907) S. 22—*Sale by official receiver—Refusal to conform—Appeal to District Judge—Reversal of order of Official Receiver.*

The Official Receiver refused to confirm a sale held by him on the ground that the purchase money had not been paid by the purchaser within the time noted in the proclamation of sale and resold the properties to another person. The original purchaser applied to the District Judge who rescinded the order of the Official Receiver without giving reasons. *Held* that the order of the Dt. Judge was not supportable and the case should be remanded (*Spencer and Venkatasubba Rao, JJ.*) PANJA RAMA CHANDRA RAO *v.* GURRAJU **18 L. W. 282 : 1924 M. 147.**

———S. 68—(1907) S. 22—*Official Receiver—Sale held by—Interference by Court Powers of.*

The Courts' power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some *mala fides* on the part of the Receiver or of the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors (*Spencer and Venkatasubba Rao, JJ.*) RAMABADRA CHETTY *v.* RAMASWAMI CHETTY. **44 M. L. J. 284 : 17 L. W. 622 : 1923 Mad. 350.**

——— S 68—(1907) S. 22—*Sale by Official Receiver—Application to set aside—Jurisdiction of District Court.*

S 22 of the Act is wide enough to cover the case of an application to set aside a sale by the Official Receiver and to accept the bid of the applicant for the property sold and the District Court has jurisdiction to do it on the application itself. A separate suit is unnecessary. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) RAMALINGAM PILLAI *v.* OFFICIAL RECEIVER, TRICHINOPOLY. **41 M L. J. 211 : 64 I. C. 524 (1) : 14 L. W. 234.**

———Ss. 68, 50 (2)—(1907) Ss. 22 and 26 (2)—*Application under S. 26 (2)—Limitation.*

The 21 days rule of limitation in S. 22 of the Prov. Insol Act does not apply to the court taking action under S. 26 Cl (2). (*Spencer and Krishnan, JJ.*) CHAVADI RAMASWAMIA PILLAI *v.* VENKATESWARA IYER. **42 Mad. 13 : 48 I. C. 952 : 35 M. L. J. 531.**

——— ———S. 68—(1907) S. 22—*Official Receiver—Contract of sale—Jurisdiction of Dt Judge to stop—C. P. C., O. 21, R. 90—Applicability*

O. 21, R. 90 of the C. P. Code has no application to a contract of a sale entered into by a Receiver under the Prov. Ins. Act on an application made within 21 days of the contract. The District Judge may in the exercise of his powers of supervision over the Receiver direct him not to complete the sale. (*Sadasiva Aiyar and Bakewell JJ.*) AVANASHI CHETTY *v.* MUTHUKARUPPAN CHETTY. **23 M. L T 319 : 7 L. W. 406 : 44 I. C. 885 : (1918) M. W. N. 345.**

——— ———S. 68—(1907) S. 22—*Person 'aggrieved'—Meaning of.*

The word "aggrieved" in S. 22 is a somewhat wider term than 'injured' and a person is 'aggrieved' if a decision has been pronounced

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 68.

which has wrongfully refused him something he is legally entitled to. (*Phillips, J.*) ALAGAPPA CHETTIAR *v.* NAGARATNA MUDALIAR.
33 M. L. J. 612 : 22 M. L. T. 371 : 42 I. C. 789 : 6 L. W. 445 : 1917 M. W. N. 677.

——Ss 68, 80—(1907) Ss 22, 52—*Adjudication petition for dismissal—Appeal.*

An appeal lies to the High Court against an order of the District Judge confirming an order of the Official Receiver dismissing an application for adjudication. (*Oldfield and Seshagiri Iyer, JJ.*) ALLAPICHAI *v.* KUPPA PICHAI ROWTHER.
40 Mad. 752 : 39 I. C. 429 · 32 M L. J. 449.

——S. 68—(1907) S. 22—*Person aggrieved—Meaning of—Application for directing Receiver to execute a conveyance.*

A "person aggrieved" within S. 22 is a man against whom a decision has been pronounced, which wrongfully deprived him of something or wrongfully affected his title to something. The decision must not merely impede the person concerned in his assertion to the right claimed but should affect the right claimed. One *V* was adjudicated insolvent and his property vested in the Official Receiver and on 24-5-1908, *V* had executed in favour of his father, the respondent, a pro-note and an agreement, that in case the former were not discharged within a year it should be discharged by a conveyance of certain property. The respondent asked the Court on 6-10-1913, to order the Receiver to execute the necessary conveyance alleging that he had already applied for such execution either by the Court or Receiver and that no order had been passed thereon. One of the creditors who held a mortgage over the property opposed the petition. The Receiver was not made a party originally to the proceedings in the lower court and therefore the High Court remanded the case. The Receiver had no objection to execute the conveyance and accordingly the Court directed the execution of the conveyance. *Held*, on appeal by the mortgagee creditor that as the application of the 6th October 1913 was founded on the failure of the respondent's previous petition to Court and not to the Receiver the order of the Court was without jurisdiction either under S. 22 or any other provision of the Act, (*Oldfield and Krishnan, JJ.*) MUNJULURI SIVARAMIAH *v.* SINGAMAHANTI BHUJANGA RAO.
20 M. L. T. 486 ; (1917) M. W. N. 75 : 37 I. C. 773 : 5 L. W. 255.

——S. 68—(1907) S. 22—*Suit against Insolvent—Receiver no party—Direction to Receiver to execute conveyance—Revision.*

The Court below acted with material irregularity in passing the order directing the Official Receiver to execute the deed without making him a party 18 All. 4, Foll. The High Court converted a time barred appeal into a revision and set aside the order under S, 107 of the Govt, of India Act. (*Oldfield and Sadasiva Iyer, JJ.*) MANGULURI SIVARAMAYYA *v.* SINGHUMAHANTU BHUJANGA RAO.
39 Mad 593 : 30 I. C. 703 : 18 M. L T. 200.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 68.

——S. 68—(1907) S. 22—"*Person aggrieved*"—*Meaning of Conditions of sale changed just before sale—Power of Court to set aside sale.*

Where an Official Receiver changed the conditions of sale just before holding the sale by stating that the property was to be sold free of incumbrances while as originally arranged, it was to be sold subject to two prior mortgages, *held*, that the Court had jurisdiction to set aside the sale at the instance of a creditor under S 22. Where an action of the Official Receiver was irregular and had prejudiced the interests of the creditors the Court will interfere. Any person who is entitled to demand a decision of the Court in respect of the property of an insolvent and would be damnified if the decision goes against him is a person aggrieved within the meaning of S. 22. Case law considered. (*Spencer and Seshagiri Aiyar, JJ.*) THIRUVENKATA CHARIAR *v.* THANGAYI AMMAL. **39 Mad. 479 : 29 I. C. 294 : 17 M. L. T. 432 : 29 M. L. J. 755.**

——S. 68—(1907) S. 22—*Appeal to District Court—Orders to Official Receiver.*

The right of appeal given by S. 22 to the District Court against an order of the Receiver is not confined only to such orders as are passed under Ss. 18, 19 and 20. An appeal lies to the Dt. Court against an order of the Receiver dismissing an insolvency petition under the powers given to him under S. 52 (2) of the Act. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) CHIDAMBARAM CHETTY *v.* NAGAPPA CHETTY. **38 Mad. 15 : 16 I. C. 820: 24 M. L. J. 73.**

——Ss. 68, 28, 56—(1907) Ss. 22, 16 and 18—*Omission to move Dt. Court under S. 22—Effect of.*

Omission to move the Dt. Court under S. 22 to set aside an order of the Receiver does not deprive the person setting up title as owner of his ordinary remedy by suit (*Drake Brockman, J. C.*) BASODI *v.* LALA MAMHAMAND RAO.
42 I. C. 799: 13 N. L. R. 210.

——S. 68—(1907) S. 22—*Stranger aggrieved—Remedy is both in Civil Court and in Insolvency Court.*

A stranger to the insolvency proceedings if aggrieved by any act of the Official Receiver may seek his redress in the ordinary Civil Courts or may apply under S. 68 to the insolvency court. In the latter case, he must comply with terms of the section. (*Dalal, A. J. C.*) MT. HUSAINI *v.* MAHAMMAD ZAMIR. **26 O. C. 319: 74 I. C. 802: 9 O. & A. L. R. 440.**

——Ss. 68 and 75—(1907) Ss. 22 and 46—*Decision by Official Receiver—Appeal.*

Under S. 22, an appeal lies from the decision of an Official Receiver that a debt is due by the insolvent as the decision would aggrieve the insolvent. A court acting under the Act can go behind the judgment and inquire into the validity of debt, if there is fraud, collusion or miscarriage of justice. (*Kincaid, J. C.*) ANANDJI *v* JAMES FINLEY & Co. **62 I. C. 441 : 15 S. L. R. 28.**

——S. 68—(1907) S. 22—*Suit against Receiver—Leave of Court.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 69.

No leave of the Insolvency Court is necessary before a plaintiff sues the Receiver in Insolvency, and S. 22 does not prohibit a suit without such leave being obtained. (*Hayward, J. C. and Crouch, A. J. C.*) HALIMA *v.* MATHRADAS RAMCHAND. **40 I. C 122 : 10 S. L. R. 179.**

——— S. 69—(1907) S. 43—*Concealment of property—Liability.*

An insolvent who has the means to find out where his property has been disposed of, even if he is not actually a party to the making away with it, and who does not use the means, is just as guilty of concealment within S. 69 of the Act as if he actively concealed the locality in which the property actually is. (*Piggott and Walsh, JJ.*) QASIM ALI *v.* EMPEROR. **43 All. 406 : 64 I. C. 37 : 22 Cr. L. J. 725: 19 A. L. J. 378.**

———S. 69—(1907) S. 43—*Cr. P. Code* (1898).

Where proceedings under the section are likely to result in insolvency proceedings they should be carried on in analogy with the Criminal Procedure Code and that something in the nature of a charge should be drawn up and a day or time fixed for the hearing of the evidence on that charge, the insolvent being given an opportunity to defend himself. (*Richards, C J. and Rafique J.*) MUHAMMAD ASHANULLAH *v.* EMPEROR. **38 I. C. 969 : 18 Cr. L. J. 409.**

———Ss. 69, 75 (2)—(1907) Ss. 43 (2) and 46 (2)—*Person aggrieved—Offence under S. 43—Nature of.*

A creditor whose allegations against the insolvent are found against by Court, is not "aggrieved," and so cannot appeal. The term 'aggrieved person' under S. 46 (2) of the Act is not applicable to a creditor against whom the court decides that his allegations of an insolvent's offence under S. 43 (2) of the Act are not made out and such a creditor has no right of appeal against the decision of the Court. The offences dealt with under S. 43 (2) are in the value of disciplinary offences and not offences against the criminal law. (*Walsh and Stuart, JJ.*) LADU RAM *v.* MAHABIR PRASAD. **39 All. 171 : 37 I. C. 996 : 15 A. L. J. 31**

———S 69—(1907) S. 43—*Order of Addl. Dt. Judge—Appeal—Jurisdiction.*

An order by an Addl. Dt. Judge under S. 43 of the Act is appealable to the High Court and not to the Dt. Judge. (*Karamat Hussain and Tudball JJ.*) MAKHAN LAL *v* SRI LAL. **34 All. 382 : 14 I. C. 162 : 9 A. L. J. 371.**

———S. 69—(1907) Ss. 43 and 47—*Sentence under S. 43—Appeal—Suspension of sentence pending disposal of appeal—High Court—Powers of.*

Under O. 41, R. 5, read with S, 47 (2) Prov. Insol. Act, the High Court can suspend the sentence of imprisonment under S. 43 of the Prov. Insolvency Act till the disposal of the appeal from the sentence. (*Heaton and Pratt, JJ.*) NAGINDAS BHUKHANDAS *v.* GHALANDANI CHALABDASS GHELABHAI GULABDAS. **44 Bom. 673 : 56 I. C. 449 : 22 Bom. L R. 322.**

———Ss. 69, 75—(1907) Ss 43 (2) and 46—*Subordinate Judge—Declining to take action under S. 43 (2)—Appeal to Dt. Judge against order—"Court", meaning of.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 69.

No appeal lies to the Dt Judge against an order of the Sub-Judge invested with the insolvency jurisdiction under S 3 declining to take action against the insolvent under S. 43 (2) of the Prov. Ins. Act. *Per Newbould. J* :—The word 'court' in S. 43 of the Act does not mean the Court or original jurisdiction only. 40 Mad. 630 Foll. (*Tennon and Newbould, JJ.*) DIGENDRA CHANDRA BASAK *v.* RAMANI MOHAN GOSWAMI. **48 I. C. 333 : 22 C. W. N. 958.**

———Ss. 69, 75—(1907) Ss. 43 (2) and 46—*Appeal—Order to show cause why an order under S. 43 (2) should not be made—Names of Judges, etc.*

An order requiring a person who has already been adjudicated to show cause why an order under S. 43 (2) should not be made against him is not appealable under S. 46 (2) but it is doubtful whether it can be appealed against by obtaining permission under S. 46 (3). (*Mookerjee and Richardson, JJ.*) MANMOHAN ROY *v.* HEMANTA KUMAR. **34 I. C. 777 : 23 C. L. J. 553.**

———S. 69—(1907) S. 43—*Proceedings under—Nature of.*

Proceedings against insolvents under S. 43 of the Act are in the nature of Criminal proceedings and the procedure adopted in a Criminal trial should be followed. If a Judge arrives at the conclusion of guilt of an insolvent not on evidence but substantially on the report of the Official Receiver, the conviction cannot be sustained. (*Jenkins and N. Chatterjee, JJ.*) HARIHAR SINGH *v.* MOHESWAR PROSAD. **16 Cr L. J. 135 : 18 C W. N. 692 : 27 I. C. 199**

———S. 69—(1907) S. 43 — *Imprisonment—Charge—Opportunity to answer charge.*

If an order under the section results in a sentence of imprisonment, the case is a criminal case. An opportunity should be given of answering the charge when it is framed. (*Jenkins. C. J. and Roy, J.*) AMIRUDDI KARIKAR *v.* JADAB KARIKAR. **19 I. C. 920 : 19 C. L J. 430.**

———Ss. 69, 75—(1907) Ss. 43 and 46—*Application by creditor to take action against insolvent—Appeal.*

An order refusing an application by a creditor to take action against the insolvent under S. 43 of the Act is not appealable because the application is not one which the Insolvency Act entitles a creditor to make, and the applicant is therefore not a "person aggrieved" by the order refusing the application within S. 46 nor is the order open to revision. 40 Mad. 630 : 39 All. 161, Foll. 21 Q. B. D. 24 Dist. (*Martineau, J.*) GUJAR SHAH *v.* BARKATH ALI SHAH. **56 I. C. 744 : 1 Lah. 213.**

———S. 69—(1907) S 43 (2)—*Omission to enter property in schedule—Offence.*

An insolvent who, not knowing that an equity of a redemption was valuable property failed to show it in his schedule of assets is not guilty of an offence under S. 43 (2) of the Act. (*Chevis, J.*) LAL *v.* GANHAR. **2 P. W. R. 1918 (Cr) : 44 I. C. 128 : 19 Cr. L. J. 272 : 158 P. L. R. 1917.**

——Ss. 69, 75—(1907) Ss. 43 (2) and 46—*Forum of Appeal—Small Cause Court invested with powers of Dt. Judge—Conviction under S. 43—Benefit of doubt.*

Where the powers of a Dt. Judge are conferred on a Small Cause Court an appeal against an order passed under S. 46 of the Prov. Ins. Act lies to the Chief Court. *Quaere*—Whether the Small Cause Court, Lahore, is given the powers of a Dt. Judge under the Prov. Ins. Act. The insolvents were convicted under S. 43 of the Prov. Ins. Act on the statement of a person appointed to examine their account books and who had no personal knowledge on any point in the case. *Held* the evidence was doubtful and the sentence unjustifiable. (*Broadway, J.*) PALIMAL *v.* GOVINDRAM. **94 P. L. R. 1917.**

——S. 69—(1907) S. 43—*Nature of proceedings—Effect of irregularity.*

Proceedings under S. 43 being in the nature of criminal proceedings it is necessary that there should be a charge, a finding and a conviction as a foundation of the sentence, if a substantial defect should appear in any one of these particulars the proceedings must be reversed 27 B. 394 ; 27 I. C. 199 ; 17 C. 209 ; 30 I C. 839 Fol (*Rattigan, J.*) NAWAB *v.* TOPAN RAM. **62 P. W. R. 1916 : 110 P. R. 1916 : 17 Cr. L. J. 318 . 35 I. C. 494 : 145 P L. R. 1916.**

——S. 69—(1907) S. 43—*Creditor applying—is a person aggrieved—Appeal.*

Where a creditor's petition to take action under S 43 is dismissed, he can appeal as he is an aggrieved person. (*Spencer and Devadoss, JJ.*) KARUTHAN CHETTIAR *v.* RAMAN CHETTI. **45 M. L J. 804 : 18 L. W. 837 : (1923) M. W. N. 838 : 33 M. L. T. 188 (H. C) : 1924 Mad. 185.**

——S. 69—(1907) S. 43—*Permission to Official Receiver to prosecute insolvent, if can be granted by court—Cr. P Code, Ss. 476, 195-Receiver's report—Evidentiary value of—Penal Code, Ss. 421, 424—General Clauses Act (X of 1897), S. 26.*

A Dt. Court can grant permission to the Official Receiver to prosecute an insolvent for an offence under Ss. 421 and 424 of the I. P. C. upon the strength of the Receiver's report which is sufficiently material for that purpose though it may not be evidence on which a conviction can be legally based. 37 All 429 Dist. The permission referred to above does not amount to a sanction under S. 195 or to an order under S. 476 of the Cr. P. Code. (*Abdur Rahim, J.*) SEGUBALLIAH *v* RAMASAMIAH. **42 I C 608 : 8 Cr. L. J. 992 : 16 L. W. 283.**

——S. 69—(1907) S. 43—*Criminal proceedings—Procedure.*

Proceedings under S. 43 are criminal proceedings and a Judge has therefore to observe the formalities in an enquiry into the commission of offences. There ought to be definite charges and evidence ought to be taken in support of the charges, as also any evidence which the accused may let in on his side. An insolvent cannot be punished under S. 43 on evidence given on behalf of the creditors when they were opposing his application to be adjudged an insolvent. (*Lindsay, J.C.*) PATAN DIN *v* EMPEROR. **39 I. C. 986: 18 Cr. L. J. 613 : 20 O. C. 123.**

——Ss. 69, 75—(1907) Ss. 43 and 46—*Punishment for Acts under S. 43 need not be deferred.*

Punishment for acts and omissions mentioned in S. 43 of the above act need not be deferred by the court until the insolvent applies for an order of his discharge. (*Stuart, A. J. C.*) RAM BEHARI LAL *v.* JAGANNATH. **37 I. C 638: 18 Cr. L. J. 270 : 19 O. C. 89.**

——S. 69—(1907) S. 43—*Action under—When to be taken.*

The power of the Court under S. 43 of the Prov. Ins. Act can be put in motion by a creditor at any time It is not necessary that before taking action under that section the court should wait till the debtor makes an application for discharge. (*Saunders, J. C.*) KOBEINWA *v.* DISTRICT COURT, AS RECEIVER. **49 I C. 55: 3 U.B.R. (1918) 97.**

——S. 69—(1907) S. 43—*Non-mentioning of property.*

Omission of a person to mention property in an insolvency application was held to be fraudulent and vexatious under S.43 (2) (b). Transfer in s. 43 means, a sale, a gift, a mortgage. (*Shaw, J. C.*) NGA CHOK *v.* MI PWA ON. **24 I. C. 767: II U. B. R. (1914) 1.**

——S. 69—(1907) S. 43—*Acts of bad faith—Question of, when to be determined—Punishment.*

The question whether the insolvent has or has not committed acts of bad faith should be considered at the time of an application for discharge and not when an adjudication has to be made. 20 B. 297; Dist. 32 A. 547. Diss. An insolvent committing an act of bad faith can either be dealt with under S. 43 or may be refused a discharge. (*Mc Coll, J C.*) MI BU *v.* NGA PO SAUNG. **11 I. C. 743: 1 U. B. R (1911) 84.**

——S. 69 (a)—(1907) S. 43—*Bad faith—Proof of.*

Under S. 43 a Judge can take cognizance of the bad faith of a debtor at any time whether before or after adjudication though the court has no power to refuse adjudication because an act of bad faith was committed 6 I. C. 748 ; 7 I, C. 394 Dist. (*Lindsay, J. C.*) NANHE MAL *v.* EMPEROR. **25 I. C. 363: 17 O. C. 138.**

——Ss. 69 (b) (i), 75—(1907) Ss. 43 and 46 (1)—*Application under S. 43—Order refusing to take action against Insolvent—Appeal—Failure of insolvent to produce his books.*

Under S. 43 of the Prov. Ins. Act the creditor has no right to set the Court in motion for the insolvent's failure to produce his books of account although in practice the Court may avail itself of any assistance which the creditor may render to it by bringing to its notice, the delinquency of the debtor. The person who is aggrieved by the failure of the insolvent to produce his account-books is the Court and not the creditor. No appeal lies at the instance of the latter against the order

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 69.

of the Court refusing to proceed against the insolvent under S. 43 of the Act. (*Seshagiri Aiyar and Moore, JJ.*) PALANIAPPA CHETTY *v.* SUBRAMANIA CHETTY. **11 L. W. 145 : (1920) M. W. N. 135: 54 I C. 740: 38 M. L. J. 338.**

——— **S. 69 (b) (i)—(1907) S. 43 (2) (b)**—*Proceedings under—Charge.*

In a proceeding under S. 43 (2) of Pro. Ins. Act it is not essential that there should be a definite charge, finding and a conviction. It is enough if the principles underlying a criminal trial are observed in essentials. In such a proceeding if the insolvent is informed of the nature of the proceedings, the offence he is charged with, and its consequences the essentials of a criminal trial would be held to have been complied with (*Findlay, Offg. A. J. C.*) GANAPATHY *v.* CHIMNAJI. **45 I. C. 675: 19 Cr. L. J. 627.**

——— **S. 73**—*Sale order confirming—Appeal—Parties.*

When an appeal is filed against the order of a District Judge confirming a sale effected in insolvency proceedings, the auction-purchaser and Official Receiver are necessary parties and the omission to make them parties is fatal to the appeal. (*Martineau, J.*) MT TAHLOK DEVI *v.* JOTI RAM. **68 I. C 716: 1923 Lah. 58 (1).**

——— **S. 75 –**

Aggrieved Person.
Applicability.
Jurisdiction.
Leave to Appeal.
Limitation.
Notice of Appeal.
Parties.
Miscellaneous

Aggrieved Person.

——— **Ss 75, 68 – (1907) Ss. 46 and 22**—*Person aggrieved Insolvent, if has right of appeal.*

A person aggrieved within Ss. 22 and 46 of the Prov. Insolvency Act must be a person who has suffered a real grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something, and wrongfully refused him something. The words do not mean a person who was disappointed of a benefit which he might have received if some other order has been made. During the administration of an insolvents' estate, an insolvent has no legal interest in the property vested in the trustee and *lo us stands* in the administration of the estate. He is therefore not a person aggrieved by the sale of property in which he has no interest and no right of appeal against an order of the District Judge confirming a sale of the property which is under the direction of the Receiver. (*Piggott and Walsh, JJ.*) SAKHA VAT ALI *v.* BADHA MOHAN. **41 All. 243: 49 I. C. 816: 17 A. L J. 229.**

——— **S. 75—(1907) S. 46**—*Aggrieved person—Creditor's interest and rights.*

Creditors can have no legal interest in or right to represent an insolvent's estate though they can supply the Receiver with information regarding the insolvent's claim on others, and

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 75—Aggrieved person.

bring the Receiver's conduct to the notice of the Court. A creditor can intervene only through the Receiver and where he is not a proper party to an application, he has no right to appeal except for costs which ought not to be ordered against him. He is not a person aggrieved under S. 46 of the Act. An aggrieved person is one with a grievance in law. 33 I. C. 773; 20 C. W. N. 995 Dist. (*Walsh and Stuart, JJ.*) JHABBA LAL *v.* SHIB CHARAN. **39 All. 152: 37 I. C. 76: 15 A. L. J. 1.**

——— **S. 75—(1907) S. 46**—*Aggrieved person—Receiver appointed by Resident's Court—Order of, against debtor.*

A receiver appointed by the Resident's Court at Aden not under the provisions of the Provincial Insolvency Act has no power to make an order against the debtors of the insolvent. If the debtors do not comply with his demand, the remedy of the Receiver is to sue for the debt. If such a receiver makes an order against the debtors of the insolvent, the aggrieved party can appeal to the Court appointing the Receiver or to the higher Court. (*Macleod, C. J. and Crump, J.*) MOSES MENAHIM *v.* AHRAIN SOLOMON. **47 Bom. 548: 25 Bom. L. R. 155: 1923 Bom 233.**

——— **S. 75- (1907) S. 46**—*Aggrieved person—Creditors of the insolvent.*

If the Court refuses to annul the transfer by the insolvent in favour of a person other than a a creditor, the Receiver is the 'aggrieved person' who has evidently the right to appeal The creditors of the insolvent are not 'persons aggrieved' and therefore cannot appeal against the order. (*Martineau, J.*) ISHAR DAS *v.* LADHA RAM. **62 I. C. 924.**

——— **Ss. 75, 69—(1907) Ss. 46 and 43**—*Aggrieved person—Creditor—Order under S. 43—Appeal.*

No appeal lies from an order dismissing the application of a creditor under S. 43 to take action against the insolvent. The creditor is not an aggrieved person. 39 A. 171; 38 M. 15 Rel. on. (*Chevis, J.*) DULA SINGH *v.* ATTAR SINGH. **95 P. L. R 1917: 42 I C. 287: 152 P. W. R. 1917.**

——— **S. 75 (1)—(1907) S. 46 (1)**—*Aggrieved person—Auction-purchaser — Order cancelling sale of outstandings—Auction-purchaser whether can appeal.*

Where a sale of the outstanding of an insolvent fetched a very low price and the court cancelled the sale, the auction-purchasers had a right of appeal from that order. (*Rattigan, J.*) CHUNI LAL *v.* BEHARI LAL. **33 I. C. 995 : 21 P. W. R. 1916.**

——— **S. 75—(1907) S. 46**—*Aggrieved person—Creditor is an.*

Where a creditor is a party to an application to take action under Ss 53 and 54 of the Prov. Ins. Act and the same is dismissed, he is a "person aggrieved" and can appeal (*Spencer and Devadoss, JJ.*) ANANTANARAYANA AIYAR *v* PANNAI RAMASUBBA AIYAR. **18 L. W. 857: 33 M. L. T. 196: 1924 Mad. 345.**

——— **S. 75—(1907) S. 46**—*'Aggrieved person—Insolvent when a.*

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 75—Aggrieved person.

Where the Insolvency Court admits the proof of a creditor whose debt is alleged to be not provable in insolvency, it is open to the insolvent to appeal against the order. The insolvent is a "person aggrieved" by the order within the meaning of S. 46 (1) of the Act III of 1907. (*Oldfield and Venkatasubba Rao, JJ.*) SIVA SUBRAMANIA PILLAI *v.* THEETHAPPA PILLAI.

45 M. L. J. 166 : 18 L. W. 636 : (1923) M. W. N. 895 : 1924 Mad. 163.

——— **S. 75—(1907) S. 46**—*Aggrieved person—Official Receiver superseded by special receiver—Right of appeal.*

Where by an order of Court a special Receiver is appointed in supersession of the Official Receiver, who had been originally appointed receiver, the Official Receiver is a person aggrieved by the order and has a right of appeal against it under S. 75 of the Provincial Insolvency Act. 14 Ch. D. 558 and 33 M. 134 relied on. (*Spencer and Venkatasubba Rao, JJ.*) OFFICIAL RECEIVER, TANJORE *v.* NATARAJA SASTRIGAL.

46 Mad. 405 : 44 M.L J. 251 : (1923) M W. N. 212 : 1923 Mad. 355.

——— **Ss. 75, 69—(1907) Ss. 46 and 43**—*Aggrieved person—Creditor — Order refusing action against insolvent, if appealable.*

A creditor is not a person aggrieved under S. 46 (1) of the Prov. Insolv. Act, by an order refusing to take action against an insolvent under S. 43 (2) (b) and he has therefore no right of appeal 17 C 209 Foll (*Sadasiva Iyer and Napier, JJ.*) IYAPPA NAINAR *v.* MANIKA ASARI.

27 I. C. 241 : 40 Mad 630.

——— **S. 75—(1907) S 46**—*Aggrieved person—Appeal by creditor— Sale affected by S. 37—Discharge of Receiver.*

Where the Receiver was discharged by the order of the Court and one of the creditors who made other creditors respondents appealed from an order in matter of alienation affected by S 37, *held*, the appeal was maintainable. (*Kotwal, A. J. C.*) VITHAL *v.* GOPAL.

1922 Nag. 260.

——— **Ss. 75, 69 — (1907) Ss. 46 and 43**—*Aggrieved" person—Creditors.*

To entitle a creditor to appeal against an order passed in a proceeding under S 43 of the Prov. Ins. Act. he must show that he is a "person aggrieved" by the order within S. 46 of the Act. He is not so aggrieved if the order merely holds that there is no *prima facie* case against the insolvent. 40 Mad. 630 ; 39 All. 171 Foll (*Mitra, J. C.*) VIRCHAND *v.* BULAKIDAS. **55 I. C. 717.**

Applicability.

——— **Ss. 75 (2), 69—(1907) Ss. 46 (2) and 43 (2)**—*Applicability—Order to show cause why order under S. 43 (2) should not be taken*

An order requiring a person who has already been adjudicated to show cause why an order under S. 43 (2) should not be made against him is not appealable under S 46 (2) but it is doubtful whether it can be appealed against by obtaining permission under S. 46 (3). (*Mookerjee and Richardson, JJ.*) MANMOHAN ROY *v.* HEMANTA.

34 I. C. 777 : 23 C. L. J. 553.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 75—Jurisdiction.

——— **S. 75— (1907) S. 46**—*Applicability—Appeal—Against order under old Act.*

All orders passed after the Prov Ins. Act in the Insolvency proceedings are governed by this Act as far as the right of appeal or revision is concerned although the adjudication had been made before it came into force. (*Rattigan, J.*) CHUNI LAL *v.* BEHARI LAL, **33 I. C 995 : 21 P. W R. 1916.**

——— **S. 75—(1907) S. 46**—*Applicability—Proceedings commenced before the Act General Clauses Act, S. 6 (c).*

S. 46 of Prov. Ins. Act does not apply where the insolvency proceedings commenced before the Act came into force. The right of appeal in such cases is regulated by S. 353 of the C. P. Code (1882). 32 Bom. 337 ; 9 M. L T. 259, Ref. (*Sundara Aiyar and Ayling, JJ.*) SALIMMAMMA *v.* VALLI HUSSANBHA BEARI **21 M. L J. 764 : 10 M. L T. 78 : 11 I. C 653 : (1911) 2 M. W. N. 99.**

Jurisdiction.

——— **S. 75 (3)—(1907) S.46 (3)**—*Jurisdiction—Provisions of C. P. Code to apply.*

In dealing with appeals under S. 75 (3) of the Prov, Ins. Act, the provisions of the C. P. Code ought to guide the Court. (*Piggott and Walsh, JJ.*) MUNNU LAL *v.* KUNJ BEHARI LAL.

44 All. 605 : 4 U P. L. R. (A). 66 : L. R. 3 A. 295 : 20 A. L. J. 517 : 1922 All 206.

——— **Ss. 75 (1), 69—(1907) Ss. 46 (1) and 43**—*Jurisdiction—Appeal—Forum—Additional Judge if subordinate to Dt Court—Appeal from order under S. 43—Where lies.*

An additional judge is not subordinate to a Dt. Court within S. 46 (1) and an appeal from his order of conviction of a person under S. 43 lies only to the High Court. The Court subordinate to the Dt. Court in S. 46 (1) is the subordinate Court mentioned in S. 3 of the Act. An appeal from an order under S. 43 is a Civil appeal. (*Richards, C. J. Knox, and Banerjee, JJ.*) CHIRANJI LAL *v* EMPEROR. **36 All. 576 : 25 I. C. 986 : 15 Cr. L. J. 658 : 12 A. L. J. 1105.**

——— **S 75—(1907) S. 46**—*Jurisdiction—C. P. C. Ss. 104, 106 O. 43, R. 1—Forum of appeal.*

An order of a Deputy Commissioner setting aside a transfer of an insolvent's house and shop is appealable to the District Judge and not to the High Court. (*Stephen and Chatterjee, JJ.*) CHAGMULLI *v.* JAINARAIN. **13 I C. 605 : 15 C. L. J. 239.**

——— **S. 75 (1) (4)—(1907) S. 46 (1) (4)**—*Jurisdiction—Dt. Court — Divisional Court—Punjab Courts Act, S. 23 (6)—Notification under—Effect of.*

Under Govt. Notification No. 889, dated 18th November 1908, made under S. 23 (b) of the Punjab Courts Act, 1884, the Divisional Court is deemed to be the District Court or the Principal Civil Court of original jurisdiction for the purposes of any proceedings under the Prov Ins. Act. (*Chevis, J.*) RAM KISHEN *v.* UMRAO BIBI.

33 I. C. 780 : 80 P. W. R. 1916.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 75—Jurisdiction.

——Ss. 75. 80—(1907) Ss. 46 and 52—*Jurisdiction—Dismissal of Insolvency petition by Official Receiver—Appeal—Revision.*

On a construction of S. 52 (1) with Ss. 15 and 16 the Official Receiver who is invested by S. 52 (1) with the same powers as the court referred to in the Act can dismiss an insolvency petition just as the court itself can do. No appeal lies to the High Court against an order of the Official Receiver as no provision is made in the Act for appeals to the High Court directly and as S. 22 provides for an appeal to the District Court against all the orders of the Receiver. *Quaere*:—Whether the High Court would interfere in revision? (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) CHIDAMBARAM CHETTY *v.* NAGAPPA CHETTY. **38 Mad. 15 : 16 I. C. 820 : 24 M. L. J. 73.**

——S. 75 (1)—(1907) S. 46 (1)—*Jurisdiction—Subordinate invested with insolvency jurisdiction—Appeal from order—Forum.*

Although the Insolvency Act provides that, so far as original proceedings under it are concerned a subordinate court when it is specially invested with insolvency jurisdiction shall exercise it concurrently with the District Court yet for the purpose of appeal it makes that Court subordinate to the Dt. Court under the Act, therefore the appeal lies to the District Court. (*Kotwal, A. J. C.*) MADHORAO DEORAO *v.* NAGO. **1923 Nag. 80.**

——Ss. 75 and—69 (1907) Ss. 46 and 43—*Jurisdiction—Conviction—Appeal heard by Judicial Commissioner—Nature of.*

For the North-West Frontier Province an appeal heard by the Judicial Commissioner under S. 75 of the Act against an order passed by the District Judge under S. 69 of the same is a first Civil appeal heard in the exercise of the Civil jurisdiction of the Court. (*Pipon, J. C.*) GHULAM HAIDAR *v.* EMPEROR. **73 I C. 129.**

Leave to appeal.

——S. 75 (3)—(1907) S. 46 (3)—*Leave to appeal—Procedure.*

Where leave for appealing is necessary it must be expressly sought, and without leave an appeal is incompetent. (*Piggott and Walsh, JJ.*) BALLI *v.* NAND LAL. **33 I. C. 773.**

——S. 75—(1907) S 46—*Leave to appeal—Leave must be obtained first.*

A third person objected to the seizure of certain moveable property by the Receiver of the property of an insolvent and the objection was dismissed, *Held*, that an appeal would lie against such order by special leave of the Dt. Court or the High Court. (*Ryves and Piggott, JJ.*) MULCHAND *v.* MURARI LAL. **36 All. 8: 21 I. C. 702 : 11 A. L. J. 979.**

——S. 75—(1907) S. 46—*Leave to appeal—Concurrent jurisdiction.*

The High Court and the District Judge have concurrent jurisdiction to grant leave to appeal under S. 46. Though the District judge has refused leave to appeal, the High Court can grant that leave. (*Woodroffe and Coxe, JJ.*) MADHU SUDAN PAL *v.* PARBATI SUNDARI DASYA. **29 I. C. 406 : 19 C. W. N. 760**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 75—Limitation.

——S. 75 (3)—(1907) S. 46 (3)—*Leave to appeal—Chief Court.*

The Chief Court is competent under S. 46 (3) of the Prov. Ins. Act to grant leave to appeal not withstanding the District Court refused to grant it. (*Broadway, J.*) JUGAL KISHORE *v.* ISHAR DAS. **51 I. C. 695 : 63 P. R. 1919.**

——S. 75 (3)—(1907) S. 46 (3)—*Leave to appeal—Order refusing—Appeal.*

No appeal lies against a discretionary order of a court refusing leave to appeal under the section No litigant can claim a right of appeal against an order which a Court has discretion to pass. (*Ayling and Seshagiri Iyer, JJ.*) MADHAVA IYER *v.* MUTHIA CHETTIAR. **5 L. W. 168 : 38 I C. 818: 21 M L. T. 77.**

——S. 75 (3), (5)—(1907) Ss. 46 (3) and 47—*Leave to appeal—Dismissal of application—Fraud—Revision.*

Under S. 47 a Court can dismiss an insolvency petition if its presentation was an abuse of the process of the court, *i.e.*, to perpetuate a fraud, but not if the fraud is already committed. Where the leave required under S. 46 (3) is not obtained from the District Court, the Appellate Court may deal with the appeal as revision under S. 47 (2). (*Twomey and Ormond, JJ.*) MAUNG PO MYA *v.* MAUNG PO KYIN. **30 I. C 943 : 8 Bur. L. T. 282.**

Limitation.

——S. 75—(1907) S. 46—*Limitation—Limitation Act (IX of 1908). S. 12—Applicability of.*

S. 12 of the Limitation Act does not apply to cases arising under the Provincial Insolvency Act and consequently the time requisite for obtaining a copy of the order against which an appeal is preferred to the High Court, is not excluded in computing the period of limitation as given in S. 46 (*Knox and Piggott, JJ.*) JUGAL KISHORE *v.* GUR NARAIN. **33 All. 788 : 11 I. C. 197 : 8 A. L. J. 833.**

——S. 75—(1907) S. 46—*Limitation—Limitation Act—Applicability of.*

The Prov. Ins. Act though a special law within the meaning of S. 29 of the Limitation Act is not a complete code in itself, and there is nothing to prevent the application thereto of the general provisions of the Limitation Act. (*Scott Smith, J.*) WARYAM SINGH *v.* WADHAVA. **88 P. W. R. 1918: 89 P. R 1918 : 46 I. C. 588: 87 P. L. R. 1918.**

——S 75 (4)—(1907) S. 46 (4)—*Limitation—Computation—General Clauses Act (X of 1896—97), Ss. 9 and 10.*

The principle of S. 9 of the General Clauses Act must be applied to appeals under the Prov. Insol. Act and the day on which the act appealed against is done is to be excluded, in appeals under the Prov. Insolv. Act, if the last day must be excluded under S. 10 of the General Clauses Act. (*Spencer and Krishnan, JJ.*) CHAVIDI RAMASWAMI PILLAI *v.* VENKATESWARA AIYAR. **42 M. 13: 48 I. C. 952 . 35 M. L. J. 531.**

——Ss. 75, 5—(1907) Ss. 46 and 47—*Limitation—Limitation Act, applicability of.*

Recourse should not be had to the general provisions of the Lim. Act in dealing with the

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 75—Limitation.

admission of petitions and appeal presented after the time prescribed under the provisions of the Prov. Ins. Act. (*Ayling, Seshagiri Aiyar and Bakewell, JJ.*) KOPPARTHI LINGAYYA *v.* ARVATI CHINNARAYANA. **41 Mad 169 : 44 I C. 805 (F.B.) : 7 L. W. 443 :33 M. L. J. 566.**

——— **S. 75 (4)—(1907) S. 46 (4)**—*Limitation—Exclusion of time for obtaining copies—Ss.* 12 (3) *and* (5) *of the Lim. Act—Revision—Govt. of India Act*, S. 107.

S. 12 (3) of the Lim. Act which provides for the exclusion of time occupied in obtaining the copies of the judgment and decree appealed against from the period allowed for filing the appeal does not apply to appeals under S. 46 of the Prov. Insol. Act In the exceptional circumstances of the case the High Court treated the appeal as a revision petition and dealt with it as such under S. 15 of the Charter Act 34 Mad. 505. Foll. 34 All. 496, Not Foll. *Per Sadasiva Aiyar, J.* :—The Court has power to excuse the delay in filing this appeal under S. 5 of the Lim. Act 8 C. 910 ; 12 Mad. 210 ; 12 Mad 1, Foll. 18 M. 99 ; 20 M. 249. Diss. The Court below acted with material irregularity in passing the order directing the Official Receiver to execute the deed without making him a party, 18 A. 4. Foll (*Oldfield and Sadasiva Aiyar, JJ.*) MANGULURI SIVARAMAYYA *v.* SINGUMAHANTO BHUJANGA RAO. **39 Mad. 593 : 30 I. C 703 : 18 M. L. T. 200.**

——— **Ss. 75 (4), 5—(1907) Ss. 46 (4) and 47**—*Limitation—Limitation Act*, Ss. 5, 12.

Ss. 5 and 12 (2) of the Limitation Act apply to the computation of the periods of limitation provided in the Pro. Ins. Act (*Stanyon, A. J. C.*) GANGA RAM *v.* RAMACHANDRA. **20 I. C. 258 : 9 N. L. R. 91**

Notice of Appeal.

——— **S. 75—(1907) S. 46**—*Notice of Appeal to substantial number of creditors.*

When an appeal is preferred by a debtor against the dismissal of his application for adjudication, notice of such appeal should be served on a substantial number of creditors. (*Walsh and Stuart, JJ.*) CHIRUNJI LAL *v.* AJODHIA PRASAD. **37 I C.391.**

——— **S. 75—(1907) S. 46**—*Notice of appeal in insolvency proceedings—Notice.*

In an appeal against an order passed in insolvency, only the parties directly affected by the order are entitled to notice. (*Oldfield and Tyabji, JJ.*) TRASI DEVA RAO *v.* PARAMESHRAYA. **39 Mad. 74 : 27 I. C. 144 : 20 M. L. J. 451.**

Parties.

——— **S. 75—(1907) S. 46**—*Parties—Appeal by one creditor—Other creditors, if necessary parties.*

In an appeal by one of the creditors against an order overruling his contention that he was a secured creditor, the Appellant joined as party respondent, the Receiver. Two of the creditors appeared by leave to support the order appealed against but other creditors were not made parties to the appeal. *Held*, that the appeal was competent and it was not necessary to make the other creditors parties to it. (*Mookerjee and Panton, JJ.*) THE EAST INDIA CIGARETTE MANUFACTURING CO., LTD. *v.* ANANDA MOHAN BASAK. **58 I. C 10 : 24 C. W.N. 401.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 75—Miscellaneous.

——— **S. 75 (3) — (1907) S. 46 (3)**— *Parties—Auction-purchaser—Leave to appeal—Refusal by District Court—Grant by Chief Court.*

Where property is sold in insolvency proceedings and the sale is confirmed the auction-purchasers need not be included as parties to an appeal against the order confirming the sale. (*Brodway, J.*) JUGAL KISHORE *v.* ISHAR DAS. **51 I.C. 695 : 63 P R. 1919.**

——— **S. 75—(1907) S. 46**—*Parties—Sale of property of insolvent—Purchaser.*

The auction-purchasers are necessary parties to an appeal by an insolvent against an order confirming an auction sale of the property and if they are impleded as parties after the time prescribed for filing an appeal, the appeal is incompetent. (*Rattigan, C.J. and Dundas, J.*) KHAIRA *v.* SALAM RAJ. **51 I. C. 935.**

Miscellaneous.

——— **S. 75 (1)—(1907) S. 46 (1)**—*Construction—"May appeal" and "shall be final."*

The words" may appeal" in S. 46 (1) means that a party aggrieved with an order may prefer an appeal to the High Court and is not bound to do so. The words " shall be final" in the same section do not mean that the decision of the Insolvency Court cannot be impeached in a regular suit but they simply emphasize that no second appeal lies against an appellate order of the District Judge. 35 B. 473 ; 13 Bom. L. R. 13: 14 M. I. A 209 at 222 Fol. 26 A. 594 and 25 B. 574 Dist (*Shadi Lal and Broadway, JJ.*) DUNICHAND *v.* MUHAMMAD HUSSAIN. **22 P. R. 1917 : 40 I. C. 220 : 14 P. W. R. 1917.**

——— **S 75 (1), (4)—(1907) S. 46 (1), (4)**—*Petition of Insolvency--Subsequent composition--Cannot be adjudicated afterwards.*

When a person after petitioning for insolvency effects a composition in full discharge of all his liabilities, he can no longer be regarded as an insolvent and his petition should be dismissed. (*Chevis, J.*) RAM KISHEN *v.* UMRAO BIBI. **33 I. C. 730 : 80 P. W. R. 1916.**

——— **Ss. 75, 53—(1907) Ss. 46 and 36**—*Appeal—Right to—Order under Ss.* 36 *and* 37—*Creditor, if can appeal against.*

An appeal against an order passed under Ss. 37 and 36 of the Prov. Ins. Act need not be necessarily presented by the Official Receiver but may be presented by a creditor of the insolvent. But the creditor will not be entitled to conduct proceedings in pursuance of an order of remand by the appellate Court. (*Oldfield and Sesiagiri Aiyar, JJ.*) JAGANNATHA AYYANGAR *v.* NARAYANA AYYANGAR. **52 I. C. 761.**

——— **S. 75 (1)**—*Order in appeal is not final and is open to revision.*

An order in appeal, directing the lower Court, in an insolvency proceeding, to take and submit additional evidence is not a final order under

PROVINCIAL INSOLVENCY ACT (V OF 1920). S 78.

S.75 1) and the High Court has power in revision to set that order aside. (*Moonair, A. J C.*) GANGADHAR *v.* SHRIDHAR. **61 I. C. 589.**

——— **S. 78** - *Scope of to excuse delay.*

S. 78 Pro. Ins Act does not create for the first time or take away any substantive right but merely regulates the procedure applicable to appeals and applications. The Court can excuse delay under S. 5, Lim. Act. (*Spencer and Devadoss, JJ.*) KARUTHIAN CHETTIAR *v.* RAMAN CHETTI. **(1923) M. W N. 746 : 18 L. W. 808 : 45 M. L. J. 844 : 1924 M. 400.**

——— **S. 78**—*Power of Court to excuse delay.*

S. 78 Pro. Ins. Act, empowers a court to excuse delay in the presentation of an appeal or application if it is a case where delay is execusable (*Spencer and Devadoss, JJ.*) PANNAI ANANTANARAYANA AIYAR *v.* RAMASUBBA AIYAR. **18 L. W. 857 : 1924 M. 345.**

——— **S. 78** — *Limitation — Court cannot extend.*

The Court has no power under S. 78 of the Insolvenc Act of 1920, to extend the limitation in case of an application made under and barred by limitation under the Insolvency Act of 1907. (*Spencer and Venkatasubba Rao, JJ.*) AIYAPURAJU *v.* VEERA VENKATKRISHNAYYA. **(1923) M. W. N. 195 : 18 L. W. 35 : 44 M. L. J. 303 : 1923 M. 462.**

——— **S. 78**—*Application under the old Act cannot be converted into one under the present Act—Time for applying for adjudication.*

An application to adjudicate a debtor as insolvent. made under Act III of 1907, cannot be considered to be one made under the new Act V. of 1920 merely because it was pending disposal when the new Act came into force. Hence, the discretion to extend the time given to the Court under S 78 of the new Act in respect of applications under the new Act cannot be extended to applications made under the old Act. (*Sadasiva Aiyar and Napier, JJ.*) PUTPATI HANUMAYYA *v.* RAVURI RAMAYYA. **(1921) M. W. N 881 : 64 I. C. 270 : 41 M. L J. 126**

——— **S. 79**—**(1907) S. 51**—*Notice to agent is notice to the principal—Waiver of irregularity when implied.*

Where an agent was under a power of attorney from principal authorised 'to defend all suits, appeals and acting and generally to act for him and to do all things and acts that may be necessary for the discharge of agent's duties, it was *held* that service of notice of insolvency proceedings on him is as effectual as it was on the principal. If therefore the agent appeared and filed a counter-petition without objecting to the manner or time of service he is deemed to have waived any irregularities in the giving of notice A debtor who gets notice of hearing served on his authorised agent cannot complain that he did not also receive a similar notice. (*Spencer and Phillips, JJ.*) KALIANJI SINGHI BHAI *v* BANK OF MADRAS **39 Mad. 693 : 29 M L J. 788 : 3 L. W. 13 : 31 I. C. 583 : (1916) M. W. N. 12.**

PROV. SMALL C.C. ACT (IX OF 1887).-Jurisdiction.

——— **Ss. 80. 75(1)—(1907) Ss 52. 46 (1), and 22** —*Official Receiver, if a Court subordinate to Dt. Court.*

An Official Receiver is not a Court subordinate to the District Court within the meaning of S. 46 (1) Pro. Ins. Act. (*Oldfield and Seshagiri Aiyar, JJ.*) ALLAPICHAI *v.* KUPPAI PICHAI POWTHER. **40 Mad. 752 : 39 I. C. 429 : 32 M. L. J. 449.**

PROVINCIAL SMALL CAUSE COURT ACT (IX OF 1887).

Jurisdiction.

See C. P. CODE, S. 102.

——— *Small cause case, tried as regular suit.*

A decision in a small cause suit tried by the Munsiff as a regular suit is not appealable but when actually reversed on appeal, the appellate decree should be set aside by the High Court in revision. (*Knox, J.*) ABDUL MAJID *v* BEDYADHAR SARAN DAS. **39 All 101 : 37 I. C 92 : 14 A. L J. 984.**

——— *Small cause decree can be set aside for fraud.*

A decree of a Small Cause Court though final in the sense that there is no appeal against it, can be set aside on the ground of fraud (*Teunon and Newbould, JJ.*) RAJANI KANTA *v* PURNA CHANDRA. **63 I C. 712 : 48 Cal. 298.**

——— *Suit for rent.*

Where the plaint alleges that the defendant's tenants agreed to cultivate lands and afterwards did not raise crops and that the plaintiffs were deprived of crops. *held*, that the suit was for rent and was not cognizable by the Small Cause Court. (*Mockerjee and Carnduff, JJ.*) LALAJI PANDAY *v.* BERHAMEDEO PANDAY. **13 I. C. 29 : 16 C. W. N. 89.**

——— *Immoveable property.*

For the purposes of the Provincial Small Cause Court Act the definition in the General Clauses Act of immoveable property will apply. So standing crops are immoveable property. 5 A. 564 and 14 A. 30, Foll. (*Chatterjee, J.*) PURAN CHANDRA CHOWDHURY *v.* KINKAR MANJAI. **9 I. C. 133**

——— *C. P. C., S. 95— Compensation under, if Court can award.*

An order under S. 95 of the C. P. C passed by a Small Cause Court dismissing an interim attachment issued by itself is valid and such an order cannot be questioned on appeal. (*Kumaraswamy Sastri, J.*) KARUMUR VENKATESWAMI *v.* LANKA TRIPURIAH. **26 I. C. 359.**

——— *Loan on condition of marriage—Suit to recover—Jurisdiction.*

A suit to recover money advanced as a loan, on condition that the debtor would marry his daughter to the creditor's nephew and on failure to do so would pay back the money, falls under Art. 35 (g) of the Act. (*Lindsay, J.C.*) RAMESHWAR *v.* GAURI. **40 I. C. 67 : 4 O. L. J. 171.**

——— *Suit for damages for not restoring crops attachment of which was objected to—Costs.*

A suit for damages for not restoring crops, the attachment of which was successfully objected to,

PROV. SMALL C. C. ACT (IX OF 1887), S. 9.

lies only on the regular side, not on the small cause side. A Small Cause Court dismissing a suit as not cognizable by it should not order payment of costs by the plaintiff, who presented his plaint on its being returned by a regular court to be presented to the Small Cause Court. (*Stuart, J. C.*) RAMPHAL *v.* MUTHRA.
3 O. L. J. 578 : 37 I. C. 169 : 19 O. C. 236.

——S. 9 — *Security bond for insolvent's appearance.*

Quaere: Whether a judgment-debtor arrested in execution of a decree could be required to furnish a security bond for appearance by the Presidency Small Cause Court. (*Johnstone, C. J. and Le Rossignol, J.*) SKINNER *v.* BADRI KISHEN.
98 P. R. 1915 : 31 I. C. 196 : 179 P. W. R. 1915

——S. 15 — *Small Cause suit — Suit for money— Question of title involved.*

Where a suit is, in form, one for the payment of a sum of money it is entertainable by a Small Cause Court though the principal purpose of the suit is to determine a right to immoveable property. (5 B. 472, Not applied.) (*Scott, C. J., Braman and Shah, JJ.*) PATTANGOWDA *v.* NILKANTH KALO. **37 Bom. 675 : 20 I. C. 974 : 15 Bom. L. R. 773**

——S. 15 (2)—*C. P. C. S. 102—Jurisdiction.*

A suit to recover *Katihari* regarding a tax for homestead paid by the followers of certain trades is a small causes suit and a second appeal therefore is barred under S. 102, C. P. C. (*Chamier, C. J. and Sharfuddin, J.*) MAHBOOB MOMMIN *v.* BHAGWAN PRASAD.
1 Pat. L. W. 541 : 39 I. C. 949 : (1917) Pat. 250.

——S. 15, Sch. II, Cl. (8)—*C. P. C., S. 102—Second appeal—Suit for arrears of rent of a holding.*

S. 102, C. P. C., does not bar a second appeal in the case of a suit for arrears of rent of a holding; such a suit not being within the cognisance of a Small Cause Court, 23 Mad. 547 Dist. (*Mullick and Atkinson, JJ.*) SADANAND TEWARI *v.* DEB NATH MANJHI. **3 Pat. L. W. 270: 37 I. C. 980 : 1917 Pat. 287.**

——S. 16, Sch. II. Cl. 31—*Suit for specific sum of money—Suit for accounts—Essence of jurisdiction.*

Suit for a specific sum of money on account of salary and house-rent with an incidental prayer that accounts may be gone into if necessary is a suit for recovery of money and not for accounts and is cognizable by a Small Cause Court. Merely because in the determination of the suit, accounts may have to be examined the suit does not become one for accounts. A suit for accounts implies that the deft. is under a liability to render accounts to the plff. (*Mookerjee and Cuming, JJ.*) KSHETRA NATH BHUIYA *v.* KALI DASI.
21 C. W. N. 784 : 41 I. C. 929 : 27 C. L. J. 96.

PROV. SMALL C. C. ACT (IX OF 1887), S. 17.

——S. 16—*Sanction under S. 195, Cr. P. C.*

The section bars the jurisdiction of the Dt. Court in cases of a nature cognizable, by Sm. C. Court, the Small Cause Court is itself the principal Court of original jurisdiction with regard to suits cognizable only by such Court. The District Court has no power even to grant sanction under S. 195, Cr. P. C., in respect of cases instituted in Sm. C. Court, and where the Sm. C. Judge has refused sanction. (*Roe, J.*) SUKHD SINGH *v.* DISTRICT MAGISTRATE OF MUZAFFARPUR.
38 I. C. 754 : 18 Cr. L. J. 370 : 2 Pat. L. J. 1.

——S. 16—*Jurisdiction— Small Cause Suit not triable by Chief Court—C. P. Code, O. 37.*

A chief Court has no jurisdiction to entertain a suit cognisable by a Court of Small Causes. O. 37 of the C. P. Code lays down certain rules of procedure applicable only after the plaint had been admitted by the Chief Court. (*Ormond, O. C. J. and Parlett, J.*) WOR LE LONE *v. v.* RAHAMAN.
9 L. B. R. 69 : 42 I. C. 839 : 10 Bur. L. T. 165.

——S. 16—*C. P. C. and 37 O. S. 15—Karachi Small Cause Suit—Jurisdiction.*

Karachi Small Cause Court has exclusive jurisdiction to try suits on Negotiable instruments up to the value of Rs. 1,000. S. 16 of the Small Cause Courts Act bars the jurisdiction of the said Judicial Commissioner's Court to entertain such a suit. The Small Cause Court alone can try such a suit even if it is brought under Order 37 of the C. P. Code. 6 Cal 499 Dist. (*Pratt, J. C. and Crouch, A. J. C.*) DOULATRAM *v.* HALO KANYA.
13 I. C. 244 : 5 S. L. R. 155.

——S. 17 (*Proviso*)— *Construction—Applicability.*

The proviso to S. 17, Prov. Sm. C. C. Act does not apply to an order setting aside a dismissal for default and neither costs nor security there for need be deposited. The words "in pursuance of the judgment" must be read distributively and applied to words for a review of judgment which precede. (*Piggott, J.*) GIRDHARI LAL *v.* FIRM ACHMAL SINGH TAKHAT SINGH. **45 A. 569 : L. R. 4 A. 277 : 21 A. L. J. 522 : 1923 A. 605 (2).**

——S. 17—Ex parte *decree—Application to set aside—Delay—No power to excuse.*

The period of limitation for an application to set aside an *ex parte* decree is 30 days and the Court has no power to excuse delay in presentation on the ground that the applicant was *bona fide* prosecuting the application in a Court which had no jurisdiction to entertain. (*Lindsay, J.*) GADRE *v.* BRIJNANDAN SARAN. **45 A. 332 : 21 A.L.J. 205: L. R. 4 A. (Civ.) 144 : 1923 A. 319 (2).**

——S. 17—*Restoration of case—Application for—Security furnished not valid—Effect.*

Where an applicant under S. 17 of the Prov. Sm. C. C. Act filed an invalid security bond with his application but deposited cash after the expiry of

PROV. SMALL C. C. ACT (IX OF 1887), S 17.

30 days, there is a failure to comply with the requirements of S 17 of the Prov Sm C. C. Act. (*Daniels, J.*) BADLU SINGH *v.* PANTHU SINGH.
21 A. L. J. 173 : L. R. 4 A. 136 : 9 O. & A.L.R. 433 : 1923 A. 270.

——S. 17—*Time for deposit—Court cannot extend.*

An applicant to set aside an *ex parte* decree passed by a Small Cause Court filed a security bond along with his application. The Court refused to accept the security bond as being insufficient but extended the time for payment of the decree amount. *Held*, that the Court had no jurisdiction to extend the time for depositing the decree amount and on the deposit being made to order restoration of the case and that the security bond was not accepted by the Small Cause Court as sufficient. (*Gokul Prasad, J.*) MOOL CHAND *v.* NIRANJAN SINGH. **L. R. 3 A. 327 : 20 A. L. J. 657 : 1922 All. 265**

——S. 17—*Provisions are mandatory—No extension of time.*

S 17 of the Prov. Sm C. Court Act is mandatory and an application for setting aside an *ex parte* decree must be accompanied by the deposit of the amount due from the judgment-debtor under the decree The court has no power to extend the time for deposit. (*Ryves, J.*) SRI BHAGWAT CHAUDHURI *v* BALKARAM SAITHWAR.
4 U. P. L. R. (A) 10 : 20 A L. J 209 : L. R. 3 A. 141 : 1922 All. 29.

——S. 17—*Decree*—Ex parte—*Claim decreed in full but incorrect amount entered—Application for rehearing—Deposit.*

Where an *ex parte* small cause decree was incorrectly drawn up ; *held*, that the deft. in applying for a re-hearing had sufficiently complained with S. 17 (1) proviso when he deposited the sum which was in fact named in the decree. (*Tudball, J.*) BASDEO RAM SARUP *v.* MUL CHAND.
43 All. 438 : 62 I. C. 689 : 19 A. L. J. 245.

——S 17—*Procedure, definite following of—Decree* ex parte — *Security not deposited—Jurisdiction.*

When the law lays down a definite procedure it must be followed. A Small Cause Court cannot set aside an *ex parte* decree unless the amount due under it is deposited in the Court for its due performance. (*Knox, J.*) LAL GAYENDRA SINGH *v.* TIRSA. **38 I. C. 139.**

——S. 17—*Ex parte decree, setting aside of—Deposit of decretal amount or security*

To set aside an ex parte Sm. C Court decree the applicant must, at the time of presenting his application, either deposit in court the amount of the decree or give security as provided for by S. 17. (*Rafique, J.*) JAI RAM *v.* PURNA.
35 I. C. 625.

——S. 17—*Attachment before judgment — No power to order.*

A Court of Small Causes cannot order an attachment before judgment of immoveable property or to adjudicate on claim proceedings resulting out of it. (*Rankin and B. B. Ghose, JJ.*) SADEK ALI *v.* SAMED ALI. **28 C. W. N. 16 : 1924 Cal. 193.**

PROV. SMALL C. C. ACT (IX OF 1887), S. 17.

——S. 17—*Construction of—Deposit beyond time—Lim. Act, S 5—Application for review of judgment on the last day.*

An application for review of judgment of a Small Cause Court was made on the last day of the period prescribed for limitation but without deposit of the amount of costs or security for the same as required by S. 17. On the following day the Court allowed the applicant time for making the deposit which was eventually made and the application for review was granted. *Held*, that as the application failed to comply with S 17 and was barred under Art. 161, Limitation Act. It was doubtful whether S. 5, Lim. Act applied to the case at all as the application was made within time. (*Sanderson, C. J., and Walmsley, J.*) ABDUL SHEIKH *v.* MAHOMED AYUB. **24 C. W. N 380 : 56 I C 551 : 31 C. L J. 197.**

——S. 17—*Applicability of—Application to set aside dismissal of suit for default.*

A miscellaneous application for the restoration of an application under O. 9, Rr. 4 and 9 of the C. P. Code dismissed for the default of the applicant is not covered by S. 17 of the Act. (*D. Chatterjee and Newbould, JJ.*) BEPIN BEHARI SAHA *v.* ABDUL BARIK. **44 Cal. 950 : 21 C. W. N. 30 : 35 I. C 613 : 24 C L. J. 446.**

——S. 17 (Proviso)—*Strict compliance.*

A strict compliance with the provisions of the proviso is necessary. Where owing to a mistake in calculation, the compliance is only substantial the defect cannot be condoned. (*Chetterjea and Beachcroft, JJ.*) PURNA CHANDRA SARKAR *v.* RASSORAJ PRAMANIK. **33 I. C. 133.**

——S. 17—*Directory provisions.*

The words "at the time of presenting his application" in S. 17 are directory and not mandatory and a deposit or security might be made after the court has decided as to which of the two is to be done. (*Shadi Lal, J.*) MUKANDI LAL *v.* PARS RAM. **50 I. C. 917 : 19 P. L. R. 1919.**

——S. 17—*Provisions are mandatory.*

The provisions of S. 17 of the Prov. Small Cause Courts Act are mandatory and it is not competent to be dispensed with the security or to accept the words of the defendant. 42 M. 577 foll. (*Krishnan, J.*) VENKATAPATHI DEEKSHATHALU *v.* CHENGA REDDI. **32 M L T. (H. C.) 316 : 17 L. W. 579 : 1923 Mad. 594.**

——S 17—*Deposit of decree amount—Delay in issuing chalan—Court can excuse delay.*

Where a person seeking to set aside an *ex-parte* decree of Small Cause Court applied within 30 days for a chalan to deposit the Court's delay in issuing the chalan the deposit was made after the expiry of the 30 days. *Held* that in the circumstances of the case the application for chalan was equivalent to a deposit and that even if there was a delay in depositing the amount the Court had power to extend the time under S. 5 of the Limitation Act. 45 Mad. 628 Ref 37 All. 591 foll. (*Ramesam, J.*) KOILPILLAI SAMBAN *v* SAPPANIMUTHU SAMBAN. **17 L W. 187 : 44 M. L. J. 247 : 1923 Mad. 354 (2).**

PROV. SMALL C. C. ACT (IX OF 1887), S. 17.

——— **S. 17**—Ex-parte *small cause decree—Setting aside without security*—Ultra vires.

The setting aside of an *ex parte* decree in a Small Cause suit in the absence of deposit of the decree amount or security being furnished therefor, is *ultra vires*. The provisions of S. 17 of the Pro. Sm. C. C. Act are mandatory. 43 M. 579 F B. Ref. (*Ayling, O.C.J. and Odgers, J.*) PERIA VENKATAKRISHNAMMA *v* B. VENKATARATNAM.
31 M. L. T. 320 (H.C.) : 16 L. W. 606 : 1923 M. 83.

——— **S. 17, (Proviso)**—*Scope.*

A Small Cause suit was decreed *ex parte* and the application to set it aside was made the next day without the necessary deposit or security as required by the proviso to S. 17 The deft. filed within 30 days a draft security bond but the actual bond was executed outside 30 days. *Held* the mere filing of the draft bond is not a sufficient compliance with the requirements of the proviso. The Proviso to S. 17 of the Provincial Small Cause Courts Act is mandatory and the deposit of the security must be made or given within the period of limitation prescribed for an application to set aside an *ex parte* decree. (*Ramesam, J.*) BALAKRISHNA IYER *v.* PICHAIMUTHU PILLAI.
15 L. W. 186 : 1922 M. 330.

——— **S. 17**—*Construction of—Deposit within period of limitation for application.*

The provision as to the deposit of the decree amount or the giving of security under S. 17 of the Provincial Small Causes Courts Act is mandatory but is sufficiently complied with, if the deposit is made or the security is given before the time prescribed for such application in the Lim. Act has elapsed. 32 C. 339, Foll. 13 M. 178, Not foll. (*Wallis, C. J. Oldfield and Seshagiri Aiyar, JJ.*) ASSAN MAHOMED SAHIB *v.* RAHIMAN SAHIB. **38 M. L. J. 539 : 28 M L. T. 17 : 11 L. W. 543 : 55 I. C. 977 : (1920) M. W. N. 375. (F. B.)**

[Overruling 55 I. C. 618 and 53 I. C. 926.]

——— **S. 17**—*Construction of—Deposit beyond prescribed period—Amount of decree if includes —Costs of execution.*

S. 17 of the Pro. Sm. C. C. Act requiring the deposit of the decree amount or the giving of security for it at the time of the presentation of an application to set aside an *ex parte* decree is not madatory, but only directory ; and such deposit may be made or security given at any time the Court fixes for it before the hearing. The expression "the amount due under the decree" in S. 17 of the Act does not include costs of execution. (*Krishnan, J.*) SUBINARAYANA IYER *v.* T. SOUNDARARAJA IYENGAR. **55 I. C 618.**

[Overruled by F. B in 55 I. C. 977 above.]

——— **S. 17**—*Construction of—Provisions of sections if directory or mandatory.*

The proviso to S. 17 of Prov. Sm. C. C. Act. requiring the deposit of the decree amount along with the application to set aside an *ex parte* decree is not mandatory. 13 Mad. 178, Foll; 28 All. 470 and 9 Bom. L R. 883 Not foll. (*Seshagiri Aiyar and Moore, JJ.*) AKULA ACHIAH *v.* CHALLA PALLI LAKSHMINARASIMHAM. **37 M. L. J. 433 : 10 L. W. 474: 53 I. C. 926: (1919 M W. N. 687 :**

[Overruled by (F. B.) in (1920) M W. N. 375 : 11 L. W. 543 : 28 M. L. T. 17 : 55 I. C. 977 : 38 M L. J. 539.]

——— **S. 17**—*Time for deposit granted till a certain date—It includes that date— Default—Dismissal on that date—Impropriety of.*

When time is granted by a Court for the performance of any act till a certain date, it includes that date. On application by a defendant to set aside an *ex parte* decree in a small cause suit, the Court granted time to the applicant till a certain date to deposit the decree amount but dismissed the same as no deposit was made before the application was taken up for orders on that date. *Held*, that the Court had no jurisdiction to pass the order dismissing the application. *Dawkins* v. *Wagner*, (1832) 3 Dowl 535; *Knox* v. *Simmonds*, (1791) 3 Bro. C C 358 and *Issacs* v. *Royal Insurance Co*, (1870) L. R. 5 Ex. 296 Foll. (*Oldfield and Seshagiri Aiyar, JJ.*) PERUMAL NADAN *v.* SIVANANJI NADACHI. **39 Mad. 583: 2 L. W. 729: 30 I. C. 544 (1.) : 18 M. L. T. 199.**

——— **S. 17**—Ex parte *decree—Setting aside—Security—Power of Court to determine nature and extent of.*

It is open to the Court in setting aside an ex-parte decree to direct whether the security should be paid in cash or in property and if it gives direction one way or the other a reasonable time has to be allowed for carrying out that direction. (*Kanhaiya Lal, J. C.*) SITA RAM *v* LALTA.
9 O. & A. L. R. 67 : 73 I. C. 219 : 1924 Oudh 181.

——— **S. 17**—*Provisions are mandatory.*

S. 17 is mandatory and before a new trial is granted, the applicant, at the time of presenting his application, must tender security. If the security bond, tendered by the applicant, is discovered to be invalid his application should be rejected though the bond was accepted by the Court at the time of making the application. (*Ross, J.*) BISHUN DAYAL THAKUR *v.* SHEO TAHAL SAHIU.
62 I. C. 108.

——— **S. 17**—*Construction of—Provisions, if mandatory—Time for deposit— Extension of—C. P. Code, S. 148.*

The section is mandatory and at the time of making the application to set aside *ex parte* decree the applicant must furnish security for the performance of the decree. The Court cannot grant time for furnishing it. (*Das, J.*) RAMCHARITARMAR *v.* HAKHIM KHAN. **1 Pat L. T. 323: 56 I. C. 810: 1920 Pat. 203.**

——— **S. 17**—*Construction of—Deposit, when to be made.*

Under S. 17 of the Prov. Sm. C. C. Act, it is a condition precedent to the granting of a new trial that the applicant should at the time of presenting his application deposit in Court the decretal amount or tender security for payment of the same. (*Adami, J.*) KHANTAR POTDAR *v.* PUNNI NADDAF. **54 I. C. 971.**

PROV. SMALL C. C. ACT (IX OF 1887), S. 17.

——S. 17—*Surety— Setting aside ex parte decree.*

In execution of a Small Cause Court's decree, a bullock was attached which was released on a surety executing a bond for the whole of the decree amount on judgment-debtor applying to set aside the decree. On dismissal of the application surety produced the bullock, *Held*, surety's liability extended to the whole of decree amount (*Jwala Prasad, J.*) SEHAT ALI *v.* FARZAND ALI.
38 I. C. 90.

——S. 17—*Review petition—Deposit or security to condition precedent.*

The provisions of section 17 do not contemplate an application for a review of a judgment being admitted unless, within the period allowed by law, there is a deposit in court of the amount due from applicant or unless security is furnished within that period to the satisfaction of the court (28 A. 470 foll.) (*Saunders, J. C.*) RAM BILAS TAR BENI RAM *v.* JAI SINGH.
1922 U. B. 18.

——S. 17—*High Court's power.*

High Court's power of interference should be exercised only to cure injustice. (*Kincaid and Raymond, A. J. Cs.*) HUR MOHAMMAD *v* FAIZ MAHMOD. **56 I. C. 69: 13 S. L. R 210**

——S 17 (1)—*Applicability of— Application to set aside—Dismissal for default.*

An application for an order to set aside an order of dismissal for default is not an application for an order to set aside a decree *exparte* and therefore he need not make the deposit as under S. 17 (1) Proviso. (*Mookerjee and Richardson, JJ.*) YUSUF AKRAM *v.* ARFAN ALIKAN
35 I. C. 45: 23 C. L. J 147.

——S. 17 (1)—*Deposit— Court can excuse delay.*

Where an application to set aside an *exparte* small cause decree was made within the period of 30 days accompanied by a deficient deposit and the deficiency, which was due to a *bona fide* mistake of the applicant, was made good after the 30 days. *Held* that the Court had power under S 5 of the Limitation Act to excuse the delay in making the deposit. (*Oldfield and Venkatasubba Rao, JJ.*) SUDALAI MUTHU KUDUMBAN *v* ANDI REDDIAR. **42 M. L. J. 484: 15 L. W. 494 : (1922) M. W. N. 266: 30 M. L T. 342: 1922 M. 186.**

——S. 19 (q)—*Suit to recover ornaments is small cause.*

A suit for the return of ornaments and cloth presented by custom by the prospective bridegroom at the time of betrothal is not a suit for compensation for breach of promise of marriage, and therefore the Small Cause Court has jurisdiction to try it. (*Macleod, C. J. and Crump, J.*) MADHAURAO VISVANATH *v.* SHRIKRISHNA GOVIND RAO. **1923 Bom. 393.**

——S. 22—*Applicability — Amount beyond jurisdiction of Small Cause Court— Decree for some within jurisdiction—Costs.*

A suit was filed in the High Court for a sum which was beyond the jurisdiction of the Presidency Small Cause Court, but the decree was an amount which the Small Cause Court can award. *Held* S. 22 did not apply and the High Court is competent to award costs. (*Page, J.*) CHANDMULL KANGORIA *v.* DEBI CHAND. **28 C. W. N. 6: 51 Cal. 62: 1924 C. 405.**

PROV. SMALL C. C. ACT (IX OF 1887), S. 23.

——S. 22—*Receiver—Functions of Court.*

The functions of a court under S. 22 are limited to rectifying, reversing, or modifying the executive acts of a Receiver and an order under the section is no bar to the ordinary remedy of the parties. (*Ormond and Twomey, JJ.*) RAMAN CHETTY *v.* A. V. P. FIRM. **31 I. C. 884 : 9 Bur. L. T. 61.**

——S. 23—*Reliefs, one of several, cognisable only by Munsif's Court—Jurisdiction.*

A suit wherein alternative reliefs are asked, one of which can be granted by the Small Cause Court, but the other only by the Munsif Court the suit is triable only by the Munsif's court. (*Ratique, J.*) DUKKI *v.* GHURHU **33 I. C. 768.**

——S. 23—*Return of plaint for presentation to proper Court.*

A Sm. Cause Court can return a plaint under S. 23 of the Act on the ground that the relief claimed involves a question of title. This point must be put by the Court clearly in passing an order (*Piggott, J.*) MUHAMMAD ABDUL GHAFIR KHAN *v.* GOKUL PRASAD. **25 I. C. 81: 12 A. L. J. 334.**

——S. 23—*Procedure—Court, duty of.*

The proper course for a Small Cause Court when it finds that a suit is not cognizable by it is to return the plaint and not to dismiss, the suit. S. 23 sets out a special case and does not stand in the way of a Small Cause Court from returning a plaint when the suit is not cognizable by it. (*Griffin, J.*) SHEO BODH *v.* SURJAN **19 I. C 427: 11 A L. J. 238.**

——S. 23—*Suit instituted as Small Cause suit—Transfer of case—Judge having small cause and regular jurisdiction.*

Where a judge, having both Small cause and regular jurisdiction transferred a suit instituted as small cause on to the regular line, he rightly exercised the power under S 23, Prov. Small Cause Courts Act and he need not return the plaint as he himself had jurisdiction. There was a right of appeal from the decree passed by the judge. (*Scott, C. J and Batchelor, J.*) HARI BALU GAEKWAR *v.* GANPAT RAO SAKHUJI RAP. **38 Bom. 190: 21 I. C 832: 15 Bom. L. R 1036.**

——Ss 23 and 34—*Suit involving question to title—Suit tried by Munsif on the regular side —Appeal.*

A small cause suit was tried by the Munsif on the regular side without an order returning the plaint to himself under S. 23 of the Prov. Sm. C. C. Act. *Held*, that though there was an irregularity in the form of the proceedings there was none in substance affecting his jurisdiction and an appeal lay against his decision (*Newbould, J.*) ATUL CHANDRA SEAL *v.* KOBAD ALI. **64 I. C. 436.**

PROV. SMALL C. C. ACT (IX OF 1887). S. 23.

——S. 23—*Title—Question of—Suit for damages.*

Although the decision of a Small Cause Court on a question of title to land in a suit for damages for trespass thereon may not be conclusive, the Court is not precluded from trying and deciding that question in such a suit. 21 Cal. 244, Ref. (*Chatterjea and Newbould, JJ.*) SAHERALI MOLLA *v.* BHOLA MOLLA.
52 I. C 265 : 23 C. W. N. 647.

——S 23—*Title to immoveable property—Return of plaint.*

A Small Cause Court has power to return the plaint for presenting to the proper Court when a question of title is raised even though it is alleged to be *res judicata.* (*Teunon and Cuming, JJ.*) KHETTRA MOHAN SINGH *v.* SHIB DAS CHANDER. **48 I. C 612.**

——S. 23—*Transfer of suit—Remand on appeal.*

When a suit of the nature of a small cause suit is transferred to the original jurisdiction and an appeal is filed therefrom it is open to certain expressions either absolute or provincial. A decree in a suit of the nature of a small cause transferred to original jurisdiction is appealable. (*Teunon and Newbould, JJ.*) ANHAYESWAR DEBI *v.* HATU SHEIKH. **45 I. C 645.**

——S. 23—*Suit by landlord for damages against tenant for cutting trees—Jurisdiction.*

A Suit by a landlord against a tenant for damages for cutting trees on his holding is not cognizable by Small Cause Court as the relief claimed depends upon the determination of the status of the deft as tenant. (*Chatterjee and Richardson, JJ.*) SURENDRA NATH BHAUMICK *v.* GAYASHUDDIN. **41 I. C. 494.**

——S. 23—*Return of plaint—Subsequent trial as small cause suit—Legality.*

Where a district judge assigned a small cause suit regularly triable by a second Munsiff to a third Munsiff owing to the second Munsiff's absence on leave and the third Munsiff returned the plaint saying that as it involved complicated question of title it is to be tried by an ordinary Court but the second Munsiff on his return from leave tried it as a small cause suit ignoring the order of the Munsiff and decreed it, *held* that the action of the second Munsiff in trying it as a small cause suit, was illegal. (*D. Chatterjee and Chapman, JJ.*) BHULUSARDAR *v.* MAYAN JAMADAR.
27 I. C. 751.

——S. 23—*Return of plaint for presentation to proper Civil Court—If Civil Court can refuse to entertain plaint.*

Where a Small Cause Court returns a plaint for presentation to a regular Civil Court the latter has no jurisdiction to refuse to entertain it. (*Holmwood and D. Chatterjee, JJ.*) CHANDER BADAN KOER *v.* SHEODHAR PRASAD.
18 I. C. 325 : 18 C. W. N. 380.

——S. 23—*Order returning a plaint—Revision.*

The High Court can revise an order returning a plaint under S. 23. (*Chevis, J.*) LABHU RAM *v* MULCHAND. **60 I. C. 319 : 3 Lah.L. J. 335.**

PROV. SMALL C. C. ACT (IX OF 1887). S. 23.

——Ss. 23 and 25—*Question of title not raised in pleadings—Return of plaint not justified.*

The power to act under S. 23 of the Provincial Small Cause Courts Act is a discretionary power which only a Court having jurisdiction over the suit can exercise and where a Court has ruled out that it has no jurisdiction over the suit, it has no power to act under S 23 Where on the pleadings no question has been raised as to title to immoveable property, nor any other question of title which the Court could not finally determine, the return of the plaint by a Small Cause Court on the ground that an account of the value of the lands sold to and the value of the lands taken away from the plff and the profits due to the plff have to be ascertained and some questions of the ownership of the lands might arise, is unsustainable. (*Krishnan, J.*) RAJAMMAL AYIYAR *v.* KRISHNASAMI AIYANGAR. **15 L W. 35 : 1922 Mad. 300.**

——S. 23—*Question of title—Suit instituted on Sm. C Side—Transfer to Original Side.*

A rent suit was filed on Sm C. Side of the Munsiff's Court but the deft. obtained an order under S. 23 to transfer the case to a Court authorised to determine question of title. It was then presented to the original side of the Munsiff's Court but on finding that there was no question of title the suit was re-transferred to Small Cause Side The deft. objected that the order under S. 23 had not been set aside. *Held* the objection could not be taken for the first time in revision. (*Napier and Krishnan, JJ.*) ARO ALI VELMAN *v.* SUBAROYAN. **60 I. C, 145 : 12 L. W. 423.**

——S. 23—*Title, question of.*

Where in a suit brought by executors in a Sm. C. Court the defendant pleaded that the testator had no power to dispose of the lands by will as they belonged to charity. *Held,* The Small Cause Court had no power to try the suit. (*Abdur Rahim, C. J.*) VAITHYANATHA AIYAR *v.* SUBRAMANIYA AIYAR. **38 I. C. 608 : 4 L. W. 349.**

——S. 23—*Title—Suit involving question of title, nature of.*

In a suit for value of trees wrongfully cut and carried away, the deft. contested the plff.'s title. The plaint was then returned for presentation to proper Court. *Held,* that though the case was tried on the regular side it none the less was a suit of a small cause nature. (*Spencer and Krishnan, JJ.*) NARANAPPA *v.* VENKATARAMAN.
20 M. L. T. 281 : 4 L. W. 245 : 36 I. C. 202 : (1916) 2 M. W. N. 215.

——S. 23—*Jurisdiction to determine questions of title—Suit for rent—Title found necessary for determination—Procedure.*

A Small Cause Court cannot inquire into questions relating to title, and where a suit for rent filed therein is found to involve the determination of title, the Court should return the plaint for presentation to the proper Court (*Sadasiva Aiyar and Tyabji, JJ.*) MUTHIAH CHETTIAR *v.* AUTHINAMULAGI. **15 M. L. T. 214 : 1 L. W. 203 : 22 I. C. 799 : 26 M. L. J. 225.**

——S. 23—*Jurisdiction—Appeal—Suit for damages.*

PROV. SMALL C. C. ACT (IX OF 1887), S. 23.

The Small Causes Court has jurisdiction to try suits for damages for trespass and removal of wood. The party therefore cannot perfer second appeal in such cases if they be below Rs. 500 even though they involve question of title. S. 23 of the Act lays down the direction for the trial of suits involving title-question as a regular suit in the interest of parties, and not a ground to hold that such suits are not cognizable by the Court. (*Sundara Aiyar and Sadasiva Aiyar JJ.*) CHINTALA RAGHAVA REDDI *v.* CHINTALA KRISHNA REDDI. **12 M. L. T. 206 : (1912, M. W. N. 810 : 16 I. C. 201 : 23 M. L. J. 193**

——S. 23—*Order returning plaint—Effect of.*

The effect of an order returning the plaint under S 23 is to remove the bar to the jurisdiction of the ordinary Courts imposed by S 16. The suit may be presented to any Court having jurisdiction to try the suit, (*Abdur Rahim and Ayling, JJ.*) SOWDAGAR NABHEKHAN *v.* MUHAMMAD HUSSAIN. **10 I. C. 267 : 9 M. L T. 372.**

——S. 23—*Suit for value of trees cut—Deft. claiming ownership—Return of plaint—Nature of suit.*

Where, in a suit for value of trees cut by deft. the latter claimed ownership of the trees, and the Court thereupon returned the plaint to be presented to a Court having jurisdiction to determine the question of title; *held*, that the fact of such return did not make the case any the less a suit of a Small Cause nature. (*Lyle, A. J. C.*) KANWAZ SINGH *v.* UJAGAR SINGH **65 I. C. 93 : 3 U. P. L. R. (J. C) 18**

——Ss. 23 and 25—*Question of title raised by deft.—Court, duty of.*

If the deft. raised the question of title in a small cause suit the Court may try the question of a jurisdiction or return the case and direct the plff. to lodge the plaint in a Court competent to decide the question of title. If he decides to try the question of title himself he cannot try it in a summary manner (*Lindsay A J. C.*) HIRA LAL *v.* MAHOMED SHARAFIT ULLAH. **14 I. C 2.**

——S. 23—*Question relating to title.*

A suit for wrongful destruction of a house and the removal of its materials is triable by a Small Cause Court although the question of title may incidentally arise for decision. (*Ross, J.*) MAULVI SYED RAZAUR RAHAMAN *v.* ATTAR HUSSAIN. **64 I. C. 496 : 2 Pat L. T. 739.**

——S. 23—*Returning of plaint—Rivision.*

Suit on two receipts opposed in defence by subsequent agreement which the plaintiff rejoined as rescinded owing to defendant's default was held by Court of small causes to involve a question of title and the plaint was returned for presentation to proper court. *Held*, that the High Court can interfere as the Court below failed to exercise jurisdiction vested in it by law by not deciding the question of non-performance of the subsequent agreement. (*Das, J.*) MEWA LAL SAHU *v.* RAMADHEN CHOWDHURY. **57 I. C. 602.**

——S. 23—*Suit for damages for use and occupation—Question of title if can be gone into.*

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—'Decided', Meaning of.

A Small Cause Court has jurisdiction to entertain a suit for damages for use and occupation, and for that purpose may incidentally go into a question of title. (*Ormond, J.*) YOO JOO SEIN *v.* MAUNG BA TIN. **31 I. C. 893 : 9 Bur L. T. 60.**

——S. 23—*Question of title—Incidental determination of*

A Small Cause Court has jurisdiction to decide questions of title that come up incidentally in a suit within its cognizance. (*Pratt, J. C. and Hayward, A. J. C.*) CHIMAN DAS *v.* MANGHUL MAL HEMRAJ. **16 I. C. 868 : 6 S. L. R. 85.**

——S. 23 (1)—*Object of.*

S. 23 (1) of the Act is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily but in a Court in which evidence is recorded in full and the decision is open to appeal. The matter is one of discretion. (*Sharfuddin and Roe, JJ.*) GANGA PRASAD *v.* NANDURAM. **20 C. W N. 1080 : 1 Pat. L. J. 465 : 37 I. C 129 : 3 Pat. L. W. 55.**

——S. 24—*Power of Court—Interference on behalf of parties not applying in revision.*

Where a decree is being reversed in revision as illegal the High Court has power to reverse it as regards those portions of the decree which is against parties who have not applied in revision. (*Foster, J.*) MT. BIBI NASIBAN *v.* EKNAM NARAIN. SINGH. **4 Pat. L T. 606 : 1924 P. 135.**

——S. 25.

'Decided', meaning of.
Error in procedure.
Error of Law.
Findings of fact.
New plea.
Question of costs.
Question of jurisdiction.
Question of limitation.
Review cases.
Miscellaneous.

'Dicided', Meaning of.

——S. 25—*Decided, Meaning of.*

A suit for compensation for breach of a contract was brought in the Court of Small Causes at Agra. The defendant pleaded want of local jurisdiction and many other defences. On the issue as to jurisdiction the Court took evidence and held tha the suit had been properly instituted at Agra. *Held* that no revision lay as the case had not been disposed of within S. 25 of the Prov. Sm. C. C. Act. (*Abdul Raoof, J.*) MAKHAN LAL *v.* CHUNNI LAL. **41 All. 42 : 47 I. C, 610 : 16 A. L. J. 777.**

——S. 25—*Decided, meaning of—Order setting aside* ex parte *decree—Revision.*

The word 'case' in S. 25 of the Act does not necessarily mean the 'whole' case but may mean a particular branch of a case having an independent remedy or procedure and includes an interlocutory order. The word 'decided' in the same section means disposed of and a petition to

PROV SMALL C. C. ACT (IX OF 1887), S. 25—Decided, Meaning of.

revise an order of a Small Cause Court setting aside an *ex parte* decree is maintainable. (*Martineau, J.*) RAM LAL *v.* GANESHI LAL.
59 I. C. 685 : 47 P. W. R. 1921.

——— S. 25—*Decided, meaning of—Judgment of Small Cause Court—Contents.*

The judgment of a Small Cause Judge should contain a brief statement of the reasons for the decision to satisfy the High Court that the Judge did apply his mind to the matters before him. (*Seshagiri Aiyar, J.*) KANDASWAMI CHETTY *v.* RAMALINGA CHETTY.
59 I. C. 906 : 12 L. W. 285.

——— S 25—*'Decided,' meaning of.*

'Decided' in S. 25 does not mean decided on the merits but simply means 'disposed of' and a High Court's power of Revision is not restricted to cases where there is a decision on the merits 14 C. L. J. 118 Foll. 13 C. W. N. 403. Diss. (*Seshagiri Aiyar, J.*) RAMANATHAN CHETTY *v.* MARUTHAPPA KONE.
16 M. L. T. 502 : 25 I. C. 643 : 27 M. L. J. 494.

——— S. 25—*'Decided,' meaning of—Leave to withdraw without giving reasons.*

Quaere. — Whether a suit which has been allowed to be withdrawn with liberty to sue afresh is a case "decided" within S. 25 of the Prov. Sm. C. C. Act. The High Court will interfere under S. 107 of the Government of India Act in a case where leave has been given without adequate reasons. (*Chamier, C. J. and Sharfuddin, J.*) LUCHI RAI *v.* RAGHUBIR DUBE.
43 I. C. 455 : 2 Pat. L. J. 682.

Error in Procedure.

——— S. 25—*Error in procedure—Court taking up new case at 5 p.m.—Absence of exceptional circumstances—No notice to parties concerned—Dismissal for default— Material irregularity—Interference in revision.*

Where without any special reasons or notice to parties the Court took up a fresh case after 5 p.m. and dismissed it for plff.'s default, *held* the High Court will interfere. (*Piggott, J.*) BEVIS AND Co. *v.* RAM PRASAD.
44 A. 325 : 20 A. L. J. 138 : L. R. 3 A. 25 : 1922 A. 72.

——— S. 25—*Error in procedure whether good ground for—Practice.*

The High Court will not usually under S. 25 of the Provincial Insolvency Act, interfere in revision merely for correcting errors of procedure where substantial justice has been done. (*Chamier, J.*) JANAN *v.* NARIAN DAS.
11 I. C. 259 : 8 A. L. J. 929.

——— Ss 25 and 17—*Error in procedure—Security bond, accepted by Court, but not registered—Ex-parte decree, if can be set aside—Revision.*

The requirements of S. 17 are mandatory and compliance with the essential requisites is necessary before the *ex parte* decree can be vacated. Where a security bond was given and accepted by the Court but not registered, it was held that an *ex parte* decree cannot be set aside under S. 17 where it was set aside the order was revised

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—Error in Procedure.

under S. 25. (*Mookerjee and Cuming, JJ.*) TARAPADA GHOSE *v.* JAGAT MOHINI DASI
42 I. C. 751 : 26 C. L. J. 315.

——— S. 25—*Error in procedure— Revision — Admission- Power of Court.*

Court cannot dismiss a suit for failure to prove consideration of the bond in suit where defendant admitted the claim but pleaded for instalments. (*Chatterjee and Smither, JJ.*) GANGARAM BHORAJ *v.* DHANMAN SIRDAR.
41 I. C 393.

——— S. 25—*Error in procedure — Specific Relief Act, S. 12—Relief being not cognizable and not grantable.*

When one of two alternative reliefs sought in the Small Cause Court is not cognisable by that Court but is not also grantable in law, a direction to strike it out and thus amend the plaint would be the proper course of action. (*Roe and Jwala Prasad, JJ.*) BARAT MAHTO *v.* NISARALI.
37 I. C. 665 : 20 C. W. N. 1020.

——— S. 25—*Error in procedure—Charter Act, S. 15—Revision—Return of plaint—Jurisdiction, refusal to exercise.*

The High Court can revise the S. C. Court's order returning plaint if the S. C. Court has thereby refused to exercise jurisdiction vested in it by law. (*Mookerjee and Teunon, JJ.*) UMESH CHANDRA *v.* RAKHAL CHANDRA.
15 C. W. N. 666 : 10 I. C. 8 : 14 C. L. J. 118.

——— S. 25—*Error in procedure—Genuineness of document, question of—If a ground for revision.*

Where the genuineness of a document purporting to be a receipt for the amount was doubted the High Court cannot revise as there is no error of law or procedure. (*Shadi Lal, J.*) HUKAM SINGH *v.* MAKHAN LAL.
32 I. C. 793 : 73 P. W. R. 1916.

——— S. 25—*Error in procedure—When good ground for—Substantial justice.*

A decision which though wrong in law does substantial justice, will not be interfered with in revision. (*Rattigan, J.*) GHASITA *v.* SULTAN.
93 P. R. 1911 : 151 P W. R. 1911 : 11 I. C. 445 : 228 P. L. R. 1911.

——— S. 25—*Error of procedure—Revision—Record of evidence, meagre — Judgment after seven months.*

The law pre-supposes a prompt and continuous trial, usually finished in one hearing followed by an immediate decision while the evidence of both sides, most of it unrecorded is still fresh in all its details in the mind of the judge. This is of the very essence of the Small Cause Court procedure. The judgment in a case was delivered by a Small Cause Court Judge seven months after he had heard the evidence and the record of evidence was very incomplete and imperfect. *Held* that his judgment was without the basis necessary for a legal decision and, therefore, a retrial should be ordered. (*Stanyon, A. J. C.*) RAJABKHAN *v.* LANGDAJI.
15 I. C. 938 : 8 N. L. R. 91.

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—Error of Law.

Error of Law.

——— S. 25—*Error of law—Interference of.*

The High Court will not ordinarily interfere merely because of a mistaken application of a law. But it will do so where there has been a complete wrong done. (*Walsh and Ryves JJ.*) ABDUL AZIZ *v.* MUNNA LAL. 63 I. C. 435 : 19 A. L. J. 555.

———S. 25—*Error of law—Interference in—None where decision is just.*

Where the decision on the merits does justice between parties the High Court will not interfere in revision especially where the question of law is very doubtful. (*Piggott, J.*) MAKHDUM BAKHSH *v.* SHAUKAT ALI. 29 I. C. 1008 : 13 A. L. J. 568.

——— S. 25—*Error of law—Interference.*

In the absence of an error of law the High Court will not interfere in revision under S. 25 of the Prov. Sm. C. C. Act. (*Suhrawardy and Cuming, JJ.*) BAUL CHANDRA ADDYA *v.* SHEIKH ABDUL MATLEB. 67 I. C. 851.

——— S. 25—*Error of law.*

The defendant produced a document purported to be a receipt for the amount for which he was sued. The Small Cause Court doubted its genuineness. No revision under S. 25 was necessary as there was no error of law or procedure justifying intervention. (*Shadi Lal, J.*) HUKAM SINGH *v.* MAKHAN LAL. 32 I C 793 : 73 P. W. R. 1916.

———S. 25—*Error of law—Substantial justice.*

The Chief Court refused to interfere in revision with an erroneous decision on a question of law, when it appeared that substantial justice had been done by the decree of the Small Cause Court. (*Leslie Jones, J.*) SHER KHAN *v* GOKAL CHAND. 171 P. L. R. 1915 : 30 I. C 429 : 107 P. W. R. 1915.

——— S. 25—*Error of law—Question of law doubtful.*

The High Court will interfere in exceptional cases in suits tried by Small Cause Courts if the decision arrived at is capricious of perverse and contrary to Law but it is no good ground for interference under S. 25 of the Act that the Judge had a doubtful issue of Law for determination which the High Court will decide if it came in a second appeal. (*Piggott, J. C. and Lindsay, A. J. C.*) BRIG. MOHAN LAL *v.* MUNNI BIBI. 13 I. C. 803 : 14 O. C. 343.

———Ss 25 and 23—*Error of law—Omission to determine material issue.*

The omission to determine a material issue as to the genuineness of the mortgage, amounts to an error in law and High Court can interfere under S. 25 of the Prov. Sm. C. C. Act. If the Court was of opinion that the question of the genuineness of the bond was beyond the scope of the suit it was incumbent on the court in the discretion vested in it by S. 23 to return the plaint to be presented to the proper court. Failure to do so brought the case within S. 25. (*Jwala Prasad, J.*) RAJKUMAR LAL *v.* JAIKARAN DAS. 5 Pat. L. J. 248 : 57 I. C. 653 : 1 Pat. L. T .225.

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—Finding of Facts.

———S. 25—*Error of law.*

Where the right sought for was not the right of easement but the trial Court stated it as such. *Held* there was clearly misapplication of law and revision was competent. (*Duckworth, J.*) MAUNG PO THAUNG *v.* MA GYI.
1 R. 281 : 2 Bur. L. J. 136 : 1923 Rang. 205.

——— S. 25—*Error of law—Revision.*

Where the decree of a Court of Small Causes which must also include the judgment, involves a clear error of law, causing failure of justice the High Court can interfere. (*Maung Kin, J.*) KO KYAW ZAN *v.* DAW MYA. 40 I. C. 890.

———S. 25—*Error of law—Interference.*

Under S. 25 of the Pro. Sm. C. C. Act, it is not open to interference in revision unless there is some clear error of law and injustice resulting therefrom. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) RADHOMAL KESHOWDAS *v* HOLOMAL KESUMAL. 66 I. C. 489: 15 S. L. R 193.

Finding of Fact.

———S. 25—*Finding of fact—Power to interfere.*

Under S 25 of the Act, the High Court though averse to interfere on pure question of fact, yet has the power to interfere with a decision on a question of fact. (*Macleod, C. J. and Fawcett, J.*) NATHURAM *v.* DHULARAM.
22 Bom. L. R. 1199 : 59 I. C. 267 : 45 B. 292.

———S. 25—*Finding of fact—Finding opposed to evidence.*

The powers conferred by S. 25 though discretionary are very wide and when a Small Cause Court arrives at a finding entirely opposed to the evidence in the record, the decision will be set aside in revision on the ground of miscarriage of justice. 63 P. R. 897 ; 21 B. 250, Foll. (*Leslie Jones, J.*) ISHAR DAS *v.* ALI BOSSA.
42 I. C. 198 : 165 P. W. R. 1917.

———S. 25—*Finding of fact—Entry in creditor's book.*

A finding of fact based on extremely meagre evidence can be set aside in revision. A mere entry in a creditor's book unsupported by independent testimony is of no avail as against the sworn affirmation of the person liable thereunder (*Johnstone, J.*) GOGDHU MAL *v.* FIRM OF RAM RAKHA MAL AND SHAM DAS.
173 P. L. R. 1914 : 24 I. C. 883 : 70 P. W. R. 1914.

———S. 25—*Finding of fact—Revision*

A suit was based on a document which was neither on pro-note nor an acknowledgment of debt, but a mere receipt. A decree was passed on the mere statement of plaintiff that the receipt was for money advanced as a loan. It was admitted that the parties were at one time partners in business and it was impossible to make out whether the money was or was not really paid in the course of some transaction arising out of the firm's business. The case was a fit one for revision and the suit must be dismissed. (*Kensington, J.*) FAGAL HUSAIN *v* MRS. HOLMES.
133 P. L. R. 1913 : 19 I. C. 943 : 139 P. W. R. 1913.

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—Finding of Fact.

——S. 25—*Finding of fact--When can be interfered with.*

Per *Oldfield, J.*—A finding of Small Cause Court on a question of fact reached without reference to material evidence must be rejected even in revision under S. 25 of the Prov. Sm. C C. Act. (*Oldfield and Seshagiri Aiyar, JJ.*) M. & S. M. RY. CO. *v.* SUBBA RAO.
38 M. L. J. 360 : (1920) M. W. N. 198 : 11 L W. 358 : 55 I. C. 754 : 28 M. L. T. 49.

——S. 25—*Finding of fact Burden of proof.*

Per *Sadasiva Aiyar, J.*—The High Court should not interfere in revision with a finding of fact in a small cause suit on the mere ground that the Court misdirected itself as to the burden of proof. (*Oldfield and Sadasiva Aiyar, JJ.*) RANGASWAMY BHATTAR *v.* SESHADRI AIYENGAR.
35 I. C. 204 : 4 L. W. 611.

——S 25—*Finding of fact -Finding opposed to evidence.*

Even if a finding of fact arrived at by a lower Court is entirely opposed to the evidence the High Court has no power to interfere in revision under S. 25. (*Sundara Aiyar, J.*) GANAPATHY PILLAI, *In re.* **15 I. C. 186 : (1912) M. W. N. 181.**

——S. 25—*Finding of fact—Powers of interference under.*

Small Cause Courts have been given very wide powers with regard to decision on questions of fact and in revision the Court is always reluctant in questioning a decision on the facts. But where the findings are based on or involve assumptions or inferences which there is nothing in fact or probability to support or are not justified by sufficient evidence or where finding is opposed to the evidence on record or is based on meagre or little evidence or on flagrant misinterpretation disregard of evidence or if injustice would disregard otherwise be done, the High Court has power to interfere otherwise. (*Prideaux, A J. C.*) PADAMSI *v.* SHESHRAO. **19 N. L. R. 72: 1923 Nag. 292.**

——S. 25—*Finding of fact without any evidence.*

No revision of the decision of a Small Cause Court can be allowed merely because it is wrong in law but it would be allowed if the lower Court found a certain fact for the finding of which there did not exist an atom of evidence. (*Ashworth, J. C.*) CHIRANJI LAL *v.* KALI. **1922 Oudh 130.**

——S. 25—*Finding of fact—Power of High Court to interfere in revision.*

The High Court interferes with the findings of a Small Cause Court with very great reluctance yet there are occasions when it should do so. (*Bucknill, J.*) PARSOTAM DAS *v.* FIRM OF JANGLI SAO. **1 Pat. L. T. 199.**

——S. 25—*Finding of fact.*

The powers of Court under S. 25 are wider than under S. 115, C. P. C. (1908) where a Small Cause Court decree is based on a finding which is clearly opposed to the evidence resulting in grave injustice to the defendant, the High Court can reverse it. 21 B. 250 ; 23 B. 334 ; 27 A. 192; 27 A. 531, Ref. (*Fawcett, J C. and Boyd, A. J. C.*). RUPCHAND *v.* MINHOMAL HARDASMAL. **27 I. C. 366: 8 S. L. R. 164.**

New Plea.

——S. 25—*New plea—Fresh plea of limitation—If can be raised in.*

The omission to raise a plea of limitation in the trial Court would not estop the deft. from raising that plea in revision before the High Court. If such plea depends upon evidence, the case should be remanded for retrial. (*Rafique, J.*) FIRM DEBINCIN-BHAGWAN DIN *v.* FIRM SIRKAR & Co. **56 I. C. 513: 2 U. P. L. R. (All.) 143.**

——S. 25—*New plea—Question of fact.*

The objection whether the plaintiff is or is not the agent of a particular person on whose behalf he has instituted a suit to recover money in the Small Cause Court, cannot be taken for the first time in revision. (*Knox, J.*) BUDHUKHAN *v.* HANUMAN PERSHAD. **27 I. C. 807.**

——S. 25—*New plea.*

There should be no interference in revision on a ground which has never been taken up in the lower Court. (*Ashworth, J. C.*) CHIRANJI LAL *v.* KALI. **1922 Oudh 130.**

Question of Costs.

——S. 25 — *Question of costs — Costs not allowed--Illegality.*

A judgment of a Sm. C. C. disallowing costs to a successful party without reasonable grounds is against law and the High Court will interfere in revision. (*Johnstone, J.*) THAKER SINGH *v.* ISHAR SINGH. **43 P. W. R. 1911: 10 I C. 847 : 113 P. L. R. 1911.**

——S. 25—*Question of costs—Arbitrary, refusal of.*

Ordinarily costs should follow the event. When the Lower Court does not act on this rule, it ought to give a sufficient reason for not doing so. Where the reason given by subordinate judge for disallowing the costs of a successful plff. is not sufficient, the High Court can interfere under S. 25. (*Sundara Aiyar, J.*) NARAIN AIYAR *v.* VENKATARAMA AIYAR. **15 I. C. 202 : (1912) M. W. N. 366.**

Question of Jurisdiction.

——S 25—*Question of jurisdiction.*

Decision of a suit not cognizable by Small Cause Court should be set aside by the High Court which should return the plaint to the plaintiff for presentation to proper Court. (*Mookerjee and Beachcroft, JJ.*) PADU MOHAMMAD *v.* CHATRA NATH. **41 I. C. 203: 27 C. L. J. 590.**

——S. 25—*Question of jurisdiction — Power of High Court to interfere.*

A revision application based mainly on the ground that the Small Cause Court had no jurisdiction to try the suit, which objection was not urged in the lower Court, is not sustainable in the High Court. (*Woodroffe and Mullick, JJ.*) NATIONAL INSURANCE AND BANKING CO. *v.* BISWAMBAR CHOWDHURY. **29 I. C. 566.**

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—Question of Jurisdiction.

——S. 25—*Question of jurisdiction.*

Even when no objection is taken to the jurisdiction of the Court, the High Court has powers to set aside the decree of the Small Cause Court and direct the plaint to be returned to a Court having jurisdiction. (*Chevis, J.*) NABI BAKSH *v.* MAHOMED ALI. **3 Lah. L. J. 380.**

Question of Limitation.

——S. 25—*Question of limitation—Revision.*

Where a Small Cause Court dismissed a suit on an instalment bond without reference to the provisions of Limitation Act applicable to the case, though *prima facie* some of the instalments are within time, the High Court could interfere in revision and set aside the decree and direct a retrial. (*Piggott and Walsh, JJ.*) HIRA LAL *v.* ALLAH BAKSH. **20 A. L J. 89: 65 I. C. 107 (1) : L. R. 3 A. 67.**

——S 25—*Question of limitation.*

When it is apparent on the face of the judgment of the Court below that the Court would have done better to enquire into the facts of a case and to determine it as a whole including the question of limitation, when fully satisfied as to the facts the High Court in the exercise of its discretion, would be acting reasonably in interfering in the interests of justice. (*Piggott, J.*) SHANKER SINGH *v.* MUSSAMMAT REKHA. **28 I. C. 969: 13 A. L. J. 394.**

——S. 25—*Question of limitation.*

The decision of a Small Cause Court on a question of limitation is reversable by the High Court. (*Tudball and Rafique, JJ.*) SHEO PERSHAD *v.* SHEO PERSHAD. **20 I. C. 175.**

——S. 25—*Question of limitation.*

The question of limitation is a proper ground for revision under S. 25 of the Act. (*Rafique, J.*) SHEO RAM *v.* BADRIDAS BIHARI LAL. **19 I. C. 782: 11 A. L. J. 295.**

——S. 25—*Question of limitation.*

An erroneous decision of a Small Cause Court on a question of limitation can be interfered with, in revision under S. 25 of the Act. 17 I C. 470; 15 I C. 547; 15 A. 139 Dis'. (*Lindsay, J. C.*) MADHO SINGH *v.* BADIL SINGH. **46 I. C 804 : 21 O. C. 139.**

——S. 25—*Question of limitation—Revision—Scope.*

S. 25 does not give any right of appeal in law or fact and the powers conferred by it are discretionary and not to be exercised unless there has been miscarriage of justice. Revision does not lie against an erroneous decision on the question of limitation. 39 C. 473; 15 A. 139 Con. 13 A. 277 Foll. (*Stuart, J. C.*) RAGHURAJ SINGH *v.* SAHIB DIN. **17 I. C. 470 : 15 O. C. 319.**

Review Cases.

——S. 25—*Review cases—Power of High Court to interfere with order rejecting review petition.*

The powers of High Court in cases where review is refused by the lower Court are much wider in cases where the lower Court exercises

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—Miscellaneous.

Small Cause jurisdiction. (*Johnstone, J.*) FAIZ MUHAMMAD *v.* MUHAMMAD ZAKRIYA. **140 P. W. R. 1911: 11 I. C. 15 : 195 P. L. R. 1911.**

——S. 25—*Review cases—Erroneous grant of Review.*

Although O. 47, R. 7 of the C. P. Code is not applicable to Small Cause Courts its provisions may well guide the High Court in revising an order of the lower Court granting a review. (*Oldfield, J.*) VALLIAMMAI NADATHI *v.* ASEERWADA NADAR. **53 I. C. 44.**

——S. 25—*Review cases.*

The High Court's revisional powers should not be exercised to restore an erroneous order of a Sm. Cause Court but set aside by him on review; it is in the discretion of the Judge to deal in review with an order proceeding on a mistaken view of the law. (*Twomey, J.*) MAUNG AUNG *v.* N. K. RAMANATHAN CHETTY. **12 I. C. 903 : 4 Bur. L. T. 147.**

Miscellaneous.

——S. 25—*Scope of—Powers under, wider than under C. P. Code—Failure to make ground of decision clear.*

S. 25 Provincial Small Cause Courts Act confers upon the High Court wider power of interference in revision than the ordinary powers of revision conferred by C. P. C. and the High Court has sufficient ground to interfere in revision in a case in which the judge has not made the grounds of his decision clear. (*Walsh and Ryves, JJ.*) CHANDER SEN *v.* MAN MOHAN LAL. **L. R. 3 A. 17.**

——S 25—*Revision—High Court, powers, of—Duty of Judge of Small Cause Court.*

The Judge of a Court of Small Causes must place on record enough materials to make it clear to the High Court what the grounds really are on which his decision proceeds; otherwise the High Court will interfere in revision. Duty of a Judge of the Court of Small Causes and limits of revisional jurisdiction of High Court pointed out. (*Piggott, J.*) MANGER CHAMAR *v.* GAJAI SINGH. **41 I. C. 873 : 15 A. L. J. 680.**

——S. 25—*Reference—Dt. Court, power of to make a reference to the High Court*

The Small Cause Court being a Court subordinate to the Dist. Court, the Dist. Judge is competent to make references of cases tried by that Court to the High Court under O. XLVI, R. 7, C. P. C. (*Chatterjee and Newbould, JJ.*) RATAN BEPARI *v.* HIRALAL. **34 I. C. 527.**

——S. 25—*Revision—Discretion of High Court.*

It is purely discretionary with the High Court to exercise its revisional powers. The broad rule is that this Court should not interfere to perpetuate injustice but only to promote the end of justice. (*Broadway, J.*) THE FIRM PRABH DIAL KISHEN CHAND *v.* THE FIRM HARI CHAND-SOBHA RAM. **55 I. C. 209.**

——S. 25—*Revision, interference in—Powers of High Court.*

PROV. SMALL C. C. ACT (IX OF 1887), S. 25—Miscellaneous.

Under S. 25 the High Court has wider powers of interference than under S. 115, C. P. Code. (*Scott-Smith, J.*) PRABH DIAL *v.* SHAMBHU NATH. **54 I C. 436 : 20 P. L. R. 1920.**

——— S. 25—*Revision—Court-fee—N. W. F. P. Regulation*, S. 84.

Where a suit was tried on the small cause side and a revision was presented to the Judicial Commissioner, N. W. F. P., and was admitted, such application must be deemed to have been admitted under S. 84 of the Regulation The Court-fee on it is Rs. 2 by Art. 1 (*d*), Sch. II of the Court-fees Act. (*Dob, J. C.*) DHARAM SINGH *v.* DUNI CHAND. **14 P. L. R. 1915 : 3 P. W. R. (N. W. F. P.) 1914.**

——— S. 25—*Revision—Grounds in.*

A Small Cause Court judgment is open to revision if it (1) assume facts. (2) refuses to receive and consider pleas of the parties, (3) does not decide material points of dispute. (*Scott-Smith, J.*) PIR BAKHSH *v.* HARILAL. **54 P. W. R. 1914 : 25 I C. 26 : 146 P. L. R. 1914.**

——— S. 25—*Power of High Court under.*

The interference of the High Court under S. 25 is a matter of discretion. (*Sadasiva Aiyar and Moore, JJ.*) GOVINDASWAMY PILLAI *v.* RAMASAMI AIYAR. **3 L. W. 408 : (1916) 2 M. W. N. 79 : 34 I. C. 6 : 30 M. L. J. 492.**

——— S. 25—*Power of interference— Discretionary.*

The exercise of the power of interference under S. 25 of the Act is in the discretion of the High Court and it need not interfere if it appears that substantial justice has been done between the parties by the lower Court. (*Sadasiva Aiyar J.*) GOPALA IYENGAR *v.* VENKATAKRISHNA IYENGAR **17 I. C. 748 : (1912) M. W. N. 1227.**

——— S. 25—*Correctness doubtful—If ground for revision.*

Where the applicant has not shown that the view of the case as taken by the lower Court is wrong but has succeeded, at the utmost, in throwing some doubt on its correctness, the High Court will not interfere in revision. (*Hallifax, A. J. C.*) PITAMBAR DAS *v.* G. I. P. RY. Co. **1923 Nag. 309.**

——— S. 25—*Interference—Discretion.*

Though S. 25 gives authority to the Court for interference in revision, yet to set aside on the ground of fabricating signatures of intending executants, the decree ordering the executant, who did execute the document, to repay the money which he took as a loan and which he promised to repay would be to perpetrate an injustice and encourage dishonesty merely for the sake of vindicating a legal subtlety. (*Hallifax, A. J. C.*) RAMCHANDRA *v.* RUPRAO. **64 I. C. 726 : 4 N. L. J. 270**

——— S. 25—*Revision—High Court, powers of.*

The power of a High Court, in revision under S. 25 of the Act, is not less wide than under O. 41, R. 4 of the C.P.C. (*Mittra, A.J.C.*) HEMRAJ *v.* PANNALAL. **61 I. C. 563 : 17 N. L. R. 20.**

PROV. SMALL C. C. ACT (IX OF 1887), S. 31.

——— S. 25—*Evidence—Different view—No revision*

That the revisional Court might and take a different view of the evidence in the case, is no ground for revision. (*Batten, A. J. C.*) LOBHAJI *v.* NARAYAN. **48 I. C. 907**

——— S. 25—*Revision—Interference—Substantial justice.*

The Court should only interfere to remedy injustice and where substantial justice has been done it will not interfere, in spite of a technical error on the part of the Small Cause Court. (*Duckworth, J.*) VALAB DAS *v.* MAUNG BA THAN. **1 Rang. 372 : 2 Bur. L. J. 154 : 1924 Rang. 54.**

——— S. 25—*Scope of—Interference.*

The High Court will intervene under Sec. 25 of the Act only when a substantial injustice has directly resulted from a material misapplication or misapprehension of law or from a material error of procedure (*Twomey, J.*) GAGGERO FRANCESCO *v.* EMPEROR. **6 Bur L T. 144 : 14 Cr. L. J. 496 : 20 I. C. 752 : 7 L. B. R. 76.**

——— S. 25—*Interlocutory order.*

An interlocutory order of a Court of Small causes is not subject to revision under S. 25. 13 C. W. N. 403, Ref. (*Parlett, J.*) MAUNG BA BAKYAW *v.* ME SAW. **9 I. C. 467 : 4 Bur. L. T. 23.**

——— S. 25—*Discretion will not be interfered with if fairly exercised.*

Judge has discretion to wait for pleader but his discretion will not be interfered with by High Court. (*Kincaid, J. C. and Kennedy, A.J.C.*) KHEMCHAND DARYANOMAL *v.* MENGHOMAL CHUTAKNAL. **66 I. C. 789 : 15 S. L. R. 172.**

——— S. 27—*Small Cause suit— Tried as ordinary suit—Appeal.*

If a Court invested with Small Cause Court powers tries under a suit which should be tried as Small Cause Court suit, the decree of the Munsif in the suit is not appealable to the Lower Appellate Court. (*Beachcroft, J.*) MANMATHA NATH *v.* KSHETRA NATH. **55 I. C. 642.**

——— Ss. 27 and 25—*Execution on Small Cause side—Revision or appeal.*

S. 27 of the Act bars an appeal against the order in execution on the Small Cause side and a revision petition lies under S. 25 of the Act. (*Sadasiva Aiyar and Napier, JJ.*) ALAGAMUTHU PILLAI *v.* DEVASAGAYA FERNANDEZ. **19 M. L. T. 146 : (1916) 1 M. W. N. 78 : 32 I. C. 484 : 3 L. W. 34.**

——— Ss. 27 and 25—*Execution in Small Cause—Appeal.*

No appeal is allowed from an order in Execution Proceedings of Small Cause Court decree. (*Chapman and Jwala Prasad, JJ.*) RAJ KUMAR LAL *v.* BULAKKI MYAN. **42 I. C. 467 : 3 Pat. L. W. 146.**

——— S. 31 (2)—*Small Cause suit instituted in Court not having Small Cause powers—Trial by Court having such powers.*

Where a small cause suit instituted in a Munsif's Court having no Small Cause Court powers was registered as a regular suit and that by a

new Munsif having such powers it was held that the suit having been originally instituted in Munsif's Court having no small cause powers and registered as a regular suit could only have been tried as such by the new Munsif unless it had been transferred to the small cause side by a regular order. (*Griffin, J.*) JAGMOHAN LAL *v.* LAKHA. 9 I. C. 264.

——— Ss. 32 and 33—*Small cause suit tried on regular side—Appeal.*

The character of small cause suit though tried in the ordinary manner as a regular suit is not altered and the decree therein is therefore not appealable. Where in a suit for moneys realised of illegal distress and damages, the plff. gives up his claim on account of legal distress. There is no appeal therefore from the decree in the similar suit. (*Carnduff and Beachcroft, JJ.*) INDRA CHANDRA MUKHERJEE *v.* SRISH CHANDRA BANERJEE. 21 I. C. 120 : 40 Cal. 537.

——— S. 32 (1) and (2) - *Small Cause suit instituted in Court of Munsif without small cause powers—Subsequent investment of small cause powers—Effect on suit.*

By virtue of the express provisions of sub-sections (1) and (2) of S. 32 of Act IX of 1887 taken together, a small cause suit instituted in the Court of a Munsif without any small cause powers at the time of the institution but in whom such powers are subsequently vested can only be tried as an ordinary suit. (*Reid, C. J.*) DUNGAR *v.* NANHA. 94 P. R. 1911 : 145 P. W. R. 1911 : 11 I. C 431 : 227 P. L. R. 1911.

——— S. 32 (2)—*Procedure—Court not invested with Small Cause powers—Suit of small cause nature.*

A suit of a small cause nature was filed in the Munsif's Court at a time when the presiding officer was not invested with small cause powers. The permanent incumbent who was invested with such powers took charge and tried the suit as a regular suit. *Held*, that the Munsif was right in trying the suit as a regular suit and an appeal therefore lay to the Subordinate Judge. (*Lindsay, J.*) BINDESHRI *v.* GANGA PRASAD. 18 A. L. J. 89 : 54 I. C. 428 : 1 U. P. L. R. (H. C.) 170.

——— S. 32 (2)—*Small Cause suit—Institution in Court having no Small Cause jurisdiction—Trial by Judge having such powers—Appeal.*

Where a small cause suit was instituted in a Court having no power to try small cause suits but the suit was eventually tried by a Judge who was invested with small cause powers. *Held* that an appeal lay to the District Court. The character of the suit was determined at the date it was instituted. (*Macleod, C. J. and Crump, J.*) VENKATRAMAN RAMA *v.* BABU RAYA VENKATESH. 25 Bom. L. R. 516: 1923 Bom. 454.

——— S. 32, (2)—*Small Cause suit in Court not invested with Small Cause powers—Trial of—Procedure—Subsequent investment—Effect.*

If a small cause suit is instituted in the Court of a Munsif not then vested with the powers of a Small Cause Court it should be tried as a regular suit and not as a small cause even though after its institution the former Munsif is replaced by another invested with small cause powers. (*Roe, and Coutts, JJ.*) UGRAH SINGH *v.* MOTIHARI CO., LTD. 49 I. C. 208 : 4 Pat. L J. 13.

——— S. 32 (c)—*Suit instituted in a Court not having jurisdiction to try it—Subsequent acquisition of power—Effect.*

Where a suit for recovery of Rs. 157 was instituted in a Small Cause Court invested with jurisdiction to try suits up to Rs. 100 only, that Court cannot try the suit though it is subsequently and at the time of the trial invested with jurisdiction up to Rs. 250. (*Ryves, J.*) CHUNNI LAL *v.* GOKUL. L. R. 3 A. 233 : 20 A. L. J. 257 : 1922 All. 112.

——— S. 33—*Small Cause jurisdiction—Trial on the Orginal Side—Revision.*

Where a suit of a small cause nature is tried on the Original Side and confirmed on appeal. *Held* the High Court will not interfere and order a new trial, as there has been no prejudice to the deft. (*Spencer and Ramesam, JJ.*) SUBBAYYA *v.* RAJAH OF VENKATAGIRI. 66 I. C. 207 : 14 L. W. 349.

——— S. 35—*Jurisdiction—Suit tried as original suit—Appeal lies.*

A suit was instituted on the small cause side where a Munsif had small cause jurisdiction but he was succeeded by a Munsif who had no such jurisdiction and who tried it as a regular suit *held* that the suit was rightly tried and that an appeal lay from that decision. (*Banerji, J.*) ZAMIRUL HASAN *v.* IMDAD ALI. 64 I. C. 573 : 19 A. L. J. 838.

——— S. 35—C. P. C., S. 24 (4)—*Small cause suit—Transfer of Court to with no small cause powers—Decision of latter Court, if appealable.*

The Court to which a suit of a small cause nature is transferred from a Small Cause Court must under S. 24 (4), C. P. C., be deemed to be a Court of Small Causes as regards that suit and its decision is therefore not appealable. (*Banerjee and Tudball, JJ.*) CHATURI SINGH *v.* RAMIA. 40 All. 525 : 46 I. C. 893 : 16 A. L. J. 548.

——— S. 35—*Small Cause Court abolished—Execution of Small Cause decree in the regular side—Appeal.*

An order passed on an application for execution of small cause decree presented and filed on the ordinary Court, the Small Cause Court having ceased to exist, is an order passed by the *Munsif, Qua Munsif* and is therefore appealable unless the right of appeal is taken away by some special provision of Law. (*Tudball, J.*) LACHMAN DAS *v.* AHMAD HASAN. 39 All. 357 : 38 I. C. 105 : 15 A. L. J. 305.

——— S. 35—*Small Cause Suit—Transfer of—Effect—C. P. Code, S. 24.*

A suit filed in a Court invested with Small Cause Court powers, continues to be small cause suit though the officer of that Court is transferred and is succeeded by another who has no Small Cause Court powers or the suit is transferred to a Court having no small cause powers. Therefore no appeal lies to the Dt. Judge from

PROV. SMALL C. C. ACT (IX OF 1887), S. 35.

the decision in such suit. 13 All. 325 ; 38 Mad. 25 Foll, 13 A.L.J. 639, Dist. (*Sundar Lal, J.*) UDHO SINGH *v.* MULCHAND. **36 I. C. 317 : 14 A. L. J. 705.**

——S. 35—*Finding of fact—Negligence of bailor.*

The question of negligence is one of fact. The High Court will not generally interfere with a finding on that question in revision. Where it is not shown that the Judge of the First Court misapplied the standard of care required of a bailor under S. 51 of the Contract Act, or where it was not proved that there was a perverse finding, the High Court will not interfere. 21 M. L. J. 156 Ref. (*Oldfield and Sadasiva Aiyar, JJ.*) KAYAROHANA CHETTIAR *v.* NAGALINGA CHETTIAR. **18 M. L. T. 119 : (1915) M. W. N. 533 : 30 I. C. 493 : 2 L. W. 628.**

——S. 35—Ex parte *decree by Small Cause Court — Sub-Judge not having small cause powers—Power to pass orders—Procedure.*

Where pending an application to set aside an *ex parte* small cause decree the judge is transferred and succeeded by another without small cause powers, but there is a Munsif's Court with small cause powers, the application should be transferred to that Court. The Subordinate Judge's order dismissing the application was *ultra vires* as he had no jurisdiction to hear application. (*Kanhaiya Lal, A. J. C.*) SAHI DIN *v.* HAKIN ABU SAID. **22 O. C. 152 : 52 I. C 647: 1 U. P. L. R. (J.C.) 68.**

——S. 37—*Small cause suit—Transfer of, to regular side—Decision, if appealable.*

A suit of a small cause nature was filed before the munsif with small cause powers. The munsif's successor had no small cause powers and he ordered the suit to be transferred to the regular file and it was tried as a regular suit. *Held* that an appeal lay against the decision. 22 I. C. 909 Appr. 13 A. 324 Not. Foll. 31 C. 1057: 6 C. 81 ; 23 B. 382. Ref. (*Chamier and Piggott, JJ.*) SARJU PRASAD *v.* MAHADEO PANDE. **37 All. 450 : 29 I. C. 996 : 13 A. L. J. 639.**

——Sch. II, Art. 1—*Suit for refund of—Profession tax illegally levied Small Cause Court.*

A suit for refund of profession tax illegally levied is not one concerning an act purporting to be done by any person by order of the local Govt. and is not, therefore, excluded from the jurisdiction of a Court of Small Causes. (*Scott-Smith, J.*) COMMITTEE OF THE NOTIFIED AREA, UNA *v.* CATAR BEHARI NARAIN. **74 P. L R. 1918 : 44 I. C. 910 : 74 P. W. R. 1918**

——Sch. II, Arts. 1, 3 and 19—*Suit by toll-gate contractor against President of District Board for damages is small cause.*

A suit for damages by a toll-gate contractor against the President of a District Board for loss to tolls consequent on an unauthorised order of the President exempting certain carts from payment of tolls is not exempted from the cognizance of a Small Cause Court under Arts. 1, 3 and 19 of he Prov. Sm. C. C. Act. Consequently no second

PROV. SMALL C. C. ACT (IX OF 1887), Sch. II, Art. 7.

appeal lies against a decree in such a suit. (*Schwabe, C. J. and Odgers, J.*) PRESIDENT OF THE DT. BOARD, SOUTH KANARA *v.* GOPALA KRISHNA BHATTA. **45 M. L. J. 125 : 46 Mad. 808 : 18 L. W. 82 : 32 M. L. T. 378 (H.C.) : 1923 Mad. 689.**

——Sch. II, Art. 3—*Act done by Officer of Govt.—Suits relating to—Nature of.*

Art. 3 of the Prov. Small Cause Courts Act is applicable to suits relating to some distinct act done by an officer of Govt. A mere failure to carry out a contract cannot be regarded as such an act. A suit for recovery of the contract amount due from the Govt. for the repair of a tank by a contractor is a suit of a small cause nature. *Held* the expression "an act purporting to be done" in Sec. 80 of the Civil Procedure Code was not applicable to the failure to perform a contract. 35 B. 42 Expl. 20 B. 697; 17 C. 290 ; 28 M 213 Ref. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SECRETARY OF STATE *v.* AYLAVAJJULLA RAMABRAHMAM. **37 Mad 533 : 23 M. L. J. 732 : 12 M. L T. 299 : 16 I. C. 400 : (1912) M. W. N. 954.**

——Sch. II, Art. 4—*Title—Suit involving question of—Jurisdiction.*

A suit for damages for the illegal removal of a goat's head by a shebait lies in the S. C. Court even if the title of the shebait is incidentally in issue. (*Mookerjee and Teunon, JJ.*) UMESH CHANDRA *v.* RAKHAL CHANDRA. **15 C. W. N. 666 : 10 I. C. 8 : 14 C. L. J. 118.**

——Sch. II, Art. 4—*Suit for price of skins of animals belonging by custom to plff.*

A suit to recover the price of skins of certain animals alleged to belong to the plff. by custom is cognizable by Small Cause Court. (*Rattigan, J.*) BILLA *v.* CHUTTA. **159 P. L. R. 1911 : 10 I. C. 35 : 174 P. W. R. 1911.**

——Sch. II, Art. 4—*Grazing dues—Suit to recover.*

A claim to grazing rights under a village custom is a claim to an interest in immoveable property not to be *mooted* in a Small Cause Court, and it admits of second appeal. (*Stanyon, A. J. C.*) NANHU *v.* NARBADA PRASAD. **34 I. C. 695 : 12 N. L. R. 83.**

——Sch. II, Art. 7—*Suit for apportionment of rent—Not small cause.*

Where a plff. suing for rent and claims only a rateable amount stating in his plaint that the lessee failed to get possession of a portion of the demised premises by reason of a decree against the lessor, the suit involves an apportionment of rent, if there is no agreement about it and is not a suit of a small cause nature and therefore a second appeal lies. (*Wallis, C.J., Bakewell and Kumaraswami Sastri, JJ.*) VEMA RANGIAH CHETTY *v.* V. M. VAJRAVELU MUDALIAR. **41 M. 370 : 43 I C. 78 : 33 M. L. J. 618.**

——Sch. II, Art. 7—*Apportionment of rent, suit for.*

Per *Sadasiva Aiyar, J.* (*Spencer, J. Contra*)—A suit for arrears of rent due under a lease after apportionment in consequence of transfer in

PROV. SMALL C. C. ACT (IX OF 1887), Sch. II, Art. 7.

portions of the demised premises is not a 'suit for apportionment' coming under Art. 7 of Sch. II as the prayer is for the recovery of a definite sum. The fact that the Court will have to give findings as to proper apportionment does not alter its character. (*Sadasiva Aiyar and Spencer, JJ.*) VEMA RANGIAH CHETTY *v.* VAJRAVELU MUDALIAR. 40 I.C. 655 : 6 L. W. 80.
[On appeal *see* 41 Mad. 370.]

——Sch. II, Art. 7—*"Suit for enhanced kattubadi"—Not one under Art. 7 of Sch. II.*

Claim for an enhanced kattubadi below Rs. 500 on the ground of defendant's default in the payment of the money rate is excluded under Art. 7 of Sch. II. 19 Mad. 329, Foll. (*Seshagiri Aiyar and Napier, JJ.*) CHILUKURI SITARAMAYYA *v.* VENKATA RANGAYYA APPA RAO. 31 I. C. 871.

——Sch. II, Arts. 8 and 31—*Suit in Small Cause Court for price of goods—Counter-claim for rent—Power to try suit.*

In a suit for the price of goods sold and delivered the plaintiff in order to bring his claim within the period of limitation credited the rent due from him to the defendant in respect of the latter's shop. The defendant pleaded that the rent had been grossly under-estimated and that a much higher amount was due to him. *Held* that the Court could try the whole suit and give a decree for the balance found due to the defendant and that the claim of the defendant was not barred by Art. 8 or Art. 31 of Prov. Small Cause Courts Act. (*Piggott, J.*) FIRM BASDEO BUDHEN *v.* NIAZ AHMAD KHAN. L. R. 4 A. 75 : L. R. 4 A. (Civ.) 75 : 1923 A. 202.

——Sch. II, Art. 8—*Landlord and tenant—Batai rent—Suit by landlord for damages for non-cultivation by tenant—Suit cognizable by Revenue Court.*

A suit by landlord for damages for non-cultivation by tenant, by which he would be deprived of his *Batai* rent lies only in Rev. Court. (*Ryves, J.*) RAJA NARENDRA BHADUR PAL *v.* BAFATI. L. R. 3 A. 477 (Rev.) : 20 A. L. J. 771 . 4 U. P. L. R (A). 206 : 1923 A. 50.

Sch. II, Art. 8—*Suit against partner for share of rent.*

A suit for rent by any one partner in the tenancy against another partner in the tenancy is not a suit for rent under Art. 8 and is maintainable in a Court of Small Causes. (*Piggott, J.*) RAM NATH *v.* SEKHDAR SINGH. 40 All. 51 : 45 I. C. 323 : 15 A. L. J. 862.

——Sch. II, Art. 8—*Suit to recover arrears of rent under Agra Tenancy Act, 1901—Jurisdiction.*

A Provincial Small Cause Court has no jurisdiction to try suits for arrears of rent under the Agra Tenancy Act, 1901. (*Ryves, J.*) MANOHAR LAL *v.* MUSAMMAT GAURI RAUTAIN. 22 I. C. 16 : 12 A. L. J. 36.

——Sch. II, Arts. 8 and 11—*Rent, suit for—Lease of—Right to collect rent from shopkeepers—If lease of immoveable property.*

A mortgagee in possession and entitled to receive rents from the shopkeepers, let out this right to deft. for Rs. 24 a month. *Held*, that the lease was a lease of immoveable property and a suit by the lessor to recover the said sum from the lessee did not lie in a Small Cause Court. (*Piggott, J.*) BABU LAL *v.* BHAWANI DAS. 15 I. C. 32 : 9 A. L. J. 776.

——Sch. II, Art. 8—*Money due under Kabuliat.*

A suit to recover money on the basis of Kabuliat showing no tenancy is cognizable by Small Cause Court. In such cases the Small Cause Court has power to decide the question of the status of the defendant in spite of the decisions of the Revenue Courts passed without jurisdiction. (*Chatterjee and Newbould, JJ.*) SHAIKH POKAN *v.* RAJANI KAMAL CHAKRAVARTY. 50 I. C. 285 : 23 C. W. N. 614.

——Sch. II, Art. 8—*Scope of.*

The authorization under clause 8 is entirely personal to the presiding Judge. (*Mookerjee and Beachcroft, JJ.*) SAFER ALI MANDAL *v.* GOLAM MANDAL. 19 C. W. N. 1236 : 31 I. C. 177 : 22 C. L. J. 249.

——Sch. II, Art. 8 *Suit for rent other than house rent—Small cause nature—Second Appeal.*

A suit for rent other than house rent is not cognizable by a Small Cause Court and in the absence of a Government notification to the contrary, a second appeal in such a suit will lie and is not barred by S. 102, C. P. C., although the value thereof does not exceed Rs. 500. 23 M. 547, Dist. (*N. Chatterjee and Beachcroft, JJ.*) SAHODORA MUDIALI *v.* SARBOSOBHA DASI. 42 Cal 638 : 20 C. L. J. 494 : 27 I. C. 258 : 19 C. W. N. 1030.

——Sch. II, Art. 8—*Civil Court, jurisdiction of—Bengal Tenancy Act, Sec. 193—Money payable for forest rights.*

Money payable in respect of forest right is rent and a suit for its recovery is not cognizable by a Small Cause Court. (*Mookerjee and Beachcroft, JJ.*) BANDI ALI FAKIR *v.* AMUD SARKAR. 20 C. L. J. 227 : 26 I. C. 380 : 19 C. W. N. 415.

——Sch. II, Art. 8—*Decree against deft.'s landlord—Attachment of rent due by deft. to his landlord—Suit for recovery of the money attached—Nature of.*

Plff. attached deft.'s rent due in execution of his decree against deft.'s landlord. He then brought a suit for recovery of the money. *Held*, that the suit was not a suit for rent and the Small Cause Court had jurisdiction to try it. (*Mookerjee and Caspersz, JJ.*) AMRITA LAL *v.* SHYAMA CHARAN. 10 I. C. 569.

——Sch. II, Art. 8.

Suit for interest due on mortgage money is cognizable by a Small Cause Court. (*Scott-Smith, J.*) PARDUMAN CHAND *v.* GANGA RAM. 66 I. C. 285.

——Sch II, Art. 8—*Suit for Jodi—Small Cause.*

A suit for jodi by Zamindary or Mittadar from Inamdar is cognizable by Small Cause Court. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SUBBARAYA GOUNDAN *v.* RANGANATHA MUDALIAR. 40 Mad. 93 : (1916) 1 M. W. N. 216 : 3 L. W. 273 : 32 I. C. 971 : 30 M. L. J. 387.

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 8.

——— **Sch. II, Art. 8**—*Suit on demand note for rent—Jurisdiction of Small Cause Court.*

A demand note or a bond does not cease to be an ordinary demand note or bond just because a part or the whole of its consideration is made up of rent whether in arrears or in advance. The defendant took a lease of a field for Rs.150 for a year from the plaintiffs, and at the beginning of the year paid Rs. 75 in cash and executed a demand note for the remaining Rs. 75 promising to pay interest on it. The plaintiffs sued on the demand note in the Small Cause Court. *Held*, that the suit was not one for rent and was therefore triable in that Court. (*Hallifax, A.J.C.*) PURANLAL *v.* CHIRKUTYA MALI. **1923 Nag. 285.**

——— **Sch. II, Art. 8**—*'House rent' includes shop rent.*

A suit for the recovery of shop rent is cognizable by a Court of Small Causes, shop rent being covered by the expression 'house rent' in Art. 8, Sch. II of the Prov. Sm. C. C. Act. (*Koival, A. J. C.*) NATHU *v.* SONASA.
5 Nag. L. J. 241 : 1922 N. 15.

——— **Sch. II, Art. 8**—*Fishery suit for fee due for catching fish—Nature of—Rent, meaning of.*

There is no definition of rent in the Small Cause Courts Act. It is therefore to be taken in the ordinary sense as including compensation paid to the owner of immoveable property for its use and occupation. A suit for the recovery of the amount agreed to be paid to the plff. by the defts. in consideration of their being allowed to catch fish in the village river is not cognizable by a Small Cause Court. (*Mittra, A. J. C.*) SITARAM *v.* PETIA. **43 I. C. 962: 14 N. L. R. 35.**

——— **Sch. II, Art. 8**—*Nazrana—Rent—C. P. Ten. Act, Sec.* 117.

A suit by a landlord against the tenant for realisation of Nazrana paid or agreed to be paid as price for the grant of a lease is not cognizable by a Small Cause Court, being a suit for rent. (*Stanyon, A. J. C.*) NAM DAS *v.* GABHERI PRASAD.
20 I. C. 261 : 9 N. L. R 94.

——— **Sch. II, Art. 8**—*Jurisdiction—Suit at enhanced rate of rent after demand.*

A suit by a landlord against a tenant for rent at an enhanced rate, on the allegation that he had served the defendant with notice, to vacate by a certain date and in default, he would be charged with an enhanced rate, is cognizable by the Small Cause Court. (*Hallifax, Offg. A. J. C.*) BINDESHRI PRASAD *v.* VISHWANATH DAS,
19 I. C. 858 : 9 N. L. R. 72.

——— **Sch. II, Art. 8**—*Fishery—Suit for fee due under* theka—*Small Cause nature*—'Theka'—*Lease.*

A *Theka* of a right to fish and collect a produce is not a lease, and the money payable by the *Thekadar* is not rent but fee, and hence a suit for the fee due under the *Theka* is not exempted from the cognizance of a Small Cause Court. (*Lindsay, J.C.*) SADIQ HUSAIN *v.* SECRETARY OF STATE. **25 I. C. 666.**

——— **Sch. II, Art. 8**—*Suit for rent other than house rent—S.* 102, *C. P. Code, if applies.*

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 11.

Sch. II, Art. 8 of the Pro. Sm. C. C. Act exempts suits for rent other than house rent, out of the cognizance of a Court of Small Causes. Hence S. 102, C. P. Code does not apply to suits of this nature. (*Mullick and Atkinson, JJ.*) SADANAND TEWARI *v.* DEB NATH MANJHI.
1922 Pat. 154 : 1922 P. 184.

——— **Sch. II, Art. 8**—*Murtafa—Suit for—Jurisdiction.*

A Court of Small Causes can take cognizance of a suit to recover murtafa, a tax in the nature of house-rent. (*Miller, C. J. and Adami, J.*) M. E. MILNE *v.* JAGMOHAN CARERI.
51 I. C. 961 : 1919 Pat. 439.

——— **Sch. II, Art. 8**—*Murtafa —Rent—Suit for—Small Cause Court.*

Whether rent is ground rent or house rent depends upon the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent he pays is a ground rent. If the lessor builds the house and then lets house and land together, the rent is a house rent. A suit for the former is not cognizable by a Small Cause Court ; a suit for the latter whether regarded as a suit for rent or for a tax is cognizable by a Small Cause Court. An objection to jurisdiction must be decided by the Court itself. (*Roe, J.*) EARNEST MYLNE *v.* NATHU SUNDI. **44 I. C, 887 : 4 Pat. L. W. 218.**

——— **Sch. II, Art. 11**—*Suit for balance of consideration due on a mortgage is not small cause.*

A suit by a mortgagor for recovery of part of the consideration still remaining unpaid is not cognizable by a Court of Small Causes. (*Walmsley, J.*) SAMSAL HAQ *v.* ABDUL KARIM.
1923 Cal. 567.

——— **Sch. II, Arts. 11, 12 and 13**—*Suit for share of income of Durbar Sahib.*

A suit for a share of the income of a Durbar Sahib as well as for a share of jaghir attached thereto is cognizable by the Court of Small Causes. (188 P R. 1888; 81 P. R. 1889; 204 P. R. 1889 ; 84 P. R. 1892 ; 21 B. 218 ; 80 P. R. 1898 ; 6 B. H. C. R. A. C. J. 137; 7 B. H. C. R A. C. J. 114 ; 9 B. H. C. R. A. C. J. 99 Cons. (*Arthur Reid, C. J.*) ARUR SINGH *v.* DYAL SINGH.
20 P. R. 1911 : 93 P. L. R. 1911 : 9 I. C. 579 : 54 P. W. R. 1911.

——— **Sch. II, Arts. 11 and 15**—*Unpaid purchase-money, suit for—Nature of.*

A suit by a vendor for the unpaid purchase-money against the vendee where the sale-deed has been executed and registered and the vendee placed in possession of the lands sold is not a suit for the determination or enforcement of any right to or interest in immoveable property or suit for specific performance of a contract within Arts. 11 and 15. (*Odgers, J.*) CHERUNI MOOTHAN *v.* AMMUNNI. **55 I. C. 541 : 11 L. W. 211 :**

——— **Sch. II, Art. 11**—*Unpaid purchase-money, suit for—Small cause.*

A suit to recover unpaid purchase-money of land is not a suit for the determination of a right to or interest in immoveable property within the

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 11.

meaning of S. 16, C.P.C. of 1882 and is cognizable by a Small Cause Court. (*Abdur Rahim and Ayling, JJ.*) SOWDAGAR NABHEEKAN SAHIB *v.* MUHAMMAD HUSSAIN SAHIB.
10 I. C. 267 : 9 M. L. T. 372.

——Sch. II, Art. 11—*Lac Produce.*

A suit by lessees of lac produce, to recover value of lac illegally removed is cognizable by a Small Cause Court. (*Drake Brockman, J. C.*) KALU RAM *v.* V. RAOJI. **50 I. C. 629.**

——Sch. II, Art. 13—*Suit on contract for Right to collect weighment dues—Act applies.*

A suit for the recovery of a sum of money due to the plaintiff from the defendant under a contract by which the latter was allowed to collect weighment dues on payment of a fixed amount to the plaintiff is cognisable by a Small Cause Court. The suit was not one to enforce payment of cesses or dues from persons by whom they were payable (*Daniels, J.*) COLLECTOR OF BULANDSHAHR *v.* RAM SARUP. **L. R. 4 A. 539 : 21 A. L. J. 312 : 1923 A. 420 (1).**

——Sch. II, Art. 13—*Suit for customary dues —Not within act.*

Where a zemindar brings a suit for the recovery of certain customary dues irrespective of any contract to pay those dues the suit is not cognizable by a Small Cause Court. (*Stuart, J.*) MAHOMED ASGHAR ALI KHAN *v.* RAMMON. **1923 A. 378.**

——Sch. II, Art 13—*Suit for haq chaburam is not cognizable by Small Cause Court.*

A suit for *haq chaburam* or one-fourth share of the sale-proceeds of a house, is not cognizable by a Small Cause Court and is appealable under S. 102 of the Civil Procedure Code. (*Lindsay and Kanhaiyalal, JJ.*) BECHAI *v.* BADRI NARAIN. **63 I. C 292 : 19 A. L. J. 719.**

——Sch. II, Art. 13—*Trees sold by tenant—Suit for, price of.*

A suit by a Zamindar to half the price of trees sold by his tenant based on the terms of the village. *Wajib-ul-arz* is cognizable by a Small Cause Court. (*Rafique, J.*) BOHRA BHOJ RAJ *v.* RAM CHANDRA. **55. I. C. 950 : 18 A. L. J. 561.**

——Sch. II, Art. 13—*Jurisdiction.*

A suit by a Zemindar to recover the price of oil, due by an oil-man resident in the village when under the terms of a *Wajib-ul-arz* is within Sch. II, Art. 13 of the Act. (*Abdul Raoof, J.*) BAL DEVA *v.* PANNA LAL. **40 All. 663: 16 A. L. J. 644.**

——Sch. II, Art. 13—C. P. C. (1908) S. 102—*Endowment, suit for income of.*

A suit for participation in the income of an endowment, though a part of the regular income is cognizable by a Small Cause Court. Therefore no second appeal lies when the value of the suit is Rs. 100 or less, 27 A. 200 Foll. 18 M. 202 Diss. (*Richards, C. J. and Rafique, J.*) CHINTAMANI *v.* MAHIMA DAT. **19 I. C. 628.**

——Sch. II, Art. 13—*Ferry toll, Suit for—Small Cause nature.*

A suit to recover ferry toll is not cognizable by the Small Cause Court. (*Tudball, J.*) ABDUL HAMID KHAN *v.* BABU LAL. **35 All. 156 : 18 I. C. 282: 11 A. L. J. 133.**

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 13.

——Sch. II, Art. 13—*Dues payable to Inamdar—Suit for jurisdiction.*

A suit for recovery by an Inamdar of sums payable by a *Khatidar* in respect of certain immoveable property held by him under the Inamdar as his superior holder is not cognizable by a Court of Small Causes. (*Scott, C. J. and Davar, J.*) MADHAV RAO MORESHWAR *v.* RAMA KALU GHADI. **39 Bom. 131 : 27 I. C. 350 : 16 Bom. L. R. 746.**

——Sch II, Art. 13—*Shrine—Claim to spare off offerings of—Small Cause Court*

A Court of Small Causes has jurisdiction to try a suit to recover a share of the offerings of a shrine. (*Shah-Din and Chevis, JJ.*) TABA *v.* MIHAN. **11 I. C. 410 : 92 P. W. R 1911.**

——Sch. II, Art. 13—*Suit by Archaka.*

A Court of Small Causes is debarred from taking cognizance of a suit by an archaka to receive the dues of his hereditary office under Pro. Small Cause Courts Act, Sch. II, Art. 13. (*Srinivasa Iyengar, J.*) SUBRAYA ACHARYA *v.* KESAVA UPADHYA. **31 I. C. 206 : (1915) M. W. N. 846.**

——Sch. II, Art. 13—*Hereditary allowance —Suit for arrears of—Second appeal.*

A suit for payment of the dues accruing to plff. by reason of his hereditary office as purveyor of ghee to a temple for a fixed annual allowance is not of a small cause nature and a second appeal lies therein even when the amount or value of the subject-matter does not exceed Rs. 500. (*Spencer and Coutts-Trotter, JJ.*) KUNHAM MUTHAD *v.* BANNERJEE. **30 I. C. 351: 18 M. L. T. 163 : (1915) M. W. N. 640.**

——Sch. II, Art. 13—*Suit to recover Kalavettu.*

A Small Cause Court can take cognisance of a suit to recover Kalavettu (*i.e.,*) price paid for the plaintiff's water used for irrigation by the defendant. (*Sadasiva Aiyer, J.*) SUBRAMANIA AIYER *v.* STIEVENSON. **22 I. C. 144.**

——Sch. II, Art. 13—*Amount payable annually—Suit for balultar, nature of—Second appeal.*

If money is payable annually to the plff. as *balultar*, he must show that the suit comes within one of the articles of the first schedule to the Act. Otherwise it will be treated as a suit of Small Cause nature, and no second appeal lies. (*Abdur Rahim and Ayling, JJ.*) RAMANATHA KALKURA *v.* DARAMMA SHEHITHI. **16 I. C. 107: (1912) M. W. N. 537.**

——Sch. II, Arts. 13 and 18.—*Claim for temple emoluments—Takid granting—Suit for emoluments and neivedhiam—Jurisdiction of Small Cause Court.*

A suit for temple emoluments secured to the plaintiff by a *Takid* by the author of the trust and registered on the same day as the trust deed forming the same transaction, is not cognizable by the Small Cause Court and so also a claim for rice allowance when sued along with a claim for such emoluments. (*Benson and Sadasiva Aiyar JJ.*) RANGASAMI PILLAI *v.* MUTHU CHIDAMBARA GURUKAL. **13 I. C. 183: (1911) 2 M. W. N. 589 :**

——Sch. II, Art. 13—*Local or Village cess—Suit for.*

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART 13.

Art 13 does not apply to a suit for local cess or village cess. (*Sundara Aiyar, J.*) BACHU *v.* BAGDI REDDI. **36 Mad. 126 : 12 I. C. 171: 10 M. L. T. 282 : 1912 M. W. N. 251.**

——Sch. II, Art. 13—*Suit for land cess—If of small cause nature—Second Appeal*

Suit for the recovery of land cess is of a small cause nature and no second appeal lies from a decree in such a suit. (*Abdur Rahim and Sundara Aiyar, JJ.*) MAHARAJA OF VIZIANAGARAM *v.* KOTA VEERANNA. **36 Mad, 18 : 10 M. L. T. 167 : (1911) 2 M. W. N. 139 : 11 I. C. 760 : 21 M. L. J. 819.**

——Sch. II, Art. 13—*Dues improperly collected by deft.—Suit for.*

Art. 13 applies only to dues claimed from the persons liable to pay them as such and does not cover a suit against a person who has improperly collected dues from persons liable to pay them. 26 A. 358, Foll. (*Drake-Brockman, J.C.*). DHANNYA *v.* TANYA. **32 I. C. 998 : 12 N. L. R. 47.**

——Sch. II, Art. 13—*Suit by* maguzar *to recover value of manure— Nature of—'Dues', meaning of.*

Plaintiff's *malguzar*, of a certain *mouza* sued to recover from the defendant Rs. 34 for wrongful removal of manure to which they set up title under a clause of the *wajib-ul-arz. Held*, that the suit was one of a Small Cause nature and a second appeal will be barred under S. 102, C. P. C., (1908). This amount will not be "dues" within Art. 13. The dues contemplated by Art. 13 are payments to which a person is entitled as representing his interest in certain immoveable properties and not because he possesses some interest in immoveable property. (*Drake-Brockman, J. C.*) JAIRAM *v.* DOMA. **29 I. C. 815 : 11 N. L. R. 100.**

——Sch. II, Arts. 15 and 16—*Mortgage-money —Suit for recovery of balance of—Cognizability by Small Cause Court.*

A suit by the mortgagor for the recovery of the balance of the mortgage-money not paid to him is a suit for the specific performance of so much of the agreement as has not already been performed. Such a suit is not cognizable by the Court of Small Causes. It is however open to the plaintiff in such circumstances to sue in the Small Cause Court for damages for breach of contract. (*Mookerjee and Richardson, JJ.*) SHAIK GALIM *v.* SADARIJAN BIBI. **43 Cal. 59 : 19 C. W. N. 1332 : 29 I. C. 621 : 21 C. L. J. 532**

——Sch. II, Arts. 15 and 24—*Award, suit to enforce—Small Cause Court, if can try.*

A suit to enforce an award is in essence a suit for specific performance of a contract and is not therefore cognizable by a Small Cause Court. Arts 15 and 24 of the second schedule of the Act should be read together. (*Mookerjee and Walmsley, JJ.*) KUNJO BEHARI BARDHAN *v.* GOST BEHARI BARDHAN. **22 C. W. N. 66 : 42 I. C 590 : 27 C. L. J. 486.**

——Sch. II, Art. 15—*Suit by a vendor for balance of purchase-money is small cause.*

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 18.

A suit by a plaintiff to recover the balance of purchase-money due from the defendant, is not a suit for specific performance of a contract within the meaning of Art. 15, Sch. II of the Provincial Small Cause Court Act, and the suit is cognizable by a Court of Small Causes. (*Martineau, J.*) DHUMAN *v.* RANJIMAL. **1924 L. 314.**

——Sch. II, Art. 15—*Vendor and purchaser —Suit by vendor for sale price.*

Where a vendor suing for recovery of the unpaid purchase-money expresses his readiness to perform his part of the contract and execute a conveyance, the suit is one for specific performance and not cognizable by the Small Cause Court. (*Wallis, C. J. and Seshagiri Aiyar, J.*) BHASHYAKARULU NAIDU *v.* NUNGAMBAKKAM ANDALAMMAL. **35 M. L. J. 89 : 9 L W. 19 : 49 I. C. 385 : 1918 M. W. N. 896 : 20 B. L. R. 1.**

——Sch. II, Art. 15—*Claim to recover money on fulfilment of a stipulated condition.*

A suit to recover money on the fulfilment of a condition on which it was stipulated to be paid is not a suit for the specific performance of a contract and so can be tried by a Small Cause Court, 19 M. L. J. 220, Dist. (*Miller and Sadasiva Aiyar, JJ.*) KONDUGARI SUBBIAH *v.* KAVUPATI VENKATA SUBBIAH. **15 I. C. 352.**

——Sch. II, Art. 15—*Suit for specific moveable property is not small cause.*

A suit for the recovery of specific moveable property is within Art 15 and is excluded from the cognizance of a Small Cause Court. (*Lindsay, J. C.*). BABU RAM *v.* DY. COMMISSIONER OF HORDOI. **61 I. C. 803 : 8 O. L. J. 209.**

——Sch. II, Arts. 15 and 35 (II)—*Suit for return of article or for compensation.*

A suit for the return of an article lent by the plff. to the deft. and for compensation in the alternative is not cognizable by Sm. Cause Court. (*Lindsay, J. C.*) MATA DIN *v.* MADHO CHARAN. **56 I. C. 877.**

——Sch. II, Arts. 15 and 35 (f) and (g)—*Award—Suit to enforce—Sm. Cause Court, if can try.*

A suit to enforce an award is not a suit for specific performance of a contract within Art. 15 of Sch. II of the Act and is not excluded from the cognizance of a Court of Small Causes. (*Saunders, J.C.*). MAUNG PO TEK *v.* MA SWE MI. **49 I. C. 62 : 3 U.B.R. (1918) 109.**

——Sch. II, Art. 18—*Pension, suit by schoolmaster for - Jurisdiction.*

A Small Cause Court has no jurisdiction to entertain a suit for pension by a Schoolmaster as its cognizance is barred under Sch. II, Art. 18 of the Act. (*Oldfield, J.*) SEIBER *v.* DANIEL VARKI. **25 I. C. 41.**

——Sch. II, Art. 18—*Provision in partition deed for marriage of daughter —"Suit relating to a trust."*

A suit for the enforcement of a provision in a partition deed for the performance of the marriage of a daughter is a " suit relating to a trust"

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 18.

within Art. 18 of the Act ; 18 Mad. 252 Foll. (*Oldfield, J.*) SUNDARARAJU AIYANGAR *v.* LAKSHMIAMMAL. **24 I. C. 943 : 38 Mad. 788.**

——— ——Sch. II, Art. 18—*Suit by trustee—Claim on agreement by deft. to pay a specified sum.*

A suit by a trustee for the recovery of a specified amount agreed to be paid to him by the deft. *for being used as a trust*, is not a suit relating to trust within Art. 18; 26 M. 200; 26 M. L. J. 146 Ref. (*Miller and Sadasiva Aiyar, JJ.*) AIYYA PILLAI *v.* VRITHACHELAM PILLAI. **15 I. C. 273.**

———Sch. II, Art. 18—*Scope—Suit for recovery of property entrusted to goldsmith for work to be done.*

A suit for recovery of property entrusted by the owner to a goldsmith, for work to be done on it, is not a suit relating to a trust within Art. 18. (*Brown, A. J. C.*) MA TIN *v.* MA CHIT. **4 U. B. R. 154 : 1923 Rang. 129.**

———Sch. II, Art. 19—*Declaration of right to Insurance policy, suit for.*

A suit for declaration of plaintiff's right to an assignment of an insurance policy by her husband is not cognizable by a Small Cause Court. (*Sadasiva Aiyar and Napier, JJ.*) YAKOOB SAHIB *v.* PACHA BIBI. **38 I. C. 248 : 4 L. W. 339.**

———Sch. II, Arts. 20 and 35 (j)—*Wrongful attachment of crops—Objection to attachment struck off without enquiry—Suit for compensation.*

Where certain crops were wrongfully attached in execution of a decree and the owner of the crops made objection but it was struck off without any adjudication, and the objector then filed a suit in the Small Causes Court for recovery of the crops. *Held*, that the Small Cause Court could not entertain the suit and that though the suit was limited to a claim for the price or value of the crops which were handed to the decree-holder by the Court executing the decree, yet the suit was a suit for illegal attachment within Art. 35 (*j*). Where an objection to attachment has been disallowed without adjudication, Art. 20 does not apply to bar a suit for recovery of the price of the property attached. (*Richards, J.*) RUP KISHEN *v.* SOBHI. **9 I. C. 537 : 8 A.L.J. 187.**

——— ——Sch II, Art. 24—*Award—Suit on Small Cause Court.*

A suit to recover money due under an award made out of Court between the parties, is not barred by Art. 24 of the Prov. Sm. C. C. Act, (*Lindsay, J.*) MIZAJI LAL *v.* PARTAP KUAR. **42 All. 169 : 58 I. C. 546 : 18 A. L. J. 70.**

——— ——Sch. II, Art. 22—*Suit for moveable property by heir of deceased not small cause.*

Where an heir of a deceased person brings a suit for the recovery of property left by the deceased as preferential heir to the defendant, the suit is not cognizable by the Small Cause Court. (*Richardson and B. Ghose, JJ.*) PRIYANATH SARDAR *v.* MOHENDRA NATH PARIK. **1924 C. 536.**

———Sch. II, Art. 24—*Award—Suit to enforce—Jurisdiction.*

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 29 (c).

A suit to enforce an award is not a suit on contract and is cognizable by a Small Cause Court. The jurisdiction of the Small Cause Court is excluded only in cases excepted in Sch. II of the Act 33 C. 881; 13 M. 344, Foll. (*Woodroffe and Chapman, JJ.*) SUKAR HAJAM *v.* OLI MOHAMMED. **25 I. C. 826.**

——— ——Sch. II, Art. 24—*Award—Suit on—Claim for compensation submitted to arbitration—Merger of claim in award.*

If a claim for compensation has been submitted to arbitration and an award made, the claim is merged in the award and the payment of money directed by the award is a simple claim for money cognizable by a Court of Small Causes. The fact that the defendant contests the award is immaterial. (*Saunders, J. C.*). MAUNG PO TOK *v.* MA SHWE MI. **49 I. C. 62 : 3 U. B. R. (1918) 109.**

———Sch. II, Art. 24—*Suit for money due on an award.*

Although under Art. 24 the Court has no jurisdiction to try a suit contesting an award, yet it can adjudicate on the validity of an award when the suit is to recover money due on the award. The Court has jurisdiction to try questions of title that arise incidentally. (*Pratt and Hayward, A.J.Cs.*) CHIMAN DAS *v.* MANGHOOLMAL HEMRAJ. **16 I. C. 868: 6 S. L. R. 85.**

——— ——Sch. II, Art. 28—*Moveable property of deceased—Suit by him for denial of plff's title by defendant if ousts—Jurisdiction.*

A Small Cause Court has jurisdiction to entertain a suit by the heir of a deceased to recover from the defendant certain moveable property of the deceased detained by him. The denial of the plaintiff's title by the defendant does not oust the jurisdiction. (*N. Chatterjee and Greaves, JJ.*). TIKA SHAHU *v.* CHIKKAT SHAHU. **27 I. C. 773 : 19 C. W. N. 614.**

———Sch. II, Art. 28—*Jewels presented to bride—Suit for the return of.*

A claim for the return of jewels presented to the plff's. daughter in her marriage made after the death of the bride and the bridegroom does not fall within Art. 28 of the Act. (*Sundara Aiyer and Sadasiva Aiyer, JJ.*) BONDA CHINNAYYA *v.* POTHALA ACHAMMA. **37 Mad. 538 : 23 M. L. J. 282 : 12 M. L. T. 308 : 16 I. C. 542 : (1912) M. W. N. 887.**

——— ——Sch. II, Art. 28—*Suit by executor.*

A Court of Small Causes can take cognizance of suit by an executor or administrator for possession of the deceased's moveable property. 11 W.R. 93; 12 B. 573 Foll. (*Parlet, J.*) MA PU *v.* MA SU. **37 I. C. 75 : 9 Bur. L. T. 201.**

——— ——Sch. II, Art. 29—*Partnership—Suit for dissolution and account—Jurisdiction—Revision.*

A suit for accounts of a partnership alleging dissolution of the partnership and for an alternative relief (*i. e.*) to declare its dissolution, is triable in the regular Court and not by a Small Cause Court. (*Rafique, J.*) INDARMAL *v.* BUDHA. **27 I. C. 629 . 13 A. L. J. 58.**

———Sch. II, Art. 29 (c)—*Suit for definite sum—Loan to partnership.*

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 29.

A suit for recovery of Rs. 40 advanced by plaintiff to a partnership business and Rs. 9 being the profits arising out of the money so advanced is cognizable by a Small Cause Court not being one for the balance of partnership accounts. (*Beachcroft, J.*) NARAIN PRASAD *v.* RAMESWAR ADYA, **51 I. C. 435.**

——Sch. II, Art 29—*Suit on a book entry after settling accounts of partnership.*

A suit on a book entry after settling accounts of a dissolved partnership is cognizable by the Small Cause Court (*Johnstone, J.*) FAIZ MUHAMMAD *v.* MAHAMMAD ZAKRIYA. **140 P. W. R 1911 : 11 I. C. 15 : 195 P. L. R. 1911.**

——Sch. II, Art. 31--*Profits of mortgaged land—Suit for—Value of trees cut down—Small causes.*

A suit by a mortgagor after redemption to recover from the mortgagee the profits of the mortgaged property and the value of certain trees alleged to have been cut down by the defendant, is exempted from the cognizance of a Small Cause Court by Art. 31. (*Ryves, J.*) BASDEO *v.* BEHARI LAL. **54 I. C. 117.**

——Sch. II, Art. 31—*Rent, suit for, share of —Small cause.*

A suit to recover a share of rent realized by a joint co-owner, is a suit for money had and received and is in the nature of a Small Cause suit. (*Ryves, J.*) SUKH LAL *v.* NANNOON PRASAD. **40 All. 666 : 46 I. C. 647 : 16 A. L. J. 679.**

——Sch II, Art. 31--*Mesne profits, suit for—Against trespasser—Jurisdiction.*

A suit for recovery of the mesne profits from which the plff. has been wrongfully dispossessed is not a suit of a small cause nature and the Small Cause Court cannot take cognizance of such a suit. 11 A. L. J. 238 Full. (*Rafique, J.*) DRIG PAL SINGH *v.* KUNJAL. **40 All. 142 : 44 I. C. 689 : 16 A L. J. 55.**

——Sch. II, Art. 31—*Suit for recovery of money based on accounts—Amount not precisely ascertained.*

Suit for recovery of money not precisely ascertainable unless the accounts are ascertained is cognizable by a Small Cause Court, as it is not a suit for accounts. (*Ryves and Piggott, JJ.*) INDARMAL *v.* BALDEO DAS. **23 I. C. 424 : 12 A. L. J. 230.**

——Sch. II, Art. 31 and S. 23—*Mortgagee keeping mortgagor out of possession after mortgage amount was paid—Suit for damages.*

A suit for damages on the allegation that the plff. was kept out of possession of the property for a year from the date of depositing the amount under a decree for redemption is not cognizable under the article by the Small Cause Court. (*Griffin, J.*) SHEOBODA *v.* SURJAN. **19 I. C. 427 : 11 A. L. J. 238.**

——Sch. II. Art. 31—*Suit for recovery of money due on acknowledgment is small cause.*

A suit for the recovery of a sum of money due on acknowledgment is not debarred from the cognizance of Small Cause Court. (*Suhrawardy and Cuming, JJ.*) BAUL CHANDRA ADDYA *v.* SHEIKH ABDUL MATLEB. **67 I. C. 851.**

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 31.

——Sch. II. Art. 31—*Suit for accounts on basis of an agreement is Small Cause.*

A suit based on an agreement between the plaintiff company and the defendant whereby "the plaintiff company was to supply raw materials and the defendant was to execute moulding and casting work to be paid for at certain stipulated rates, subject to deduction for bad workmanship and subject also to the return at the end of each month of all such materials or metals as the defendant did not use for the work he had to perform" is not a suit for account and is not exempted from the cognizance of a Small Cause Court. 21 C. W. N. 784 foll. (*Richardson, J.*) THE RUSSA ENGINEERING WORKS, LTD. *v.* BHADRESWAR DAS. **64 I. C. 327.**

——Sch. II, Art. 31—*Suit for accounts—What is.*

Where the relation between the parties to the suit is such that one of them is bound to give accounts to the other, the suit is one for accounts. The mere fact that accounts are taken in a suit does not make it a suit for accounts. (*Chatterjee and Panton, JJ.*) JOGESH CHANDRA MANDAL *v.* CHINTA MANI BODHAN. **57 I. C. 951.**

——Sch. II, Art. 31—*Suit for rent by one co-sharer landlord.*

A Small Cause Court cannot entertain a suit by one of several joint landlord for recovery of sums collected by other co-sharers from a tenant in excess of their shares. (*Mookerji and Cuming, JJ.*) UZIR *v.* HARI CHARAN PAL. **37 I. C. 671.**

——Sch. II, Art. 31—*Accounts, suit for—What is.*

If in order to grant proper relief to the plff. it is necessary to take accounts, the suit is one for accounts and the Small Cause Court has no jurisdiction to try it, as it comes under Art. 31, Sch. II of the Act. (*Mookerji and Caspersz, JJ.*) KAILAS CHANDRA *v.* KARENENDA GHOSE. **10 I. C. 883 : 24 C. L. J. 187.**

——Sch. II, Art. 31—*Suit for accounts — Nature of.*

A suit for an account within the meaning of the article is a special form of suit. The distinguishing feature of these suits is the defendant's duty to furnish detailed accounts. The plaintiff advanced money to defendant upon the security of yarn which the defendant agreed to sell to plaintiff for sale as commission agent. The yarn was sold by plaintiff and the price credited to defendant. A suit by plff. for recovery of certain sum due from defendant is not covered by Art. 31. (*Shadi Lal, J.*) MUHAMMAD SAID *v.* TIDDOO MAL. **34 P. R. 1917 : 41 I. C. 46 : 109 P. W. R. 1917.**

——Sch. II, Art. 31—*Suit for damages for breach of covenant for title is small cause.*

A suit for damages for breach of covenant for title is not excluded from the cognisance of the Small Cause Court. (*Krishnan, J.*) RAJAMMAL AIYAR *v.* KRISHNASAMI IYENGAR. **15 L. W. 35 : 1922 Mad. 300.**

——Sch. II, Art. 31—*Profits of land—Suit for—No prayer for accounts—Small Cause.*

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 31.

A suit for a specific sum as a half share of the profits of land in which no accounts are asked for is a suit of a small cause nature. (*Bakewell and Phillips, JJ.*) HAMMAKKE HENGSU *v.* KOCHAPPA RAI. **52 I. C 631 : 26 M. L. T. 245.**

——Sch. II, Art. 31—*Definite sum—Suit for—Small Cause.*

The mere fact that accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff would not render the suit one for accounts under Art 31 of the Provincial Small Cause Courts Act. (*Kumaraswamy Sastri, J.*) UKKANDAN NAYAR *v.* SHANKAR VARMA RAJA **24 M. L. T. 453 : 48 I. C 94 : (1918) M. W. N. 717.**

——Sch. II, Art. 31—*Crops harvested before and after delivery of possession, claim for—Nature of claim.*

Per *Seshagiri Aiyar, J.*—The claim for the crops harvested and removed before delivery of possession is one for an account and is triable only by regular Courts. The claim for subsequent cutting and carrying away of the crops is a claim for damages and thus cognizable by a Small Cause Court. (*Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J.*) RAMASWAMI AIYANGAR *v.* GOVINDA AIYAR. **31 M. L. J. 839 : 20 M. L. T. 512 : 38 I. C. 1 : 5 L. W. 443.**

——Sch. II, Art. 31—*Jurisdiction— Small Cause Court.*

Suit for specific sum between Principal and Agent when the accounts between them have yet to be settled, is a suit for an account within Art. 31. (*Sadasiva Aiyar, J.*) MARIAPPA NADAN *v.* ARUNACHALAM CHETTY. **3 L. W. 143 : 33 I. C. 16 : (1916) 1 M. W. N. 162.**

——Sch. II, Art. 31—*Suit against Agent for value of goods not accounted for.*

A suit against an agent for the value of goods not accounted for is not a "suit for account" and is cognizable by the Court of Small Causes. (*Miller, J.*) MALAYA PILLAY NADAN *v.* VENGANAN. **24 I. C. 764 : 1 L. W. 180.**

——Sch. II, Art. 31—*Specific sum of money—Suit for account—Agency—Jurisdiction—Test of.*

Article 31 of the Act applies to cases where the relationship of the parties is such that one of them is bound to render accounts to the other notwithstanding the fact that the plaintiff might have put a definite money value upon his claim 1912 M. W. N. 36 Foll. The mere fact that a question of agency arises is not enough to take the suit out of the cognizance of a Small Cause Court. A suit to recover a specific sum of money would often be entertainable by it. (*Benson and Sundara Aiyar, JJ.*) VARADARAJULU CHETTIAR *v.* PATRA NARAYANA SWAMY CHETTY. **14 M. L. T. 46 : 24 M. L. J. 693 : 20 I. C. 518 : (1913) M. W. N. 879.**

——Sch. II, Art 31—*Applicability of.*

Art. 31 of Sch. II applies only to cases where the relationship is such that one of the parties is bound to render account to the other. So where the plaintiff claimed Rs. 500 from a certain person

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 31.

without alleging that any other defendant was bound, *held* that the suit was of a Small Cause nature. (*Sundara Aiyar and Spencer, JJ.*) CHIDRIE KRISTAPPA *v.* SIDDAMOETTI YAMANAPPA. **11 M. L. T. 13 : 13 I. C. 159 : (1912) M. W. N. 36.**

——Sch. II, Art. 31—*Trespass—Suit for damages—Small Cause nature.*

A Small Cause Court has jurisdiction to entertain a suit for damages for trespass resulting in the carrying away of standing crops as land trespassed, where such damages are capable of being measured by the landholder's share of the standing crops. 17 B. 42 Dist. (*Ayling, J.*). RAMU AIYAR *v.* SWAMINATHA IYER. **35 Mad. 726 : 21 M. L. J. 442 : 11 I. C. 31 : (1911) 2 M W. N. 189.**

——Sch. II, Art 31—*Title suit involving question of jurisdiction.*

A Small Cause Court is not deprived of its jurisdiction merely because a question of title is involved in a suit. 20 I. C. 974 ; 37 B. 675 Foll. (*Drake Brockman, J. C.*) BHANYA *v* NAKA. **31 I. C. 5 : 11 N. L. R. 160.**

——Sch. II, Art. 31—*Suit for accounts—Special feature.*

A "suit for an account" is a special form of suit and does not include every case in which accounts have to be looked into in order to ascertain whether the amount claimed by the plaintiff is correct or not. The distinguishing feature of these cases seems to be the defendant's possession of, or duty to furnish, detailed accounts, the plaintiff being more or less precluded, by reason of the nature of the relations between the parties from putting the precise pecuniary outcome of those relations of the Court. (*Drake Brockman, J. C.*) MAROTI *v.* BALAJI. **14 I C 786 : 8 N. L. R. 36.**

——Sch. II, Art. 31—*Accounts, suit for—Suit for ascertained sum—Profits wrongfully received.*

Plaintiff's suit for a sum alleged to be the profits of property received by defendant under an arrangement is cognizable by Small Cause Court. A suit for an ascertained sum is not excluded from the cognizance of the Court of Small Causes under Art 31 of the Act by reason of the defendant raising a plea of accounts. Every case in which accounts may have to be looked into is not a suit for accounts. The question whether a suit is cognizable by a Court of Small Causes or not must be determined only by reference to the plaint. (*Roe and Imam, JJ.*). RAJIVA NARAYAN *v.* KIRAT NARAYAN SINGH. **3 Pat. L. J. 423 : 1918 Pat. 55 : 43 I. C. 755 : 4 Pat. L. W. 70.**

——Sch. II, Art. 31—*Suit for mesne profits is not Small Cause.*

Art. 31 of Sch. II of the Pro Small Cause Court Act withdraws from the jurisdiction of a Court of Small Causes a suit for mesne profits. 25 B. 85 : 25 M. 108 foll; 23 C. 884 not foll. (*Saunders, J.C.*). MAUNG TUN E. *v.* MAUNG SHWE THA. **66 I. C. 368 : (1921) 4 U. B. R. 83.**

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 32.

——Sch. II, Art. 32—*Salvage, suit for—Small cause nature.*

A suit for services rendered in saving cargo from a leaky boat is not a suit for salvage and is thus cognizable by small Cause Court (*Robinson, J.*). A. W. PILLAI *v.* C. K. SHEIKH EBRAHIM.
36 I. C. 10 : 9 Bur. L. T. 163.

——Sch II, Art. 34—*Contract of Insurance—Suit on.*

A suit on a contract of Insurance is not maintainable in a Small Cause Court under Art 34, Sch. II of the Act. *Held* that the contract in question was one of life insurance. (*Stephen and Mullick, JJ.*) RASIK CHANDRA *v.* CHANDRA KUMARI.
20 I. C. 155.

——Sch. II, Art. 35—*Suit for damages for misappropriation is not small cause.*

The cutting down of trees belonging to other persons and misappropriating them is an offence against property punishable under Ch. XVII of the Indian Penal Code and a claim for damages is not maintainable in the Small Cause Court. (*Rafique, J.*). DUKHI *v.* DHANNI MISIR.
21 A. L. J. 357 : L. R. 4 A. 215 : 1923 A. 543.

——Sch. II, Art. 35—*Suit by landlord for recovery of trees cut away by tenant is small cause.*

A Zamindar sued his tenant for a certain sum of money alleging that the latter had wrongfully cut and carried a tree belonging to him and the tenant pleaded the tree was his own. The Small Cause Court decreed the suit and the defendant applied for revision. *Held* that the case did not fall within Art. 35, Cl. (2) of the Prov. Small Cause Courts Act and that the High Court was not obliged to interfere even if the plea of the defendant was a good one. (*Lindsay, J.*) KUNWAR PAL *v.* BAKSHI MADAN MOHAN.
21 A. L. J. 213 : L. R. 4 A. 172 : 1923 A. 428.

——Sch. II, Art. 35—*Suit for compensation for wrongful removal of trees is small cause.*

A suit by the plaintiffs for the recovery of the price of certain trees alleged to have been wrongfully cut and misappropriated by the defendants from the lands of the plaintiff, is maintainable in the Small Cause Court. (*Cuming and Panton, JJ.*). MIRZA DILBAR HOSSAIN *v.* SADARUDDIN CHOWDHURY. **27 C. W. N. 469 : 1923 Cal. 568.**

——Sch. II, Art. 35—*Suit for damages—Obstruction to irrigation is not small cause.*

A suit for recovery of damages sustained in consequence of the defendant having prevented the plaintiff from watering his fields from a certain well falls under Art. 35, Cl. 2 of Sch. II to the Prov. Small Cause Courts Act. (*Martineau, J.*). CHHAJJU *v.* QUTAB DIN.
5 Lah. L. J. 92 : 1923 Lah. 39

——Sch. II, Art. 35—*Criminal intention necessary for the article to apply.*

Where in the plaint there is no definite allegation that the defendants had the intention requisite for the commission of the offences mentioned, the suit is not excepted under the article. (*Shadi Lal, C. J. and Brasher, J.*) SHIV GIR *v.* KAZAN GIR. **3 L. 369 : 1922 Lah. 451.**

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 35 (ii).

——Sch. II, Art. 35 (h)—*Suit for damages for infringement of monopoly is small cause.*

A suit by the holder of a monopoly for a certain year against the previous year's holder for damages for infringing his monopoly does not fall within Sch. II, Art. 35 (h) of the Prov. Sm. C. C. Act and is hence cognizable by a Small Cause Court. (*Martineau, J.*) RAMJI DAS *v.* JAI GOPAL.
1923 Lah. 244.

——Sch. II, Art. 35 (i) as amended by Act VI of 1914—*Suit for damages for wrongful act—Small Cause Court—No jurisdiction.*

The Small Cause Court has no jurisdiction to try a suit for damages for defendant's tearing and damaging plaintiff's fish-net and allowing the fish therein to escape, as the allegations make out an offence against property under the I.P.C. (*Chatterjee and Beachcroft, JJ.*). ADU MALO *v.* NAGAR BASHI MALO. **33 I. C. 728.**

——Sch. II, Art. 35 (i)—*Contract to allow plff. to drain land—Breach—Damages—Jurisdiction.*

A suit for damages for breach of a contract to allow plff. to drain the water from his field into deft's. is not within Art. 35 (i) of the Act, and is triable by a Small Cause Court. (*Seshagiri Aiyar J.*) SOORIYAN *v.* NATESAN PILLAI.
25 I. C. 44 : (1914) M. W. N. 497.

——Sch. II, Art. 35 (i)—*Contract of betrothal--Breach of—Suit for damages--Jurisdiction.*

A suit for compensation for breach of contract of betrothal and loss of provisions, etc., is not cognizable by a Small Cause Court under Art. 35 (g) of the Act. (*Benson and Sundara Aiyar, JJ.*). MOHIDEEN KUTTI *v.* PARKER.
38 Mad 274 : 13 M. L. T. 497 : 19 I. C. 700 : (1913) M. W. N. 637.

——Sch. II, Art. 35, Cl. (i)—*Damages—Suit for.*

A claim for damages to the plaintiff's wall by the defendant's diversion of his own water course is not within Art. 35 (1) of Sch. II (20 B. 283 Foll.) (*Lindsay, J.C.*) JAGDAT *v.* JAGMOHAN.
46 I. C. 801 : 21 O. C. 138.

——Sch. II, Arts 35 (ii) and 43 (a)—*Suit to recover ornaments pledged—Identification impossible—Procedure.*

A Court of Small Causes can take cognisance of a suit to recover pledged ornaments or in the alternative for their value. Neither Art. 35 (*ii*) nor 43 (*a*) applies to such suits. Where identification of the ornaments in such suits is impossible, the court should pass a decree for the amount, compensating plaintiff for the ornaments. (*Bannerjee, J.*) MATHURA *v.* RAGHUNATH SAHA.
18 A. L. J. 354 : 58 I. C. 663 : 2 U. P. L. R. (A.) 412.

——Sch. II, Art. 35 (ii)—*Suit for paddy wrongfully and forcibly taken away.*

A suit to recover the value of paddy wrongfully and maliciously cut and taken away by the

PROV. SM. C. C. ACT (IX OF 1887), SCH. II, ART. 35 (ii).

defendant from the possession of the plaintiff is not triable by a Court of Small Causes. (*Teunon and Newbould, JJ.*) LALU SARDAR *v.* OHEDALI MRIOHA. **45 I. C. 15.**

——Sch. II, Art 35 (ii)—*Suit for damages for cutting and carrying away trees.*

A suit for recovery of damages for trees alleged to have been forcibly cut and taken away is not triable by a Small Cause Court. (*Fletcher and Newbould, JJ.*) HELALUDDI MOLLA *v* ABDUL GAFUR. **41 I. C. 936.**

——Sch. II, Art. 35 (ii)—*Suit for compensation for trees wrongfully cut and removed not small cause.*

Where a vendee of trees intended to be cut and sold brings a suit for damages, it falls under Art. 35 (2) of the Second Schedule of the Provincial Small Cause Courts Act as amended by Act VI of 1917 and it is excluded from the cognisance of a Court of Small Causes. (*Le Rossignol, J.*) BIR SEN *v.* RAJA RAM. **1924 L. 71.**

——Sch. II, Art. 35 (ii)—*Suit to recover share of offerings at temple is small cause.*

A suit to recover the value of a share of certain offerings made at a temple and also the value of certain movables alleged to belong exclusively to the plaintiff as Mahant of the temple does not come within the exemption contemplated by the second clause of Art. 35 of Schedule II to the Small Cause Courts Act and is, therefore, cognisable by a Small Cause Court. (*Abdul Raoof, J.*) SHIV GIR *v.* KHAZAN GIR. **69 I. C. 275.**

——Sch. II, Art. 35 (ii)—*Suit for value of fruit removed from a tree is not small cause.*

A suit for value of fruit removed by deft. from a tree which plff claimed to be his, a Small Cause Court has no jurisdiction to try. (*Chevis, J.*) NABI BAKSH *v.* MUHAMMAD ALI **3 Lah. L. J. 380.**

——Sch. II, Art. 35 (ii)—*Suit for refund of—Misappropriated rent is not small cause.*

The plaintiff held certain land in an estate though he was not formally recorded as tenant. The amount paid by him had not been credited by the defendant Ziledar of the state against the rent due from the plaintiff and must therefore have been misappropriated. *Held*, a suit to recover money paid to the defendant and misappropriated by him is a suit for compensation within the meaning of article 35 (ii) of sch. V of the Prov. Sm. C. C. Act. 48 Cal. 879 Foll. (*Daniels, A. J. C.*) UTTAM PRASAD *v.* KODAI. **26 O. C 200 : 9 O. & A. L R. 23 : 1923 Oudh 38 (1).**

——Sch. II, Art. 35 (ii)—*Suit for compensation—Unlawful cutting of trees.*

A suit for compensation for unlawful cutting of trees which would constitute an offence of mischief or theft punishable under Ch XVII of the Penal Code falls within Art. 35 (ii) of Schedule II of Prov. Sm. C. C. Act and is not cognizable by a Small Cause Court. (*Syed Wazir Hasan, J. C.*). MT. SHAHIDAN *v.* JAGANNATH. **4 U. P. L. R. (J. C.) 23 : 8 O. L. J. 594 : 1922 Oudh 161.**

PROV. SM. C. C. ACT (IX OF 1887) SCH. II, ART. 35 (l).

——Sch. II, Art. 35 (ii)—*Suit for damages for trees cut—No offence under Ch. XVII, Penal Code disclosed—Small cause.*

Where the plaint in a suit for damages for trees wrongfully cut, did not disclose an offence under Ch. XVII of the Penal Code and there was no allegation that the act was done fraudulently or dishonestly : *held* that the suit was of a Small Cause nature and no second appeal lies from a decree passed therein. (*Lyle, A. J. C.*). KANNAR SINGH *v.* UJAGAR SINGH. **3 U.P.L.R. (J. C.) 18 : 65 I.C. 7 : 8 O.L.J. 391.**

——Sch. II, Art. 35 (ii)—*Criminal prosecution—Suit for damages—Not small cause.*

A suit by plff. for damages for mental and physical worry and the cost of a criminal prosecution in which the deft. was convicted of criminal breach of trust, is exempted from the jurisdiction of a Small Cause Court. (*Daniels, A.J. C.*) MUSAMMAT SUGHRA *v.* RAM LAL MISRA. **59 I C. 593 : 23 O. C. 352.**

——Sch. II, Art. 35 (j)—*Illegal attachment—Suit for damages—Jurisdiction.*

A suit for damages for illegal attachment is excepted from the cognizance of the Small Cause Court under Art. 35 (j) of the Act. (*Tudball, J.*) MUZAFFAR HUSAIN *v.* BIBAN. **18 I. C. 695 : 11 A. L. J. 91.**

——Sch. II, Art. 35 (j)—*Suit for damages for wrongful execution is small cause.*

Where a decree-holder omits to certify payments of a decree outside court and executes the decree and realises the decree amount, a suit by the judgment-debtor for damages is maintainable in a Small Cause Court. (*Maung Kin, J.*) MAUNG MYO *v.* MAUNG KHA. **11 L. B. R. 429 : 1 Bur. L. J. 207 : 1923 Rang. 88.**

——Sch. II, Art. 35 (l)—*Injury to the person—suit for—Assault with a shoe—Small Cause nature.*

A suit to recover damages from the deft. who ran after plff. with a shoe in his hand, threatening to beat him and using vulgar and abusive language, is a suit for "injury to the person" within Art. 35 (l) and therefore is not within the cognizance of the Small Cause Court. The Act complained of is an assault and an offence affecting the human body. (*Scott C.J. and Russel, J.*) GOBIND BALKRISHNA JOSHI *v.* PANDURANG VINAYAK JOSHI. **36 Bom. 443 : 15 I. C 505 : 14 Bom. L. R. 323.**

——Sch II, Art. 35 (l)—*Suit for compensation for wrongful cutting and removal of tree.*

A suit for compensation for unlawfully cutting and removing a tree and misappropriating crops is not cognisable by Small Cause Court. (*Mookerjee and Beachcroft, JJ.*) RAM PRASAD PRAMANIK *v.* SRICHARAN MANDAL. **21 C. W. N. 1109 : 41 I. C. 276 : 27 C. L. J. 594.**

——Sch. II, Art 35 (l)—*Suit to recover money—Jurisdiciction of Small Cause Court.*

A suit to recover a sum of money from the defendant police officers on the ground that it was a bribe extorted by them from the plaintiff is cognizable by the Small Cause Court. (*Chitty and Chatterjee, JJ.*) RAKIMUDDIN AHMED *v.* NAIMULLAH. **9 I. C. 623 : 15 C. L. J. 219.**

PROV. SM. C. C. ACT (IX OF 1887), Sch. II, Art. 35.

——Sch. II, Art. 35 (1)—*Jurisdiction—Compensation for losing wife.*

A suit for the recovery of money as compensation for losing the wife is not cognizable by a Court of Small Causes and a second appeal lies (*Scott Smith and Dundas, JJ.*) ABBAS KHAN *v.* NUR KHAN **1 L. 574 : 58 I. C. 167: 2 U. P. L. R. (L.) 160 : 58 P. W. R. 1920.**

——Sch. II, Art. 35 (1)—*Personal injury caused through an animal, suit for*—Qui facit per se—*Applicability of maxim.*

A suit for damages for personal injury caused through an animal falls within Art. 35 (1). To such an act the maxim *Qui facit per se* applies and the position is the same as if the defts. have touched the plff. with the substance. 13 W. R 434 Dist. (*Drake Brockman, J.C.*) NAMA *v.* GOPALYA. **32 I. C. 236 : 12 N L.R. 7.**

——Sch. II, Art. 38—*Maintenance, fixed—Suit for arrears of fixed maintenance—Jurisdiction*

A suit for arrears of fixed maintenance against deceased husband's brother, on the allegation that the defendant took the property by his father's will, subject to a charge of maintenance, is one for maintenance and thus not cognizable by the Small Cause Court. (*Piggott, J.*) MUNIR-UD-DIN *v.* SAMIRA UNNISSA BIBI. **40 All. 52 : 42 I. C. 903 : 15 A. L. J. 857.**

——Sch. II, Art 38—*Maintenance—Jurisdiction—Small Cause Courts.*

Suit for damages as arrears of maintenance for three years is a suit for maintenance and is not therefore not cognizable by Small Cause Court. Hence a second appeal lies in such suit. (*Piggott, J.*) MUHAMMAD HUSAIN *v.* NUR JAHAN. **16 I. C. 13 : 10 A. L. J 185.**

——Sch. II, Art. 38—*Maintenance—Suit for arrears of maintenance by assignee thereof.*

A suit for arrears of maintenance due to a member of an Aliyasantana family and assigned to plff. is not cognizable by a Small Cause Court. 20 M. 19, Foll. (*Oldfield and Seshagiri Aiyar, JJ.*) SESHAPPA HEGGADE *v* CHANDAYYA HEGGADE **53 I. C. 665 : 37 M L. J. 402.**

——Sch. II, Art. 38—*Maintenance, meaning of.*

Maintenance is a sum of money payable by a person under an obligation either by law or specific contract. A suit by the guardian of the person of a minor against the guardian of the property to recover the money ordered by Court is not for maintenance. (*Kumaraswami Sastri, J.*) MANIKA MAYIKAR *v.* SWARNATHAMMAL. **32 I. C. 547.**

——Sch II, Art. 38—*Maintenance—Suit on agreement—Jurisdiction.*

Where two sons agreed among themselves that their mother should reside with one of them and that the other should pay his brother a certain quantity of paddy by way of maintenance to the mother but fell into arrears and therefore the sons of the brothers with whom the mother lived, sued the other brother in the Small Cause Court for arrears due. *Held*, that the suit not being by the maintenance holder herself for maintenance but

PROV. SM. C. C. ACT (IX OF 1887), Sch II, Art. 41.

being based on a contract was not one *relating to maintenance* within Art. 38. 20 Mad. 29 : 14 M.L. J. 480 Foll. 26 M. 321, Dist. (*Oldfield and Napier, JJ.*) ANNASAWMI SASTRIGAL *v.* RAMASWAMY SASTRIGAL. **27 I. C. 824 : 2 L. W. 103**

——Sch. II, Art 38—*Jurisdiction.*

A suit for the recovery of the value of paddy by the maintenance holder is cognizable by a Small Cause Court; such a suit does not fall under Art. 38. (*Miller, J.*) ANNASAMI SASTRIGAL *v.* A. S. RAMASAMI SASTRIGAL. **38 Mad. 553 : 22 I. C. 39 : 1 L. W. 19.**

——Sch. II, Art. 38—*Maintenance—Suit on agreement to pay maintenance to a child—Jurisdiction.*

A suit to recover a sum of money agreed to be paid for the maintenance of a child is a suit for maintenance and is, therefore, not cognizable by the Small Cause Court under Art, 38 16 B 267 : 20 M. 29, Ref. (*Rigg, J.*) MAUNG PO MYANG *v.* MA PAN. **9 L. B. R. 51 : 38 I. C. 209 : 10 Bur. L. T. 239.**

——Sch. II, Art 39 (ii)—*Obstructing irrigation—Suit for damages—Not Small Cause.*

A suit for damages for loss sustained in consequence of the defendants having prevented the plaintiffs from irrigating their fields from certain wells falls within Sch, II, Art. 35 (ii) of the Provincial Sm. Cause Courts Act as the acts would constitute the offence of mischief and is not cognizable by the Small Cause Courts Act.

Quaere: if Art. 35 (1) would apply. (*Martineau, J.*) CHAJJU *v.* MUHAMMAD. **5 Lah L. J. 91 : 1923 Lah. 38.**

——Sch. II, Art. 40—Dharat *collections—Suit for—Small Cause Suit.*

A suit for a share of *dharat* collections against a share-holder or a person who has wrongfully received it is cognizable by a Civil Court and is in the nature of a Small Cause suit. (*Arthur Reid, C. J.*) MOHAR SINGH *v* TAJ MOHAMED. **120 P. R. 1912 : 64 P W. R. 1913 : 18 I. C. 532 : 103 P. L. R. 1913.**

——Sch. II, Art. 41—*Contribution, suit for—Jurisdiction.*

A suit by one of the heirs of a deceased Mahomedan for recovery from the other co-heirs of his share of debt due by the deceased and paid off by the plff. is cognizable by a Small Cause Court. (*Richards, C.J. and Tudball, J.*) MAHOMED ALI *v* TAMIZ-UN-NISSA BIBI. **41 All. 51 : 47 I. C. 842 : 16 A. L. J. 787.**

——Sch. II, Art. 41—*Contribution—Judgment—Debt.*

Where a decree for maintenance has been passed against three brothers and one of them is made to pay the whole amount, and sues his brothers for contribution, the suit is maintainable in the Small Cause Court. 30 M. 212 ; 14 M. L. J. 480 Ref. (*Piggott and Walsh, JJ*) ANT RAM *v.* MITHAN LAL. **40 All. 135 : 45 I. C. 560 : 16 A. L. J. 44.**

——Sch. II, Arts. 41 and 42—*Contribution, suit for—Jurisdiction.*

PROV. SM. C. C. ACT (IX OF 1887), Sch. II, Art. 41.

A suit by one co-mortgagor against the other co-mortgagors for contribution in respect of money paid by him for the redemption of the mortgaged property is not cognizable by a Small Cause Court. (*Banerji, J.*) TALAIMAND SINGH *v.* GOVIND SINGH. 29 I. C. 247 : 13 A. L. J. 694.

———Sch. II, Art. 41—*Decree for arrears of rent against joint tenants realized from one tenant Contribution.*

Arrears of rent against several tenants occupying separate fields in one and the same *khata* has been realized from plff. *Held*, a suit for contribution against others is barred by Art. 41 from the cognizance of a Small Cause Court. (*Chamier, J.*) FATIMA BIBI *v.* HAMIDA BIBI.
28 I. C. 587 : 13 A. L. J. 452.

———Sch. II Art. 41—*Suit to recover amount paid by purchaser for encumbrance on property sold free of all encumbrances—Compensation.*

A suit by the vendee against the vendors for recovery of the money paid by him for an encumbrance on the property sold represented to be free of all encumbrances is a suit for compensation and not for contribution and is cognizable by the Small Cause Court. (*Banerjee, J.*) SARJU PANDAY *v.* MULLOO CHAUDHURY.
26 I. C. 909 : 12 A. L. J. 1279.

———Sch. II, Art. 41—*Suit for contribution against co-judgment debtors—Small Cause.*

Two suits, one for damages for breach of contract to deliver land in joint possession of plff. and defts. and the other for mesne profits were decreed with costs and the decree-holder recovered the decretal amount from the plff. alone. Plffs. filed two suits against defts. for the share of the money. *Held*, the suits did not fall within Art. 41 and the subject matter being less than Rs. 500, no second appeal was competent. (*Teunon and Newbould, JJ.*) KAILASH CHANDRA *v.* CHANDRA KANTA. 62 I. C. 651.

———Sch. II, Art. 41—*Suit for contribution against joint tort-feasors is Small Cause.*

A suit for contribution by one tort-feaser against his joint tort-feasor where the sum claimed is below Rs. 500, is a Small Cause suit and no second appeal lies. (*Teunon and Abdul Majid, JJ.*) GOVINDA SUNDAR *v.* MOHESH CHANDRA.
62 I. C. 504

———Sch. II, Art. 41—*Contribution, suit for—Jurisdiction.*

A suit by some of several persons bound by a common liability, who have discharged the joint obligation, to compel their co-sharers to make good their shares falls within Art. 41 of the Act. (*Mookerjee and Beachcroft, JJ.*) RAJANI KANTA GHOSH *v.* RAM NATH ROY. 20 C. L. J. 200 : 27 I. C. 56 : 19 C. W. N. 458.

———Sch. II, Art. 41—*Suit for contribution—Suit for money paid by plaintiffs for the benefit of defendants.*

Where the plaintiffs deny that they were liable to satisfy the judgment-debt which they satisfied and which was recoverable only from the defendants, a suit for recovery of money paid by them is not a "suit for contribution" and is therefore

PROV. SM. C. C. ACT (IX OF 1887), Sch. II, Art. 41.

cognizable by a Small Cause Court. (*Mookerjee and Beachcroft, JJ.*) SATYA BHUSHAN BANDOPADHYAYA *v.* KRISHNA KALI BANDOPADHYAYA.
20 C. L. J. 196 : 24 I. C. 259 : 18 C. W. N. 1308.

———Sch. II, Art. 41—*Contribution, suit for—Jurisdiction.*

A suit for contribution by a co-sharer against another co-sharer whose name appears as recorded tenant though he has sold away his share in respect of money paid by the plff. towards a decree passed against the deft. as recorded tenant comes under Art. 41, as the deft. fills a representative capacity in such suit. (*Stephen and Richardson, JJ.*) BATUK NATH MANDAL *v.* BIPIN BEHARI CHAUDHURI. 16 C. W. N. 975 : 17 I. C. 90 : 17 C. L. J. 179.

———Sch. II, Art. 41—*Contribution, suit for—Second appeal.*

Where an *ex parte* decree was obtained against the plaintiff for rent of certain lands of which he was the registered tenant but in which he had an interest at the time of suit and the plaintiff paid off the decree and sued for contribution the persons who had an interest in the land and the suit amount was less than Rs. 500 *held* that the suit was not excluded by Art. 41 of the Act and that no second appeal lay. (*Stephen and Richardson, JJ.*) GAGAN CHANDRA DAS *v.* RAMDHAN DHAR. 14 I. C. 735.

———Sch. II, Art. 41—*Contribution, suit for—Decree jointly against two—Satisfaction by one.*

A decree against certain joint owner was executed against plff alone who sued defendant, the other owner in the Small Cause Court to recover half of the amount paid by him, *Held*, that the Small Cause Court has no power to take cognizance of the suit being one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer. The fact of the plaintiff paying a decree against him and the deft. instead of paying the amount before it was sued for, makes no difference. 40 A 135 Rel and 15 M. 155. (*Martineau, J.*) NAND LAL *v.* HARBANS LAL. 2 Lah. L. J. 387.

———Sch. II, Art. 41—*Contribution, suit for—Undissolved partnership.*

A suit for contribution will lie on the small cause side even though the debt in respect of which the decree was obtained was one relating to a partnership trade carried on between plaintiff and deft. jointly unless the partnership is one undissolved and continuing (*Sundara Aiyar, J.*) GUDLAVELLARU VENKATARATNAM *v.* VELLA THAMBI VENKATARATNAM. 11 M. L. T. 188 : 15 I. C. 218 ; (1912) M. W. N. 384.

———Sch II, Art. 41—*Suit for contribution—Cognizability.*

A Court of Small Causes can try suits for contribution. (*Stuart and Kanhaiya Lal, A J. Cs.*) BHAGAWATI PRASAD SINGH *v.* MUHAMMAD ABDUL HASAN KHAN. 46 I. C. 236 : 5 O. L. J. 109.

———Sch. II, Art. 41—*Suit by one of several joint under-proprietors against others for contribution*

A suit by one of several joint under-proprietors who satisfied the decree for arrears of rent

PROV. SM. C. C. ACT (IX OF 1887), Sch. II, Art 41.

passed jointly against them for contribution against the other joint under-proprietors is not within Art. 41 and so cognizable by a Small Cause Court. 28 A 292 Foll. 23 C 189 Dist (*Lindsay, J. C.*) SURAJ BAKHSH SINGH *v.* RAGHUBAR SINGH.
24 I. C. 28 : 1 O. L. J. 244

——Sch. II, Art. 41—*Claim under Ss. 69 and 70 of the Contract Act is small cause.*

A suit for the recovery of money under Ss. 69 and 70 of the Contract Act does not fall within Art. 41 of Sch II to the Prov Small Cause Courts Act and is therefore not excluded from the cognizance of a Small Cause Court. (*Bucknill, J.*) SURADHANI DEBI *v.* HARI CHARAN MAHTON.
1921 P. H. C. C. 298 : 3 Pat. L. T. 122 : 1922 P. 337.

——Sch. II, Art. 41—*Payment of rent by mortgagor for the mortgagee—Contribution.*

A mortgaged his holding to B, who agreed to pay portion of the rent to the landlord A having paid the whole rent to the landlord to prevent the sale of the holding, sued B for contribution in the Court of Small Causes. The suit was held to be barred from its cognizance by Art. 41 as A and B were joint holders of the holding and the suit by A is to recover money due by another co-sharer. (*Jwala Prasad, J.*) RAM SARUP PALHAK *v.* HAZARI MAHTON.
57 I. C. 595.

——Sch. II, Art. 42—*Joint mortgagors — Meaning of - Liability.*

Where one of two executants of a mortgage had no interest in the mortgaged property and did not purport to transfer any interest still they constitute joint mortgagors and both of them would be personally liable. (*Gokul Prasad, J.*) AMAR DEO PANDE *v.* GAYA PANDE.
1923 A. 408.

——Sch. II, Art. 42—*Compensation, suit for —Jurisdiction.*

A suit by the plaintiff to recover money from the defendant for a wrong committed by him and another in mortgaging plaintiff's property for their own purposes which mortgage the plaintiff had to pay off to secure his property is a suit for compensation and cognizable by the Small Cause Court. (*Chamier, J.*) RAZA HUSAIN *v.* HASAN JAN. **29 I. C. 245 : 13 A. L. J. 632.**

——Sch. II, Art. 43 (A)—*Suit to recover property or its value—Alleged misappropriation.*

On a suit for recovery of certain ornaments or their value it was not alleged that defts. had committed any criminal offence in respect of the ornaments but certain other persons were said to have misappropriated them and pledged them with the defts. *Held*, that Arts. 35 (ii) and 43 were not applicable to the case. (*Banerji, J.*) MATHURA *v.* RAGHUNATH SAHAI. **18 All. L. J 354 : 58 I. C. 663 : 2 U P. L. R. (A.) 412.**

——Sch. II Art. 43,-A—*Suit for value of coal wrongfully appropriated is small cause—Interest at 24 per cent—Power to grant.*

The plaintiff instituted a suit for the recovery of a sum of money due on a chit executed by defendant under the following circumstances. The

PUBLIC CONVEYANCES ACT (VI OF 1863), S. 18.

defendant in collusion with some Railway servants took some coal belonging to the plff. and misappropriated it. Plaintiff and defendant had some discussion over it as a result of which the defendant executed a chit promising to pay a particular sum made up in a particular way. The plaintiff in suing on the chit alleged fraud and misappropriation on the part of the defendant or his executing a chit. The plaintiff claimed interest at 24 per cent. which was awarded by the court below. *Held* in revision, that the suit was one upon the chit executed by defendant and was not one for damages either for theft of coal or for the conversion of the coal in any sense. Consequently the suit was maintainable in the Small Cause Court. Though 24 per cent. was a high rate of interest it could not be said that the Court had no jurisdiction to execute it. (*Rankin, J.*) RAKHAL CHANDRA CHATTERJEE *v.* ROHINE KUMAR CHATTERJEE. **27 C. W. N. 549 : 37 C. L. J. 399 : 1923 Cal. 650.**

——Sch. II, Art. 43 (A)—*Criminal offence—Plff. accusing deft. of—Jurisdiction.*

If plff. accuses the deft. of conduct amounting to a criminal misappropriation the jurisdiction of the Small Cause Court to try the suit is barred by Art. 43 A. (*Drake Brockman, J. C.*) NANDA LAL *v.* NARAYAN. **55 I. C. 328.**

PROVINICAL DECREE.
See C. P. CODE, S. 2.

PUBLIC AUTHORITY.
See (1) CORPORATION.
(2) CROWN.
(3) SECRETARY OF STATE.

PUBLIC BODY.
See (1) COMMUNITY.
(2) COMPANY.
(3) CORPORATION.

PUBLIC CHARITY.
See C. P. CODE, S. 92.

PUBLIC CHARITY AND CHARITABLE TRUST.
See (1) C. P. CODE, S. 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) TRUST.
(4) TRUSTS ACT.

PUBLIC COMPANY.
See (1) COMPANIES ACT.
(2) COMPANY.
(3) CORPORATION.

PUBLIC CONVEYANCES ACT (VI OF 1863).

——Ss. 1 and 7—*Public conveyance—Hand-drawn lorry*

A public conveyance need not necessarily be one drawn by animals, and a hand-drawn lorry plied for hire is a public conveyance within the meaning of the Act. (*Batchelor and Rao, JJ.*) EMPEROR *v.* BANUBHAI HADUBHAI.
15 Bom. L. R. 66 : 18 I. C. 414 : 14 Cr. L. J. 78 : 37 Bom. 374.

——S. 18—*License of conveyance—Omission to produce list of fares on demand by Police officer.*

PUBLIC DEMANDS RECOVERY ACT (I B. C. OF 1895).

S. 18 is meant for the benefit of the hirer or the passenger, and when the list of fares is not produced on demand by the hirer or the passenger the penalty provided in the section can be imposed; but it cannot be imposed on the licensee for failure to produce the list of fares when required to do so by a Police-officer at the carriage stand. (*Scott, C. J. and Chandavarkar, J.*) EMPEROR *v.* ALIBHAI MEABHAI.

13 Cr. L J. 787 : 17 I.C. 531: 14 Bom. L. R. 875.

PUBLIC DEMANDS RECOVERY ACT (I B.C. OF 1895).

———*Suit for setting aside sale—Valuation.*

A suit for setting aside a sale under the Bengal Public Demand Recovery Act should be valued for purposes of jurisdiction and Court-fees at the value of the whole property hold. (*Walmsley and Suhrawardy, JJ.*) PRAN KRISHNA GHARAI *v.* NITYA GOPAL MAITI.

50 Cal. 892 : 1924 Cal. 239.

———*Sale for arrears of road cess — Certificate issued to person who has no interest in the property—Validity of sale.*

A sale of property held under the Act by issuing certificates for arrears of road cess against a person on the books of the Collector, when the person has no interest in the property, does not affect the real owner of the property. (*Chamier, C. J. and Mullick, J.*) SHAHZADI BEGAM *v* FASL UDDIN AHMAD. **41 I. C. 252.**

———S. 7—*Certificate.*

A certificate cannot be issued for a claim for damages as it does not fall under S. 7. A tenant cannot get refund of money recovered as damages for use and occupation for certain non-agricultural lands when he had notice of the increase in demand by the Settlement Officer. (*Stephen and Mullick, JJ.*) ABDUL RAHIM CHOUDHURY *v.* SECRETARY OF STATE. **22 I. C. 626.**

———S. 7—*Rent, certificate, procedure.*

If it is not settled either by agreement or by Court, no rent can be levied for occupation of Government land by the certificate procedure. (*Mookerjee and Teunon, JJ.*) JUTHI SINGH *v.* SECRETARY OF STATE FOR INDIA.

10 I. C. 335.

———S. 9 (3)—*Object of granting certificate.*

The obvious intention under S. 9 (3) is that the Officer shall use his discretion as to the issue of a certificate and decide whether the case is a proper one and whether the money is due or not A certificate issued under cl. (1) though not duly signed or verified is not valid in law. (*Mookerjee and Beachcroft, JJ.*) MOHIUDDIN *v.* PIRTHICHAND LAL. **31 I. C. 664 : 19 C. W. N 1159.**

———Ss. 10, 19 (2) and 21—*Sale under Act—Right of purchaser—Non-service of notice—Effect.*

A purchaser at a sale under the Act acquires the rights and interests of the judgment-debtors mentioned in the Collector's certificate. Non-service of notice upon the judgment-debtors invalidates the sale and the original owners can recover the property within 12 years from that

PUNBJAB ALIENATION OF LAND ACT (XIII OF 1900).

date if at all dispossessed. Return of the serving officer stating that notices have been served producing receipts of the judgment-debtors is *prima facie* proof of due service. (*Mookerjee and Beachcroft, JJ.*) BEPIN BEHARI BERA *v.* SHASHI BHUSHAN DATTA. **18 C. L J 628 : 22 I. C. 95 : 18 C. W. N. 766.**

PUBLIC DOCUMENTS.

See EVIDENCE ACT, Ss. 65 AND 74.

PUBLIC NUISANCE.

See NUISANCE.

PUBLIC OFFICE.

See (1) C. P CODE, S. 6.
(2) CONTRACT ACT, S. 23.

PUBLIC PLACE.

See (1) GAMBLING ACT.
(2) MUNICIPAL ACTS.

PUBLIC POLICY.

See CONTRACT ACT, S. 23.

PUBLIC PURPOSE.

See LAND ACQUISITION ACT.

PUBLIC RELIGIOUS TRUST.

See (1) C. P. CODE, S. 92.
(2) RELIGIOUS ENDOWMENTS.

PUBLIC ROAD.

See (1) HIGHWAY.
(2) TORT.

PUBLIC SERVANT.

See C. P. CODE, S. 2 (17).

PUBLIC STREET.

See (1) C. P. CODE, S. 91.
(2) HIGHWAY.

PUBLIC TEMPLE.

See (1) C. P. CODE, S. 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.

PUBLIC TRUST.

See (1) C. P CODE, S. 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) MAH LAW—WAQF.
(4) REL. AND CHA. ENDOW. ACT.
(5) TRUST.
(6) TRUSTS ACT.

PUBLIC WAY.

See (1) C. P. CODE, S. 91.
(2) HIGHWAY.
(3) TORT.

PUBLIC WORSHIP.

See (1) C. P. CODE, S. 9.
(2) REL. ENDOWMENTS.

PUISNE MORTGAGE.

See T. P. ACT, S. 74.

PUNJAB ALIENATION OF LAND ACT (XIII of 1900.)

———*Notification under—Kureshi tribe—Notification if retrospective.*

A mortgage effected by a member of a Kureshi tribe prior to the date when the Kureshis were notified as agriculturists under the Punjab Alienation of Land Act (XIII of 1900) can be given effect to in a suit filed subsequent to the said notification No. 44, dated 4th March, 1911, by

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900).

which the Kureshis were included in the list of agricultural tribes. (27 P.L. R. 1906, 7 P. R 1910 and 90 P. R. 1904 (F. B.) Foll. (*Broadway, J.*) MIRAN BAKSH *v.* MILKHI RAM.

1923 Lah. 673.

———*Applicability—Service of notice within one year.*

The Land Alienation Act does not apply to a case as where the service of notice of foreclosure is effected within one year before the Act came into operation. The proceedings for the enforcement of foreclosure of mortgage comprising a stipulation of conditional sale remain pending until the year of grace has expired. (*Le Rossignol and Harrison, JJ.*) BAJRANG DAS *v.* GHANI RAM.

1923 Lah. 299 (2).

———*Sanction by Collector to permanent alienation—Date of operation—Pre-emption.*

The sanction of the Collector under the Act to a permanent alienation relates back to the date of alienation which is therefore effective from the date on which it is made. (19 I. C. 239 Fol.) (*Rattigan, J.*) MUHAMMAD BAKHSH *v.* CHHANGA.

56 P. W. R. 1914 : 25 I. C. 59 : 143 P. L. R. 1914.

———**Ss. 2, 16**—*Attachment of mortgagee—Rights in execution of money decree, whether valid—Transfer of mortgagee rights.*

Defendant No. 2 was the mortgagee of a certain piece of land. Defendant No. 1 obtained a money decree against defendant No 2 who transferred his mortgagee rights on the mortgage to the plaintiff (his brother). Defendant No. 1 got the mortgagee rights of defendant No. 2 attached in execution of his decree. The plaintiff filed a suit for declaration that the defendant No. 1 had no right to attach mortgagee rights. *Held*, (1) that the mortgagee rights of defendant No. 2 come within the meaning of S. 2 (3), Punjab Alienation of Land Act, and could not be sold in execution of the decree; (2) the mortgage by defendant No. 2 was made six weeks before the attachment and was not fraudulent in law, and he was not bound to keep his property in a shape convenient for his creditors to proceed against; (3) that the plaintiff's interests being vitally bound up with those of defendant No. 2, he was entitled to object to the action taken against defendant No. 2 in the shape of execution proceedings, when such action injured plaintiff's interest. (*Johnstone, C. J.*) KARAM ILAHI *v.* GULAB RAI.

39 P. R. 1916 : 33 I. C. 960 : 102 P. W. R. 1916.

———**S. 2 (3) and (6)**—*'Lands,' if include trees.*

The term 'land' as defined in the Act includes trees situated on a land belonging to a member of the agricultural tribe; and so they cannot be sold in execution of a decree against an agriculturist. (*Wilberforce, J.*) AMIR KHAN *v.* LAHARI MEL.

58 I C. 638 108 P. R. 1919.

———**Ss. 2 (3) and 16**—*"Land"—Trees growing on land—Attachment.*

The definition of "land" in S 2 (3) of the Act is not exhaustive. Although the maxim *Quicquid plantatut solo solo cedit* cannot be accepted in India as having the wide meaning attached to it in England it does cover the case of trees growing on the land 52 P. R. 1906 Foll Standing trees are included in the definition of land in S. 2 (3) of the Act and are exempt from attachment and sale under S. 16 of the Act. (*Wilberforce, J.*) RULIA RAM *v.* SULTAN KHAN.

54 I. C 38.

———**S. 2 3)**—*"Right to receive rent," meaning of.*

'A right to receive rent' which is included in the definition of 'land' means a right to receive rent payable in future and not a right to realise arrears of rent already due. (*Kensington, C J. and Shah Din, J.*) SHANKER LAL *v.* DALLU.

132 P. W. R. 1914 : 280 P. L. R 1914 : 25 I. C. 68 : 13 P. R. 1915.

———**S. 2 (3)**—*'Land' if includes mortgagee's rights in land.*

The mortgagee's rights in land, prohibited by the Act to be alienated, are land within S. 2 (3). (*Shah Din and Chevis, JJ.*) ASA SINGH *v.* BUTA.

12 P. R. 1911 . 6 P. L. R. 1911 : 9 I C. 396 : 23 P. W. R. 1911.

———**S. 2 (3) (b)**—*Trees on land of agriculturist, if liable to attachment.*

The protection afforded by S. 2 (3) (*b*) extends only to incorporeal rights and therefore trees standing on the land of an agriculturist are liable to attachment in execution of a decree. (*Jones, J.*) AHMAD KHAN *v.* JHANDARAM.

54 I. C. 262 : 68 P. L. R. 1919.

———**S. 3**—*Alienation—Covenant to convey in future.*

A covenant by a vendor that he would convey an equal extent of land in case the vendee was dispossessed of the plots actually conveyed, is not an alienation *in praesenti* but an agreement to convey in future and is effected by S. 3. (*Chevis and Shadi Lal, JJ.*) FAKIRA MA' *v.* NABBU.

83 P. W. R. 1915 : 29 I. C. 751 : 166 P. L. R. 1915.

———**S. 3 (2) and (3)**—*Sale—Sanction of the Deputy Commissioner—When to be got.*

There is no provision in the Act that an application for sanction must be made before an alienation takes place. Sanction can be given even after the alienation has been otherwise completed. The Deputy Commissioner must enquire into the circumstances but has discretion to grant or refuse sanction. (*Martineau, J.*) MAULA DAD *v.* MUHAMMED.

63 I. C 700.

———**S. 4**—*Adoption of a profession—Effect of—Marriage with non-agriculturist.*

The adoption of a profession cannot change a man's status for the purposes of the Act. Members of agricultural tribe do not cease to hold their status as such, if they adopt or if their ancestors adopted, prostitution as a profession nor can such adoption vary their custom in respect of inheritance. *Obiter.*—If a Mahomedan belonging to an agricultural tribe marries a woman who is not a member of such a tribe, she does

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S 4

not attain the status or a member of his agricultural tribe. (*Abdul Raoof, Beavan and Petman, JJ.*) MUSSAMMAT UMRAO BIBI *v.* MUHAMMAD BAKSH. 55 I. C. 236.

—— —— S. 4—*Inclusion as agricultural tribes in list under—Effect.*

The inclusion of a tribe in the list under S. 4 of the Act is not conclusive proof that the tribe has adopted the general rule of customary law. (*Agnew and Shadi Lal, JJ.*) NATHU *v.* RAFIQUE MUHAMMAD. 270 P L. R. 1913 : 20 I. C. 207 : 171 P W. R. 1913.

——— Ss. 6 and 17—*'New mortgage'—Terms unchanged.*

Where a mortgage is effected before 8th June 1901 and a further advance is made after that date on the same security the further advance is not a new mortgage if the terms of the original transaction are unchanged. (*Jones and Martineau JJ.*) REMAL DAS *v.* JAMAT. 62 I. C. 789 : 2 Lah 202.

——— S. 6—*Mortgage by agriculturist to pay off a debt due to a non-agriculturist is not illegal.*

If a third person takes the land of an agriculturist on mortgage and undertakes to pay off in exchange, the debts of the mortgagor due to a non-agriculturist, the agreement is not illegal or opposed to public policy. (*Chevis, J.*) LADHA SINGH *v.* AHMED YAS. 60 I. C. 463

——— Ss. 6, 7 and 8—*Punjab Redemption of Mortgages Act, S 1 proviso.*

S. 1 proviso of the Redemption of the Mortgages Act excludes from the operation of that Act mortgages under Alienation of Land Act, S. 6. (*Fagan, F. C.*) SARUPA *v.* KHANDAN LAL 7 P R. 1917 Rev. : 42 I. C 383 : 2 P. W. R 1917 Rev.

——— Ss. 6 and 7 (3)—*Power of Deputy Commissioner to fix proportion of mortgage debt.*

Under the Act the Deputy Commissioner is required to inquire into the extent of realizations by mortgagee towards his debt and if it is liquidated he may grant redemption without any further payment. The equitability of the proportion is to be determined by him irrespective of arithmetical calculations. (*Jagan, J. C.*) SULTAN *v.* LAKHU RAM. 2 P. R. 1917 Rev : 39 I. C. 341 : 6 P. W. R. 1917 Rev.

——— S. 6—*Scope of Act.*

The Act does not prohibit a non-agriculturist from inducing an agriculturist to liquidate a debt due to him and to a mortgage of land from his debtor as security for himself. 48 P. L. R. 1908 ; 53 P. R. 1916 Foll. (*Broadway, J.*) HAIDAR *v.* FATTEH KHAN. 119 P. L. R. 1916 : 37 I. C. 193 : 114 P W. R 1916

——— Ss. 6 and 9—*Bond by agriculturist in favour of mortgagee — Non-agriculturist—Consideration.*

Where A, in consideration of money due to C, executed a registered mortgage of his land to B. without contravening the Punjab Alienation of Land Act, and B executed a registered bond for the same amount in favour of C, the bond by B, in favour of C. is supported by consideration. (*Chevis and Shadi Lal, JJ.*) MUZUFFAR KHAN *v.* WAISAKHI RAM 4 P. L. R. 1916 : 30 I. C. 509 : 105 P. W. R. 1915.

——— S. 9—*Mortgage by conditional sale—Regulation XVII of 1806—S. 8—Expiry of notice after the Act.*

On 20 3-1896 a mortgage by way of conditional sale was executed by an agriculturist in favour of a certain person. The mortgagee in October 1900 caused a notice to be served on the mortgagor under Sec. 8 of Regn. XVII of 1806. The Punjab Alienation of Land Act came in force on 8th June 1901. An application was made to the Deputy Commissioner under Sec 6 of the Act in 1904 by which he prayed that he should be granted a mortgage in any of the forms permitted by Sec. 6 in lieu of the previous conditional mortgage. And thereupon the Deputy Commissioner ordered the mortgagor to execute in favour of the mortgagee a mortgage for twenty years under Sec. 6 (1) (*a*). But the mortgagor did not comply with the order and the mortgagee sued the mortgagor for possession. *Held*, that no sooner the year of grace expired the title of the mortgagee became absolute and his former rights as mortgagee matured into ownership.

Held, further that the suit was not on a mortgage covered by Sec. 9, sub section 1 or 2 of the Land Alienation Act and the mortgage being no longer current it was incumbent on the Civil Court to refer the case to the Deputy Commissioner who could interfere with a conditional mortgage only during its currency. The Deputy Commissioner was not bound to interfere though he was entitled to do so under Sec. 9 (2) and he could in his discretion refuse to take action under the section and to relegate the parties to their original possession (*Robertson and Rattigan, JJ.*) BHERO DAS *v.* MONA. 14 I. C. 783.

——— S 9—*Mortgage—Expiry of year of grace—Agricultural tribes—Declaration—Effect of.*

When after the year of grace, a mortgagor who was served with notice of foreclosure was declared to belong to an agricultural tribe a suit by the mortgagee after that year is one for possession and not on the mortgage. The Civil Court is not bound to make a reference under S. 9 (3) of the Act and the Deputy Commissioner is precluded from exercising powers of interference. 38 P. R 1904 ; 20 P. R. 1905 Rel, on. (*Shadin, J.*) BULANDA *v.* DIWANU. 14 I. C. 332 : 109 P. W. R. 1912.

——— S. 9 (2) and (3)—*Mortgage by conditional sale—Discharge—Plea of enquiry into.*

Where a mortgagee by conditional sale applies direct or is referred by a Civil Court to the Deputy Commissioner under S. 9 (2) or (3) of the Punjab Land Alienation Act and the mortgagor denies execution of the mortgage or pleads payment of the mortgage-debt, the Deputy Commissioner must decline to exercise the power conferred upon him by S. 9 (2) of the Act. (*Diack, F. C.*) LAKHMIDAS *v.* HAYAT. 2 P. R. 1915 Rev. : 29 I.C. 502 : 3 P. W. R. 1915 Rev.

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 9.

——S. 9 (3)—*No applicability to a suit to enforce registration of a mortgage.*

S. 9 of the Act does not apply to a suit to enforce registration of a deed under S. 77 of the Registration Act as the expression in that sub section that if a suit is instituted in any Civil Court on a mortgage to which sub-section (1) or sub-section (2) applies the Courts shall refer the case to the Deputy Commissioner for the exercise of the power conferred by the sub-section applying thereto, means a suit instituted to enforce some of the terms of a mortgage. (*Scott-Smith and Martineau, JJ.*) NARAIN DASS *v.* SAHIB BANO.
1 Lah L. J. 212.

——S. 9 (3)—*Mortgage by conditional sale—Reference by Civil Court to Dy. Commissioner—Offer of Commission rejected—Jurisdiction of Civil Court to proceed with the case.*

A Civil Court made a reference in regard to a mortgage by conditional sale to a Dy. Commissioner. The latter made an offer to the mortgagees but the offer was rejected; *held*, that a Civil Court had no jurisdiction to proceed any further with the case. (*Johnstone and Rattigan, JJ.*) MUST BAKHTAWARI *v* SHIBBAN LAL.
55 P. R. 1916: 157 P. L. R. 1916. 35 I C. 532: 155 P. W. R. 1916.

——S. 9 (3)— *Foreclosure proceedings consigned—Year of grace unexpired—No pending proceedings.*

Where foreclosure proceedings have been consigned to the record room before the expiry of the year of grace and after the consignment but before the expiry of the year of grace, the new Act came into force, *held*, that there were no pending proceedings for enforcement of the conditional sale clause. (*Johnstone and Rattigan, JJ.*) BAKTHAWAR *v.* SHIBBAN LAL. **69 P. W. R. 1912: 121 P. L. R. 1912. 13 I. C. 621: 59 P. R. 1912.**

——S. 10 - *Applicability—Conditional sale clause in decree of Court—Validity.*

S. 10 of the Act must be strictly enforced regardless of consequences flowing therefrom. The terms of the section are very wide and they apply to a mortgage created by a decree based upon a compromise, and passed after the commencement of the Act, quite as much as to a mortgage created by private agreement between the parties. (*Shahdin and Scott-Smith, JJ.*) DEBI SAHAI *v.* RAMJI LAL, **56 P. R. 1918: 46 I. C. 460. 127 P. W. R. 1918.**

——S. 10 — *Mortgage— Conditional sale—Agriculturist.*

S. 10 of the Act is wide enough to include every mortgage which contains a stipulation as to conditional sale, and it is absolutely immaterial whether the mortgagor is or is not member of an agriculturist tribe. (*Shadi Lal, J.*) ALLAH DIN *v.* FATEH DIN. **31 P. R. 1918· 54 P. W. R. 1918: 45 I. C. 101: 27 P. L. R. 1918.**

——S. 16—*Mortgagees not entitled to sell security—Mortgage inseparable from security.*

Provisions of S. 16 of the Act prevent the decree-holder from selling up the mortgagee's rights, he can sell neither the debt nor the security inasmuch as a mortgage cannot be separated from its

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 17.

security, and a sale of debt carries with it its security. (*Rattigan, C. J. and Chevis, J.*) LAL CHAND *v.* ALLAH DAD. **16 P. R. 1918: 37 P.W.R. 1918 : 44 I.C. 528 (1): 16 P.L. R. 1918.**

——S. 16—*Execution of decree— Temporary alienation of land— Power to order.*

A Civil Court can in execution of a decree order a temporary alienation of the land of a judgment-debtor who is a member of an agricultural tribe S. 16 of the Punjab Alienation of Land Act prohibits only a sale and not a temporary alienation of such land. 4 P. R. 1903 Foll. (*Shadi Lal, Le Rossignol and Broadway, JJ.*) SARDARNI DATAR KUAR *v.* RAM RATTAN. **1 Lah. 192: 58 I.C. 603. 2 L L. J. 333 (F. B.).**

——S. 16—*Sale of mortgage debt apart from the security—Execution of decree.*

The sale of a mortgage debt in execution of a decree would carry with the security. As S. 16 of the Punjab Alienation of Land Act prevents the sale of the mortgagee's rights to the land, the sale of the debt is equally prevented. 26 Bom. 305 Ref. (*Rattigan, C. J. and Chevis, J.*) LALCHAND *v.* ALLAH DAD. **16 P. R. 1918: 16 P. L. R 1918: 44 I. C. 528: 37 P. W. R. 1918.**

——S. 16 (i) —*Land belonging to agricultural tribe—Sale in execution.*

A sale in execution of a decree of land belonging to a member of an agricultural tribe is illegal under S. 16 (1) of the Punjab Alienation of Land Act, and S. 72 of the C. P. Code clearly postulates and implies that the Collector's representation is to be made with reference to and in view of a proposal to sell attached land. No temporary alienation of the land of such member can be made by the Collector under the authority of the latter section. The executing Court, though it can attach the land can take no further action towards satisfying the decree by selling or otherwise dealing with that land. (*Fagan, F. C.*) AHMAD KHAN *v.* PARMANAND. **8 P. R. 1917 Rev.: 43 I. C. 356: 7 P. W. R. 1917 Rev.**

——S. 16 (1)—*Power of Court.*

A mortgage decree declared that in default of payment the property was to be sold. *Held* that the Court has no power to direct sale of the land to plaintiff who is a member of an agricultural tribe. (*Rattigan and Scott-Smith, JJ.*) NIHAL CHAND *v.* GHULAM MUHAMMAD.
235 P. L. R. 1918: 19 I. C 856: 146 P. W. R. 1918.

——Ss. 17 (2) and 2 (2)—*Sale of land to Member of an agricultural tribe—Sanction of Dy. Commissioner, want of – Effect.*

Where a person is not resident of Lyalpur District nor holds land therein, he must obtain sanction to purchase land if he does not belong to the agricultural tribe. Under S. 17 (2) sale deed could not be registered unless a certified copy of sanction was given to the registering officer. Where sanction was not procured till the agreed date a subsequent obtaining of sanction will not preclude the defendant from resiling from the agreement to sell to the plaintiff. (*Shadi Lal and Le Rossignol, JJ.*) PAL SINGH *v.* THAKAR SINGH. **38 I. C. 15: 120 P. R. 1916.**

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 21.

——S. 21—*Object of—Declaratory decree, whether can be contrary to Act—Application by Dy. Commissioner— Procedure— Power of Chief Court.*

The object of S. 21 (*a*) was merely to enable the correction of decree which on the face of the record infringe the provisions of the Act. A decree, even though it be only declaratory which has the effect of conferring a legal title where no such title would otherwise exist may well be contrary to the provisions of the Act. Evidence on the record being not sufficient for the disposal of an application made by a Dy. Commissioner under S. 21 (*a*) of the Act, the Chief Court has power to order a remand for further inquiry. (*Rattigan, Shadi Lal and Leslie Jones, JJ.*) FEROZ DIN *v.* BASRI. **52 P. R. 1916: 72 P. W. R. 1916: 32 I. C. 446: 35 P. L. R 1917 (F. B.).**

——S. 21—*Reference to Civil Court—Duty of Court -Sale of mortgagee—Rights in execution contrary to Act—Effect.*

When under S. 21 a reference is made by a Deputy Commissioner to a Civil Court the latter is bound to adjudicate on the matter. If it refuses the reference it may on a representation reconsider its order and pass a fresh order according to law When mortgagee-rights are sold in execution of a decree, in contravention of the Act, the sale may be set aside upon a reference made by the Dy. Commissioner of the district under S. 21 of the Act. (*Shah Din and Chevis, JJ.*) ASA SINGH *v.* BUTA. **12 P. R. 1911: 6 P. L. R. 1911: 9 I C. 396: 23 P. W. R. 1911.**

——S. 21-A—*Alienation by widow— Subsequent decree of Court—Limitation.*

The widow of a Gaur-Brahman had sold her occupancy rights in land to some Rors, and after her death her reversioners sued for possession of the land The suit resulted in a compromise, and the decree of the Civil Court was passed in 1919. The Deputy Commissioner applied in revision on 12th April, 1922. *Held*, the application is time barred. Moreover it fails on the merits, as, even if thealienation by the widow Contravened the provisions of the Land Alienation Act, it is not explained in what way they are contravened by the subsequent decree of Court. (*Martineau, J.*) RAM KALA *v.* HIRA. **1923 Lah. 218.**

——S. 21 A—*Nature of—Limitation.*

S 21-A of the Punjab Alienation of Land Act is retrospective and a Deputy Commissioner can apply for revision of a decree passed before or after the section came into force but he must do it within two months of notice of the decree or order. (*Kensington and Johnstone, JJ.*) BHOLA RAM *v.* MUHAMMAD. **14 I. C. 330: 235 P. W. R. 1912.**

——S 21-A—*Application under—Limitation —Time spent in prosecuting application in wrong Court—Lim. Act, S. 14.*

The period of limitation for an application under S. 21 A by a Deputy Commissioner against a decree in contravention of Act XIII of 1900 is two months from the date when the Deputy Commissioner is informed of such a decree S. 21-A of Act (XIII of 1900) provides only for applications to a Court competent to interfere with the first Court's decree in appeal or reversion and time spent on prosecuting such an application in a wrong Court cannot therefore be excluded ; the period of 2 months is not subject to the provisions of Ss. 4 to 25 of the Limitation Act. (*Chevis, J.*) KATARA *v* ARIAN SINGH. **200 P.L.R. 1911 : 11 I. C. 34 : 158 P.W R. 1911.**

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 21-A.

——S. 21, Cl. (2)—*Decision of revenue authority not binding on Civil Court.*

The Civil Courts are at liberty to form their independent opinion on the point and are not bound by the decision of a revenue officer as to whether a person is a member of an agricultural tribe or not. (*Martineau, J.*) LADHA RAM *v.* ALI SHAH. **3 Lah. L. J. 489.**

——S. 21-A (2)—*Time prescribed for an application under— Whether Chief Court can extend.*

The Chief Court cannot extend the time prescribed for an application under S 21-A (2) of the Act *Obiter.*—It is doubtful whether a decree under S. 9 of the Sp. Rel. Act which does not settle any question of title can be revised under S. 21-A, Cl (2) of the Punjab Alienation of Land Act (*Kensington, O. C. J.*) PHUMAN SHAH *v.* CHHANGA. **7 P. R. 1914 : 23 I. C. 299 : 135 and 153 P. L. R. 1614.**

——S. 21-A (2)—*Consent decree—Alienation —Alteration of decree—Forum.*

An agriculturist sold his land to a non agriculturist in 1879 but in the Revenue Records the transaction was described as a mortgage. The parties compromised the litigation and the Court passed a declaratory decree whereby three-fourths of the land was treated as permanently alienated to the vendee, while the remaining one-fourth was released absolutely to the vendor : *Held*, the compromise decree merely construed the sale-deed of 1879 in accordance with the wishes of the parties and the compromise and the decree based thereon did not amount to an alienation by an agriculturist to a non-agriculturist in opposition to the Alienation of Land Act. The proper Court for the Dy. Commissioner under S. 21-A (2) of the Act, to apply to in the case of a consent decree, is the Chief Court. *Quaere* : Whether the power to "Alter" a decree under S. 21-A (2) of the Act, also implies the power to set it aside especially when the decree is a consent decree and is not appealable under S. 96 (3), C. P. Code? 200 P. L. R. 1911 Ref. (*Kensington and Beadon, JJ.*) MILKI *v.* BISHEN DAS. **8 P. R. 1913 : 9 P. L. R 1913 : 16 I C. 957 : 280 P. W. R. 1912.**

——S. 21-A (2)—*Sale under, recognised by Deputy Commissioner if can be interfered with by successor.*

A sale under S. 21-A (2) once recognized by a Deputy Commissioner cannot be interfered with by his successors in office except on proof that the former had not full knowledge of the facts or was mislaid A knowledge of such sale by one Deputy Commissioner is knowledge of his successor in office. (*Rattigan, J.*) SURGIANI MAL *v.* COLLECTOR OF JULLUNDUR. **132 P. W. R. 1911 : 11 I. C. 273 : 215 P. L. R. 1911.**

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 21

——S. 21 (2)—*Civil Court not to take cognizance of Dy. Commissioner's manner of exercising his powers.*

The Deputy Commissioner's manner of exercising his powers under the Act cannot be taken cognizance of by a Civil Court as S. 21 (2) debars such a procedure. (*Johnstone, C. J. and Chevis, J.*) GANGA RAM *v.* RAJA RAM
37 I. C. 763 : 124 P. R. 1916.

——S. 44—*Record of rights—Entry in—Caste—Onus of proof.*

An entry in the Revenue records about the caste of a person does not relieve him of the burden of proving affirmatively, if the fact is disputed by the opposite party. S 44 of the Punjab Land Revenue Act is not applicable to the case. (*Martineau and Moti Sagar, JJ.*) SADIQ HUSSAIN, *v.* ANUP SINGH. **4 Lah 327 : 5 L. L. J. 462 : 1924 Lah. 151**

PUNJAB CANAL AND DRAINAGE ACT (VIII OF 1873).

——S. 10 (4)—"*Authorised distribution*"—*Whether it includes internal distribution*

"Internal distribution" in a village by the village community is not an authorised distribution within S. 70 (4) as it is not formally approved or sanctioned by any canal authority where they have merely accepted the distribution made by the villagers and disturbing the arrangement of the village community does not justify conviction. (*Chevis and Dundas, JJ.*) EMPEROR *v.* PAKHAR SINGH. **60 I. C. 59 : 1 Lah. 604.**

——Ss. 20 and 23—*Permanent right of irrigation.*

Canal authorities cannot confer permanent right of irrigation on a person without proceeding either under S. 20 or 23 of the Act. (*Martineau, J.*) KANAI LAL *v.* NARAIN SINGH.
50 I. C. 299 : 177 P. W. R. 1918.

——S. 32—(e)—*Use of water course for irrigation—Agreement to pay compensation to owner—Effect and validity.*

An agreement to pay compensation to the owners of a water course for the use of the same for irrigation amounts to a sale of canal water and is not permissable without the consent of the Superintending Engineer, except in the circumstances contemplated in S. 32 (*e*) of Act VIII of 1873 ; such an agreement is contrary to public policy and cannot be enforced by the Court. (*Fenton, F. C.*) MOHAMMAD NASIR KHAN *v* FARID. **8 P. R. 1913 (Rev.) : 22 I. C. 398 : 216 P. L. R. 1915**

——S. 47—*Payment of dues by Lambardar—Interest.*

A Lambardar paying canal dues from his pocket is entitled to collect the same with interest from subordinate zamindars including muafidar. (*Tudball, J.*) RAMKISHEN *v.* MAHESWAR PRASAD.
32 I. C. 556.

——S. 70 (4)—"*Authorised distribution*"—*Meaning of—Private arrangement—Civil remedy*

The "authorised distribution" in S. 70 (4) means distribution expressly made by the canal authorities ; and any further distribution between a landlord and his tenant is a matter of private contract, breach of which, only entitles a tenant to bring a civil action. (*Kensington and Shahdin JJ.*) BASAN *v.* EMPEROR. **217 P. L. R. 1913 : 14 Cr. L. J. 281 : 21 P. W. R. 1913 : 19 I. C. 713 : 19 P. R. 1913 (Cr.)**

PUNJAB CANAL COLONY.

——*Residence—Condition of—Possession of a habitable house—Chenab Canal Valley.*

In the Lower Chenab Colony the fact that a grantee has a habitual house in his *chak* must be accepted as conclusive evidence that he is fulfilling the condition of residence. (*Maynard, F. C.*) BAHADIR *v.* EMPEROR. **3 P. R. 1914 (Rev.) : 26 I. C. 756 : 228 P L. R. 1915.**

PUNJAB CHIEF COURT RULES (VOL III OF 1881.)

——Rr. 3 and 4—*Pleader's fees—Injunction, suit for.*

The pleader's fee in a suit for an injunction is not left to the pleasure of the Court but should be calculated according to the valuation of the suit or according to such a sum not exceeding the valuation as the Court shall think reasonable under the rules. (*Scott Smith, J.*) GURDIT SINGH *v.* ISHARDAS. **54 I. C. 905 : 165 P. R. 1919.**

——R. 30 (3) and (4)—*Pre-emption suit—Pleader's fee—Method of calculation.*

It is R 30 (4) which deals with the question of Pleader s fees in a suit for pre-emption and the fees are to be calculated with reference either to amount decreed or according to the valuation of the suit, or according to such sum not exceeding the valuation, as the Court thinks reasonable, and fixes with reference to the importance of the subject of dispute. (*Rattigan, J.*) BALU *v.* MADAN GOPAL. **149 P. L. R. 1911 : 10 I. C. 38 : 192 P. W. R. 1911.**

PUNJAB COLONISATION OF GOVERNMENT LANDS ACT (V OF 1912).

——Ss. 14, 15 and 19—*Passing of proprietary right to tenants on payment of the first instalment—Small balance due—No hindrance to possession.*

If a tenant under the Govt. Tenants Act, paid the purchase money by instalments for the acquisition of proprietary rights under the terms of Cl. 17 of the statement of conditions applicable, he gets proprietary rights on the payment of the first instalment S. 14 of the Colonization Act, 1912, prevents S. 15 of that Act from operating with retrospective effect and the latter section does not deprive the instalment purchaser of a right of property already acquired because there was a small balance of interest still due from the tenant to Govt. (*Fenton, F. C.*) GURU DUTT *v.* KARTAR SINGH. **2 P. W R. 1916 (Rev.) : 36 I. C. 125 : 32 P. L. R 1917.**

——S. 19—*Will of occupancy—Validity.*

Where an occupancy tenant devised his occupancy land prior to the Act but acquired proprietary rights after the Act *held*, that the Will was not invalid under S. 19 of the Act. (*Broadway and Wilberforce, JJ.*) DALIP SINGH *v.* BALWANT SINGH. **59 I. C. 513: 1 Lah. 500.**

PUNJAB COLONISATION OF GOVERNMENT LANDS ACT (V OF 1912), S. 21.

——— S. 21—*Government tenant—Succession—Widow—Gift of estate.*

A Government tenant died after acquiring occupancy right and his land was mutated in favour of his widow. The widow subsequently acquired proprietary rights and gifted the land away. In a suit by the reversioners of the tenant, *held* that the widow had absolute control of the property on acquisition of occupancy rights and that S. 21 of Act V of 1912 was not applicable to the widow and her estate. Consequently the reversioners of the tenant could not succeed to occupancy right. (*Shadi Lal, C. J. and Wilberforce, J.*) BISAKHA SINGH *v.* ISHAR.
4 Lah. L. J. 296.

——— S. 21—*Death of tenant before the Act came into force—Payment of sums to Government for proprietary rights—Effect of*

On the death of the tenant, the tenancy was mutated in the names of his son's widow and his son's son's widow who paid necessary sums to Government for the acquisition of proprietary rights and the reversioners of the tenant sued for the property. *Held*, that the section did not apply owing to the death of the tenant before the Act came into force, and that the payment of sums to Government made them owners of the land in their own right. (*Johnstone and Shadi-Lal, JJ.*) MALAP KAUR *v.* HAKIM SINGH.
8 P. R. 1915 : 28 I. C. 441 : 195 P. L. R. 1915.

——— S. 33—*Retrospective operation—Scope—Omission to do an act.*

S. 38 is not retrospective and it cannot apply to punish a person for an act committed before the Act came into force.

An omission to do a certain act does not come within the purview of S. 33 of the Act and is not punishable. (*Shadi Lal, J.*) MIRAN BAKSH *v.* EMPEROR. **26 P. R. 1913 Cr. : 91 P. L. R. 1914 : 15 Cr. L. J. 146 : 22 I. C. 722 : 33 P W R. 1914 (Cr.)**

PUNJAB COURT OF WARDS ACT (II OF 1903).

——— Ss. 8, 19—*Court of Wards assuming superintendence of property of person other than ward*—Ultra vires.

A Court of Wards, purporting to act under S. 8 of the Act, wrongly assumes superintendence of the property of persons other than the ward, its action is *ultra vires* and objection to such action can be taken not only by the person owning the property but by any person affected thereby. (*Chevis and Scott Smith, JJ.*) TARA SINGH *v* GANDA SINGH. **2 Lah 151 : 3 Lah. L J. 342 : 63 I. C 606 : 3 U. P. L. R. (Lah.) 58.**

——— Ss. 11, 12 — *Deputy Commissioner's Jurisdiction.*

An order, by a Deputy Commissioner, restraining alienation when person and the property are both outside the jurisdiction, is not valid (*Lord Buckmaster,*) MAHAMED RUSTAM ALIKHAN *v* MUSTAQ HUSSAIN **42 All. 609 : 47 I. A. 224: 32 C. L. J. 471; 18 A L. J. 1039 : 39 M L J 263 : (1920) M. W. N. 565 : 12 L. W. 539 : 57 I. C. 329 : 28 M. L. T. 220 (P.C.). [Affirmed O. A *See* 35 I. C. 718.]**

PUNJAB COURTS ACT (XVIII OF 1884), S. 11.

——— Ss. 13 (1), 20, 40 and 46—*Suit by Court of Wards—Death of a ward—Effect.*

The suit is not abated by the death of one of the wards on whose behalf a suit has been instituted by the Court of Wards nor does the Court of Wards cease to have an interest in the property in dispute. (*Le Rossignol and Martineau, JJ.*) KARIM BAKSH *v.* COURT OF WARDS SALARWAHAM ESTATE. **4 Lah. L. J. 391.**

——— S. 26—*Subsequent application without certificate.*

The executing court has every power to entertain a subsequent application without the Deputy Commissioner's certificate under Sec. 26 of the Act, if it has been once filed along with the application for execution of the decree or in proceedings relating thereto. (*Shah Din, J.*) DEPUTY COMMISSIONER AMRITSAR *v.* BALA MAL.
58 I. C. 635 : 3 P. R. 1919.

——— Ss. 26 and 31—*Property under the charge of Court of Wards—Execution.*

If the decree-holder files the requisite certificate from the Deputy Commissioner, the executing court has power to issue attachment or other processes against the property of the judgment-debtor under the superintendence of the Court of Wards. (*Shahdin, J.*) BALWANT SINGH *v.* MAHIMDAR SINGH. **49 I. C. 476 : 23 P W. R. 1919.**

——— S. 31—*Ward of Court—Execution of decree against—Filing of certificate if necessary on each application.*

It is enough if one certificate is filed in the executing court to the effect specified in S 3 (2) and the executing court has every power to take action upon a subsequent application for execution without a fresh certificate. The property of the ward can be attached and sold in execution without the consent of the Court of Wards, (*Shahdin, J.*) DEPUTY COMMISSIONER, AMRITSAR *v.* BALAMAL. **58 I. C. 635 : 3 P. R. 1919.**

——— S. 31—*Powers of Executing Court under.*

The Executing court has power under S. 31 of Act to order the sale of the attached property under Court of Wards without their consent or concurrence. (*Shahdin, J.*) DY. COMMISSIONER, AMIRTSAR, *v.* MAHINDAR SINGH. **58 I. C. 631 : 9 P. R 1919.**

PUNJAB COURTS ACT (XVIII OF 1884).

——— *Question of custom — No certificate necessary.*

For agitating a question of custom in second appeal there is no necessity for a certificate, (*Broadway and Moti Sagar, JJ.*) IFTIKHAR ALI KHAN *v.* RISALAT KHAN. **5 Lah. L. J. 341.**

——— S. 11—*Reference of Full Bench by Sessions Judge—Verdict of Jury though given to be unanimous, was only of majority.*

In a trial by Jury, an unanimous verdict of guilty was given, but was subsequently found to be only the verdict of the majority of jurors. The Judge thereupon took action under S. 11 and referred for the opinion of the Full Bench the question whether any proceedings should be taken in the matter and if so, what course should be adopted. *Held*, that the Full Bench could

PUNJAB COURTS ACT (XVIII OF 1884), S. 13.

give the opinion as the question arose before a Judge sitting as single bench, in a judicial proceeding. (*Reid, C. J. Robertson and Rattigan, JJ.*) EMPEROR *v.* BRIAN BOUHAM.
6 P. R. 1913 Cr. : 175 P. L. R. 1913 : 9 P. W. R. 1913 (Cr) : 17 I. C. 559 : 13 Cr. L. J. 815 (F. B.).

——S. 13—*Power of Superintendence—Extent of.*

S. 13 of the Act gives the Chief Court a power of superintendence and control only over Civil Courts. It does not apply where the Court is asked to revise the order of a Dt. Magistrate. 8 P R. 1900, Dist. from. (*Kensington, C. J. and Rattigan, J.*) SADRUDDIN *v.* EMPEROR.
18 P. R. 1914 (Cr.) : 51 P. W. R. 1914 (Cr.) : 25 I. C. 513 : 15 Cr L J. 601 : 266 P L. R. 1914.

——S. 14—*Rules under—Copying agent—If Officer of Court.*

The copying agent is not an officer of court to whom application for copies could properly be made and that he could not be regarded as of higher status than an agent of the appellants. (*Johnstone and Shah Din, JJ.*) ASHIQ HUSSAIN *v.* ALI BAKHSH.
61 P. L. R. 1911 : 9 I. C. 381 : 189 P. W. R. 1911.

——Ss. 39 and 40—*Jurisdiction — First appeal—Test of.*

The question of jurisdiction in respect of a first appeal must be determined with reference to the claim made and not with regard to the decision upon the claim. A distinction can be made between first appeals under S. 39 and further appeals under S. 40 of the Punjab Courts Act. 106 P.R. 1909, Rel (*Kensington and Beadon, JJ.*) ALLAH BAKSH *v.* RAM LAL. **3 P. L R. 1913 : 16 I. C. 865 : 274 P. W. R. 1912.**

——S. 39 (1) A and B—*Suit for redemption—Forum of appeal.*

In a redemption suit the value of the suit is the amount of the property. The value of the suit as stated in the plaint cannot be altered by the plea of the defendant, whether it be true or false. The jurisdiction for purposes of a suit as well as appeal is to be determined with reference to the claim made and not to the amount which is actually adjudged to be due. (*Le Rossignol and Broadway, JJ.*) FATEH CHAND *v.* MT. JOWAHAR DEI. **5 Lah. L. J. 143 : 1923 Lah. 568.**

——S. 40—*Value of suit under Rs. 1000—Further appeal.*

In a suit for declaration of the invalidity of a sale deed and injunction, plaintiff valued the suit at Rs. 1,080 for purposes of jurisdiction and at Rs 750-5-0 for purposes of stamp duty. The lower courts decreed the claim and the defendant appealed to the Chief Court. *Held*, that no further appeal lay to the Chief Court as the value of the suit was under Rs. 1,000. An appeal filed as a further appeal under the Act of 1884 could not be altered after the coming into force of the new Act into a second appeal or revision under S. 70

PUNJAB COURTS ACT (XVIII OF 1884), S. 40.

(1) of the old Act that the plaintiff was not estopped from contending that the value of the suit was really less than what he put it at. (*Johnstone and Rattigan, JJ.*) SUKH RAJ *v.* KANHAYA LAL.
2 P. R. 1915 : 28 I. C. 113 : 194 P. L R. 1915.

——S. 40—*Finding of fact without evidence.*

A finding of fact based on no evidence on the record will be set aside in second appeal (*Johnstone, J.*) MAM CHAND *v.* BUD RAM.
179 P. L. R. 1914 : 24 I. C. 902 : 80 P. W. R 1914.

——S. 40—*As amended by Act IV of 1912—Second appeal—Finding as to necessity of mortgage—If can be gone into.*

The Chief Court will not interfere in second appeal with the finding of lower courts on the question of legal necessity for a mortgage. (*Scott Smith, J.*) DIWAN SINGH *v.* BISHNA.
31 P. W. R. 1914: 23 I.C. 940 : 117 P. L. R. 1914.

——S. 40—*Certificate appeals—Applicability of O. 43, R. 1 of C. P. C.*

The certificate appeals under S 40 of the Act do not fall within the purview of the second part of Cl. (u) of Rule 1 of O 43 C. P. C. (*Shah Din and Chevis, JJ.*) SAWAN SINGH *v.* MOTHU.
162 P. L. R. 1914 : 120 P. W. R. 1914 : 23 I. C. 817: 86 P. R 1914.

——S. 40—*As amended by Acts I and IV of 1912--Second appeal on question of custom—Without certificate—Revision.*

Under S. 40 of the Act as amended by the Acts of 1912, no second appeal lies regarding the validity of existence of a custom without a certificate even if a question of law or error in procedure have occurred and it would not be proper to interfere in revision either. (*Chevis, J.*) ARURA *v.* IMAM BAKSH. **4 P. W. R. 1914 : 23 I. C 352 : 28 P. L. R. 1914.**

——S. 40—*Unclassed suits—Same question—Each decree less than Rs. 2,500 but both combined exceed Rs. 2500—Further appeal, if lies.*

Where two decrees in unclassed suits involving the same question of inheritance, directly involved together property worth more than Rs. 2,500 but each decree involved less than that amount no further appeal lies under S. 40 of the Act as it stood before Amendment Act of 1912. (*Johnstone and Shah Din, JJ.*) HUKUM CHAND *v.* MUSAMMAT JINDO BAI. **129 (a P. L. R 1914 : 23 I. C. 109 : 90 P. W. R. 1914.**

——S. 40—*Second Appeal—Declaratory suit—Reversionary interest—Valuation for jurisdiction.*

The jurisdictional value of declaratory suit to protect a reversionary interest in the land is 30 times the assessment. There would be no second appeal under the Punjab Courts Act before 1912 if the jumma is Rs. 8 only. (*Kensington, J.*) HAR NAM SINGH *v.* RAMA DITTA. **178 P. W R. 1913 : 21 I. C. 308 : 311 P. L. R. 1913.**

——S. 40--*Punjab Courts (Amendment) Act (I of 1912) S. 6—Appellate decree passed after Act I of 1912 - Further appeal, General Clauses Act (X of 1897), S.6—Punjab General Clauses Act (X of 1898), S. 4—C. P. Code, S. 154.*

PUNJAB COURTS ACT (XVIII OF 1884), S. 40.

An appellate decree passed after the date on which the Punjab Act I of 1912 came into force is open to no futher appeal, under S. 40 of the Act XVIII of 1884 to the Chief Court. The express saving of the "present" right of appeal in S. 6 of the Punjab Act I of 1912 shows the exclusion of any future right not in existence at the commencement of the Act. The word "present" in S. 6 of the Punjab Act I of 1912 means that there should be in existence a decree or order subject to appeal. 12 P. R. 1900 : 84 P. W. R 1912. 8 I. C. 8 ; 14 I. C. 53; 16 C. W. N 1015 Rel. (*Reid, C. J., Robertson Kensington Rattigan, Chevis and Beadon, JJ.*) DEOKI NANDAN *v.* HARANAM DAS.
122 P. R 1912 : 13 P L. R 1912 : Suppl. 256 P. W. R. 1912 : 16 I. C. 983.

——S. 40—*Suit for injunction compensation for Rs.* 3000—*Appeal.*

Where in a suit for injunction to stop the construction of a building the Lower Appellate Court awarded Rs. 3,0 0 as damages. *Held* that a further appeal lay to the Chief Court as the decree involved a question regarding property of Rs. 3000 in value. 24 P.R 1903 ; 35 P.L. R. 1903 (F B). Followed (*Shah Din and Chevis, JJ.*) HAIDER HUSSAIN *v.* MUHAMMAD HUSSAIN. **90 P. R 1911 : 14 I. C. 405 : 204 P. W. R. 1912**

——S. 40 (3)—*Punjab Courts Amendment Act I of* 1912, S. 2—*Second appeal—Question whether validity of custom properly raised before lower Court—Certificate, necessity for.*

Where the question raised in a second appeal is not the validity or existence of a custom but whether the validity or existence of a custom was a question properly raised before the Lower Appellate Court, a second appeal lies without the certificate of such Court under S. 40 (3) of the Act (XVIII of 1884) as amended by Act (I of 1912) S. 2. 19 P. R. 1915. Foll. (*Chevis and Le Rossignol, JJ.*) NUR ALI *v.* BAHAWAL. **31 I. C 386 : 54 P. W. R 1916 : 34 P. R. 1916.**

—— S. 40 (1) (a)—*Second appeal—Question of fact, whether common ancestor occupied land—Punjab Tenancy Act,* S. 59.

In a suit by a collateral for succeeding under S. 59, Punjab Tenancy Act, to an occupancy holding, the question whether, the land was occupied by a common ancestor is one of fact and cannot be made a ground of second appeal (*Johnstone, J.*) DHIAN SINGH *v.* SANTA SINGH.
190 P. L. R. 1914: 24 I. C. 687: 92 P. W. R 1914.

—— S. 40 (1) (a)—*Validity or existence of custom—Second appeal—Certificate.*

A decision which is contrary to law, custom, or usage is open to second appeal and it is only where the contention is that the alleged custom is invalid or does or does not exist that a certificate is necessary. (*Rattigan and Shadi Lal, JJ.*) SANTA SINGH. *v.* WARYAM SINGH.
207 P. L. R. 1914: 19 P. R 1915: 24 I. C. 361: 147 P. W. R. 1914.

—— S. 40 (1) (a) (i)—*Appellate decree declaring a house to be waqf property—Further appeal.*

A further appeal lies from an appellate decree declaring a house to be waqf if its market value exceeds Rs. 1,000. (*Chevis, J.*) KHAIR AHMAD *v.* MIR AHMAD ULLAH. **52 P. W. R. 1912. 13 I. C. 408: 93 P. L. R. 1912.**

PUNJAB COURTS ACT (XVIII OF 1884), S. 70—Interlocutory order.

——S. 40 (1) (a) (ii)—*Further appeal--Failure to pay required Court-fee in first appeal.*

Where the appellant failed to pay the required Court-fee as directed and the appeal was on that account rejected, the decree of the first court being confirmed, S. 40. (1) (*a*) (ii) of the Punjab Courts Act, before its amendment by Act I of 1912 precludes a further appeal. (*Shah Din and Chevis, JJ.*) SURJU MAL *v.* ASRAM.
160 P. L. R. 1914: 23 I. C. 451: 150 P. W. R. 1914.

——S. 41, Sub-Sec. (3)—*Custom, Question of Court—Certificate.*

Semble:—A certificate from the lower appellate Court on questions of custom or usage is necessary for the maintainability of an appeal under S. 41 Sub Sec. (3) (*Johnstone, C. J.*) ALLAH DIN *v.* SALAM DIN. **96 P. R. 1915: 31 I C. 497: 169 P W. R 1915.**

—— S. 70—

Delay.
Interlocutory order.
Material irregularity.
Onus wrongly laid.
Question of fact.
Question of law.
Scope of.
Miscellaneous.

Delay.

—— S. 70—*Delay—Order setting aside* ex parte *decree.*

Where an *ex parte* decree was set aside on condition of payment of costs, which were paid and received by the plff. without protest and a reply to the deft.'s pleas was put in by the plff., and two months later he put in a petition for revision of the order setting aside the *ex parte* decree the plff.'s conduct amounted to acquiescence in the order and no revision would lie. (*Johnstone and Shah Din, JJ.*) PONNALAL *v.* COWSJI. **25 P. R. 1914: 23 I. C. 919: 157 P. L. R. 1914.**

Interlocutory order.

—— S. 70—*Interlocutory order—Court-fee—Court-Fees Act,* S. 7 (*iv*) (*f*) *and* II.

An interlocutory order in a partnership account suit directing plff. to pay enhanced Court-fee calculated on a higher valuation, would not ordinarily be interfered with in revision. (*Kensington, J.*) SANT SINGH *v.* NATHU MAL.
115 P L. R. 1913 : 18 I. C. 480: 94 P W. R. 1913.

——S. 70—*Interlocutory order—Revision.*

A High Court will not interfere on revision with inter locutory orders unless for special reasons, and circumstances. (*Robertson and Banerjee, JJ.*) YUSUF *v.* NAZRE **17 P. L. R. 1913: 278 P. W. R. 1913: 16 I. C. 995: 11 P R 1913.**

—— S. 70—*Interlocutory order—Application to sue* in forma pauperis.

No revision lies against an order granting an application to sue *in forma pauperis* as it is only an interlocutory order 99 P. R. 1882 Dist. 32 A. 623 Foll. (*A. Reid, C. J.*) SUNDAR DAS *v.* NARAIN DEVI. **193 P. W. R. 1912: 87 P. R. 1912: 14 I. C. 240 : 261 P. L. R. 1913**

PUNJAB COURTS ACT (XVIII OF 1884), S. 70—Interlocutory order.

——— S. 70—*Interlocutory order.*

An interlocutory order is not ordinarily open to revision. But it can be interfered with by the chief Court where irreparable loss would result otherwise. (*Johnstone, J.*) NIHALA MALL *v.* BAGU RAM. **164 P. W. R. 1911 : 11 I. C. 880: 243 P. L. R. 1911.**

——— S. 70—*Interlocutory order—Final order appealable—Revision—Court-fees.*

An interlocutory order in a case *e.g.* to pay a higher Court fee cannot be interfered with in revision by the High Court where an appeal lies against the final order. (*Johnstone and Rattigan, JJ.*) CHANDO *v.* JWALA PERSHAD.
169 P. W. R 1911: 11 I. C. 840 : 253 P. L. R. 1911.

Material Irregularity.

——— S 70—*Material irregularity—Misapprehension of the nature of a claim and pleadings.*

Where the lower Courts have misapprehended the nature of the claim and the pleadings of the parties and have wrongly dismissed the suit as barred by limitation, the chief Court will interfere in revision. (*Robertson, J.*) SOHAN SINGH *v* LAKHUMAL. **96 P. W. R 1913: 19 I. C. 5: 135 P. L. R. 1913.**

——— S. 70—*Material irregularity plea not adjudicated.*

Omission to adjudicate a plea is a good ground for revision under S. 70 (1) (*a*) of the Act. (*Reid, C. J.*) MATHRA DASS *v.* KARAR DEVI.
5 P. W. R. 1913: 18 I. C. 610: 140 P. L. R. 1913.

——— S. 70—*Material irregularity--As amended by (XXV of* 1889.)

If a Court bases its decision on a perverse view of the facts and on arbitrary assumption it commits a material irregularity which can be interfered with in revision. (*Kensington, J*) JAWAHRI MAL *v.* DHANPAT. **163 P. W. R. 1912: 17 I. C. 223: 170 P L. R. 1912.**

——— S. 70—*Material irregularity—Order returning plaint for deficiency of Court-fee.*

An order rejecting a plaint for deficiency of the Court fee is not subject to revision. If, for non-compliance with the order, the Court rejects the plaint the order of rejection would be a decree and appealable as such. (*Reid, C. J.*) NAWAB *v.* DUNI CHAND. **69 P. R. 1912: 202 P W. R. 1912: 16 I.C. 475. 212 P. L. R. 1912.**

——— S 70—*Material irregularity—Revision*

A deft. must be limited to the defence set up by him in the first Court. An appellate Court cannot go outside the merits, and consider a technical point not raised in the original pleading and if it does so, it will be a material irregularity liable to be interfered with in revision. (*Chevis, J*) KARAM BAKSH *v.* ABDUL KARIM.
81 P. W. R. 1912: 14 I. C. 1008: 146 P. L. R. 1912.

——— S. 70—*Material irregularity—Misconstruction of documentary evidence.*

Misinterpretation of a post card which is only a piece of evidence and not the foundation of the suit is not such a substantial question of law to justify a revision petition to be treated as a

PUNJAB COURTS ACT (XVIII OF 1884), S. 70—Material Irregularity.

second appeal but misconstruction of a document forming the basis of a suit, or a contract or document of title is a sufficient ground for second appeal, 10 I. C. 325 Foll. (*Shah Din, J.*) NARAIN SINGH *v.* JAGGAT SINGH **14 I. C. 331: 190 P. W. R. 1912.**

——— S. 70—*Material irregularity—Misunderstanding position of parties.*

Where, in a suit for possession under S. 9, the Court misunderstood the plff.'s position and ignored material evidence, and did not distinguish between possession and use or occupation, *held* that all these constituted material irregularity so as to necessitate a retrial (*Arthur Reid, C. J. and Rattigan, J.*) O'BRIEN *v.* ABDUL RAHMAN.
28 P. W. R. 1912 : 14 P. L. R. 1912 : 13 I. C. 6.

——— S. 70—*Material irregularity—Over-looking statute.*

It is material irregularity to overlook relevant portions of an Act of the legislature. (*Johnstone, J*) HUSSAIN BIBI *v.* NEK ALAM.
157 P. W. R. 1911 : 11 I.C 833: 245 P. L. R. 1911.

——— S. 70—*Material irregularity—Substantial justice.*

The Chief Court can interfere in revision only where the decree or order sought to be revised is manifestly injust and inequitable resulting in substantial harm to the litigant party. (*Johnstone, J.*) SAADAT SULTAN BEGAM *v.* MUHAMMAD MUNIR KHAN **149 P. W. R. 1911 : 11 I C. 831 : 249 P. L. R. 1911.**

——— S. 70—*Material irregularity—Erroneous decision on a point of limitation.*

An erroneous decision by lower Court on a question of limitation, (where it is a doubtful one especially) is not a material irregularity within the meaning of S. 70 (1) (*a*) of the Act and such an error is not a sufficient ground for revision. (*Chevis, J.*) JALU *v* SAINAND. **204 P. L. R. 1911. 11 I. C. 60 : 231 P. W. R. 1911.**

——— S. 70—*Material irregularity—Suit for declaration—Decree for possession, if can be passed in*

The passing of a decree for possession under whatever ground in a suit for mere declaration is a material irregularity within the meaning of S. 70 (*a*). (*Kensington, J.*) FAZAL DIN *v.* AMIR BAKSH. **199 P. L. R 1911 : 11 I. C 33 : 159 P. W. R. 1911.**

——— S. 70—*Material irregularity—Dismissal of suit on technical construction.*

The dismissal of a suit solely on a technical construction of S. 83 of the Neg. Instr. Act constitute " material irregularity " under S. 70 (*a*). (*Reid, C J. and Kensington, J.*) KHAN CHAND *v.* GOLAB RAM. **39 P R. 1911 : 142 P. L R. 1911 : 10 I. C. 133 : 234 P. W. R. 1911**

——— S. 70—*Material irregularity.*

The Court will not interfere in revision merely on the ground that the construction placed on the words in a document is incorrect unless it finds

PUNJAB COURTS ACT (XVIII OF 1884), S 70—Material Irregularity.

that in the interpretation of those words a material irregularity has been committed. (*Rattigan, J.*) MAKHAN *v* NATHU RAM
125 P. L. R. 1911 : 9 I. C. 1008 : 89 P. W. R. 1911.

——— S. 70—*Material irregularity.*

A mere misinterpretation of document or error of law does not amount to material irregularity. (106 P. R. 1908, con.) (*A. Reid, C. J.*) ARUR SINGH *v.* DAYAL SINGH.
20 P. R. 1911 : 93 P. L. R. 1911 : 9 I. C. 579 : 54 P. W. R. 1911.

Onus wrongly laid.

——— S. 70—*Onus wrongly laid.*

The judgment based upon a wrong adjustment of onus is revisable under S. 70 (1) (*a*) of the Act. (*Scott Smith, J.*) FIRATH RAM *v.* ANTAR SINGH. **8 P. W. R. 1914 : 22 I. C. 861 : 32 P. L. R. 1914.**

——— S. 70—*Onus wrongly laid, if ground for revision.*

A revision is not justified on the mere ground that the onus was placed on the wrong party. 64 P. R. 1885 ; 22 P. R. 1886 ; 20 A. 78 ; 11 I. A. 237, Ref. (*Reid, C. J.*) KARIMULLAH *v.* KIMON.
102 P. R. 1912 : 207 P. L. R. 1912 : 15 I. C. 839 : 213 P. W. R. 1912.

Question of Fact.

——— S. 70—*Question of fact—Possession not permissive—No revision.*

That possession is not permissive is a finding of fact and cannot therefore be questioned in revision. (*Chevis, J.*) SHAM SINGH *v.* PREM SINGH. **17 I. C. 508 : 260 P. W. R. 1912.**

——— S. 70—*Question of fact—Appeal—Respondent can support on independent grounds.*

At the hearing of an appeal, admitted under S. 70 (1) (*b*) of the Act, the petitioner cannot attack the lower Court's decision on findings of fact. But the respondent may support the decision on any grounds. Including those decided by the lower Courts, in favour of the petitioner. (*Shah Din and Chevis, JJ.*) DURGA DAS *v.* KANSHI RAM. **166 P. L. R. 1912 : 16 I. C. 769 : 273 P. W. R. 1912.**

——— S. 70—*Question of fact—Custom—Mortgage of house by occupant in village Abadi—Suit by some proprietors in their own right, for possession.*

Where a suit by certain members alone of the proprietary and body of a village *Abadi in their own right* but not in a representative capacity for possession of a house mortgaged by the occupant is dismissed on the ground that they did not establish the individual rights asserted, *held* no question of custom was involved in the suit and therefore there was no revision to the chief Court. (*Shah Din, J.*) BAGGA SINGH *v.* HARNAM SINGH.
95 P. L. R. 1911: 11 I. C. 377: 213 P. W. R. 1911.

——— S. 70—*Question of fact—No revision.*

A finding that a mortgage was not a fictitious transaction as the greater part of the considera-

PUNJAB COURTS ACT (XVIII OF 1884), S. 70—Question of law.

tion had been paid and that the judgment-creditor had failed to prove collusion between the mortgagee and the mortgagor is a question of fact. (*Shah Din, J.*) ISHAR KUAR *v.* RAM SINGH.
114 P. L. R. 1911: 9 I. C 1018: 172 P. W. R. 1911.

Question of law.

——— S. 70—*Question of law—Wrong decision by lower Court.*

No revision lies where the lower Court has erred in law in relying upon an inapplicable ruling of the chief Court. (*Chevis, J.*) HONDA RAM *v.* CHIBBAR MAL.
19 I. C. 847: 132 P. L. R. 1913.

——— S. 70—*Question of Law—Wrong decision regarding jurisdiction—Not subject to revision.*

An appellate Judgment though it may erroneously decide that the Court of first instance had jurisdiction to try a case cannot be interfered with in revision by the Chief Court. (*Shahdin and Scott Smith, JJ.*) HAZURA SINGH *v.* ILAM DIN. **19 I. C. 237: 204 P. L. R. 1913.**

——— S. 70—*Question of law—Inference from facts.*

An order of a Judge in chambers directing issue of notice on the ground that the amount involved was considerable and that some points were arguable is not an admission of the petition for revision under S. 70 (1) (*b*). The mere fact that a finding as regards the nature of a contract is based on legal inference from facts does not sufficiently prove that an important question of law is involved. (*Shah Din, J.*) BRIJ LAL *v.* LOKU RAM.
136 P. L. R. 1912. 14 I. C. 16: 116 P. W. R. 1912.

——— S. 70—*Question of law—Revision.*

The fact that an appellate order may be open to some doubt on a question of law of some difficulty is no ground for interference in revision under S. 70 (1; (*a*). (*Kensington, J.*) THAKUR SING *v.* GURDIT SINGH.
12 I. C. 733: 178 P. W. R. 1911.

——— S. 70—*Question of law.*

The Chief Court is not, in revision, competent to deal only with a pure question of law. (*Rattigan, J.*) RAM MAHESH SINGH *v.* KHUCHI RAM.
119 P.L.R. 1911 : 11 I. C. 518 : 256 P. W. R. 1911.

——— S. 70—*Question of law—Jurisdiction—Remand by lower Appellate Court to try suit.*

An Appellate judgment deciding that the lower Court should hear a suit and remanding the case to it is not open to revision under S. 70 (1) (*a*) or second appeal under S. 70 (1) (*b*) (*Reid, C. J.*) MANNU LAL *v* HAR CHARAN DAS.
147 P. L. R. 1911 : 10 I. C. 36 : 258 P. W. R. 1911.

——— S 70—*Question of law—Jurisdiction.*

Under S. 70 (1, (*a*) of the Act, the Chief Court cannot interfere with an appellate judgment deciding though erroneously that the first Court had jurisdiction. 46 P. R 1886 Foll. (*Arthur Reid, C. J.*) ARUR SINGH *v.* BUA DITTA.
4 P R. 1911 : 45 P. L. R. 1911 : 9 I. C. 674 : 26 P. W. R. 1911.

PUNJAB COURTS ACT (XVIII OF 1884), S. 70—Scope of.

Scope of.

——S. 70—*Scope of—Amendment of plaint.*

A plaint can be amended in revision. (*Robert son, J.*) MADDU MAL *v.* BAGGU.
160 P. W. R. 1913 : 20 I. C. 831 : 280 P. L. R. 1913.

——S. 70—*Scope of—Order under S. 25 of the Punjab Law Acts, if open to*

An order under S. 25 of the Punjab Laws Act of an Insolvency Court is not a decree : consequently no application for revision of such order lies under S. 70 (1) (*b*). 70 P. R. 1904 : 65 P R. 1905 Foll. (*Reid, C. J. and Shah Din, J.*) RAM CHAND *v.* BILLA MAL. **64 P. R. 1911 : 12 I. C. 867 : 187 P. W. R. 1911.**

Miscellaneous.

——S. 70—*Revision filed before new Act came into force—Admission by mistake—Power of treating it as appeal.*

A revision petition filed under S. 70 of the Punjab Courts Act of 1884 was admitted after the Act of 1912 came into force by mere inadvertance, *Held*, as at the time of filing it, the petitioner could file as appeal he could go on with the merits. (*Broadway and Abdul Raoof, JJ.*) JAI CHAND *v.* SHAHZADA **67 I. C. 358 : 1 L. L. J. 126.**

——S. 70 and S. 70 of Act I of 1912—*Small cause suit of the value of less than Rs. 2,500—Second appeal not lying—Whether could be treated as Revision Petition.*

Where under S. 40 (1) (*a*) ii of the Act a second appeal is precluded in the case of a small cause suit of a value of less than Rs. 2,500, the Court has no power to treat the memorandum of appeal as a revision petition as S. 70 of the Old Act has been repealed and S. 70 of the New Act gives no such power. (*Shah Din and Chevis, JJ.*) SURJU MAL *v.* ASRAM. **160 P L. R. 1914 : 23 I. C. 451 : 150 P. W. R 1914**

——S. 70—*Second Appeal—Powers of Chief Court—Amending Act I of 1912.*

The power of entertaining a second appeal in a land suit below Rs. 1,000 under S 70 (1) (*b*) of the Act of 1884 has been withdrawn from the Chief Court by the Amending Act I of 1912. (*Johnstone and Chevis, JJ.*) NURDIN *v.* MUSSAMAT JHAU. **89 P. W. R. 1914 : 23 I. C. 85 : 44 P. L. R. 1914.**

——S. 70—*Revision.*

S. 70 (1) (*b*) of the Act precludes the chief Court from going into any question except the one on which the revision petition has been admitted as a further appeal. (*Agnew and Shadi Lal, JJ.*) MANOHAR *v.* DULA.
301 P.L.R. 1913: 203 P. W. R. 1913 : 20 I. C. 755 : 15 P. R. 1914.

——S. 70—*Improvements.*

There is no authority for the proposition that a deft 's action *pendente lite* can affect the value of the suit so that for purposes of jurisdiction for an appeal in a pre-emption suit the value of improvement effected during suit should be included. (*Chevis, J.*) LAL HUSSAIN *v.* HASSA KHAN. **68 P. W. R. 1912 : 13 I. C. 428 : 96 P. L. R. 1912.**

PUNJAB COURTS ACT (I & IV OF 1912), S. 41.

——S 70—*Revision petition made under S. 70 (1) (a)—Chief Court, if can consider matters under cl. (b).*

Where a revision petition to the Chief Court raising questions as to which law customary or personal governs the parties is inadvertently made under clause (*a*) of S.70 (1), the chief Court is entitled to consider them under clause (*b*). (*Johnstone, J.*) MUHAMMAD ALI *v.* MUHAMMAD IKRAM. **63 P R. 1911 : 194 P L. R 1911 : 11 I. C. 63 : 171 P. W. R. 1911.**

——S. 75 (2)—*District Judge—Power of, to transfer case to Additional Dt. Judge.*

S.75 (2) of the Act cannot be construed so as to prevent, a Dt. Judge from transferring to a Subordinate Court a case pending before himself. It is merely intended to invest a Dt. Judge with power of control over the distribution of business and does not imply that an Additional Dt. Judge has no judicial powers until Dt Judge confers them on him. (*Johnstone and Rattigan, JJ.*) SHIB NATH *v.* ALLIANCE BANK OF SIMLA, LTD., LAHORE. **1 0 P. W. R. 1914 : 215 P. L. R. 1914 : 25 I. C. 480 : 3 P. R. 1915.**

——(I AND IV OF 1912.)

——S. 40—*Second appeal—Finding of fact—Dedication.*

A finding that a house is a Dharmasala by dedication to religious uses is one of fact with which interference in second appeal is incompetent. (*Shah Din, J.*) DAULAT RAM *v.* GADI RAM.
49 I. C. 138 : 1 P. R. 1919.

——S. 40—*Refusal of certificate—Appeal.*

Where a certificate to appeal on the question of custom is not granted, no second appeal lies to the chief Court irrespective of the ground on which the same is refused. (*Shah Din, J.*) MULA *v.* HOSHIARA. **24 P. W. R. 1915 : 27 I C. 723 : 85 P. L. R. 1915.**

——S. 40—*Finding of fact—Ignoring evidence—Grounds of appeal.*

A finding of fact will be set aside on second appeal, where the lower Court has decided a question by giving too exclusive an attention to one particular piece of evidence and ignoring the whole of the evidence in the case. 37 C. 293, Ref. (*Johnstone, J.*) GOBIND RAM *v.* HAKIM.
174 P. L. R. 1914 : 24 I. C. 880 : 76 P. W. R. 1914.

——S. 41 (1) (c)—*Second Appeal—Finding of fact.*

When the decision of the lower Appellate Court is essentially based on a finding of fact pure and simple it is open to question and it must be seen whether the complaint that the court has gravely erred by overlooking material evidence present, on record is justifiable. In cases of old mortgages where mortgagors have expressly and impliedly admitted receipt of consideration, Courts will not expect mortgagees to give the same precise proof of payment and 'necessity' as in recent transactions. (*Johnstone, J.*) RONZOR SINGH *v.* GAYAN. **114 P. L R. 1915 : 29 I. C. 785 : 228 P. W. R. 1915.**

PUNJAB COURTS ACT (I & IV OF 1912), S. 70.

——— S. 70 *Question of law—Succession certificate, necessity for.*

The question if a succession certificate is necessary in a case is open to revision under S 70 of Act XVIII of 1884 as amended by Punjab Acts I and IV of 1912. (*Johnstone, J.*) BASSA *v.* AMIR BIBI. **175 P. L. R. 1914 : 24 I. C. 893 : 73 P. W R. 1914.**

——— S. 70—(*as amended*)—*Scope of—Revision—Decree on private award, if open to.*

A decree based on a private award filed in Court cannot be revised by the Chief Court under S. 70 of the Punjab Court's Act (amended.) (*Johnstone, J.*) THAKURDAS *v* RAMDAS. **13 P W. R. 1914 : 23 I. C 950 114 P L. R. 1914.**

———S. 70—*Delay—If ground for refusing*

Dilatoriness of the petitioner in making his application is a good ground for refusing a revision. (*Kensington, J.*) FAZAL ILAHI *v.* MUHAMMAD JAN. **79 P.L.R. 1913 : 18 I. C. 795 : 76 P. W. R. 1913**

———(III OF 1914).

———*Jurisdiction—Decree before the Act—Appeal, if Dt. Judge under the new Act can hear.*

A Dt. Judge under the New Punjab Court's Act has no jurisdiction to hear an appeal from the decree of an officer who was a Dt. Judge before the Act came into force. Where therefore, such an appeal was heard by a new Dt. Judge the Chief Court set aside the judgment and decree, transferred the appeal to its file, and decided it on the merits. (*Shah Din, J.*) LASHKAR KHAN *v.* SHAH DIN. **33 I. C. 997 : 26 P. W R. 1916**

———S. 10—*Division Bench — Power to make reference, difference in point of law.*

A Division Bench of the Punjab Chief Court cannot make a reference under S. 10 (2) (*b*) of the Act when the members of that Bench have differed on a point of law. The proper course is to refer the point under the *proviso* to S 98 C. P C, (*Rattigan, Shah Din and Le Rossignal, JJ.*) GOKAL CHAND *v.* HUKAM CHAND NATHUMAL. **109 P. W. R. 1916 : 154 P L. R. 1916 : 70 and 71 P. R. 1917 : 34 I. C. 714 (F.B.)**

——— Ss. 21, 28 and 39—*Appeal — Forum—Erroneous valuation of Court fees.*

An appeal from a decree in a suit of the jurisdictional value of Rs. 5,500 was filed in the High Court. The figure Rs. 5,700 found its way into the decree apparently ; because the plaintiff assessed the market value of the land in suit at that sum, although the real value of the suit for purposes of jurisdiction calculated at 30 times the Jama was only Rs. 615. *Held*, that the appeal lay to the District Judge. (*Chevis, C.J. and Le Rossignal, J.*) DAIM SHAH *v.* MAYA DAS. **2 Lah. L. J. 300.**

———Ss. 21 (2) 28 and 39—*Decree by subordinate Judge who has been appointed Additional Judge—Appeal—Forum.*

PUNJAB COURTS ACT (III OF 1914), S. 41.

An appeal from the decree of a subordinate Judge who has been appointed Additional Judge when the case has not been transferred to him by the District Judge under S. 21 (2) of the Punjab Court's Act, lies to the District Judge if the value of the suit does not exceed Rs. 5,000, and not to the Chief Court. 46 P. R. 1898 ; 23 P R. (Cr.) 1881 referred. (*Shadi Lal and Broadway, JJ.*) NIRINJAN DAS JETHAN MAL *v.* KIRORI MAL. **38 P. R. 1917 : 108 P. W. R. 1917 : 41 I. C. 42.**

——— S. 34—Ex parte decree *by Subordinate Judge, if can be set aside by Munsif.*

A subordinate Judge of the 2nd class exercises no control over a Munsif of the 2nd class and his Court is not superior to that of the Munsif. A Munsif to whom a case is transferred under S. 30 of the Act can validly set aside an *ex parte* decree though it had been passed by a subordinate Judge. (*Leslie Jones, J.*) SHIV LAL *v.* PARAS RAM. **86 P. L. R. 1917 : 84 P. W. R. 1917 : 42 I. C. 242.**

——— S 40—*Second appeal—Finding of fact—Dedication.*

A finding that a house is a *dharmasala* by dedication to religious uses is one of fact with which interference in second appeal is incompetent. (*Shah Din, J.*) DAULAT RAM *v.* GADI RAM. **1 P. R. 1919 : 49 I. C. 138.**

——— S 40 (3)—*Refusal of certificate—Grounds for—Revision.*

No revision ordinarily lies from an order of the lower Appellate Court refusing to grant a certificate under S. 40 (3) of Act III of 1914. If certificate is refused on the ground that no general question of custom, etc., is involved, the Chief Court can revise the order and remand the application. (*Scott Smith, J.*) SAHAB DIN *v.* DASWANDHI BEG **27 I. C. 722: 23 P. W. R. 1915 : 86 P. L. R. 1915.**

———S. 41—*Second Appeal—Custom—Certificate, when necessary.*

When the question for decision before the lower Appellate Court was whether the general rule of custom had been abrogated by a special custom, no second appeal lies without a Certificate. (*Broadway and Dundas, JJ.*) FITHA *v.* DEBKEE. **2 Lah. L J. 503 : 56 I. C. 651.**

——— S 41—*Error of Law—Revision—Material irregularity.*

An erroneous view of law or omission to decide a question of fact (*i.e.*) whether or not a balance was struck, is a material irregularity justifying revision. The omission to determine a question of fact on which the decision as to limitation depends is a material irregularity for which a revision lies. (*Broadway, J.*) RAMJI LAL *v.* MANYA. **37 P. L. R. 1919 : 52 I. C. 115.**

———Ss 41 and 44—*Refusal of certificates.*

The order of a District Judge refusing certificate under S. 41 (3) without considering the grounds therefor is open to revision and remand. 18 P. R. 1918 Followed. (*Broadway, J.*) CHOTTO *v.* SONA DEVI. **50 I. C. 651.**

PUNJAB COURTS ACT (III OF 1914), S. 41.

——S. 41—*Second Appeal—Onus.*

Where a decision proceeds upon a wrong laying of onus there being no evidence on either side, the question of onus is one of law and a second appeal lies, but where onus being wrongly placed a case is decided on evidence let in by both parties, the case is different. (*Johnstone, C. J.*) KAURA *v.* KALU RAM.

40 I. C. 1003 : 36 P. W. R. 1917.

——S. 41—*Onus wrongly placed.*

A finding of fact can be set aside in second appeal if burden of proof is wrongly allocated. (*Shah Din, J.*) NIAZ ALI KHAN *v.* SHER.

37 P. W. R. 1917 : 40 I. C. 176.

——S. 41—*Necessity if a question of law—Shamilat allotted on partition if ancestral.*

Shamilat when allotted on partition to the proprietor of a village which is an ancestral property also becomes his ancestral prpoperty. Whether a question of legal necessity is a question of fact or law depends on a consideration of the knowledge of the alienee about the use the money was put to or on the Lower Court's violation of the rules and maxims of the Chief Court. (*Broadway, J.*) BUTA SINGH *v.* ISHAR SINGH.

16 P. W. R. 1917 : 39 I. C. 644.

——S. 41—*Second appeal—Misreading of evidence.*

Misreading of evidence is sufficient reason for the Chief Court to interfere in second appeal. (*Johnstone, C. J.*) JOWALA SINGH *v* LAKHA SINGH.

81 P. R. 1916 : 126 P. W. R. 1916 : 35 I. C. 892 : 39 P. L. R. 1917.

——S. 41—*Second appeal—Finding of fact.*

A finding of fact will not generally be gone into in second appeal when it is sufficiently definite though not very clear. (*Scott Smith, J.*) JAWAHIR SINGH *v.* NAURANG SINGH.

20 P W. R. 1915 : 27 I. C. 620 : 67 P. L. R. 1915.

——Ss. 41, and 38—*Appeal—Forum of—How determined—Value of claim in land suits.*

In land suits where the value of claim is calculated according to the revenue payable on the land, it is that value that decides the course of appeal and not the amount decreed in the lower Court. (*Shah Din and Beadon, JJ.*) TEJA SINGH SUNDER SINGH.

10 P. L. R. 1914 : 23 I. C. 89 : 21 P. W. R. 1914.

——S. 41 (1)—*Second appeal—Question of law—Interpretation of document.*

The question "whether M. gifted *shamilat* patti to D" is one of fact though in deciding that question one has to interpret a document and consequently no second appeal lies. When a question involving the interpretation of a document is one of law explained. (*Johnstone, C. J.*) DIWAN CHAND *v.* SUNDAR.

68 P. R. 1916 : 182 P. W. R. 1916 : 36 I. C. 199 : 77 P. L. R. 1917.

——S. 41 (1) (3)—*Point overlooked — Demand.*

Though under S. 41 (1) and (3) the Chief Court can, in the absence of a certificate, decide the "existence or validity" of a custom, it is not

PUNJAB COURTS ACT (III OF 1914), S. 41.

barred from remitting a case for decision on a point of custom overlooked or deliberately neglected by the lower Court. (*Shadi Lal and Le Rossignal, JJ.*) SOHNAMAL *v.* NANAKCHAND

22 P. R. 1916 : 34 I. C. 904 : 212 P. W. R 1915.

——S. 41 (c)—*Second appeal—Substantial error, defect in procedure.*

A second appeal cannot be entertained on the ground of mere alleged error in weighing evidence. (*Johnstone, C. J. and Rattigan, J.*) RAMJI DAS *v.* THAKAR DEVI.

72 P. R 1916 : 138 P L R. 1916 : 35 I. C. 366 : 119 P. W. R. 1916.

——S. 41 (1) (c)—*Second appeal—Omission to consider oral evidence.*

An omission by a lower appellate Court to consider the oral evidence and record a finding thereon is a material irregularity and a ground for second appeal. (*Shadi Lal, J.*) KALU *v.* BIR SINGH.

73 P. W. R. 1915 : 29 I. C. 901 : 149 P. L. R. 1915.

——Ss. 41 (2) 38 and 39—*Decision by Additional Dt. Judge in a case not assigned.*

Where a case has been heard and decided by an Additional Dt. Judge which had not been assigned to him by the Dt. Judge and who had never been appointed as Subordinate Judge an appeal from his decree lies to the chief Court and not to the Dt Court. (*Scott-Smith and Martineau, JJ.*) RAM DIYAL *v.* MAHOMED RAJU.

51 I. C. 437 : 46 P. R. 1919.

——S. 41 (3)—*Decision on custom—No second appeal without certificate.*

Although the District Judge's view was erroneous, nevertheless, inasmuch as it was a decision on custom no second appeal was competent without the necessary certificate. (*Broadway and Moti Sagar, JJ.*) JITA *v.* HAR CHAND

5 Lah. L. J. 298 : 1923 Lah. 589.

——S. 41 (3)—*Second appeal—Point of custom.*

Where there is no certificate, a second appeal is not competent on a question of onus in a case of custom. On a refusal of certificate on the ground that the case was not covered by S. 41 (3) a remand for reconsideration of the question as to whether certificate should be granted cannot be ordered. (*Scott-Smith and Leslie Jones, JJ.*) SUBA *v.* JALAL. **69 I. C. 392 : 2 Lah. L. J. 479.**

——S. 41 (3)—*Second appeal— Question of—Custom.*

Whether by the custom prevailing in the tribe to which the parties belong, a union between a man and his nephew's widow is recognized as valid and whether by custom the issue of such a union should be regarded as legitimate and entitled to succeed are questions of custom into which the High Court cannot enter in second appeal when there is no certificate. (*Chevis; C.J. and Wilberforce, J.*) MAHARAM *v.* BASAU.

2 Lah. L. J. 370.

——S 41 (3)—*Second appeal—Custom.*

The decision in the case of self-acquired property, that a daughter's son excludes a nephew

depended upon a finding as to custom which cannot be contested in second appeal without a certificate. (*Scott-Smith, J.*) FATEH MUHAMMAD *v.* IMAM-UD-DIN. **2 Lah. L. J. 188.**

——— S. 41 (3) —*Second appeal.*

An appeal was held to have been filed within time where the widow explained that her delay in applying for a certificate was, until she discovered her mistake, due to an erroneous supposition that a second appeal from the decree would lie as of right to the chief Court. (*Rattigan, C. J.*) ALAM BI *v.* LATTU.

57 I. C. 204 : 1 Lah. 245.

——— S. 41 (3)—*Second appeal—Custom.*

A finding that the parties are governed by Hindu Law and not by custom cannot be challenged in second appeal without a certificate (*Scott Smith and Dundas, JJ.*) MUSSAMMAT ASO *v.* MUSSAMMAT HARNAMI. **1 Lah. L. J 60 : 56 I. C. 944 : 2 U. P. L. R (Lah.) 114.**

——— Ss 41 (3) and 44—*Revision—Order refusing certificate.*

When an application for a certificate under S. 41 (3) of the Act is refused by the Dt. Judge on the erroneous ground that no question of custom arose here is a revision to the Chief Court from the order of refusal on the ground that the Dt. Court has failed to exercise the jurisdiction vested in him. 86 P. L. R. 1915 Foll 6 P. R 1917 dist. (*Scott-Smith, J.*) SARUP SINGH *v.* MT. JOWAHRI. **44 I. C. 732 : 18 P. R. 1918.**

——— S 41 (3)—*Question of onus in Custom case—When question of law.*

The question of *onus probandi* in a custom case is not a pure question of law, unconnected with custom; on the other hand, it is not under all circumstances a question relating to the validity of the existence of a custom, a party to a suit may be held t be entitled to an initial presumption in his favour on the s rength of a generally accepted rule of custom as laid down by the judicial decisions or otherwise. (*Shah Din, C. J. and Le Rossignol, J.*) MUSSAMMAT BHARI *v.* KHANAM. **44 I. C 162 : 7 P. R. 1918.**

——— S. 41 (3)—*Second appeal—Defective certificate.*

A second appeal cannot be admitted on the strength of a certificate not in accordance with S. 41 (3) of the Act of 1914. (*Shah Din, J.*) YAD RAM *v.* MANBAARI. **4 P. W. R. 1918 : 44 I. C. 87 : 148 P. L. R. 1917.**

——— S. 41 (3)—*Refusal of certificate—Second appeal—Gifted property whether reverts to the donor.*

Where the question involved in an appeal to the Dt. Judge was one of custom and he rejected an application for a certificate under S. 41 (3) of the Act, a second appeal is not maintainable against his decree. Even where the lower appellate Court, decided the rule of custom erroneously and on a misconception of pri r decisions a certificate under S. 41 (3) is necessary to sustain a second appeal on the point of custom. The view that gifted property reverts to the heirs of the donor in the event of all the heirs of the

donee being exhausted is erroneous. (*Shah Din' C. J. and Le Rossignol, J.*) CHINTI *v.* ISHAR, **109 P. R. 1917 : 43 I. C. 299 : 71 P. W. R. 1917.**

——— S. 41 (3) — *Second appeal — Custom—Certificate.*

Where the lower Court found that the parties are governed by custom and not by Hindu Law, the aggrieved party cannot in second appeal urge as a ground of appeal that the parties are governed by Hindu Law and not by custom in the absence of a certificate under S. 41 (3) of the Act. (*Shah Din, C J.*) THULSI RAM *v.* AMAR SINGH. **42 I. C. 115 : 141 P. W R. 1917.**

——— S. 41 (3)—*Order af remand on question of custom—Appeal.*

No appeal from an order of remand as to the existence or non-existence of a custom lies, where however parties are admittedly governed by customary law the order of remand should be set aside and a decree must be passed by the trial Court for what the plff was en itled to by custom. (*Chevis, J.*) ALI AKHAR SHAH *v.* BARKAT ALI SHAH. **76 P. W. R. 1917 : 39 I. C. 775 : 109 P. L. R. 1917.**

——— S. 41 (3)— *Unreasonable refusal to certify—Procedure.*

The Chief Court cannot on the revision side consider the reasonableness of a refusal to grant certificate nor regard it as granted when it is unreasonable. The question cannot be considered in the absence of a certificate. (*Johnstone, C. J.*) SHER *v.* ALLAH DAD. **39 I. C. 96 : 6 P. R. 1917.**

——— S. 41 (3)—*Second appeal, certificate for, on point of custom—When to be granted.*

The certificate referred to in S 41 (3) of the Act should be granted only when the lower appellate Court is satisfied that the evidence regarding custom is conflicting or uncertain and there is substantial doubt regarding its existence. The Chief Court will not act upon a certificate which is not granted having regard to the aforesaid terms. (*Shadi Lal and Leslie Jones, JJ.*) BANI SINGH *v.* SURAT SINGH. **82 P. R. 1916 : 199 P. W. R. 1916 : 35 I. C. 884 : 38 P. L. R. 1917.**

——— S. 44—*Revision—Arbitration cases.*

The High Court is reluctant to interfere on revision in arbitration cases unless it is compelled to do so in circumstances of gross and material irregularities. The Judgment of the lower appellate Court being entirely based on inaccuracies or misunderstandings is vitiated thereby it is set aside. (*Wilberforce, J.*) KESAR MAL SHANKAR DAS *v.* HUKAN CHAND BADRI NATH. **67 I. C. 260 : 2 Lah. L. J. 681.**

——— S. 44—*Revision—Interlocutory order.*

It is not incumbent on the High Court to interfere on the revision side even though the lower Court acts without jurisdiction unless failure of justice has directly resulted from such a defect. An order in a suit for partition after the preliminary decree and before the final decree is an interlocutory order, and is non-appealable. (*Broadway, J.*) GANDA MAL *v.* SUNDAR LAL. **2 Lah. L. J. 673.**

PUNJAB COURTS ACT (III OF 1914), S. 44.

——— S. 44—*Revision—Interlocutory order.*
It is only in exceptional casesto shorten litigation that the chief Court should ordinarily interfere with an interlocutory order in revision. (*Le Rossignol, J.*) RADHA KISHEN *v.* TIRATH RAM. **1 Lah. L. J. 220.**

——— S. 44—*Revision--Interference in—Equities.*
The chief Court would not be justified in interfering with the order of the lower Court in revision, if the equities were all against the appellant (*Broadway, J.*) JIWAN SINGH *v.* SAWAN MAL. **54 I. C. 941 (1) : 168 P. R. 1919.**

——— S. 44—*Onus wrongly placed—Revision.*
A wrong placing of the onus, resulting in a totally erroneous decision is sufficient for interference in revision, (*Wilberforce, J.*) SUGHRU MAL HARCHARAN DAS *v.* SHAM LAL GOKAL CHAND. **46 I. C. 777 : 146 P. W. R. 1918.**

——— S. 44—"*Decided*" *meaning of—C. P. C., O.* 41 R, 5—*Interlocutory orders.*
A case cannot be said to be decided under S. 44 of the Act, if there has been an order of remand under O 41, R. 25, C. P. C. The chief Court will not interfere in revision with interlocutory orders, (*Shah Din, J*) GOPI MAL *v.* ISHAR DAS. **58 P. L. R. 1918 : 46 I. C. 554 : 134 P. W. R. 1918.**

——— S. 44—*Revision—Limitation.*
A case is within S. 44 if a suit has been erroneously held to be either within time or barred by limitation owing to the application to it of an article of the Limitation Act which cannot apply to the facts. (39 C. 473 : 20 A 78 Not fol.) (*Rattigan, C. J.*) SARAB DIAL ISHAR DASS *v.* DEVI DITTA MAL GORDHAN DAS. **59 P. L. R. 1918 : 46 I. C. 541 : 139 P. W. R. 1918.**

——— S. 44—*Wrong decision on question of law no ground for revision.*
Where the conduct of the petitioners is most reprehensible the chief Court would not entertain an application for revision made on the ground that the lower appellate Court has taken a wrong view of law in making them liable to the claim. (*Broadway, J.*) GHANIA SINGH *v.* ISHAR. **88 P. L. R. 1917.**

——— S. 44—*Revision—Material irregularity.*
The lower Court has committed a material irregularity in omitting to determine whether the application was governed by the Limitation Act of 1877 or by the Act of 1908, and that this is a good ground for revision. (*Shadi Lal and Rossignoll, JJ.*) MANOHAR LAL *v.* SADIGA BEGAM. **37 I. C. 292 : 101 P. R. 1916.**

——— S. 44—*Revision—Finding of fact—Evidence not considered.*
A finding of fact by an appellate Court without fully considering the evidence of the parties is liable to be set aside in revision. (*Shah Din, J.*) KARIM ILAHI *v.* NUR MAHI. **7 P. W. R. 1915 : 27 I. C. 593 : 120 P. L. R. 1915.**

——— S. 44—*Revision—Interference in—Ends of justice.*

PUNJAB COURTS ACT (VI OF 1918), S. 41.

The chief Court is not bound to interfere in revision if the order of the lower Court does justice as between the parties. (*Shah Din. J.*) BABU LAL *v.* CHANDA. **6 P .W. R. 1915 : 27 I. C. 589 : 38 P. L. R. 1915.**

——— (VI OF 1918.)
——— S. 41—*Finding regarding custom—Whether can be challenged.*
The finding by the lower appellate Court that the parties are governed by Hindu Law cannot be challenged in second appeal without a certificate. (*Scott-Smith and Leslie Jones, JJ.*) TANI *v.* RIKHI RAM. **1 Lah. 554 : 2 Lah. L. J. 481 : 56 I. C. 742 : 114 P. L. R. 1920.**

——— S. 41—*Second appeal—Question of law—Question whether property is a shop.*
The question whether a property of which pre-emption is claimed is a shop is one of law *i.e.* the facts found by the Court below are not to be disturbed, but the inference to be drawn from these facts is one of law. (*Le Rossignal and Broadway, JJ.*) DEWAN CHAND *v.* BASANT RAI. **2 Lah, L. J. 302.**

——— S. 41, (3)—*No dispute as to custom—Certificate—Necessity for.*
Where the question of custom arising in a case is well established and there is no dispute between the parties as to its existence no certificate is necessary in support of a second appeal to the High Court. (*Abdul Qadir, J.*) MUSA *v.* GUL. MAHOMED. **1924 Lah 289.**

——— S. 41 (3)—*No finding as to custom—Certificate—Necessity for*
Where it was clear from the judgment of the lower appellate Court that the question as to existence of custom was not decided on the merits no certificate need be produced, as required by S. 41 of the Punjab Courts Act. (*Abdul Raoof and Lumsden, JJ.*) PARMESHRI DAS *v.* PARAS RAM. **1924 Lah. 278 (1).**

——— S. 41 (3)—*Appeal without certificate—Question of custom.*
The question raised in appeal was about the existence of a custom which a jat can contract a valid marriage with a *Chuimbi* woman whose first husband though alive, has repudiated her, *Held* the words "notwithstanding anything in sub-section (1) of this section" within which sub-section (3) of S. 41 of the Punjab Courts Act commences precludes, a Court of second appeal in the absence of a certificate from going into the question whether the first appellate Court has erred in law or procedure. (*Campbell, J.*) LEHNA SINGH *v.* JAGAT RAM. **1923 Lah. 377.**

——— S. 41 (3)—*Question of Mahomedan Law or custom.*
Where the question as to the respective rights of inheritance was in issue, the District Judge's finding that the parties are governed by Muhammadan Law and not by custom cannot be challenged in the absence ofa certificate. (*Martineau, J.*) RASUL KHAN *v.* MT. HAWASI. **1923 Lah. 284 (2).**

——— S. 41 (3)—*Certificate-grant of—Discretion—Nature of.*

PUNJAB COURTS ACT (VI OF 1918). S. 41.

The grant of a certificate under S. 41 (3) of the Punjab Courts Act for the purpose of carrying the matter to a higher tribunal is entirely in the discretion of the lower appellate Court, but the Court refusing such a certificate must indicate by its order that the requirements of the Statute have been borne in mind in coming to the conclusion it has arrived at. (*Broadway, J.*) NUR MUHAMMAD *v.* MEHR CHAND. **69 I. C. 425.**

——— **S. 41 (3)**—*Question of Grazing rights—Second appeal.*

The question as to the existence of grazing rights is one of custom and cannot be entertained in second appeal without a certificate. (*Shadi Lal, C. J. and Abdul Qadir, J.*) SAREF SINGH *v.* KHEMAN. **1922 Lah. 470.**

——— **S. 41 (3)**—*Scope of.*

The object of the Legislature by enacting sub-S. 3 of S. 41 of the Act was to make an exception in matters of second appeal regarding a question of custom or usage, of sufficient importance and to allow an appeal on evidence also. To hold that the right of questioning a decision on custom exists in appeals from decrees and does not exist in appeal from orders of remand would create an anomaly. (*Shadi Lal, C. J., Abdul Raoof and Martineau, JJ.*) MUSAMMAT UMRI *v.* SHAH MAHOMED. **4 L. L J. 359 : 3 L. 218 : (1922) Lah 178.**

——— **Ss. 41 (3) and 44**—*Question of onus—Second appeal—Certificate necessary—Refusal to grant certificate—Revision—Interference.*

The question of *onus probandi* in a custom case cannot be raised in second appeal without a certificate under S. 41 (3) of the Punjab Courts Act. When an application for a certificate under S. 41 (3) of the Punjab Courts Act is refused by the District Judge on the erroneous ground that no question of custom arose, a revision to the chief Court from the order of refusal is competent on the ground that the Dt judge had failed to exercise the jurisdiction vested in him. 18 P. R. 1918 Ref. (*Scott-Smith and Harrison, JJ.*) NATHU *v.* BATAN SINGH. **67 I. C. 759.**

——— **S. 41 (3)**—*Custom—Burden of proof—Second appeal—Certificate.*

The question of *onus* in a case where a custom of adoption is set up is one relating to the existence of a custom and cannot be agitated in second appeal in the absence of a certificate. (*Jones and Broadway, JJ.*) RAM RAKI *v* MEHA RAM. **63 I. C. 657 : 2 Lah. 167.**

——— **S 41 (3)**—*Certificate necessary—Custom or Hindu Law—Finding as to.*

The lower Courts finding that the parties are governed by Hindu law and not by custom cannot be challenged in second appeal without a certificate. (*Scott Smith and Dundas, JJ.*) MUSSAMAT ASO *v.* HARNAMI. **1 Lah. L. J. 60 : 56 I. C. 944 : 2 U. P. L R. (Lah.) 114.**

——— **S. 41 (3)**—*Second appeal—Custom.*

It is not open to an appellant in second appeal to challenge a right on the basis of custom without a certificate. (*Broadway, J.*) BHAGMAL *v.* HARI SINGH, **50 I. C. 895 : 40 P. L. R. 1919.**

PUNJAB COURTS ACT (IX OF 1919) S. 44.

——— **S. 41 (3)**—*Second appeal—Custom.*

If the appellants do not dispute the custom of reversion to the donor no certificate to prefer a second appeal is necessary. (*Martineau, J.*) MOHAR SINGH *v.* MANGAL. **50 I. C. 769.**

——— **S. 44**—*'Case', meaning of.*

The word 'case', does not necessarily mean the whole case, but it must at least mean a particular branch of a case for which an independent remedy or different procedure is provided by the Code. An order that the suit can be brought in its present form *i.e.*, as a suit for administration and rendition of accounts is not open to revision. (*Brasher, J.*) ABDUL HAFIZ *v.* MT. RASHIDA KHATUM. **1923 Lah. 288 (1).**

——— **S. 44**—*'Case decided'—Refusal to issue interrogatories.*

The refusal to issue interrogatories for the examination of witnesses does not amount to the decision of a "case" within S. 44 and hence the order is not revisable. (*Scott-Smith, J.*) ROOP CHAND *v.* THE CHURCH MISSIONARY TRUST ASSOCIATION. **1923 Lah. 282 (2).**

——— **S. 44**—*'Case', meaning of.*

'Case' includes a particular branch of a case or which an independent remedy or a different procedure is provided by the Civil Procedure Code. An order staying proceedings under S. 10 of the Civil Procedure Code is a 'case' and is therefore open to revision. (*Martineau, J.*) BISHEN DEVI *v.* BISHEN CHAND. **61 I. C. 830.**

——— **S. 44**—*Finding of fact—No Revision.*

Held, that the finding based on the fact that there was no consideration for a bond is a question of fact and hence is not revisable. (*Wilberforce, J.*) JETHA MAL *v.* HASAL. **35 P. W. R. 1921.**

——— **S. 44**—*Revision—Substantial justice.*

The High Court may not exercise revisional powers where substantial justice has been done. (*Pelman, J.*) BUTA RAM *v.* CHARHATA RAM. **55 I. C. 82 : 2 U. P. L. R. (Lah.) 60.**

——— **S. 44**—*Misconstruction of document—Revision.*

A Court misconstruing a definitely worded document commits an irregularity which invites revision. (*Broadway, J.*) ALI MUHAMMAD *v* MANOHAR LAL. **3 P. W. R. 1919 : 50 I. C. 614 : 30 P. L. R. 1919.**

——— **S 70 (1) (a)**—*Scope—Appellate Court holding that trial Court had jurisdiction.*

An appellate Judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the chief Court under S. 70 of the Punjab Courts Act, the lower appellate Court having had jurisdiction to entertain and decide the appeal. (*Scott-Smith, J.*) AYUB *v.* KIRPAL SINGH. **1924 L. 278 (2).**

——— **(IX OF 1919).**

——— **S. 44**—*Wrong placing of onus—Revision.*

A wrong placing of the onus of proof is a material irregularity justifying interference in

PUNJAB COURTS ACT (IX OF 1919), S. 44.

revision. (*Shadi Lal, C. J.*) GANDA RAM *v.* PEHANA. **64 I. C. 91 : 3 Lah L. J. 417.**

——S. 44—*Revision—Powers of Chief Court—Interlocutory order—Interference.*

The Chief Court may interfere with, interlocutory orders, only in exceptional cases, to shorten the litigation but it should not ordinarily do so. (*Le Rossignol, J.*) RADHA KISHEN *v.* TIRTH RAM. **1 L. L. J. 220.**

——S. 44—*Revision—Error of law—Not a sufficient ground.*

An error of law is not a material irregularity and is not a good ground for interference in revision nor is it a good ground that the Court below had come to a wrong conclusion on the question of limitation. (*Shadi Lal, C. J.*) FAQIR CHAND *v.* DULLAN. **56 I. C. 848.**

PUNJAB CUSTOM.

See CUSTOM (PUNJAB).

PUNJAB ELECTORAL RULES.

——R. 3, Pt. I, Sch. IV. R 2, Pt. II, Sch. IV—*Personation without corruption is no offence.*

Mere personation, without corruption or a bad mind or intention in doing so, is not an offence. A person who is able to write and who, instead of signing the identity voucher of an illiterate voter thumb-marks it in order to enable him to vote in the name of that voter, is guilty of a corrupt practice under R.2, Part II. Sch. IV of the Rules Where, to the knowledge of a candidate a campaign of personation is carried on in his interests and he takes no steps to dissociate himself from the practice of his agents, he must be held to have connived at these practices and is guilty of corrupt practices. (*Kennaway, Abdul Qadir and Dalip Singh, Commissioners.*) MAHAMMAD IRSHAD ALI KHAN *v.* MIR MUHAMMAD KHAN. **63 I. C. 666.**

——Sch. IV, Rr. 2 (A) and (B)—*Corrupt practice — Refusal by returning officer to receive nomination paper.*

An improper refusal by the returning officer to receive a nomination paper, requires the strongest possible evidence to uphold the election. The mere fact that the name and signature of the seconder is not in its proper space but somewhere else in the form would not render the nomination invalid. The refusal of the officer, without proof of corrupt motive or intention would not amount to a corrupt practice. The parties should be left to their costs. (*Kennaway, Abdul Qadir Dalip Singh Commissioners.*) GOVERDHAN DAS *v.* LAL CHAND. **61 I. C. 315.**

PUNJAB EXCISE ACT (I OF 1914).

——S. 61—*Possession of illict liquor—Joint possession—Proof.*

To establish that possession and control of a place are with some member of the family, other than the managing member there must be good and clear evidence of the fact before the Court can arrive at such a conclusion. (*Shadi Lal, C. J.*) TARA *v.* EMPEROR. **61 I. C. 720 : 22 Cr. L. J. 432.**

PUNJAB GOVERNMENT TENANTS ACT (III OF 1893), S. 8.

PUNJAB GENERAL CLAUSES ACT (I OF 1898.)

——S. 22—*Notification under repealed Act—If ipso facto cancelled by repealing Act*

A notification under S. 7 of the Punjab Pre-emption Act of 1905, if it is not inconsistent with S.6 of the Pre-emption Act 1913, remains in force till it is cancelled according to law. (*Le Rossignol and Harrison, JJ.*) JOLAL DIN *v.* NATHU RAM. **1922 Lah. 474.**

PUNJAB GOVERNMENT TENANTS ACT (III OF 1893).

——*Government grant of land—Abadkar—Widow enquiring proprietary rights in the holding—Self-acquired property.*

In 1896 Government granted Abadkar rights in certain lands. The grantee died in 1898 leaving a widow and a daughter. In 1899 the widow's name was inserted and in 1903 she was granted occupancy rights In 1912 she acquired full proprietary rights in these lands and made over the property to her daughter. *Held*, that the land became the self-acquired property of the widow and the collaterals of her deceased husband cannot impeach an alienation by the widow. (*Scott-Smith and Broadway, JJ.*) SEWA SINGH *v.* MT. BHOLI. **129 P. R. 1916 : 36 I C. 382 : 83 P. L. R. 1917.**

——*Lapsed occupancy tenancy—Re-grant.*

The Civil Courts have no jurisdiction to interfere with a regrant by the Revenue Authorities of a lapsed occupancy tenancy coming within the Government Tenant's Act. It is their duty to scrupulously refrain from any sort of encroachment on the powers of the Local Government where their action has no legal authority and may prove embarrassing. (*Kensington, C. J.*) KESAR SINGH *v.* MUSSAMMAT DAYALI. **38 P. R. 1915 : 102 P. W. R. 1915 : 29 I. C 570 : 3 P. L. R. 1916.**

——*Illegal decree—Remedy.*

One S held a horse breeding colony which could devolve upon a single person as an impartible holding of which alienation was prohibited except with the previous sanction of the Financial Commissioner. S died without male issue leaving three brothers A. B and C. The Colonization Officer mutated the whole grant in favour of B only. On this A instituted a civil suit for possession of the land on the ground that he as eldest son of his father should succeed in preference to B A compromise was entered into whereby they agreed to hold the land jointly in equal shares. The Court passed a decree in terms of the compromise. *Held*, the decree in no way affected the right of the Government as landlord who were free to obtain ejectment or otherwise enforce the conditions of the tenancy; that as between A and B there was a valid compromise to which the Court was bound to give effect in a decree which was valid and binding on the parties (*Robertson and Beadon, JJ.*) ALI MARDEN *v.* BAKAR KHAN. **7 P. W. R 1913 : 27 P. L. R 1913 : 17 I. C. 680 : 13 P. R. 1913.**

——S. 8—*Agreement by Govt. Tenant—To share whatever right may be acquired by him is valid.*

PUNJAB LAMARDARI RULES, R. 15.

An agreement by a Government Tenant with a plaintiff to the effect that if the plaintiff helped the former in bringing the land under cultivation the former would give to the plaintiff one half of whatever rights he may acquire in the land is not opposed to public policy. (*Abdul Raoof and Harrison, JJ.*) NATHU *v.* ALLAH DITTA.
1922 Lah 287.

PUNJAB LAMBARDARI RULES.

—— —R 15 -*The question of appointing a successor to a lambardar dying without issue should be decided under R.* 15.

An officer acting under R. 15 should carefully consider all reasonable matters suitable to the appointment. He should, decide between rival claimants looking to their claims and administrative advantages and disadvantages. If reasonable discretion has been used his decision should not be upset because the higher authority differs from his view. (*Hayward, F C.*) MASHIRALI *v.* CHIRAJH KHAN. **1 P. R. 1918 (Rev). 2 P.W.R. 1918 (Rev) : 45 I. C. 87 : 131 P. L. R. 1918.**

PUNJAB LAND REVENUE ACT, (1871)

——Kr. D—1. 3—1. *Framed under—Muafidar—Right to share of produce.*

An assignee of land revenue, cannot claim share of the produce, as of right though he may have taken it in the past unless he has some title to proprietary rights as explained in R.D.—1, 3—1. 1 P. R. 1885 Rev. Dissent. (*Fagan, F. C.*) SANT BHIM SANI *v.* FAZAL. **88 I. C. 41 : 2 P. R. 1916 Rev.**

——(XVII OF 1887).

—— *Rules under--Lambardar—Succession to office—Primogeniture—Adopted son.*

It is essential that the expression "nearest eligible heir according to the rule of primogeniture," in R 17 (*ii*) of the rules under the Land Revenue Act, should be strictly construed ; it does not apply to an adopted son. The rule of primogeniture is by birth and does not embrace descent by adoption. Consequently, in the case of a vacancy in the office of headman, an adopted son cannot succeed to or through his adoptive father under any rule of primogeniture. 9 P. R 1892 ; 14 P. R. 1886 ; 10 P. R. 1892 ; 11 P. R. 1892 ; 12 P. R. 1892 ; 13 P. R. (Rev). 1892 Expl. (*Fenton, F. C.*) BHAG SINGH *v.* JAURA SINGH. **2 P. R. Rev. 1912 : 15 I. C. 925 : 7 P.W.R. (Rev). 1912.**

—— **Ss. 3 and 111**—*Partition—Widow's right to—Suit to restrain partition of joint holding—Jurisdiction—Civil or Revenue Court.*

Among agricultural classes in the Punjab, a widow has a clear unequivocal statutory right under the Land Revenue Act to demand partition. A co-sharer may sue in a civil Court to prove that by custom, the widow cannot obtain partition of the joint holding in which she is a co-sharer for life. The burden of proving the existence of such custom clearly lies upon him. 82 P. R 1898 Foll. The only question to be considered in such cases is whether the plaintiff has succeeded in proving restraint imposed by custom. (*Robertson and Kensington, JJ.*) BHAG BHARI *v.* WAZIR KHAN. **70 P. R. 1912 : 124 P. L. R. 1912 : 14 I. C 45 : 91 P. W. R. 1912.**

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 36.

——Ss. 6 and 34--*Whether Girdwar Kanungo is a Revenue Officer—Power to attest.*

A Girdwar Kanungo is not a Revenue Officer under S. 6 and cannot attest mutation within the meaning of S. 34. (*Scott-Smith, J*) SUBA *v.* MAHOMED ALI. **57 I. C. 721.**

—— —— **Ss. 15 (1) (a) and (3), 118 (3) and (4)**—*Review, Revision—Appeal—Partition—Discretion.*

An order passed on review is appealable if it does not merely confirm the previous order. A mere permission, however given to a subordinate Revenue Officer to review an order is not in itself an 'order' and therefore no appeal lies from it though it may be open to revision. *Held*, it is within the discretion of the Revenue Officer to allow the withdrawal of an application for partition and that no action under S. 118 (4) Land Revenue Act was necessary because there was no applicant other than the first party who had been permitted to withdraw his application. (*Fenton, F. C*) AHMAD *v.* AHMAD. **3 P. R. (Rev) 1912 : 15 I. C. 937 : 6 P W. R. Rev. 1912.**

—— **S. 16**—*Order of Revenue Court--Setting aside.*

A revenue Court's order re-opening a question which is *res judicata* between the parties is liable to be set aside. (*Donic, J.*) BODHA RAM *v.* NET RAM. **10 I. C. 299 : 4 P.W.R. 1911 (Rev).**

—— **Ss. 17, 110 and 117**—*Partition—Irregularities committed—Power of Financial Commissioner.*

Where, in a partition case many share-holders were not consulted possession was disturbed and many other irregularities were committed, the Financial Commissioner could set aside those proceedings. (*Maynard, J. C.*) BASHAWAL *v.* NUR KHAN. **13 I. C. 815 : 1 P. W. R. 1912 Rev.**

—— —— **S. 36**—*Attachment under S. 146 of the Cr. P. Code—Procedure.*

S. 36 of the Act is not applicable to cases in which the property has been attached by a Magistrate under S, 146 of the Cr. P. Code. If one of the parties after such attachment is put in possession of the property by a Revenue Officer under S. 36 of the Act the Chief Court as a criminal Court cannot interfere in revision. (*Chevis, J.*) EMPEROR *v.* ABDUL HAZIZ. **44 I. C. 117 : 19 Cr. L. J. 261 : 46 P. W. R. 1917 Cr.**

—— —— **S. 36** — *Mutation — Revenue Officer — Power to put persons into possession.*

S. 36 cl. (2) of the Act does not empower a Revenue Officer to eject a third party actually in possession of the land in dispute. The section applies only where the legal or constructive succession is vacant. (*Fagan, F. C. J.*) ANUP KUAR *v.* ABDUL AZIZ. **43 I. C 216 : 4 P. W. R. 1917. (Rev).**

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 37.

——— **S. 37** (a)—*Correcting entry in annual record—Revenue Officer.*

A Revenue Officer in correcting entries in annual records caused by the mistake or fraud of a *Patwari* or *Kanungo* is not reviewing or revising an order of a predecessor or Revenue Officer. (*Fenton, F. C.*) TAJA *v* KARAM ALI.
4 P. W. R. 1913 Rev. : 4 P R. 1913 Rev 19 I. C. 302 : 201 P. L. R. 1913.

——— **S. 44**—*Record of Rights—Entries in —Value of.*

An entry that the land in question was a graveyard for Mahomedans is conclusive as to its character as waqf by user if not by dedication. (*Lord Macnaughten.*) COURT OF WARDS *v.* ILAHI BAKSH. **40 Cal. 297 : 40 I. A. 18 : 1 P. W R. 1913 : 17 C. L. J. 360 : 27 P. R. 1913 : 83 P. L. R. 1913 : 11 A. L. J. 265 : 13 M.L.T 318: (1913) M W. N. 270 : 15 Bom. L. R. 436 : 17 I. C. 744 : 25 M. L. J. 61 (P. C.).**

——— **S. 44**—*Mutation entry—Onus of proving mistake.*

The onus of proving that a mistake was made and that the intention of the one of the parties was not correctly expressed in recording the mutation entries lies very heavily upon the party seeking to impugn the entries on that ground specially where it appears that the parties were present at the time of mutation, the Revenue Officers made every effort to ascertain what they wished to be done, and mutation entries themselves are quite clear (*Rattigan, C. J. and Chevis, J.*) WADHAWA SINGH *v.* BALWANT SINGH **2 P. W. R. 1918 : 44 I. C. 277 : 153 P. L. R 1917.**

——— **S. 44**—*Settlement records of* 1868 *and* 1892, *entries in—Presumption— Ownership—Grazing cattle and cutting grass.*

The settlement records of 1868 and 1892 are prepared with great care and accuracy and therefore the presumption to be attached under S. 44 of the Act to the correctness of the entries made therein cannot be rebutted by the provisions of the *Rewaj-i-am* prepared in 1852. (*Chevis and Jones, JJ.*) SANT SINGH *v.* FRANGU. **41 I. C. 755 : 54 P. W. R. 1917.**

——— **Ss. 44 and 46**—*Correctness of entry—Entry of amount due on the mortgage—List of mortgages.*

An entry of the amount of mortgage-money due set out in the statement of mortgages with possession prepared at the settlement of 1898, has the same presumption of correctness under S. 44 of the Punjab Land Rev. Act as all other entries in a Record of Right such statement being one under statement H under No. 86 of the rules framed under S. 46 of the Act. (*Kensington, C.J. and Rattigan, J.*) JUMMA *v.* MUBARIK KHAN. **55 P. R 1915 : 50 P. L. R. 1916 : 30 I. C. 87 : 167 P. W. R. 1915.**

——— **S. 44**—*Presumption of entries—Onus of proof.*

Where a mutation has been effected in favour of A as the legitimate son of B, the burden of proving the legitimacy of A will be on the person asserting it. (*Rattigan and Smith, JJ.*) MAHBUP ALI *v.* TAJ KHAN. **26 I. C. 969: 255 P. W. R. 1915.**

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 111.

——— **S. 44**—*Presumption--Entries in Revenue Record.*

Entries in Revenue Records must be presumed to be correct until proved to be wrong is proved. (*Robertson, J.*) MADDU MAL *v.* BAGGU. **160 P. W. R. 1913 : 20 I. C. 831 : 280 P L. R. 1913.**

——— **S. 44**—*Onus—Pedigree Table.*

The presumption of truth as to the entries in a Record of Rights under S. 44 extends also to a Settlement Pedigree Table forming part of the record. (*Kensington and Johnstone, JJ.*) ISHAR *v.* DALIP SINGH. **215 P. W R. 1912: 18 I. C. 218 : 111 P. L. R. 1913.**

——— **S. 44**—*Existence of custom.*

The section is not much useful where the fact to be established is the existence of custom. (*Reid, C. J. and Johnstone, J.*) DEBI SINGH *v.* PREUN. **11 P. R. 1911 : 83 P. L. R. 1911 : 9 I. C. 683 : 57 P. W. R. 1911.**

——— **Ss. 45, 48 and 158 (1)**—*Jurisdiction—Civil and Revenue Courts—Suit by Jagirdar for declaration of right to receive rent in kind*

The plfff. sued for a declaration that as *jagirdar* or assignee of land revenue he was entitled to receive the revenue in kind out of the landlord's share of the produce which had to be paid by the tenants to proprietors, but which as a matter of fact, had always been paid to him by the cultivators in the shape of one fourths of the produce. *Held*, that the suit involved the question as to whether in the village concerned the land revenue should be paid to the *jagirdar* in cash or in kind. This being a question, which under S. 48 of the Land Revenue Act can be decided only by the Local Government no civil Court can exercise jurisdiction in respect of it. The fact that the present suit was one for a declaration did not give the civil Courts jurisdiction to entertain it, notwithstanding S. 45 of the Act. (*Shah Din and Chevis, JJ.*) JIWAN DAS *v.* PIRAN DITTA. **48 I. C. 384 : 110 P. R 1918.**

——— **Ss. 111 and 117**—*Scope of—Question of title—Jurisdiction of Civil Court—Partition — Right of widow.*

S. 111 does not deal with questions of the title or with the questions relating to the right of a joint land-owner to obtain or compel partition which in fact is governed by sections 116 and 117 of the Act. S. 111 merely concedes to a widow a *locus standi* before a Revenue Officer for claiming, that is, for applying, for partition which she may or may not be entitled to obtain in virtue of her life estate ; the proper course for the Revenue Officer in such a case would be to proceed under S. 117 and to either stay the proceedings for the determination of the question of the widow's right to obtain partition by a competent Court or to determine the question himself as if he were a Civil Court. The mere fact that the partition has taken place is no sufficient reason for holding that a civil suit subsequently instituted to decide the question of title which has not been disposed of during the partition proceedings, is barred. A widow is a joint owner of lands though with limited rights

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 111.

of ownership, and as such is possessed of a statutory right to demand partition Applying the ordinary rule of law of evidence the onus is then clearly upon the party who disputes her rights to obtain partition to prove a custom to the contrary. (*Martineau and Moti Sagar, JJ.*) SANT SINGH *v.* MUSSAMAT BASANT KAUR.
1923 Lah. 81 (2).

——S. 111--*Widows can apply for partition.*

A widow has a *locus standi* under S. 111 of the Punjab Land Revenue Act to apply for a partition of the joint estate of her husband. (*Le Rossignol and Abdul Qadir, JJ.*) SHADI *v.* MT. JEONI. **3 Lah. 236 : 1922 Lah. 362.**

——S. 111—*Partition proceedings — Mortgagee of undivided share—Suit by.*

A mortgagee of an undivided share in joint property alleging injury to his interest by the collusive proceedings of the mortgagor in partition proceedings, can claim his remedy by a regular suit in the civil Courts. A dispute of this character does not come within the functions of a Revenue Officer dealing with a partition under the Land Revenue Act. (*Maynard, F.C.*) THAKAR DAS *v.* SULTAN BAKSH. **2 P. R. 1918 Rev : 45 I. C. 405 : 3 P. W. R. 1918 Rev.**

——Ss. 111, 115 and 117—*Custom—Widow, right of to demand partition of joint holding—Procedure.*

A widow in the enjoyment of a life-estate in an undivided holding can under S 111 apply to a Revenue Officer for partition which she may or may not be entitled to obtain in virtue of her life-estate. 82 P. R. 1898, F.B ; 11 P. R. 1895. Rev. Foll. Agricultural custom in the Punjab does not confer on such a widow the right to obtain partition 100 P L. R. 1909. Ref. 70 P. R. 1912 Diss. She can get separate possession of her share, as distinguished from a definite partition through a civil Court but not through a Revenue Officer under Chapter IX of the Act. The procedure, to be followed when a widow in possession of her life-estate in a joint holding applies for partition discussed. (*Fagan, F. C.*) ABDUL GADIR *v.* RABIA. **4 P. R. 1917 Rev. : 41 I C. 473 : 1 P. W. R. 1917 Rev.**

——S. 111—*Adhasalidar's right to partition.*

Adhasalidar who gets part of profits for paying part of revenue is neither a joint owner nor a joint tenant. (*Arthur Reid, Kt. C. J.*) GADDA *v.* RIJHA. **191 P. W. R. 1911 : 75 P. R. 1911 : 10 I.C. 147 : 152 P L. R. 1911.**

——Ss. 115 and 116—*Wajib-ul-arz--Partition of Shamilat—Duty of Revenue Officer.*

An entry in the Wajib-ul-arz prohibiting the partition of *Shamilat* lands does not necessarily operate as a bar to a partition. It being the duty of the Revenue Officer dealing with the partition to decide whether such a clause should prevail or not. *Held*, that as the conditions had changed and a large section of the community contested the Wajib-ul-arz the Revenue Officer was justified in sanctioning partition. (*Diack, F. C.*) LAKHI *v.* DOST MOHAMED KHAN.
1 P. R. 1915 Rev : 29 I. C. 498 :32 P.L.R. 1916.

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 117.

——S. 115—*Partition — Discretion of Revenue Officer.*

Under S. 115 of the Punjab Land Revenue Act, a Revenue Officer has a discretionary authority absolutely to disallow an application for partition and he ought to use this authority in every instance in which the same question has been previously decided unless it is shown that the circumstances which made the previous order appropriate have changed. (*Maynard, F. C.*) NATHU *v.* BISHNA. **5 P. R 1914 Rev : 27 I. C. 417 : 229 P. L. R. 1915.**

——Ss. 116 and 117—*Civil and Revenue Court--Suit for declaration--Partition of Common land effected by Revenue authorities.*

A suit for declaration that a certain partition of common land effected by the Revenue authorities is inoperative so far as plff.'s interes s are concerned, the partition having been affected in accordance with *Khewat* of 1880 settlement and not according to the *Khewat* of the 1909 settlement, is cognizable by Civil Court 99 P. R. 1905 ref. The fact that the partition had actually been completed did not oust the jurisdiction of the Civil Courts. 61 P. R. 1897 (F B.) and 28 P. R. 1913 (F B.) Ref. (*Scott Smith and Broadway, JJ.*) CHAJJU *v* DALLU. **53 I. C. 419· 112 P. R. 1919.**

——Ss. 117 — *Revenue Officer — Duty to record judgment.*

A revenue officer trying a suit under the procedure laid down under S. 117 (2) (6) of the Punjab Land Revenue Act must give a judgment as directed by the C. P Code (*Scott-Smith and Le Rossignol, JJ.*) GELA RAM *v.* GANGU RAM. **70 P W. R. 1921.**

——Ss. 117—*Partition—Question of title—Application by third person, not in possession—Onus.*

Where an applicant for partition is recorded as a co-sharer, the presumption is that he is a co-sharer of the land of which he seeks partition. When a question of title is raised by the respondent, the Revenue Officer himself should try it. (*Fagan, F. C.*) KIRPA *v.* NASIB SINGH.
48 I. C 788 : 6 P. R. 1918 Rev.

——S 117—*Partition proceedings - Revenue Officer—Rights in Shamilat—Decision--Effect of—Subsequent civil suit—Res judicata.*

The question raised in the suit, *viz.*, whether the Shamilat should be partitioned in accordance with the ancestral shares or hasab rasad khewat, being a question of title is not *res judicata* by reason of the decision on this point by the Revenue Officer in partition proceedings, the officer not having decided it in accordance with the procedure laid down in S. 117 of the Act. (*Rattigan, C. J. and Le Rossignal, J.*) FAIZ BAKSH *v.* NIAMAT KHAN. **48 I. C. 365: 105 P. R 1918.**

——S. 117—*Suit under—Mere declaration competent—Partition proceedings.*

A suit on title arising out of partition proceedings under S. 117 of Act XVII of 1887 is not being an ordinary declaratory suit under S. 42 of the Specific Relief Act no other relief except declaration of title can be obtained in it. A party to partition proceedings can ignore them and

PUNJAB LAND REVENUE ACT (XVII OF 1887), S 117.

bring a possession suit for land not in possession but he is not bound to do so. (*Shah Din and Smith, JJ.*) LACHHAMI BAI *v.* HONDI BAI.
100 P. R. 1913 : 21 I. C. 719: 7 P. L. R. 1914 : 14 P. W. R. 1914.

——**Ss. 117 and 158**—*Partition--Completion —Question of title not raised —Subsequent suit for declaration that certain persons were not entitled to Shamilat—Suit, if cognisable by civil Court—Questions of title —Revenue Officer*

If a party to a partition proceeding allows a Rev. Officer to effect a partition without raising any objection and thereafter institutes a suit averring that deft. who was a party to those proceedings, had no title under his deed of purchase to various portions of *Shamilat* land which had been allotted to him by partition, the suit is cognizable by a civil Court. If in defence to a suit of the above kind, the deft. raises the plea of estoppel or waiver, there is no *a prior* objection to the Court entertaining and deciding such point on the facts of the case, and the longer the silence of the plff. the more strongly would it affect his claim. A Rev. Officer as such cannot dispose of questions of title raised under S. 117 of the Act, when he proceeds to determine such questions he acts either as a *Revenue Court* under sub-sec. 2 (*a*) or as a civil Court under sub-sec. 2 (*b*) of the said section. 8 P. R. 1910 overruled. 72 P. R. 1896 ; 61 P. R 1897 appr. (*Kensington, Rattigan and Chevis, JJ.*) ANWAR *v.* ALLAHI YAR.
28 P. R. 1913 : 10 P. L. R. 1913 : 16 I. C. 967: 275 P. W. R. 1912.

——**Ss. 117 and 158**—*Jurisdiction of Civil or Rev Courts.*

A suit for partition must first be instituted in the Rev. Court and if that Court in taking the pleas of the deft,. finds a question of title involved, it may refer a party to the Civil Court for a decision on the question of title or it may resolve itself into a Civil Court and hear and decide that question. Civil Court in partition cases can simply decide the question of title pure and simple. (*Johnstone, J.*) AUTAR SINGH *v.* SURAIN.
10 I. C. 902 : 181 P. W R, 1911.

——**S. 117 (2) (c)**—*Question of title—Decision by Revenue Officer—Appeal—Amending Act (III of 1914), S. 49.*

An appeal from the decision of Revenue Court in its civil capacity lies to the District Court and not the High Court. In a Letters Patent Appeal, a Division Bench can reverse a judgment of a single Judge which ignored the amendment of the law not brought to his notice. A Revenue Officer deciding a question of title as though he were a Civil Court is to be deemed a Subordinate Judge for the purpose of determining the *forum* competent to hear an appeal from a decree passed by him. The Assistant Collector in the matter of determination of the question of title is acting as Subordinate Judge and the appellant can appeal to the Court of the District Judge. (*Shadi Lal and Martineau, JJ.*) SADDA SINGH & CO. *v.* KIRPALA AND CO.
1 Lah. 387 : 58 I. C. 768 : 2 Lah. L. J. 269.

——**S. 141**—*Trees—If land—Delivery of possession—How effected.*

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 158.

Trees are land within the meaning of S 141 of the Punjab Land Revenue Act and delivery of possession can only be given by the Collector as provided by the section. (*Moti Sagar, J.*) NIDHI RAM *v.* PARSA RAM.
1923 Lah 693.

——**Ss. 144, 158 (2)**—*Title to crop—Delivery by revenue officer—Suit in Civil Court—Jurisdiction.*

Defendants applied to the Revenue Officer for a division or appraisement of the produce of a holding in which they were co-sharers with the plaintiffs. An appraisement of the produce was duly made by the referee appointed by the Revenue officer but before division of the produce plaintiff removed it and stored it in a house The referee thereupon made over a whole Khatti of barley to the defendants in lieu of their share of the produce. In a suit by plffs. for the price of the barley alleging that it belonged to them exclusively :

Held, that the question whether the barley was joint property or belonged exclusively to the plaintiffs, was a question of title which cannot be determined by a Revenue Officer. Consequently the Civil Court has jurisdiction to entertain the suit which did not come within S. 158 (2) (xix) of the Punjab Land Revenue Act (*Shadi Lal and Harrison, JJ.*) RAMJI LAL *v.* MANGAL SINGH,
2 Lah. 302 : 28 P. L. R. 1922 : 1922 Lah. 157.

——**S. 144**—*Punjab Tenancy Act, Ss. 17 and 19—Division of produce—Power of referee.*

S. 144 of the Act gives a Revenue Officer power to compulsorily effect a division of the produce in spite of the adjustment of interested parties. (*Maynard, F. C.*) MURAD BIBI *v.* KHADIM HUSSAIN.
43 I. C. 495 : 9 P. R, 1917 (Rev.).

——**S. 145**—*Entry as owner in a summary settlement—Occupancy tenant in the subsequent regular settlement – Latter prevails.*

In deciding the question whether a particular person is an owner or occupancy tenant of certain land, the entries of the summary settlement of 1847 Punjab in regard to rights in land cannot have the same force as those of the subsequent regular settlement at which a detailed record of rights was prepared after full inquiry. (*Campbell and Scott Smith, JJ.*) MANGAL SINGH. *v.* RATTAN SINGH.
1923 Lah. 12.

——**S 158**—*Property omitted in prior partition by mistake—Suit in Civil Court—Question of title.*

Where after a partition among the co-sharers it was found out by one of them that certain lands were left out by mistake and also that the lands allotted to him were smaller in area than it was assumed, a suit for a declaration of his rights would be cognisable by a Civil Court as it related to title and did not in any way seek to undo the prior partition in its entirety. Such a suit would be governed by Art. 120, Lim. Act. (*Shadi Lal, C. J. and Abdul Qadir, J.*) SHER *v.* PIARA RAM.
1924 Lah. 324.

——**Ss. 158, 111 and 121**—*Suit for declaration—Partition by Rev. Officer—Jurisdiction of Civil Court.*

The Civil Court has no jurisdiction to entertain any question as regards procedure when there is

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 158.

no dispute about title to the land. The facts that the Revenue Officer, did not specifically refer to the trees in his method of partition, that he did not carry out the partition in the manner prescribed by himself in his order, that he did not expressly give sanction as provided for in O. 32, R. 7. C. P. C. to the agreement between the minor's representative and defendant to take shares by selection instead of by drawing of the lots; and that the agreement was not sanctioned by the Dt. Judge under S. 29 of the Guardians and Wards Act, do not give the Civil Court jurisdiction in face of the clear prohibition in S. 158 of the Land Rev. Act. (*Le Rossignol and Bevan Pelman, JJ.*) GHULAM HAIDAR *v.* AMIR HAIDAR.
1 Lah 298 : 2 Lah. L. J. 192 : 5 P. L. R. 1921 : 58 I. C. 19 : 2 U. P. L. R. (L.) 156.

——— S. 158—*Quaere.*

Whether the exclusion of civil jurisdiction provided in S. 158, Land Revenue Act, as regards partition is intended to be applicable where the partition is done by private agency. (*Johnstone and Shadi Lal, JJ.*) RAM JAWAYA MAL *v.* DEVI DITTA MAL. **107 P. W. R. 1916 : 117 P. R. 1916 : 34 I. C. 192 : 70 P. L. R. 1917.**

——— S. 158—*Jurisdiction—Civil and Revenue Courts—Muafi.*

Under Revenue rules the local Revenue Officers are enjoined in case of resumption of *muafis* to settle the land with the heirs of the late *muafidars*, and civil courts cannot interfere even where the local Revenue Officers make the settlement with the heirs of the last surviving *muafidar* ignoring the heirs of another joint *muafidar* who died earlier (*Johnstone, J.*) HARCHARAN DAS *v.* DIWAN CHAND. **96 P W. R. 1914 : 25 I C. 622 : 198 P. L R. 1914.**

——— S. 158 (1) (2)—*Jurisdiction—Civil and Revenue Court—Question of title—Partition of Shamilat.*

A suit for partition of *Shamilat* in which the dispute was as to the nature of the alienations to the parties and as to the title to the suit properties is cognisable by a Civil Court and is not barred by S. 158 of the Act. A suit for partition of common land will lie in a Civil Court so far as it seeks the determination of the plaintiff's share and a finding that his right to partition is in accordance with such share. (*Reid, C J, and Rattigan, J.*) MADAN MOHAN LAL *v.* ABDUL RAHMAN.
88 P L. R. 1913 : 18 I. C 356 : 58 P. W. R. 1913.

——— S 158 (2) (xvii)—*Collector's order for partition—Declaratory suit that land impartible is not maintainable.*

An agreement among some co-sharers of shamilat land that it should remain joint and indivisible was entered in the Wajib-ul-arz. When the Collector ordered partition, a suit was instituted in a Civil Court for a declaration that the land could not be partitioned:

Held, under S. 158 (2) (xvii) of the Land Rev. Act it was not cognizable by a Civil Court. (*Abdul Raoof and Martineau, JJ.*) SINGH RAM *v.* DATA RAM. **3 Lah 4 : 4 U P L R (Lah.) 72 : 63 & 70 P. L. R. 1922 : 1922 Lah. 88.**

PUNJAB LAND REVENUE RULES, R. 27

——— S. 158 (2) (vxii)—*Suit for partition—Tenant for a fixed term—Jurisdiction.*

A suit for partition of agricultural land brought by a tenant for a fixed term of the share of one of the joint owners is not cognizable by a Civil Court. (*Scott-Smith and Martineau, JJ.*) BHAN SINGH *v.* JAGAT SINGH. **51 I. C. 645 : 55 P. R. 1919.**

——— S. 158 (2) (xvii)—*Partition—Suit for declaration of right to—Civil Court—Jurisdiction.*

A Civil Court has jurisdiction to entertain and decide a suit as framed. 82 P. R 1898, Foll. (*Rattigan, C. J.*) DIALI *v* KALA SINGH.
123 P. W R. 1918 : 46 I. C. 11 : 7 P. R. 1919.

——— S. 158 (2)—*Declaration under S. 45*

Suit for declaration that entries in the Record of Rights are wrong and that the land in suit was *Shamilat*, is not for actual correction within the meaning of S. 158 but only to obtain a declaration under S 45. (*Shah Din, C. J and Le Rossignol, J.*) RAM SINGH *v* BAKSHI **102 P W. R. 1917: 41 I. C. 895: 64 P. R 1917.**

——— S. 158 (2) (xvii)—*Partition, collusive—Widow and co sharers—Suit by reversioners—Jurisdiction—Civil or Revenue Court*

S. 158 (2) sub cl. (xvii) only debars persons who were or should have been parties to partition proceedings from going to the Civil Court and the proceedings are final as between them alone. A reversioner of a childless proprietor is not his representative and a suit by him to avoid a partition between the widow and the co-sharers on the ground of collusion is cognizable by a Civil Court. (*Rattigan and Chevis, JJ.*) DASONDHI *v.* BUTA. **37 P. W. R. 1913 : 93 P. L. R. 1913 : 18 I. C 452 : 74 P. R. 1913.**

——— S. 158 (2) (XIV)—*Revenue suit tried by Civil Court—Objection by the defendant—Remedy.*

Where a revenue suit not cognisable by the Civil Court is tried by the Civil Court, and the defendant objects all along, the decree should not be registered as a revenue decree and his remedy in such a case is to set aside the whole proceedings and return the plaint for presentation to the Revenue Court. (*Chevis, J.*) RUKMAN DEVI *v.* SAIN DAS. **45 P. W. R. 1912 : 13 I. C. 401 : 73 P. L. R. 1912.**

PUNJAB LAND REVENUE RULES.

——— R. 27—*Zaildar—Conditional resignation—Succession of person designated.*

When a Zaildar who is so old as not to be able to perform personally the duties of his office the usual and proper course is for a substitute to be appointed. There is nothing in the Land Revenue Rules to preclude an unconditional resignation of his office by a Zaildar though a resignation conditional on the succession of a particular person designated by the resigning Zaildar is opposed to the spirit of the rules regulating succession to the Zaildar. The initiation and prosecution of needless proceedings in connection with such posts as this is to be deprecated. (*Fagan, F. C.*) MAHAMMAD ILAHI *v.* FAZAL ILAHI. **4 Lah. L. J. 415.**

PUNJAB LAWS ACT (IV OF 1872).

— *Insolvency proceedings are not a suit and an order therein is not a decree.*

Insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a suit and an order releasing from attachment the residential house of an insolvent in accordance with the conditions of the trust deed in respect thereof, is not a decree and hence an appeal does not lie from it. (*Scott-Smith, J.*) RADHA KISHAN *v.* MADAN GOPAL. **67 I. C. 794 : 3 Lah. L. J. 338.**

——S. 5—*Scope of -Custom--Applicability of*

No presumption in favour of a custom against the general or personal law is created by s. 5 of the Act ; it is only when a custom is proved as required by law, that it is made the rule of decision, 41 P R. 1906 Appr. (*Lord Buckmaster*) ABDUL HUSSAIN KHAN *v.* BIBI SONA DERO.
45 Cal. 450 : 16 A. L. J. 17 : 4 Pat. L. W. 27 : 22 C. W. N. 353 : 23 M. L. T. 117 : 27 C.L.J 240 : 1 P. L. R. 1918 : 20 Bom. L. R. 528 : 12 S. L. R. 104 : 45 I. A. 10 : 43 I. C. 306 : 34 M. L. J. 48. (P. C.)

——S 5—*Custom—Proof of.*

The primary rule of decision in cases where a plea of custom is raised, is custom and the custom ought to be adjudicated upon. (*Broadway, J.*) KISHAN SINGH *v.* NUR DIN. **42 I. C. 193 : 156 P. W. R. 1917.**

——S. 5—*Residents in town—Personal law —Presumption.*

A non-agricultural tribe residing in a town and living on Government service, are presumed to follow their personal law in matters of inheritance and the onus of proving any particular custom lies on the person asserting it. Instances of exclusion of daughters by sons, of sisters by brothers and of succession of widows in the absence of sons, do not raise the presumption that in all matters their personal law has been superseded. (*Chevis and Shadi Lal, JJ.*) AYAZUDDIN *v.* MAHFUZUNNISSA. **3 P. W. R. 1915 : 32 P L. R. 1915 : 27 I. C. 542 : 53 P. R. 1915.**

——S. 9—*Pre-emption--Partly sale and partly exchange.*

Where transaction is partly a sale and partly an exchange and both are inseparably connected, there can be no pre-emption. The parties could effect their purpose so to avoid the right of pre emption. 64 P. R. 1888 : 45 P. R. 1895 ; 29 P. R. 1893 ; 111 P. R. 1885 Ref. (*Rattigan and Jones, JJ.*) GUL MUHAMMAD *v.* TOTA RAM.
82 P. R. 1915 : 31 I. C. 221 : 172 P. W. R. 1915.

——S. 25--*Order under, refusing to discharge insolvent—Appeal.*

An order under S. 25 of the Act refusing to discharge an insolvent before the estate is fully administered is not a decree and hence not appealable. (*Kensington and Johnstone, JJ.*) AMAN ULLAH *v.* ABDUL GHAFUR. **85 P. R. 1911 : 13 I. C. 808 : 209 P. W. R. 1911.**

——Ss. 25 and 31—*Order under S. 25—Appeal—Failure to comply with Rules under S. 31—Effect.*

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (I OF 1900).

An order of the Judge of an Insolvency Court under S. 25 is not appealable. Failure to comply with R. 30 of the rules under S. 31 of the Act is not a material irregularity The discharge of the burden of proof on the creditor under R. 30 is not a condition precedent to proceedings against the insolvent under S. 25. S. 25 is not confined to conduct in contracting debts. It covers concealment of account books and false allegations which go to constitute gross misconduct in reference to debts. (*Reid, C.J. and Shah Din, J.*) RAM CHAND *v.* BILLA MAL. **64 P. R. 1911 : 12 I. C. 867 : 187 P. W. R. 1911.**

——S. 31—*Rules under, if ult a vires.*

The rules under S. 31 of the Act allowing appeal to the Chief Court from an order refusing to discharge an insolvent are *ultra vires* of the Government. (*Kensington and Johnstone, JJ.*) AMAN ULLAH *v.* ABDUL GHAFUR. **85 P.R. 1911 : 13 I. C 808 : 209 P. W. R. 1911.**

——Ss. 47 and 50 (b)—*Possession of buoy.*

The possession of a buoy for use in crossing a river is not a punishable offence. (*Kensington, J.*) EMPEROR *v* SOHAN SINGH. **13 Cr. L. J. 185 : 13 I. C. 1001 : 18 P. R. 1911 (Cr).**

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (I OF 1900).

—— *Starting point is date of attestation.*

Where the transactions were alienations of ancestral land by a male proprietor as mortgages or as sales, time begins to run from the date of the attestations. Even if Art. 144 were held to apply the suits would still be barred as time would begin to run from the date when the alienees came into possession as owners and under S. 9 of the Limitation Act would continue to run not only as against the original alienors but against all the world. 18 P. R. 1919 Foll. (*Broadway and Campbell, JJ.*) SHEOLAL *v* MOTI. **1923 Lah. 133.**

——'*Heir,*' *meaning of — Limitation Act, Sch I, art.* 144.

'*Heir*' in the Sch. to the Act means only the next heir after the alienor's death and does not include a remote reversioner. The Act therefore is not applicable to a suit for possession by a remote reversioner of the last male holder whose right to possession did not arise till the death of the intervening reversioner. (*Scott-Smith, J.*) RULDU SINGH *v.* SAWAL SINGH. **3 Lah. 188 : 1922 Lah. 380.**

——*Applicability of—Alienor's death leaving a widow.*

The Act is not applicable where the alienor died leaving a widow during whose life-time the reversioner could not obtain possession of the property alienated and it is immaterial whether the alienor died before or after the Act came into force. 145 P. R. 1907 : 62 P. R. 1910 ; 33 P R. 1911 ; 29 P. R. 1914 and 95 P. R. 1918, Rel. (*Shadi Lal and Le Rossignol, JJ.*) HIRU *v.* SOHNUN. **139 P. R. 1919 : 54 I. C. 964.**

——*Applicability of—Death of alienor after the commencement of the Act.*

The Punjab Limitation Act, 1900, is applicable to suits, whether for declaration or for possession, provided that the alienor has died

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (I OF 1900).

after the commencement of the Act. 91 P. L. R 1906 ; 44 P. L. R. 1907 and 196 P.L. R. 1913 Ref. (*Shadi Lal, J.*) MANNA SINGH *v.* LADHA SINGH. **49 I. C. 703 : 18 P. R 1919.**

———*Suit for recovery of land alienated—Starting point.*

Limitation for a suit to recover possession of ancestral land alienated by a male proprietor during his life-time, runs primarily from the date on which the alienation is attested. The proprietary title of a mortgagee arises only when the right of redemption is extinguished and when mutation is sanctioned. (*Leslie Jones, J.*) JAGAT RAM *v.* DHARAM SINGH. **40 I. C. 446.**

———*Scope of.*

The Act is confined to alienations by male proprietors only. (*Chevis and Shadi Lal, JJ.*) THAKAR *v.* GANESHI. **15 P. R. 1916 : 33 I. C. 161 : 198 P. W. R. 1915**

———*Scope of.*

If a person's right to sue subsists when the new Act came into force, he is entitled to its benefit. The Punjab Limitation Act applies also to a sale of the equity of redemption by sonless male proprietor whose reversioner can maintain a suit that the sale is not binding on him. (*Smith J.*) MAHIAMAL *v.* GHULAM KADIR, **61 P. L. R. 1915 : 27 I. C. 607 : 11 P. W. R. 1915.**

———*Knowledge of alienation, if necessary.*

The period of limitation in a case of alienation, governed by the Punjab Limitation Act, commences from the date of the date on which the alienee gets the possession, and a reversioner's knowledge of such alienation is not necessary. (*Scott-Smith, J.*) GANDA SINGH *v.* GULAB SINGH. **66 P. W. R. 1914 : 25 I. C. 724 : 159 P. L. R. 1914.**

———*Suit by a plaintiff who was a minor on date of mutation—Limitation Act, S. 6.*

Under the Punjab Limitation Act time runs from the date of mutation and where the plaintiff in a suit governed by that Act was a minor on that date he is entitled under S 6 of the Indian Limitation Act, to bring his claim within 3 years of his attaining majority. (*Rattigan and Beadon, JJ.*) NATH SINGH *v.* KISHEN SINGH. **84 P. L. R. 1914 : 22 I. C. 637 : 47 P W. R. 1914.**

———*Alienation—Suit by sons of reversioners to contest—Limitation.*

A claim for possession of ancestral property by a reversioner on the ground that donee's line being extinct, the property reverts to the family of the donor, is barred by the Punjab Act (I of 1900), if no suit to contest it was brought within 12 years from the date on which the mutation was effected in favour of the donee. (*Agnew, J.*) KALU *v.* SAVARIYA, **300 P.L. R. 1913 : 20 I. C. 567 : 154 P. W. R. 1913**

———*Applicability of.*

A suit by the sons of B to set aside his alienation is governed by the Punjab Limitation Act (I of 1900) where B died after the Act came into force. (*Shah Din and Chevis, JJ.*) ATAR SINGH *v.* ALLAH DIN. **126 P. L. R. 1913 : 18 I. C. 445 : 93 P. W. R. 1913.**

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (I OF 1900), Art. 2.

———*Applicability — Alienation by sonless proprietor—Setting aside.*

An alienation was openly made and mutation published. There had been two settlements giving effect to the alienation. *Held*, that the alienation was not kept from the knowledge of the plaintiff by fraud Where an alienation by a sonless male proprietor took place in 1888, and mutation was effected at the same time, a suit instituted in 1909 by the reversionary heirs repudiating the alienation is time-barred. In view of publicity given to the alienation at the mutation proceedings it is impossible to infer fraudulent concealment on the part of the defts.—respondents. (*Shah Din and Beadon, JJ.*) PHULA SINGH *v.* PREM SINGH. **177 P. L. R. 1912 : 16 I. C. 844 : 236 P. W. R. 1912.**

———S 1—*No applicability to rights accrued before Act.*

The Punjab Limitation Act I of 1900, does not affect any prescriptive right or title which had accrued or been acquired before the Act came into operation ; limitation in such cases would be governed by the Indian Limitation Act. (*Scott Smith and Fforde, JJ.*) (SARUP SINGH *v.* LAL SINGH. **1923 Lah. 642.**

———S. 41—*Water-tax—Liability.*

Under S 44 water-tax is liable to be levied on buildings and lands so situated as to derive benefit from the works as they stand and not on lands which may be benefited if further connections were made. A notification sanctioned the imposition of water-tax on the rents of all houses and buildings "500 ft. from the *public water-main.*" *Held*, that the expression referred to the public water-mains from which water can be drawn and not public water-mains absolutely closed and from which no one can benefit as it stands. (*Robertson and Beadon, JJ.*) STEPHENSON *v.* MUNICIPAL COMMITTEE, LAHORE. **266 P. W. R. 1912 : 15 P. L. R. 1913 : 17 I. C. 149 : 42 P. R. 1913.**

———Art. 1—*Applicability of—Right to sue accruing under old Act—Limitation.*

Where the time prescribed for setting aside an alienation had already expired when the Punjab Limitation Act came into operation, that Act does not operate so as to extend the time. This principle however is not applicable to a case in which the right to sue had accrued under the old Act but the period of limitation had not expired when the Punjab Limitation Act of 1900 was passed. (*Le Rossignol and Wilberforce, JJ.*) HAKUMAT RAI *v.* WADHAWA SINGH. **4 Lah. L. J. 243 : 1922 Lah. 398.**

———Art. 2—*Applicability of—Death of alienor—Death of—Object of the enactment—Test of applicability of the section*

An action to recover possession of ancestral land alienated by a male proprietor subject to the customary law of the Punjab is governed by the Punjab Act I of 1900 if the death of the alienor which gives rise to the cause of action for a suit for possession, takes place after the enforcement

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (I OF 1900), Art, 2.

of the Act. The whole scheme of the Act makes it clear that the object of the legislature was to remove an uncertainty about titles to land by compelling the relatives of the male proprietors to impeach their alienations within a limited period of 12 years. The title of the alienee is to be immune from attack if the alienation in his favour was not contested within the 12 years of the date specified in the third column of Art 2. Art. 2 should be read with Art 1 which prescribes the period of limitation for suits for a declaratory decree and the word "heir" in the former article connotes the same person or persons as the expression "son or reversioner" in the latter article. The word "heir" denotes a person who succeeds by descent to an estate of inheritance, and as long as a proprietor is living he has no heir. It is only after the death of the proprietor that the "son or reversioner" becomes an heir. (*Shadi Lal, C. J. and Harrison, J.*) RULDU SINGH *v.* SAWAL SINGH. **3 Lah. 188 : 1922 Lah. 380.**

——Art. 2—*Alienation by proprietor—Suit for possession—Limitation is 12 years from attestation.*

Where property is alienated without consideration and necessity by a man proprietor, a suit by the heir to have it set aside and for possession is within time if filed within 12 years of the attestation by the Revenue officer. (*Chevis, J.*) KUNDAN *v.* MAM RAJ. **4 Lah. L. J. 178 : 31 P. W. R. 1922 : 1922 Lah. 57.**

——Art. 2—*Reversioner.*

Suit for recovery of ancestral land after alienors widow. A suit by reversioners for recovery of ancestral land after the death of the alienor's widows is not governed by the Punjab Limitation Act, but by Art. 141 of the Limitation Act, notwithstanding that the alienor died after the former Act came into force. (*Broadway, J.*) GANESH RAM *v.* PANJU. **95 P. R. 1918 : 128 P. L. R. 1918 : 47 I. C. 977 : 174 P. W. R. 1918**

——Art. 2—*Suit for possession by customary heir—Starting point—Attestation of mutation—Date of taking phylical possession.*

A mortgaged certain land to B. by duly registered deed on the 16th June 1893 ; subsequently B sold his mortgage rights to C by deed of sale, dated 25th January 1898. He never obtained mutation of names but on the 18th August 1898. C had mutation effected in his favour. A died in 1906. On the 9th March 1908, A's minor son, aged six years, sued for possession of the land on the ground that the land was ancestral, that C took possession under the pretence that he was the mortgagee, that no mortgage existed in fact and that even if there was any such mortgage, it was invalid as being neither for consideration nor for necessity. *Held*, that the suit is not one for redemption of the mortgage of 1893 and that the defts. who pleaded the mortgage must establish that fact and that the suit was instituted within twelve years from the date of the mortgage and was not barred. Under the Act, the Court before deciding whether a suit is barred, has to look, in a case in which at the time of alienation, possession is given, or agreed to be given first to the date (if any) of the attestation by the Rev. Officer in the Register of Mutations, and in the absence only of such attestation to the date of alienee's physical possession of the land alienated. A suit which would fall under Art. 2 is in time, if brought within 12 years from the date of such attestation though attestation actually took place 12 years after the alienee had taken possession. (*Rattigan, J.*) FAZLA *v.* BADAN SINGH. **48 P. R. 1911 : 237 P. L. R. 1911 : 11 I C. 765 : 141 P. W. R. 1911.**

PUNJAB MUNICIPAL ACT (XX OF 1891), S. 38.

——Arts. 16 and 22 — *Instalment bond—Penalty—Default—Limitation.*

Art 16 of the Punjab Loan Limitation Act governs a suit for the recovery of money due on a bond containing a penalty for a default in payment of instalments. Art. 22 is more general and is applicable to suits on all bonds whether payable by instalment, or otherwise. (*Shadis, Lal, C.J. and Abdul Qadir, J.*) SIBA SINGH *v.* SUNDAR SINGH. **3 Lah. L. J. 522.**

—— —Sch. I—*Heir— Meaning of — Suit by remote reversioner for possession.*

The word "heir" in theSchedule to the Punjab Limitation Act includes only the next heir after the death of the alienor and not a remote reversioner. A suit for possession by a remote reversioner of the last male holder, whose right to possession did not arise till the death of the intervening reversioner is not governed by the Act. (*Scott Smith, J.*) RULDU SINGH *v.* SAWAL SINGH. **1922 Lah. 380.**

PUNJAB MUNICIPAL ACT (XX OF 1891).

——*Committee's powers—Construction.*

The powers conferred on the Municipal Committees ought to be strictly construed as they are an interference for the public good with the ordinary rights and privileges of the public. The Committee therefore ought to exercise these extraordinary powers strictly in accordance with law and procedure. (*Johnstone and Shah Din, JJ*) MUHAMMAD YASIN *v.* MUNICIPAL COMMITTEE. **130 P. L. R. 1911 : 91 P. W. R. 1911 : 9 I. C. 889: 56 P. R. 1911.**

——S. 2 (2)—*Rules under S. 154 (j) of Act XIII of 1884.*

Rules made under S. 154 (*j*) of Act XIII of 1884 by the Lieutenant Governor are still in force by virtue of S. 2 (2). (*Reid, C. J. and Kensington, J.*) MUNICIPAL COMMITTEE, AMBALA *v.* MOHENDAR SINGH. **118 P. L. R. 1911: 38 P. R. 1911: 9 I. C. 1000: 97 P. W. R. 1911.**

——S. 38—*Notice—Declaratory suit against Municipal Committee, if necessary.*

No notice of one month under S. 38 is necessary for bringing against a Municipal Committee a suit for declaration as to ownership of a plot of land. (*Reid, C. J.*) ISHAR *v.* MUNICIPAL COMMITTEE OF LAHORE. **1 P. W. R. 1914: 24 P. L. R. 1914: 23 I. C. 317: 32 P. R. 1914.**

——S. 38—*Notice—Purpose of the law.*

The purpose of the law is that a Municipal Committee should have reasonable time to answer claims made against it, and so the date of the presentation of a plaint in its final amended

PUNJAB MUNICIPAL ACT (XX OF 1891), S. 56.

stage may be looked to, if it satisfies the provision of S. 38 ; 3 P. L. R. 1900 Foll. (*Johnstone and Shah Din, JJ.*) MAHOMED YASIM *v.* MUNICIPAL COMMITTEE. **9 I. C. 844 : 110 P. L. R. 1911.**

——— S. 56 (g)—*Scope—Trees not provided by Municipality—Municipality Power.*

S. 56 (g) does not apply to trees not provided by the Municipality itself. A Municipality can remove or plant trees; because it has full control over the sanitation and general management of the Municipal area, but on no other ground, but cannot sell to make profit out of the trees which do not belong to it. (*Johnstone, C. J.*) FAZAL KARIM KHAN *v.* THE MUNICIPAL COMMITTEE OF URMUR. **38 I. C. 93 : 39 P. W. R. 1917.**

— S. 92—*Punjab Municipal Act (II of 1911) S. 189 and 193—Sanction.*

If no reply is given to a notice given to a Municipality for erecting, re-erecting or repairing a house within six weeks from the date of service, such silence amounts to an irrevocable sanction of the Municipality. (*Roberton, J.*) GOPAL DAS *v.* MUNICIPAL COMMITTEE, LAHORE.
52 P. W R. 1913: 19 I. C. 781: 122 P. L. R. 1913.

——— Ss. 92 and 95—*Municipal Committee's powers.*

A Municipal Committee can order the removal of a building or a portion thereof only under Ss. 92 and 95, under the former when the building is new, under the latter when it is desired to remove projections or structures overhanging, projecting into, or encroaching on the street. (*Johnstone and Shah Din, JJ.*) MUHAMMAD KASIM *v.* MUNICIPAL COMMITTEE, LAHORE.
130 P. L. R 1911: 91 P. W. R. 1911: 9 I C. 889: 56 P. R. 1911.

——— S 94 (a) and (e)—*Superstructure on old Chatta—Material alteration.*

The replacing of an old by a new superstructure, upon an old chatta or bridge over a lane is a material alteration within cl. (*a*) of S. 94 of the Act and affects the security of the old building within cl. (e) of the section. The Committee acts *intra vires* in calling on the plff. to remove such new superstructure erected without its permission. (*Roberston, J.*) THE MUNICIPAL COMMITTEE OF DELHI *v.* MAMAN CHAND. **178 P. L. R. 1912 : 15 I. C. 658 210 P. W. R. 1912.**

——— S. 195—*Erection of building—Notice to demolish—Injunction.*

Plaintiff constructed a Chabutra in contravention of the sanction of the Municipality and the Municipality ordered its demolition. Plaintiff sued for an injunction urging that his plan was more advantageous to the public than would be the building as sanctioned, but this was negatived. *Held*, that no second appeal lay in the case. The Court could not go into the question of advantage to the public. (*Ratligan, J.*) HARJI MAL *v.* MUNICIPAL COMMITTEE, DELHI.
107 P. L. R. 1915: 29 I. C. 766 : 67 P. W. R. 1915.

——— (III of 1911.)

——— *Adverse possession by municipality.*

The Municipal Committee is not precluded from acquiring title by adverse possession under the Act. (*Abdur Raoof, J.*) MAHOMED RAMZAN *v.* MUNICIPAL COMMITTEE, ADIPUR. **1923 Lah. 534.**

PUNJAB MUNICIPAL ACT (III OF 1911) S. 3.

——— S. 3 (5)—*Act XX of 1891—S. 92—Building without Municipal sanction — Notice of demolition—Addition*

Plaintiff asked permission to build a saiban the plan showing light gaps between the supports of the roof The plff. subsequently made additions by filling these gaps with doors and windows. The Municipality gave notice to demolish the additions. In a suit for an injunction restraining the Municipality from demolishing the additions: *Held*, that the notice was not illegal as the opening of doors and windows constituted a material alteration of the building within S. 3 (5) (a) of the Act. (*Scott Smith, J.*) MADAN MOHAN LAL *v.* MUNICIPAL COMMITTEE, DELHI.
58 P. L. R. 1915 : 28 I. C. 341 : 49 P. W. R. 1915.

——— S. 3 (10), 188—*Bye-laws—"Occupier"—Definition in Act and bye-laws conflicting*— Ultra-vires.

A bye-law must conform with the provisions of the enactment under which it purports to be made. The definition of "occupier" in the bye-laws of the Delhi Municipality framed under S. 188 of the Municipal Act is *ultra vires* in so far as it is inconsistent with the definition of that term in S. 3 (10) of the Act. A bye-law which makes the owner of a building responsible for the use of the building by his tenant, where he has no legal power to control the acts of his tenant with regard to the use of the premises, is manifestly unjust to the owner and hence unreasonable A bye-law which is unreasonable is *ultra vires*. (*Abdul Qadir, J.*) JOTI PERSHAD *v.* EMPEROR.
22 Cr. L. J. 739 : 2 Lah. 239 : 64 I. C. 129.

——— S. 3 (13)—"*Public street*" — *Dedication—Evidence of user—Road through private market—License to trading public.*

In determining the question whether a road through a private property is a public highway, though not expressly dedicated to the public, it is of crucial importance to distinguish between evidence showing an intention to dedicate to the public generally and evidence showing that visitors to or traders with tenants whose shops abut on the road have by permission, a right of passage. The Privy Council held that having regard to the evidence in the case and the previous conduct of the Municipality, the road in question was not a public street within S. 3, sub-section (13) of the Punjab Municipal Act (*Lord Shaw*) MUHAMMAD *v.* MUNICIPAL COMMITTEE OF KARNAL CITY
1 Lah. 117 : 1 P. W. R. 1920 : 13 P. L. R. 1920 : 11 L. W. 579 : 18 A. L. J. 468 : 22 Bom. L R. 563 : 28 M. L. L. 1 : 2 U. P. L. R. (P. C.) 87 : 38 M. L. J. 455 (P.C.)

——— S 3, (193), 18 and 193—"*Street*"—*Meaning of—Permission to build—Condition can be given.*

The expression "Street" is defined as meaning any road, foot-way, square, court, alley or passage accessible, whether permanently or temporarily to the public, whether a thoroughfare or not. As regards accessibility mere physical accesses apart from the right of access cannot be regarded as test. 30 B. 558 ; 6 Bom. 686 ; 20 B. 146: 60 P.L R. 1918 referred to. Where permission is asked

for to erect a new building it is open to the Municipal Committee to grant a conditional sanction and insist on the demolition of a particular wall before the building is begun. (*Broadway, J.*) MUNICIPAL COMMITTEE, DELHI *v.* ABDUL HASSAN KHAN.

1924 Lah. 393.

——S. 3 (13)—*Lane temporarily accessible to public is street.*

A lane which is accessible to the public whether permanently or temporarily is a street within S.3 (13). (*Martineau, J.*) GANGARAM *v.* THE MUNICIPAL COMMITTEE, AMRITSAR.

1922 Lah 41.

——Ss. 3 (13) (b) and 56 (1) (g)—*Street—Vesting in Municipality—Right of Municipality over public street.*

When a street is vested in a Municipal committee it has power only to the extent of exercising its rights over it in order to maintain it as a street. It cannot use the public street otherwise than a street and it cannot interfere with enjoyment of the right of way by the public by leasing portions of it to private individuals. 25 M, 635 foll. (*Scott Smith, J.*) THE MUNICIPAL COMMITTEE OF MULTAN *v.* TAHLIA RAM

5 L. L. J. 26 : 1923 Lah. 272.

——S. 3 (13) (b)—*Public street.*

Where plaintiff's predecessors built a market on a plot of land and let it out to shopkeepers and left an open space between the shops to be used as thoroughfare, this open space is a public place within S. 3 (13) (b). (*Johnstone, C. J. and Scott Smith, J.*) MUNICIPAL COMMITTEE, KARNAL *v.* MUHAMMAD RUSTAM ALI KHAN.

108 P. R. 1916 : 146 P. W. R. 1916 : 35 I. C. 458.

——S. 3 (13) (b)—*Public street—Limited access of public to a private place—Effect of.*

A limited access by the public to a private place does not operate to convert it into a public street. 6 B. 686 and 20 B. 146 referred to) A private *serai* let to tenants had its gateways broken down. The Municipality cannot interfere with the proprietors setting them up. (*Johnstone, C.J. and Scott Smith, J.*) MUNICIPAL COMMITTEE, KARNAL *v.* MAHOMED UMAR DARAZ ALI KHAN.

109 P. R. 1916 : 145 P W. R 1916 : 35 I. C 355 : 136 P. L. R. 1916.

——S. 3 (18) (a)—"*Accessible to public*"—*Meaning of.*

"Accessible to the public" means open to all the public in fact whether by right or permission (*Shadi Lal, C. J. and Fforde, J.*) ABDUL HASSAN KHAN *v.* THE MUNICIPAL COMMITTEE, DELHI.

1923 Lah. 417

——Ss. 13 (a), 175 and 219—*Street—Obstruction—Old latrine—Conviction for keeping.*

Unless it is proved that the site on which the projection or obstruction stands is part of a street within S. 13 (*a*) of the Act S. 175 of the Act will not justify the Municipal Committee in calling upon a person to remove a latrine. Where the petitioner was convicted under S. 219 of the Act and ordered to demolish a latrine which had stood for 65 years situated in a street close to the house and it appeared that the latrine had been all along treated as private property, the conviction could not stand. (*Shah Din, J.*) SHAHAB-UD-DIN *v.* EMPEROR.

60 P L. R. 1918 ; 44 I. C 46 : 19 Cr. L. J. 254 : 15 P. W. R. 1918 (Cr).

——Ss 33, 152 and 428—*Powers of Municipal committee—Delegation to President—Prosecution for offences under the Municipal Act can be done by agent.*

It is not competent to the Municipal Committee to delegate to its President the powers conferred on it b S. 152 of the Punjab Municipal Act. Prosecution for an offence against the Municipal Act can be initiated only by a duly authorised agent of the Municipality and the authority must be in writing and must give full particulars of the person to be prosecuted. (*Abdul Raoof, J.*) MT. GULZAR JAN *v.* EMPEROR.

4 Lah. 120 : 24 Cr. L. J. 769 : 1924 Lah. 80.

——S 47—*Contract by Secretary.*

Contract with a Municipal Committee is not binding on the Committee unless signed by the President or the Vice-President and one more member or members to whom the functions had been delegated as required by S. 47 of the Punjab Municipal Act. (*Shadi Lal and Le Rossignol, JJ.*) KISHAN CHAND *v.* MUNICIPAL COMMITTEE OF AMRITSAR.

39 P. R. 1919 : 51 I. C. 391 : 80 P. L. R. 1919.

——S. 56 (1) (b)—*Charity well—Power of Municipal Committee to close the well.*

A well was sunk as a charitable act by a private person and dedicated by him to the public. The well lay in a recess at the end of a lane which was a *culdesac. Held*, that the well together with the recess was a public one and therefore vested in the Municipality and that the Municipality might deal with it as it pleased, provided that no private rights were invaded. (*Le Rossignol, J.*) KISHEN SINGH *v.* THE MUNICIPAL COMMITTEE OF AMRITSAR.

4 Lah L. J. 62 : 1922 Lah. 167.

——S. 61-B (b)—*Religious teacher—Offering made to—Tax.*

The profession of a theologian or religious teacher is one of the learned professions or callings and hence any income derived from offerings from disciples will be taxable under S 61-B (b) (*Shadi Lal, C J. and Abdul Qadir, J.*) MOTI SINGH *v.* PRESIDENT, COMMITTEE OF ANANDPUR.

1923 Lah. 127.

——Ss. 82 and 242—*Profession tax—Jurisdiction of Civil Court to determine legality of tax.*

The power conferred by a Special Act on a local authority to impose a particular tax for a particular purpose in a special manner does not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers. A Civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and *ultra vires* and to give relief if a tax has been levied

PUNJAB MUNICIPAL ACT (III OF 1911), S. 114.

from a person who is not liable to pay the same. (*Scott Smith, J.*) THE COMMITTEE OF THE NOTIFIED AREA, UNA *v.* CHATAR BEHARI NARAIN. **74 P L R. 1918 : 44 I. C. 910 : 74 P W. R 1918.**

——Ss. 114 and 121—*Notice to demolish must be specific.*

A notice under S. 114 of the Municipal Act (Punjab) must specify the portion of the building which is dangerous and the repairs required to be made. (*Shadi Lal, J.*) ABDUL AZIZ *v.* EMPEROR. **9 P. R. 1916 (Cr.) : 39 I. C. 841 : 17 Cr. L. J 105 : 11 P. W. R. 1916.**

——S. 121—*Offensive business—Decision of Municipal Committee—Civil Court.*

The question whether a certain business is offensive within S. 121 of the Act is to be decided by the Municipal Committee and unless the Committee's action is wanton, unreasonable or tainted with *mala fides*, the Civil Courts have no jurisdiction to interfere with its decision. (*Le Rossignol, J.*) THE MUNICIPAL COMMITTEE SONAPET *v.* DINU. **49 I. C. 881 : 34 P. W. R. 1919.**

——S 121—*Order—If Courts can interfere.*

A Civil Court has no jurisdiction to interfere with an order under S. 121 of the Act, unless the action of the Municipal Committee is wanton, or without jurisdiction or is tainted by *mala fides.* (*Le Rossignol, J.*) MUNICIPAL COMMITTEE, ROHTAK *v.* KARIMUDDIN. **135 P W R. 1918 : 6 P R. 1919 : 46 I. C. 571 : 11 P. L. R. 1919.**

——Ss. 152 and 153—*Brothel—Residence of prostitute—Notice—Summary trial—Cr. P. Code, S. 260.*

Unless the owner or tenant of the house summoned by the Magistrate fails to comply within five days with the Magistrate's order to discontinue the use of the house as a brothel, no offence is committed by him. Where no offence is committed by the owner of a brothel at the time when the complaint is made to the Magistrate, the Magistrate had no jurisdiction to hold a summary trial under S. 260, Cr.P C. The house of a public prostitute does not become a brothel within S.153 of the Act merely because the owner plies the trade of a prostitute therein. (*Shah Din, J.*) MUSSAMMAT KANKU *v.* MATHRA DAS. **12 P.W.R. 1918 (Cr.): 45 I.C. 113: 19 Cr. L. J. 449: 55 P.L.R. 1918.**

——S. 153—*House used as brothel—Magistrate—Powers of.*

Under S. 153, a Magistrate passed an order to the effect that if the accused did not vacate the house by a certain date mentioned therein she would be fined Rs 20: *held*, that the order of the Magistrate was bad as it contravened the provisions of S. 153, but revision was refused as there was no injustice. (*Johnstone, C. J.*) THE MUNICIPAL COMMITTEE OF LAHORE *v* RADHA RANI. **17 Cr. L. J. 46 32 I. C 334: 10 P. W. R 1916 (Cr.).**

——S 169—*Right to close a street--Municipal Committee.*

A Municipal Committee can permanently close a street for a particular class of traffic, though it causes some hardship to individuals. (*Martineau, J.*) KISANCHAND *v.* MUNICIPAL COMMITTEE, LAHORE. **50 I. C. 215.**

PUNJAB MUNICIPAL ACT (III OF 1911), S. 175.

——S. 172—*Permission of the Municipality necessary to construct balcony.*

It is clear from S. 172 that a person is not entitled to build a balcony without the permission of the Committee. The Committee has full power to withhold permission for the building of a structure that will project over a street and a Civil Court has no jurisdiction to interfere in such a matter. (*Martineau, J.*) GANGARAM *v* THE MUNICIPAL COMMITTEE. **1922 Lah 41.**

——S. 172—*Notice by Municipal Committee requiring demolition of bridge constructed with permission—Injunction.*

The Municipality gave permission to plff. to build a bridge across a drain in front of his house on condition that he would, at the end of ten years, either apply for fresh permission to maintain the bridge or permit its demolition. The ten years having elapsed, the plff not having applied for fresh permission (Punjab Pre-emption Act S. 3), the Municipality issued a notice under S. 172 calling upon the plaintiff to demolish his bridge or obtain fresh permission to maintain it. *Held*, that the notice issued by the Municipality was *ultra vires* and as the Municipality was exceeding its statutory powers, it could be restrained by an injunction. (*Shadi Lal and Dundas, JJ.*) THE MUNICIPAL COMMITTEE OF LUDHIANA *v.* AHAD SHAH. **51 I. C. 831.**

——Ss. 172, 175, 195 and 219—*Encroachments—Action of Municipal Committee—Modes of.*

S. 195 of the Punjab Municipal Act is inapplicable unless the Committee had delivered the notice to accused to remove certain *chappers*, etc, within reasonable time. S. 172 is inapplicable to structures or encroachments built from 8 to 15 years prior to the date of the notice. The section applicable to encroachments or structures which are not recent or were made with permission is S. 175 (1) under which the Committee must award reasonable compensation. 6 I. C. 431 (435); 23 B. 248; 25 C. 161 (166) Ref. (*Rattigan, J.*) KRIPA RAM *v.* CROWN. **16 Cr. L. J. 350: 2 P R. 1915 (Cr.): 28 I. C. 734 : 18 P. L. R. 1916.**

——S. 173—*Deposit of goods in street—Site let out to third person*

If the Municipality has leased out the right to stock goods on a specified portion of a street to one person, it cannot prosecute another person under S. 173 for depositing goods thereon without the permission of the lessee. (*Scott Smith, J.*) SANT RAM *v.* EMPEROR. **20 Cr. L. J. 516 : 51 I. C. 676 : 22 P. R. (Cr.) 1919.**

——S. 175—*Notice of removal of projection—Tender of compensation.*

The language of S. 175 of the Punjab Municipal Act indicates that the requisition open to the Municipality is subject to the payment of compensation (*i. e.*,) the tender of compensation must accompany the notice. (*Le Rossignol, J.*) GHASITA *v.* EMPEROR. **4 Lah. 158 : 24 Cr. L. J. 701 : 1924 Lah. 89.**

——S. 175—*Suit to challenge action of Municipal Committee—Civil Court—Jurisdiction.*

PUNJAB MUNICIPAL ACT (III OF 1911), S. 189.

The Municipal Committee first sanctioned the erection by plff. of a verandah on a *chabutra* in front of his house and afterwards required him to pull it down. The site of *chabutra* belonged to Municipality. The plff. then sued for an injunction against the Committee. *Held*, that persons dissatisfied with the action of a Committee cannot appeal to a civil Court, which can interfere only when the Act is in excess of the powers of the Committee and cannot decide whether the Act is reasonable or not. *Held*, also that as the site under the *chabutra* was not the property of the plff. and was therefore part of the Municipal property the verandah built on it was overhanging the street and the Committee could rightly require it to be demolished on payment of reasonable compensation under S. 175. (*Shadi Lal and Le Rossignol, JJ.*) MUNICIPAL COMMITTEE, AMBALA *v.* MADAN LAL. **104 P.R. 1916: 36 I.C. 599 : 81 P. L. R. 1917.**

——— **Ss. 189 and 193**—*Removal of* Thara—*Compensation.*

A Municipal Committee is competent to remove a *Thara* whether old or new, but in the former case it is necessary to give compensation. (*Robertson, J.*) GOPAL DAS *v.* MUNICIPAL COMMITTEE, LAHORE. **52 P. W R. 1913 : 19 I. C. 781 : 122 P. L. R. 1913.**

——— **Ss. 189 (3), 193**—*Building not abutting a road—No conditions enforceable.*

The Municipal Committee has no power to enforce conditions regulating the line of frontage unless the intended building abuts on a street. S. 193 empowers the committee to refuse sanction to build or grant to sanction either absolutely of subject to such modification as it may deem fit in respect of all or any of the matters specified in sub-S. (3) of S. 189. That is to say the committee may refuse permission to build at all but if permission is granted it can only impose such conditions as are provided for in the sub-section. (*Shadi Lal, C. J and Fforde, J.*) ABDUL HASAN KHAN *v.* MUNICIPAL COMMITTEE, DELHI. **1923 Lah. 417.**

——— **S. 189 (3) (i) and (iii)**—*Conditional sanction—Condition, if fair, should be complied with.*

In granting sanction under S. 193, the Municipal Committee ordered that the plff. should not build his wall within two feet of a certain open space which was originally about 5 feet and 4 inches wide. In spite of this order, the plff. built his house and thereupon the Committee served a notice on him under S. 194 requiring him to demolish the upper storey. The plff. sued for an injunction. *Held*, that the condition was not illegal, wanton, capricious or oppressive, but was eminently reasonable and conducive to sanitation, free circulation of air and ventilation within S. 189 (3) (1) and (iii). (*Rattigan and Shah Din, JJ.*) ABDUL SAMAD *v.* MUNICIPAL COMMITTEE OF DELHI. **75 P. R. 1916 : 140 P. L. R. 1916: 35 I. C. 377: 154 P. W. R. 1916.**

——— **Ss. 193 and 195**—*Injunction, suit for, against the Municipal Committee—Question of good faith or* mala fide.

In granting sanction under S. 193, the Municipal Committee ordered that the plff. should not build his wall within two feet of a certain open space which was originally about five feet and 4 inches wide. In spite of this order, the plff. built his house and thereupon the Committee served a notice on him under S. 194 requiring him to demolish the upper storey. The plff. sued for an injunction. *Held*, that the question of *good faith*, or *mala fide* of the Municipal Committee in imposing the condition was one of fact, and could not be considered in second appeal. (*Rattigan and Shah Din, JJ.*) ABDUL SAMAD *v.* MUNICIPAL COMMITTEE OF DELHI. **75 P. R. 1916: 140 P. L. R. 1916: 35 I.C. 377: 154 P.W.R. 1916.**

——— **S. 193**—*Alteration.*

The mere substitution of new bricks for old ones in a platform on the ground does not constitute anything more than repairs to such platform. (*Robertson, J.*) GOPAL DAS *v.* MUNICIPAL COMMITTEE, LAHORE, **52 P. W. R. 1913: 19 I. C. 781: 122 P. L. R. 1913.**

——— **S. 193**—*Building on private property.*

The section refers only to buildings to be erected on private property. 62 P.R. 1907, Ref. (*Martineau, J.*) GANGARAM *v.* THE MUNICIPAL COMMITTEE. **1922 Lah. 41.**

——— **Ss. 195 and 225**—*Municipal Committee—Appeal to Commissioner against order of Committee.*

The omission to appeal to the Commissioner under S. 225 of the Act against the order of a Municipal Committee does not deprive a party of the right to sue for an injunction restraining the Committee from taking steps to remove a structure. (*Broadway, J.*) BASANTA MAL *v.* MUNICIPAL COMMITTEE, HOSHIARPUR. **51 I. C. 708: 62 P. R. 1919.**

——— **Ss. 219, 172 and 195**—*Prosecution under—Composition order not legal.*

The accused errected certain projections overhanging a public street without the permission of the Municipal Committee. The committee issued a notice under Ss. 172 and 195 for their removal. The accused removed all the projections with the exception of one which was about nine inches in width. The Committee thereupon prosecuted the accused under sections 172 and 219. The trial Magistrate ordered that the accused should pay a penalty of Rs. 5 and that the projection should be allowed to remain intact. *Held*, that the order is without jurisdiction and cannot be sustained. (*Moti Sagar, J.*) THE MUNICIPAL COMMITTEE, MULTAN *v.* MOTI RAM. **1923 Lah. 686.**

——— **S. 219**—*Building without sanction—If continuing offence.*

A person who has been tried once for building a house without sanction of the Municipality and acquitted cannot be tried again for the same offence on the ground that the house continues to stand and thus constitutes a continuous offence. (*Johnstone, C. J.*) SAIFUDDIN *v.* EMPEROR. **38 I. C. 436: 18 Cr. L.J. 324: 14 P. W. R. 1917 (Cr.)**

——— **S. 219**— *Encroachment — Acquittal—Subsequent conviction for disobedience*—Autrefois acquit.

PUNJAB MUNICIPAL ACT (III OF 1911), S. 221.

A person was convicted for constructing an overhanging balcony without permission of the Municipality and sentenced to fine of Rs. 50 and to pay Re. 1 per day for the time the balcony remains undemolished. In revision, it was held that the order for demolition and the fine for prospective disobedience were bad The accused still persisted in disobeying the Municipality's notice to remove the offending balcony. Then the Municipality prosecuted him and had him fined Rs. 50 for disobedience and Rs. 2 for every day of his disobedience till judgment. *Held*, that the subsequent prosecution was not bad on any principle of *Autrefois acquit*. (*Le Rossignol, J.*) CROWN *v.* MOHAN LAL. **119 P. L. R. 1915: 30 I. C. 157: 16 Cr. L. J. 605 : 36 P. W. R. (Cr.) 1915.**

——— S. 221—*Disobedience of order proved by Municipality—Order not precise.*

A conviction under S. 221 for disobedience of an order passed by the Municipality is bad when the order is vague and indefinite. (*Johnstone, J.*) PIRTHI SINGH *v.* EMPEROR. **5 P. L. R. 1914: 22 I. C. 767 : 15 Cr. L. J. 191 : 2 P.W R. 1914 (Cr.)**

——— S. 228— *Unauthorised complaint—Conviction.*

Under this Act complaints must be by authorised persons. A complaint by an unauthorised person is no complaint and conviction in such a case is bad. (*Chevis, J.*) AHMED DIN *v.* EMPEROR. **18 Cr. L. J. 511: 39 I. C. 479: 4 P R 1917 (Cr.)**

——— S. 228—*Authority to prosecute must be personal.*

Except in cases specified in explanation to S. 228 the authority to prosecute must be personal and therefore a conviction based on the complaint of a person authorised not by a name but by designation is illegal. Where the "*Daroga Sajai*" was to institute a complaint under S. 219 of the Act, the complaint is not made by a 'duly authorised' person in accordance with S. 228 of the same Act, and is therefore illegal. (*Rattigan, J.*) EMPEROR *v.* DARMA SHAH. **13 P. W. R. 1916 (Cr) : 34 I.C. 311: 17 Cr. L. J. 199 : 8 P. R. 1916 (Cr.)**

——— S. 240—*Sanction to prosecute—Rule 26 (2)—Powers of Magistrate to grant sanction.*

A person appointed by the Duputy Commissioner to prepare and revise voters' lists issued a notice to one of the candidates and other persons at the instance of a rival candidate to show cause why action should not be taken under S 476, Cr. P Code or sanction should not be given under S. 195 Cr. P. Code. *Held*, that under the Municipal Act no Court could take cognizance of any offence under rules made under S. 240, except on complaint made with the sanction in writing of the Deputy Commissioner and that the proceedings were without jurisdiction. (*Abdul Qadir, J.*) SHIV DAYAL *v.* TAKAN DAS. **37 P. L. R. 1922: 1922 Lah. 183.**

——— S. 242—*Powers of Local Government—Imposition of taxes—Notified areas.*

S. 242 (*a*) of the Punjab Municipal Act gives power to the Local Government to improve on a notified area only those taxes detailed in S. 61-B. Those detailed in S. 61-A cannot be imposed without the sanction of the Governor-General in Council. (*Broadway, Harrison and Moti Sagar, JJ.*) NOTIFIED AREA COMMITTEE, UNA *v.* AMAR SINGH. **75 I. C. 908: 4 Lah. 442 (F.B.).**

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 3.

——— S. 242 (1) (a)—*Notification under—Profession tax—Naib Tahsildar if liable to pay.*

Where a Notification under S. 242 (1)(a) of the Punjab Municipal Act imposed a tax on persons exercising a profession, a Naib Tahsildar will not be liable thereunder as he can appropriately be said only to hold an office. (*Le Rossignol and Broadway, JJ.*) PALA RAM *v.* NOTIFIED AREA COMMITTEE, KOTADDU. **4 Lah. 256: 1924 Lah. 147.**

PUNJAB PRE-EMPTION ACT (II OF 1905).

— *Right to arrears of rent—If agricultural land.*

The right to realise arrears of rent of agricultural land is not agricultural land and need not be included in a pre-emption suit in respect of the land with which the said right is sold. (*Kensington, C. J. and Shah Din, J.*) SHANKER LAL *v.* DALLU. **132 P.W.R. 1914 : 230 P. L. R 1914 : 25 I.C. 68 : 13 P. R. 1915.**

——— S. 2 (2)—*Punjab Tenancy Act (XVI of 1887), Ss 5, 6, 53, 56 and 60.*

Where one of two joint occupancy tenants sells his rights to the landlord, the other tenant is entitled to pre-empt and the landlord is estopped by reason of being a party to the sales from suing to avoid the sale under S 60 of the Tenancy Act. There is nothing in Tenancy Act or in the Pre-emption Act giving a landlord a right of pre-emption or a right to defeat a claim to pre-empt in the case of a sale of an occupancy right under any section other than S. 5. 16 P. R. 1905, Dist. (*Chevis, J.*) AMAR SINGH *v.* HUSAINA. **15 P. W. R. 1912 : 18 P. L. R. 1912 : 13 I. C. 28 : 36 P. R. 1912.**

——— S. 3 (2) and (3)—*Town—Municipal limits—Inclusion of rural area.*

An administrative act including an area within the limits of a Municipality does not necessarily operate to destory the pre-existing character of the area and such an administrative action is not in itself sufficient to make the area so included a sub-division of a town for the purposes of pre-emption. At the same time the inclusion of an area in municipal limits is strong evidence of the urban character of that area. It is not the law that any portion of an agricultural village may lose its character as such and become, by the force of circumstances, a suburb of a town, and a suburb of this nature is to be regarded as a sub-division of a town, (*Pipon, J. C.*) SHER ALI *v.* KALANDAR KHAN. **78 I. C. 200.**

——— Ss. 3 and 5—*Agricultural land—Test.*

The test to find out whether a certain land is for pre-emption purposes agricultural or urban depends upon its character at the time of the sale and not before or after so that the fact that it was revenue free or abutting a road in a town extension scheme connecting the town with

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 3.

a Railway Station will not make it urban if it is proved that it was used for agricultural purposes. (*Shah Din, J.*) JIVA *v.* RATA. **21 P. W. R. 1912 : 23 P. L. R. 1912 : 13 I. C. 167 : 26 P. R 1912.**

——— **Ss. 3 (1) and (2) and 4**—*Tea factory—Agricultural land—Notification of Govt. negotiating pre-emption within specified area—Not retrospective.*

A tea factory outside the village site and a tea garden not within the village site or *abadi* though within the village boundary are not liable to pre-emption under S. 4 of the Act. Neither the site of such building nor a stretch of natural forest is "agricultural land" under the Act. But the fields in which the tea is grown come within that definition. Plff. must sue to pre-empt the machinery as well as the site. A notification by the Government declaring that the right of pre-emption shall not exist in the area concerned could not affect the plaintiff's statutory rights of pre-emption in respect of a sale which took place before the notification. (*Le Rossignol and Wilberforce, JJ.*) KAJU MAL *v.* SALIG RAM. **52 I. C. 563 : 91 P. R. 1919.**

——— **Ss 3 (3) (a) and 7 (1)**—*House property in Cantonment—Notification—Effect of.*

Notification No. 677 of 10—11—1908 of the Punjab Government under S. 3 (3) (*a*) declaring the Rawalpindi City and Cantonment to be a town, cannot confer a right of pre-emption in respect of house property situated in the Cantonment of Rawalpindi for house property in a Cantonment is by S. 7 (1) made not subject to pre-emption. (*Kensington, J.*) ALI MARDAN *v.* MUHAMMAD HASSAN. **3 P. L.R. 1911 : 9 P. R. 1911 : 9 I. C. 388: 30 P. W. R. 1911.**

——— **S. 3 (5)**—*Execution of decree, possession given to decree-holder.*

A transaction whereby possession of land is given to the decree-holder in execution of a compromise decree does not give rise to a right of pre-emption. (*Beadon, J.*) ATTARCHAND *v.* UMAR HAYAT. **150 P. W. R. 1913 : 20 I. C. 556 : 296 P. L. R 1913.**

——— **S. 4**—*Transfer by pre-emptor pending appeal by vendee—Effect under decree.*

Where a pre-emptor obtained a decree and during the pendency of an appeal from that decree preferred by the vendee, he parted with his property, *held*, that the transfer does not disentitle him to his rights and the vendee cannot ask the appellate Court to take away from the pre-emptor, the benefit of the decree. (*Johnstone and Rattigan, JJ.*) MEGHARAM *v.* MOKHAN LAL. **126 P. L. R. 1912: 67 P. R. 1912: 13 I. C. 667: 255 P. W R 1912.**

——— **Ss 4 and 5**—*Scope of enquiry under—Right of pre-emption.*

No right of pre-emption can be set up in cases of a grant of occupancy rights even to a stranger. The initial question to be determined in cases of pre-emption is whether or not the transaction is a sale. S. 5 precludes inquiry into custom, in cases of agricultural land while S. 4 limits pre-emption to sales. (*Reid, C.J. and Kensington, J.*) HAJI *v.* GULAM SHAH. **121 P. L. R. 1911 : 37 P. R. 1911 : 10 I. C. 4: 104 P. W. R. 1911.**

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 11.

——— **S. 6**—*Custom—Banga Town, Jullundur District—Nawan Bazaar.*

The custom of pre-emption prevails in Banga, a town in the Jullundur District. The Nawan Bazaar, in the town of Banga, is not a sub-division of that town. (*Johnstone, J.*) THAKARDAS *v.* KAHNA. **71 P. R. 1912 : 200 P. W. R. 1912 : 16 I. C. 466 : 211 P. L. R. 1912.**

——— **S. 6**—*Custom of pre-emption—Mohalla Acharijian, Gumti Bazaar, Lahore City.*

The custom of pre-emption does not obtain in Mohalla Acharjan which is part of the recognized sub-division of Bazaar Gumti in Lahore city. (*Rattigan and Shah Din, JJ.*) DURGA DEVI *v.* RAMZAN. **91 P. R. 1911: 127 P. L. R. 1911: 10 I. C. 330: 217 P. W. R. 1911.**

——— **S. 6**—*Custom of pre-emption of houses—Mohalla Mimaran or Mohalla Pansarian in Kaithal Sub-division.*

The custom of pre-emption of houses exists in Mohalla Mimaran, identical with Mohala Pansarian, a sub-division of Kaithal. (*Reid, C. J.*) MUHAMMAD HUSSAIN *v.* GHULAM MUHAMMAD. **78 P. R 1911 : 138 P.L R. 1911: 10 I. C 240 : 241 P. W. R. 1911.**

——— **S. 7 (2)**—*Pre-emption— Notification of Govt. declaring pre-emption right not to exist—Retrospective.*

A notification of the Punjab Govt., dated 6—12—1910 under S. 7 (2) of the Act, saying that the right of pre-emption does not exist in certain local areas has retrospective effect and affects a pre-emption suit pending on the date of the publication of the notification. 12 P. R. 1900 ; 90 P. R. 1904, Dist. (*Reid, C. J. and Rattigan, J.*) BISHEN SINGH *v.* GANDA SINGH. **10 P. R. 1913 : 264 P. W. R. 1912 : 16 I C. 959 : 5 P. L. R 1913.**

——— **Ss. 10 and 19**—*Money deposited in Court by pre-emptor—Attachment—Liability for deficiency.*

A pre-emptor deposited money under S 19 of the Punjab Pre-emption Act, but during the pendency of the suit, a portion of the amount was withdrawn under an attachment at the instance of a person who had a decree against the pre-emptor plaintiff.

Held, that under S. 10 of the Act, the money deposited by the plaintiff could not be attached, but as he had presumably benefited by the payment to the attaching-creditor, he was in equity bound to make good the deficiency. (*Rattigan and Scott-Smith, JJ.*) PANNA LAL *v.* NATHA SINGH. **27 P. R. 1915 : 29 I. C. 354 : 27 P. L. R. 1916.**

——— **S. 11**—*Member of same tribe—Darzi Mir and Darzi Mughal of Rawalpindi Dt.*

Where in deciding whether persons belong to the same tribe the real facts are impossible to ascertain, names used are the only data left, and they should be dealt with in a liberal spirit. *Held*, also that in the absence of proof to the contrary Darzi Mir and Darsi Mughal are sub-divisions of a tribe of Darzis. (*Johnstone, C. J.*) GIRDHARI LAL *v.* ATTAR. **37 P. R. 1916 : 33 I. C. 967 : 101 P. W. R. 1916.**

——— S. 11 (Proviso) — *Pre-emption suit—Plffs. proprietors at time of sale and date of suit.*

The pltfs. were proved to have been proprietors in the village at the time of the sale and the date of the suit *Held*, that they were entitled to pre-empt. (*Shadi Lal, J.*) NEK MUHAMMAD *v.* MYA RAM. **32 I. C. 605 : 35 P. W. R. 1916.**

——— S. 11 (Proviso)—*Meaning of 'recorded'.*

Entry in the register of mutation by a *patwari* as owner and his report to that effect is no sufficient entry in the Record of Rights. (*Rattigan and Shah Din, JJ.*) JAGAT RAM *v.* MEHAR DIN. **9 P. R. 1916 : 68 P. L. R. 1917 : 32 I. C. 528 : 205 P. W. R. 1915.**

——— S. 11 (Proviso)—*Scope of.*

The proviso to S. 11 of Act (II of 1905) only enables a person who is recorded as owner of agricultural land for 20 years *previous to the date of sale*, to claim the right of pre-emption; so that the land should have been registered either in the name of pre emptor or an agnate of his for a continuous period of 20 years preceding the sale without even a short break of the ownership in the middle failing which he will lose his right of pre-emption. (*Shah Din and Chevis, JJ.*) PRITHVI CHAND *v.* SAFA CHAND.

75 P. R. 1915 : 31 I. C. 202 : 157 P. W. R. 1915.

——— S. 11 (Proviso) — *Sale to subsequent vendee—Limitation—Mutation Register—Residence in some village whether necessary.*

Limitation for a pre-emption suit against the subsequent vendee is 6 years from the date of sale in his favour. 18 I. C. 70 Foll. Under the proviso to S. 11 of the Act, residence in the same village is not a *Sine Quo Non* for success in a pre-emption suit. A mutation register is a record within S. 11 proviso and a presumption under S. 114, Evidence Act, will be drawn that proper entries must have been made in the *Jama-bandi* in pursuance of mutation order. (*Chevis and Shadi Lal, JJ.*) HARI RAM *v.* ALLADITTA. **17 P. R. 1915 : 28 I. C. 695 : 186 P. L. R. 1915.**

——— S. 11—'*Agnate*' —*Meaning of—Joint sale by two vendors.*

The word 'agnate' in the proviso to section is not limited to a deceased agnate to whom the vendee has succeeded by inheritance. When a vendee buys from two vendors each owning a half, he should, when attacked by pre-emptor, be permitted to retain the half sold to him by one of the vendors if he can show that though plaintiffs' rights are superior as to the other half, his rights are equal to the plaintiffs in the former. (*Johnstone and Shadi Lal, JJ.*) DULHA *v.* HARIKISAN DAS. **190 P. L. R. 1915 : 28 I. C. 213 : 6 P. R. 1915.**

——— S. 11—*Member of an agricultural tribe—Notification by Government—Tenant holding at will.*

The expression "member of an agricultural tribe" means, according to the Government notification dealing the subject, a person (1) belonging to any one of the tribes notified as agricultural irtbes for the district in which he claims that status and (2) either holding land or residing in that district. It is very doubtful whether a person who occupies land as a tenant-at-will, can be said to hold land within the meaning of the notification. (*Kensington and Shadi Lal, JJ.*) FATEH SINGH *v.* SANT SINGH

47 P. W. R. 1915 : 125 P. L. R. 1915 : 27 I. C. 29 : 43 P. R. 1915.

——— S. 11 (Proviso)—'*Tribe*' —*Lohars and Tarkhans—Village Harnauli, District Mianwali.*

The word 'Tribe' in S 11 proviso of the Act should be construed broadly and each case should be decreed on its merits. The *Lohars* and *Tarkhans* of the village Harnauli, District Mianwalli form one tribe, within the meaning of S. 11 proviso of the Act. (*Johnstone and Shah Din, JJ.*) FAZIL HUSAIN *v.* MALIK JINDA.

49 P. R. 1914 : 252 P. L. R. 1914 : 25 I. C. 443 : 160 P. W. R. 1914.

——— S. 11 (Proviso) — *Scope of—Pre-emptor entitled to pre-empt only a portion—If bound to claim pre-emption of whole.*

S. 11 proviso of the Act does not require that the pre-emptor should own and be recorded as owning the *same* land for 20 years. It is sufficient if he owns and is recorded as owning *any* land in the village during that period. A pre-emptor need not clai n the whole of the property sold if his rjghts of pre-emption extend only over a portion thereof. (*Agnew and Shadi Lal, JJ.*) MULCHANDA *v.* UTTAM CHAND.

156 P. W. R. 1913 : 20 I. C. 185 : 275 P. L. R. 1913.

——— Ss. 11, 12 and 14—*Pre-emption— Rival pre-emptors— Different tribes.*

The mere fact that a pre-emptor is a member of an agricultural tribe gives him no preferential right of pre-emption as against a person who comes within the proviso to S. 11 of the Act. *Shamilat* land when separately allotted on partition to a proprietor becomes part of his *Khewat* holding. (*Kensington and Shah Din, JJ.*) DILNIER *v.* DEVIDAS. **35 P. W. R. 1913 : 19 I. C. 84 : 77 P. L. R. 1913.**

——— Ss. 11 and 12—*Pre-emption—Waiver by father when binding on son.*

A pre-emptor claiming under S. 11 proviso of the Act is bound by the waiver of his father, but it is not so in cases governed by S. 12 of the Act. (*Rattigan, J.*) SHAM SINGH *v.* SUHEL SINGH.

2 P. W. R. 1913 : 143 P. L. R. 1913 : 18 I. C. 596 : 24 P. R. 1913.

——— Ss. 11 and 12—*Pre-emption—Joint purchase if divisible—Vendee and stranger.*

For a sale to be divisible, the mere writing in the sale-deed of the shares of each vendee in the property sold is not sufficient, and a vendee who claims the sale as divisible must show as a matter of fact, his purchase was in fact a distinct and separate purchase. 19 A. 148 ; 6 P. R. 1909, Ref.; 48 P.R. 1907, Rel. A vendee who joins a stranger with him in the sale cannot claim any status higher than that of his co-vendee. Where one of two rival pre-emptors is a member of an agricultural tribe while the other is qualified under proviso to S. 11 of the Punjab Pre-emption Act

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 11.

both can complete under S. 12 of that Act. (*Robertson and Chevis, JJ.*) KHOTA RAM *v.* MAJU DIN.
12 P. L. R. 1912, (Suppl) : 16 I. C. 979 : 276 P. W. R 1912.

——Ss. 11, 12, 12 (a) and 12 (c)—*Right of vendee to assist—Pre-emptor's right barred by S. 11—Right of only some owners to sue under S. 12 (c).*

In a suit for pre-emption the vendee must show that he has himself a right to purchase the property which is equal to, or superior than the right of the person who claims to pre-empt it. A person who is entirely debarred from any right of pre-emption by S. 11 of the Act cannot claim that under S. 12 he has, as a defendant a right of pre-emption which enables him to defeat the right of a person to whom the Act gives the right of claiming pre-emption. A vendee who is debarred under S. 11 from claiming pre-emption as a plaintiff is not entitled to resist a suit for pre-emption as defendant on the ground that as the next heir of the vendor he has a superior right to that of plaintiff, under S. 12 (*a*) of the Act. S. 12 (*c*) does not debar some out of many owners from suing in respect of their individual and several right, while, the rest elect to stand aside without taking any action in the matter (*Robertson and Rattigan, JJ.*) DAULAT RAM *v.* SUBBA SINGH.
2 P. L. R. 1912 (Suppl.) : 15 I. C. 102 : 179 P. W. R. 1912.

——S. 11 (Proviso)—'*Agnate'—Meaning of.*

A *Sapinda* is not synonymous with agnate and so the widow of a male agnate is not an agnate within the meaning of S. 11 of the Act. (*Johnstone and Rattigan, JJ.*) CHAJJUMAL *v.* TELUMAL.
61 P. W. R. 1912 : 13 I. C. 665 : 108 P. L. R. 1912 : 53 P. R. 1912.

——S. 12—*Shamilat.*

A plaintiff has no right of pre-emption under S. 12 if he claims by virtue of his *shamilat* which is a mere appendage of the proprietary land, since that only gives a right of pre-emption. (*Johnstone, C.J.*) JAVALA SINGH *v.* LADHA.
173 P. L. R. 1915 : 31 I. C. 272 : 114 P. W. R. 1915.

——Ss. 12 and 16—*Pre-emption land under building—Improvements — Compensation for—Costs.*

A person owning a plot of land under building is not a land-owner within S. 12 of the Punjab Pre-emption Act, even if it is assessed to land revenue. S. 16 of the Act is not exhaustive and does not exclude equities. A vendee can get the market value of the lands purchased, but he cannot get his costs of the pre-emption suit, except in exceptional circumstances. In a case of foreclosure of a mortgage, compound interest may be allowed to the mortgagee where a suit for a pre-emption of that property has been brought. It is the duty of the vendee or mortgagee to support his claim for improvements by production of account. (*Johnstone and Shah Din, JJ.*) SHAM SUNDAR *v.* HARBANS SINGH.
13 P. L. R. 1916 : 71 P. R. 1915 : 30 I. C. 517 : 109 P. W. R. 1915.

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 12.

——S. 12—*Owner of the Estate—Mere house-holder in* Abadi.

A mere house-holder in the *Abadi* of a village is not an owner of the estate within S. 12 of the Act. There is a distinction between "Owner of the estate" and "Owner in the estate." (*Reid, C.J. and Kensington, J.*) NARAIN SINGH *v.* GOPAL SINGH.
252 P. L. R. 1913 167 P. W. R. 1913 : 20 I. C. 2 : 106 P. R. 1913.

——S. 12—*Sale by father—Son, a Minor—Acquiescence, if can be presumed—Right of son.*

Under S. 12 a son has got an independent right of pre-emption and so the fact of his being a minor under the guardianship of his father cannot give rise to a presumption of his acquiescence in a sale by the father. (*Shah Din and Scott-Smith, JJ.*) NUR KHAN *v.* SULTAN KHAN.
54 P. W. R. 1912 : 14 I. C 352 : 89 P. L. R. 1912.

——S. 12—*Right of each collateral is independent—Guardian waiving right to pre-empt—Ward not bound.*

As by S. 12 each of several agnates has an independent right to claim pre-emption, the right of one *agnate* cannot be extinguished by waiver on the part of a nearer agnate, so also the guardian's acquiescence in a sale and the consequent giving up of minor's right to pre-empt will not in the absence of proof that he was acting on behalf of his ward bind the ward though the guardian were the father of the ward. 121 P. R. 1889, referred. (*Rattigan and Chevis, JJ.*) MUHAMMAD BAKSH *v.* HASAN BAKSH.
7 P. R. 1912 : 239 P. L. R. 1911 : 11 I. C. 708 : 155 P. W. R. 1911.

——S. 12 (a)—*Sale by husband to wife—Succession under custom—Widow and reversioners—Precedence.*

A widow takes by succession to her husband in precedence of her husband's reversioners under S. 12 (*a*) of the Act and in the case of a sale of land by a person to his wife, the reversioners have no right of pre-emption against the vendee. (*Reid and Rattigan, JJ.*) MAHOMED KHAN *v.* AKBAR KHAN.
84 P. L. R. 1913 : 83 P. W. R. 1913 : 18 I. C. 384 : 70 P. R. 1913.

——S. 12 (a)—*Widow's right to pre-empt as heir—Customary law.*

If a widow has a right to succeed collaterally, she has a right to pre-empt under S. 12 (a) of the Act. Under S. 12 (a), the right of pre-emption is not confined to agnates alone. *Obiter*:—Under the customary law as under the Hindu Law, a widow is an heir of her husband. 9 P. R. 1899, Ref. (*Chevis, J.*) BHAGI *v.* MUHAMMAD.
205 P.L.R. 1912 : 15 I.C. 734 : 212 P.W. R. 1912.

——Ss. 12 (a), 14 (b)—*Equal relations.*

Where two persons are equally related to the vendor, the fact of sharing in the holding in which the land is situate give the superior right to either. (*Robertson, J.*) PATHANA *v* NABA.
87 P. R. 1911 : 13 I C. 802 : 245 P. W. R. 1911.

——Ss. 12 (b) (3) (4) and (c), (2)—*Mother or widow- Right to exercise pre-emption—Succession—Mother's right.*

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 12.

A mother or widow not being 'heirs' under customary law cannot exercise a right of pre-emption under sub-cl. (3) but can do so as co-sharers under sub-cl. (4) of S. 12 (*b*) of the Act. Nor has the mother of an occupancy tenant any right to succeed on his death to occupancy rights held by him; her claim to pre empt can only fall under Cl (*c*) (2). (*Rattigan and Beadon, JJ.*) FATEH NISHAN *v.* AHMED SHAH.
46 P R. 1914 : 103 P. W R. 1914: 23 I C. 532 : 55 P. L. R. 1914

——— **Ss. 12 (b) and 14**—*Pre-emptor and vendee equally related—Former also co-sharer in holding, if can pre-empt.*

Where the pre-emptor and the vendee are equally related to the vendor, but the former is also a co-sharer in the holding, the pre-emptor is entitled to a preferential right. (*Robertson, J.*) NABA *v.* PATHANA.
53 P.L.R. 1913: 72 P.W R. 1913 : 18 I. C. 86 . 60 P. R. 1913

——— **S. 12 (c)**—*Pre-emption—Patti—Proprietor, rights of*

A 'Patti' created purely for fiscal purposes and inno way showing homogeneity of area or *descent* of the proprietors is not a "sub-division" within S. 12 (*c*) and therefore, a proprietor in such *Patti* has no right of pre-emption A pre-emptor is given a very special and peculiar right which overrides the ordinary rights of contract, and if he asks the Court to give effect to that right, he must be careful to see that he complies with his honest pleas. with the decree which follows. (*Kensington, C.J. and Rattigan, J.*) WARAYAM SINGH *v.* MAHTAB SINGH.
21 P.R 1915 : 26 I. C. 433 : 31 P. L. R. 1916.

——— **S. 12 (c) and (d)**—*Scope—Recognition of further divisions of sub-divisions.*

The Legislature intended in enacting clauses (*c*) and (*d*) of S. 12 not only to recognize the primary sub-divisions of a village, but also any further divisions of such sub-divisions as may well be marked or authenticated by Settlement Record and history of the village. 45 P. R. 1897 and 142 P. L R. 1905, Dist. (*Shah Din and Chevis, JJ.*) BASAWA SINGH *v* NATHA SINGH.
60 P. R. 1914 : 128 P L. R. 1914 23 I. C. 151: 83 P. W. R. 1914.

——— **S. 12 (c)**—*'Occupancy tenant.'*

S. 12 of the Pre-emption Act refers to occupancy tenures as contemplated by the Tenancy Act and not to tenants entitled to hold possession on certain special terms not mentioned in the Tenancy Act. (*Shah Din and Chevis, JJ*) KISHEN *v* GURDIT SINGH.
112 P. L. R 1911 : 9 I. C. 838: 235 P. W. R. 1911.

——— **S. 13**—*'Shop'—Meaning.*

The question whether the disputed property is "Shop" and as such exempt from right of pre-emption under S. 13 of the Act is to be decided with reference to the primary purpose for which it has been used. If it is only residential and not a building or apartment primarily used for buying and selling goods it is not a "Shop" although there was in it an oven for cooking *rotis* and there were cash dealings with regard to *rotis* prepared. (*Shadi Lal and Le Rossignol, JJ.*) BHAMBA RAO *v.* ALLAH BAKSH.
69 P. R. 1915 : 31 I. C 191 : 156 P. W. R. 1915.

——— **S. 13 (Fifthly)**—*Pre-emption—House in Towns—Common entrance.*

To bring a case within S. 13 (fifthly) of the Act, there must be an entrance from the street common to both the proprietors. It is not enough to prove that each house has an entrance from the street. A public street leading from the road to the two houses cannot be taken as a 'Common entrance from the street." (*Rattigan, J.*) RAM CHAND *v.* RAM JOWAYA.
29 P. L. R. 1912 : 14 I. C. 494 : 254 P. W. R. 1912.

——— **Ss. 13 (1) and 14 (e)**—*'Stair-case'-Meaning of—Step leading to Thara—Entrance from the street—Rival claimants—Option of vendor.*

A step leading to the Thara cannot be called a stair-case within S. 13 (1) nor an entrance from the street within the fifth clause of the section. The sale having taken place while the old Act was in force and the suit having been instituted and the decree of the trial Court having been passed before the present Act came into force, the suit is governed by Act II of 1905 and the pre-emptors were entitled to the benefit of the election made by the vendors in their favour under S. 14 (*e*) of the Act. (*Scott-Smith and Abdul Raoof, JJ.*) NANUK CHAND *v.* TEK CHAND.
56 I. C. 17 : 2 Lah. L. J. 630.

——— **S. 13 (1). Seventhly** — *Mosque*—Muttawalli, *if can claim pre-emption.*

The *Muttawalli* of a mosque can claim pre-emption on behalf and for the benefit of the mosque 153 P. R. 1884, Foll. ; C. A. No. 1525 of 1882, overruled. (*Johnstone and Shah Din, JJ.*) JINDU RAM *v.* HUSAIN BAKSH.
52 P. W. R 1914 : 147 P. L. R. 1914 : 24 I. C. 100 : 59 P. R. 1914.

——— **S. 13, Cls. (1) and (5)**—*Rival pre-emptors.*

A co-sharer in a part of the property sold has a superior right of pre-emption under S. 13 (1) to the vendee whose claim falls under S. 13 (5). (*Rattigan, J.*) RAMA BHIJA MAL *v.* MUHAMMAD AMIN.
50 P. W. R. 1913 : 19 I. C. 784 : 119 P. L. R 1913.

——— **S. 13 (1) (Fifthly)**—*Punjab Municipal Act (XX of 1891), S 3 (4)—"Street"—Meaning of.*

The word "Street" in the Act is used much in the same sense as in the Municipal Act as including an alley whether thoroughfare or not over which the public have a right of way. Where it is shown that four houses opened into a blind alley which gave access to the houses from the street that there was an arch or door, that the alley was not the private property of any one of the owners and that there was nothing to show that no one other than the owner of those houses or a right to own the blind alley. *Held*, that the blind alley was not a common entrance from the street within the meaning of S. 13 (1) fifthly of the Act. (*Robertson and Shah Din, JJ*) NABA *v* PIARA MAL.
70 P. W. R. 1912 : 44 P. R. 1912 : 13 I. C. 427 : 95 P. L. R. 1912.

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 13.

——S. 13 (1) (Seventhly)—*Right in whom vests.*

The right of pre emption under S. 13 (1) (seventhly) vests only in the owner of adjacent property and the person not yet the owner but only the next heir to the owner cannot pre-empt. (*Chevis, J.*) SEIVA RAM *v.* BALU RAM.
8 P. L. R. 1912 : 12 I. C. 623 : 254 P. W R. 1911.

——Ss. 13 (1), (2) (a)—*Owner of shop, if can claim pre-emption—Execution of agreement to sell his own property by pre-emptor, effect of.*

The fact of that shops are excluded from pre-emption by S. 13 (2) *a)* does not disentitle the owner of a shop from claiming pre-emption by virtue of being its owner. "Immoveable property" in 13 (1) seventhly of the Act includes a shop while a pre-emptor may lose his right of pre-emption if he parts with the property as owner of which he claims the right. A mere agreement to sell such property does not destroy his right. (*Reid, C. J.*) GULAM HUSSAIN *v* GANGA SINGH.
80 P. R. 1911 : 177 P. L. R. 1911 : 10 I. C. 404 : 93 P. W. R. 1911.

——S. 13 (2)—*Pre-emption, if exists in respect of shop with residential quarters.*

There is no right of pre-emption in respect of a shop having residential quarters attached thereto. (*Johnstone and Shah Din, JJ.*) SARDAR RAGHUBIR SINGH *v.* AMIR BAKSH. 58 P. L R. 1914 : 22 I. C. 960 : 93 P. W. R. 1914.

——S. 13 (2)—*Custom.*

There is a custom of pre-emption in respect of houses in *Mohalla Sathan* in the City of Lahore The character of the property at the date of sale determines whether S 13 (2) applies to the property. If at the date of the sale, the property sold is a house, it is immaterial whether subsequently to that date the house was converted into and used as a *Darmasala.* (*Shah Din and Chevis, JJ.*) KRIPA SINGH *v* MAYA SINGH.
22 P. R. 1611 : 185 P. L. R. 1911 : 10 I. C. 848 : 52 P. W. R. 1911.

——S. 14, cls. (c) and (e)—*Properties in three patties sold—Proprietor of three patties—Preference of, to proprietor in one patti only.*

When lands situate in three *patties* are sold, if one of the rival pre-emptors is a proprietor in all the three *patties* he cannot have a preferential right to one who has land only none of the *patties,* so far as the land situate in that patti is concerned *Held,* that such a case fell within cl. (c) of S. 14 and the fact that the vendor in the pleadings preferred one of the rival pre-emptors did not bring the case within cl. (*e*) of the section. (*Rattigan and Shadi Lal, JJ.*) UTTAM SINGH *v* SUNDAR SINGH. 218 P. L R. 19 4 : 24 I C. 913 : 136 P. W. R 1914

——S. 14—*Rival pre-emptors—Equal right as regards one portion and superior right as regards other.*

Where a pre-emptor has, as regards one portion, an equal right with a rival pre-emptor and a superior right as regards another, the former portion must be shared by both equally according to S. 14 of the Act. (*Rattigan and Chevis, JJ.*) CHANDA SINGH *v.* ISMAILJI. 46 P. W. R 1913 : 95 P. L. R. 1913 : 18 I. C. 453 : 75 P. R. 1913.

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 19.

——S. 14—Lis pendens—*Doctrine when applicable.*

The section may be used where during the continuance of a suit for pre-emption, the vendee sells the property to a person who possess equal right of pre-emption, the doctrine of *lis pendens* does not apply if the right of the subsequent vendee subsists at the date of sale and is not time barred for no new right is created by the sale. (*Johnstone, J.*) KARAM ILAHI *v* HIRA.
74 P. L. R. 1911 : 10 I. C. 842 : 175 P. W. R. 1911.

——S. 14—*Rival pre-emptors.*

S. 14 of the Punjab Pre emption Act applies only to cases in which several pre-emptors in respect of one particular sale, are found by the Court to be equally entitled to the right of pre-emption. It does not apply to a case in which a pre-emptor is claiming to enforce his right of pre-emption by suit against an original vendee or a second vendee who has an equal right of pre-emption with such pre-emptor. (*Shah Din and Chevis, JJ.*) SUNDER SINGH *v.* SAJJAN SINGH.
53 P. R. 1911 : 164 P. L. R. 1911 : 10 I. C. 367 : 166 P. W. R. 1911 :

——S. 16—*Notice through Naib-Tahsildar—Effect.*

Where an owner of land sold his land to a non-agriculturist after issuing a notice to the agriculturists of whom the plaintiff was one through the *Naib-Tahsildar,* of his intended sale fixing the price at a sum far in excess of the market value and which the plaintiff considered prohibitory and unfair, *held* that (1) the notice served was not given through a Court "under S. 16 as Naib-Tahsildar" was an executive officer only, (2) that there is no waiver by plaintiff of his right of pre-emption as he all along proclaimed his intention of suing to pre empt the land on what he considered to be "the right price." (*Shah Din and Chevis, JJ.*) KARIM CHAND *v.* GULAM HASSAN.
74 P. R. 1915 : 31 I. C. 199 : 159 P .W. R 1915.

——Ss. 17 and 16—*Notice to pre-emptor—Waiver of right.*

Where a pre-emptor receives a notice issued under S. 16 of the Act, but takes no action thereon he must be deemed to have waived his right to pre empt A notice under S. 16 need not be signed by the presiding officer of the Court, nor need it give minute details of title. The law of pre-emption interferes with the right to transfer and purchase property. (*Beadon and Smith, JJ.*) ABDULLAH SHAH *v.* HUSSAIN JAHANA KHAN SHAH. 250 P.L.R 1913 : 179 P. W. R. 1913 : 20 I. C. 564 : 14 P. R. 1914.

——S. 19—*Pre-emption decree—Plff. Allowed costs—Form of decree—Power of Court to grant time for payment of costs.*

A pre-emption decree should direct that the purchase money together with the costs decreed against the plff. should be paid into Court within

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 19.

the specified time, but when the decree omits to direct the costs to be paid with the purchase money, the Court has inherent power to allow the pre-emptor further time for payment of the costs. (*Robertson and Rattigan, JJ.*) BAGHELA *v.* SALLO. **226 P. L. R. 1913 : 18 I. C. 994 : 3 P. R. 1913.**

——S. 19—*Rival pre-emptors—Money raised by mortgaging to vendees—Effect of.*

Where there are rival pre-emptors and the superior pre-emptors sues to establish his right, it cannot be defeated simply because the money for prosecuting the suit and making the deposit was secured by mortgaging the land to the vendees. (119 P. R. 1898 ; 7 P. R. 1912, Foll. Where a deposit has been made by a pre-emptor by order of Court, the Court cannot reject the plaint simply because the deposit has been subsequently withdrawn. The penal provision of sub-section (3) applies only when the deposit has not been made within the fixed time. (*Robertson and Shah Din, JJ.*) SHERU *v.* JAWAHIR SINGH. **240 P. W. R. 1912 : 13 I. C. 662 : 58 P. R. 1912.**

——S. 20—*Duty of Court to decide the issues suo motu.*

The Court is bound to investigate and decide the issue specified in S. 20 and cannot be guided by the admissions of the parties nor does their omission to adduce evidence on the point relieve the Court from the obligation created by the law. (*Chevis and Shadi Lal, J.*) WISANDA MAL *v.* GANESHA MAL. **195 P. W. R. 1915 : 33 I. C. 813 : 14 P. R. 1916.**

——Ss. 21 (1) and (2), 26 and 29—*Sale subject to sanction of Dy. Commissioner—Limitation—Starting point.*

Limitation in a suit to pre-empt a sale, which requires the sanction of the Dy. Commissioner under the Alienation of Land Act, runs from the date of sanction given by the Dy. Commissioner. A suit filed within a year of that date is in time. (*Scott Smith, J.*) SAID KHAN *v.* MATWALA. **82 P. R 1912 : 219 P. L. R. 1912 : 16 I. C. 775 : 219 P. W. R. 1912.**

——S. 22—*Consideration entered in sale-deed actually paid—Good faith—Market value.*

A pre-emptor must pay to the vendee the amount paid by the latter in good faith to the vendor the price mentioned in the sale-deed irrespective of the market value. The question of the market value of the property cannot be gone into in such a suit. (*Shah Din and Smith, JJ.*) LACHMAN DAS *v.* DYAL DAS. **198 P W. R. 1912 : 14 I. C. 558 : 114 P. R. 1912.**

——S. 22—*Pre-emption price—Consideration—Old debts.*

If in a pre-emption suit the price fixed for the sale is wholly made up of old debts, the real consideration for the sale is the actual value of the debts and the amount payable by the pre-emptor is the market value, if the total debts exceed it. (*Johnstone and Shah Din, JJ.*) TOTA MAL *v* SRI RAM. **54 P. R. 1911 : 168 P. W. R. 1911 : 12 I. C. 501 : 250 P. L. R. 1911.**

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 59.

——S. 22 (2) (Proviso)—*Applicability of.*

The proviso to S. 22 (2) of Act II of 1905 does not apply to a case in which the price does not consist mainly or a debt greatly exceeding in amount the market value of the property. (*Shah Din, J.*) FATEH CHAND *v.* GANDAMAL. **94 P. W. R 1915 : 29 I. C. 150 : 72 P. L. R. 1915.**

——S 22 (2)—*Pre-emption price.*

If a Court finds that the price at which a sale purports to have taken place was duly paid in good faith it must fix such price for the suit, irrespectively of sums subsequently paid by the vendee to other pre-emptors to forego their claims. A successful pre-emptor is not the legal representative of the vendee and so he cannot rely upon agreements between the latter and the former claimants for pre emption in a suit for a share of the property. (*Rattigan, J.*) SHAMMAS *v.* SARFARAZ. **182 P. W. R. 1911 : 12 I. C. 497 : 259 P. L. R. 1911.**

——S. 22 (4)—*Security bond filed after the date fixed—Extension of time.*

A security bond was filed after the date fixed for filing it and was placed on the record. This does not by implication extend the time for filing the bond and in such a case the plaint should be rejected under S. 22 (4). (*Shah Din and Chevis, JJ.*) MUHAMMAD HAYAT *v.* RAGHBAR DIAL. **33 I. C. 487 : 67 P. W. R. 1916.**

——S. 29—*Delivery of possession—Attornment of tenants—Limitation.*

In a suit for pre-emption where the sale sought to be pre-empted was an oral one and had taken place some six months prior to 26th July 1907 and possession was delivered to the vendors in June 1907 by getting the tenants to attorn to the vendees and by pointing out on the spot each and every field which had been sold, the vendees were held to have come into physical possession of the land sold in June 1907 within the meaning of S. 29. (*Scott Smith and Broadway, JJ.*) BISHEN SINGH *v.* FEROZ CHAND. **97 P. R. 1917 : 93 P.W. R. 1917 : 40 I. C. 618 : 113 P. L. R. 1917.**

——S. 29—*Applicability of—Rival pre-emptors.*

S. 29 of the Act does not apply to pre-emption suits by rival pre-emptors in respect of the same sale but applies only to a case of contest between the pre-emptor and the original vendee. (*Shah Din, J.*) ILAHI BUKSH *v.* MAHOMED RAB NOWAZ KHAN. **186 P. W. R. 1912 : 14 I. C. 328 : 80 P. R. 1912.**

——S. 29—*Pre-emption suit after more than a year since—Redemption of mortgage by purchaser.*

An agricultural land which was under a mortgage was sold and the vendee paying of the incumbrance took physical possession but during that year neither cultivated the land nor did anything which could have the effect of showing that he had taken physical possession. A few days after the completion of a year from the date of the change of possession, a pre-emption suit was brought in respect of the sale. *Held*, that the

suit was barred since more than a year has elapsed since the date of the change of possession. (*Chevis, J.*) WAZIRA *v.* NARAIN SINGH **264 P. W. R. 1911 : 12 I. C. 512 : 257 P. L. R. 1911.**

——(I of 1913).

——*Right of pre-emption—Date of accrual—"Owner", meaning of.*

There is nothing in the Punjab Pre-emption Act which declares that a pre-emptor's title vests at the date of the sale or which modifies the explicit direction of O. 20, R. 14, Code of Civil Procedure, that Courts shall declare the title of the pre-emptor be deemed to accrue from the date of payment into Court of the purchase-money after decree Nor has the Act qualified the term "owner" so as to mean a person who is not in danger of losing his ownership right at the suit of a pre-emptor. (*Campbell, J.*) HADAYAT ULLAH *v.* GHULAM MAHAMMAD BEG. **1923 Lah. 529.**

——*Right not existing at time of suit does not affect.*

If the right to pre-empt exists at the time of sale it does not matter if it does not exist at the time of suit. (*Abdul Raoof, J.*) AZIM KHAN *v.* SEWA RAM. **1923 Lah. 458 (2).**

—— Ss. 2 (3), 22 (4) (a)—*Retrospective operation.*

Where a pre-emptor withdraws the amount deposited by him in Court in compliance with a previous order of the Court, before he appeals, S. 22 (4) (*a*) does not retrospectively operate. Read with S. 2, sub-sec. (3), it does not cause a forfeiture of pre-emptor's right to have his appeal adjudicated on the merits, when he withdraws the money since the Act I of 1913 came into force. (*Shah Din and Chevis, JJ.*) PRITHVI CHAND *v.* SAFA CHAND. **157 P. W. R. 1915 : 31 I. C. 202 : 75 P. R. 1915.**

——Ss. 3 and 4—Sardrakhti *rights—Agricultural lands—Village immoveable property—Pre-emption*

Sardrakhti right is neither agricultural land nor village immoveable property within S. 3 of the Act and is not liable to pre-emption. (*Scott-Smith and Abdul Raoof, JJ.*) MAHOMED ISMAIL *v.* SHAMSUDDIN. **1 Lah. 567 : 2 U. P. L. R. (L) 164 : 2 Lah. L. J. 684.**

——S. 3 (1)—*Sale of* Sardrakhti *rights.*

Sale of *Sardrakhti* rights of a lessee is not sale of agricultural land under the Act. (*Scott-Smith and Abdul Raoof, JJ.*) MUHAMMAD ISMAIL *v.* SHAMSUDIN. **2 Lah. L. J. 684 : 1 Lah. 567 : 2 U. P. L. R. (L.) 164.**

——S. 3 (3)—*Town or village—Padhana in Lahore Tahsil—Pre-emption.*

A town may be defined as an area inhabited by residents not bound together by a common interest in agriculture, that is, a place which depends mainly on trade while a village appears to mean the area occupied by a body of men mainlydependent upon agriculture or occupations subservient thereto. The question whether a place is a town or village for the purposes of the Act is a question of law. Padhana in the Tahsil and District of Lahore is a village. (*Shadi Lal and Wilberforce, JJ.*). SHANKAR DAS *v.* MATHRA DAS. **55 I. C. 520.**

—— Ss. 3 (3) and 5 (a)—*Pre-emption—Thaunsa—Town or village.*

The Thaunsa is a town for the purpose of the Act. It is doubtful if the question whether a place is a town or village can be raised in second appeal. 96 P. R. 1910 Dist (*Shadi Lal and Wilberforce, JJ.*) MAHMUD *v.* JUMMA. **54 I. C. 646 : 28 P. R. 1919.**

——S. 3 (3)—*Pre-emption—Thaunsa—Town or village—Census Register.*

Thaunsa is a town for the purposes of the Punjab Pre-emption Act. In deciding whether a place is a town or a village the fact that it is described as a town in the Census report is of importance. (*Scott-Smith, J.*) ALLAH BAKSH *v.* TOPAN RAM. **54 I. C. 642 : 28 P. R. 1919 (Note).**

——S. 3 (3)—*Mahatpur in Jullundur Dt.—If town.*

Mahatpur in *tahsil* Nakhodhar of the Jullundur District is not a "town" for the purpose of the Act. (*Shadi Lal, J.*) RAM KISHEN *v.* GANGA RAM. **46 I. C. 173 : 65 P. W. R. 1918.**

——S. 3 (3)—*Urban immoveable property—Test of.*

To determine whether any specified area is part of a town or part of a village, the test to be applied is whether such an area has retained any of its original characteristics which would be consistent with the organization of a society to whom the principles of pre-emption in agricultural communities would apply or whether it is one to which the principles of town pre-emption apply. (*Pipon, J. C.*), MAHOMED ALI KHAN *v.* MAKHAN SINGH. **73 I. C. 855.**

——S. 3 (5)—*What is a sale.*

Where the sale price was Rs. 100 and the sale-deed was unregistered, the fact does not render the transfer something other than a sale within the meaning of the Punjab Pre-emption Act. 7 All. 482 Foll. (*Campbell, J.*) GANDA SINGH *v.* BHAN. **1923 Lah. 310.**

——S. 3 (5) (a)—*Sale of minor's property with leave of Court under S. 29 of the Guardian and Wards Act—Right to pre-emption.*

In a suit for pre-emption, if appeared that terms of the sale were settled between the parties privately but to complete a sale on behalf of a minor permission had to be obtained under S. 29 of the Guardians and Wards Act. It was therefore obtained by the guardian and the sale was completed by the guardian privately in favour of the vendee. *Held*, that the sale was a private sale and a claim for pre-emption was not prohibited by S. 3, clause 5 (a). 46 P. R. 1909, dist. ; 52 I. C. 337. (*Abdul Raoof, J.*) HAR KISHEN SINGH *v.* KALA RAM. **67 I. C. 924 : 2 Lah. L. J. 261.**

——S. 3 (5) (a)—*Sale by Guardian appointed by Court with sanction of Court—Presumption.*

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 3.

S. 29 of the Guardians and Wards Act prohibits the sale by a guardian of the property of a ward without permission of the Court. The Court under this section makes no order for sale, but merely authorises a transaction which would otherwise not be binding upon the minor. The sale is in fact of a transaction *inter parties* approved of by the Court. The Court having approved of the contemplated sale has no further stay in the matter. Consequently such a sale is not exemp from the law of pre-emption and S. 3 (5) (a) of the Pre-emption Act has no applica ion to the case (*Shadi Lal, C. J. and Fforde, J.*) SALIG RAM *v.* BARKAT ALI. **4 Lah. 164 : 5 Lah. L. J. 406 : 1924 Lah. 48.**

——S. 3 (5) (*a*)—*Sale during course of suit —Sale in execution of decree not for money—Liable to pre-emption.*

Under the Act, a sale during the course of a suit and a sale in execution of a decree not for money, are liable to pre-emption. (*Wilberforce, J.*) BHAGHA *v.* BIR SINGH. **3 U. P. L. R. (Lah.) 37.**

—— —S. 4—Adalphi *tenure—Not a sale.*

The creation of an *adalphi* tenure in which no consideration passed does not amount to a sale and hence does not give rise to a right of pre-emption. (*Scott-Smith, J.*) ALLAH RAKHIYA KHAN *v.* AHMAD. **1923 L. 70.**

——S. 4—Adalphi *transaction is not a sale.*

A transaction known as *Adalphi* tenure under which a person becomes the proprietor of a piece of land in consideration of his clearing some other piece of land is not one of sale and not therefore subject to pre-emption. In a transaction of sale, some money consideration must pass. (*Broadway and Wilberforce, JJ.*) GHULAM MAHOMED *v.* TEK CHAND. **62 I C. 932 : 2 Lah. 199.**

——S. 4—*Intikalnama—Sale of decree.*

A decree-holder for possession of land conditional on his paying Rs. 300 sold the decree to the deft. together with all right, title and interest in the land, the subject-matter of the decree. The deed of sale was described as *intikalnama. Held,* that what was sold was not land or immoveable property but a right to obtain the property by complying with the decree. The sale did not therefore give rise to a right of pre-emption. (*Broadway, J.*) SHAMSUDDIN *v.* GULAM HASSAN. **42 P. R. 1917 : 38 I. C. 658 : 51 P. W. R. 1917.**

——S. 5—*Shop building site—Part used as shop and part as residential quarter.*

The building in suit was situated in a lane not a bazaar and was originally purely residential. There had been some subsequent alteration in the structure and three rooms abutting on the lane were used as shops. The upper storey had been used as residential quarters by different persons including the owner. *Held,* that at the time of the sale the building was not used for commercial purposes, it was not a shop and the plaintiff was entitled to pre-empt (*Rossignol, J.*) HANNUMAL *v.* ATMARAM. **47 P. L R. 1915 : 27 I. C. 799 : 239 P. W. R. 1915.**

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 7.

——S. 5 (a)—*Shop—Building when deemed a shop.*

Where no goods are sold in a building, the building cannot be said to be a shop, the word "Shop" denotes a building or an apartment which is primarily used for buying and selling goods. (*Martineau, J.*) WADHAWA MAL *v.* LACHMAN DAS. **1924 L. 213.**

——S. 5 (a)—*Building—Shop or residential house—Test of.*

The question whether a building in Lahore City is a shop or a residential house must be decided with the reference to the chief or most important purpose to which the building is devoted. Where the primary value of the building in question lay in certain shop the rest of the house being neglected and of comparatively insignificant value, no right of pre-emption exists in respect of the property. (*Broadway and Campbell, JJ.*) LAL CHAND *v.* MT. BEGAM. **3 Lah. 433 : 5 L. L. J. 193 : 1923 Lah. 262.**

——S. 5 (a)—*Pre-emption—Building or shop —Test.*

A suit was brought for possession by pre empt on of a house it appeared that the plaintiff when mortgagee of this property described it as consisting *inter alia* of shops. The buildings in dispute were suited for use as shops as well as for use of residential buildings. *Held,* that in the presence of two lease deeds which show that the buildings were leased as residences and in the absence of any clear evidence that they were ever actually used as shops, the inference drawn from the facts by the learned District Judge was correct. (*Le Rossignol and Broadway, JJ.*) DEWAN CHAND *v.* BASANT RAI. **2 Lah. L. J 302.**

——S. 5 (a)—*Purpose for which building is used guides the determination of its nature for pre-emption purposes.*

The main purpose for which a building is used guides the determination of the question of its being a shop or residence, for pre-emption purposes. Thus a building, the lower storey of which was used for more than 50 years for shops, the upper storey being a *Baita Khana,* was held to be a shop of an indivisible nature. (*Johnstone, C. J. and Le Rossignol, J.*) JAITHU MAL *v.* JANKI DAS. **37 I. C. 843 : 30 P. W. R. 1917.**

—— —S. 6—*Pre-emption—Sale of house apart from site.*

A standing building in a village was held to be village immoveable property and liable to pre-emption even apart from the site ; but the pre-emptor would hold just on the same terms as the vendor did. 10 P R. 1909, Foll. (*Chevis, C. J.*) WAGHA *v.* MUHAMMAD ALI. **68 I C. 193 : 2 Lah L. J. 345.**

——Ss. 7 and 19—*Custom of pre-emption—Presumption—Right of owner of adjacent building.*

If there is one thing which is clearly established in Pre-emption Law it is that if in a definite mohalla or sub-division of a town the custom of pre-emption exists it must be treated as existing throughout the whole of sub-division. 44 P. R. 1903 ; 122 P. R 1888 ; 52 P. R. 1903 referred to.

PUNJAB PRE-EMPTION ACT (I OF 1913), S 7.

Where the owner of a site has sold it, the owner of the adjoining building has a right of pre-emption so long as the building subsists. (*Harrison and Martineau, JJ.*) ALLAH DIN *v* SHANKAR SHAH. **1924 L. 335.**

——— **S. 7**—*Custom of pre-emption—Where to be proved to be existing.*

Where a town is sub-divided, the pre-emptor must prove the existence of the custom of pre-emption in the particular sub-division in which the property is situate and instances of such a custom in the neighbouring sub-divisions are of no value. (*Broadway and Abdul Qadir, JJ.*) GAINDAMAL *v.* RADA. **63 I. C. 766**

——— **S. 7**—*Village or town—Test.*

Naraiangarh in the Ambala district is a town within S 7. Whether a place is a town or village can be determined by the important test which is the presence of a substantial *bazar* and the profession of majority of the inhabitants (*Le Rossignol, J.*) MANSA RAM *v.* JOTI. **62 I C. 808**

——— **S. 7**—*Pahar Ganj is a Town and Custom of pre-emption must be proved.*

'Pahar Ganj' is a suburb of the city of Delhi and must be treated as a town for the purpose of the Punjab Pre-emption Act. The custom of pre-emption is not proved to exist in Pahar Ganj (*Shadi Lal, C J. and Wilberforce, J.*) IMPERIAL GOVT. OIL AND GENERAL MILLS CO. *v.* MISBAH-UD-DIN. **61 I. C. 325 : 2 Lah. 83.**

——— **S. 8 (2)**—*Notification of Local Government—Effect of.*

Pending a suit for pre-emption, the Punjab Government declared by notification that there would be no right of pre emption with regard to agricultural land and village immoveable property in a certain area which comprised the suit lands. *Held*, the rules had no retrospective effect. The usual method of dealing with pre-emption suits is to decide the questions at issue according to the state of affairs existing when the plaintiff's cause of action arose. (*Abdul Raoof and Campbell, JJ.*) MOHINDAR SINGH *v.* ARUR SINGH. **3 Lah. 267 : 1922 Lah. 344.**

——— **S. 9**—*Sale—Sanction by Dy. Commr.—Effect of.*

Once, the Deputy Commissioner grants sanction to an alienation, the sale becomes immune from pre-emption under S. 9 of the Act, and it cannot be objected to on the ground that the Deputy Commissioner did not make an enquiry. (*Martineau, J.*) MAULA DAD *v.* MUHAMMAD. **63 I. C. 700.**

——— **Ss 9, 21 (2), and 24**—*Punjab Alienation of Land Act (XIII of 1900), Ss. 3(2), 5, 21 (2)—No right of pre-emption when sale sanctioned by Deputy Commissioner.*

Where a sale is sanctioned by the Deputy Commissioner under S. 3 (2) of Punjab Alienation of Land Act, no right of pre-emption exists in respect of such a sale as S. 9 of the Act of (1913) repeals S. 5 of Punjab Alienation of Land Act (1900). (*Johnstone, C. J. and Chevis, J.*) GANGA RAM *v.* RAJA RAM. **37 I C. 763 : 124 P. R. 1916.**

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 13.

——— **Ss. 12, 17 and 25**—*Pre-emption—Rival claims—Priority—Rule of decision—Relationship—Proof of—Tradition—Oral testimony.*

S. 12 of the Punjab Pre-emption Act does not contemplate merely inheritance by one person, or even by a group of people, who at the critical moment would be together equally entitled to inherit the property sold, if the vendor were dead, but it assumes that there will be different priorities as between the different claimants and that such priorities shall be determined in due order of succession. To be in a position to enforce by suit a claim to pre-empt under the Act the claimant must under S 17 of the Act have given a notice within a limited time of his intention to enforce his right of pre-emption A claimant to be successful need not have been at the date of the sale or at any time the heir presumptive of the vendor The heir presumptive may not have the means to purchase or for any reason may not be desirous to purchase and may have omitted to give within the time limited a notice of his intention to pre-empt. Where among the community to which the rival pre-emptors belong, there are no accessible records of births and deaths or family memorials the proof of relationship depends on oral tradition which requires close scrutiny. (*Lord Buckmaster.*) SABZ ALI KHAN *v.* KHAIR MAHOMED KHAN. **3 Lah. 48 : 30 M. L. T. 237 : 20 A. L. J. 427 : 49 I. A. 74 : 43 M. L. J. 49 : 1 P. L. R (P.C.) 1922 : 35 C. L. J. 514 : 4 U. P. L R (P. C.) 39 : 80 M. L. T. 237 : 7 P. W. R. 1922 : (1922) P. C. 139 : (P. C.).**

——— **S. 12 (a)**—*Persons entitled to pre-empt—N. W. F. Provinces.*

The law of pre-emption in N. W. F. Provinces deprives a person claiming to succeed by will or other form of artifically regulated succession from putting forward claims under S. 12 (a of the Punjab Pre-emption Act, but it includes all cases where the pre-emptor would be entitled to succeed to the property by right of blood relationship, whether such relationship is with the vendor or his heirs. (*Pipon, J. C.*) HABIB GUL *v.* SHAHDAD KHAN. **73 I C 594.**

——— **Ss. 13, 16 (sixthly)**—*Vicinage—Suit by one Co-owner.*

One co-sharer of a share can sue for pre-emption of an adjacent house even if all the co-owners do not join in the suit. (*Abdul Raoof, J.*) AMIR CHAND *v.* HEM RAJ. **19 P. L. R. 1921 : 59 I. C 243 : 12 P. W R. 1921.**

——— **S. 13**—*Building or shop—Question of law—Second appeal.*

Whether upon certain facts found, a building should or should not be held to be a "shop" within the meaning of the Punjab Pre-emption Act, is a question of law and gives a good ground for second appeal. (*Shadi Lal and Le Rossignol, JJ.*) BHAMBA RAM *v.* ALLAH BAKHSH. **69 P. R. 1915 : 31 I C. 191 : 156 P. W. R. 1915.**

——— **S. 13 (o)**—*'Agricultural land,' meaning of.*

Though a plot of land is assessed to land revenue, it does not become an agricultural land

unless the plot is proved as occupied or let for agricultural purpose or purposes sub-servient to agriculture. (*Martineau, J.*) MAHAMAD SAID *v.* SHAHA NAWAZ. **60 I. C. 580.**

——S. 14— *Municipality — Sale in non-agriculturist cannot pre-empt.*

Though under the notification issued by the Govt. under the Alienation of Land Act, a non agriculturist may buy land from a member of an agricultural tribe without restriction in a Municipality he cannot pre-empt a sale of such land. (*Leslie Jones, J.*) LACHMAN SINGH *v.* SUNDAR DAS. **3 L. L. J. 430 : 67 I. C. 816 : 4 U. P. L. R. (Lah.) 98.**

——Ss. 15 and 21—*Sale of occupancy rights —Person having right of pre-emption—Suit by a landlord does not lie.*

Where an occupancy tenancy is sold to a person having a right of pre-emption under S. 15 (a) or (b) of the Punjab Pre-emption Act, the landlord is not entitled to sue under S. 21 for pre-emption. (*Campbell, J.*) AHMED KHAN *v.* JANGBAZ KHAN **1924 L. 210.**

——S. 15—*Pre-emption — Right to— Co-sharers in well and not agricultural land—Adjunct—Appendage.*

The fact that the plff. is a co-sharer in a well with path attached to it would not give him a right of pre-emption to other land held separately being a mere appendage or adjunct to the other land. The well and the path to the well being clearly an adjunct or appendage to the other land the plff. cannot treat it as a property separable from the rest of the land and claim a right of pre-emption in it alone on the strength of his being a co-sharer therein when he has no such right in the other land sold. 44 P.R. 1900, Foll. There has been no change in the law by the passing of the Pre-emption Act. The omission of the word "undivided" which occurred in S. 12 (*a*) of the Punjab Laws Act is not material. (*Martineau, J.*) SUBA *v.* SAHAB DIN. **1 Lah. L. J. 238.**

——S. 15 (a)—*House—Reversioner is preferred to owner of land.*

Reversioners have a better claim to pre-empt a standing house than owner of the land. (*Martineau, J.*) SARDAR DIN *v.* MT. AJAH BIBI. **1923 Lah. 394 (2)**

——S. 15 (a)—*Relationship—Proof.*

A pre-emptor claiming by relationship must prove it by some specific evidence; the mere fact of his being of the same *got* as the vendor is not sufficient. (*Scott Smith, J.*) GHULAM HUSSAIN *v.* SULLAIN MAHOMED. **39 I. C. 717 : 8 P. W. R. 1917.**

——S 15 (b)—*Widow cannot pre-empt—Co-sharer—Shamilat land.*

The widow of a vendor of land, not being his heir, is not entitled to claim pre-emption. Where the plaintiff in a pre-emption suit is found to be a co-sharer in the proprietary land, the mere fact that a portion of the Shamilat land only has been sold cannot deprive plff. of the right to maintain

the suit as a co-sharer. (*Abdul Raoof and Abdul Qadir, JJ.*) MT. AMIR NISHAN *v.* KANSHI RAM. **1924 L. 333.**

——S. 15 (c)—*"Patti" or other sub-division —Meaning of.*

Where at the Settlement of 1864 two *tarafs* or *pattis* were created but they were nominal divisions created for purely fiscal purpose and in fact there was no real sub-division of the village except that some properties had been allotted to one *lambardar* and some to another merely for the convenience of collecting land revenue, they are not *pattis* or *tarafs* within the meaning of S. 15 (c) of the Punjab Pre-emption Act (*Chevis, J.*) UTTAM CHAND *v.* MEHTAB SINGH. **67 I. C. 48.**

——S. 15 (c)—*Owners of estate—Right to pre-empt—Mali Kabza.*

A man is not debarred from pre-empting though he is only a *malik kabza* and owns no share in the village *Shamilat*, or only an owner by purchase. A person is not necessarily one of the owners of the estate merely because he owns some immoveable property in the village. The words "Owner of the Estate" in S. 15 (c) refer to the village proprietary body. A man who owns only a small plot of 8 *marlas* unassessed to revenue, and almost uncultivated and destined to be a building site, is not one of the owners of the estate. 106 P.R. 1913, Foll. (*Chevis and Dundass, JJ.*) JAVALA SINGH *v.* TARA SINGH. **1 Lah. 503 : 2 Lah. L. J. 565 : 57 I. C. 159 : 2 U. P. L R. (L.) 122.**

——S. 15 (c)—*Rupar—Pattis—Whether sub-divisions.*

Rupar is divided into *pattis* which are well recognised and which are 'sub-divisions' within S. 15 (*c*) of the Punjab Pre-emption Act. 21 P. R. 1915, Dist. (*Shah Din, J.*) SHIB RAM *v* MAQSUM ALI KHAN. **40 P. R. 1919 : 51 I. C. 394 : 81 P. L. R. 1919.**

——S. 15 (c)—*Pattis —Sub-division—Question of fact.*

The question whether a Patti is a real sub division of a village is a question of fact under S. 15 (*c*) of the Act. (*Chevis, J.*) WARYAM SINGH *v.* HARNAM SINGH. **109 P. R. 1918 : 48 I. C. 379 : 23 P. L R 1919.**

——S. 16—*Co-sharers— Plaintiff co-sharer acquiring portion under decree for pre-emption—Subsequent suit.*

The right to pre-empt is a right to be substituted for the vendee. A successful pre-emptor is vested with the rights of the vendee whom he dislodges not from the date of the sale but from the date on which he enforces his right (*i. e.*) from the date on which he satisfies the condition of his decree and brings it into operation. No doubt, he is substituted for the vendee in all the rights that were transferred by the sale, but it is unreasonable to conclude that the process of substitution takes places on any date prior to the satisfaction by the presumption of the conditions on which his decree has been granted to him. Any other conclusion will really increase the difficulties of persons desiring to dispose of their property by sale for they would have to enquire

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 16.

regarding the existence not only of ostensible protential pre-emptors but would also have to enquire into the history of contiguous estates. (*Le Rossignol and Harrison, JJ.*) MAHOMED AKBAR KHAN *v.* MAHOMED AZIM KHAN.
4 Lah. 137 : 1923 Lah. 451.

——S. 16—*Right of pre-emption—Existence of common party—Wall.*

Plaintiff the owner of a shop adjoining a house which was sold has a right of pre-emption over the house sold on the ground that the rafters and beams of the house and the shop rest on a common wall. (*Broadway and Wilberforce, JJ.*) CHELA RAM *v.* MEHR CHAND.
70 I. C. 901 : 5 Lah. L. J. 53

——S. 16—*Pre-emption on the ground of vicinage—Plff. selling land to his wife.*

Plff. sued for pre-emption on the ground of vicinage. It appeared that he had sold the house to his wife who had in her turn mortgaged it. It was contended that the sale in favour of the wife was ineffectual. *Held* that the sale in favour of the wife was ineffectual meant that it was questioned by plff.'s creditors and therefore as between husband and wife, the wife was the owner and plff. had no right to pre-empt. (*Abdul Raoof and Broadway. JJ.*) ABDUL RAZZAK *v.* FAZAL ILAHI. **60 I. C. 271 : 3 U. P. L. R. (Lah.) 60.**

——S. 16—*Joint wall—User of, not an easement.*

The existence and user of a joint wall between two houses is not an easement under S. 16 of the Act. (*Scott-Smith, J.*) ATMA SINGH *v.* HEMRAJ.
59 I. C. 939.

——S. 16—*Pre-emption—Sale of a house—Rights of owner.*

The owner of a site cannot exercise the right of pre-emption if a non-proprietor effects a sale with respect to his house standing on the site. 2 N.W.P.H.C.R. 101 Ref. (*Abdul Raoof, J.*) BUTA *v.* ALI BUKSH. **55 I. C. 609 : 2 Lah. L.J. 252.**

——S. 16 (2)—*Building or structure—What is—Owner's right of pre-emption.*

The owner of "building or other structures" on a site is like a co-owner in the property sold and his right of pre-emption is inferior only to a co-sharer therein. The word "building" or "structure" is not defined but it may be stated every building is a structure though every structure is not a building. (*Broadway and Zafar Ali, JJ.*) MAHOMED UMAR *v.* FAYAZ-UD-DIN.
1924 Lah. 172.

——Ss. 19 and 20—*Notice to pre-emptor—Non-specification of property or price—Omission to reply—Effect of.*

Held, that under the circumstances there was sufficient notice of the sale given to plff. who attended the Court and for the purpose of S. 19 of the Pre-emption Act and that the plff. had failed to prove that he had duly complied with the provisions of S. 20. The right of pre-emption had been extinguished before the suit was instituted and the plff. cannot claim any relief. (*Rattigan, C.J.*) JESA RAM *v.* MEHR CHAND.
45 I. C. 935 : 104 P. W. R. 1918.

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 22.

——Ss. 19 and 20—*Notice—Defective—Suit whether barred.*

If a notice issued by the vendor to the pre-emptor under S. 19 does not state the price at which the vendor is willing to sell and the vendor sells the land before three months after the notice is issued the right of suit of the pre-emptor is not barred. (*Johnstone, C. J. and Shah Din, J.*) AMIR CHAND *v.* AMIR SINGH.
53 P. R. 1917 : 41 I. C. 266 : 115 P. W. R. 1917.

——S. 22—*Order for deposit or security—Deficient security filed out of time—Suit to be dismissed.*

In a pre-emption suit, the plaintiff was directed to put in a security bond for Rs. 12,000 the price mentioned in the sale-deed or in cash one-fifth of the amount. The 9th Dec. 1920 was fixed for it, but neither the security bond was produced nor one-fifth of the sale-price was deposited. On the 8th of January 1921, a security bond in the amount of Rs. 11,000 was filed which bore an endorsement which showed it was accepted. *Held*, plaintiff had failed to carry out the order of the Court which required the filing of a security bond for the full amount of the sale-price and that his suit should be dismissed. (*Abdul Raoof, J.*) SULTAN *v.* SHERA.
4 L. L. J. 526 : 1923 Lah. 257 (1).

——S. 22—*Extension of time for deposit—Discretion—Appellate Court.*

Held, under the circumstances of the case, the lower appellate Court, ought not to have gone out of its way to exercise the discretion of extending time in favour of the plaintiff to deposit the sale price. An Appellate Court has all the powers which the original Court has and can do all that the original Court can do. S. 22 (2) of the Punjab Pre-emption Act was enacted rather to enlarge the powers of an Appellate Court authorising it to make the same orders with respect to an appeal as the original Court can with regard to the original suit. (*Abdul Raoof, J.*) INAYAT *v.* DARBARA SINGH.
55 I. C. 621.

——S. 22—*Pre-emption money — Money deposited by co-pre-emptor--Decree in favour of other pre-emptor.*

According to S. 22 one of the two co-plff. pre-emptors deposited Rs. 1,000 in Court on behalf of both the plffs. but decree was passed in favour of the other plff. conditional on his paying the Court Rs. 6,000 before a certain date. A *parcha* was given to him to pay Rs. 500 on or about 31st July 1915, and it was stated that Rs. 1,000 were already in Court on his behalf, *i.e.*, the other plff. paid Rs. 5,000 on 25th June 1915 and on 29th July 1914 the plff. depositing Rs. 1,000 made an application for refund. *Held* he was entitled to a return. (*Shah Din, J.*) GHISA *v.* MANZUR-UL-HAQ.
39 I. C. 57 : 10 P. L. R. 1917.

——S. 22 (1)—*Deposit—Duty of Court to fix time for*

S. 22 (1) of the Punjab Pre-emption Act is imperative Court must fix a time within which the deposit must be made and if the Court fails to so fix the time the pre-emptors cannot be

penalized for having disobeyed an order which was not made. (*Wilberforce, J.*) BOLMAKAND *v.* LACHHMAN BAI. **67 I. C. 796 : 3 L. L. J. 545.**

——S. 22 (4)—*'Shall be rejected'—Meaning of.*

The phrase "his plaint shall be 'rejected'" read with the provision as to an extension of time means that the plaint shall be rejected if the Court should not deem it proper to allow further time and though the Court may not extend time *suo motu* it should not all the same, act with such celerity in rejecting the plaint as not to allow the plaintiff even a moment for reflection for action (*Martineau and Zafar Ali, JJ.*) RAM RATTAN *v.* RAJARAM. **5 L. L. J. 454 : 1923 Lah. 643.**

——S. 22 (5) (a)—*Withdrawal of deposit—Dismissal of suit.*

Where, in a pre-emption suit the money deposited by the plaintiff is withdrawn, the suit is liable to be dismissed. (*Martineau, J.*) PARAS RAM *v.* DALPAT RAI. **54 I. C. 268 : 7 P. W. R. 1920.**

——S. 24—*Sale opposed to Alienation of Land Act—Effect.*

Where a sale is opposed to the Alienation of Land Act a suit for pre-emption in respect of the sale is liable to dismissal under S. 24 of the Pre-emption Act. (*Johnstone, C. J. and Chevis, J.*) MANGA RAM *v.* RAJA RAM. **37 I. C. 763 : 124 P. R. 1916.**

——S. 25—*Good faith—Meaning of—Paying more than market value to deter pre-emptors.*

The words "in good faith" in S. 25 do not cover the word "paid" so that where full payment is proved, the question of good faith need not be discussed. In order to deter pre-emptors a purchaser may pay more than the market value of the property purchased (*Chevis, J.*) THAKAR SINGH *v.* NABI BAKSH.
2 P. R. 1918 : 138 P. L. R. 1917 : 39 I. C. 735 : 67 P. W. R. 1917.

——S. 29—*Suit for pre-emption—Limitation—Starting point.*

The underlying principle governing the limitation in pre emption suits is that it runs from the date of notice. If physical possession is given under the sale the whole world is given notice o the alienation. If a registered deed is executed, constructive notice is given and the same constructive notice is given by mutation. Where under the terms of an agreement ownership was to pass only on fulfilment of certain conditions but possession was given to facilitate the fulfilment of the conditions, and after they were complied with mutation of names was effected *held* in a suit for pre-emption time bega to run from the date of mutation under S. 29 of the Punjab Pre-emption Act. (*Abdul Raoof and Harrison, JJ.*) TOLA RAM *v.* LORINDA RAM.
3 Lah. 261 : 1922 Lah. 210.

——S. 29—*Sale—Dispute about validity—Limitation.*

A plaintiff in a pre-emption suit could not for the purpose of bringing his suit within limitation claim that time should be computed from the date of the decision of previous suit in which the validity of the sale was in question. (*Scott-Smith and Broadway, JJ.*) SUNDAR SINGH *v.* DHIAN SINGH.
15 P. R 1919 : 49 I. C. 358 : 43 P. L. R 1919.

——S 30 *Pre-emption—Sale of property in physical possession of vendee—Limitation.*

Where prior to the sale the vendee was already in physical possession of the property sold as a tenant and no physical possession could be given to him, the period of limitation for a suit for pre-emption starts from the date where mutation was attested. (*Brasher, J.*) MISRI KHAN *v.* SHAHJI
1924 Lah. 394.

——S. 30—*Land in possession of tenants—Limitation for suit for pre-emption.*

In the case of land in the possession of tenants, it is capable of physical possession and a suit for pre-emption brought more than a year after the eviction of the tenants is barred. (*Le Rossignol, J.*) TULSI RAM *v.* GANWA. **1924 Lah. 196.**

——S. 30—*Physical possession—Possession of tenants is not.*

"Physical possession" in S. 30 of the Punjab Preemption Act means personal and immediate possession. When the land is in the possession of tenants-at will, it is not capable of physical possession for the purposes of the section. (*Scott-Smith, J.*) HAIDER ALI SHAH *v.* BHIKHE SHAH.
1923 Lah. 94.

——S. 30—*Sale of undivided share—Limitation runs from date of physical possession.*

If the assignee from a co-sharer of joint undivided property gets possession of any portion of the property, time begins to run under S. 30(2) of the Pre-emption Act from the time of such assumption of possession (*Le Rossignol, J.*) SARDAR ALI *v.* FAZIL. **1923 Lah 75.**

——S. 30—*Share in undivided* mahal *not capable of physical possession.*

A share in an undivided *mahal* is not susceptible of physical possession within the meaning of s. 30 (citing Ellis' Law of Pre-emption, 4th Edn., p. 40). (*Broadway, J.*) MD. ATA ULLAH KHAN *v.* GOPALA MAL. **1923 Lah 74.**

——S. 30—*Sale including a share in the Shamilat—Limitation Act, Art.* 10.

A suit for pre-emption in respect of a sale including a share in the shamilat is covered by Art. 10 of the Limitation Act and not by S. 30 of the Act. (*Scott-Smith, J.*) LEHNA SINGH *v.* BAGAT SINGH. **68 P. R 1918 : 158 P. W. R. 1918 : 47 I. C. 359 : 108 P L. R 1918.**

——S. 30 (1)—*Pre-emption — Vendor not in exclusive possession.*

The vendors sold certain land which belonged to them and their nephew, who was a minor ignoring his rights. The land being free of crop, the vendors reported to the *Patwari* that they had placed the vendee in possession *Held* that in these circumstances it must be held that vendee took possession on the date of sale from which period of limitation began to run. (*Le Rossignol, J.*) UDMI *v.* RAM GOPAL.
52 I. C. 48 : 9 P. L. R. 1919.

PUNJAB REDEMPTION OF MORTGAGES ACT (II OF 1913.)

——— —*Punjab Act (III of 1900), S. 9 (2)—Mortgagee in possession — Proceedings by Revenue authorities—Effect.*

Where the mortgagee was in possession of the land and had the Revenue authorities not intervened, it would have been the business of the mortgagor to bring a suit for possession by redemption. *Held* the summary proceedings taken by the Revenue authorities cannot affect the rights of the parties and a suit for declaration of charge and for possession until payment of the charge money is thus virtually a defence against an order divesting the mortgagee of possession before payment of the full sum due. In such circumstances the question of limitation does not arise and the provisions of O. 2. rule 2 are inapplicable. (*Shadi, C. J. and Lumsden, J.*) RAM SARAN DAS *v.* MULA. **4 Lah. 346 : 5 L. L. J. 513 : 1923 Lah. 648.**

———*Collector's order—Effect on rights of parties—Right to remain in possession—Duty to restore benefits.*

Proceedings under Act II of 1913 are summary and in a disputed case neither party should be prejudiced by the Collector's act when the matter is later on submitted to the decisions of the Civil Courts A suit under S. 12 of the Act is merely declaratory. In a suit under S. 12 by an usufructuary mortgagee of the property of a Mahomedan minor from his *de facto* guardian for declaration of the validity of his mortgage. *Held*, that as the minor must, before he recovers possession restore the benefits he has derived under the mortgage, the mortgagee would be entitled to remain in possession even in case of the invalidity of the mortgage provided the minor is under a duty to restore benefits. (*Le Rossignol, J.*) SARDAR *v.* KAURA RAM. **36 P. R 1918 : 7 P W. R. 1918 : 44 I. C. 219 : 152 P. L. R. 1917.**

———**Ss. 6 (a) and (b) and 11**—*Order for redemption—Remedy of aggrieved party.*

A mortgagee aggrieved by an order of redemption passed by the Collector under the Punjab Redemption of Mortgages Act, 1913, may sue for a declaration that there is a further charge on the mortgaged land and is not bound to sue for recovery of the additional mortgage money to which he claims to be entitled and S. 42 of the Specific Relief Act is no bar (51 P. R. 1897 ; 14 I. C. 510.) (*Shah Din, C. J.*) BALVANT RAI *v.* CHERU. **85 P. R. 1917 : 157 P. W. R. 1917 : 39 I. C. 451 . 5 P. L. R. 1918.**

——— **S. 12**—*Mortgagor in possession after redemption — Suit for declaration that more money due will lie—Objection not be raised in second appeal.*

Even after redemption and putting the mortgagor in possession, a suit by a mortgagee for a bare declaration that some more money is due under the mortgage is maintainable under S. 12 of the Redemption of Mortgages Act. Such an objection cannot be raised for the first time in second appeal. (*Scott-Smith and Campbell, JJ.*) NARIJAN SINGH *v.* DIWAN CHARAN DAS. **3 Lah. 239 : 1922 Lah. 363.**

PUNJAB TENANCY ACT (XVI OF 1887), S. 3.

———**S 12**—*Power of Civil Court to set right a wrong done by Collector.*

S. 12 is wide enough for a Civil Court to set right a wrong done by the Collector in the summary proceedings, and if necessary to restore possession to the mortgagee on the ground that the sum due under the mortgage is larger than that allowed by the Collector. (*Wilberforce and Abdul Qadir, JJ.*) NIZAM-UD-DIN *v.* DAULAT RAM. **63 I. C. 890 : 2 Lah. 234.**

——— **S. 15**—*Deposit by mortgagor—Delivery of possession—Attachment of deposit.*

The provisions of S. 15 of Punjab Act II of 1913 are primarily for the protection of the mortgagor or other person depositing the money. Where therefore the depositor is given possession of the land, the money becomes the property of the mortgagee and could be attached as such. (*Broadway and Martineau, JJ.*) MOHANA MAL *v* TULSI RAM. **3 Lah. 141 : 1922 Lah. 290.**

PUNJAB RESTRICTION OF HABITUAL OFFENDERS' ACT (V OF 1918).

——— **Ss. 3 and 7**—*Order of restriction.*

A restriction order under S. 7 of the Act following an order for security for good behaviour under S. 118. Cr. P. C. is *ultra vires*. (*Rattigan, C. J.*) KABIR BAKSH *v.* CROWN. **1 Lah. 100 : 21 Cr. L. J 385 : 55 I. C. 993 : 95 P. L. R. 1920.**

——— **S. 7—Cr. P. C., (1898), S. 118**—*Order of restriction.*

An order under S. 7 cannot be made against one against whom an order under S 118, Cr. P. C, has been made. (*Scott-Smith, J.*) BHANA *v.* EMPEROR. **2 P. W. R. 1919 (Cr.) : 50 I. C. 832 : 20 Cr. L. J. 352 : 84 P. L. R. 1919.**

——— **S. 8**—*Order exceeding one year—Confirmation.*

An order of restriction for a period exceeding one year passed under the Act need not be confirmed by the Sessions Judge. (*Shadi Lal, C. J.*) EMPEROR *v.* SUHELA. **1 Lah. 614 : 22 Cr. L. J. 108 : 59 I.C. 412 : 5 P. W. R. 1921 Cr : 17 P. L. R. 1921.**

PUNJAB TENANCY ACT (XVI OF 1887).

———*Mortgagee has right to seek declaration as to amount of mortgage debt.*

The mortgagee who is dissatisfied with the amount ascertained by Revenue Officer as the amount of the mortgage deed which would be a charge on the purchase-money can bring a declaratory suit under S. 42 of the Specific Rel. Act for declaring that the mortgage debt due to him is larger than the sum so ascertained by the Revenue Officer. (*Johnstone and Shahdin, JJ*) RAGHUNATH DAS *v.* RAHIMAN. **93 P. W. R. 1912 : 14 I. C. 776 : 23 P. R. 1912.**

——— **S. 3**—*Suit for rent against occupant of water mill.*

A suit for rent due from the occupant of a water mill is not governed by the Act as the site of the mill cannot be held to be agricultural land and the occupant cannot be said to "hold" land

within the meaning of the Act. Such a suit is cognisable by the Civil Court. 77 P. R. 1904, Foll. (*Chevis, J.*) DEVLA JAMBU *v.* HARI DAS.
39 P. L. R. 1912 : 13 I. C. 348 : 47 P. W. R. 1912.

——S 4—"*Land,*"—'*Agricultural purpose*' —*Manufacture of saltpetre is not.*

The manufacture of saltpetre is not an agricultural purpose or a purpose subservient to agriculture and property is not land within the meaning of S. 4 (1) of the Punjab Tenancy Act unless it is occupied or has been left for agricultural purposes or for purposes subservient to agriculture or for pasture. What has to be considered is the character and use of the property at the time immediately before the cause of action arose and the nature of the suit will not be affected by the act of the defendants which gives the plaintiff his cause of action. It must be held therefore as defined in the Tenancy Act, and that the suit is triable by a Civil Court. (*Martineau, J.*) SETH KARORI MAL *v.* WASAWA.
1923 Lah. 462 (1).

——S. 4 (5)—*Position of Muqarridar is a tenant and not inferior proprietor.*

A Muqarridar is a tenant and not an inferior proprietor. A tenant is a person who holds land under another person, and but for a special contract would be liable to pay rent for that land to that other person. Muqarridar holds the land which is subject to his right under the proprietor to whom he pays a fixed rent. (*Harrison, J.*) KANSHI RAM *v.* SHAH NAVAZ. **1923 Lah. 295 (2).**

——S. 4 (6)—'*Landlord*'—*Mortgagee with possession.*

The term 'landlord' as defined in S. 4 of the Act includes mortgagee in possession. A suit for possession by pre-emption of certain land sold by an occupancy tenant to the mortgagees with possession of the proprietary rights does not lie inasmuch as the sale must be held to have been made in favour of the landlord. (*Martineau, J.*) NANAK *v.* BHAGWAN SINGH.
47 I. C. 3 : 149 P. W. R. 1918.

——Ss. 4 (7), 5 (1) (d) and 84—'*Tenant*', *meaning of--Occupancy rights--Jagirdar's descendants—Right of—Revision.*

If the other conditions of clause (*d*) of S. 5 (1) of the Act are satisfied a successor or descendant of a jagirdar or ex-jagirdar is entitled to claim under the clause for occupancy rights. The new provision in S. 4 (7) of the Act includes in the definition of 'tenant' predecessors and successors-in interest of a tenant. Where the lower Court dismissed a claim on the ground that the claimant is a descendant, *held*, there was a failure to exercise jurisdiction and that the case was one for interference in revision under S. 84 of the Act. (*Fenton, F. C.*) SHIV DYAL *v.* PARITAM SINGH.
7 P. R. 1912 (Rev) : 18 I. C. 56 : 178 P. L. R. 1913.

——Ss. 4 (15) and 5 (1) (d)-"*Village Servants*" Khangah *service.*

The *Muafi* granted by the Zamindars of the village for the service of *Khan ah* brings the persons responsible for such service within the category of "village servants" and excludes them

from being "Jagirdars" for the purpose of S. 5 (1) (*d*) of the Tenancy Act. *Fenton, F.C.*) SOHNA *v.* KAHWAJA. **4 P. R 1915 (Rev.) : 31 I. C. 238 : 5 P. W. R. 1915 (Rev.)**

——S. 5 (1) (a) and (2)—*Ejectment—Suit to contest—Presumption.*

Where the presumption given in cl. 5 (2) has not been rebutted the plff. a tenant who sued to contest a notice for ejectment can have occupancy rights under s. 5 (1) (*a*) (*Fenton, F. C.*) KANWAN *v.* NATUA SINGH. **30 I.C. 845: 2 P.W.R .1915 (Rev).**

——Ss. 5 (1) (a) and 5 (2)—*Conditions as to continuous occupation by more than two generations in male line.*

The provisions of S. 5 (1) (*a*) as to continuous occupation of land by more than two generations in the male line, apply only to the tenant in occupation at the commencement of the Act, and if in respect of his occupation such conditions are satisfied, his subsequent successors-in-interest are entitled to the benefits of the same and they need not themselves be in the male lineal descent. (*Fenton, F. C.*) POLAR *v.* KHAYALI.
7 P.R. 1913 (Rev.) 22 I. C. 552 : 76 P. L. R. 1914.

——S. 5 (1) (b)-*Muafidars are occupancy tenants.*

Muafidars are not village servants but jagirdars and therefore there are occupancy tenants and hence can be ejected. (*Maynard, F. C.*) GILANI SHAH *v.* MUSSAMMAT HASAN. **2 Lah. L. J. 714.**

——S. 5 (1) (b)—*Owner losing ownership—Inability to pay revenue—Occupancy tenant.*

An owner who through inability to pay the revenue loses his ownership, ceases to be a landowner by an involuntary act within S. 5 (1) (*b*) of the Act 19 P. R. 1871 : 6 P. R. 1881, Dist. (*Fenton, F.C.*) GHIPI *v.* SIGARU. **15 I. C. 927 : 3 P. W. R. (Rev) 1912.**

——Ss.5 (1) (c), 111 and 112—*Erroneous statement—Entry in Record of Rights—Effect of.*

An erroneous statement by the tenants that they are non-occupancy tenants, even though recorded in the Record of Rights will not operate to deprive them of their right. (*Maynard, F. C.*) JIWAN *v.* MOHAMAD HAYAT. **54 I. C. 969 : 3 P. R. (Rev). 1919.**

——S. 5 (1) (c)—"*Settlement along with the founder*" *explained.*

Under S. 5(1)(*c*) of the Act, the meaning of "settlement with the founder" is settlement contemporaneously with or in association with the original founder in the initial stages of the foundation and development of the village. But "settlement by the founder" might be after these initial stages. There is a fair rebuttable presumption in favour of a cultivator being settled in a village by the founder as cultivator thereof when there is evidence of his commencing to reside in and cultivate *Shamilat* land in a village during the lifetime of founder who was at the time a *lambardar* or had direct concern otherwisewith the *Shamilat* management, the requirements of S. 5 (1) (*c*) being so far fulfilled (*Fagan, F. C.*) LAKHI *v.* AMAR SINGH. **37 I. C. 1006 : 3 P. R. 1916 (Rev.).**

PUNJAB TENANCY ACT (XVI OF 1887), S. 5.

——— S. 5 (2)—*Thirty years—How reckoned.*

The term thirty years means thirty years from the commencement of the suit and not from the Act. (*Maynard, O. F. C.*) CHAILU *v.* MAN SINGH. **3 P. R. (Rev) 1911 : 258 P. L. R. 1911 : 12 I C. 442 : 5 P. W. R. (Rev.) 1911.**

——— Ss. 6 and 8—*Sale of occupancy rights—Collaterals, right of.*

Where occupancy rights are sold to the landlord, the collaterals of the vendor cannot pre-empt against the landlord though the said rights are not covered by S. 5. (*Johnstone, C.J. and Shadi Lal, J.*) AKBAR HUSSAIN *v.* ALI AHMED. **38 I. C. 712 : 116 P. R. 1916.**

——— Ss. 7 and 8—*Transferability of rights of grantee—Cause of action.*

The right of a grantee under S. 7 is not transferable under S. 8 unless it is consented to in writing by the Financial Commissioner. Transfer in any form even by conduct is prohibited, and a cause of action arises by transfer of a share. (*Le Rossignol and Broadway, JJ.*) UTTAM CHAND *v.* JINDA RAM. **2 Lah. L. J. 597 : 58 I. C. 298 : 2 U P. L. R. (L) 158.**

——— S. 8—*Occupancy right—Acquisition of—Basiku Opahus of the Kangra District.*

Basiku Opahus or tenants who had settled upon land and have built themselves a *bhasti* or homestead on or near it are entitled to occupancy rights under S. 8 of the Act, if there is an express or implied contract that they shall hold so long as they farm well and pay their rent or in other words, '*ta quasur*,' *i. e.*, till commission of fault against their tenure. A contract to that effect may be implied where the tenants and their predecessors have occupied the lands as *basiku opathus* for 100 years and have built houses on the land occupied by them paying half produce as rent. (*Scott Smith, J.*) PARMAN *v.* GANTHU. **51 I. C. 484: 50 P. R. 1919.**

——— S. 8—*Acquisition of occupancy rights—Agreement not to eject.*

Occupancy rights may be decreed under S. 8 where there has been a promise not to eject the tenant, which promise may be implied from the conduct of the parties. A promise not to eject does not, however, mean a promise not to eject under all circumstances but '*ta quasur*', *i.e*, till commission of a fault against the tenure. (*Maynard, F. C.*) KIRPA *v.* TIRHU. **5 P. R. 1918 (Rev.) : 46 I. C. 571 : 4 P. W. R. 1918 (Rev.).**

——— S. 8—*Transfer of tenancy right.*

Where owing to a dispute between an occupancy tenant and his sub-lessee a compromise was arrived by which the former gave up a portion of the holding to the latter and the compromise acted on by the Court, it is effective to transfer title though not sanctioned by the Financial Commissioner. (*Scott Smith and Broadway, JJ.*) GANDA SINGH *v.* BATA SINGH. **88 P. R 1917 : 42 I. C. 380: 175 P. W. R. 1917.**

——— S. 8—*Occupancy rights—Tenants of the Morni hill tract—Tahsil Naraingarh.*

Looking to the Morni tract tenures as detailed in the settlement report and to the fact of

PUNJAB TENANCY ACT (XVI OF 1887), S. 12.

occupation for 28 years, through two generations, without payment of any rent over and above land revenue and cesses a tenant of Mauza *Mauli Bhoj Rajpura*, was held entitled to occupancy rights under S. 8 of the Act. (*Maynard F. C.*) PATRAM *v.* ABHA. **3 P R. (Rev.) 1917 : 41 I. C. 34: 8 P. W. R. (Rev.) 1917.**

——— S. 8—*Sub-letting, if void.*

An agreement by which a Govt. tenant sub-lets a portion of Government grant to his three brothers, without the previous permission of Financial Commissioner is void. (*Fenton, F. C.*) VIR SINGH *v.* KALA SINGH. **3 P. R. 1915 (Rev.) : 31 I. C. 400 : 6 P. W. R. 1915 (Rev).**

——— S. 8—*Occupancy Right—Butamari.*

Butamari *per se* connotes no occupancy right. As to whether it does or not must turn on the question whether at the time when the land was first broken up and occupied the competition for land was such that the tenant could dictate his own terms or such that the landlord could do so. (*Maynard, F. C.*) NEWAB ALI *v.* LAL SINGH. **6 P. R. 1914 (Rev) : 27 I C. 791 : 230 P. L. R. 1915.**

——— S. 8—*Wajib-ul arz—Butamari*

The Wajib-ul-arz of Mouza Rambura, Sirsa Tahsil prepared in 1862 and revised in 1882 does not imply that *Butamari per se* confers an occupancy right. But as the village was Barani and the demand for tenants grew up to 1882, land *personally* broken up in 1882 and cultivated by tenants is held by them as occupancy tenants. (*Thorburn, F. C.*) ARJAN *v.* MANDAS. **6 P. R. 1914 (Rev) Note : 27. I C. 745 : 231 P. L. R. 1915.**

——— Ss. 8, 111 and 112—*Occupancy rights—Wajib-ul-arz—Entry in.*

An entry in a *Wajib-ul-arz* signed by the landlords and tenants to the effect that the tenants shall be entitled to occupancy rights under certain conditions is binding upon the signatories and their representatives for ever, and its non-repetition in a subsequent settlement does not amount to its cancellation. The question whether an agreement in an administration paper would operate only for the term of the settlement or beyond it is one of intention. (*Fenton, F. C.*) DARA *v.* MATU. **2 P. W. R. 1913 (Rev) : 18 I. C. 598 : 148 P. L. R. 1913.**

——— S. 8—*Cheenab Canal—Capitalist grant—Private agreement with another.*

An agreement among two applicants as capitalists grantees to share in the cultivation if one of them alone succeeds is not opposed to S. 8 of the Act. (*Reid and Robertson, JJ.*) HUSSAIN KHAN *v.* JAHAN KHAN. **48 P. L. R. 1913 : 18 I. C 5: 36 P. W. R. 1913 : 58 P. R. 1913.**

——— Ss. 12 and 77 (3) (*j*)—*Civil and Revenue Court—Claim by water carrier against proprietary body based on Wajib-ul-arz.*

A suit by a village "water carrier" against some of the proprietary body to recover from them his dues on basis of the *Wajib-ul-arz* in return for his doing the work of a water carrier at marriages and at the camps of officers on tour, is cognizable

by a Civil and not a Rev. Court. *Hag Buhf* or *Pooch Baki*, etc. are cesses recoverable independent of any service. (*Broadway, J.*) AZIM *v.* GOPI.
74 P R. 1917 : 40 I. C. 487 : 44 P. W. R. 1917.

——S. 13—*Commutation of Rent—Mortgagee with possession.*

A mortgagee with possession cannot under S. 13 of the Act commute produce rent into cash rent so as to bind the mortgagor landlord after the redemption of the mortgage (*Maynard, J.*) SANWAN SINGH *v.* BUTA. **3 P. R. 1918 (Rev) : 46 I. C. 5 : 132 P. L. R. 1918.**

——Ss 14, 50 and 77 (3), (g)—*Tenant—Suit for compensation—Suit after dispossession—Forum.*

A suit by a tenant who is dispossessed for compensation, more than a year after dispossession is cognizable only by a Revenue Court and not by Civil Court. 17 Cal. 926; 20 All 471 and 21 All. 204 Ref. (*Shah Din, Chevis and Le Rossignol, JJ.*) AKBAR HUSSAIN *v.* KARM DAD. **48 I.C. 8: 90 P. R. 1918 (F. B.)**

——Ss 14 and 77 (3) (n)—*Civil and Revenue Court—Plaintiff entitled to possession, if landlord.*

A person entitled to possession of land is a landlord within the S. 14 of the Act, and a suit for mesne profits in respect therof is cognizable by a Revenue Court under S. 77 (3) of the Act. 82 P. R. 1894; 1 P.R. 1893 Foll. 145 P.R. 1893 not Foll. (*Shah Din and Scott Smith, JJ.*) RATTAN DAS *v.* BATTAN SINGH. **46 I. C. 437 : 53 P. R. 1918.**

——S. 14—*Holding land in contravention of agreement—Plff.'s right.*

When defts. cultivate in contravention of the agreement and without the consent of the plffs. the latter can claim that defts. should pay them for the use and occupation of the land. Under S. 14 aforesaid the Rev. Court is precluded from decreeing a larger amount than the rent payable in respect of the land in one agricultural land, (*Shah Din and Leslie Jones, JJ.*) KARAM CHAND *v.* NAWAB KHAN. **30 P. R. 1917 : 38 I. C. 580 : 41 P. W. R. 1917.**

——Ss. 14, 84 (5)—*Ejectment—Person in adverse possession of land made over to another in partition proceedings.*

A person in adverse possession of land which has been made over to another in partition proceedings to which the former was not a party cannot be liable to ejectment proceedings under the Act. (*Maynard, F. C.*) MAHAN SINGH *v.* NARAIN SINGH. **1 P. R. 1914 (Rev) : 25 I. C. 867 : 199 P. L. R. 1915.**

——S. 17—*Appraisement—Record of Rights—Entries—Punjab Land Rev. Act, S. 144.*

Both of S. 17 of Act XVI of 1887 and S. 144 of Act XVII of 1887 give a co-sharer in a joint holding a right to apply for appraisement. All the co-sharers need not join in it. In disposing of applications under S. 144 of the Act of 1887 and S. 17 of the Act of 1887, the Rev. Officer should not go behind the entries in the Rev. Records. He should act as if the co-sharers recorded therein were in

fact the co-sharers in the holding. A procedure is provided for those who dispute the correctness of the Record of Rights entries to have them altered and pending alterations, the Rev. Officer should, in a proceeding under S. 17, Tenancy Act, treat the entries as correct. (*Fenton, F. C.*) NIHAL DEVI *v.* KISHORE CHAND. **15 I.C. 914 : 4 P. W. R (Rev) 1912.**

——S. 19—*Appraisement—Confirmation—Objections.*

The refusal by a tenant to accept the result of an appraisement is no reason for declining to confirm it. The failure by a Revenue Officer to give effect to the direction contained in S. 19 (2) of the Act does not affect the admissibility or the value of the evidence contained in the appraisement record. In suits for the value of produce rents there is no conclusive presumption that produce calculated according to the Financial Commissioner's instructions in paragraph 12 in Standing Order No. 2 is the actual produce of the particular land in the particular harvest in suit. (*Mookerjee and Beachcroft, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SIBAPRASAD JANA. **45 I.C. 983 : 27 C.L.J. 447.**

——S. 19—*Appraisment—Refusal of order S. 19—Evidentiary value of proceedings.*

The refusal by a tenant to accept the result of an appraisement is not an adequate reason for declining to confirm it by an order under S. 19 (2).

An omission on the part of a Revenue Officer to make an order under S 19 either confirming or varying an appraisement does not affect the value of the evidence contained in it nor is it a bar to its admissibility, where value of produce rents is in question, it cannot be conclusively presumed that the actual produce of a particular land is the same as that calculated according to the Financial commissioner's instructions in O. 2 para 12. The object of the executive instructions there given is to provide a Revenue Court with a means of calculating the probable produce and its probable selling value from the records of crop inspection, the settlement officer's estimate of average outturns and other available sources, in those cases in which reliable evidence of the *actual* produce and *actual* selling price is not available.

For the validity of an appraisement under chapter II of the Punjab Tenancy Act the consent of neither the landlord nor the tenant is necessary. (*Maynard, F. C.*) MULK SHAH *v.* NATHU. **4 P. R. 1918 (Rev) : 45 I. C. 980 : 1 P.W.R. 1918 (Rev.)**

——S. 38—*Abandonment of holding—Proof of—Possession of proprietor.*

Where occupancy tenants did not for a long time cultivate the land without sufficient cause, and did not arrange for payment of rent when due, *Held*, that abandonment is established and adverse possession by the proprietors may be presumed from the fact that they gave the land to their own tenants-at-will, 2 P. R. (Rev.) 1901, Ref. (*Bevan Petman, J.*) MUHAMMAD UNAR KHAN *v.* RAZI KHAN. **54 I.C. 873 : 170 P. R. 1919.**

——Ss. 38, 59 and 60—*Abandonment—Relinquishment—Test of—Sub-lease for more than a year.*

PUNJAB TENANCY ACT (XVI OF 1887), S. 38.

To constitute abandonment of the occupancy holding within S. 59, there must be relinquishment of possession and also the absence of intention to retain. A gift unaccompanied by any other act or omission cannot be regarded either as relinquishment under S. 38 or abandonment under S. 59 of the Act. (*Shadi Lal and Broadway, JJ.*) THAKUR SINGH *v.* BIHARI LAL.
51 P. L R. 1917 : 1 P. W. R. 1917 : 39 I. C. 163 : 44 P. R. 1917.

——— **Ss. 38 and 59 (1) (b)**—*Abandonment by widow—Effect.*

Abandonment terminates the rights of the widow and the occupancy right at once devolves upon the next claimant. Under S. 38 the tenant who is alleged to have abandoned, must have been, at some time, in possession of the tenancy in question. The moment the period required to bring S. 38 into operation, is completed, the widow ceases to be the 'tenant having the right of occupancy' by operation of S. 59 (1) (*b*). (*Maynard, F.C.*) RUGHA *v.* MUGHLI.
200 P. L. R. 1915 · 25 I. C. 854 : 2 P. R. 1914 (Rev.)

——— **Ss. 39 and 77 (3)**—*Landlord and tenant—Failure to cultivate—Damages, suit for—Civil and Revenue Courts.*

A Suit for damages against occupancy tenants for non-cultivation of a part of the land does not fall within S. 77 (3) of the Act, and is not excluded from the cognizance of a civil Court. (*Shah Din, C.J.*) RAM SINGH *v.* RODA.
99 P. L. R. 1917 : 42 I. C. 279 : 90 P. W. R. 1917.

——— **S. 50**—*Tenant—Wrongful dispossession—Limitation.*

A person wrongly dispossessed of his tenancy is bound to sue for recovery of possession in a Revenue Court within one year from dispossession. (*Shah Din, J.*) LOCHANGIR *v.* SADA.
54 I. C. 832.

——— **Ss. 50 and 51**— *Applicability—Suit by under tenant-at-will.*

These sections do not apply to a suit by an under tenant-at-will of an occupancy tenant for recovery of possession of land from the occupancy tenant as it is not between landlord and tenant. (*Shah Din and Scott Smith, JJ.*) KESAR SINGH *v.* MANGAL SINGH. **102 P. W R. 1913 : 84 P. R 1913 : 19 I. C. 346 : 198 P. L. R. 1913.**

——— **Ss. 50 and 77 (3) (i)**—*Suit for share of produce removed.*

A suit by a tenant for recovery of his share of produce forcibly removed by the landlord is a suit cognizable by the Revenue Court. (*Chevis, J.*) HETA RAM *v.* CHANDAN.
49 P. W. R. 1912 : 13 I. C. 447 : 101 P. L. R. 1912.

——— **Ss. 53 and 76 (1)**— *Occupancy tenant—Issue of notice of sale to the landlord—Withdrawal from proceedings—Jurisdiction.*

In answer to a suit for possession brought by the plaintiffs the defendant-appellant set up a sale to him under the provision of S. 53 of the Tenancy Act. It was not the intention of the legislature to render the action of a tenant irrevocable once he had made an application under clause (2) of S. 53 and that a tenant has as much right to refuse to carry on the proceedings as the landlord has to refuse to accept the valuation of the right of occupancy by the Revenue Officer. It will be seen that under sub-S. (5) of S 53 the Revenue Officer after having decided on the value has to fix a date by which the landlord has to pay the ascertained price, but that the landlord is not compelled to pay that price and may resile from the position taken up by him under sub-clause (3). Similarly a proper construction of this section enables the tenant to withdraw his offer up to such time as the landlord makes the payment contemplated by sub-clause (5) (*Broadway and Moti Sagar, JJ.*) GHULAM QUTAB UD-DIN *v.* SARDARA. **4 Lah. 173 : 5 Lah. L. J. 338 : 1923 Lah. 521.**

PUNJAB TENANCY ACT (XVI OF 1887), S. 53.

——— **Ss. 53 and 56**—*Effect of—Discharge of mortgage.*

If plaintiff, an occupancy tenant, had alone paid off an old standing mortgage by himself, he would be entitled to retain possession of the share of the mortgaged area until his mortgage rights had been satisfied. (*Shadi Lal and Le Rossignol, JJ.*) SUBA *v.* KUTBA. **52 I. C. 525 : 95 P. R. 1919.**

——— **Ss. 53 and 56**—*Sale of occupancy holding by joint tenant to co-sharer landlord—Right of reversioner of tenant.*

A sale by one of several co-tenants to one of several co-landlords of a specific share of the holding, which had fallen to his share in a private partition is valid and cannot be challenged by the reversioner of the tenant. The vendee landlord will occupy the same position as the vendor co-tenant in a general partition of the holding. 31 P. R. 1896 ; 24 P. R. 1902 Foll. (*Chevis, J.*) GURDIT SINGH *v.* MUSA. **66 P. W. R. 1917 : 41 I. C. 301 : 137 P. L. R. 1917.**

——— **Ss. 53, 56 and 59**—*Alienation by an occupancy tenant.*

Reversioners have no right to control alienations by occupancy tenants under these provisions. (*Johnstone, C. J.*) SHER *v.* ALLOH DAD.
39 I. C. 96 : 6 P. R. 1917.

——— **Ss. 53 and 59**—*Nature of tenancy—Limitation to avoid gift.*

The nature of status of occupancy tenant is not affected by presence or absence of statutory heirs. To avoid a gift by an occupancy tenant of his holding to an adopted son, time runs against the landlord from the date of gift and not from the date of the donor's death since he can oust the donee during the donor's life-time, otherwise, the gift ceases to be voidable and if it is not voidable by the reversioner the donee becomes a tenant. (*Fenton, F. C.*) RUHELA *v.* DULA.
5 P. W. R. 1913, Rev : 5 P. R. 1913 Rev : 19 I. C. 344 : 200 P. L. R. 1913.

——— **S. 53**—*Bar of suit not pleaded—Power of appellate court not to raise objection* suo motu.

PUNJAB TENANCY ACT (XVI OF 1887), S. 53.

If the defendant in a declaratory suit fails to plead in the first court or in his grounds of appeal that the suit as regards its form is barred under S. 42 of Spec. Rel. Act it is not for the appellate court to raise the objection *suo motu* and dismiss the suit. (*Johnstone and Shah Din, JJ.*) RAGHUNATH DAS *v.* RAHIMAN. **14 I. C. 776.**

——Ss. 53 and 56—*Mortgage of occupancy—Rights by tenant, if can be questioned by reversioner.*

A reversioner of an occupancy tenant cannot impugn a mortgage of occupancy rights by the tenant in favour of the landlord. Ss. 53 and 56 of the Act apply to every kind of alienation—Sale, gift or mortgage and a tenant complying with the provisions of the sections has an absolute right of alienation. (*Johnstone and Chevis, JJ.*) BURI *v.* MULA SINGH. **73 P. R. 1911 : 113 P. W. R. 1911 : 11 I. C. 427 : 208 P. L R. 1911.**

——S 53 (b)—*Scope of.*

The scope of the Act is to legislate between landlord and tenant and S. 53 (*b*) means only that on the landlord purchasing occupancy rights under the provisions of the section. the rights of the occupancy tenant or any one who would have a right to succeed him under S. 59 after his death, are finally extinguished. (*Chevis, J.*) KHUDADAD KHAN *v.* GIRDHARI RAM. **42 I. C. 468 : 163 P. W. R. 1917.**

——S. 53 (3) and (5)—*Locus penitentiae.*

S. 53 (3) does not deprive the occupancy tenant of a *Locus Penitentiae* He may withdraw from the proceedings at any time prior to the completion of the purchase by the landlord as determined by S. 53 (5). (*Fagan, F. C.*) LABHU *v.* HAMRIA. **38 I. C. 944 : 1 P. R. (Rev.) 1917.**

——Ss. 58, 74, 77 (3) (b), 60—*Improvement—Compensation—Sub-letting by tenant.*

The planting of trees by a tenant is an improvement within the definition of that term in the Act.

A sub-letting by an occupancy tenant operates to create privity of contract as landlord and tenant between the landholder and the sub-tenant.

An award of compensation for improvements to a tenant on ejection can be made by the executing Court when it is omitted in the decree. The Court ordering the sub-tenant's ejectment is bound to award him compensation for improvements made by him. (*Fenton, F. C.*) WASWA SINGH *v.* MAHANA SINGH. **34 I. C. 248 : 1 P. W. R. 1916 Rev.**

——S. 59—*Partition of occupancy tenancy—Survivorship—Claim by landlord.*

Joint tenancy according to the Punjab custom is not the same as the estate known as joint tenancy in English Law. As regards the landlord, joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as single tenant and as long as any of them or the descendants of any of them survive, the landlord cannot claim the share of any tenant when the line has died out. Where a holding is divided for purposes of cultivation or in order to raise money, it does not amount to a partition (*Le Rossignol and Zafar Ali, JJ.*) AMIR KHAN *v.* MINH MAL. **5 Lah. L. J. 381 : 1924 L. 127.**

PUNJAB TENANCY ACT (XVI OF 1887), S 59.

——S. 59—*Succession of occupancy tenancy is governed by the act—Gift by widow to her illegitimate son—Right to contest alienation—Onus.*

Succession to an occupancy tenancy is governed not by customary law but by the provisions of S. 59 of the Tenancy Act Unless the plaintiff can prove that the land was occupied by the common ancestor, he has no *locus standi* to contest an alienation by the widow of an occupancy tenant because he is not her heir and is in no better position than any stranger even though he may be a collateral of her deceased husband and so far as he is concerned, the consent or otherwise of the landlords is immaterial. (*Shadi Lal, C. J. and Leslie Jones, J.*) MUSSAMMAT TOTI *v.* MALUKA. **66 I. C. 919 : 3 Lah. L. J. 89.**

——S. 59—*Joint tenancy— Tenancy in common—Distinction—Survivorship.*

Where there are defined shares in a tenancy in common but not joint tenancy the principle of survivorship applies only in the case of joint tenancy. (*Chevis, J.*) UTTAMI *v.* NIHAL CHAND. **60 I. C. 862.**

——S. 59 —*Joint tenancy and tenancy in Common—Test—Principle of survivorship.*

The test to determine whether a tenancy is joint tenancy or tenancy-in-common, is to see whether definite shares have been allotted. The principle of survivorship applies only in the case of a joint occupancy tenancy. (*Chevis, J.*) HAKO *v.* SULTAN MOHAMAD KHAN. **60 I. C. 513.**

——S. 59—*Collaterals of deceased occupancy tenant—Succession to tenancy—Onus of proof.*

In a dispute as to the succession to tenancy between collaterals of the deceased tenant and the landlord the former must prove that the provisions of S. 59 proviso, are complied with ; and the fact that they are in possession and mutation has been effected in their name does not shift the onus of proof. The Civil Court must, in such cases come to an independent finding and should not base their judgment on the view of the Rev. authorities. (*Chevis, J.*) BAHADUR *v.* RAM SINGH. **60 I. C. 456.**

——S. 59—*Adopted son—Status of.*

Where a Jat occupancy tenant in Gurgaon Dt., adopted *A* and died thereafter, *held* in a suit by the plffs-landlords for possession of the occupancy lands, that *A's* adoption being a formal one, *A* must be regarded aa a male lineal descendant of the adopter within the meaning of S. 59 of the Act and that the suit for possession must fail. (*Shadi Lal, C.J. and Wilberforce, J.*) GIASU *v.* HAR DIAL. **59 I. C. 82 : 6 P. W. R. 1921.**

——S. 59—*Succession—Occupancy rights—Entry in settlement record—Presumption of correctness.*

Held, that as it was not proved that the land entered in the name of S as whose heir plff. claimed was the same as that entered in the name of K. father of the plff. it could not be presumed to be the same. A presumption of correctness does

attach to the entry in the Regular Settlement of 1860 and S having at that time been declared as having been declared occupancy tenant of the land in suit, K having had no part or share in bringing the land under cultivation, the plff.'s suit was not maintainable. Presumption could not take the place of positive proof. (*Scott-Smith, J.*) HAYAT MUHAMMAD *v.* MAHMUD. **45 I. C. 938 : 107 P. W. R. 1918.**

——S. 59—*Occupancy right—Joint tenants—Defined shares—Survivorship.*

The right of a landlord to claim the extinction of an occupancy right when there are joint tenants does not arise on the death of one of them, as they collectively constitute a single tenant and the right continues to exist in the survivor or survivors.

The fact that the occupancy tenants are recorded as having defined shares in the tenancy does not make any difference and does not affect the right of survivorship. 11 P. L. R. 1903 ; 6 P. R. 1917 Rev. Foll. (*Scott-Smith, J.*) UDMI *v* MUNSHI. **45 I. C. 574 : 95 P. W. R. 1918.**

——S. 59—*Occupancy holding joint—Death of one tenant without heirs—Landlord, right of.*

On the death of one joint tenant of an occupancy holding without heirs his share devolves on the other tenant or his heirs and not on the landlord. 109 P. R. 1894 Foll. (*Maynard, F.C.J.*) CHANDRA SINGH *v.* GIWAN SINGH. **6 P. R. 1917 Rev : 42 I. C. 87 : 5 P. W. R. 1917 Rev.**

——Ss. 59 and 112 — *Succession—Burden of proof.*

A person who rests his case solely upon an agreement overriding the rules of succession in S. 59 must show that the language of the agreement is clear and that the intention is unmistakeable. (*Shadi Lal, J.*) MUSSAMMAT WALAYAT BEGAM *v.* SHER ALI SHAH. **39 I. C. 232 : 19 P. R 1917.**

——S. 59—*Transfer of occupancy rights by widow.*

Even a transfer of occupancy rights by a widow in favour of the landlord in contravention of the provison of the Punjab Tenancy Act should not be recognized by the Mutation Officer. (*Fenton F.C.*) KHANAM NUR *v.* HAYAT KHAN. **6 P.R. 1913 Rev. : 22 I. C 660 : 120 P.L.R. 1914.**

——S. 59—*Occupancy rights — Succession—Long possession—Presumption.*

Where the lands are proved to have descended from a common ancestor who had himself occupancy rights in the property and the settlement of 1862 also showed the same about a portion of the holding, the Courts were justified in presuming from this fact of long possession that the holding came from the ancestor. (*Rattigan, J.*) UDE SINGH *v.* NUR MUHAMMAD **331 P. L. R. 1913 : 21 I.C. 561 : 192 P.W.R. 1913.**

——Ss. 59, 111 and 112—*Occupancy holding—Gift—Extinction of donee's line—Reversion.*

The donee of an occupancy holding with the consent of the landlord becomes the tenant of the landlord and on his line becoming extinct the holding is extinguished in the landlord's favour and does not revert to the donor. The rule that land reverts to the donor's family on the extinction of the donee's line does not apply to S. 59 of the Act. The rule affects only the lines of the donor and donee and cannot prejudice the rights of the third party. (*Shah Din and Agnew, JJ.*) DEWAN SINGH *v.* KISHEN SINGH. **303 P.L.R. 1913 : 113 P.R. 1913 : 20 I.C. 771 : 198 P.W.R. 1913.**

——S. 59—*Male lineal descendant—Illegitimate son of Rajput.*

An illegitimate son of a deceased Rajput is not a male lineal descent of his putative father within S. 59 of the Act and cannot succeed to the occupancy tenancy left by the deceased. (12 W. R.P.C.) 41 ; 10 I.C. 152, Dist. 30 A. 508, Rel. on. (*Agnew and Shadi Lal, JJ.*) MANOHAR *v.* DULA. **203 P.W.R 1913 : 15 P.R. 1914 : 20 I C. 755 : 301 P L.R. 1913.**

——S. 59 - *Wajib-ul-arz—Meaning of words.*

The phrase "if he goes away leaving possession of the land of his own accord, his *nazadaki bhai* will be entitled to possession if he so desires" in the Wajib ul-arz does not touch the matter of inheritance of occupancy rights at all. (*Johnstone, J.*) SAHIB DITTA *v.* KHANDA. **39 P. W. R. 1913 : 19 I.C. 243 : 70 P. L R. 1913.**

——S. 59 (1) (a)—*Adopted son— Lineal descendant.*

A formally adopted son under Hindu Law is a "male lineal descendant" of his adoptive father within S. 59 (1) (*a*) of the Act and he is entitled to succeed to the holding of the latter. A customary adoption or an appointment of an heir is outside within this section (*Reid, C. J. Robertson, Kensington, Rattigan, Chevis and Beadon, JJ.*) DUNI CHAND *v.* MUSSAMMAT PADMAN **30 P. W. R. 1913 : 2 P. R. 1913 : 19 I. C. 40 : 71 P. L. R. 1913 (F. B.).**

——S. 59 (3)—*Occupancy rights—Mortgage by widow—Assent of Landlord.*

A mortgage of occupancy rights by a widow whether for necessity or not is void under S. 59 (3) of the Act, even if he receives the assent of the landlord, and a reversionary heir is entitled to take possession of the land without payment, on the death of the widow. (*Beadon, J.*) ALLAHDITTA *v.* HASSAN, **26 P. W. R. 1913 : 18 I. C. 623 : 50 P. L. R. 1913.**

——S. 59 (3)—*Sale of occupancy land by widow—Void sale.*

The sale of occupancy land by the widow of a deceased tenant succeeding to a right of occupancy is absolutely void. (*Johnstone, J.*) HAYAT BAKSH *v.* GAUHAR. **195 P. W. R. 1911 : 9 I. C. 339 : 54 P. L. R. 1911.**

——Ss. 59, 111—*Succession to occupancy rights—Rights of collaterals.*

Where an occupancy tenant dies without leaving male lineal descendants and collaterals claim to succeed as against the landlord they must under S. 59 show that the common ancestor of

PUNJAB TENANCY ACT (XVI OF 1887), S. 59.

themselves and of the deceased occupied the land and also must establish an agreement referred to in S. 111. (*Chevis and Shadi Lal, JJ.*) HIRA *v.* MAHAMADI. **21 P. W. R. 1915: 64 P. L. R. 1915: 26 I. C. 404: 16 P. R. 1915.**

——Ss. 59 (b) and 112—*Succession—Occupancy Rights*—Wajib-ul-arz—*Attested after* 1871.

For purposes of S. 112 of the Act a *Wajib-ul-arz* of the revised settlement alone is to be considered. Where a *Wajib-ul-arz* forming part of the settlement record taken up in 1872 and not attested by the Settlement Tahsildar till 1873 does not fulfil the conditions laid down in S. 112 of the Act. (*Kensington and Shah Din, JJ.*) NARAIN DEVI *v.* HIRA.
212 P. W. R. 1913 : 339 P. L. R. 1913 : 22 P. R. 1914 : 21 I. C. 843 : 12 P. L. R. 1914

——Ss. 70, 70 (2), 74 and 84 (5)—*Notice of ejectment—Compensation—Court-fee.*

The Court has no power to ask the tenant to pay Court-fee for improvements claimed by him, but is bound to determine the amount in the suit to contest the notice of ejectment. A finding on the merits could not be disturbed on revision. (*Fenton, F.C.*) WASAYA *v.* ISA.
30 I. C 848 : 4 P. W. R. 1915 Rev.

——S. 77—*Claiming a share in occupancy holding—Civil Court, jurisdiction of.*

Where the plaintiffs claim a share in the occupancy holding and not as tenants under defendants the suit is tenable by Civil Courts. (*Le Rossignol and Martineau, JJ.*) SANTA SINGH *v.* VIR SINGH. **4 Lah. 195 : 1923 Lah. 500.**

——S. 77—*Proviso — Suit for possession—Civil and Revenue Courts.*

The plaintiff stated that defts. were mere trespassers and the defts. pleaded that the plffs. had no rights On examination by Court, plffs. urged that the defts. were their tenants-at-will and the defts. pleaded that they were occupancy tenants. *Held*, that the order returning the plaint to the Revenue Court was right, for it was impossible in a case of this kind for the Civil Court to ignore the plea put foward by the defts. having regard to the Act III of 1912. (*Rattigan, C. J.*) ATA ULLAH KHAN *v.* UMARDIN.
68 P. L. R. 1918 : 47 I. C. 594 : 171 P. W. R. 1918.

——Ss 77 and 100—*Panahi tenant—Suit for establishing occupancy right.*

Act III of 1912 does not set up any bar to action under S. 100 of the Tenancy Act.

A *panahi* tenant is not debarred from establishing occupancy rights under the Punjab Tenancy Act. 1886. (*Johnstone and Le Rossignol, JJ.*) WADHAWA *v.* MUSAMMAT HASSI.
111 P. L. R. 1915 : 73 P. R 1915 : 29 I. C. 778 : 64 P. W R. 1915.

——S. 77 (1)—*Suit for price of tree cut by occupancy tenant—Revenue Court.*

A suit for the price of trees cut by an occupancy tenant in contravention of the terms of his tenancy is cognizable only by the Revenue Court. (*Harrsion J.*) ABDULLAH *v.* BISHAN DAS.
64 I. C. 152.

PUNJAB TENANCY ACT (XVI OF 1887), S. 77.

——S. 77 (3)—*Proviso—Suit by lessee for possession—Civil and Revenue Courts—Jurisdiction.*

A suit by a tenant to establish a claim to a right of occupancy or by a landlord to prove that a tenant has not such a right, is exclusively triable by a Revenue authority under S. 77 (3) (a) of the Punjab Ten. Act. The Civil Court has no jurisdiction to decide that the tenants had a subsisting right of occupancy, having regard to the proviso to S. 77. (*Scott-Smith and Harrsion, JJ.*) CHUSA *v.* ASA.
3 Lah. 84 : 4 Lah. L. J. 196 : 4 U. P. L. R. (Lah.) 44 : 1922 Lah. 33.

——S 77 (3) (d)—*Occupancy Rights—Adverse possession—Civil or Revenue Court.*

A claim that plaintiff has acquired occupancy rights by more than 12 years' possession coupled with assertion of occupancy rights adversely to the owners falls within S. 77 (3) (*d*) and is not cognizable by a Civil Court (*Broadway and Abdul Raoof, JJ.*) BISHEN SINGH *v.* JAFFAR.
159 P R. 1919 : 54 I. C. 911.

——S. 77 (3)—*Land Revenue Acts*, S. 158 (2).

Where a suit was not covered by S. 77 (3), a Revenue Court could not try it since S. 158 (2) of Punjab Land Revenue Act which debars a Civil Court from trying suits mentioned therein did not confer jurisdiction on a Revenue Court as distinguished from a Revenue Officer. A suit for correction of an entry in Record of Rights, Annual Record or the Register of Mutations is not cognizable by Revenue Court. (*Shah Din, C. J. and Rossignol, J.*) RAM SINGH *v* BAKSHI.
102 P. W. R. 1917 : 41 I. C. 895 : 64 P. R. 1917.

——S. 77 (3)—(*As amended by Punjab Act III of* 1912) *Procedure—Civil and Revenue Courts.*

Uuder the proviso to sub-sec. (3) of S. 77, the question whether defts. are occupancy tenants of the land arising in the suit, should be determined by a Rev. Court in the manner laid down in the said proviso. (*Shah Din, J*) MIHAN SINGH *v.* MT. BHAGWAN KAUR. **37 I. C. 390 : 111 P. R. 1916.**

——S 77 (3)—*Suit by mortgagor for redemption—Defence of occupancy right.*

When plffs. mortgaged their lands with possession to defts. who were tenants-at-will and the defts. in a suit for redemption, set up occupancy right, *held*, that the Court could not take cognizance of such a plea under S. 77 (3). (*Chevis and Leslie Jones, JJ.*) JHANDA *v.* DATARAM.
59 P. R 1916 : 35 I. C. 597: 93 P. L. R. 1916.

——S. 77 (3)—*Civil or Revenue Court.*

A suit falling within the purview of S. 77 (3) of the Act must be heard by a Revenue Court whether or not the suit also falls within the purview of the Specific Relief Act. 7 I. C. 717 Dist. (*Johnstone, C.J. Chevis and Shahdi Lal, JJ.*) IBRAHIM *v.* AKBAR. **104 P. W. R. 1916 : 34 I. C. 209 : 58 P. L. R. 1917.**

——S. 77 (3)—*Civil and Revenue Courts—Punjab Land Rev. Act, Ss.* 45 *and* 158—*Specific Relief Act*, S. 42—*Declaratory suit.*

PUNJAB TENANCY ACT (XVI OF 1887), S. 77.

In all cases coming under statutory provisions excluding the jurisdiction of Civil Courts such as S. 158 of the Land Rev. Act and S. 77 (3) of the Tenancy Act ; a declaratory suit is also excluded from the Civil Court's cognizance. Revenue Courts are not debarred from giving the equitable relief for which the Specific Relief Act makes a provision in cases otherwise within their jurisdiction. (*Fenton, F. C.*) SAJAWAL *v.* SODAGAN SINGH. **81 P. L. R. 1913 : 2 P. R. 1913 Rev. : 18 I. C. 796 : 3 P. W. R. 1913 Rev.**

——S. 77 (3) (a)—*Civil or Revenue Court.*

A suit for possession by the purchaser from a deceased occupancy tenant against one who claimed under a gift from the same tenant but the validity of which was disputed by the plaintiff falls under S. 77 (3) of the Act and is cognizable by the Revenue Court. (*Broadway, J.*) AHMAD DIN *v.* KISHORE CHAND. **46 I. C 882 : 141 P. W. R. 1918.**

——S 77 (3) (a)—*Suit by one proprietor against another for occupancy rights—Decree of Civil Court, if can be registered in Revenue Court —Return of plaint.*

A suit by one proprietor against another for claiming occupancy rights in the land of the latter falls under S. 77 (3) (*a*) of the Act and is triable only by a Revenue Court. A decree by a Civil Court in a suit of such a nature cannot be registered as that of a Revenue Court. In such cases Civil Courts should return the plaint for presentation to Revenue Courts. (*Chevis, J.*) KIRPA RAM *v.* KIRPA RAM. **282 P. L. R. 1914 : 26 I. C. 89 : 156 P. W. R. 1914**

——S. 77 (3) (b) (1)—*Plaint going behind decree of Revenue Court—Civil Court cannot entertain.*

Where the plaintiff in substance wanted to go behind a decree of Revenue Court commuting rent from cash to kind held the Civil Court had no jurisdiction, though plaintiffs asserted that defendants acted fraudulently in obtaining the decree of Revenue Court. (*Campbell, J.*) DALIPA *v.* BARKET ALI. **1923 Lah. 412.**

——S. 77 (3) (b)—*Ejectment—Sub-tenant.*

A suit to eject a sub tenant on the death of the occupany tenant without heirs who had granted the sub-lease is simply a suit in ejectment of a person holding under time expired lease and is not a suit falling under S. 77 (3) (b) of the Act. (*Fenton, F. C.*) WASWA SINGH *v.* S. MAHANA SINGH. **34 I. C. 248 : 1 P. W. R. 1916 (Rev.)**

——S. 77 (3) (c) (d)—*Occupancy rights, created by widow—Reversioner's suit.*

A suit by a reversioner to contest the validity of the creation of occupancy rights by the widow is cognizable by a Civil Court. (*Wilberforce, J.*) SARDH *v.* LAKHU. **56 I. C. 465.**

——S. 77 (3) (d)—*Claim to establish occupancy right—Revenue Court*

A claim to establish a right of occupancy by adverse possession is governed by S. 77 (3) (*d*) and no enquiry can be made into this question by the Civil Court. (*Broadway and Abdul Raoof, JJ.*) BISHEN SINGH *v.* JAFFAR. **69 P. W. R. 1921.**

PUNJAB TENANCY ACT (XVI OF 1887), S. 77.

——S. 77 (3) (d)—*Person ejected from tenancy under S. 43—Suit for possession of holding in Civil Court.*

A Civil Court has jurisdiction to try a suit for possession of the land as occupancy tenant brought by a person who has been dispossessed from his tenancy in accordance with a notice issued under S. 43 of the Act, and who has been unsuccessful in a suit to contest his liability in ejectment, S 77 (3) (*d*) of the Act having no application to such a suit. 73 P. R. 1093 Foll. 90 P. R. 1917 Dist. (*Scott-Smith and Martineau, JJ.*) PARMAN *v.* JHASSU. **51 I. C. 443 : 49 P. R. 1919.**

——S. 77 (3) (d)—*Civil and Revenue Courts —Suit by proprietors on death of occupancy tenant's widow.*

A suit by landlord to eject the reversioner on the ground that he is not entitled to succeed to the land as occupancy tenant thereof, on the death of the widow of the last male owner, is cognizable by a Civil Court only. 22 P. R. 1894, Ref. 111 P. R. 1916, Dist. (*Shah Din, J.*) GHULAM *v.* JOWALA SINGH.

103 P. R. 1918 : 130 P. L. R. 1918 : 48 I. C. 363 : 179 P. W. R. 1918.

——S. 77 (3) (d)—*Civil and Revenue Courts —Jurisdiction.*

A plaint filed in Civil Court for possession of certain land, wherein the plff. in order to succeed must establish a claim to a right to occupancy which is within the cognizance of a Revenue Court under S 77 (3) (*d*) of the Act and must therefore be returned for presentation to the proper Court. (*Scott-Smith, J.*) PARAMAN *v.* GHANTU. **46 I. C. 811 : 147 P. W. R. 1918.**

——S. 77 (3) (d)—*Proviso* (1) *and* 100 (3)—*Civil and Revenue Courts—Jurisdiction.*

A plaint filed in a Civil Court for possession of certain land wherein the plaintiff in order to succeed must establish a claim to a right of occupancy which is within the cognizance. (*Chevis and Jones, JJ.*) JHANDA *v.* DATARAM. **93 P. L. R. 1916 : 35 I. C. 597 : 59 P. R. 1916.**

——S. 77 (3) (d)—*Suit for declaration of tenancy by one proprietor against another—Triable by Revenue Court.*

According to S. 77 (3) (d) of the Punjab Tenancy Act a suit by one proprietor against another for a declaration that the former holds lands belonging to the latter as an occupancy tenant, can be tried only by a Revenue Court and the Chief Court will refuse to register a decree passed in such a case by a munsiff having no revenue power. The proper course is to return the plaint for presentation to a competent Court. (*Chevis, J.*) KIRPA RAM *v.* KIRPA RAM.

282 P. L. R. 1914 : 27 I. C. 89 : 156 P. W. R. 1914.

——S. 77 (3) (p)—*Declaration of right to recover dues—Revenue Court.*

A suit for a declaration of a right to recover dues in kind is one arising out of the conditions

PUNJAB TENANCY ACT (XVI OF 1887), S. 77.

of a tenancy and is cognizeble only by a Revenue Court. (*Pipon, J. C*) PUNNU LAL *v.* BHOJA RAM. **73 I. C. 760.**

——S. 77 (3) Proviso (1)—*Declaratory suit for rents not triable by Civil Court.*

A suit for a declaration that the plaintiffs are entitled to receive rent in kind and not in cash, is not triable by the Civil Courts and is covered by S. 77 (3) (1). But even if the contention that the suit is one for the correction of a revenue entry be sound it would be triable by a revenue court alone, and that the jurisdiction of the Civil Courts would be barred under S. 158 (2) (vi) of the Land Revenue Act. (*Scott-Smith and Moti Sagar, JJ.*) DASONDHI *v.* BADAR BAKHSH.
4 Lah. 127 : 5 Lah. L. J. 336 : 1923 Lah 405.

——S. 77 (3)—Prov. (1)—*Scope of—Return of plaint.*

When after having entertained the suit the Court reaches a point in the trial at which it holds that the plaintiff is a tenant and is suing as such, the proviso takes effect and makes it incumbent on the Court to return the plaint for presentation to the Collector. (*Abdul Raoof and Harrison, JJ.*) MURID HUSSAIN *v.* FASAL ILLAHI. **1922 Lah. 173.**

——S. 77 (3) (1)—*Suit for declaration—Plffs. not liable to pay rent as entered in Revenue record—Jurisdiction.*

A suit for declaration that plffs. are not liable to pay rent as entered in the Revenue records falls within S. 74 (3) (1) of the Act, and is exclusively triable by a Revenue Court. (*Broadway, J.*) SWAN SINGH *v.* RAHMAN. **55 I. C. 739.**

——S. 77 (3) (1)—*Civil and Revenue Court—Suit for injunction—User of site.*

Plffs. occupancy tenants, sued for an injunction restraining defts. members of the proprietary body from preventing them using a certain site. *Held*, that as plffs. claimed to use the land not by reason of their having been enjoying the use for it for many years, the suit did not fall under S. 77 (3) (1) of the Act and was cognizable by a Civil Court 44 P. R. 1914 Dist. (*Martineau, J.*) KHAIRATI *v.* INDAR. **55 I. C. 720.**

——S. 77 (3) (1)—*Suit by tenants for possession—Civil or Revenue Court.*

A suit by occupancy tenants against the landlord for possession of the land in suit as a thrashing floor is within S. 77 (3) (1) of the Act and is cognizable by the Revenue Courts alone. (*Johnstone and Chevis, JJ.*) BIR-SINGH *v.* KAHAN SINGH. **44 P. R. 1914 : 25 I. C. 502 : 254 P. L. R. 1914.**

——Ss 77 (3) (1) and 100—*Revenue payable by deft. paid by plaintiff—Suit to recover.*

A suit for the recovery of the money from the deft. which the plaintiff was obliged to pay as land revenue when it was payable by the deft. is not cognizable by a Civil Court. (*Chevis, J.*) BUCKMAN DEVI *v.* SAIN DAS.
45 P. W. R. 1912 : 13 I. C. 401 : 73 P. L. R. 1912.

PUNJAB TENANCY ACT (XVI OF 1887), S. 84.

——S. 77 (3) (j)—*Applicability—Jurisdiction*

Clause (j) of S. 77 (3) applies only to suits between the person claiming dues and cesses and the person by whom they are payable. Therefore a suit between parties each of whom claims entitled to collect such dues, is not governed by the clause when the persons by whom such dues are payable are not parties thereto. Such a suit is cognizable by the civil Courts (*Robertson and Rattigan, JJ.*) KAMIRA *v.* LALU.
30 P. L. R. 1913 : 17 I. C. 907 : 110 P. R. 1912.

——S. 77 (3) (k)—*Limitation Act, Art.* 120.

A suit by a co-sharer in a holding under S.77 (3) (k) of the Act for a share of the profits comes under Art. 120 of the Limitation Act. 23 Cal. 799 28 All. 161, 37 All. 318 Ref. (*Fenton, F. C.*) KHADIM HUSSAIN KHAN *v.* MURAD BIBI.
5 P. R. 1915 Rev : 32 I. C. 102 : 7 P. W. R. 1915 Rev.

——S 77 (3) (k)—*Applicability—Suit for value of trees.*

S. 77 (3) (*k*) of the Act does not apply to a suit for the value of a tree on the ground that it is plff's own exclusive property even though the finding is that it is the joint property of the plaintiff and the deft. 52 P. R. 1910 Dist. (*Shah Din, J.*) KANWAL *v.* SRI. **10 P. R. 1911 : 9 I. C. 685 : 81 P. L. R. 1911 : 50 P. W. R. 1911.**

——S. 77 (3) (n)—*Jurisdiction — Civil or Revenue Court.*

The defts. held cultivating possession of the land in suit under the plffs. who were mortgagees thereof. They had agreed to surrender possession to the plffs. and not to cultivate in future and promised that if they did cultivate the land in future they would pay Rs. 80 a year. The plffs. sued for recovery of Rs. 160 alleging that defts. had cultivated the land for two years contrary to the agreement. Upon the question whether the suit was cognizable by a Civil or Revenue Court, *held*, that as the object of the agreement was to enable plffs. to get back possession of the land from the defts. who had agreed to give it up and to ensure this object it was stipulated that the defts. should be liable to pay Rs. 80 a year as damages, the agreement was not a lease and from the date of agreement the relation of landlord and tenant, if it existed before, ceased to exist between the parties, and therefore the suit was cognizable by the Rev. Court under S. 77 (3) (*n*), and that the compensation assessed in accordance with the terms of the agreement did not affect the jurisdiction of that Court. (*Shah Din and Leslie Jones, JJ.*) KARAM CHAND *v.* NAWAB KHAN. **30 P. R 1917 : 38 I. C. 580 : 41 P. W. R. 1917.**

——S. 84 (5)—*Revision—Powers when to be exercised.*

The broad principle to follow is to interfere in revision only where a refusal to interfere would result in injustice or a failure of justice. (*Maynard, F. C.*) MAHAN SINGH *v.* NARAIN SINGH.
1 P. R. 1914 Rev. 25 I. C. 867 : 199 P. L. R. 1915.

PUNJAB TENANCY ACT (XVI OF 1887), S. 84.

——S. 84 (5)—*Revision — Material and technical irregularities.*

A technical irregularity is not a good ground for revision. The powers under S. 84 (5) of the Act will be exercised only where it is necessary for doing substantial justice. The inclusion in the notice of ejectment and in the subsequent delivery of possession of a particular field, held in previous judicial proceedings to be part of the land from which the tenants were not liable to ejectment is a material irregularity, but the omission of the direction for ejectment, from the order of dismissal of the suit contesting the liability of ejectment, is only a technical irregularity. (*Maynard, F. C.*) HIRA *v.* MIHAL SINGH.
4 P. R. 1914, Rev. : 25 I. C. 831 : 198 P. L. R. 1915.

——Ss. 84 (3) and 98—*Revenue Record—Presumption of correctness.*

In a suit for arrears of rent in respect of a holding, the entries in the *Jamabandi* were—"In the ownership column *Shamilat Deh* and the cultivators column, certain tenants on behalf of *Haidar Shah* co-sharer one-third and Tola Singh two-third." Deft. pleaded that they had paid in the entire rent to Haidar Shah who was then joined as deft. and he repudiated Tola Singh's claim alleging that Tola Singh was out of possession altogether and that the entry in *Jamabandi* was wrong. *Held*, that a presumption of correctness attaches to Revenue Records. The proper course would have been to postpone the case for two months to allow Haidar Shah to prove his exclusive title if so advised. If no suit was brought, the Court should decide in favour of the plff. (*Meredith, F. C.*) TOLA SINGH *v.* MUHAMMAD. **6 P. W. R. 1912 Rev : 15 I. C. 467: 54 P. L. R. 1912.**

——S. 98—*Civil Court does not get jurisdiction by reference.*

When a Revenue Court refers parties to a civil suit under S. 98 of the Punjab Tenancy Act, the Civil Court does not thereby acquire jurisdiction to hear a suit which it would otherwise be incompetent to entertain under all other provisions of law. (*Pipon, J. C.*) PUNNU LAL *v.* BHOJA RAM. **73 I. C. 760.**

——S. 98—*Postponement of—Limitation.*

Where the Revenue authorities refuse to sanction mutation of the land in suit in the plaintiff's name, limitation begins to run from that date for obtaining declaration of title and is not postponed by any reason of compliance with any requisition made by Revenue authorities under S. 98. (*Shah Din, J.*) KALU *v.* RAM LAL.
71 P. L. R. 1916 : 34 I. C. 958: 91 P. W. R. 1916.

——S. 100—*Civil Decree—Registration as Revenue Court decree— Memo. of appeal sent to Revenue Court.*

Under S. 100 of the Punjab Tenancy Act, High Court has the power to order that a decree passed by a Civil Court be registered as a decree of a Revenue Court. Therefore the memo. of appeal was directed to be sent to Rev. Appellate Court after the registration of the decree of that Court as decree of a Revenue Court. (*Scott Smith and Moti Sagar, JJ.*) DASONDHI *v* BADER BAKSH.
5 Lah. L. J. 335: 4 Lah. 127: 1923 Lah. 405.

PUNJAB TENANCY ACT (XVI OF 1887), S. 153.

——S. 100 (2)—*Registering Collector's decree.*

S. 100 (2) of the Act gives the Chief Court power to act only where it appears that the parties have not been prejudiced by a mistake as to jurisdiction. If the effect of registering the Collector's decree in a suit of value under Rs. 500 (Small Cause, if heard in Civil Courts) is to deprive the defendant of all further remedy, the Chief Court will not intervene. (*Kensington, C.J.*) NAWAB KHAN *v.* KARAM CHAND. **56 P. R. 1914 : 154 P. W. R. 1914: 25 I. C. 506: 235 P. L. R. 1914.**

——Ss. 111 and 112—*Occupancy tenant—Rights of succession on alienation.*

The provisions of the Act in regard to the alienation of, and succession to, an occupancy tenancy may be overridden by an agreement valid under Ss. 111 and 112 of the Act. An agreement entered in a settlement record must be interpreted in a reasonable manner and all the provisions in it must be taken into consideration. (*Maynard, F. C.*) RAM CHAND *v.* KISHAN CHAND.
53 I. C. 531 : 2 P. R. 1919 Rev.

——Ss. 111 and 112—*Claim based on agreement—Agreement how proved.*

A collection of a deceased occupancy tenant claiming to succeed to the tenancy upon an agreement must prove the agreement in one of the three following ways:—(1) By producing a document containing terms agreed upon between parties; (2) By an entry made before 18th November 1871 and attested by proper officer in the record of regular settlement sanctioned by the Local Government; (3) By an entry in Record-of-Rights made after the above-mentioned date or an entry in the Annual Record prepared under the provisions of the Punjab Land Revenue Act, 1887. An entry in No. 2 is by law presumed to be an agreement and its production is sufficient but an entry in No. 3 not being so, the party relying on it has to prove that it embodies the terms of the agreement between the parties. In the absence of express intention to the contrary agreements recorded in a Settlement Record are not intended to take effect after the expiry of the period of settlement. (*Chevis and Shadi Lal, JJ.*) HIRA *v.* MUHAMADI. **16 P. R. 1915: 64 P. L. R. 1915: 26 I. C. 404: 21 P. W. R. 1915.**

——S. 111—*Quarabattis—Succession—Agreement.*

The quarabattis of a deceased occupancy tenant succeed to the land in suit under S. 111 of the Act in the absence of an agreement to that effect. (*Shah Din and Agnew, JJ.*) LABHU *v.* GANDA SINGH. **2 P. L. R. 1914: 20 I. C. 528: 185 P. W. R. 1913.**

——S. 153 (h) (ii)—*Bye-law 18—Construction—Appointment of agent without notification.*

Under bye-law 18, the agent shall be held to be appointed when the owner has duly notified the same in writing to the Engineer Secretary and no agent can be recognised as an agent unless and until his appointment is so notified.

PURAKUDI.

Failure to notify renders the owner liable to the penalty provided in cl. (4) of the bye law. (*Rattigan, J.*) EMPEROR *v.* BEJA RAM.
51 P. W. R 1911 (Cr.) : 14 I. C. 193 : 13 Cr. L. J. 193 : 21 P. R. 1911 (Cr.)

PURAKUDI.
See LAND TENURE.

PURCHASER.
See (1) C. P. CODE., O. 21, RR, 93 AND 94.
(2) T. P. Act, Ss. 54 and 55.

PUROHIIT OFFICE.
See (1) HINDU LAW—RELIGIOUS OFFICE.
(2) T. P. Act, S. 6.

PUTRA PAUTRADI.
See (1) DEED—CONSTRUCTION.
(2) DEED—WILL—CONSTRUCTION.
(3) GRANT.
(4) HINDU LAW—GIFT—WILL.
(5) WORDS AND PHRASES

PUTRAVAKASAM GIFT.
See MALABAR LAW.

PYATBAINGS.
See BUDDHIST LAW.

QUANTUM MERUIT.
See CONTRACT ACT, Ss. 69, 70 and 73.

QUARRIES.
See MINES AND MINERALS.

QUASI EXECUTOR DE SON TORT.
See (1) EXECUTOR.
(2) WILL.

QUASI JUDICIAL ORDER.
See (1) JUDICIAL ORDER.
(2) JUDICIAL PROCEEDINGS.

RAILWAY COMPANY RULES, R. 57. (G. T. P.)

QUESTION OF LAW.
See C. P. CODE., Ss. 100, 110.

RABID ANIMAL.
See ANIMAL.

RAILWAY RECEIPT.
See also (1) CONTRACT ACT, Ss. 107, 178,
(2) RAILWAYS ACT.

———*Assignment when passes title.*
Assignment of Railway receipts passes title to the goods only when they are proved to be negotiable. (*Robinson and Macgregor, JJ.*) ARUNACHELLAM CHETTY *v.* KO PO YAN.
1 Bur. L. J. 90 : 11 L. B. R. 341 : 1923 Rang. 1.

RAILWAY COMPANY RULES,

———*Rules for the guidance of Public and Railway Officials having business on Railway Premises.*
The desire of a person to see his friend off does not constitute business especially when his friend does not require any assistance from him. (*Reid, C. J. and Kensington, J.*) E. I. RY. CO. *v.* MOTI SAGAR. 116 P. L. R. 1911: 36 P. R. 1911: 9 I. C. 1011: 102 P. W. R. 1911.

———R 57 (G. I. P.) *Change of maund rate into waggon rate.*
Where a Railway Company has accepted a consignment of goods and charged for their conveyance at maund rate, the maund rate cannot be changed into waggon rates for though the Company may have under the consignment note, the right of re-measurement, re-weighment, re-classification and re-calculations of rates at destination, this is not a case of re-calculation. (*Banerjee, J.*) ALLAUDDIN HADI *v.* G. I. P. RAILWAY COMPANY. 34 I. C. 104.

INDIAN RAILWAYS ACT (IX OF 1890.)

STATUTE INDEX.

Absolute sanction for railway opening, S. 19 (4)
Accident, omission to give notice of, S. 103
Accidents, Ss 83—87 (Ch. VIII.)
Accidents at sea, limitation of liability of Railway Company for, S. 82
Accidents on Railway, Reports of, S. 83
Accidents, power to make rules about inquiries into, S. 84
Accidents, power to make rules about notices for, S. 84
Accidents, Submission of return of, S. 85
Accident, temporary entry on land to prevent, S. 9
Accommodation works, S. 11
Acts of children, endangering safety of persons travelling by railway, S. 130
Administration, Railway defined, S. 3, (6)
Agents, representation of, in Courts, S. 145
Agreement with Governor-General for construction of rolling stock, S. 49
Agreement with Governor-General for lease of rolling stock, S. 49
Alteration of pipes, wires and drains, S. 8
Altering pass or ticket, S. 116
Alternative character of remedies, S. 98.
Amendment of Indian Penal Code, S. 149
Amendment of Sindh-Pishin Railway Act, 1887, S. 150
Animals, Burden of proof in suits of loss of, S. 76
Appeals from orders of Railway Commission, S. 31
Appointment of Inspectors, S. 4
Appointment of Railway Commission by Governor-General, S. 26 (1)

Arrest for offences under Ss. 100, 101, 119, 120, 121, 126, 127, 128, 129, and 130 (i), S. 131
Arrest of persons likely to abscond or unknown, S. 132
Articles of glass, Sch. II-(*k*)
Articles of marble, Sch. II-(*k*)
Articles of special value, liability of Railway Company as a carrier of, S. 75
Articles, Plated, Sch. II-(*b*)
Articles to be added further by Governor-General Sch, II-(*s*)
Articles to be declared and Insured, Sch. II
Art pottery, Sch. II-(*k*)
Assessors, S 33
Assessor's capacities, S. 33 (*i*)
Assessors, remuneration to, S. 33 (2)
Attempt to travel without proper pass or ticket, S. 112
Authority of Railway administration to do necessary work, S. 7
Bank notes, Sch II-(*h*)
Bar of ordinary courts in matters cognizable by Railway Commission, S. 41
Bars, S. 13
Bengal Embankment Act, 1882, Ss. 16 and 17 Repeal of, Sch I, art. 5
Bills of Exchange, Sch II-(*h*)
Bridges, roads over and under, S. 14
Burden of proof in suits of loss of animals and goods, S. 76
Capability of assessors, S. 33 (1)
Carriage in motion, entering into, S. 118
Carriage of passengers, Ss. 62—72 (Ch. VI)
Carriage of property, Ss. 53—62 (Ch. VI.)
Carriers Act, 1865, Repeal of, Sch I, art. 1
Carvings, Sch II-(*j*)
Cases to be referred to Railway Commission, S. 28
Cattle trespass, S. 125
Certification by railway servant in charge of work S. 21-A
China wares, Sch II-(*k*)
Clocks of any description, Sch II-(*e*)
Clothes, golden and silver laced not of men wearing uniform Sch II-(*c*)
Clothes, Golden and Silver tissued, not of men wearing uniform. Sch. II-(*c*)
Collector, defined, S. 3 (18)
Commencement of Act, S. 1 (3)
Communication between passengers and railway servants in charge, S. 62
Commissioners, lay, S. 26 (4)
Commission, Railway, Ss. 26—42 (Ch. V)
Compartment for females, reservation of, S. 64
Compelling passengers to enter carriages already full, S. 102
Compensation for injuries to officers and soldiers and followers on duty, S. 79
Compensation for losses, notification of claims for, S. 77
Compensation, payment of, for damage consequent on lawful exercise of power, S 10
Compulsory medical examination of persons injured by accidents, provisions for, S. 86
Conditional sanction for Railway opening, S. 19 (4)
Conditional sanction to re-open a closed railway, S. 24 (3)
Constitution of Railway Commission, S. 26
Constitution of Railway Commission in Session, S. 29
Construction of rolling stock, agreement with Governor General for, S. 49
Construction of works, Ss. 7—16 (Ch. III)
Contravention of Ss. 16, 18, 20, 21 and 24 Penalty for, S. 88
Control of Governor-General on the control of Railway's powers. S. 7 (2)
Coral, Sch. II-(*p*)
Costs of proceedings in Commissions, S. 35
Dangerous goods, S. 59
Dangerous goods, unlawfully bringing on Railway, S. 107
Defacing pass or ticket, S. 116
Defacing public notices, S, 111
Delay in submitting returns under S. 52 and 85 penalty for, S 92
Delegation of powers of Governor-General, S. 144
Delegation of railway opening powers to Inspectors, S. 25
Disobedience of omnibus drivers to the Railway Servants' orders, S. 123
Disposal of differences between Railways carrying joint traffic, S. 48
Disposal of fines for travelling without ticket and transferring any half of it, S. 115
Disposal of unclaimed things, S. 56
Dissolution of Railway Commission, S. 39
Documents, evidence of, S. 37
Drains, alteration of, S. 8
Drunkenness, S. 100
Drunkenness on Railways, S. 120
Duties of Inspectors, S. 4
Duty of Railway to arrange for receipt and despatch of goods, S. 42
Ebony, Sch. II-(*p*)
Endangering the safety of persons, S 101
Endangering safety of persons in railway by acts of children, S. 130
Endangering safety of persons in Railway by rash or negligent act, S. 129
Endangering safety of persons in Railway by wilful act or omission, S. 128
Engravings Sch. II-(*j*)
Entering carriage in motion, S. 118
Entrance into compartment over full or reserved, S. 109
Entrance into compartment, resistance to, S. 109
Establishment of ferries for traffic, S. 51
Establishment of roadways for traffic, S. 51
Evidence of documents, S. 37
Exceptional provisions, S 21
Execution against Railway propery, Restriction on, S. 136
Execution of order of High Court, S 36
Execution of order of Railway Commission, S 36
Exhibition of passes and tickets, S. 69
Exhibition of quoted rates to public of authority, S. 60
Exhibition of time-tables and fare-tables at stations, S. 65
Exoneration from responsibility for falsely described goods, S, 78
Extent of the Act, S 1, (2)
Facilities and equal treatment, provisions for, where ships and boats are used, S 44
Facilities, Railway, Ss. 42—47 (Ch. V)
Facilities to Inspectors, S. 6

Failure to maintain communication between railway servants and passengers, penalty for, S 94
Failure to reserve compartment for females, penalty for, S 95
Failure to show quoted rates, S 99
False account of goods, giving of, S 106
Falsely described goods, exoneration from responsibility for, S 78
False returns, S 105
Fare-tables, exhibition of, at stations, S. 65
Females, reservation of compartment for, S 64
Fences, S. 13
Ferries for traffic, establishment of, S. 51
Ferry, defined, S. 3 (2)
Finality of Railway Commission's orders, S. 40
Fines for travelling without ticket and transferring any half of it, disposal of, S. 115
Followers on duty, compensation for injuries to, S. 79
Forfeiture by Railway Companies, Ss. 87—99 (Ch IX)
Furs, Sch. II-(*h*)
Gates, S. 13
Gates, improperly shutting of, S. 124
Gates, opening of, S. 124
General, Ss. 47—53
Giving false account of goods, S. 106
Glass articles, Sch. II-(*k*)
Gold and silver, Sch II-(*a*)
Gold and silver coined, Sch. II a
Gold and silver manufactured, Sch II-(*a*)
Gold and silver unmanufactured. Sch. II-(*a*)
Golden and silver laced clothes, not of men wearing uniform, Sch. II-(*c*)
Golden and silver tissued clothes not of men wearing uniform, Sch. II-(*c*)
Goods, burden of proof in suits for loss of, S. 76
Goods, dangerous and offensive, S. 59
Goods, defined, S. 3 (9)
Goods, duty of railway to arrange for impartial receipt and despatch of, S. 42
Goods through booked, compensation for injuries to, S. 80
Governor-General, delegation of powers of, S. 144
Governor-General, mode of signifying communication from, S. 139
Governor-General's control on Railway's powers S. 7 (2)
Governor-General to hear special reports of Railway Commission, S. 38
Governor-General to sanction the power of engines, S. 16
Governor-General's power to make rules for Railway Commissions, S. 34
Government sanction necessary for opening of Railway, S. 18
Government Securities, Sch. II-(*f*)
Government Stamps, Sch. II-(*g*)
Gross charges, requisition on Railway Company for details of, S. 61
Grounds for order to close Railway, S. 23 (2)
High Court Judge to be the Law Commissioner, S. 26 (3)
High Court's order, execution of, S. 36
High Court to hear appeal from Railway Commission, S 31 (2)
Hundies, Sch. II-(*h*)
Improperly shutting of gates, S. 124
Improper travelling on Railway, S. 118
Indian Penal Code, amendment of, S. 149
Indian Railways Act, 1879, repeal of, Sch. I, Art 2
Indian Railways Act, 1883, repeal of, Sch I, Art 3
Indian Tramways Act, 1886, Sec 49, repeal of, Sch. I. Art 4
Infectious person, permitting person to travel by Railway, S. 117
Injuries to through booked goods, suits for compensation for, S. 80
Inland water, defined, S. 3 (3)
Inspection of Railways, Ss. 4—7 (Ch II)
Inspector, defined, Ss. 3 (8)
Inspector's appointment and duties, S. 4
Inspectors, delegation of Railway opening powers to, S. 25
Inspectors, facilities to, S. 6
Inspector's inspection necessary before Government sanction, S. 19 (1)
Inspector's powers, S. 5
Inspector's report and Governor-General's sanction to reopen a Railway, S. 24 (2)
Inspector's report, postponement of Railway opening upon, S. 19 (2)
Ivory, Sch. II-(*p*)
Jewellery, Sch. II-(*d*)
Joint traffic, disposal of differences between Railways carrying, S. 48
Jurisdiction of Railway Commission, restricted in special cases, S. 27
Jurisdiction under Act, Magistrates having, S. 133
Land, temporary entry on, to prevent accident, S.9
Land, temporary entry on, to repair, S. 9
Lace, Sch. II-(*n*)
Law Commissioner, High Court Judge to be, S. 26 (3)
Lay Commissioners, S. 26 (4)
Lease of rolling stock, agreement with Governor General for, S. 49
Level-crossing, obstruction to, by unnecessarily keeping rolling stock on rails, S. 104
Liability of Railway Company as a carrier of articles of special value, S. 75
Liability of Railway Company for accidents at sea, limitation of, S. 82
Liability of Railway Company for luggage, S. 74
Lien for other charges, S. 55
Lien for rates, S. 55
Lien for terminals, S. 55
Limitation of appeal from Railway Commission's order, S 31 (3)
Limitation of liability of Railway Company for accidents at sea, S. 82
Lithographs, Sch II-(*f*)
Load for wagons, maximum, S. 53
Local authorities, taxation of Railways by, S. 135
Local authority, defined, S. 135 (5)
Local authority's power to cause additional accommodation works, S. 12
Locomotives, right to use, S. 16
Magistrate's permission to fell trees, S. 15
Maintenance of works, Ss. 7—16 (ch. III)
Magistrates having jurisdiction under Act, S. 133
Maliciously hurting or attempting thereto the persons travelling by railway, S. 127
Malicious wrecking or attempting to wreck a train, S. 126
Managers, representation of, in Courts, S. 145
Maps, Sch. II-(*i*)

Marble articles, Sch. II-(*k*)
Material alterations of railway. application of S. 17, S. 20
Material alterations of railway, application of S. 18, S. 20
Material alterations of railway, application of S. 19, S. 20
Maund, defined, S. 3 (17)
Maximum load for wagons, S. 53
Maximum number of passengers for each carriage, S. 63
Means of communication in a train, needless interference with, S. 108
Measure of responsibility of Railway Company as carrier of animals, S. 72
Measure of responsibility of Railway Company as a carrier of goods, S. 72
Mode of signifying communication from Governor General, S. 139
Musical instruments, Sch. II-(*r*)
Musk, Sch. II-(*q*)
Needless interference with means of communication in train, S. 108
Negligence about carrying capacity of rolling stock, Penalty, S. 93
Negligent act endangering safety of persons in railway by, S. 129
Non-compliance with decision under S. 48, Penalty for, S. 91
Non-compliance with S. 13, Penalty for, S. 87
Non-exhibition of certain documents at stations, penalty for, S. 89
Non-fulfilment of conditions, sanction void upon, S. 19 (5)
Notices by Railway administration, Service of, S. 141
Notice of accident, omission to give, S. 103
Notice of intended opening of Railway, S. 17
Notice served by post, Presumption where, S. 142
Notices on Railway administration, mode of, S. 140
Notification of claims for compensation for losses, S. 77
Notification of claim for refunds, S. 77
Nuisance on Railway, S. 120
Number of passerges of each compartment, maximum, S. 63
Obstructing level crossings by closure, S. 104
Obstructing level crossings by unnecessarily keeping rolling stock on rails, S. 104
Obstructing railway servant on duty, S. 121
Occupier's power to cause additional accommodation works, S. 12
Offences of railway servants, Ss 99—131 (Ch. IX).
Offences under Ss. 100, 101, 119, 120, 121, 126, 127, 128, 129, 130 (i), S. 131
Offensive goods, S. 59
Offensive goods, unlawfully bringing on railway, S. 107
Officers on duty, compensation for injuries to, S. 79
Oils to use iter and perfumes, Sch. II-(*q*)
Omission, endangering safety of persons in railway by, S. 128
Omission to give notice of accident, S. 103
Omission to give notice of accidents, Penalty for S. 96
Opened railway, power to close, S. 23
Opening of gates, S. 124
Opening of railway, notice of intended, S. 17
Opening of railways, Ss. 16—26 (Ch. IV)
Opening of railways, power to make rules about, S. 22
Operation of orders of Railway Commission, S. 32
Opium, Sch. II-(*o*)
Order of Railway Commission, execution of, S. 36
Orders for money payment, Sch. II-(*h*)
Orders of Railway Commission, appeals from, S. 31
Orders of Railway Commission, operation of, 32
Ordinary courts barred in certain matters cognizable by Railway Commission, S. 41
Other charges, lien for, S. 55
Other securities for money payment, Sch. II-(*h*)
Other works of art, Sch. II-(*j*)
Over and under-bridges, S. 14
Over-full compartment, entrance into, S. 109
Owner's power to cause additional accommodation works, S. 12
Paintings, Sch. II-(*j*)
Pass, attempt to travel without. S. 112
Pass, defacing or altering of, S. 116
Pass, defined, S. 3 (15)
Passengers and Railway Servants, communication between, S. 62
Passengers' carriage. Ss. 62—72 (Ch. VI)
Passengers, compelling them to enter already full carriages, S. 102
Passengers with injection, power to refuse to carry, S. 71
Passengers with tickets but no accommodation, Provisions for, S. 67
Passes, exhibition and surrender of, S. 69
Pass, prohibition against travelling without, S. 68
Pass, travelling with insufficient, S. 113
Pass, travelling without, S. 112
Payment of compensation for damage consequent on lawful exercise of power, S. 10
Pearls, Sch. II-(*d*)
Penalties and offences, Ss 87—135 (Ch. IX)
Penalty for omitting to give notice of accidents, S. 96
Penalties, Recovery of, S. 97
Penalty for failure to reserve compartment for females, S. 95
Penalty for contravention of, Ss. 16, 18, 20, 21, and 24, S. 88
Penalty for negligence about carrying capacity of rolling stock, S. 93
Penalty for non-compliance with decisions under S. 48, S. 91
Penalty for non-compliance with S. 13, S. 87
Penalty for non-exhibition of certain documents at stations, S. 89
Penalty for not maintaining communication between passengers and railway servants, S. 94
Penalty for not making rules under S. 47, S. 90
Penalty for submitting return under Ss. 52 and 85, S. 92
Permission of Magistrate to fell trees S. 15
Permitting infectious person to travel by Railway, S. 117
Persistance in smoking after warning, S. 110
Persons, endangering the safety of, S. 101
Persons likely to abscond, arrest of, S. 132
Persons travelling by Railway, maliciously hurting or attempting thereto, S. 127
Persons unknown, arrest of, S. 132

Photographs, Sch. II-(*j*)
Pipes, alteration of, S. 8
Place of trial, S. 133
Plated articles, Sch. II-(*b*)
Postponement of Railway opening on inspector's report, S. 19 (2)
Post, Presumption where notice served by, S. 142
Pottery, Sch. II-(*k*)
Power for local authority to cause additional accommodation works, S. 12
Power for occupier to cause additional accommodation works, S. 12
Power for owner, to cause additional accommodation works, S. 12.
Power for rules about opening of Railways, S. 22
Power of Governor-General to dispense with such notice, S. 17 (2)
Power of Governor General to make rules for commission, S 34
Power of Railway Commission to fix terminals S. 46
Powers of Railway company to enter into working agreements, S. 50
Power of Railway company to impose conditions for working traffic, S. 54
Power of Railway company to take indemnity on delivery of certain goods, S. 57
Powers, of Governor-General, delegation of, S. 144
Powers of Inspectors, S. 5
Powers of Railway Commission, S. 30
Powers of Railway opening, inspectors delegated for, S. 25
Power to close an opened Railway, S. 23
Power to extend act to steam tramways, S. 147
Power to make rules about inquiries into accidents, S. 84
Power to make rules about notices of accidents, S. 84
Power to refuse to carry passengers with infections, S, 71
Precious stones, Sch. II-(*d*)
Preliminary, Ss. 1—4 (Ch. I)
Presumption where notice served by Post, S. 142
Proceedings in Commissions, costs of, S. 35
Procedure, Ss. 131—135 (Ch. IX)
Procedure for summary delivery to Railway company of property detained by Railway servant, S. 138
Procedure in sanctioning the Railway opening, S. 19
Prohibition against travelling without pass, S. 68
Prohibition against travelling without ticket, S. 68
Promissory notes, Sch. II-(*h*)
Property, carriage of. Ss. 53—62 (Ch. VI)
Provision for Railway company carrying luggage, S. 74
Provision for passengers with tickets but no accommodation, S. 67
Provisions, Exceptional, S. 21
Provisions for compulsory medical examination of persons injured by accidents, S. 86
Provisions for equal treatment where boats are used, S 44
Provisions for equal treatment where ships, are used, S. 44
Provisions for facilities where boats are used, S. 44
Provisions for facilities where ships are used, S. 44
Provisions for railway company carrying animals, S. 73
Provisions, supplemental, Ss. 135—150 (Ch. X)
Provisions with respect to rules, S. 143
Public notices, defacing, S. 111
Public servants, Railway servants as, under Ch. IX of I. P. C., S. 137
Quoted rates, exhibition to public of authority, S 60
Quoted rates, failure to show, S. 99
Railway accidents, Report of, S. 83
Railway administration, authority of, to do all necessary work, S. 7
Railway administration defined, S. 3 (6)
Railway as carriers, responsibility of, Ss. 72—83 (Ch. VII)
Railway carrying luggage, provision for, S. 74
Railway Commissions and traffic facilities, Ss. 26—47 (Ch. V)
Railway Commission's constitution in session, S. 29
Railway Commission, constitution of, S. 26
Railway Commission's dissolution, S. 39
Railway Commission's jurisdiction restricted in special cases, S. 27
Railway Commission's order, Execution of, S. 36
Railway Commission's orders, finality of, S. 40
Railway Commission's order, Limitation of appeal from, S. 31, 3
Railway Commission's orders, appeals from, S. 31
Railway Commission's orders, operation of, S. 32
Railway Commission's powers, S. 30
Railway Commission's powers to fix terminals, S. 46
Railway commission's special reports submitted to Governor General, S. 38
Railway companies, forfeiture by, Ss.87—99 (Ch. IX)
Railway company as carrier of animals, measure of responsibility of, S. 72
Railway company as carrier of goods, measure of responsibility of, S. 72
Railway company defined, S. 3 (5)
Railway company's power to impose conditions for working traffic, S 54
Railway company's power to take indemnity on delivery of certain goods, S. 57
Railway company's powers to enter into working agreements, S. 50
Railway, defined, S. 3 (4)
Railway, drunkenness and nuisance on, S. 120
Railway, improper travelling on, S. 118
Railway, notice of intended opening of, S. 17
Railway opening, power for rules about, S. 22
Railway opening, Procedure in sanctioning of, S.19
Railway opening, sanction of Government, necessary for, S, 18
Railway, power to close an opened, S. 23
Railway property, restriction on execution against, S. 136
Railway, reopening of a closed, S. 24
Railway servant, defined, S. 3 (7)
Railway servant in charge of work, certification by, S. 21 (*a*)
Railway servant, matters supplemental to, S. 11
Railway servant on duty, obstruction to, S, 124S.

Railway servants, as public servants for Chapter IX of I. P. C, S. 137
Railway servants, offences of, Ss. 99—131 (Ch.IX)
Railway servant's orders, disobedience of omnibus drivers to, S. 123
Railway servants, rules for conduct of, S. 47-(e)
Railway, supplemental matters to, S. 148
Railways, Inspection of, Ss. 4—7 (Ch. II)
Railways, opening of, Ss. 16—26 (Ch. IV)
Railways, working of, Ss. 47—72 (Ch VI)
Rash act, endangering safety of persons in Railway by, S. 129
Rate, defined, S. 3 (13)
Rates, Lien for, S. 55
Recovery of Penalties, S. 97
Reference of cases to Railway Commission, S. 28
Refunds, notification of claims for, S. 77
Refusal to desist from trespass, S. 122
Remuneration to assessors, S. 33 (2)
Removal of trees dangerous to railway working, S. 15
Removal of trees obstructing Railway working, S. 15
Reopening of a closed railway, S. 24
Requirements against postponement of Railway opening, S. 19 (3)
Requisition on Railway Company for details of gross charges, S. 61
Requisitions for written accounts of description of goods, S, 58
Repairing, temporary entry on land for, S. 9
Repeal, S. 2
Report of Railway accidents, S. 83
Report to Governor General within 72 hours after entry, S. 9 (2)
Representation of managers and agents in courts, S. 145
Reservation of compartment for females, S. 64
Reserved compartment entrance into, S. 109
Resistance to entry into compartment not full, S. 109
Responsibility of Railway as carriers, Ss. 72—83, (Ch VII)
Restriction of Railway Commission's jurisdiction in special cases, S. 27
Restriction on execution against Railway Property, S. 136
Returns, false, S, 105
Returns of Railway revenue, S. 52
Return tickets, S. 70
Return ticket, transferring any half of, S. 114
Right to use locomotives, S. 16
Roads over bridges, S. 14
Roads under bridges, S. 14
Roadways for traffic, establishment of, S. 51
Rolling Stock, defined, S. 3 (10)
Rules for accommodation of passengers, S. 47 (b)
Rules for carrying infectious passengers, S. 47 (d)
Rules for offensive goods, S. 47 (c)
Rules for regulating the mode of rolling stock. S. 47 (a)
Rules for retaining goods of consignee, S. 47 (f)
Rules for use of Railway, S. 47 (g)
Rules, provisions with respect to, S. 143
Rules to be approved of by Governor General S. 47 (3)
Safety of persons, endangering the, S. 101
Sanction absolute for Railway opening, S. 19 (4)
Sanction conditional for Railway opening, S. 19 (4)
Sanction conditional to reopen a closed railway S 24 (3)
Sanctioning the railway opening, procedure in, S. 19
Sanction of Governor General for rules, S. 47 (3)
Sanction of Government, necessary for Railway opening, S. 18
Sanction void on non-fulfilment of conditions S. 19 (5)
Sandalwood, Sch. II (p)
Sandalwood oil, Sch. II (q)
Screens, S. 13
Sculpture, Sch II-(j)
Season tickets, S. 70
Section 81, Repeal of, S. 81
Securities, Government, Sch II-(f)
Scientific instruments, Sch II-(r)
Servant, Railway, defined, S 3 (7)
Service of notices by Ry. administrations, S. 141
Services of notices on Ry administrations, Ss. 140
Services, undue preference to unequal rates for S. 43
Session, constitution of Railway Commission in, S. 29
Shawls, Sch. II-(m)
Silver and Gold, Sch. II-(a)
Silver and gold, coined, Sch II-(a)
Silver and gold, manufactured Sch. II-(a)
Silver and gold, uncoined, Sch II-(a)
Silver and gold, unmanufactured, Sch II-(a)
Sindh Pishin Ry. Act (1887), Amendment of, S.150
Smoking against consent of fellow passengers, S. 110
Soldiers on duty, compensation of injuries to, S.79
Special reports of Ry. Commission to be submitted to Governor General, S. 38
Stamps, Government, Sch. II (g)
Steam tramways, Power to extend Act, to S. 147
Stock, rolling, defined, S. 3 (10)
Submission of return of accidents, S. 85
Suits for compensation for injuries to through-booked goods, S. 80
Summary delivery to Ry. Company of Property detained by Ry. servant, Procedure on, S. 138
Supplemental matters to Railway and railway servant, S. 148
Supplemental Provisions, Ss. 135—150 (Ch X)
Supplementary Character of remdies, S. 98
Supply of tickets on payment of fares, S. 66
Surrender of passes and tickets, S. 69
Taxation of Railways by local authorities, S. 135
Telegraphic notice to the Inspector of Railway, S. 21 (b)
Temporary entry on land to prevent accident, S.9
Temporary entry on land to repair, S. 9
Terminals, S. 45
Terminals, defined, S. 3 (14)
Terminals, lien for, S. 55
Terminals Power of Ry Commission to fix, S. 46.
Through Traffic, defined, S. 3 (12)
Ticket, altering or defacing of, S. 116
Ticket attempt to travel without, S 112
Ticket, defined S. 3 (16)
Ticket prohibition against travelling without, S.68.
Tickets, exhibition and surrender of, S. 69
Tickets, return and season, S. 70
Ticket supply on payment of fares S. 66
Ticket, travelling without, S. 112
Timepieces of any description, Sch II-(e).
Time tables Exhibition of, at Stations. S. 65.

Title-deeds Sch II-(*j*)
Title, of the Act S. 1 (1)
Traffic, defined S. 3 (2)
Traffic facilities and Railway Commissions, Ss. 26—47 (Ch V)
Traffic, through, defined S. 3 (12)
Traffic undue preference to unequal rates for like, S. 43
Train, malicious wrecking or attempt thereto, S. 126
Tramway, defined, S. 3 (1)
Transferring any half of return ticket, S. 114
Travelling beyond authorized distance, S. 113
Travelling with insufficient pass, S. 113
Travelling without proper pass, S. 112
Travelling without proper ticket, S. 112
Trees dangerous to Railway working, removal of, S. 15
Trees obstructing railway workings, removal of, S. 15
Trespass, S. 122
Trespass of cattles, S. 125
Trial, place of, S. 134
Trinkets, Sch II-(*d*)
Uuauthorized distance, travelling in, S. 113
Unclaimed things, Disposal of, S. 56
Undue preference to unequal rates for like traffic, S. 43
Undue perference to unequal rates for services, S. 43
Unlawfully bringing dangerous goods on Railway, S 107
Unlawfully bringing offensive goods on Railway, S. 107
Unwrought and unmanufactured silk, Sch. II-(*k*)
Wagons, maximum load for, S. 53
Watches, Sch. II-(*e*)
Water, Inland, defined, S. 3 (3)
Wilful act, endangering safety of persons in Railway Co., S. 128
Wires, alteration of, S. 8
Working of railways, Ss. 47—72 (Ch VI)
Working traffic, Power of Ry. company to impose conditions on, S. 54
Works construction and maintenance of, S. 7—16 (Ch. III)
Works for accommodation, S. 11
Writing, Sch. II-(*i*)
Wrought and manufactured silk, Sch. II-(*l*)

RAILWAYS ACT (IX OF 1890).

———*Resolution of the Govt. of India, at pp.* 18, 19 *Supp. Gazette of India*, 1884—"*Rule.*"

The Government of India resolution pp. 18 and 19 of the supplement of the Gazette of India, 1884, does not constitute a rule under Act IV of 1879 as it merely defines the conditions under which all but ticket-holders may be excluded. The Railway Company has the right to exclude from Railway premises all persons excepting those having business with them and may impose on the rest of the public any terms they think proper. 22 Bom. 525 ; 26 B. 609 Foll. (*Arthur Reid, C. J. and Kensington, J.*) EAST INDIA RAILWAY COMPANY *v.* MOTI SAGAR.
116 P. L. R 1911 : 36 P. R. 1911 : 9 I. C. 1011 : 102 P. W. R. 1911.

———**Ss. 3 and 140**—*Connotation.*

The connotation of the words "Railway Administration" in S. 3 of the Act is not in any way cut down by S. 140 of the Act. (*Chatterjee and Beachcroft, JJ.*) RADHA SHAM BASAK *v.* SECRETARY OF STATE. **44 Cal. 16 : 34 I. C. 130 : 23 C. L. J. 547.**

———**Ss. 3 (4) and 5**—"*Railway*" *and* "*Railway Company*"—*Meaning—New plea*

"Railway" includes all ferries, ships, etc., used on inland waters for the purposes of the traffic of a Railway and belonging to or hired by the authority administering the Railway ; hence a navigation company which undertakes to convey goods despatched by Railway to other places is also a "Railway". A plea that the deft. company is not a Railway Company within the meaning of the Act cannot be raised for the first time on appeal (*Reid, C. J. and Rattigan, J.*) INDIA GENERAL NAVIGATION RY. CO., LTD. *v.* HARCHARAN DAS. **233 P. L. R. 1912 : 111 P. R. 1912 : 15 I. C. 12 : 224 P. W. R. 1912.**

RAILWAYS ACT (IX OF 1890), S. 3.

———**S. 3 (4)**—"*Railway*"—*Meaning.*

"Railway" includes all stations, offices, warehouses, etc., constructed for the purpose or in connection with a Railway Company. (*Reid, C. J. and Kensington, J.*) E. I. RY. COMPANY *v.* MOTI SAGAR **116 P. L. R. 1911 : 36 P. R. 1911 : 9 I. C. 1011 : 102 P. W. R. 1911.**

———**S. 3 (4)**—*Staff-quarters—Whether railway.*

Staff-quarters for residence are not part of Railway within S. 3 (4). (*Ayling and Oldfield, JJ.*) MARGAM AIYAR *v.* S. J. MERCAR.
15 Cr. L. J. 225 : 23 I. C. 177 : (1914) M. W. N. 124.

———**Ss 3 (6), 77 and 140**—*Loss of consignment—Notice on General Trafic Manager, not enough.*

A plaintiff claiming damages for loss of a consignment of goods sent by a Railway must serve notice of the claim on the Agent and not upon the General Traffic Manager. 28 A. 552 ; 31 B. 534 ; 35 C. 194 ; 36 M. 65 Ref. (*Le Rossignol and Zafar Ali, JJ.*) AGENT, B. B. AND C. I. RAILWAY CO. *v.* FIRM OF MANOHAR LAL.
5 Lah.L. J. 3 : 4 Lah. 46 : 1923 L. 84.

———**Ss. 3 (6) 77, 140**—*Notice of claim—Notice to Traffic Superintendent is sufficient, if agent has knowledge of claim within 6 months.*

A person suing a Railway Company for damages will not be entitled to it unless he has given notice of the same in writing to the Agent of the Company In the absence of any rules of conduct giving the agent the right to delegate the receipt of such notices to the District Traffic Superintendent, notice to the latter is insufficient. Per *Kumaraswami Sastri, J.*—S. 140 of the Act is an enabling section and the word 'may' should not be construed as "must." The knowledge of the agent of the claim within 6 months is sufficient to create a right for the plff. to sue. (*Ayling, A.C.J., Kumaraswami Sastri and Odgers, JJ.*) MAHADEVA AIYAR *v.* S. I. RY. COMPANY.
14 L. W. 685 (F.B.).

RAILWAYS ACT (IX OF 1890), S. 3.

——S. 3 (11)—*Traffic.*

Traffic does not include person going to a Railway station to see a friend off. (*Arthur Reid, C. J. and Kensington, J.*) E. I. RY. COMPANY *v.* MOTI SAGAR. **116 P L. R. 1911 : 36 P. R. 1911 : 9 I. C. 1011: 102 P. W. R. 1911.**

——Ss. 7, 10 and 11—*Level crossing—Public street—Street vested in Municipality—Sanction of Government.*

The respondent Railway Co., constructed a line of railway across a public street vested by statute in the appellant Municipal Corporation without obtaining the consent of the latter and without taking proceedings under the Land Acquisition Act for the acquisition of the highway.

Held, that the provisions of the Land Acquisition Act did not cut down the power of the Railway Company under S. 7 of the Railways Act, to carry a line of railway across a public street, subject to the control of the Governor-General in Council, that the construction of the railway line across the street was not an acquisition of immoveable property within S. 7 and that the Railway Company had power to lay the railway lines under S. 7 without obtaining the consent of the appellant Municipality. (*Viscount Haldane.*) MUNICIPAL CORPORATION *v.* GREAT INDIAN PENINSULA RY. CO. **41 Bom. 291 : 21 M L. T. 1 : 19 Bom. L. R. 48 : 15 A. L. J. 63 : 21 C. W. N. 447 : 25 C. L. J. 209 : 43 I. A. 310 : 38 I. C. 923 : (1917) M. W. N 83 (P. C.).**

[On appeal from 23 I. C. 765 : 38 Bom. 565.]

——S. 7—*Level crossing—Closing of, if justifiable.*

Railway Company can close the level crossing and open a new one at any point lower down the line. (*Macleod, C. J. and Crump, J.*) HARILAL *v.* B. B. AND C. I. RY. **22 Bom. L. R. 822 : 57 I. C. 601 : 44 B. 705.**

——S. 7—*Laying line across Municipal street—"Notwithstanding anything in any other enactment", etc.*

The words "Notwithstanding anything in any other enactment....." in S. 7 empower a Ry. Co. to do certain acts specified in it, regardless of provisions in other enactments so that a Ry. Co., desiring to lay a line across a Municipal street, need not proceed under Land Acquisition Act, nor obtain permission under S. 293 of the City of Bombay Municipal Act. (*Scott, C.J, and Batchelor, J.*) G. I. P. RY. *v.* MUNICIPAL CORPORATION OF BOMBAY. **38 Bom. 565 : 23 I. C. 765 : 16 Bom. L. R. 104**

[On appeal 38 I. C. 923 : 41 Bom. 291 (P.C.)].

——Ss. 41, 42, 28 and 3—*Reservation for a particular section whether reasonable—Jurisdiction of a Civil Court.*

A Railway Company as carriers of passengers are at liberty to set apart whatever accommodation they may choose for the carriage of the various classes of their passengers apart from the limitation imposed by the statute and it is not open to a civil Court to consider the question whether such reservation is an undue or unreasonable preference in favour of a particular class. (*Macleod, Kt. C. J. and Shah, J.*) VISHVANATH GANESH JAVDEKER *v.* G. I. P. RY. **62 I. C. 1004 : 23 Bom. L. R. 809.**

RAILWAYS ACT (IX OF 1890), S. 42.

——S. 41—*Undue or unreasonable preference—Ordinary Court, if could consider.*

Ordinary Courts cannot in view of the provisions of 26 to 41 of Chapter V of the Railways Act, consider whether there has been any undue or unreasonable preference within S. 42 of that Act. (*Crouch and Hayward, A. J. Cs.*) MATHRADAS *v.* SECRETARY OF STATE FOR INDIA. **21 I. C. 499: 7 S. L. R. 42.**

——Ss. 42, 45, 47 and 109—*Reservation of seats—Legality of—Breach of the rules—Offence.*

A bye-law or rule providing for special accommodation or for the special convenience of a particular individual or of a particular class of individuals and for the general convenience of the travelling public is legal under S. 47 of the Railways Act. The "preference" forbidden by Ss. 42 and 43 refers to goods traffic and rates charged upon traders and does not apply to passengers. A person who enters a compartment of a Railway carriage reserved by a Railway Co., for the use of passengers of a particular class to which he does not belong, and refuses to leave when required to do so by a Railway servant, is liable to penalty under S. 109 of the Railway Act. (*Piggott and Walsh, JJ.*) BIRJBASI LAL *v.* EMPEROR. **42 All. 327 : 2 U. P. L. R. (All.) 65: 21 Cr. L. J. 294: 55 I. C. 342: 18 A. L. J. 254.**

——S. 42—'*Traffic*'.

S. 42 applies both to the goods traffic as well as passenger traffic. (*Macleod, Kt. C.J. and Shah, J.*) VISHVANATH GANESH JAVDEKER *v.* G. I. P. RY. **62 I. C. 1004: 23 Bom. L. R. 809.**

——Ss. 42, 47 and 109—*Reservation of compartment for Europeans and Anglo-Indians—Legality of—"Another passenger" meaning of—Object of the rule making power.*

It is lawful for a Railway Company to reserve a compartment by its train for the use of Europeans and Anglo-Indians only.

The accused entered and persisted in remaining in a third class compartment to which a card had been attached purporting, over the initials of the senior ticket examiner, to reserve it for Europeans and Anglo-Indians, *Held*, per the *Officiating Chief Justice and Oldfield, J.* (*Krishnan, J.* dissenting) that the accused had committed an offence punishable under S. 109 of the Indian Railways Act.

Per *The Officiating Chief Justice and Oldfield, J.*—The term 'passenger' in the expression another passenger' in S. 109 (1) is not restricted to a person who actually enters a Railway carriage for the purpose of travelling but also includes possible passengers who may join at any later station. The object and the result of making rules under S. 47 (1) of the Act with the sanction of the Governor-General in Council are only to make their breach an offence punishable by the Courts. The Traffic Working Orders are not general rules published under S. 47 of the Act

RAILWAYS ACT (IX OF 1890), S. 42.

They are not available and in no way resemble a power of attorney from which the station-master's authority is derived; they form merely a domestic code which every organisation must formulate for the guidance of its employees. The reservation of accommodation for Anglo-Indians or any class of passengers is not an undue or unreasonable preference in favour of a particulardescription of traffic within the meaning of S. 42 (2) of the Act. Per *The Officiating Chief Justice.*—There is nothing in any of the rules of the Traffic Working Orders to indicate that a compartment can only be legally reserved by a label or notice signed or initialled by the Station-master. The direction in R. 172 (*a*) to the effect that the Station-master should label the carriage or compartment does not imply that he must do so with his own hands or sign the label.

Per *Krishnan, J.*—The third class compartment in the case was not reserved for Europeans and Anglo-Indians, as the label that was in the carriage door was not the usually printed label signed or initialled by the Station-master under S. 172 (*a*) of the Traffic Working Orders. The Station-master has to observe the formalities required by the rules before properly he can reserve a compartment as his authority to do so is given to him by the Railway Administration subject to the rules.

The expression "Traffic" in S. 42 (2) is not restricted to conveyance of animals and goods and the fixing of charges therefor. (*Ayling, Offg. C. J. and Oldfield, J.*) KOMARAN, *In re.*

45 Mad. 215: 42 M. L. J. 21: (1922) M. W. N. 34: 30 M. L. T. 134: 15 L. W. 207: 23 Cr. L. J. 296: 1922 Mad. 35.

——**S. 42 (2)**—*Reserved accommodation for a class is legal.*

The railway is entitled to reserve accommodation for a particular class of persons without showing *undue* preference. The onus of proving undue preference is on the person who asserts it. It is a question of fact whether there has been undue preference. Per *Shah, A. C. J.*—A penal provision ought to be strictly construed and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on the occasion. A reservation of this kind is apt to involve a transgression of the limitation laid down in S. 42 (2). (*Shah, A. C. J., Crump and Marten, JJ.*) EMPEROR *v.* NARAYAN KRISHNA GOGTE.

47 Bom. 465: 25 Bom. L. R. 26: 24 Cr. L. J. 297: 1923 Bom. 1.

——**S. 47**—*Rules, scope of.*

Rule controlling or limiting statutory liability of railway under S. 72 of the Act, is illegal. (*Piggott, Walsh and Gokul Prasad, JJ.*) SOHAN PAL MUNNALAL *v.* THE E. I. RY.

20 A. L. J. 31: 44 A. 218: 1922 A. 9.

——**S. 47**—*Rules adopted by Company and published in the Gazette, if satisfy, S. 47.*

Rules adopted by the Company though not originally prepared but which had received the sanction of the Governor-General and published in the Gazette, are completely covered by S. 47 and it is unnecessary that the identity of the rules made by the Company and those published, should appear in the circular or Gazette. (*Jenkins, C. J. and Chatterjee, J.*) BENGAL-NAGPUR RAILWAY CO., LTD. *v.* RAM PRATAP.

16 C. W. N. 360: 13 I. C. 529 : 15 C. L. J. 215.

——**S. 47**—*Rules, publication of.*

The rules imposed on all Railways by Government by a notification do not become the rules of a particular Railway Co., till they are published in the India Gazette in the manner provided by S. 47. (*Jenkins, C. J. and Woodroffe, J.*) HARI LAL SINHA *v.* BENGAL-NAGPUR RAILWAY CO.

15 C. W. N. 195 : 9 I. C. 331 : 13 C. L. J. 150.

——**S. 47**—*Object of.*

Object of making rules under Sec. 47 is to regulate the traffic. (*Ayling, C. J.*) *In re* KOMARAN.

45 Mad. 215: 42 M L. J. 21 : 30 M. L T. 134 : 1922 M. W. N. 34 : 1922 M. 35.

——**Ss. 47 and 101 (c)**—*Rr. 87 and 87 (a)*—*Accident—Message by guard.*

If under Rr. 87 and 87 (*a*) of the rules framed under Railway Act, the guard of a train sends a message asking for assistance, it is the duty of the driver to ascertain the terms of the message. His omission to do so would make him liable under S. 101 (*c*) of the Act, if it results in endangering the safety of any person. (*Mitra, A. J. C.*) LOCAL GOVERNMENT *v.* KHAIRAT ALI.

54 I. C. 988: 21 Cr. L. J. 204.

——**S. 47**—*'Day' definition of—Notice—What is sufficient.*

A rule by a Railway Company that the interval between the time of issue of a return ticket and the midnight of the same day shall be counted as one day is neither unreasonable nor *ultra vires.* A specification on the ticket itself of the day of expiry is sufficient notice of the rule. (*Hayward, J. C. and Boyd, A. J. C.*) SECRETARY OF STATE *v.* SAHIJRAM ASANMAL.

25 I. C. 801: 8 S. L. R. 14.

——**Ss. 47 (1) (f) and 72**—*R (2) of rules framed under S. 47*—*Liability of Railway Co.*

A "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises, it means some sort of acceptance by Railway, a taking as well as a giving. The commencement of the Company's liability for goods delivered to be carried under S. 72 does not depend upon a receipt being granted and must be determined on the evidence in the case. 23 A. 367 Dist. (*Heaton and Shah, JJ.*) RAMACHANDRA *v.* G. I. P. RY.

39 Bom. 485: 29 I. C. 545: 17 Bom. L. R. 496.

——**S. 47 (1) (f)**—*North-Western Railway Tariff Rule No. 464 (V)*—*Negligence of servants—Liability of Railway.*

Tariff Rule No. 464 (V) of N. W. Ry. is a rule passed under S. 47 (1) (*f*) and has the force of law. The rule is wide enough to include the loss due to the negligence of Railway or the servants. So the railway is not liable for the damage caused by the negligence of its servants after the goods had arrived for delivery. (*Pratt, J. C. and Hayward, A. J. C.*) AJUMAL *v.* SECRETARY OF STATE.

17 I. C. 37 : 6 S. L. R. 103.

RAILWAYS ACT (IX OF 1890), S. 56.

——Ss. 56 and 80—*Carriage of goods by rail—Delivery to consignee—Damage to goods—Demand for clear receipt—Refusal—Sale of goods.*

A consignee has no right to demand that the goods shall be opened and inspected on the railway premises before he can be called upon to take delivery, 11 A. L. J. 772 Ref. There is no provision of law which obliges a railway company to make or allow to be made in its delivery register any note alleging that goods are in a damaged condition. A consignee cannot refuse to take delivery because the Ry. Co. refuses to make an entry in their books that the goods are damaged and the consignee could not insist upon an entry. If he had any complaint, he was entitled to make his representation to the company in any other way. Where in such a case the consignee refuses to clear the goods and the Ry. Company sells them under S. 56 of the Act, it is guilty of conversion, 11 A. L. J. 775 : 39 C. 311 Ref. Where goods are despatched through several railway systems and the consignee sues one of the railways for damage to goods he could only recover damages from that Railway by proving that the damage was caused on its system. 34 A. 422 Ref. (*Lindsay and Kanhaiya Lal, JJ.*) SRI GANGAJI COTTON MILLS CO., LTD. *v.* EAST INDIAN RAILWAY CO.

20 A. L. J. 761 : 4 U. P. L. R. (A) 222 : 44 A. 76 : 1922 All. 514.

——Ss. 56 and 72—*Detention of consignment by Railway—Liability.*

A Railway Company has by S. 55 power to detain goods consigned, for recovery of some other amount other than that due by the consignor on that consignment. This is not so with an ordinary bailee. When the power of detention is exercised illegally or wrongfully by the Railway, the Company is liable for illegal or wrongful detention. (*Banerjee, J.*) E. I. Ry. Co. *v.* SHEORATAN DAS. **19 I. C. 370 : 11 A. L. J. 335.**

——S. 56—*Suit for surplus proceeds of sale—Limitation.*

Art. 62 governs a suit to recover the surplus proceeds of sale held by the Railway Company under S. 56 as the proceeds are received for plff.'s use. 41 Mad 871 Dist. (*Oldfield and Ramesam, JJ.*) TARACHAND *v.* MADRAS AND SOUTHERN MAHRATTA RY. CO., LTD. **44 Mad. 823 : 13 L W. 693 : 41 M. L. J. 205 ; 62 I. C. 742 : (1921) M. W. N 422**

——S. 57—*Railway receipt not forthcoming—Station master, duty of—Demurrage.*

A station master is not competent to deliver goods unless the Railway receipt is produced. But demurrage cannot be charged for the period, taken in enquiry as to the identity of the person entitled to delivery. (*Das and Adami, JJ.*) E.I.R. Co. *v.* BHAGWAN DAS. **63 I. C. 256 : 2 Pat L. T. 523**

——Ss. 63, 93, 108 and 109—*Pulling the chain—Overcrowding—Reasonable and sufficient cause.*

Accused pulled a chain used as an alarm signal in a railway carriage on the ground that the compartment had become over-crowded on account of 70 passengers having entered into it, whereas the compartment was marked for 27 passengers only. He also complained to the Railway authorities but received no attention. *Held*, that he had reasonable and sufficient cause for pulling the chain within the meaning of S. 108 of the Railways Act. To prevent any danger to the health and life of passengers S. 63 of the Railways Act provides that the limit of passengers to occupy a compartment must be fixed and must be exhibited in some conspicuous place inside or outside the compartment on pain of penalty. A corresponding obligation has been cast under S. 109 of the Act, upon passengers to obviate entering a compartment which already contains the maximum number of passengers exhibited therein. These provisions of the Act therefore confer a right upon the occupants of a compartment to resist the entry of passengers when the compartment had already contained the maximum number allowed under the rules (*Jwala Prasad, J.*) ISHWAR DAS VARSHANI *v.* EMPEROR

1 Pat. 260 : 3 Pat. L. T. 195 : 23 Cr. L. J. 257 : 1922 Pat. 63 : 1922 P. 8.

——S. 66 or 68—*Rules for the guidance of Public and Railway officials—R. 29—Platform ticket—Sale whether unlawful.*

Under rule 29, a Railway Administration has the right to exclude from platforms any person not having business on the Railway premises ; such right is not repugnant to S 66 or 68. *Quaere*: Assuming that the demand of payment for a platform ticket is unlawful, whether a suit for the recovery of the amount paid lies. (*Reid, C.J. and Kensington, J.*) E. I. R. Co. *v.* MOTI SAGAR.

116 P. L. R. 1911 : 36 P. R 1911 : 9 I. C. 1011 : 102 P. W. R. 1911.

——Ss. 68, 69 and 113—*Person travelling without ticket.*

It is not a criminal offence to travel in a train without a pass or ticket, when there is no intent to defraud the Company, but a person so travelling is liable under S. 113 of the Railway Act to pay on demand an excess charge in the nature of a penalty. (*Choudhury and Newbould, JJ.*) MUHAMMAD HUSSAIN *v.* FARLEY. **25 C. L. J. 610 : 40 I. C. 295 : 18 Cr. L. J. 647 : 44 Cal. 279.**

——S. 72—*Risk note Form H—Consignor signing—Liability of the Company.*

Where a consignor signs a risk note in form H, which frees the Company from all responsibility for any loss, the Company cannot be held liable for compensation for loss. (*Colvin, J. C.*) RAM GOPAL *v.* AGENT, BOMBAY-BARODA AND CENTRAL INDIA RAILWAY CO.

13 I. C. 297.

——S. 72—*Risk rates and ordinary rates—Destruction of goods—Liability—Burden of proof.*

Where goods were carried at owner's risk rate over part of the journey and at the ordinary rate over the rest and were destroyed during the latter part of the journey the Railway Company are in the position of bailees and have to prove affirmatively that they took the same degree of care as a prudent man would take over his own property (*Mears, C. J. and Piggott, J.*) MESSRS GADODIA & CO. *v.* G. I. P. Ry. Co. **L R. 4 All. 619 : 22 A. L. J. 1 : 1924 All. 254.**

RAILWAYS ACT (IX OF 1890), S. 72.

——S. 72—*Carriage of goods—Contract as freight—Parties if bound.*

Where there is an original contract to carry goods according to the maund rate the Railway Co., is not authorised to alter that agreement, but if there was no such contract at all and the Company having originally charged at the wagon rate but there being a miscalculation on the amount which was charged the company can recover the balance. (*Sulaiman, J.*) B. B AND C. I. RY. CO. *v.* FIRM OF BUDH SEN PUSP CHAND.

21 A. L. J. 880 : L. R 4 A. 570 : 9 O & A. L. R. 1074 : 1924 All 180.

——S. 72—*Loss of goods—Suit for damage—Risk note Form B—Onus of proof*

In a suit for damages for goods consigned to a Railway under Risk-note, Form B naturally the burden of proof lies on the plaintiff consignor to show wilful neglect or theft apart from mere loss of goods. Wilful neglect is mostly to be inferred from the circumstances. Where the sealed waggon which contained the goods is kept at a jungle side railway yard for 2 days with no protection against thieves and the seals are found broken the court can infer the loss is due to wilful default. (*Sulaiman, J.*) EAST INDIAN RAILWAY COMPANY *v.* SRI RAM MAHADEO.

21 A. L. J. 896 : L. R. 4 A. 612 : 46 All. 125 : 1924 All. 177.

——S. 72—*Railway—Consignment of goods—Owner's risk rate and ordinary rate—Liability of destruction.*

Where goods were carried at owner's risk rate for part of the journey and at ordinary rate over the rest and were destroyed during the latter part of the Journey the Company must prove that they took as much care of the goods as they would had the goods been their own. (*Mears, C. J. and Piggott, J.*) MESSRS. GADODIA & CO. *v.* G. I. P. RY. CO.

L. R. 4 All 619 : 22 A. L. J. 1 : 1924 All. 253.

——S. 72—*Risk-note form B—Delay.*

Damage suffered by the consignor owing to delay during transit entitles him to sue the company for damages. Risk-note B does not protect the Company in such cases. 20 A. L J. 973 and 1923 All. 426 Dist. 1924 All. 7 : 45 All. 530 Ref. (*Daniels, J.*) EAST INDIAN RAILWAY COMPANY *v.* FIRM GOPI KRISHNA KASHI PRASAD.

45 A. 534 : 21 A. L. J. 448 : L. R. 4 A. 242 : 1924 A. 8.

——S. 72—*Short delivery—Liability for—Risk-note B.*

In a suit for damages for short delivery of goods consigned to a Railway Company, risk-note B does not protect the company, and the plaintiff is entitled to succeed in the absence of evidence of loss. (*Daniels, J.*) EAST INDIAN RAILWAY CO. *v.* FIRM KISHEN LAL TIRKHA MAL.

45 A 530 : 21 A. L. J. 438 : 9 O. & A. L. R 531: L. R. 4 A. 249 : 1924 A. 7.

——S. 72—*Risk note Form X--Loss of goods—Liability of railway.*

If the article in respect of which a risk-note in Form X was given, was not one of the excepted articles, the mere giving of the risk-note X would take away the liability of the Railway Company. (*Rafique, J.*) KEDAR NATH RAJNARAIN *v.* EAST INDIAN RY.

21 A. L. J. 351 (2) : L. R. 4 A. 204 : 45 All. 453 : 1923 A. 538.

——S. 72—*Risk-note, Form B—Deterioration of goods—Damages—Liability of Railway—Loss—Meaning of.*

The plaintiff made over to the defendant railway several parcels of mangoes for transit from Saharanpore to Labore. At the time of sending the goods, the plaintiff executed a risk-note in Form B. The goods were delayed in transit and did not reach Lahore till a fortnight after and by that time the fruits had become rotten. Delivery was offered to the consignee but was refused by him and the goods were then destroyed by the railway. In a suit by the plaintiff to recover the value of consignment, the Railway Company claimed the protection of the risk-note Form B, pleading that as there was no loss of the goods by them, the plaintiff could not recover. The Court below found that the delay in the transit of the goods and the resulting deterioration of the fruit was due to gross negligence on the part of the railway servants. *Held*, that though the deterioration was due to the neglect of the Railway servant, the contract of indemnity contained in the risk-note excluded the defendant's liability. The word " loss " in the risk-note meant loss by the Railway Administration and could not mean loss to owner in the sense of injury to him arising out of his being deprived of his goods. 1897 P. R. 23 referred to. (*Lindsay, J.*) SECRETARY OF STATE. *v.* JIWAN.

45 A. 380 : 21 A. L J. 220 : 1923 A. 426.

——S. 72—*Risk-note—Consignment—Deterioration of goods—Cause of action.*

Certain quantity of wheat flour was despatched by railway under the terms of a risk-note which held the Railway Company concerned liable only in case of loss of one or more packages forming part of the consignment. Owing to a mistake on the part of the Railway the bags were sent to a wrong station ; during the course of the transit the goods deteriorated. *Held*, that the consignor had no cause of action against the Railway. (*Stuart and Gokul Prasad, JJ.*) RAM KISHUN RAM *v.* NORTH-WESTERN RAILWAY.

L. R. 4 A. 20 : 20 A.L.J. 973 : 1923 A. 122 (2).

——S. 72—*Station—master retaining goods—Acceptance of bailment—Liability of Railway.*

Where the station-master never definitely directed the plaintiff to remove the goods, and never definitely told the plaintiff in unmistakeable terms that the goods were being kept on the railway premises at his own risk and also never definitely accepted the goods at railway risk. *Held*, his conduct retaining the goods in the railway shed affords evidence that he accepted the bailment of the goods on behalf of the Railway Company and S. 72 of the Railways Act came into operation and the Railway Company was responsible for their safe custody. (*Stuart and Sulaiman, JJ.*) MUNNA LAL *v.* EAST INDIAN RAILWAY CO.

1923 A. 71.

RAILWAYS ACT (IX OF 1890), S. 72.

——S. 72—*Risk-note Form A—Delay—Liability.*

Where certain goods are despatched by railway but there is no proof that they were despatched under a risk-note in Form A the Railway Company is liable in damages for the delay in the delivery of the goods at the proper time. The liability of the Ry. Co. is under S. 161 of the Contract Act. (*Banerjee, J.*) EAST INDIAN RAILWAY Co. *v.* FIRM OF INDERMAN KULSHI RAM.

20 A. L. J. 114 : L. R. 3 A. 101 : 1922 A. 63.

——Ss. 72, 47 and 54—*Delivery of goods to railway—Grant of receipt by railway not essential to complete delivery—Rules to that effect* ultra vires—*Liability of railway—Contract Act,* S. 149.

Plaintiff handed over goods to a Railway Company for despatch to another place, which was accordingly done. He however failed to take a receipt for the goods despatched which never reached their destination and in a suit for damages the company pleaded that under a rule framed under S. 47 (1) (*f*) "delivery" will be deemed to be complete only as a receipt in the proper form being granted by the company's authorised servants, and that as the rule had not been complied with in the case, they were not liable. *Held,* overruling this plea, goods had been 'delivered' to the Railway authority within the meaning of S. 72 and the company could not escape liability for their negligence.

Per *Piggott, J.*—It is not open to a Railway Company to enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the Railway, nevertheless the Court shall not deem them to have been so delivered unless and until the Railway servant in question has performed a particular act, such as granting a receipt.

Per *Walsh, J.*—No rule which any company can make can cut down, control or limit its liability which is a creature of statute under S. 72 and if a rule is relied upon by the company which is inconsistent with that liability, it has clearly gone beyond the authority created for making rules.

S. 72 of the Railways Act, defines the responsibility of a Railway Company entrusted with goods as that of a bailee for reward as defined in Ss. 151, 152 and 161 of the Contract Act. The definition of "bailment" involves the definition of "delivery" as contained in S. 149 of the Contract Act and the two Ss. 148 and 149 of that Act are equally incorporated with the Railways Act and define and control the liability of the Railway Company. 23 All. 367 Dist. (*Piggott, Walsh and Gokul Prasad, JJ.*) FIRM SOHANPAL MUNNA LAL *v.* THE EAST INDIAN RAILWAY Co. **44 A. 218 : 20 A. L. J. 31 : L. R. 3 A. 33 : 1922 A. 9.**

——S. 72—*Railway Company—Position of—Is that of a bailee.*

The position of a Railway Company carrying goods for another is that of a bailee and it is bound to carry the goods under ordinary circumstances within a reasonable time. (*Stuart and Kanhaiya Lal, JJ.*) FAZAL ILAHI *v.* E. I. RY. Co. **43 All. 628 : 64 I. C. 868 : 19 A. L. J. 654.**

RAILWAYS ACT (IX OF 1890), S. 72.

——S. 72—*Loss of goods—Goods left uncleared for unreasonable time.*

A consignee of goods cannot make the carriers responsible for any loss if he for his own convenience or by his own laches allows them to remain with them for an unreasonable time after the goods have arrived at their destination and the carriers are ready to deliver them. A different liability as warehousers would arise if the evidence established such an agreement. The charging of demurrage does not necessarily give rise to such an implication. (*Piggott and Walsh, JJ.*) B. N. W. RAILWAY *v.* MOOL CHAND.

18 A. L. J. 764 : 2 U. P. L. R. (All.) 268 : 58 I. C. 1000 : 42 A. 655.

——S. 72—*Risk note Form H—Loss of goods—Liability of Ry. Co.—Burden of proof.*

Where goods are consigned, under risk note Form H, the Railway is held free from all responsibility for any loss except where it is shown that the loss was due to wilful neglect of the Railway or to theft or to the wilful neglect of its servants. The burden of proof does not lie on the Railway to show that the loss was not so caused. *Held,* that in the present case the loss was not due either to a theft by their Ry. servants or to their wilful neglect. (*Richards, C. J. and P. C. Banerji, J.*) EAST INDIAN RAILWAY Co. *v.* NATHMALL BEHARI LAL. **15 A. L. J. 321 : 39 I. C. 130 : 39 A. 418.**

——Ss. 72 and 73—*Risk note—Liability of Railway.*

A risk note not signed by the consignor or on his behalf, but filled in by the Railway Clerk, cannot relieve the Railway of its responsibility. (*Banerjee, J.*) ARRUTOON, M. J. *v.* EAST INDIAN RY. Co. **38 I. C. 143.**

——S. 72—*Consignment under Risk-note, Form H—Loss—Wilful neglect—Sale of goods—Liability.*

Certain perishable goods consigned under risk note Form H from a station on B. B. and C. I. Railway to a station on G. I. P. Railway were carried by the former Company to a junction station and put in an empty wagon of the latter company. Not having been retranshipped at another station, they were carried to a wrong station and remained there unnoticed, but when they were ultimately sent to the proper destination they were in a stinking condition and so they were sold by public auction without notice to the consignors or their agents. On a suit by the plaintiffs, *held* that the Railway Authorities were not guilty of wilful neglect resulting in a loss of the complete consignment within the meaning of the risk note. (*Chamier, J.*) JHUNNILAL *v.* B. B. AND C. I. RAILWAY.

35 I. C. 265 : 14 A. L. J. 396.

——S. 72—*Liability of company for shortage of goods—Rights of consignee.*

A risk note in Form A is simply an indemnity bond by the sender for the company. It cannot in itself affect the rights of the consignee who is entitled to receive the consignments as ordered by him and to claim compensation in the event of

the consignment suffering loss or damage. Rights of the consignee considered. (*Piggott. J*) ROHILKHAND AND KUMAUN RAILWAY CO. *v.* ISMAIL KHAN. **29 I. C. 207 : 13 A. L. J. 417.**

———S. 72—*Risk note Form B—Theft from running train—Burden of proof.*

The plaintiff sued the defendant Railway Company for damages in respect of short delivery of goods. The plaintiffs had signed the risk note B, and in order to recover, the plaintiff had to prove that the loss was due to theft by or to the wilful neglect of the Company's servants, transport agent, or carriers employed by them before, during and after transit over the said railway or other railway lines working in connection therewith, etc, provided that the term "wilful neglect" could not be held to include fire, robbery from a running train or other unforeseen accident. *Held*, that although in equity the railway company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them under the law it was not incumbent upon them to do so and they were not obliged to go out of their way to assist the plaintiff in proving wilful neglect. In this country it may be adopted as a safe rule that the railway should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods. *Smith, Ltd. v. G. W. Ry. Co.* (1922) 1 A. C. 178 Ref. (*Macleod, C. J. and Crump, J*) G. I. P. RAILWAY *v.* HIMATLAL JAGJIVANDAS. **25 Bom. L. R. 350 : 1923 Bom. 389.**

———S. 72 and Sch. II (M)—'*Shawls*' *does not cover cheap cloth.*

The word "Shawls" in the Railways Act is used in a special and restricted sense as meaning a costly woollen fabric and does not cover articles of cheap manufacture at home or abroad. 39 C. 1029, Foll ; 42 A. 76 not foll. (*Macleod, C. J. and Shah, J.*) THE EAST INDIAN RAILWAY COMPANY *v.* DAYABHAI VANMALIDAS. **24 Bom. L. R. 416 : 1922 Bom. 416.**

———S. 72—*Risk note Form B—Theft in a running train—Onus of proof.*

Where there is a risk note in Form B in the case of a theft in a running train, the company is protected by the risk note. It is open to the consignor in such a case to prove that theft did not occur in the running train or that the theft was brought about by the company's servants But if nothing more can be proved except that there was a theft in a running train, then the company by the risk note Form B will be protected, (*Macleod, C. J. and Shah, J.*) B. B. AND C. I. RAILWAY *v.* SARKAR CHAND KALIDAS SHAH. **24 Bom. L. R. 787 : 1922 Bom. 256.**

———S. 72—*Risk note Form H—Wilful neglect—Onus of proving loss.*

A person suing a Railway Company for damages for the loss of goods consigned, under the risk-note in the Form H, is required to show that the loss was due to the wilful neglect of the Company. It is only after showing the wilful neglect on the part of the Company, that the liability is thrown on the Company, of proving that the loss was due to a theft in the running train. (*Macleod, C. J. and Shah, J.*) B. B. AND C. I. RAILWAY *v.* DAYA RAM BECHARDAS. **64 I. C. 4 : 23 Bom. L. R. 583.**

———S. 72—*Loss by fire—Goods delivered to be carried—Liability of Company—Negligence.*

Held, that the plaintiff's goods were "delivered to be carried" within S. 72 of the Railways Act as soon as they were taken into the goods shed of the Railway station and that there was negligence on the part of the Railway Company, inasmuch as they did not do their duty in taking all measures for the protection of goods shed when the risk of fire was imminent or had actually occurred. The liability of a Railway Company in respect of the goods is that of a bailee under S. 151, Contract Act, unless modified by contract approved by Government. (*Scott, C. J. and Shah Din, J.*) NARSINGIJI MANUFACTURING CO. *v.* THE G. I. P. RY. **51 I. C. 309 : 21 Bom. L. R. 406.**

———Ss. 72 and 76—*Loss of goods by fire—Liability of Railway Company.*

Though fire was not due to the negligence of the Company, the company did not take proper precautions to extinguish it, *held* the plaintiff is entitled to the value of the bales at the same rate at which the rescued bales were sold. (*Scott, C. J. and Batchelor J.*) LAKHI CHAND RAMCHAND *v.* GREAT INDIAN PENINSULA RY. CO. **37 B. 1 : 14 I. C. 793 (2) : 14 Bom. L. R. 165.**

———S. 72—*Goods delivered for carriage—Loss—Liability—Onus.*

A railway is responsible for the loss or destruction of goods delivered for carriage in the same measure as a bailee. The Railway is not in the position of an insurer or common carrier. Where goods are not delivered to the consignee at the place of destination, the onus lies upon the Railway to prove circumstances exempting it from liability for negligence. (*Mookerjee and Cuming, JJ.*) SURENDRALAL *v.* SECRETARY OF STATE. **43 I. C. 263 : 21 C. W. N. 1125.**

———S. 72—*Risk note—"Package."*

The word "package" in a risk note means both that which is packed and that in which it is packed, *i.e.*, its covering or receptacle. (*Woodroffe and Cuming, JJ.*) KALI DAS *v.* E. I. RY. CO. **40 I. C. 626 : 21 C. W. N. 815.**

———S. 72—*Liability—Loss due to* vis major.

The liability of a Railway Administration for loss of goods entrusted to it for carriage is the same as that of a bailee. A plff. suing a Railway Company for damages for non-delivery of goods consigned to it for carriage need not prove how the loss occurred. The Company must show circumstances which exempt it from liability. Plff. made over to Railway Company certain goods for despatch. The Railway Company loaded and despatched them in the ordinary course of business that very day without unnecessary delay. Part of the distance the goods had to be carried over a river on flats where the goods were lost by the sinking of flats by a cyclone. The Railway Company was not liable, the cause of the loss

RAILWAYS ACT (IX OF 1890), S. 72.

being an act of God and not the negligence of the Company. (*Mookerjee and Cuming, JJ.*) SURENDRA LAL *v.* SECRETARY OF STATE.
38 I. C. 702 : 25 C. L. J. 37.

——— **S. 72**—*Loss of goods—Taking benefit of reduced freight—Effect of.*

Where tins of ghee were consigned to be carried by a Railway Company and some of them being lost, the owner agreed to take the benefit of reduced freight under S. 72 of the Railways Act in lieu of the loss. *Held*, that the Company was discharged from the onus, if any, that lay on them and they were not responsible for the loss. (*Holmwood and Chapman, JJ.*) LAL CHAND SEN KARAN *v.* EAST INDIAN RAILWAY CO.
19 I. C. 242 : 17 C. W. N. 635 (note).

——— **S. 72**—*Loss of goods—Liability—Contract—Onus.*

In case of loss of goods consigned through a railway company with a contract providing that the company would be liable for any loss only if it is due to wilful negligence or theft on the part of the company's servants, the burden of proving that the loss was due to such causes making the company liable for it, is on the plff. (*Harrington and Caspersz, JJ.*) SHEO BARAT RAM *v.* BENGAL NORTH WESTERN RAILWAY CO.
15 I. C. 56 : 16 C. W. N. 766.

——— **S 72**—*Effect of breach of sale rules.*

A sale contrary to rules is a nullity and the consignee is entitled to damages. (*Jenkins, C. J. and Chatterjee, J.*) JANKIDAS *v.* B. N. R. CO.
15 C. L. J. 211 : 13 I. C. 509 : 16 C. W. N. 356.

——— **Ss. 72 and 77**—*Loss of goods—Liability of Railway Company—Risk-note—Effect of.*

It is not the law that in the case of non-delivery, loss ought to be presumed and the plaintiff's suit dismissed on the ground that he failed to prove that the same was due to the wilful neglect of the Company or of its servants. In such cases the Railway Company must give proof of the actual loss of the goods that it is not sufficient that they have not been delivered. After the loss is proved, it is for the claimant to prove the exceptional circumstances mentioned in the risk-note making the Railway Company liable for damages as wilful neglect on the part of the Railway servants or theft by them. There is no authority for the contention that" loss." in a risk note includes loss by non-delivery or conversion. (*Moti Sagar, J.*) G. I. P. RY. CO. *v.* FIRM OF PANNA LAL GOPALJI. **1923 Lah. 609.**

——— **S. 72**—*Risk-notes A and B—Short delivery—Onus on Railways.*

In case of short delivery of a consignment booked under Risk-notes in forms A and B the initial onus of establishing loss, destruction or deterioration of or damage to the said consignment, lies on the Railway Administration concerned, and the onus of proving that it was due to the neglect of the Railway Administration or to theft by, or to the wilful neglect of. its servants, etc., should not be thrown on the person claiming compensation for it. A Railway company seeking shelter under a risk note for the non-delivery of the whole or a part of a consignment must show that it was lost. (*Zafar Ali, J.*) EAST INDIAN RAILWAY CO., LTD *v.* FIRM OF MOHAN LAL PANNAMAL. **1923 Lah. 432.**

——— **Ss. 72 and 77**—*Loss of consignment—Notice.*

When there is a loss of consignment, notice of loss to the Railway Company under S. 77 is necessary: (*Le Rossignol, J.*) THE EAST INDIA COMPANY *v.* RAHI BUKSH. **1923 Lah. 72.**

——— **S. 72**—*Carriage of goods—Railway's risk—Shortage in weight—Open delivery—Refusal to give—Suit for damages does not lie.*

There is no provision in the Railways Act or any rule or regulation made under it, making it incumbent upon a Railway Company to effect an open delivery and the consignee could not insist on the Railway authorities to open the parcel and compare its contents with the items given in the beejak in his possession. The consignee is not justified in refusing to take delivery of the parcel for that reason and he cannot prefer-a claim for the price of the goods as on a refusal to deliver. 11 A L. J. 772 Foll. (*Abdul Raoof, J.*) SECRETARY OF STATE FOR INDIA *v.* SHAM LAL DEOKI NANDAN. **4 U. P. L. R. (Lah.) 65 : 1922 Lah. 448.**

——— **Ss. 72 and 76**—*Risk-note—Suit for compensation for loss—Onus.*

Where goods consigned to a Railway Company under the special terms of a risk note are lost and a suit is filed for damages, the plaintiff has to prove how the loss occurred. (*Oldfield and Devadoss, JJ.*) NARAYANA AIYAR *v.* S.I. RY. COMPANY, LTD. **75 I. C. 260 : 18 L. W. 322.**

——— **S. 72**—*Carriage of goods—Liability for loss—Contract Act, Ss. 151 and 152—" Loss "—Meaning of—Default of servant.*

Railways in India are common carriers ; and a Railway Company has not the liabilities of an insurer but only those of a bailee under Ss. 151, 152 and 161 of the Contract Act. 40 Cal 716 and 18 Cal. 620 Foll. It is open to a Railway Company to limit its liability under a special contract in respect of the minimum care which the Contract Act imposes on bailees 32 Mad 95; 25 M.L.J. 162 Ref Where in pursuance of a special contract embodied in a risk note a Railway in consideration of acceptance of a reduced charge, limited its liability only to cases of loss through wilful negligence. *Held*, the Company can be held liable only for the loss of a complete consignment or one or more complete packages and the company would be exempted from liability where there has been merely" destruction, deterioration and damage". It cannot be said that there is no loss whatever to the contents if the outer cover which encloses the parcel was delivered by the Company. Per *Seshagiri Aiyar, J.* Persons who undertake to do certain things and who employ servants to do those things must be responsible for the careless negligence or wilful default of the servants in the discharge of their duties. (*Oldfield and Seshagiri Aiyar, JJ.*) THE M. & S. M. RY. *v.* MATTAI SUBBA RAO. **38 M. L. J. 360 : (1920) M. W. N. 198 : 28 M. L. T. 49 : 55 I.C. 754 : 11 L. W. 358.**

RAILWAYS ACT (IX OF 1890), S. 72.

——— S. 72—*Risk note Form B—Non-delivery—Onus is on Company to show loss.*

In a suit by a consignor for damages for non-delivery of goods consigned under risk note in Form B if the Railway fails to prove that the circumstances in which the risk note is intended to operate and exempt them from liability have occurred, that is to say, that the goods in the particular case have actually been lost or destroyed, the Railway Company will be liable in damages. (*Batten, J. C.*) DAUDBHAI *v.* G. I. P. RAILWAY, **6 Nag. L. J. 97 : 1924 Nag. 43.**

——— **Ss. 72 and 151**—*Delivery and acceptance—Loss by fire.*

The making over of the goods to and the receipt of them by the station-master following upon the letter of instructions by D. T. S. is delivery for carriage within the meaning of S. 72. Loss or damage by fire having been committed, it is for the defendant company to prove that they had taken the care described in S. 151, and that there was no negligence on their part. (*Kotwal and Prideaux, A. J. Cs.*) C.I.P. RAILWAY CO. *v.* WHITTLE & CO. **1923 Nag. 174.**

——— S. 72—*Non-delivery of goods—Suit for damages—Negligence—Burden of proof.*

In a suit by a consignor for damages for non-delivery of goods the Railway company must prove actual loss of goods to come within the exception clause. The onus probandi of due diligence is primarily on the railway and it is only then that the consignor will have to prove the existence of exceptional circumstances excepted in the risk note. (*Dhobley, A. J. C.*) DAUDBHAI *v.* G. I. P. RY. CO. **69 I. C. 750: 5 N. L. J. 233.**

——— S. 72—*Risk-note Form B—Loss of goods—Theft—Want of care—Burden of proof.*

The right of a Railway Company to limit its liability in consideration of a reduction of the freight by special agreement has been recognised. The burden of proving wilful neglect on the part of the Railway Administration or its servants lies on the plaintiff. Wilful neglect may be inferred from the fact that the steps taken to secure the goods against loss by theft were inadequate. A theft is not the same thing as robbery from a running train because the latter imports the idea of the use of force. (*Kanhaiya Lal, J. C.*) ROHILKHAND AND KUMAUN RY. CO., LTD *v.* BRIJ RAJ. **10 O.L.J. 58 : 9 O. & A. L. R. 421: 1923 Oudh 212.**

——— S. 72—*Risk note form B—Responsibility of railway—Rights of consignor.*

S. 72 (2) of the Railways Act limits the responsibility of the railway company to the extent specified in a risk note filled up and signed by the consignor. In the case of a consignment lost in transit and covered by a risk note in form B the onus of proving neglect or theft by the railway administration or its servants lies on the consignor 39 All. 418; 43 Bom 769 ref. (*Dalal, A. J. C.*) HAZAI LAL *v.* SECRETARY OF STATE FOR INDIA. **8 O. L. J. 588: 1922 Oudh 170.**

——— S. 72—*Contract contrary to Risk note—Contract Act Ss.* 151 & 152 *apply.*

The ordinary law as to the performance of contracts to be found in Ss. 151 and 152 of the Contract Act applies where the Railway makes a special contract contrary to risk note. The individual with whom the contract is made can take advantage of the contract. (*Foster, J.*) THE EAST INDIAN RAILWAY COMPANY *v.* THE NADIA COAL COMPANY. **1 Pat. L. R. 336: 1924 P. 39.**

——— S. 72—*Risk note form B—Protection under when available to Railway Company—Liability of consignor—Ratification.*

Where a plaintiff who consigned his goods for carriage by the defendant Railway Co. under a risk-note in Form B brought a suit for compensation for non-delivery of the goods, the defendant company cannot escape liability by having recourse to the risk-note unless they have pleaded loss or destruction in their written statement. In such a case the plaintiff may rest his claim on the presumption that the goods were still in the possession of the Railway Company, a presumption which may be raised under S. 114, Illn. (*d*) of the Evidence Act. The reason why it is so necessary to lay stress on the pleading in such a case is this—that the plaintiff has already a very heavy burden indeed and that it would not be just to increase the burden by excusing the defendant from the necessity of pleading 'loss' or 'destruction'. It may be loss in the ordinary sense of the word or it may be destruction by fire or water or vermine but the plaintiff should at least have some knowledge that the goods are no longer in company's possession. Where a broker signs a Risk-note B on behalf of a buyer of goods, the latter may ratify the contract including the contract of carriage with the Railway under the Risk-note B. (*Foster, J.*) EAST INDIAN RY. CO. *v.* FIRM SUKHDEO DAS. **4 Pat.L.T. 443: 1924 P. 25.**

——— S. 72—*Risk-note—Package—Meaning of*

Held, following 41 C. 576 and 21 C. W. N. 815 that the word "package" means both that which is packed and that in which it is packed *i.e.* its covering or receptacle. (*Das and Adami, JJ.*) BHAGWAN DAS *v.* THE EAST INDIAN RY. CO. **4 Pat. L T. 392: 1923 P. 487.**

——— **Ss. 72 and 80**—*Loss of goods—Misdelivery—Negligence—Liability of Railway Company.*

Under Ss. 72 and 80 of the Railway Act, loss of goods includes loss suffered by the consignor or the owner whether such loss occurred by reason of misdelivery or non-delivery. 41 M. 871; 43 M. 617; 43 B 386 Foll. Where a contract, as for instance a risk-note, contains an exception and a proviso, the party who desires to take the benefit of the exception must not only plead it but prove it, and if that is done, the other party who desires to take the benefit of the proviso must prove that the subject-matter is not within the exception. In the case of a risk-note in form B, the onus is in the first instance upon the Railway Administration to prove that there was loss of the description for which the Railway is entitled to claim exemption from responsibility and when that is done the onus shifts to the consignor to prove that the loss was due to the wilful neglect of the administration or their servants within the meaning of the proviso, 45 Bom. 1201; 44 I.C. 395

RAILWAYS ACT (IX OF 1890), S. 72.

distinguished. (*Mullick and Bucknill, JJ.*) THE G. I. P. RY. CO. *v.* JITAN RAM NIRMAL RAM.
2 Pat. 442 : 1923 Pat 82 : 4 Pat. L. T. 173 : 1 Pat. L. R. 169: 1923 P. 285.

——— S. 72—*Risk note signed by agent—Consignor is bound—Loss—Onus of proof.*

Under S. 72, if a person who delivers the goods to the company signs the Risk-note, the consignor is bound and he cannot impugn the authority to sign. Where a risk-note is proved to be valid and the company has proved loss, the burden is on the other party to establish that the loss was due to wilful neglect of the Ry. administration or to theft by or due to the wilful neglect of its servants. (*Macpherson, J.*) EAST INDIAN RY. CO. *v.* MESSRS. GOPIRAM GOURISHANKAR.
1924 P. 315

——— Ss. 72 and 76—*Risk-note—Forms A and B—Effect of—Liability of company—Onus—Difference.*

The effect of risk-notes A and B is to limit the ordinary liability of the Railway Company under Ss. 72 to 76 of the Railways Act. The company becomes bailee under Ss. 151, 152 and 161 of the Contract Act and are common carriers. The ordinary liability to which under Ss. 72, 76 the Railway Coy. will be subject for loss, destruction, etc., as carriers, is intended to be limited under these Risk-notes, the consideration being the reduction in the tariff rate. Under them, the company is only liable for the loss of one or more complete packages due to wilful neglect of its servants, transport agents or carriers. The plaintiff in such a case must set forth all the particulars constituting wilful neglect or default and substantiate the same, the onus being on them. The onus would have been otherwise in the absence of risk-notes, if the case were simply under the Railways Act. Case law on this point of distinction referred to. (*Jwala Prasad, J.*) G. I. P. RY. COMPANY *v.* JITAN RAM NIRMAL RAM.
3 Pat. L.T. 222 : 1922 P. 17.

——— S. 72—*Liability of railway for goods consigned on risk notes—Onus.*

In a suit for compensation for non-delivery of goods consigned to the railway for carriage on an approved risk-note, it is for the railway company to prove the loss, and for the plaintiff to prove that the loss was caused by the theft or wilful neglect of the company's servants. 39 A. 418, Foll. (*Robinson, Offg. C. J.*) JAMNADHAR BALDEVDASS *v.* BURMA RAILWAYS COMPANY, LIMITED.
64 I. C. 395 : 13 Bur. L. T. 190.

——— S. 72—*Loss of goods—Negligence—Extent of liability of Railway Company.*

The nature and extent of the responsibility for the loss of goods delivered to a Railway to be carried is clearly laid down by Sec. 72 is that of a bailee under Ss. 152 and 161 of the Indian Contract Act. The Railway are bound to take such care of the goods bailed to them as a man of

RAILWAYS ACT (IX OF 1890), S. 72.

ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

In the present case, the train was travelling from Shewan to Dadu in open day light with a valuable cargo. The doors of the waggon were not locked. It was known that thefts from running trains had frequently occurred. In spite of this knowledge no measures were taken to guard against theft by the Railway Company. *Held*, that the Railway Company is responsible for the loss as no man of sense would leave valuable goods stored in an unlocked ware-house, situated in some out of the way place, altogether unguarded knowing that there were thieves in the neighbourhood. Also the Ry. Administration cannot be absolved from all obligations to watch the goods in their charge merely because the ware-house in which they are stored is in a state of rapid movement. (*Crouch, A. J. C.*) FIRM OF NIKOOMAL LOKUMAL *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.
39 I. C. 904 : 10 S. L. R. 196.

——— S. 72 (1)—*Consignment of goods—No receipt taken—Liability of Railway Company.*

When delivery of goods was made to company's servant without Ry. receipt, the Company was held liable for the loss by Railway Act. (*Piggott, Walsh and Gokul Prasad, JJ.*) SOHANPAL *v.* THE E. I. RAILWAY.
20 A. L. J. 31 : 44 A. 218 : 1922 A. 9.

——— S. 72, Cl. (a) and (b)—*Goods consigned under Risk-note Form H'—Loss of goods—Onus of proving negligence.*

Where goods are consigned to a Railway under Risk-note Form H, the Railway is not liable for the loss of goods unless the loss was caused by theft by one or more of the Ry. servants or by their wilful neglect and the consignor must prove wilful neglect since he has entered into a special form contract. Whether the expression "robbery from a running train" in Risk-note Form H, means anything more than an ordinary theft is doubtful. (*Richards, C. J. and Banerjee, J.*) E. I. RY. *v.* NILKANT.
39 All. 418 :15 A. L. J. 321.

See, also, 19 C. L. J. 142 : 41 Cal. 576 : 22 I. C. 679 : 19 C. W. N. 95: 39 I. C. 130.

——— S. 72 (1)—*Loss of goods—Responsibility of Railway Co.— Risk-note—Burden of proof.*

The plaintiff sued the defendant Railway Co. for damages for failure to deliver a bale of cotton which he had consigned at Nagpur for delivery to himself at Ahmedabad. The plaintiff had executed Risk-note in Form B. *Held* that to lay a foundation for the company's liability the plaintiff would have to prove non-delivery, loss, destruction, or deterioration of the goods bailed but the responsibility under S. 72 (1) might be limited by special contract as provided in S. 72 (2). Risk-note, Form B is one form of such contract. Where the Railway Company admit non-delivery but set up in defence the Risk-note, it is for them to plead and prove the circumstances

in which the Risk-note is intended to operate and exempt them from liability or in other words, the goods have been lost or destroyed. Neither a mere allegation or loss by the Company nor an admission of non-delivery by the plaintiff is proof of such loss. If the Railway Company prove the loss, which they may do, they are exempted from liability by the risk-note unless the plaintiff prove that his cases come within the exception mentioned therein, it may be that the loss alleged by the Railway Company is admitted by the plaintiff. In such a case the Company need not adduce evidence to prove the loss. 14 N. L. R. 122 Dist. (*Hallifax, A. J. C.*) HANUMANT RAM *v.* G. I. P. RAILWAY CO. **19 N. L. R. 56 : 1923 Nag. 223.**

——— S. 72 (2)—*Risk-note, Form B—Theft of goods in transit—Robbery—Company not liable for loss.*

The meaning of the term "Robbery" in risk-note, form B is the same thing as theft and not as defined by the Indian Penal Code. Where goods consigned under risk-note form B were stolen during transit the railway cannot be held liable for the loss under the terms of Risk-note Form B. (*Ryves, J.*) G. I. P. RAILWAY CO. *v* FIRM OF BHOLA NATH DEBI DAS. **L. R. 3. A. 464**

——— Ss. 72 (2) and 76—*Risk-note, Form B—Proof of negligence—Onus—Contract Act, Ss* 151, 152 *and* 161.

In a suit for compensation for the loss of goods consigned under a risk-note in form B, the deft. Railway Company would not be liable if the plff. fails to prove that the loss was due to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of its servants. 16 C. W.N. 766, Foll. The case would be guided by the terms of the special contract embodied in the Risk-note, Form "B" and not by Ss. 151, 152 and 161 of the Contract Act or the other provisions of the Railways Act. (*Richardson and Beachcroft, JJ.*) THE E.I. RY. CO., LTD. *v.* KANAK BEHARI HALDAR. **44 I. C. 691 : 22 C. W. N. 622.** See also 15 I. C. 56 : 16 C. W. N. 766.

——— S. 72 (2)—*Improper signing of a Risk-note—Company not free from liability only.*

The signing of the name of the principal by the agent without signing his name as agent in a risk-note is not 'signing' and therefore the Company is not free from liability. Provisions of S. 72 must be very scrupulously observed. (*Holmwood and Mullick, JJ.*) MOHABASHA *v.* SECRETARY OF STATE. **32 I. C. 393: 20 C. W. N. 685.**

——— S 72 (2) (b)—*Risk-note, Form B—Contract in—Public policy—Short delivery of goods—Railway Company's liability.*

The agreement known as "Risk-note, Form B" is not contrary to public policy and absolves a Railway Company from all liability for short delivery of goods, provided there is no loss of a whole consignment or of one or more complete packages of consignment. (*Chitty and Teunon, JJ.*) WILLIAMS DRING *v.* SHIV PRASAD BHAKAT. **18 I. C. 216 : 17 C. W. N. 529.**

——— S. 72 (2)—*Railway Company—Liability for loss of consignment.*

Where the plff. sued to recover money paid by him for a Railway receipt for *charas* sent to him by the deft. which consignment was lost by the Railway, held in the absence of any special rate paid or tendered by the consignor as required by S. 72 (2) the Railway administration was not liable. (*Le Rossignol, J.*) SOBHA SINGH *v.* MELA MAL. **2 P. L. R. 1919.**

——— S. 72 (2)—*Risk-note, Form B—Neglect of Railway servant—Burden of proof.*

Where a consignor has agreed with a Railway Company to limit his liability by executing a risk-note in Form B the onus is upon the consignor or consignee to prove that the loss was due to wilful neglect or theft by the Railway Administration of its servants. (*Adami, J.*) BADRI DAS *v.* EAST INDIA RY. CO. **4 Pat. L. T. 185 : 1923 P. 325.**

——— S. 72 (2) (b)—*Risk-note—Form B—Deviation from route—Liability for loss.*

Where a railway company carries goods covered by a risk-note in Form B otherwise than by the agreed route to suit its own convenience, without notice to the consignor and without giving him an opportunity to consider whether he should sign a risk-note in Form B, the Company's liable for damages for loss of the goods and could not rely on the protection afforded by the risk-note. (*Macleod, C. J. and Coyajee, J.*) VALI MAHOMED HAMAD *v.* G. I. P. RAILWAY CO. **46 Bom. 830 : 24 Bom. L. R. 316 : 1922 Bom 74.**

——— S. 72 (2) (b)—*Risk-note—Form H—Loss of goods—Wilful neglect—Inference from conduct—Onus of proof.*

Goods were delivered to a Railway Company to be conveyed to a certain place under the usual risk-note Form according to which in consideration of a specially reduced tariff, under which the consignor agreed to hold the Railway Company free from all responsibility for any loss, destruction, or deterioration of or damage to all or any of the consignment from any cause whatever except loss due to wilful neglect or theft, wilful neglect not including fire, robbery or any unforeseen accident. In a suit by plaintiff for shortage of a part of the goods, *held* on the facts the loss was due to theft owing to wilful negligence of the Company also. Plaintiff having proved a *prima facie* case the onus was on the Railway company to offer some reasonable explanation to escape liability. (*Macleod, C. J. and Shah, J.*) THE CENTRAL INDIA SPINNING AND WEAVING COMPANY *v.* G. I. P. RAILWAY CO. **24 Bom. L. R. 272 : 1922 Bom. 46.**

——— S. 72 (2) (*b*)—*Risk-note form H—Goods consigned under—Loss of—Suit for damages for—Onus on plff.*

In a suit for compensation for the loss of goods booked for carriage by railway under a risk-note

RAILWAYS ACT (IX OF 1890), S. 72.

(Form H), the onus lies on the plff. who alleges that the case fell within the exceptions mentioned in the risk-note to prove the facts necessary to charge the company with liability. (*Kumaraswami Sastri, J.*) ALBUQUERQUE AND SONS *v.* THE SOUTH INDIAN RAILWAY COMPANY.
43 M.L.J. 90 : (1922) M.W.N. 328 : 16 L. W. 667 : 31 M. L. T. 470 (H. C.) : 1922 Mad. 231.

——S. 72 (2) (b)—*Risk-note H or B—Liability of railways.*

In cases where goods are consigned under risk-note B or H it is incumbent on the plaintiffs to prove in order to succeed wilful neglect on the part of the railway or theft. (*Adami, J.*) THE BENGAL NORTH WESTERN RAILWAY COMPANY *v.* ABDUL KARIM. **1922 P. 419.**

——S. 72 (3)—*Loss of goods—Suit for damages.*

Consignee alone can sue for damages for loss of the goods consigned. (*Philiips, J.*) M. & S. M. RY. Co. *v.* K. RANGASWAMY CHETTY.
1924 M. 517.

——Ss. 73 and 72—*Death of birds consigned—Value—Ascertainment of.*

On the death of certain birds due to the negligence of the Railway Company the Railway Company is liable to pay compensation at the rates specified in Sec. 73, if the consignor omits to declare value. (*Banerjee, J.*) ARRATOON M. J. *v.* E. I. R. Co. **38 I. C. 143.**

——S. 75—*Exemption from liability—Onus.*

To avoid liability under S. 75 of the Railways Act, a Railway Company must establish, first, that the articles composing the consignment were articles mentioned in the second schedule to the Act, and, secondly, that the total value of the consignment exceeded Rs. 100. (*Stuart, J. C.*) SHUDARSHAN *v.* E. I. RAILWAY COMPANY.
42 All. 76 : 53 I.C. 644 :17 A. L. J. 1031.

——S. 75—*Loss of package—Company's Liability necessity of declaration, package meaning of.*

"When any article mentioned in the second sch., contained in any parcel or package, for carriage by Railway are delivered to a railway administration and the value of the articles of the parcel exceeds Rs. 100 the railway administration shall not be liable for the loss of the parcel or package or for the destruction or damage, unless the sender or person delivering the parcel to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel for carriage by Railway."

A parcel booked as a luggage is no less a package within the meaning of S. 75 of Railway Act. (*Tudball and Chamier, JJ.*) EAST INDIAN RAILWAY *v.* M. K. ROY. **13 A. L. J. 658 : 30 I. C. 400 (All.) : 37 A. 463.**

——S. 75—*Precious metal—Theft in transit—Mode of theft.*

S. 75 lays down that the consignor must declare the value of precious metal consigned and pay the percentage to hold the company responsible for the loss. Mere signing of a risk-note does not bind the Company. The section embraces the thefts of goods in transit even though the actual way of the theft is not proved. (*Richards, C. J. and Banerjee, J.*) NARAYAN DAS *v.* E. I. RAILWAY CO. **34 All. 656 : 10 A. L. J. 297 : 16 I. C. 369.**

RAILWAYS ACT (IX OF 1890), S. 75.

——Ss. 75 and 80—*Suit for damages—Short delivery—Matters to be proved.*

In a suit for damages against a Railway Co. for short delivery of certain packages sent, the plff. must prove that the packages were lost while in the possession of the Ry. Co. S. 75 of the Act affords protection to, not only articles which ought to be insured, but to all articles contained in the package in which the articles protected were placed. 33 Bom. 703. Foll. (*Banerjee, J.*) GREAT INDIAN PENINSULA RAILWAY *v.* SHAM MANOHAR.
34 All. 422 : 14 I. C. 803 : 9 A. L. J. 492.

——S. 75—*Value of articles—Loss of includes consequential damage—Articles of special value—Damages—Measure of.*

Plff. delivered to the deft. Railway Company a parcel containing the account books for carriage from Bombay to Nagpur. The parcel was misdelivered to a person who thinking that the parcel was the one which was sent to him from Khandwa for destruction of the papers therein destroyed the account books. The plff. sued the deft. Railway Company for damages for Rs. 25,000; *Held*, Per *Scott, C. J.* S. 75 of the Railways Act applies to articles of special value declared by the legislature in the schedule. They must therefore be articles free from any *pretium affectionis* on the part of the owner that is to say, which could be valued by any sufficiently trained expert quite apart from the feelings of the owner. The damages recoverable against the Railway Company, was the value of the property lost and nothing more. The plff. could not sue for any remote or consequential damages which he might allege he had suffered from the loss. The plff. could recover Rs. 70 as the actual cost of the books and no more. *Per Macleod, J*—The protection under S.75 lasted as long as the Railway Company were liable as carriers and in this case their liability would continue after the goods had arrived at their destination for such reasonable time as would be required for the consignee to come to take delivery. The whole object of S.75 would be defeated if the consignor could claim consequential damages for the loss of an excepted article without insuring it on the ground that its value was over Rs. 100. The section was an absolute bar to an action against the Railway Company for any amount exceeding Rs. 100 for the loss, and the consequences of the loss of excepted goods entrusted to them for carriage unless a declaration had been made under the section. The word "value" in S. 75 did not necessarily mean "market value." If an article has a special value to the owner beyond the market value and if he wished to recover that value he must declare and insure the goods. If however a loss occurred the liability of the Railway Company was limited by S. 75 (2) to the true value. (*Scott, C. J. and Macleod, J.*) GREAT INDIAN PENINSULAR RY. CO. *v.* RAMCHANDRA JAGANNATH. **43 Bom. 386 : 49 I. C. 396 : 21 Bom. L. R. 6.**
[On appeal from 20 Bom. L.R 591 : 41 I.C. 401.]

RAILWAYS ACT (IX OF 1890), S. 75.

——S. 75—*Misdelivery of goods—Liability for loss—"Value loss"—Meaning of.*

The value of the articles in S. 75 means intrinsic value of the articles, *i.e.* market value, *i.e.* price for which they would reasonably sell at the time in the market as well as the value in the market independently of any circumstances peculiar to the plff. Under S. 75, the loss for which a Railway Company is protected from liability, must be the loss to the Railway Company itself and it must be the loss which occurs while the goods are in their custody as carriers and cannot apply to a loss to the owner. Negligent misdelivery of goods to a person other than the owner is not such a loss of goods within the meaning of S. 75. (*Kanjiji, J.*) RAMACHANDRA JAGANNATH *v.* GREAT INDIAN PENINSULA RAILWAY.

44 I. C. 401 : 20 Bom. L. R. 591.

[**On appeal 43 B. 386 : 49 I. C. 396 : 21 Bom. L. R. 6.**]

——S. 75—*Parcel containing silk—Value of over Rs. 100—Parcel not insured—Liability.*

Where a parcel consigned to a Railway Company contains silk, in a manufactured or unmanufactured state and whether wrought up or not with other materials of the value of Rs. 100, the Railway Company are not responsible for the loss and for anything contained in it, if the parcel were not declared or insured. (*Holmwood and Mullick, JJ.*) EAST INDIA RAILWAY CO. *v.* CHANGA KHAN. **42 Cal. 888 : 19 C. W. N. 1034 : 28 I. C. 245 : 22 C. L. J. 212.**

——S. 75 and Sch. II, Item (m)—*"Shawl" alwan of small value—Article sent through Railway and Steamer Companies—Loss in transit over Railway—Liability of Steamer Companies.*

The term "Shawl" need in item (m), Sch. II, Railways Act refers to valuable Indian Shawals such as alwans. Where a parcel containing alwans was delivered to a Railway Administration for carriage and the value of the articles exceeded Rs. 100, the Railway administration shall not be responsible for the loss of the parcel unless the sender caused its value and contents to be declared under S. 75 of the Railways Act. A parcel was delivered to a Railway to be carried by the Railway and certain Steamer Companies, and the parcel was lost in transit over the Railway. The Steamer Companies are in no way liable for the loss. (*Brett and Sharfuddin, JJ.*) SARAT CHANDRA BOSE *v.* SECRETARY OF STATE.

14 I. C. 726 : 39 Cal. 1029.

——S. 75 and Sch. II, cls. (M) and (S)—*'Shawls'—Meaning of.*

S. 75 applies to all articles specified in Sch. II whether they are of any special or exceptional value or not. 'Shawls' in Cl. (M.) of Sch. II should not be interpreted in a restricted sense by reference to the use of the phrase 'article of special value' in the marginal note to S. 75. (*Spencer and Ramesam, JJ.*) THE G. I. P. RAILWAY CO., CHELLA RAM GIANCAAND.

14 L. W. 614 : (1921) M. W. N. 852 : 65 I. C. 99 : 41 M. L. J. 603.

RAILWAYS ACT (IX OF 1890), S. 76.

——S. 75—*Applicability.*

S. 75 does not apply when the value of a package does not exceed Rs. 100. (*Benson, O. C. J. and Sankaran Nair, J.*) MADRAS AND SOUTHERN MAHARATTA RAILWAY CO. *v.* BHIMAPPA.

17 I. C. 419 : 23 M. L. J. 511.

——S. 76—*Consignment—Shortage—Burden of proof—Risk-note Form A.*

A person consigned goods under a Risk-note, Form A which stated that the consignment was in bad condition and was liable to damage, leakage and wastage as the cases in which the goods were contained were old, torn and wet. Further the consignor agreed to hold the Railway free from responsibility for the condition in which the goods may be delivered to the consignee at destination and for any loss arising therefrom. In an action by plff. (consignor) for damages for short delivery *held* that the onus lay on the consignor to prove that under S. 76 of the Railways Act the shortage was due to pilferage by the railway servants and the Risk-note, Form A properly protected the railway. (*Ryves, J.*) FIRM OF PARBHOOLAL RAM RATAN *v.* THE BENGAL NORTH WESTERN RAILWAY CO.

1923 A 234 (2).

——S. 76—*Railway Risk-note, B—Short delivery—Railway admitting loss—Liability.*

Where in a suit for compensation for non-delivery of goods entrusted to a Ry. Company under risk-note B form, the company admits that the goods were lost, it cannot escape the liability but must prove that goods were lost by leading evidence. (*Macleod, C. J. and Shah, J.*) CHELABHAI PUNSI *v.* EAST INDIAN RAILWAY COMPANY.

45 Bom. 1201 : 63 I. C. 241 : 23 Bom. L. R. 525.

——S. 76—*Burden of proof as to time of loss.*

The burden of proof as to when the goods were lost is on the Railway Company. (*Benson, O. C.J. and Sankaran Nair, J.*) MADRAS AND SOUTHERN MAHRATTA RY. CO. *v.* BHIMAPPA.

17 I. C. 419 : 23 M. L. J. 511.

——Ss. 76 and 80—*Railway Company—Suit for loss or destruction of goods—Onus of proof—Risk-note.*

In a suit against a Railway Company for compensation for loss, destruction, etc., of goods entrusted to them for transit, the plaintiffs ordinarily need prove only the loss. The Railway may then either show that the loss occurred in circumstances which exempted a bailee from the responsibility for the loss or they may rely upon a special contract which exempts them from liability. When there is a risk-note which is a special contract exempting the Railway from all liability except in certain specified cases, the plffs. can succeed only if they establish that their case comes within these exceptions. Under S. 80 of the Railways Act no suit will lie against a Railway Company to whom the goods were not entrusted unless it is shown that the loss occurred while the goods were in their possession. In no case can a decree be passed against both the companies. (*Mitra, A. J. C.*) AGENT, G. I.P. RY. CO. *v.* KARAYAL.

48 I. C. 294 : 14 N. L. R. 122.

RAILWAYS ACT (IX OF 1890), S. 76.

——S. 76—*Non-delivery—Wilful neglect of Railway Co.—Liability.*

The Railway Company cannot plead in defence the risk-note as freeing it from all responsibilities, when the loss of the property in question is due to the wilful neglect of the Railway administration or theft or neglect of its servants. (*Jwala Prasad, J.*) EAST INDIAN RY. CO. *v.* KALI CHARAN RAM PROSAD.

3 P. L. T. 215 : 1922 Pat. 145 : 1922 P. 106.

——S. 76—*Contract under risk-note, form B.*

The burden of proof lies on the plaintiff, to prove facts from which it can be fairly and reasonably inferred that loss was due to wilful neglect of company which cannot be presumed from loss of special contract. (*Pratt, J. C. and Crouch, A.J. C.*) FIRM DOULAT RAM *v.* SECRETARY OF STATE. **32 I. C. 551 (2) : 9 S. L. R. 177.**

——S. 77—Notice.

See also RAILWAYS ACT (1890), S. 40.

——S. 77—*Notice to Traffic Manager if notice to Agent.*

A notice to a Traffic Manager making claims on the company is a claim preferred "to the Railway Administration" within the meaning of S. 77 of the Act and notice of the claim to the Traffic Manager is equivalent to notice to the Agent. 2 I.C. 107, Foll. (*Colvin, J.C.*) RAM GOPAL *v.* AGENT, B. B. & C. I. RAILWAY CO.

13 I. C. 297.

——S. 77—*Damages—Short delivery—Liability.*

In a suit for damages for short delivery, the company cannot plead a Risk-note in defence unless it is shown that the loss was due to theft from a running train or some such cause. (*Gokul Prasad, J.*) EAST INDIAN RAILWAY *v.* MAKHAN LAL BINDESRI PRASAD,

45 A. 575 : 21 A. L. J. 515 : L. R. 4 A. 280 : 1923 A. 605 (1).

——Ss. 77 and 140—*Damages for short delivery--Notice of suit--Notice to subordinate official and not to the agent—Not sufficient.*

Plaintiff delivered certain bales to the defendant Railway for despatch from Cawnpore to Bombay. The Railway delivered the consignment at Bombay with shortage of one bale. The plaintiff sent a notice to the Deputy Traffic Manager of the defendant Railway Company who had been appointed by the Agent of the said Railway for disposing of claims for damages. The plaintiff however made no direct communication to the Agent of the defendant Railways within 6 months of the date on which the goods were delivered for transit. In a suit by plaintiff for damages *held* that the suit must fail for want of a proper notice under S. 140 of the Railways Act. The notice of suit sent to a subordinate official of the Railway who had been appointed to dispose of claims was not a sufficient notice within the meaning of S. 77 of the Railways Act. 28 A. 552 ; 33 A. 544, Foll. (*Lindsay and Daniels, JJ.*) CAWNPUR COTTON MILLS CO., LTD. *v.* G. I. P. RY.

45 A. 353 : L. R. 4 A. 371 : 21 A. L. J. 223 : 1923 A. 301.

RAILWAYS ACT (IX OF 1890), S. 77.

——S. 77—*Notice—Proof.*

Where there was evidence of the plaintiff's son that notices were sent by registered post to the Agents of all three Railways, and there was on record the registered receipt of the Agent of the B.N. Railway, and plaintiff swore that the receipt was for the notice sent and there were letters on the record from the B and N.W. Railway actually making an admission that they were prepared to pay a small sum in full satisfaction of the plaintiff's claim, *held* it was impossible to hold that notice was not sent within the meaning of S. 77 of the Railways Act. (*Ryves, J.*) DUKHI RAM BARAI *v.* B. N. W. RAILWAY.

1923 All. 145.

——Ss. 77 and 140—*Loss of goods—Notice to Traffic Manager—Not enough.*

Where a person sent his goods for carriage by a railway and they were lost in transit, notice of a suit for damages must be given to the Agent of the Company. Correspondence with the traffic manager or notice sent to him does not, in law, amount to notice to the Agent. 28 A. 552, Foll. A direction in the railway receipt given for the goods despatched that all claims should be sent to the Traffic Manager does not dispense with the necessity of giving the notice contemplated by S. 77 of the Railways Act. 33 A. 544, foll. (*Gokul Prasad, J.*) RAM SAHAI CHHIDDA LAL *v.* EAST INDIAN RAILWAY CO.

44 All. 645 : 20 A. L. J. 664 : L. R. 3 A. 311 : 1922 A. 280 (2).

——S. 77—*Notice of claim—Proof of—Offer by Ry. Co. to pay—Estoppel—Limitation Act. Art.* 81.

For a suit for compensation for non-delivery of goods consigned to a Railway Company for carriage, notice of claim as contemplated in S. 77 must be proved. The fact that an offer was made by Railway Company to pay a certain amount in satisfaction of the plaintiff's claim would not estop the Railway Company from raising the plea of notice. (*Stanley, C. J. and Banerji, J.*) G. I. P. RY CO,. *v.* GANPAT RAI.

33 All. 544 : 10 I. C. 122 : 8 A. L. J. 543.

——S. 77—*Goods carried over different Railways--Notice not given to one—Liability.*

Where plff.'s agent at Aleppey in the Madras Presidency consigned to the South Indian Railway Co. certain bags of copra to be carried to Wadi Bunder, Bombay, and where the consignor executed a risktnote whereby he undertook to hold the Railway administration and all other Railway administration working in connection therewith over whose Railways the said goods may be carried in transit from Alleppey to Wadi Bunder harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever before, during, and after transit over the said Railway or other Railways' lines working in connection therewith, or any other agency employed by them respectively for the carriage of the whole or any part of the said consignment, and whereby mistake on the part of the Railway servants the goods went from Jalarpet *via* Madras along the East Coast up to Waltair where they were delivered to the B. N. Railway Co. which

carried them to Ramkrishtapur at Calcutta and where the defendant Company brought them back to Wadi Bunder *via* B.N.R. and G.I.P. after long time considerably damaged and infested by insects and where the surveyors of the plff. and the G. I. P. Co. assessed the damages at Rs. 6 per bag. *Held*, that the deft. G. I. P. Railway Co. were not liable for the acts of M. & S. M. Railway Co. who were liable for a breach of contract but not for any tortious or wrongful act ; but the notice to the M. & S.M. and S.I. Railway Co. being not given within six months though it was given to G. I. P. the M. & S. M. and S. I. Railway Cos. were not liable for damages. (*Macleod, C. J. and Shah, J.*) SHANKAR *v.* S.I. RY.

64 I. C. 390 : 23 Bom. L. R. 866.

——S. 77—*'Loss' includes—Non-delivery.*

A claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. Where detention is not pleaded or put in issue, a claim simply for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of S. 77. The word 'loss' used in S. 77 is wide enough to include all cases where the goods are not forthcoming and therefore included a case of non-delivery. (*Richardson, and Ghose, JJ.*) THE ASSAM-BENGAL RAILWAY CO., LTD. *v.* RADHIKA MOHAN NATH. **1923 Cal. 397.**

——S. 77—*Notice to "Manager."*

The agent of the Eastern Bengal Railway is the Manager within the meaning of the Act, and the notice under S. 77 must be given to the Agent and not to the Traffic Manager. (*D. Chatterjea and Walmsley, JJ.*) KALA CHAND SHAHA *v.* THE SECRETARY OF STATE.

38 I. C. 844 : 21 C. W. N. 751.

——Ss. 77 and 140—*Notice to Claims Superintendent."*

Notice of a claim against a Railway Company served on the Claims Superintendent of the Company, who generally settles such claim is not a sufficient notice under S. 140 unless it is proved that the office was authorised by the agent to receive such notices. (*Chatterjee and Beachcroft, JJ.*) E. I. RY. CO. *v.* RAM AUTAR.

38 I. C. 502 : 20 C. W. N. 696.

——S. 77—*Notice served on Government.*

Notice of claim against a State Railway under S. 77 of the Act is effective if served on Government. (*Chatterjee and Beachcroft, JJ.*) RADHA SHAM *v.* SECRETARY OF STATE. **44 Cal. 16 : 34 I. C. 130 : 23 C. L. J. 547.**

——S. 77—*Suit against Railway for loss of goods—Notice of Agent—Service on Goods Superintendent, if sufficient.*

Notice served on the Goods Superintendent, which however never reached the Agent, is bad for, under S. 77, notice is to be served on the Agent. A promise by the Goods Superintendent to pay a liquidated sum without the knowledge of the agent is not binding on the company. (*Fletcher and Chatterjee, JJ.*) RADHAKISSEN *v.* E. I. RAILWAY COMPANY.

21 I. C. 970 : 19 C. W. N. 62

——Ss 77 and 140—*Claim for damaged goods—Notice.*

Notice of a claim under S. 77 of the Act in respect of goods delivered in a damaged condition must be served under S. 140 on the Agent and not on the Traffic Manager. 13 C. W. N. 24. Dist. (*Harrington and Carnduff, JJ.*) E. I. RY. CO. *v.* MADHE LAL. **18 C. L. J. 147 : 19 I. C. 673 : 17 C. W. N. 1134.**

——S. 77—*Suit against Railway Company—Notice not served according to S. 77—Consignee imposing unauthorised conditions.*

Where notice of a claim against a Railway Company was not served according to S. 77 and otherwise did not satisfy the requirements of S. 77, the suit against the Company must fail. A Railway Company is not responsible for non-delivery of goods if it was due entirely to the imposition of a condition by the consignee which he had no right to impose. (*Jenkins, C. J. and Chatterjee, J.*) JANKI DAS *v.* THE BENGAL NAGPUR RAILWAY COMPANY. **15 C. L. J. 211 : 13 I. C. 509 : 16 C. W. N. 356.**

——S. 77—*Notice received by a subordinate to agent, not enough.*

S. 77 of the Railways Act insists th notice shall be given in writing to the Agent of the Railway Company in India and notice to a subordinate of the Agent is not notice contemplated by the section. (*Le Rassignol and Jafar Ali, JJ.*) B. B. AND C. I. RY *v.* THE FIRM MANOHAR LAL.

4 Lah 46 : 5 L. L. J. 3 : 1923 Lah. 84.

——S. 77—*Notice of loss necessary.*

When there is a loss of consignment, notice of loss to the Railway Company under S. 77 is necessary. (*Le Rossignol, J.*) THE EAST INDIA COMPANY *v.* RAHIM BUKSH. **1922 Lah. 72 (1).**

——S. 77—*Railway—Misdelivery—Suit for damages—Notice of claim for compensation essential.*

In a suit by the plaintiff as endorsee of the Railway receipts against the defendant Railway Company for damages for misdelivery, *held* that it was barred by limitation because the notice prescribed by S. 77 of the Railways Act had not been given to the defendant within 6 months. (*Wallis, C. J. and Spencer, J.*) THE MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY, LIMITED *v.* HARIDAS BANMALI DAS.

41 Mad. 871 : 24 M. L. T. 38 : 8 L. W. 340 : 49 I. C. 69 : 35 M. L. J. 35.

See also 49 I. C. 493 : (1919) Pat. 150.

——Ss. 77 and 140—*Notice—Service on Officer other than Agent—Agent's knowledge of claim—Legality of notice—Maintainability of suit.*

A suit against the Railway Company is maintainable even though the notice is served on any officer other than the Agent provided that it is shown that the Agent had knowledge of the claim. (*Phillips, J.*) AGENT AND MANAGER, S. I. RY. CO. *v.* VANGU PATTAR. **10 M. L. T. 382 : 12 I. C. 169 : 21 M. L. J. 1061.**

——S. 77—*Notice to manager or agent—Not sufficient.*

RAILWAYS ACT (IX OF 1890), S. 77.

S. 77 Railways Act, will apply to all claims for compensation whether due to loss, destruction and deterioration or non-delivery or mis-delivery In every case notice must be given in strict accordance with the section. A letter addressed to the Manager or the Agent in the alternative, unless it is proved that the Agent actually receives such letters as a matter of course is not a valid notice. (*Baker, J. C.*) JIWANDAS *v.* THE AGENT, E. I. RY. CO.

19 N. L. R. 139 : 1923 Nag. 314.

——**Ss. 77 and 140**—*Notice to General Traffic Manager—Not sufficient.*

A notice under S. 77 of the Railways Act must be served within the time prescribed by that section on the Agent or Manager of the Railway Company in one of the modes prescribed by S. 140 of the Act. (*Batten, A. J. C*) DEORAD *v.* G. I. P. RY. COMPANY. **14 I. C. 684 : 8 N. L. R. 34.**

——**S. 77**—*Suit for compensation for non-delivery—Notice necessary.*

In a case where compensation is claimed against a Railway Company for non-delivery of goods, S. 77 applies and a notice of the claim in writing must be sent within the time fixed. (*Macpherson, J.*) EAST INDIAN RAILWAY COMPANY *v.* MESSRS. GOPIRAM GOURISHANKAR.

1924 P. 315.

——**S. 77**—*Non-applicability to case of non-delivery-Notice to General Traffic Manager when sufficient.*

In a suit for possession or compensation on account of non-delivery of the goods consigned to the company which the defendant is bound to deliver to the plff. S. 77 has no application and the company is not entitled to any notice in case of non-delivery. When the assignment of power to settle claims is proved, notice to the General Traffic Manager is sufficient. (*Jwala Prasad, J.*) EAST INDIAN RAILWAY COMPANY *v.* KALI CHARAN RAM PRASAD. **3 Pat. L. T. 215 : (1922) Pat. 145 : 1922 P. 106.**

——**S. 80**—*Goods sent over several Rys.—Loss on particular line not proved—Liability.*

Where goods were handed over to B. N. Ry and travelled over E. I. Ry., O. R. Ry., and B. N W. Ry., also but it was not proved that the loss was caused while passing over the latter, *held* the B. N. Ry. are liable for the damage caused to the goods. (*Ryves, J.*) DUKHI RAM BARAI *v.* B. N. W. RAILWAY. **1923 All. 145.**

——**S. 80**—*Consignment of goods—Loss.*

Where goods were consigned at a station under one Railway Administration and the loss of the goods consigned occurred at a place under another Railway Administration, a suit for damages for the loss of the goods can be brought against either of the Railway Administrations. (*Piggott, J.*) MAKHAN LAL *v.* B. B. & C. I. RAILWAY COMPANY. **25 I. C. 77 : 12 A. L. J. 339.**

——**S. 80**—*Open delivery—Consignment not tampered with—Damage.*

Where the consignment was intact so far as the seals and package was concerned but some little metal clips on the edges were loose, the plaintiff could not compel the Railway Company to give open delivery, though there may be some difference in weight; and so the Company's refusal to give such open delivery did not make it liable for damages. (*Tudball, J.*) JWALA PRASAD *v.* G. I. P. RY.

21 I. C. 448 : 11 A. L. J. 772.

——**S. 80**—*Carriage of goods—Non-delivery—Different Railways carrying goods—Consignment—Bags torn—Refusal to re-weigh.*

Where the consignment was booked in one Railway and was to be delivered at a station belonging to another Railway, the latter were agents of the former and are not liable to be sued for non-delivery. Where the consignee on finding the bags loose and torn, requested the Railway staff to re-weigh them and on refusal by the staff did not take delivery or pay freight. *Held*, that railway authorities were right in selling the bags after due notice to the consignee. The plffs'. suit for damages was unsustainable. (*Chamier and Rafique, JJ.*) KOKAMAL *v.* G. I. P. RY.

21 I. C. 428 : 11 A. L. J. 775 Note.

——**S. 80**—*Carriage of goods by different Railways—Loss of goods—Liability of particular Railway.*

Where goods carried by different Railways were lost in the course of the transit, it is necessary for attaching liability on any particular Railway to prove that the loss occurred on the line of that Railway. (*Fletcher and Chatterjee, JJ*) E. I. RY. CO. *v.* NOPECHAND.

23 I. C. 22 : 19 C. L. J. 434.

——**S. 80**—"*Loss*" *includes loss by mis-delivery.*

"Loss" in Chap. VII of the Act includes loss of goods made over to a Railway Administration which have been misdelivered and so have been lost to the person entitled thereto. (*Scott-Smith, Le Rossignol and Abdul Raoof, JJ.*) HILL SAWYERS & CO. *v.* THE SECRETARY OF STATE.

2 Lah. 133 : 61 I. C. 926 : 3 Lah. L. J. 297 (F. B.).

——**S. 80**—'*Deterioration*'—*Meaning of—Agreement between two Companies—Liability.*

"Deterioration" in S. 80 includes decrease in market value consequent on detention. Notice of an agreement between two companies that each is responsible to the other but not to the public would not relieve the company with whom the goods were, at the time of loss, from liability to the public. (*Reid, C. J. and Rattigan, J.*) INDIA GENERAL N. AND RY. CO., LTD. *v.* HARCHARAN DAS. **233 P. L. R. 1912 : 111 P. R. 1912 : 15 I. C. 12 : 224 P. W. R. 1912.**

——**S. 80**—*Scope of.*

Section 80 which gives an option to a plaintiff to sue one or other of two Railway Administrations in cases where goods have been booked through cannot be construed to mean that where the plaintiff has sued both Railway Administrations he is entitled to a decree against that one of them which has satisfied the Court that it was in no way to be blamed for the loss accruing to the

RAILWAYS ACT (IX OF 1890), S. 84.

plaintiff. (*Lindsay, J. C.*) SECRETARY OF STATE FOR INDIA *v.* AFZAL HUSAIN. **7 O. L. J. 250 : 2 U. P. L. R. (J. C.) 109 : 56 I. C. 714 : 23 O. C. 96.**

——S. 84—*Power of Magistrate to inquire about heirs of deceased Railway Servant.*

The Railways Act does not empower a Magistrate to make an inquiry as to the true heirs of a deceased Railway Servant. (*Hayward, A. J. C.*) ALLAHWARAYO *v.* EMPEROR. **35 I. C. 672 : 17 Cr. L. J. 368 : 10 S. L. R. 64.**

——S. 101—R. 100—*Object of rule—Breach—Punishment.*

The object of S. 101 and rule 100 is to lessen the risk of accidents through shunting on a through line after the line clear has been given. The disregard of the rule enhances the danger to passengers. The breach of the rule will render the rule breaker liable to punishment even though no accident might have occurred. In determining the punishment, the gravity of the offence should be estimated not by the ultimate consequences but by the risk involved. 6 Mad. 201, Rel. (*Scott, C. J. and Shah, J.*) EMPEROR *v.* RAM CHANDRA HARI. **15 Bom. L. R. 702 : 14 Cr. L. J. 460 : 20 I. C. 620 : 37 B. 685.**

——S. 101—"*Endangering*"—*Meaning of—Shunting train to a wrong line.*

In every case where a travelling train is unexpected shunted on to a wrong line by an erroneous laying of the points in a station yard, the safety of the persons in the train or about the yard is endangered within the meaning of that term in section 101; and if the error in the points is due to such disobedience as is *referred* to in the Act, an offence punishable under the Act is committed. From the facts of one case, no safe analogy can be drawn as to whether danger has arisen in the other case. (*Stanyon, A.J.C.*) LOCAL GOVERNMENT *v.* HAR PERSHAD. **18 Cr. L. J. 822 : 41 I. C. 646 : 13 N. L. R. 90.**

——S. 101—*Offence falling under two enactments—Punishment under both, whether legal.*

When an accused by one act endangered the lives of the public and committed an offence under S. 101 of the Act and 353 of Penal Code he can be punished under one Act only and not under both. (*Roe and Jwala Prasad, JJ.*) RAHMATALLA *v.* EMPEROR. **1 Pat L. J. 373 : 18 Cr. L. J. 321 : 38 I. C. 433 (1) : 1 Pat. L. W. 340.**

——S. 101—*Disobedience of a rule.*

S. 101 does not provide for cases in which the disobedience of a rule is merely 'likely' or 'calculated' to endanger the safety of any person. To render a person liable to conviction under S. 101, it must be proved that the safety of a person was actually endangered in point of fact. (*Twomey, J.*) BALIN *v.* EMPEROR. **7 L.B.R. 72 : 15 Cr. L. J. 17 : 22 I C 161 (2) : 7 Bur. L. T. 101**

——S. 101, Sub-S. (a), (b) and (c)—"*General Rules and Regulations*" *apply to all Railways, R. 86—G. I. P. Ry. Working Instructions, R 9—Protection of trains standing outside distant*

RAILWAYS ACT (IX OF 1890), S. 109.

signal—Breach of R. 9 whether to be under Sub-S. (a) or (b) of S. 101—Construction of rules framed by Railways.

The omission of the guard to place detonators to protect the train when it is stopped outside a distant signal amounts to a disobedience under R. 9 of G. I. P. Ry. Working Instructions and is punishable under S. 101 (a). Where a guard is charged under S 101 (b) the onus of proving that a guard charged under S. 101 (b) did not comply with general rule 86 is on the prosecution which burden can be discharged by the Ry. authorities inspecting the line to see if any metallic remnants are formed there. When a train stands outside the distant signal, it is "authorised" detention and not due to "accident, failure or obstruction." The wording of G. I P. Ry. rule 9 is somewhat inappropriate and allowance should be made, considering that even a District Traffic Superintendent misreads the rule. (*Mittra, Offg. A. J. C.*) K. BEZANJI *v.* EMPEROR. **21 I. C. 996 : 14 Cr. L. J. 676.**

——Ss. 108, 121, 128 and 131—*Liability of Railway Co., Assault by Railway servant.*

Where the driver and guard of a Railway Co., assaulted the plaintiff a passanger, for stopping a running train by pulling the alaram chain, *Held*, that the Ry. company itself had no power of arrest and was not liable for the tort of its servant, as the assault committed by its servants was outside the scope of their authority and the course of their employment of the company. (*Scott, C. J. and Batchelor, J.*) GIRJASHANKAR DAYASHANKAR *v.* B. B. AND C. I. RY. **43 Bom. 103 : 45 I. C. 715 : 20 Bom. L. R. 126.**

——S. 108—'*Sufficient cause*'—*Test of—Overcrowding is one.*

No hard and fast rule can be laid down as to what must constitute reasonable and sufficient cause within the meaning of S. 108, Railways Act and it must depend upon the circumstances of each case whether there was such a cause as to justify a passenger in pulling the communication chain. Where a passenger's complaints as to the overcrowding of a compartment are not listened to by the authorities, and finds the compartment packed to suffocation, he is justified in pulling the chain. (*Jwala Prasad, J.*) ISWAR DAS VARSHANI *v.* EMPEROR. **1 Pat. 260 : 1922 Pat. 63 ; 3 Pat. L. T. 195 : 23 Cr. L. J. 257 : 1922 P. 8.**

——S. 109 — '*Passenger*' *includes possible passengers.*

The expression a "Passenger" includes possible passengers. (*Ayling, C. J.*) KOMARAN, *In re.* **45 Mad. 215 : 42 M.L.J. 21 : 30 M. L. T. 134 : 1922 M. W. N. 34 : 1922 M. 35.**

——S 109—*Resistance on ground of maximum number—No offence.*

Passengers are entitled to claim that a compartment does not contain more than the maximum number. (*Jwala Prasad, J.*) ISHWAR DAS *v.* EMPEROR. **1 P. 260 : 3 P. L T. 195 : 1922 Pat 63 : 23 Cr. L. J. 257 : 1922 P. 8.**

RAILWAYS ACT (IX OF 1890), S. 109.

——— S. 109—*Reservation of Ry. Compartment for Europeans—Whether company can remove a passenger entering a reserved carriage.*

S. 109 of the Act confers a general power on the Railway Company to reserve a compartment to passengers of a particular class, community or race and there is nothing illegal in such a provision. The removal of a person by a threat of using force, is a forcible removal. The Railway authorities are not entitled to remove a passanger from a compartment which is reserved for another passenger or class of passengers. (*Fawcett, A. J. C.*) MATHARADAS *v.* SECRETARY OF STATE FOR INDIA. 13 I. C. 237 : 5 S. L R. 140.

——— S. 112—*Conviction—Legality.*

A person charg d under S 112 for entering a railway carriage without a ticket pleaded guilty as to entering the carriage but said that he did not purchase the ticket because the train was about to start. *Held*, that this conviction is bad as his statement amounts to a positive denial of an intention to defraud. (*Walsh, J.*) BANWARI LAL *v.* EMPEROR. 57 I. C 825.

———Ss. 112 and 68—*Wrong ticket.*

Where a passenger travelling by a Railway train on being called upon, produces a ticket bearing date of a previous day throwing away another in his possession, he cannot be held to have dishonest intention so as to justify a conviction under S. 112 as the essence of the offence under that section is an intent to defraud the Railway Company. Unless there is clear evidence to show that a passenger knows that the ticket he is holding has been used before, an intention on his part to cheat the Railway Company cannot be inferred from the mere fact that the passenger knows that he is committing a breach of the Railways Act or rules framed under the Act. If the ticket does not show to its holder that, under the Railway rules it is only available for a particular train or on a particular day, his knowledge of the Railway rules posted on the Stations will not be assumed unless it is proved that the attention of the traveller was drawn to them (*Harrington and Teunon, JJ.*) MANINDRO NATH MITTER *v.* BENGAL NAGPUR RAILWAY COMPANY. 35 I. C. 665 : 17 Cr. L. J 361.

——— S. 113—*Conviction — Liability to pay higher fare—Distress warrant.*

The petitioner was prosecuted for an offence under S. 133 of the Railways' Act (*i.e.*) travelling without a ticket and he pleaded in defence that he had not travelled by the train. The Magistrate without any enquiry issued distress warrant for the amount of penalty imposed. *Held*, the Magistrate could pass orders only after taking evidence on the question whether the accused was liable to pay and how much was payable by him. (*Walmsley and Huda, JJ.*) STATION MASTER, RANNGHAT *v.* KABUL SHEIKH. 21 Cr. L. J. 321 : 55 I. C. 593 (1) : 24 C. W. N. 195.

——— S. 118—*Passenger, meaning of.*

The word "Passenger" in S. 118 of the Railways Act is used in a restricted sense and denotes a person who without permission of a Railway

RAILWAYS ACT (IX OF 1890), S. 122.

servant enters any Railway carriage for the purpose of travelling as a passenger. (*Heaton and Shah, JJ.*) LADHU *v.* EMPEROR. 15 Bom. L. R. 996 : 14 Cr. L. J. 654 : 21 I. C. 894.

——— Ss. 120 and 122—*Removal of passengers.*

There is no provision in the Railways Act for ejecting passengers except in certain circumstance specified in S 120 of the Act and the expression 'railway' in S. 122 does not include a railway carriage. (*Choudhury and Newbould, JJ.*) MOHAMMAD HUSSAIN *v.* FARLEY. 44 Cal. 279 : 18 Cr. L. J. 647 : 40 I. C. 295 : 25 C. L. J. 610.

——— S. 120—*Travelling without ticket does not justify removal.*

Travelling without a ticket is not one of the circumstances mentioned in S. 120 of the Railways Act as justifying removal from a Railway carriage by a Railway servant. (*Campbell, J.*) RADHA KISHEN *v.* EMPEROR. 23 Cr. L. J. 622 : 1923 Lah. 71 (1).

——— S. 120—*Railway official removal of passenger.*

The word "person" in S. 120 of the Act includes railway official and a railway guard who removes a passenger from a compartment which he is entitled to occupy is guilty of an offence under S. 120. (*Abdur Rahim and Napier, JJ.*) CUFFLY *v.* MUHAMADALI MUHAMAD IBRAHIM KHAN. 44 I. C. 329 : 19 Cr. L. J. 313.

——— S. 120 (b)—*Using the delivery shed as a market place for selling fish.*

A person who persists in selling fish in the delivery shed of a Railway, which is not meant to be a market, and obstructs the business for which the shed is prepared is guilty of nuisance within S. 120 (b). (*Teunon and Ghose, JJ.*) DEOKI SHA *v.* EMPEROR. 25 C. W. N. 603 : 62 I. C. 876 : 22 Cr. L. J. 604 : 33 C. L. J. 293.

——— S. 121—*Abuse—If amounts to obstruction.*

Abuse or insult to a railway authority does not necessarily constitute obstruction or impediment to a railway servant in the discharge of his duty and a conviction under S. 121 is not sustainable. (*Campbell, J.*) RADHA KISHEN *v.* EMPEROR. 23 Cr. L. J. 622 : 1923 L. 71.

——— S. 121—*Station Master—Delegation of duties to Signaller—Obstruction—General Rules 229 231 and 244.*

Rules 244, 229 and 231, of the General Rules empower a Station Master to appoint a Signaller temporarily to do the duties of a Ticket Collector. When a Signaller so appointed undertakes such duties and acts in the discharge thereof, he is a "railway servant" within S. 121 of the Railways Act. Obstruction to him is punishable under that section. (*Sadasiva Aiyar and Burn, JJ.*) CHITRALA BHEEMANNA, *In re.* 10 L. W 669 : (1920) M. W. N. 156 : 21 Cr. L. J. 62 : 54 I. C. 414 : 37 M. L. J. 656.

——— S. 122—*Unlawful entry—Essence of offence.*

RAILWAYS ACT (IX OF 1890), S. 122.

Unlawful entry is the essence of the offence under both the clauses of S. 122 of the Railways Act. If the entry was lawful, refusal to leave on being desired to do so would not make the original entry unlawful. Nor would it make a person guilty under cl. 2 which is but an aggravated form of the offence under cl (1). (*Chitty and Smither, JJ.*) DURREL *v.* KUMUD KANTA CHAKKRABARTY. **19 Cr. L. J. 878 : 47 I. C. 74 : 22 C. W. N. 575.**

——— **Ss. 122 and 47 (g)**—*"Unlawful"—Meaning—Trespass on railway line—Offence under S. 122 or S. 47.*

The word "unlawful" in S 122 means without the leave of the Railway Administration and a person entering the railway line without such leave is guilty under S. 122, S. 47 or the bye-laws made under Cl. (g) thereof have no reference to this offence of trespass. 11 C. W. N. 583 rel. (*Johnstone and Shah Din, JJ.*) MOHAN MALIK *v* EMPEROR. **155 P. L. R. 1914 : 15 Cr. L. J 468 : 24 I. C. 348 : 4 P. R. 1914 (Cr.) :**

——— **Ss. 122 (2) and 3 (4)**—*Railway employee rejection of, from staff quarters—If Section applicable.*

S. 122 (2) of the Railways Act is inapplicable to eject a Railway employee from the staff quarters occupied by him while under service, because they are not part of a Ry. under S. 3 (4) of the Act. (*Ayling and Oldfield, JJ.*) MARGAM AIYAR *v* S. J. MERCER. **15 Cr. L. J. 225 : 23 I. C. 177 : (1914) M. W. N. 124.**

——— **S. 122**—*Scope of—Original entry lawful—Subsequent breaking of wagon.*

Subsequent unlawful act, *i.e.*, breaking lock of a wagon does not make the original entry itself unlawful under S. 122 of the Act when it was found that the Dalals like the accused were freely allowed to enter the station premises. (*Mitra, A J. C*) BASHIR AHMAD *v.* EMPEROR. **20 Cr. L. J. 98 : 48 I. C. 896 : 15 N. L. R. 34.**

——— **S. 122**—*Reservation of compartment—Trespass—Removal by Company.*

There is nothing in the Railways Act to forbid the reservation of compartment for different communities and any member of any other community entering such compartment becomes a trespasser and could therefore be removed under S. 122. (*Crouch and Hayward, A.J.Cs.*) MATHUSADAS *v.* SECRETARY OF STATE. **21 I. C. 499 : 7 S. L. R. 42.**

——— **S. 125**—*Keeper's negligence— Owner's liability.*

The owners of cattle straying on a Railway line cannot be convicted of an offence under S. 125 for the negligence of their keeper. (*Chamier, J.*) GUR PRASAD *v.* EMPEROR. **34 All. 91 : 12 Cr, L. J. 614 : 12 I. C. 990 : 8 A. L. J. 1249.**

——— **Ss. 130 and 126 (a)**—*Minor offender—Forum of trial.*

An offence punishable under S. 130 read with S. 126 (*a*) of the Railways Act, 1890, is not exclusively triable by a Court of Sessions, but can be tried by a competent Magistrate. (*Macleod and Pratt, JJ.*) EMPEROR *v.* DHONDYA DUDYA. **43 Bom 888 : 52 I. C. 667 : 20 Cr. L. J. 699 : 21 Bom. L. R. 768.**

RAILWAYS ACT (IX OF 1890), S. 140.

——— **S. 138**—*Possession of staff quarters by Railway employee—Whether dismissal puts an end to possession.*

Possession of staff quarters lawfully obtained by a Railway employee can be determined only by steps taken under S. 138 and for that possession to become unlawful there must have been an interruption thereof and a re-entry. The fact of dismissal of the servant by itself does not put an end to his right of possession. Staff quarters for residence are not part of a Railway within S. 3 (4) of the Act (*Ayling and Oldfield, JJ.*) MARGAM AIYAR *v.* S.J. MERCER. **15 Cr. L. J. 225 : 23 I. C. 177 : (1914) M. W. N. 124.**

——— **S. 140**—

Notice.

See also RAILWAYS ACT, IX OF 1890, S. 77.

——— **S. 140**—*Notice—To whom to be sent.*

Notice to Traffic Manager is not a notice to Agent. (*Gokul Prasad, J.*) RAM SAHAI CHHIDDA LAL *v.* EAST INDIAN RAILWAY CO. **L. R. 3 A. 311 : 44 A. 645 : 20 A. L. J. 664 : 1922 A. 280 (2).**

——— **S. 140**—*Object of—Notice on manager—Whether sufficient.*

The object of S. 140 of the Act is to provide a convenient course of action for the parties aggrieved. S. 140 of the Act does not mean that the Manager is the only person on whom notice of action against a State Railway can be served ; it only says, if notice is served on him, it must be done in the manner provided (*Per Chatterjee, J, Beachcroft, J dubitante*). A notice served on the Collector will be treated as equivalent to notice on Government. (*Chatterjee and Beachcroft, JJ.*) RADHASHAM BASAK *v.* SECRETARY OF STATE. **44 Cal. 16 : 34 I. C. 130 : 23 C. L. J. 547**

——— **Ss. 140 and 77**—*Notice to District Traffic Superintendent—Whether notice to Agent.*

A notice to the District Traffic Superintendent of a Railway company is not a notice to the Agent. 3 I. C. 479 Dist. (*Stephen and Mullick, JJ.*) EAST INDIAN RAILWAY CO *v.* RAMGATI RAM, **23 I. C. 142 : 19 C. L. J. 180.**

——— **S. 140**—*Notice some how reaching agent sufficiency.*

So far as S. 140 is concerned, it is only an enabling provision and gives the party the option of serving the notice on manager of the company instead of on Railway administration at its registered office. The object of the section is to see that the company gets notice. The word "may" does not mean "must". (*Ayling, O. C. J., Kumaraswami Sastri and Odgers, JJ.*) MAHADEO AIYAR *v.* SOUTH INDIAN RAILWAY CO. **14 L. W. 684 : 30 M. L. T. 112 : 45 M. 135 : 1921 M. W N. 878 : 42 M. L. J. 202 : 1922 M. 362 (F. B.)**

——— **S. 140**—*Service of notice — Modes prescribed by rules.*

RAILWAYS ACT (IX OF 1890), S. 140.

Where a mode of service of notice of a claim be prescribed the company cannot plead insufficiency of notice. Notice to the Traffic Manager is good notice when allowed by the Rules of the Company. (*Benson, O. C. J. and Sankaran Nair, J.*) MADRAS AND SOUTHERN MAHRATTA RAILWAY CO. *v.* BHINAPPA. **17 I. C. 419 : 23 M. L. J. 511.**

——S. 140—*Suit against Railway Company —Notice to whom should be given.*

Under S. 140 of the Act, all notices of claims against Railway Companies should be given to the Agent or any officer designated for the purpose or who, according to the practice of the Company, deals with such claims. (*Sundara Iyer, J.*) *In re* MANIKONDA SESHACHELLAM. **36 Mad. 65 : 10 M. L T. 236 : 12 I. C. 76 : (1911) 2 M. W. N. 195.**

——S. 140—*Notice—Service must be in form prescribed:*

The notice on the agent is effective only when it is served in the form and manner indicates in section 140 of the Act. (*Batten, A.J.C.*) DEORAO *v.* G. I. P. RY. CO. **14 I. C. 684 : 8 N. L. R 34.**

——S. 140—*Notice, Service of—Proof.*

Where a claimant addressed his notice of claim to the Agent of the Railway Company, but the letter was opened by the General Traffic Manager, he is entitled to prove that notice was in fact delivered to the agent and that there was service under S. 140 (a) (*Mullick and Bucknill, JJ.*) DURGA PRASAD *v.* G. I. P. RAILWAY AND E. I. RAILWAY. **1923 Pat. 284 : 1924 P. 98.**

——Ss 140, 141—*C. P. C., O. 29,—Suit against Railway Company, form of.*

Neither O. 29 of the Code nor Ss. 140 and 141 of the Railways Act say anything about the manner in which a suit against a Railway Company is to be framed. The form in which a Company is to be sued is given in Sch. 1 App. A. of the Code (*Ross, J*) SINEHI RAM-BENARI LALL *v.* AGENT, E. I. RY. **64 I. C. 125 : 2 Pat. L. T. 679.**

——Sch. II. Cl. (k)—*Liability for loss of wax pearl—Risk note.*

If an article in respect of which a risk note is given is not one of the excepted articles under Sch. II, the mere giving of the risk note will not take away the liability of the Railway Company. Wax pearls with a thin covering of glass are not articles made of glass within Sch. II, cl. (*k*). of the Railways Act. (*Rafique, J.*) FIRM KEDAR NATH RAJ NARAIN *v.* THE EAST INDIAN RAILWAY COMPANY. **45 A. 453 : L. R. 4 All. 204 : 1923 A. 538 (2).**

RAIN WATER.

See EASEMENTS ACT.

RAIYAT.

See (1) B. T. ACT, Ss. 3—5, ETC.
(2) MAD. EST. LAND ACT. S. 3 AND OTHER LOCAL ACTS.

RANGOON RENT ACT (II OF 1920).

RANGOON MUNICIPAL ACT (VI OF 1922).

——S. 80 (2)—*Annual value—Meaning of—Taxation of lands and buildings—Basis of assessment—Standard rent—Rangoon Rent Act, 1920—Sub-tenants—Rents paid by.*

The Corporation must in the absence of special circumstances take as its basis the standard rent in these cases on which the standard rent has been fixed by the Rent Controller. In other cases it must fix the rateable value on a consideration of all the surrounding facts and circumstances including the effect that the Rangoon Rent Act has or may have on the matter. It cannot be said in every instance that the amount that a tenant is able to obtain from his sub-tenants is always to be taken as the rateable value ; but that amount may be taken into consideration with all the other facts governing the question. In other words in arriving at a decision as to the amount for which the premises may reasonably be expected to let the Assessor will consider the rent a tenant can extract from his sub tenants ; but this will not be the only matter to be considered in arriving at a decision. (*Robinson, C. J., May Oung and Po Han, JJ.*) THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON *v.* THE SWATI BARA BAZAR COMPANY, LTD. **1 Rang. 668 (F. B.)**

——S. 91 (2)—*Notice—Orders reserved—Failure of Commissioner to inform complainant the date of final disposal—Date from which fourteen days' period begins.*

Before advantage could be taken of the requirement of notice within fourteen days of any particular date the requirements of the Act with reference to that date must be fully and properly complied with. When orders are reserved, the complaint is not disposed of, and will not be disposed of, within the meaning of the Act until the order is delivered. Where nothing remains but for the order to be written and delivered, the date on which it is disposed of will be the date, of the delivery of the order, and notice of that date, the Commissioner is, by the Act, bound to give to the complainant. But where no such notice of the final disposal is given, but notice is served on the complainant with a copy of the Commissioner's order, the date of receipt of that notice and copy of the order constitutes a sufficient compliance with the requirements of the Act as to notice of the date for final disposal. And if notice of an intention to appeal is served on the Corporation within fourteen days of the date on which the appellants received a copy of the Commissioner's order, the Court would have jurisdiction to entertain the appeal. (*Robinson, C. J. and May Oung, J.*) DAVDOODJEE AND SONS *v.* The MUNICIPAL CORPORATION OF THE CITY OF RANGOON. **1 R. 220 : 1923 Rang. 193.**

RANGOON RENT ACT (II OF 1920)

——*Stipulation for payment of premium—Favourable lease—Enforcement.*

A stipulation by the landlord for payment of a premium of salami in addition to the rent in consideration of his granting a lease on specially favourable terms is void as being repugnant to

RANGOON RENT ACT (II OF 1920), S. 2.

S. 9, Cl. (1) of the Rangoon Rent Act. (*Maung Kin, J.*) ISMAIL YACOOBJEE DOODHA *v.* ABDOOLLA HAJEE ABBA CO.
1 Bur. L. J. 143 : 1923 Rang. 80.

——— S. 2—*Motive.*

Motive is of no account when the landlord satisfies the Court that he wanted the premises for his reasonable use. (*Robinson, C. J. and May Oung, J.*) MAHOMED MOOSA *v.* GOOLAM RASSOOL.
2 Bur. L. J. 161: 1924 Rang. 64.

——— S. 10—*Requiring property for purposes of supervision—If sufficient*

A landlord requiring the building for the use of his servant to enable him to supervise the construction of a building close by cannot maintain an ejectment suit, as the provisions of S. 10 are not complied with. (*Heald, J.*) ISVAACS *v.* MAMSA BROTHERS
1 Rang. 634 : 2 Bur. L. J. 252 : 1924 Rang. 164.

——— S. 10—*Guardian of minor—If can sue in ejectment*

Under S. 10 of amended Rangoon Act a guardian of a minor cannot eject by a suit a tenant on the ground that premises are wanted by minor for his use for the guardian is not a landlord. (*Carr, J.*) MAUNG PE THEIN *v.* S. BOON KYAN. **2 Bur. L. J. 280 : 1924 Rang. 163.**

——— S. 10—*Ejectment—Reasonable use—Erection of bigger building.*

Respondent purchased certain premises held by appellant as tenants. He gave notice to the appellant to quit the premises mentioning that he wanted to demolish the old one-storied building standing thereon and to erect a four storied one. He then brought a suit for ejectment *held* it is not the object of the Act to interfere with the legal use of private property ; it is aimed to protect tenants from ejectment where they are unable or unwilling to pay an enhanced rent. But if the respondent has the means to carry out his purpose and has a *bona fide* intention to do so if he can obtain possession he is entitled to a decree for ejectment. It would be for the public benefit that the site should be put to a use that would be to the advantage of a large number of persons more particularly at a time when residential premises are very scarce. (*Robinson, C. J and Macgregor, J.*) THE PUNJAB MOTOR CO. *v.* SHAIK JUMAN. **1 Bur. L. J. 87 : 1923 Rang. 13.**

——— S. 10 (1) Proviso 'Bona fide' *requirement means genuine requirement and 'own occupation' includes occupation by employees.*

A landlord alleging *bona fide* requirement is not bound to prove that the requirement is reasonable under the circumstances but he has only to show that it is a genuine requirement. The words "own occupation" in the proviso to S. 10 (1) include the occupation by the employees of the landlord. (*Robinson, C. J. and Macgregor, J.*) S. JOSEPH BROTHERS AND COMPANY *v.* O. RAISEE & COMPANY.
64 I. C. 290 : 11 L. B. R. 7.

——— S. 13—*Over payment of rent—Right to deduction must be exercised within 6 months.*

RANGOON SMALL CAUSE COURTS ACT (1920.)

The right to deduct overpayment of rent given by S 13 of the Rangoon Rent Act must be exercised within 6 months after the date of the last over payment and in default the right is barred. (*Duckworth, J.*) JAISHANKAR *v.* JIVANRAM SANTHAL. **1 Bur. L. J 169 : 11 L. B. R. 427 : 1923 Rang. 46.**

——— S. 14 (A)—*Excess rent taken by tenant from sub-tenant—Application by landlord to recover—Maintainability—Certificate.*

An application by a landlord under S. 14 A. of the Rangoon Rent Act to recover the excess of rent levied by his tenant from the sub-tenant will not in the absence of a certificate of the controller fixing the standard rent. (*May Oung, J.*) BAHADUR *v.* JADAWJEE MEHTA. **1 Rang 687 : 2 Bur. L. J 235 : 1924 Rang. 172.**

——— S. 18—*Rent Controller—Civil Court*

Under the Rangoon Rent Act the Rent Controller is a civil Court and as such subordinate to the High Court. (*Robinson C. J., Pratt and Macgregor, JJ.*) MAHOMMED EBRAHIM MOOLLA *v.* S. R. JANDASS. **1 Bur. L. J. 138 : 11 L. B. R. 387 : 1923 Rang. 94.**

——— S. 18—*C. P. C., S. 115—First Judge, Court of Small Causes, Rangoon, whether Court subordinate to High Court.*

The 1st Judge of the Court of Small Causes when disposing of a reference under the Rangoon Rent Act, is a Court subordinate to the High Court within the meaning of Section 115 of C. P. C. He decides questions of civil rights in the same manner as a Court exerising civil jurisdiction would do and he must be regarded as a Civil Court and as a Court subordinate to High Court. Section 18 provides that his decision shall be final, but there is nothing to show that this expression is used in any other meaning then its ordinary legal meaning, *viz.*, that his order shall not be appealable. (*Robinson, C. J., Pratt and Macgregor, JJ.*) MOHAMED EBRAHIM MOOLA *v.* S. R. JANDASS. **1 Bur. L. J. 138 : 11 L. B R. 387 : 1923 R. 94.**

——— S. 18—*Rent Controller—Powers of—Ex-parte decision—Setting aside revision—Powers of High Court*

The Rent Controller under Burma Act II of 1920 is a Civil Court subordinate to the High Court and the High Court can entertain an application for revision from his decision. A Rent Controller has inherent power to set aside an *ex parte* order in accordance with the provisions of the C. P. Code. A person aggrieved by a decision of the Rent Controller may apply in revision to the High Court or he may impugn the order when making a representation to the Small Cause Judge. If the objection is one to an order fixing a standard rent. 1 Bur. L. J. 138 Rel. (*Duckworth, J.*) MOHAMED EBRAIM MOOLLA *v.* S. R. JANDASS.
1 Bur. L. J. 200 : 11 L B. R. 394 : 1923 Rang. 49.

RANGOON SMALL CAUSE COURTS ACT (1920).

——— S. 14 (S)—*Declaratory relief prayed in a case of tort—Effect.*

Merely asking for a declaration in a suit in which the real cause of action is one of tort

RASH AND NEGLIGENT ACT.

does not necessarily make it a suit for a declaratory decree within the meaning of S. 14 of the Rangoon Small Cause Courts Act, 1920. This applies to suits where only declaration is asked for. (*Rutledge, J.*) TAKIR RAM KALWAR *v.* M. N. SWAMI NAIDU. **1 R. 283 : 1923 R. 215.**

RASH AND NEGLIGENT ACT.
See (1) TORT.

RATEABLE DISTRIBUTION.
See C. P. CODE, S. 73.

RATIFICATION.
See also (1) CONTRACT ACT, SS. 196—200.
(2) MINOR.

———*Void transaction.*
A transaction which is ab initio void cannot be ratified. (*Scott-Smith and Dundas, JJ.*) ALLAH DITTA *v* GIAN SINGH. **4 Lah. L. J. 454.**

REASONABLE AND PROBABLE CAUSE.
See MALICIOUS PROSECUTION.

RECEIPT.
See (1) STAMP ACT, S. 35.
(2) REGISTRATION ACT, S. 17.

RECEIVER.
See also (1) C. P. CODE O. 40.
(2) PROV. INSOLVENCY ACT, S, 59.

———*Compromise — Sanction of Court — Practice.*
Where a Receiver is appointed by a judge in a particular action, it is for that judge to say what action should be brought on behalf of the estate what defended and what compromised. It is not the duty of the Court under whom an action between the estate and some third party to grant the necessary permission is tried. Reason for the rule explained. (*Marten, J.*) BAPUJI SORABJI PATEL *v.* LAKHMIDAS RAVJI TERSI.
25 Bom. L. R 1180 : 48 Bom. 200 : 1924 Bom. 89

———*Appointment of—Execution against property—Omission to obtain leave of Court does not make it void.*
The rule that possession of a receiver may not be disturbed without leave, does not apply so far as third parties are concerned, until a receiver has been actually appointed and is in actual possession. Even where a receiver is in possession, a sale of property in his hands at the instance of a stranger to the suit without leave of Court is not void but only voidable. It can only be set aside by appropriate proceedings and if the persons interested do not impeach the sale, it is not open to others to do so. (*Chatterjea and Pearson, JJ.*) RAJA JAGADISH CHANDRA DEO DHABAL DEO *v.* BHUBANESWAR MITRA. **37 C. L. J. 265 : 27 C. W. N. 38 : 1923 Cal. 121**

———*Conditional order of discharge—Decree got after—Effect.*
Where a conditional order discharging a receiver had been passed, but the order had not been carried out nor possession taken and subsequently the Receiver was even continued in office by an order of Court a decree obtained by the Receiver in a suit for rent subsequent to the above order was quite valid and binding. Even on the footing that the Receiver had been discharged before the rent decree, it would only result in a devolution of interest and the decree would enure for the benefit of the persons on whom the interest had devolved. Under the circumstances there was neither in fact nor in law, such a discharge as made it incumbent on the Receiver to disclose it to the Court. (*Woodroffe and Ghose, JJ.*) BEPIN BEHARI BOSE *v.* BONNERJEE. **70 I. C. 104 : 26 C. W. N. 361.**

———*Principles governing—Joint tenancy.*
The principle applicable to the competency of one joint tenant giving notice on behalf of all, does not govern the case of joint receivers. Where two or more persons are appointed joint receivers of an estate, in all matters which requires the exercise of judgment and are not purely ministerial concerning the management of the estate, they should act after united deliberation. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) CASIM AHMED MOLLA *v.* EUSUF HAJI AJAM PEPARDI. **34 I. C. 221 : 23 C.L. J. 453.**

———*Criminal offence—Sanction of Court, whether necessary for prosecution.*
It is not a general rule of law that in all criminal proceedings, the leave of the Court is not necessary to prosecute a receiver. 30 C. 593 : 30 C. 721, Rel on. Sanction is required to proceed against a Receiver for defamation when he acts for the protection of the estate in his hands, *e.g.*, where the alleged act of defamation arises out of the matter for repairs to the estate and is based on a letter written with reference thereto. (*Holmwood and Imam, JJ.*) ANATH NATH DEY *v.* MOHENDRA NATH SRIMANI. **15 I. C. 489 : 13 Cr. L. J. 489.**

———*Proceeding against—Leave when to be taken.*
Leave to proceed against a receiver need not precede institution of proceedings. (*Mookerjee and Caspersz, JJ.*) MAHARAJA OF BURDWAN *v.* APURVA KRISHNA ROY. **14 C L J 50 : 10 I. C. 527 : 15 C. W. N. 872.**

———*Decree in favour of—Attachment without leave of Court—Assignment by receiver—Right of assignee.*
An act done without the Court's sanction to proceed against a Receiver could subsequently be validated on obtaining leave. 43 M. 793 ; 42 M. L. J. 339 ref. Where however a decree obtained by a receiver was attached without the leave of the Court that appointed him and the receiver subsequently transferred the decree to a third person who took the assignment in good faith and without knowledge of the attachment, *held* that the attachment was irregular and did not affect the title of the assignee of the decree. (*Spencer and Venkatasubba Rao, JJ.*) KALYANA SUNDARAM AIYAR *v.* NARASIMHA IYENGAR. **44 M. L. J. 427 : 18 L. W. 280 : 1923 Mad 567.**

———*Receiver appointed after final decree in mortgage suit—Refusal to add him in execution proceedings is a material irregularity.*

RECEIVER.

Where after the final decree on a simple mortgage is passed in a mortgage suit and before the sale, a receiver appointed of the properties of the mortgagor i a partition suit between them and Receiver applies to be made a party to the execution proceedings, he ought to be made a party. The mere fact that there is a mortgage on the property in the hands of the Receiver would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of a receiver, without the sanction of the Court which appointed him. Property in the possession of a receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. It is in the discretion of the Court to refuse to permit a sale of the property in its possession under a judgment though the levy was made before the Receiver was appointed. 26 C. 127 doubted. The Receiver in such a case is not a new party under O. 1, R. 10, C. P. Code and that rule does not stand in the way of the eceiver being made a party. The refusal to make the Receiver party to the execution proceedings is a material irregularity in the exercise of the Jurisdiction of the lower Court justifying the interference of the High Court under S. 115, C. P. Code. (*Devadoss, J.*) FRASER AND ROSS *v.* KRISHNASWAMI IYER.

43 M. L. J. 211 : 16 L. W. 322 : 31 M. L. T. 290 : (1922) M W. N. 745 : 1923 M. 144 (2).

———*Leave to sue—Want of objection if fatal to the suit.*

Failure to obtain the sanction of the appointing Court for suing a Receiver can be effectively cured by obtaining the same during the course of the litigation. Where the Receiver originally appointed had ceased to exist and had been substituted by the heirs of one of the parties who were on record the objection that the suit against the receiver was instituted without leave will not stand. (*Sadasiva Aiyar and Spencer, JJ.*) JAGANA SANYASIAH *v.* M. P. ATCHAMA NAIDU.

15 L. W. 289 : 70 I.C. 759 : 42 M. L. J. 339.

———*Remuneration of—Insolvency — Official Receiver.*

Where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the receiver sells the property free from the mortgage and realises the purchase money the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgagee. He is not entitled to a percentage on the whole of the purchase-money. Notification 35 B-XIX, dated 19th April 1920 fixes the remuneration of the receiver. East to Berar, Amravathi at 5 per cent. on the assets realised and available for distribution. (*Kotwal, A. J. C.*) GOVINDA *v.* ABDUL KADIR.

1923 Nag. 150.

———*—Appointment when not to be made.*

Appointment of a Receiver should not be made if decree holder objects. (*Jwala Prasad and Bucknill, JJ.*) MOKHTAR AHMED *v.* BIBI RAHIMUNNISSA.

(1922) Pat. 66 : 4 P. L. T. 58 : 1922 P. 369.

RECORD OF RIGHTS.

———*Appointment of—Effect on title and possession.*

A receiver is entitled to be represented in a suit the result of which may be to affect the property *in custodia legis*, but here no attempt has been made to interfere with right of the receiver to the property entrusted to his care. Though the appointment of a receiver may in many cases operate to change possession it has no effect whatever on the title of the party to the property which is placed in the possession of the receiver. (*Adami and Bucknill, JJ.*) MADHEWA SURENDRA SAHI *v.* AWADH MISSER.

3 Pat. L T. 316 : 1923 P. 86.

———*Right to sue for rent accruing due prior to appointment.*

A receiver who has been appointed to manage certain properties, is the only person who can sue in respect of rent whether it accrued due prior to his appointment or not. (*Das and Adami, JJ.*) BALKI LAL *v.* SURENDRA NATH RAY.

1 P. 255 : 1922 P. 480.

———*Appointment—Not to be made in execution proceeding under mortgage decree.*

Appointment of a Receiver should not be made whereby the Mortgage decree-holder has a a right to sell the property. (*Jwala Prasad and Bucknill, JJ.*) MOKHTAR AHMAD *v.* BIBI RAHIMUNNISSA.

1922 Pat 66 : 4 P. L. T. 58 : 1922 P. 369.

RECIPROCAL PROMISES.

See CONTRACT ACT, S. 2.

RECISSION OF CONTRACT.

See (1) CONTRACT.
(2) CONTRACT ACT.

RECITALS.

See also (1) DEED.
(2) EVIDENCE.

———*Effect of—Pre emption.*

Recitals in deeds are evidence only against the parties to the deeds and persons claiming through them. A pre-emptor does not claim through the vendor or vendee and he is not bound by a recital of delivery of possession in the sale deed. (*Martineau, J.*) DHARAM SINGH *v.* KRIPAL SINGH.

1923 Lah. 31 (2).

RECOGNISED AGENT.

See C. P. CODE, O. 3.

RECORD.

See EVIDENCE ACT.

RECORD OF RIGHTS.

See also B. T. ACT. S. 103.

———*Wrong entry subsequently corrected—Effect.*

Where the plaintiff in a suit for profits was a recorded co-sharer at the date of the institution of the suit, his right to a decree will not be taken away by an order subsequently passed by the Revenue Court removing his name from the *Khewat* even though the decree is based on a finding that the original entry was wrong 43 All. 177, *Foll.* (*Daniels, J.*) DHIRJA *v.* MITHAN LAL.

1923 A. 562.

RECORD OF RIGHTS.

——*Entry in—Presumed to be correct.*

Where it is contended that an entry in the Records of Right is wrong, it lies on the party so contending to prove that it is wrong and not on the opposite party to prove that it is right. (*Mr. Ameer Ali.*) RAJA SRINATH RAY *v.* MAHARAJA PRATAP UDAI NATH SAHAI DEO.

33 M. L. T. (P. C.) 408 : 28 C. W. N. 145 : (1923) M. W. N. 702 : 1923 P. C. 217 (P. C.)

——*Entry in*—Prima facie *evidence of title.*

An entry in Khewat is *prima facie* evidence of title which may be rebutted by showing that there is no likelihood of there being any title. (*Simpson, A. J. C.*) SAIYAD GHULAM MUHAMMAD *v.* SHIYAD SABIT ALI. **1922 Oudh 140.**

——*Entry in—Presumption—Limitation.*

An entry in the record-of-rights merely raises a presumption of correctness, and is not a starting point for the computation of the period of limitation. (*N. R. Chatterjee and Suhrawardy, JJ.*) SORAJ KUMAR ACHARI CHOWDHURI *v.* UMED ALI HOWLDAR. **25 C. W. N. 1022 : 35 C. L. J. 19 : 1922 Cal. 251.**

——*Entry in, does not nullify previous decisions.*

Where a prior decision operates as *res judicata*, the subsequent publication of the record of rights does not nullify the effect of that decision nor does it sweep out all decisions between the parties. (*Mookerji, A. C. J., and Fletcher, J.*) JALADUR BHOWMIK *v.* BIRENDRA NATH ROY. **60 I. C. 389.**

——*Entry in—Presumption as to correctness—Suit for declaration of right—Onus of proof.*

In a suit by plaintiffs for declaration of their right to lands as *khudkasht*, the record of rights showed an entry that the lands were *Khudkasht. Held*, that the onus was on defendant to show that the entry was wrong. (*Fletcher, Greaves and Huda, JJ.*) GAJADHAR PRASAD SINGH *v.* SHEO NANDAN PRASAD SINGH. **51 I. C. 115· 23 C. W. N. 304.**

——*Entries in—Presumption as to correctness of—Rebuttal.*

Where both the parties to a suit repudiate an entry in the Record of Rights, the presumption as to its correctness is rebuttted. (*Walmsley and Newbould, JJ.*) MURALI DHAR ADITYA *v.* THAKUR DAS MONDAL. **51 I. C. 50.**

——*Entry in—Presumption.*

• An entry in the Record of Rights against the plff. only raises a presumption against him and he has to prove by evidence that it is incorrect. (*Chatterjea and Suhrawardy, JJ.*) SARAJ KUMAR ACHERJI *v.* UMED ALI. **25 C W. N. 1022. 35 C. L. J. 19 : 1922 Cal. 251.**

——*Entry in—Value of.*

An entry in the Record of Rights in Berar though not supported by a statutory presumption as in the Central Provinces does raise a presumption of correctness. (*Stanyan, A. J. C.*) RAGHOBA *v.* PALHOBA. **45 I. C. 217.**

RECORD OF RIGHTS.

——*Entry in—No further proof necessary.*

There is no authority for the proposition that although the record of rights is in favour of the tenant, it is still necessary for him to establish by clear evidence that the entry to the effect that he has occupancy right of the holding is correct. 49 I. A. 339 dist. (*Das and Kulwant Sahai, JJ.*) STONEWIGG *v.* KAMESWAR NARAYAN SINGH. **(1923) Pat. 122 : 1923 P. 340.**

——*Presumption of accuracy—Rebuttal—What evidence Admissible—Acquisition of occupancy rights.*

Evidence of facts documentary and oral prior to that of the publication of the Record of Right is admissible to rebut the presumption of accuracy attaching to the Record of Rights. Provincial Settlement Records are of high value in determining the status of tenants and an entry therein is sufficient to rebut the presumption of correctness attaching to Records of Rights. *Rafa-tankidars* are occupancy raiyats and not tenure holders. Under raiyats may by custom acquire certain privileges possessed by occupancy tenants, but that does not confer upon them the status of occupancy tenants. (*Das and Adami, JJ.*) RAGHUNATH MISRA *v.* RAM BEHERA. **1 P. 187: 5 P. L. T. 140: 1922 P. 548.**

——*Entry—Construction.*

In a suit for rent where the Khatian contained an entry as to rent as follows. "Every year the land which actually grows crop is measured. The tenant pays to the malik and Dhan and Moong Laggi 9 feet 9 inches". *Held* the entry meant that the rent was payable at the rate of Rs 3-5-6 Bigha of land grown with Dhan and 4 annas per bigha of the land grown with moong the actual quantity of land grown with Dhan and Moong being ascertained by measurement every year. (*Jwala Prasad, J.*) GOBIND RAUT *v.* THAKUR PRASAD CHOUDHURI. **1922 P 481.**

——*Publication, Certificate of—Presumption.*

The production of the certificate of publication of the Record of Rights by the defendants raises a presumption that there was publication according to the procedure laid down in the Regulation, throwing the onus on the plaintiffs to establish that there was no regular publication of the Record of Rights. (*Das and Adami, JJ.*) DWARKA PRASAD *v.* JAI BARHAM. **1922 P. 322.**

——*Value of entry—Adverse possession.*

A mere entry in the Record of rights of the possession of the redeeming mortgagor, is of no effect to prove adverse possession against a co-mortgagor. But it is valuable evidence on adverse possession if the Record is one of exclusive title of one mortgagor and he proves knowledge of it by the co-mortgagor. (*Jwala Prasad and Das, JJ.*) RAM NARAYAN *v.* RAM DEVI. **63 I. C. 282.**

——*Presumption—Evidence to rebut is admissible.*

RECORD OF RIGHTS.

An entry in the Record of rights raises a presumption which can be rebutted by evidence oral and documentary of a date prior to that of the publication of the Record. Such evidence is admissible and should be weighed. (*Das and Adami, JJ.*) ALI KHAN *v* SECRETARY OF STATE FOR INDIA. **61 I. C. 78: 2 P. L. T. 133.**

———*Presumption as to entry in—Circumstance negativing.*

A circumstance relied upon as negativing the presumption of correctness of Record-of Rights, must not only be inconsistent with the Record but it must be incapable of explanation on any other hypothesis than that the Record-of-Rights is wrong. (*Das, J.*) GOBIND PRASAD *v.* CHATURBHUJ. **60 I. C. 482.**

——— *Entry in—Effect.*

An entry in the Record of Rights operates in the same way between landlords of neighbouring estates, as between landlord and tenant or between landlords of the same estate or between tenant and tenant. (*Das and Adami, JJ.*) BIBI WAKILAN *v.* NANDAN PROSAD. **5 Pat. L. J. 681: 59 I. C. 295: 2 Pat. L. T. 81.**

——— *Entry in—Presumption as to correctness—Evidence—Duty of Court.*

An entry in the Record of Rights is presumed to be correct so long as it is not rebutted by sufficient evidence. (*Mullick and Sultan Ahmed, JJ.*) JANKI KUER *v.* SAUDAGAR RAM.
1 Pat. L. T. 221: 56 I. C. 417 : 1920 Pat. 177

———*Suit for declaration that entry is wrong entry barred by limitation—Suit for consequential relief, if barred.*

The fact that a claim for a declaration that an entry in the Record of Rights is wrong is barred by limitation would not prevent the Court from determining that the entry is wrong if it is essential for the main or consequential relief claimed. A claim is not necessarily barred by an entry in the Record of Rights which if produced in evidence and unrebutted would be fatal to the relief claimed. (*Miller, C. J. and Jwala Prasad, J.*) UTTIM SAHU *v.* ARJANI.
46 I. C. 229

———*Entry in—Presumption as to correctness of.*

An entry in a Record of Rights raises only a presumption, but where evidence is let in to rebut the presumption the judgment must show that the rebutting evidence has been carefully considered and that the Court has come to a conclusion whether or not the evidence has rebutted the presumption. If nothing to that effect appears in the judgment, the suit should be remanded (*Imam, J.*) DURGA PRASAD *v.* HARIHAR PRASAD. **45 I C. 916: 4 Pat. L. W. 448.**

———*Entry—Presumption as to correctness*

There is a presumption of correctness attached to an entry in a Record of Rights, to rebut which strong evidence to the contrary will be necessary (*Atkinson, J.*) DEBI RAUT *v.* ASHUTOSH BHATTACHARJEE. **39 I. C. 561.**

REFORMATORY SCHOOLS ACT (VIII OF 1897), S 31.

———'Lagan abtak nahin dia —*Meaning.*

The description *Lagan abtak nahin dia*" in the settlement record may possibly denote that the lands may be "*B-lagan*" *i. e* rent free or "*Kabil-lagan*" *i. e.* capable of being assessed. (*Kingsford, J.*) HARBANSA PARSAD TIWARI *v.* RAMAKANT TIWARI **35 I. C 588.**

RECTIFICATION.
See (1) DEED.
(2) SP. REL. ACT, SS. 31—34.

RECURRING RIGHT.
See LIM. ACT, S. 23 AND ART. 131.

REDEMPTION.
See (1) C. P. CODE, O. 34.
(2) MORTGAGE.
(3) T. P. ACT, SS. 60 AND 91.

RE-ENTRY.
See (1) LANDLORD AND TENANT.
(2) T. P. ACT S. 111.

REFERENCE.
See (1) C. P. CODE, S. 113, AND O. 46.

REFORMATORY SCHOOLS ACT (VIII OF 1897).

——— **S. 4**—*Boy of 15 not youthful offender.*

Under S. 4 of the Reformatory Schools Act a boy ceases to be technically a youthful offender at the age of 15. (*Heald, J.*) HAMID *v.* EMPEROR, **2 Bur. L. J. 96: 1924 Rang. 16.**

——— **S. 8**—*Scope—Fine or detention for default.*

A boy under 12 years was convicted for stabbing a companion with a knife and was sentenced to pay a fine of Rs 100 or in default of payment to go to the Reformatory School for three years. The order was illegal. Under S. 8 before such an order is passed the offender must have been sentenced to imprisonment or transportation and not to mere fine. (*Hartnoll, J.*) NGA PO TOK *v.* EMPEROR. **12 Cr. L. J 244 : 10 I.C. 773 : 4 Bur L. T. 69.**

———**S. 9 (2)**—*Second class Magistrate—To whom he may refer a case which he cannot try.*

A second class Magistrate not empowered to act under S.8 of the Act must refer the case to the Dt. Magistrate after convicting the accused and not to the joint Magistrate to whom he may be immediately subordinate. (*Oldfield, J.*) KANUKAYYA *v* EMPEROR. **26 I. C. 336: 16 Cr. L J. 32.**

——— **S. 16**—*Order of detention in lieu of imprisonment—High Court, if can interfere with.*

The High Court will not interfere with an order directing detention in a Reformatory School rather than imprisonment but it is not precluded from altering the sentence of imprisonment into a sentence of whipping, and in the latter case the order of detention falls to the ground. 21 A. 391, Rel on. (*Pratt, J. C.*) IMPERATOR *v.* RAJAB ALI. **13 I C 284 : 13 Cr. L. J. 44 : 5 S. L. R. 173.**

———**S. 31**—*Minor girl—Conviction of murder*

S 31 of the Act is applicable to the case of a minor girl found guilty, even of murder. (*Daniels, A. J. C.*) PARBATI *v.* EMPEROR. **65 I C. 609 : 24 O. C. 305.**

REFUSAL OR OMISSION TO DECIDE PARTICULAR ISSUES.

See (1) CIVIL PROCEDURE CODE.
(2) PRACTICE.

REGISTER ENTRY IN.

See EVIDENCE ACT.

REGISTERED HOLDER.

See LOCAL ACTS.

REGISTERED PATNIDAR.

See BENGAL PATNI.

REGISTRATION.

——*Notice to strangers.*

Registration of a document does not amount to notice to third persons. (*Chatterji and Richardson, JJ.*) AKHOY KUMARI DEBI *v.* KANAILAL KUNDU. **16 I. C. 618 : 17 C. W. N. 224.**

——*Mistake as to proprietorship of land—Suit in Civil Court does not lie.*

Where a document is by mistake admitted to registration the mistake arising from the fact that the transferees are co-proprietors of other land in the same village, the proper remedy of the party is by application to a Revenue Officer and the jurisdiction of the Civil Court is ousted. (*Hallifax, A.J.C.*) CHUNGA PRASAD *v.* PHULWA. **1922 Nag. 126.**

——*Title not necessarily transferred—Intention of parties can be looked to.*

Mere registration of a deed of sale does not necessarily pass the title, if the parties intend that no title shall pass till the consideration money has been paid in full. For this purpose the Court may look to previous as well as subsequent conduct of the parties. 85 P. R. 1911: 3 I. C. 177 approved. (*Scott-Smith and Abdul Raoof, JJ.*) RAM SINGH *v.* GANGA RAM. **3 Lah. 389: 1922 Lah. 356.**

——*Is notice.*

The registration of an instrument is tantamount to constructive notice of its contents. (*Shadi Lal, C. J. and Harrison, J.*) MALAN *v.* TARA SINGH. **63 I. C. 744.**

——*Notice.*

Registration of a prior sale deed is *prima facie* sufficient notice to the subsequent transfers. (*Sadasiva Aiyar and Napier, JJ.*) SAMI ASARI *v.* AZHAGIYA PILLAI. **12 L. W. 718 : 61 I C. 580 : (1921) M. W. N. 497.**

——*Notice of non-possessory hypothecation of moveables.*

A registered deed of the hypothecation of moveables without possession is neither a constructive nor actual notice of such hypothecation to strangers. (*Stanyon, A.J. C.*) NANHUJI *v.* CHINNA. **10 I. C. 869: 7 N. L. R. 72.**

——*Liability of document to—Test.*

The liability of a document to registration must be determined with reference to the consideration money entered therein and not the real value of the property dealt with thereby. (*Daniels, A. J. C.*) BIKAROO *v.* ANANT BAHADUR. **63 I. C. 551 : 8 O. L. J. 311.**

——*Not necessarily notice.*

Even in countries where registration is compulsory, registration is not necessarily notice. (*Kennedy, J. C. and Raymond, A J. C.*) BEGRAJ *v.* ALISHER. **16 S. L. R. 278 : 1923 Sind 50.**

THE INDIAN REGISTRATION ACT (XVI OF 1908).

STATUTE INDEX.

Abetment, Penalty for, S. 82
Absence of Registrar, S. 10
Absence of Registrar on duty in district, S. 11
Absence of Sub-Registrar, S. 12
Acceptance for deposit at private residence, S. 31
Act, Exemptions from, Ss. 90-92 (Pt. XV)
Addition, defined, S. 2 (1)
Admission of execution, Procedure on, S. 35
Agent to present document for registration S. 32 (c)
Alterations, documents containing, S. 20
Amalgamation of Office of Registrar with Sub-Registrar, S. 7 (2)
Appeal to Registrar, from Sub-Registrar's refusal to register, S. 72
Appearance at registration, persons exempt from, S. 38
Appearance of executant and witness, procedure for, S. 36
Application, Registrar's procedure on such, S. 74
Application to Registrar from Sub-Registrar's Refusal to register, S. 73
Appointments, reports of certain S. 13 (1)
Attestation of power of attorney by Registrar, Sub-Registrar or Magistrate, S. 33 (2)
Authorities to adopt, persons entitled to, S. 40
Blanks, documents containing, S. 20
Book, defined, S. 2 (2)
Books, registering officers to allow inspection of certain, S. 57
Boxes, fire proof, S. 16
Branch Inspector-General of Sind, S. 4
British India, Execution of documents out of, S. 26

Burmese Registration rules confirmed, S 92
Cases where Registrar registers, S. 30
Certificate of Registration, S. 60
Certificate to be copied and document returned, S. 61
Certified copies of entries to be given by Registering officers, S. 57
Claimant to present document for registration, S. 32 (a)
Commencement of Prosecution by Registering officer, S. 83
Commencement of the Act, S. 1 (3)
Commissions, law relating to, S. 39
Compulsory registration for certain documents, S. 17
Confirmation of Registration rules of Burmese, S. 92
Contents of Indexes, S. 55
Controlling Powers of Registrars and Inspectors-General, Ss. 68-70 (Pt. XI E)
Control of Sub-Registrar by Registrars, S. 68
Copies, fees for, Ss. 78-80 (Pt. XIII)
Copies of certain orders, certificates and instruments to be sent to registering officers and filed, S. 89
Copies of such documents, S. 91
Copying incorrect, Penalty for, S. 81
Court to issue and cause service of summons, S 37
Current indexes and entries therein, S 54

Death of depositor, Proceedings on, S. 45
Defect in appointment, no invalidation by, S. 87
Defect in Procedure, no invalidation by, S 87
Delivery of false copies, Penalty for, S 82
Denial of execution, Procedure on, S. 35
Deposit, acceptance of, at private residence, S. 31
Deposited sealed cover, withdrawal of, S. 44
Deposit of will at any time, S. 27
Deposit of wills, Ss. 42 48 (Pt. IX)
Deposit of wills, Procedure on, S 43
Depositor's death, Proceedings on, S. 45
Description of houses and lands, referred by Government maps or surveys, S. 22
Description of maps, plans and property, S. 21
Destruction of unclaimed documents, S. 85
Dismissal of Officers, S 13 (3)
District Court, defined, S. 2 (4)
District, defined, S. 2 (3)
District includes Presidency town, S. 10 (2)
Districts and Sub-districts, S. 5
Districts, military cantonments to be declared as, S. 9

Documents by Govt. Officers and Public functionaries, Registration of, S. 88
Documents containing interlineations, erasures, blanks and alterations, S. 20
Documents, copies of such, S. 91
Documents, destruction of unclaimed, S. 85
Documents executed by Govt., exemption of, S. 90
Documents executed by several persons at different times, S. 24
Documents executed in favour of Govt., exemption of, S. 90
Documents executed out of British India, S. 26
Documents for compulsory Registration, S. 17
Documents in language unknown to Registering officers, procedure on presentation of, S. 62
Documents, inspection of such, S. 91
Documents, Place of registering other, S. 29
Documents, Registrable, Ss. 17-23 (Pt. III)
Documents, Registration of certain, S. 23-A.
Documents relating to land in several districts, Procedure where, S 65
Documents relating to land in several Sub-districts, Procedure where, S 64
Documents relating to land, place of registration of S. 28
Documents, time of presenting, S. 23
Documents with language not understood by Registering Office, S 19
Documents with optional registration, S. 18
Duties and powers of registering officers, Ss. 51—71 (Pt. XI.)
Duties in special of Registrar, Ss. 66-67 (Pt XI D)
Duties in special of Sub-Registrars, Ss. 64-66 (Pt. XI C)
Duties of registering officers when document presented, S. 52
Duty, absence of Registrar on, S. 11
Effect of non-registration of documents to be registered, S. 49
Effect of registered documents about property against oral agreements, when, S 48
Effects of registration and non-registration, Ss. 47—53 (Pt. X)
Enactments repealed, Schedule
Endorsed, defined, S. 2 (5)
Endorsement, defined, S 2 (5)
Endorsement of particulars on documents admitted to registration, S. 58
Endorsements to be dated and signed by registering officer, S. 59
Endorsements to be copied and document returned, S. 61
Endorsing incorrect Penalty for, S 81
Enforcing the appearance of executants and witnesses, Ss. 36 39 (Pt VII)
Enquiry before registration by registering officer, S. 34
Entries in current indexes, S. 54
Entries in Indexes to be sent by Sub-registrars to Registrars and filed, S. 56
Entries, Registering officers to give certified copies of, S. 57
Entries to be numbered consecutively, S. 53
Erasures, documents containing, S. 20
Executants and witnesses, enforcing appearance of, Ss 36 39 (Pt VII)
Executant's appearance, procedure for, S. 36
Execution of documents by Government officers and its registration, S. 88
Execution of documents by public functionaries and its registration, S. 88
Execution of documents by several persons at different times, S. 24
Execution of documents out of British India, S 26
Executor to present document for registration, S. 32 (a)
Exemption of certain documents executed by Govt. or in their favour, S. 90
Exempted persons, S 38
Exemptions from Act, Ss. 90-92 (Pt. XV)
Extent of the Act, S. 1 (2)
False copies, delivery for and penalty for, S 82
False Personation, Penalty for, S. 82
False statement, Penalty for, S. 82
False transactions, Penalty for, S. 82
Fees to be fixed by Local Government, S. 78

Fees for Registration, Searches and copies, Ss. 78 80 (Pt. XIII)
Fees payable on presentation, S. 80
Fees, Publication on, S 79
Fines, Inspector-General's power to remit, S. 70
Fire proof boxes, S. 16
Fixing of fees by Local Government, S. 78
Government maps, description of houses and land referred by, S. 22
Houses, description referred by Govt. map or surveys, S. 22
Immoveable Property, defined. S. 2 (6)
Incorrect copying, penalty for, S. 81
Incorrect endorsement, penalty for, S 81
Incorrect registration, penalty for, S 81
Incorrect translation, penalty for, S 81
Indexes and register books, Ss. 51-58 (Pt. XI)
Indexes, contents of, S. 55
Indexes current and entries therein, S. 54
Indexes, registering officers to allow inspection of, S. 57
Indexes to be made by registering officers, S. 55
Inspection and copies of such documents, S. 91
Inspection of such documents, S. 91
Inspector-General of Registration, S. 3
Inspector-General's controlling powers, Ss. 68-70 (Pt. XI E)
Inspector-General's powers to superintend Registration offices and to make rules, S. 69
Inspector-General's power to remit fines, S 70
Inspector-General to appoint Registrars and Sub-Registrars, S 6 (Proviso)
Inspectors of Registration offices, S 8
Inspectors, subordination to, S. 8 (2)
Interlineations, documents containing, S. 20
Land, Procedure on Registration of documents relating to, S 66
Lands, description referred by Government maps or surveys, S. 22
Lands in several districts, procedure on documents relating to, S 65
Lands in several sub-districts, Procedure on documents relating to, S. 64
Law as to summonses, commissions and witnesses, S. 39
Lease, defined, S. 2 (7)
Limits of districts and sub-districts, S. 5
Local Government to appoint Registrars and Sub-Registrars, S. 6
Local Government to fix fees, S. 78
Magistrate's attestation of power of attorney, S. 33 (2)
Making statement false, penalty for, S. 82
Maps, description of, S. 21
Military Cantonments declared, districts or sub-districts, S. 9
Minor, defined, S. 2 (8)
Miscellaneous, Ss. 84—93 (Pt. XV)
Moveable property, defined, S. 2 (9)
No invalidation by defect in appointment or procedure, 87
Non-liability of Registering officer for refusal in official capacity, S. 86
Non-liability of Registering officer for thing done *bona fide* in official capacity S. 86
Non-registration of documents to be registered, effects of, S. 49
Number of entries to be consecutive, S. 53
Oaths, Power to administer, S. 63
Office of sub-registrars amalgamated with Registrar, S. 7 (2)
Officer's suspension, dismissal and removal, S. 13 (3)
Officer to issue and cause service of summons, S. 37
Offices of Registrars and Sub-Registrars, S. 7
Operation of registered documents, time when, S. 47
Optional registration of certain documents, S. 18
Order by Registrar to register and Procedure thereon, S. 75
Order of refusal by Registrar, S. 76
Order of refusal by Registrar, suit case of, S. 77
Particulars to be endorsed on documents admitted to registration, S. 58
Penalties, Ss. 81—84 (Pt. XIV)
Penalty for false statement, delivery of false copies or transactions, false personations, abetment, S 82
Penalty for incorrectly endorsing, copying, translating or registering with intent to injure, S. 81
Personation, Penalty for false, S. 82
Persons entitled to present wills and authorities to adopt, S. 40
Persons exempt from appearance at Registration, S 38
Persons to present documents for registration, S. 32
Place for registering other documents, S. 29
Place of Registration, Ss. 28—32 (Pt. V)
Place of Registration of documents relating to land, S. 28
Plans, description of, S. 21
Power of Inspector-General to remit, S. 70
Power of Registrar to superintend and control Sub-Registrars, S. 68
Powers of attorney recognizable for, S. 32, S, 33
Powers of controlling of Registrars and Inspectors-General, Ss. 68 70 Pt. XI E)
Powers of Inspector-General to superintend Registration offices and to make rules, S. 69
Power to administer oaths, S. 63
Preliminary, Ss. 1—2 (Pt. I)
Presentation, fees payable on, S 80
Presentation of documents in language unknown to Registering officers, Procedure on, S. 62
Presentation of will at any time, S. 27
Presentation of will, person entitled to, S. 40
Presentation time, Ss. 23—27 (Pt. IV)
Presenting documents for registration, Ss. 32-36 (Pt. VI)
Presenting wills and authorities to adopt, Ss. 40-41 (Pt. VIII)
Presidency town, included in district, S 10 (2)
Private residence, acceptance of deposit and registration at, S. 31
Procedure after registration under, S 30, S. 67
Procedure on admission and denial of execution, S. 35
Procedure on admitting to registration, Ss. 58-64 (Pt. XI B)
Procedure on deposit of wills, S. 43
Procedure on documents relating to land in several districts, S. 65
Procedure on documents relating to land in several sub-districts, S. 64
Procedure on presentation of document in language unknown to registering officer, S. 62
Procedure on Registration of documents relating to land, S. 66
Procedure on Registrar on such application, S. 74

Procedure on Registrar's order to register, S. 75
Procedure where executant's or witness's appearance is desired, S 36
Proceedings on death of depositor, S. 45
Property, description of, S. 21
Provisions for unavoidable delay in presentation, S. 25
Prosecution by Registering officer, commencement of, S 83
Publication on fees, S. 79
Public servants, Registering officers to be deemed, S. 84
Reasons for refusal to register to be recorded, S 71
Record of reasons for refusal to register, S. 71
Record of substance of statements, S 63
Refusal by Registrar, order of, S 76
Refusal to register, Ss. 71-78 (Pt. XII)
Refusal to register, reasons to be recorded for, S. 71
Register books, S. 16
Register books and Indexes, Ss. 51-58 (Pt. XI P)
Register books to be kept in several offices, S. 51
Registered documents about property when effect against oral agreements, S 48
Registered documents, time whence operates, S 47
Registered documents to take effect against unregistered ones, S. 50
Registering documents relating to land, Place of, S. 28
Registering incorrect, Penalty for, S. 81
Registering officer, copies of certain instruments to be sent to
Registering officer, copies of certain orders to be sent to, S. 89
Registering officer, copies of certificates to be sent to, S. 89
Registering office, documents in language not understood by, S. 19
Registering officer, endorsements to be dated and signed by, S 59
Registering officer may begin prosecution, S. 83
Registering officer, not liable for refusal in official capacity, S. 86
Registering officer not liable for thing done *bona fide* in official capacity, S. 86
Registering officers deemed public servants, S. 84
Registering officers, duties and powers of, Ss. 51-71 (Pt. XI)
Registering officers' duties when document presented, S, 52
Registering Officer's duty in case of exempted persons, S 38 (2
Registering officer, seal of, S. 15
Registering officer's enquiry before registration, S. 34
Registering officers, remuneration and establishment of, S. 14
Registering officers to give certified copies of entries, S. 57
Registering officers to make indexes, S 55
Registering other documents, place of, S 29
Register, refusal to, Ss. 71-78 (Pt. XII)
Registrable documents, Ss. 17-23 (Pt. III)
Registrar, appeal from Sub-Registrar's refusal to register to, S. 73
Registrar's absence, S. 10
Registrars and Sub Registrars, S. 6
Registrar's attestation of power of attorney, S. 33 (2)
Registrar's controlling powers, Ss. 68-70 (Pt. XI E)
Registrar's office, S. 7
Registrar's office, vacancy in, S. 10
Registrar's order of refusal, S. 76
Registrar's order of refusal, Suit case of, S. 77
Registrar's order to register and Procedure thereon, S. 75
Registrar's power to superintend and control Sub-Registrars, S. 68
Registrar, special duties of, Ss. 66-67 (Pt. XI D)
Registrar's procedure on such application, S. 74
Registrar's registration in certain cases, S. 30
Registration and non-Registration, effects of, Ss. 47-50 (Pt. X)
Registration at private residence, S. 31
Registration by Registrars in certain cases, S, 30
Registration compulsory, documents having, S. 17
Registration establishment, Ss. 2-17 (Pt. II)
Registration, fees for, Ss. 78-80 (Pt. XIII)
Registration, Inspector-General of, S. 3
Registration of certain documents, S. 23-A
Registration of certificates, S 60
Registration of documents executed by Government Officers and Public functionaries, S. 88
Registration of documents relating to land, Procedure on, S. 66
Registration offices, Inspector of, S 8
Registration of wills and authorities to adopt, S. 41
Registration optional of certain documents, S. 18
Registration, Particulars to be endorsed on documents admitted to, S. 58
Registration, Persons to present documents for, S. 32
Registration, persons to present documents for, S 32
Registration, place of, Ss. 28-32 (Pt. V)
Registration, presenting documents for, Ss. 32-36 (Pt. VI.)
Registration rules confirmed, Burmese, S. 92
Registration under S. 30, Procedure after, S. 67
Removal of Officers, S 13 (3)
Remuneration and establishment of Registering Officers, S. 14
Repeal of enactments, Schedule
Repeals, S. 93
Report of certain appointments, S. 13 (1)
Representative, defined, S. 2 (10)
Rule making power of Inspector-General, S. 69
Savings of certain enactments and Power of courts, S. 46
Seal of registering officer, S. 15
Searches, fees for, Ss. 78-80 (Pt. XIII)
Service of Summons, Officer or Court to issue and cause, S 37
Several offices, register books to be kept in, S 51
Several persons executing documents at several times, S. 24
Sind, Branch Inspector-General of, S. 4
Special duties of Registrar, Ss. 66, 67 (Pt. XI D)
Special duties of Sub-Registrars, Ss. 64-66 (Pt. XI C)
Statements, record of substance of, S. 63
Sub-district, defined, S. 2 (3)
Sub-districts and disiricts, S. 5
Sub-districts, military cantonments to be declared as, S. 9
Subordination of Inspector to, S. 8 (2)
Sub-Registrar's absence, S. 12
Sub-Registrars and Registrars, S. 6

Sub-Registrar's attestation of Power of Attorney, S. 33 (2)
Sub-Registrar's office, S. 7
Sub-Registrar's office, vacancy in, S. 12
Sub-Registrar, special duties of, Ss. 64-66 (Pt. XI C)
Sub-Registrars to send entries in indexes to Registrars to be filed, S 56
Substance of statements, Record of, S. 63
Suit case of order of refusal by Registrar, S. 77
Summonses, law relating to, S. 39
Superintendence of Sub Registrars by Registrars, S. 68
Superintending power of Inspector-General, S. 69
Surveys, description of houses and lands referred by, S. 22
Suspension of officers, S 13 (3)
Time of presentation, Ss. 23 27, (Pt. IV)
Time of presenting documents, S. 23
Time whence registered document operates, S. 47
Title of the Act, S. 1 (I)
Transactions, false, penalty for, S. 82
Translating incorrect, Penalty for, S. 81
Unavoidable delay in presentation, provision where, S. 25
Unclaimed documents, destruction of, S. 85
Unregistered, defined, S 50
Vacancy in Registrar's Office, S. 10
Vacancy in Sub-Registrar's Office, S. 12
Will deposited at any time, S 27
Wills, deposit of, Ss. 42-48 (Pt. IX)
Wills presented at any time, S. 27
Wills, registration of, S. 41
Withdrawal of deposited sealed cover, S. 44
Witnesses' appearance, Procedure for, S. 36
Witnesses, law relating to, S. 39

REGISTRATION ACT (XVI OF 1908).

———*Duty of Registrar before Registration of deeds.*

Held, that it is the duty of the Registrar, before registering a deed to examine the grantor or some one whom he is satisfied is the proper representative of the grantor before he allows the deed to be registered. (*Lord Phillimore.*) MUNSHI EHTISHEM ALI *v.* JAMNA PROSAD.

48 I. A. 365: 64 I. C. 299: 24 O. C. 272.

———*Board of Revenue—Powers.*

The Board of Revenue cannot refer to High Court a question under the Registration Act. (*Banerjee and Tudball, JJ.*) SOMWARPURI *v.* MATABADAL.

38 All 351: 34 I C. 280: 14 A L J. 422.

———*Unsigned memorandum—Registration.*

Unsigned memorandum reciting the names of the parties to it and the amount of the charge, the period for the mortgage and the names of witnesses is not a mortgage and does not require any statement. Before a document can be registered it must be shown that it has been signed by the executor. (*Harrison, J.*) TIRKHA *v.* SOHLU. **5 Lah. L. J. 75 : 1923 Lah. 242.**

———*Registration, object of.*

The object of Registration is to check forgery and to provide good evidence of the genuineness of written instruments, and not to give information to third parties. (*Benson and Sundara Aiyar, JJ.*) VEERAPPA CHETTY *v.* KADIRESAN CHETTY

(1913) M. W. N. 525: 24 M. L. J. 664: 20 I. C. 385: 14 M. L. T. 237.

———S. 2 (6)—*Immoveable property—Standing trees.*

Standing timber has been excluded from S. 2 (6) of the Act and therefore standing trees are not immoveable property for the purpose of registration. (*Karamat Husain, J.*) MANGALSEN *v.* NAULI. **9 I. C. 478.**

———S. 2 (3)—*Right of way—Easements Act.*

A right of way created by writing requires registration if the value of the right be more than Rs. 100 as it comes under the term "immoveable property" in S. 2 (6) of the Act. *Chatterjee and Richardson, JJ.*) SITAL CHANDRA *v.* ALLEN J. DILANI. **34 I. C. 450: 20 C. W. N. 1158.**

REGISTRATION ACT (XVI OF 1908), S. 2.

———S. 2 (6)—"*Immoveable property*"—*Standing timber and standing trees—Distinction between.*

"Standing timber" means trees, the wood of which is useful for building or repairing houses or for other industrial purposes, and implies an intention, sooner or later, to sever the trees from the soil. The terms "standing trees," however, does not suggest any such severance. A mortgagee took a usufructuary mortgage of the tenant's right in a grove, consisting mostly of fruit bearing trees, and the parties to the mortgage never contemplated the severance of the trees and use of their wood for industrial purposes. The trees of the grove could not be considered to be "standing timber" and that therefore the mortgage of the grove-holder's rights was a transfer of an "immoveable property" within the Regn. Act, S 2 (6). 9 I. C. 478 Diss; (1887) A. W. N. 59 Ref. 18 O. C. 122; 30 I C. 281 Foll. (*Stuart and Muhammad Ali, A. J. Cs.*) RAMAN LAL *v.* RAM GOPAL.

35 I. C. 713: 3 O. L. J. 367.

———S. 2 (6) and (9)—*Standing trees—Moveable and immoveable property—Registration.*

Where there is a transaction regarding trees in connection with which an instrument of transfer has been executed, the character of the transaction will determine whether the trees referred to are moveable or immoveable property. 6 M. H. C R. 71; 28 I. C. 180 Ref. Where a *nim* tree is mortgaged without any intention of its being severed from the land and used as timber, the tree is immoveable property. (*Lindsay, J C.*) MUHAMMAD AHMAD SHAH *v.* MUHAMMAD TAQUI.

30 I. C. 281: 2 O. L. J. 285.

———S. 2 (7)—*Lease— Agreement to lease—Meaning of.*

An agreement to grant a lease on a future contingency is not within the definition of a lease and does not require registration. (*Lord Buckmaster.*) RANI HEMANTA KUMARI *v.* MIDNAPUR JEMINDARI CO., LTD.

46 I. A. 240: 24 C. W. N. 177: 37 M. L. J 525: 17 A. L. J. 1117: (1920) M. W. N 66: 27 M. L. T 42 : 11 L. W. 301: 53 I. C 534 : 47 C. 485 : 22 Bom L. R. 488 (P.C.).

REGISTRATION ACT (XVI OF 1908), S. 2.

——Ss. 2 (7) and 17—*Agreement to lease not importing a present demise—Registration.*

An agreement to lease, which does not import a present demise or the creation of an immediate interest, is not compulsorily registrable. 10 Bom. 101 Ref (*Pratt, J.*) SECRETARY OF STATE *v.* MAHOMED YUSUF.

54 I. C. 134 : 21 Bom. L. R. 1130.

——Ss. 2 (7) and 17 (1) (d)—*Document creating immediate interest in grantee—Registration.*

A document specifying the boundaries of a certain plot of land and fixing the rent and stating that a lease is granted to the grantee who undertakes to execute a *Kabuliyat* within a certain time, is in substance a lease It creates an immediate interest in the grantee in the land leased out and is therefore compulsorily registrable. (*Mookerjee and Beachcroft, JJ.*) BHUBAN MOHAN BANERJEE *v.* EDAN SARDAR. **27 I. C. 91.**

——S. 2 (7)—*Agreement to lease.*

Unless the agreement operates as an immediate demise of the property it need not be registered 47 Cal. 485 (P. C.) Foll. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SWAMINADHA MUDALIAR *v.* RAMASWAMI MUDALIAR

44 Mad. 399 : 40 M. L. J. 161 : 13 L. W. 327 : (1921) M W. N. 145 : 62 I. C. 354 : 29 M. L. T. 152.

——S. 2 (7)—*Lease—Agreement to lease.*

Agreement settling the terms of a "lease" are leases within S. 2 whether the creation of another document is intended or not. (*Ayling and Napier, JJ.*) MORGAN *v.* FERNANDEZ.

3 L. W. 370 : 30 M. L. J. 519 : (1916) 1 M. W. N. 373 : 33 I. C 439 : 19 M L. T. 377.

——S. 2 (7)—*Agreement to lease creating interest immediately is within section.*

An agreement to lease, in order that it may fall under S. 2 (7) of the Act, must grant an immediate interest, even before the execution of any other document, agreements creating interests which are to come into existence at some future date are not covered by S 2 (7) of the Act. (*Hallifax, A. J. C.*) SONOO *v* BHADARIA.

6 N. L. J. 151 : 1923 N. 171.

——S 2 (9)—*Moveables—Cash allowance.*

An allowance paid by Govt. to a Deshpande family as a remuneration for public services is moveable property. (*Scott, C. J. and Hayward, J.*) HANMANTAPPA RAO *v.* RAMABAI HANMANT.

51 I. C. 954 : 21 Bom. L. R. 716.

——Ss. 2 (9), 17 (1) (a) and 49—*Grove—Moveable or immoveable property—Timber and trees.*

Standing timber and standing trees are not convertible terms. The question whether a grove transaction amounts to merely a transfer of standing timber or to a larger transfer of an interest in immoveable property is one to be determined on the circumstances of the case. Where there was no intention in a deed of transfer of a grove that the trees should be severed and used as timber, the transfer is one of immoveable property and requires registration. 6 M. H. C. R. 71 Ref. (*Lindsay, J C*) ALI BAKSH *v.* GHURAI.

18 O C. 122 : 28 I C. 180 : 2 O. L. J. 97.

REGISTRATION ACT (XVI OF 1908), S. 17.

——Ss. 17 49 and 50—*Object of registration—Registration, if notice to the public.*

Notice cannot in all cases be inferred from the fact that a document is found on the register of deeds. Whether registration is a sufficient notice is a question of fact depending on the circumstances of each case. The test is whether omission to search the registry amounts to gross negligence on the part of the person to be affected with notice. (*Lord Buckmaster.*) TILAKDHARI LAL *v* KHEDAN LAL. **48 Cal 1 : (1920) M. W N. 591 : 13 L. W. 161 : 25 C. W. N. 49 : 22 Bom. L. R. 1319 : 32 C. L. J. 479 : 2 Pat. L T 101 : 28 M. L. T. 224 : 18 A L. J. 1074 : 57 I. C. 465 : 47 I. A. 239 : 2 U. P. L. R. (P.C.) 139 : 39 M. L. J. 243 (P.C.).**

——S. 17—*Mortgage — Agreement between first and second mortgagee.*

Where first and second mortgagee agree that they would share equally the money real sed, the bond is admissible to prove the agreement though it is not registered. (*Lord Buckmaster.*) VYRAVAN CHETTY *v.* SUBRAMANIA CHETTY

43 Mad. 660 : (1920) M. W. N 368 : 18 A. L. J. 726 : 39 M L. J. 37 : 12 L. W 143 : 56 I. C 642 : 24 C. W. N. 1053 (P. C.).

——Ss. 17 and 49—*Application in mutation proceedings—Admission of title — Registration not compulsory.*

Where in an application in mutation proceedings, there is an admission of title, the same cannot be said to be a document of title and as such is not compulsorily registrable. (*Daniels, J.*) RAM KISHEN RAI *v.* SHEO SAGAR PANDEY.

1924 A. 304.

——S. 17—*Compromise petition—Presented in mutation case—No stamp—No registration necessary.*

Where a petition was presented in the mutation case and it only informed the Court of the compromise which the parties had effected, *held* that the petition did not require to be stamped or registered as a transfer of interest in immoveable property (*Banerji, J.*) JAGRANI MISRANI *v* BISHESHAR DUBE.

26 I. C. 791 : 12 A. L. J. 1316.

——S 17—*Law requiring registration—Transfer—Can be effected only by registration or decree of competent Court.*

Transfer of property, where registration is compulsory, can only be effected by a registered instrument or by a decree of a competent Court. (*Knox and Piggott, JJ.*) RUSTAM ALI KHAN *v.* GAWRA.

33 All. 728 : 12 I C. 109 : 8 A. L. J. 918.

——Ss 17 and 54—*Construction of Act.*

Macleod, J.—If paragraphs 2 and 3 of S. 54 of the T.P. Act were read at the end of the Regn. Act there it would not have the effect of introducing instruments relating to transfers of property under the value of Rs. 100 into S. 17, Registration

REGISTRATION ACT (XVI OF 1908), S. 17.

Act. (*Beaman and Macleod, JJ.*) DAWAL PIRANSHAHA *v.* DHARMA RAJARAM.
19 Bom. L. R. 622 : 41 I. C. 273 : 41 B. 550.

——S. 17—*Construction.*

The section should be strictly construed and unless a document is clearly within its scope, its non-registration should not bar its admissibility. Before such a document is barred, it must be proved that at the time of its execution the property to which it relates is worth more than Rs. 100. (*Leslie Jones and Moti Sagar, JJ.*) ABDULLA *v.* FATEH MAHOMED. **62 I. C. 809.**

——Ss 17 and 49--*Usufructuary mortgage for over Rs. 100—Absence of registration—Nature of possession.*

In a suit on an unregistered usufructuary mortgage for more than Rs. 100 it can be received in evidence for proving that the defendant was in possession as mortgagee and as such that he prescribed for the limited interest of usufructuary mortgagee. Per *Venkatasubba Rao, J.*—It can be looked at for ascertaining the quantum of interest which the adverse possessor has been prescribing for. Per *Spencer, J.*—In a suit for redemption on such a document, the terms of the document have to be proved and no other evidence will suffice to prove it (*Ramesam, J. on a difference between Spencer and Venkatasubba Rao, JJ.*) NADEPENA APPAMMA *v.* SARIPALLI CHINNAVADU.
45 M. L. J. 667 : (1923) M. W. N. 825 : 33 M. L. T. 146 (H. C.) : 1924 M. 292.

——S. 17—"*Documents*"—*Meaning.*

The word "Documents" in S. 17 covers more than one letter creating a lease. (*Ayling and Napier, JJ.*) MORGAN *v.* FERNANDEZ.
3 L. W. 370 : 30 M. L. J. 519 : (1916) 1 M. W. N. 373 : 33 I. C. 439 : 19 M. L. T. 377.

——Ss. 17 (1) (a) and 49—*Recital of gift in petition for mutation—Gift unregistered—Admissibility to prove character of donee's possession as owner.*

A petition by the donees reciting a gift of a *mittah* village and praying for the mutation of names in favour of the donee though inadmissible in evidence to prove title by gift, may be yet admissible to prove the character of the donee's possession of the *mittah* as absolute owner. (*Viscount Cave.*) VARATHA PILLAI *v.* JEEVARATHAMMAL.
(1919) M. W. N. 724 : 10 L. W. 679 : 24 C. W. N. 346 : 38 M. L. J. 313 : 53 I. C. 901 : 18 A. L. J. 274 (P. C.).

——Ss. 17 (1) (a) and 49—*Unregistered deed of gift—Effect of—Title to property.*

Where the source of title for a property is an unregistered deed of gift and the property itself is worth more than Rs. 100 in value, the gift is inadmissible in evidence If the gift had been the outcome of a compromise of a disputed claim then it might be admissible. (*Broadway and Moti Sagar, JJ.*) CHANAN SINGH *v.* SUCHA.
4 L. L. J. 7 : 1922 Lah. 112.

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b) —Family Arrangement.

——S. 17 (1) (a)—*Gift already complete.*

A mere memorandum of an already completed oral gift does not require registration. (*Johnstone and Chevis, JJ.*) RAHIM BAKHSH *v.* BUBHAN.
92 P. L. R 1914 : 74 P. R. 1914 : 22 I. C. 712 : 141 P. W. R. 1914.

——S. 17 (1) (a)—*Gift by bridegroom to bridge*

Kanwin property, *i.e.*, property given by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair; it is a gift and must be in writing and registered as required by S. 123 of the T. P. Act, otherwise if there is mutual divorce the property will revert to the husband as being only *paying* property. (*Maung Kin, J.*) MAUNG SHWE KHO *v.* MA MYA.
33 I. C. 129 : 9 Bur. L. T. 87.

——S. 17 (1) (b)—

Family Arrangement.
Lease.
Mortgage.
Partition Deed.
Relinquishment or Release.
Sale.
Scope of.
Transfer of future interest.
Trusts.
Miscellaneous.

Family Arrangement.

——S. 17 (1) (b)—*Family arrangement—Registration.*

An instrument which is not testamentary but is final, irrevocable and immediately operative against immoveable property is void if unregistered. (*Lord Macnaughten.*) UMRAO SINGH *v.* LACHMAN SINGH. **33 All. 344 : 14 O. C. 133 : 38 I. A. 104 : 15 C. W. N. 497 : 8 A. L. J. 465 : 13 C. L. J. 519 : 9 M. L. T. 507 : 21 M. L. J. 637 : 10 I. C. 285 : 13 Bom. L. R. 404 : (1911) 2 M. W. N. 242 (P. C.).**

——S. 17 (1) (b)—*Family arrangement.*

A document which purports or operates to create or extinguish any right or interest in immoveable property with Rs. 100, even though it records a family settlement is compulsorily registrable (*Sulaiman, J.*) CHHAJJU *v.* GOKUL.
1923 All. 338.

——Ss. 17 (1) (b) and 2 (vi)--*Family arrangement—Mutation proceedings—Petition of compromise—Doubtful claims.*

In the course of mutation proceedings in a Revenue Court a petition was presented which stated a settlement out of Court fixing the share of each party, and asked for mutation accordingly. *Held*, that such a petition which contained nothing more than a recital of the oral settlement effected out of Court and did not by itself purport to create, assign or declare any rights in immoveable property did not require to be registered. 5 Bom. 232 ; 22 Mad. 508 (P. C) : 20 All. 171 (P.C.) Ref. 32 All. 206 Dist. Per *Piggott, J.*—Any petition intended by the parties to serve, and so drafted as to serve as a document of title or an authoritative admission by such party as against the other, of the title of the other party, to whatever share has been agreed upon amongst them,

REGISTRATION ACT (XVI OF 1908). S. 17 (1) (b) —Family arrangement.

becomes a document purporting to declare the rights of the parties concerned in immoveable property, and requires registration, if that property exceeds Rs. 100 in value. 38 All. 366 (F B.) Ref. (*Piggott and Kanhaiya Lal, JJ.*) BALDEO SINGH *v.* UDAL SINGH. **18 A. L. J. 877 : 2 U. P. L. R. (All.) 202 : 58 I. C. 732 : 43 All. 1.**

——— Ss. 17 (1) (b) and 49—*Family settlement —Registration.*

Family settlement under Hindu Law need not be registered though it involves the giving up of disputed land to strangers. (*Richards and Banerji, JJ.*) DAYASHANKAR *v.* HUB LAL. **37 All. 105 : 27 I. C. 497 : 13 A. L. J. 21.**

——— S. 17 (1) (b)—*Family arrangement.*

A petition embodying a family settlement to the Revenue Court is not compulsorily registrable. (*Richards, C. J. and Banerji, J.*) MUSAMMAT KOK LAL *v.* PEAREYLAL. **35 All. 502 : 21 I. C. 29 : 11 A. L. J. 765.**

——— S. 17 (1) (b)—*Family arrangement—Entry in Bahi—Registration.*

The document was an entry in Bahi reciting that a settlement had been arrived between uncle of the one part and nephew's brothers of the plaintiff, of the other part, by which the house in suit was given to uncle and another house known as Nereliwala to the four nephews in a partition. The entry stated that two of the nephews made themselves responsible for their two brothers, and had therefore executed the document. The entry was signed by them and by three witnesses. One of the nephews below his signature declared that the settlement had been made at the instance of the brotherhood and that "the above writing is accepted" The purport of the document was plainly to serve as a title deed ; it was clearly a declaration of will creating a definite change of legal relation to the property, and the intention of the executants undoubtedly was to constitute the document and its counter-part with the nephews the sole repository and the appropriate evidence of the partition. *Held*, the document required registration and was inadmissible without registration. (*Campbell, J.*) NARSINGH DAS *v.* UTTAM CHAND. **1923 Lah. 392.**

——— Ss. 17 (1) (b) and 49—*Family arrangement—Document admitting relationship and right to a share in property—Registration.*

A document whereby K acknowledges the title of S to a share in certain immoveable property as the son of R is compulsorily registrable and will be admissible in evidence in the absence of registration to prove sonship in a suit for the share, as it would affect the immoveable property in suit. (*Johnstone and Chevis, JJ.*) KESSAR SINGH *v.* SANT SINGH. **19 P. L. R. 1914.**

——— S 17 (1) (b)—*Family arrangement—Instrument declaring widow's right to maintenance.*

The document made by brothers declaring the right and interest of the brothers in an estate of large value and also stating in one clause that their widows should not inherit a life estate but

REGISTRATION ACT (XVI OF 1908). S. 17 (1) (b)—Family Arrangement.

receive maintenance only, must be registered. (*Chevis and Le Rossignol, JJ.*) MOTI SINGH *v.* MT. JAMNA DEVI. **8 P R 1916 : 32 I. C. 522 : 203 P. W. R. 1915.**

——— S. 17 (1) (b)—*Family arrangement—Hindu Law—Reversioner—Unregistered deed of exchange of immoveable property worth more than Rs. 100 by sonless father—Decree on admission of his widow—Right of reversioners.*

Where there is an unregistered deed of exchange of immoveable property worth more than Rs. 100, it is inadmissible in evidence for want of registration and a decree obtained thereon on the admission of the widow can be challenged by the reversioners. (*Johnstone, J.*) DALIP SINGH *v.* MUNSHI. **176 P. L. R. 1914 : 24 I. C. 894 : 74 P. W. R. 1914.**

——— Ss. 17 (1) (b) and 49—*Family arrangement—Letter embodying agreement of transfer—Recital of possession.*

Where a letter from a vendor to a vendee contained an agreement to transfer certain lands and also a clause as to possession, the document could be admitted as evidence of an agreement to convey the lands without registration. (*Sadasiva Aiyar and Spencer, JJ.*) RAMA BRAHMAN *v.* KOTTAYYA. **21 I. C 777.**

——— Ss. 17 (1) (b) and 49—*Family arrangement—Joint Hindu family—Throwing into the common stock—Registration.*

Where a divided member of a joint Hindu family throws his properties into the common stock so as to make it joint family property of a reunited family, a registered instrument is necessary to validate it. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) REDDI *v.* REDDI. **8 L. W. 400 : 47 I. C. 716 : (1918) M. W. N 680.**

——— Ss. 17 (1) (b) and 19—*Family arrangement—Recital of a prior gift in a petition for transfer of registry—Registration optional.*

A petition to the Collector praying for the transfer of a registry of a certain *Mitta* in the name of one D recited that the village had been given to D as *stridhanam* and concluded as follows :—The said Doraisami Ammal shall hold and enjoy the villages, with the right of alienation thereof by way of gift, mortgage, sale, etc. *Held, by the Full Bench* that the petition containing the above recitals was not a document declaring the rights of D's estate. 5 Bom. 232 Foll. Per *Coutts Trotter, J.*—Exclusion of evidence under statutory rules should be confined strictly to the letter of the statute (*Wallis, C.J., Abdur Rahim and Seshagiri Aiyar, JJ.*) JEEVARATHNA AMMAL *v.* VAKADA PILLAI. **19 M. L. T 52 : (1916) 1 M. W. N 17 : 32 I. C. 111 : 3 L. W. 1 (F. B.).**

——— S 17 (1) (b)—*Family arrangement—Distributing properties.*

Distribution of properties among relatives should only be made by registered instrument. (*Miller and Abdur Rahim, JJ.*) ILLA SOMANNA *v.* MADDALA SETTANNAMA. **18 I. C. 636 : 13 M. L. T. 102.**

——— S. 17 (1) (b)—*Family arrangement—Maintenance to Hindu widow—Writing if necessary.*

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b)—Family Arrangement.

Under Hindu Law, no transaction need be in writing and so the grant of immovable property to a widow for maintenance is perfectly valid if proved by oral evidence (*Mitra, O. A. J. C.*) GIWAN LAL *v.* CHUDAMAM. 26 I. C 835 : 10 N. L. R. 111

——— S. 17 (1) (b)—*Family arrangement—Compromise unregistered—Filed in mutation proceedings.*

S. 17 of the Registration Act, aims at those documents which operate by themselves to confer a fresh title, and not at those in which no new interest is created but simply a declaration is made as to an antecedent title of certain persons by way of inheritance. A family settlement arrived at between the several claimants to the property of a deceased and allotting different parcels among them is not compulsorily registrable, as no fresh rights are created but only existing titles are acknowledged by the compromise. (*Lindsay, J. C.*) RAM SARUP *v.* BINDESHUR.
18 O. C. 51 27 I. C. 838 : 2 O. L. J. 67.

Lease.

——— S. 17 (1) (b) and (c)—*Lease—Registered lease—Subsequent unregistered agreement to take less—Inadmissible in evidence.*

Where there is a registered lease fixing a yearly rent, a subsequent unregistered agreement to take less than the amount fixed is inadmissible in evidence. (*Sir John Eage.*) DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BAGCHI.
41 Cal. 483 : 40 I. A. 223 : 26 M. L. J. 25 : 15 M. L. T. 68 : 19 C. L. J. 95 : 18 C. W. N. 66 : (1914) M. W. N. 1 : 21 I. C. 760 : 16 Bom. L. R. 42. (P. C.).

——— S. 17 (1) (b)—*Lease—Equitable mortgage.*

A letter accompanying deposit of title deeds need not be registered. (*Leslie Jones and Broadway, JJ.*) THE FIRM OF RAM MOHAN LAL *v.* THE BHARAT NATIONAL BANK, LTD. 3 Lah. L. J. 373.

——— Ss. 17 (1) (b) and 49—*Lease—Agreement to occupy vacant site, build on it and retain it for life.*

An undertaking to occupy land contained in a document and to build on it is neither a lease nor an undertaking to occupy within S. 17 (2) or S. 2 (7), Registration Act. The undertaking to occupy not being a lease no right or interest in the land was created and registration of it was not therefore compulsory. 16 Mad. 97; 27 All. 190 Ref. S. 17 of the Act must be construed very strictly as read with S. 49 it imposes a serious disability. 16 P. R. 1895 ; 51 P. R. 1898 Foll. (*Abdul Raoof, J.*) WARYAM SINGH *v.* BASANT SINGH. 53 I. C. 451 : 124 P. R. 1919.

——— Ss. 17 (1) (b) and 49—*Lease—Unregistered lease for less than a year—Admissibility to prove character of possession.*

An unregistered Case deed for less than a year is admissible to prove the character of the possession of the occupier of the demised property. (*Wallis, C. J., Ayling and Krishnan, JJ.*) RAMA SAHU *v.* GOWRO KATHO. 44 Mad 55 : (1920) M. W. N. 711 : 12 L. W. 649 : 39 M. L. J 629 : 59 I. C. 350 : 29 M. L. T. 10 (F.B.).

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b)—Mortgage.

——— S. 17 (1) (b)—*Lease—Lease for drawing toddy if should be registered.*

A lease for drawing toddy does not create an interest in "immovable property" within the meaning of S. 17 (*b*) of the Registration Act and does not require registration. 6 M H.C.R. 71 ; 20 Mad. 58; 12 W.R 366, Dist (*White, C.J. and Oldfield, J.*) NATESA GRAMANI *v.* TANGAVELU GRAMANI.
38 Mad. 883 : 15 M. L. T 257 : 23 I. C. 102 : (1914) M. W. N. 327.

Mortgage.

——— S. 17 (1) (b)—*Mortgage—Equitable mortgage in writing—Registration.*

If a memorandum is of such a nature that it could be treated as the contract for the mortgage which the parties considered to be the only repository and appropriate evidence of their agreement it would be the instrument by which the equitable mortgage was created, and would come within S. 17 of the Regn. Act. Where title deeds are handed over with nothing except that they are to be security the law supposes that the scope of the security is the scope of the title. Where, however title deeds are handed over accompanied by a bargain, the bargain must rule. Lastly, when the bargain is a written bargain it alone must determine the scope and extent of security. Although it is a well established rule of equity that deposit of a document of title without writing, or without word of mouth, will create in equity a charge upon the property referred to, that general rule will not apply when there is a deposit accompanied by an actual written charge. In that case the terms of the written document must be referred to and any implication that must be raised supposing that there was no document is put out of the case and reduced to silence by the documents by which alone the case has to be governed. (*Lord Carson.*) SUBRAMANIAN *v.* M. L. R. M. LUTCHMAN.
44 M L J. 602 : 50 Cal 338 : 32 M. L. T. (P. C.) 184 : 2 Bur. L. J. 25 : 38 C. L. J. 41 : 18 L. W. 446 : (1923) M. W. N. 762 : 28 C. W N. 1 : 1 Rang. 66 : 25 Bom. L R. 582 : 50 I. A. 77 : 1923 P. C. 50 (P.C.).

——— Ss. 17 (1) (b) and 49—*Mortgage—Registered usufructuary mortgage—Subsequent writing providing for variation of term—Not admissible.*

An unregistered document purporting to affect or vary the mode in which the rents and profits of the property usufructuarily mortgaged are to be appropriated under the terms of a registered mortgage is inadmissible in evidence. (*Lord Ma naughten*). ABDULLAHKHAN *v.* BASHARAT HUSSAIN.
35 All. 48 : 40 I. A. 31 : 17 C. W. N. 233 : 13 M. L. T. 82 : 1913) M. W. N 131 : 17 C. L. J. 312 : 15 Bom. L. R. 432 : 17 I. C 737 : 25 M. L. J. 91 (P.C.).

——— Ss. 17 (1) (b) and 49—*Mortgage-Redemption—Proof of—Unregistered receipt inadmissible.*

No particular form of document is required to redeem a mortgage. An unregistered receipt

REGISTRATION ACT (XVI OF 1903), S. 17 (1) (b)—Mortgage.

cannot in itself be used as evidence of redemption of a mortgage. (*Ryves, J.*) CHANBEY BASDEO *v.* BEHARILAL. **54 I. C. 117.**

——S. 17 (1) (b)—*Mortgage—Conversion of simple into usufructuary mortgage—Mortgagee put in possession—Registration necessary.*

A subsequent unregistered but compulsorily registrable mortgage in lieu of the previous mortgage, being invalid the mortgagee is entitled to sue upon the original mortgage. (*Chamier, J.*) DEO CHAND *v.* PEARAY. **27 I. C. 430 : 12 A. L. J. 1133.**

——S. 17 (1) (b)—*Mortgage—Right of redemption.*

The right to redeem a mortgage comes within the expression "other intangible thing" in clause (2) of the section and as such cannot be transferred except by registration. (*Richards, C. J. and Tudball, J.*) RAHAMAT ALI *v.* MOHAMMAD MAZHA HASAM. **19 I. C. 818 : 11 A. L. J. 407.**

——Ss. 17 (1) (b) and 49—*Mortgage—Deposit of title-deeds—Written agreement—Registration.*

Where there is an agreement in writing with reference to the deposit of title-deeds, the Court must refer to that agreement in order to determine the conditions of deposit. If the writing contains terms of contract it must be registered. (*Macleod and Covajee, JJ.*) CHUNILAL SOMESHWAR BHATT *v.* VITHALDAS KARSANDAS. **24 Bom. L. R. 502 : 1922 B. 440.**

——S. 17 (1) (b)—*Mortgage—Equitable mortgage, deposit of title-deeds by letter not registered.*

Deposit of title-deeds by unregistered letter followed by advance of money does not create a valid equitable mortgage. (*Chatterjee and Panton, JJ.*) BHAIRAB CHANDRA BOSE *v.* ANATH NATH DE. **24 C. W. N. 599 : 57 I. C. 686 : 31 C. L. J. 375.**

——S. 17 (1) (b)—*Mortgage—Record of deposit of title-deed.*

A letter written by the mortgagor containing the fact of deposit of the title-deeds and execution of a pro-note for the amount due need not be registered since the letter was not the evidence of the contract, but only a writing which was the evidence of the fact from which the contract is to be inferred. 13 Cal. 322; 33 Cal. 410; 7 B.L.R 55, 23 I.C 129 Dist. (*Leslie Jones and Broadway, JJ.*) MOTI RAM *v.* BHARAT NATIONAL BANK. **3 Lah. L. J. 373**

——S. 17 (1) (b)—*Mortgage—Memorandum recording deposit of title deeds.*

A memorandum recording the deposit of title deed as an equitable mortgage and the purpose thereof does not create any interest in immoveable property and is not a mortgage, 38 Bom. 372 Dist. (*Wilberforce, J.*) UMRAO SINGH *v.* THE PUNJAB NATIONAL BANK, LTD **3 U P.L. R (Lah.) 6 · 59 I C. 578 : 3 L. L. J. 44.**

——S. 17 (1) (b)—*Mortgage—Recital of mortgage—Chaupatta—Registration.*

An entry in a CHAU ATTA account book as to the detail of money due on a mortgage effected

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b)—Partition Deed.

orally does not create the mortgage and is not compulsorily registrable. (*Adbul Raoof, J.*) GHANIA *v.* SHIAMON. **57 I. C. 58.**

——S. 17 (1) (b)—*Mortgage—Enhancement of interest.*

A deed altering the terms of interest payable on mortgage does not fall within S. 17 (1) (b) of the Registration Act, and is admissible in evidence without Registration. 24 C. 20 ; 22 M. 217 Foll. 37 C. 293 ; 39 C. 284 Dist. (*Shadi Lal, J.*) ISARMAL *v.* TUKA. **50 I. C. 647.**

——S. 17 (1) (b)—*Mortgage—Receipt of payment of mortgage debt.*

A receipt of a sum of money in full discharge of mortgage-debt, the balance being excused, need not be registered for its admissibility in evidence. (*Spencer and Krishnan, JJ.*) NEELAMANI *v.* SUKADUVA. **43 Mad. 803 : 60 I. C. 255 : 12 L. W. 269.**

——S. 17 (1) (b)—*Mortgage—Equitable mortgage—Transfer of Registration if necessary.*

A transfer of a mortgage by deposit of title-deeds need not be registered. (3 B. 312 Dist.) (*Wallis, J.*) DWARKA DASS *v.* DINAKOTI AMMAL. **23 I. C. 129 : 15 M. L. T. 198.**

——S. 17 (1) (b)—*Mortgage—Unregistered agreement for redemption is invalid.*

The parties entered into a sale-deed which was registered. A subsequent agreement for redemption was entered into but it was unregistered. *Held*, that as it required registration, it was unenforceable. (*Maung Kin, J.*) C. CHAING KY WAN *v.* MAGO. **1 Bur. L. J. 223 : 11 L. B. R. 456 : 1923 R. 52.**

——S. 17 (1) (b)—*Mortgage—Equitable mortgage—Memorandum—Registration*

A document merely reciting that certain documents are handed over to an equitable mortgagee, is a memorandum and is not a mortgage and is not compulsorily registrable. (*Pratt and Ormond, JJ.*) BADRI DASS *v.* CHETTY FIRM OF OAMK. **45 I. C. 918.**

——S. 17 (1) (b)—*Mortgage—Redemption—Agreement creating interest in immovable property.*

Agreement which in effect creates a right to redeem immovable property requires to be registered. (*Parlett, J.*) MA THIN *v.* YASSIN. **32 I.C. 694.**

Partition Deed.

——S. 17 (1) (b)—*Partition—Unstamped and unregistered—Compromise—Admissibility.*

Where a compromise of certain proceedings for partition in a Revenue Court has been acted upon by the parties it is not open to one of them to resile from the compromise on the ground that it is unregistered. Even an oral agreement of partition acted upon by the parties and admitted by them will be binding. 28 A. 78; 43 A. 1; 31 A. 412 referred to. (*Gokul Prasad, J.*) SITA RAM *v.* HAR SAHAI. **1923 A. 438.**

——S. 17 (1) (b)—*Partition—Kacha deed.*

Crump, J.—Where the whole tenor of a deed shows that the intention was that the parties should be the owners of their separate share as

REGISTRATION ACT (XVI OF 1908) S. 17 (1) (b)—Partition Deed.

——S. 17 (1) (b)—*Surrender—Landlord and tenant.*

from the date of the document, it is impossible to escape from the bar created by S. 17, clause (*b*) of the Registration Act. The mere fact that parties had in contemplation the execution of a formal document in the future, does not suffice to take it out of the scope of that section. (*Macleod, C. J. and Crump, J.*) KASTURIBAI MANIBAI *v.* BAI MAHALAKSHMI. **1923 Bom. 464.**

——Ss. 17 (1) (b) and 49—*Partition.*

In a suit to recover property four duly signed receipts acknowledging the acceptance of certain portions of the property at partition were filed *Held*, they were (I) inadmissible as they collectively constituted an instrument of partition but were unregistered. (II) They were mere lists which when read separately did not prove the partition. (III) In either case, partition is not established. (*Macleod, C. J. and Heaton, J.*) NILKHANT BHIMAJI SINDE *v.* HANMANT EKNATH SINDE. **22 Bom. L. R. 992 : 58 I. C. 415 : 44 B. 881.**

——Ss. 17 (1) (b) and 49—*Partition—Unregistered deed—Oral evidence—Admissibility of.*

An unregistered deed of partition is admissible in evidence for the purpose of proving a division between the sharers. Oral evidence of the partition is also shut out of S. 91 of the Evidence Act in cases where the contract between the parties has been reduced to writing. (*Abdul Raoof, J.*) CHANDU LAL *v.* DAULAT RAM. **1924 L. 286**

——Ss. 17 (1) (b) and 49—*Partition—Map and chitta—Allotment on partition.*

A map and a chitta put in to prove that land in dispute was allotted in a partition to a certain person, cannot be said to be instruments falling within of S. 17 of the Registration Act and requiring registration (*Chitty and Walmsley, JJ.*) BRINDABAN CHANDRA DE *v.* KRISHNA MOHAN DE. **47 I. C. 159.**

——S. 17 (1) (b)—*Partition—Memorandum of prior partition.*

A memorandum in an account book of a partition which has already taken place need not be registered in order to be admissible in evidence. *Wilberforce, J.*) KANSHI RAM *v* LAL CHAND. **56 I. C. 182 : 2 U. P. L. R. 93.**

——S. 17 (1) (b)—*Partition—Document reciting fact of partition.*

A document reciting the fact that certain immovable property has already been partitioned and that each party has since been in possession of the share allotted to him at partition, does not require registration. (*Shadilal and Petman, JJ.*) AMAR NATH *v.* KHUDU MAL. **53 I. C. 123.**

——S. 17 (1) (b)—*Partition—Acknowledgment of partition, whether compulsorily registrable.*

A document purporting to be nothing more than an acknowledgment that a partition was effected at a certain time does not create any right in any property and is not compulsorily registrable. (*Shah Din, C.J. and Broadway, J.*) BABU LAL *v.* HARI BAKHSH.

122 P. W. R. 1917 : 41 I. C. 479 : 13 P. R. 1918.

REGISTRATION ACT (XVI OF 1908) S. 17 (1) (b)—Partition Deed.

——S. 17 (1) (b)—*Partition deed.*

A partition, evidenced by oral testimony and two lists, which in no sense amounts to a partition deed need not be registered. (*Johnstone, C.J. and Jones, J.*) MAHMUD *v.* MUHAMAD HAMID **11 P. W. R. 1917 : 38 I. C. 387 : 33 P. R. 1917.**

——S. 17 (1) (b)—*Partition, document of—Admissibility for collateral purpose.*

For the purpose of proving a partition and to indicate that plff. has lost his right in the suit properties, a non-testamentary document extinguishing the right of plff. in certain immovable property exceeding Rs 100 in value and acknowledging receipt of other property in lieu of his relinquishment are not receivable in evidence for want of registration. (*Chevis and Le Rossignoll, JJ.*) JAT MAL *v.* BELI RAM. **35 P. R. 1916 : 33 I. C. 948 : 52 P.W R. 1916.**

——S. 17 (1) (b)—*Partition—Lists of partition signed by co-sharers—Registration.*

Lists of properties allotted to each co-sharer in a partition of joint family properties were prepared and each was given a list of his share of the properties signed by the other co-sharers. The lists formed the actual deed of partition and therefore registration was necessary. (*Kensington and Beadon, JJ.*) UTTAM CHAND *v.* GHANSISHAM DAS. **188 P. L. R. 1913 : 19 I. C. 646 : 127 P.W.R. 1913.**

——S. 17 (1) (b) — *Partition— Recitals — Memoranda of previous disposition—Document drawn up to evidence partition made at the time.*

Deeds which are mere recitals or memoranda of dispositions of property which have been previously agreed upon or made and which do not themselves operate to effect any such dispossession need not be registered. 30 P.R. 1884 ; 184 P. R. 1889; 48 P. R. 1905 Rel. But where a document is executed at the time of partition of properties worth more than Rs. 100 and it is not intended to serve merely as a memorandum of what had been previously arranged, the document is compulsorily registrable. (*Shah Din and Scott-Smith, JJ.*) NIHAL CHAND *v.* DAVID SASSOON & CO., KARACHI. **229 P. L. R. 1912 : 15 I. C. 28 : 231 P. W. R. 1912.**

——Ss. 17 (1) (b) and 49—*Partition—Unregistered deed—Admissibility in evidence.*

An unregistered document of partition dividing the properties by metes and bounds which is inadmissible for want of registration to prove that partition is admissible in evidence, to prove a unilateral declaration of an intention to divide thereby, effecting a division in status. 23 M. L. T. 504 ; 19 M. L. J. 228 ; 30 M. L. J. 404 foll.; 30 M. L. J. 62 ; 30 M. L. J. 404 doubted.

Per *Spencer, J.*:—S. 49 of the Regn. Act has to be read on the light of S. 17 of the same Act and S.91 of the Evidence Act. If this is done, the word "affecting" will be seen to be only a compendious "term expressing" purporting or operating to create, declare, assign, limit or extinguish, whether in present or future, any right, title or interest, whether vested or contingent. (*Spencer and*

REGISTRATION ACT (XVI OF 1908) S. 17 (1) (b)—Partition Deed.

Venkatasubba Rao, JJ.) ATLURU SARASWATAMMA *v.* ATLURU PADDAYYA.
46 Mad. 349 : 18 L. W. 418 : 44 M L. J. 45 : 1923 Mad. 297.

——S. 17 (1) (b)—*Partition—Partition deed effecting division in status.*

A partition deed creating division in status only extinguishes rights within sub-section (1). (*Wallis, C. J. and Krishnan, J.*) RAJANGAMMAL *v.* RAJANGAM AIYAR. **39 M. L J. 382 : 57 I. C. 18 : 12 L W. 435.**

——Ss. 17 (b) and 49—*Partition Book containing a list of properties affecting immovable property—A formal declaration of status—Unregistered—Admissibility.*

A document containing a list of properties both movable and immovable available for division and containing a note as "In presence of the witnesses named hereunder we divided" is a formal declaration of division of status attested by witnesses and it is inadmissible in evidence as it affects immoveable properties and as it is unregistered. (*Wallis, C.J. and Kumarasamy Sastri, J.*) AYYAKUTTI MANKONDAN *v.* PERIASAMI KOUNDAN. **2 L W. 1184 : 31 I. C. 615 : 30 M L. J. 404.**

——S. 17 (1) (b)—*Partition— Memorandum of partition—Declaring divided status—Registration.*

Per *Spencer, J.*:— A document purporting merely to be a memorandum of partition and is imperfect as a deed does not require registration and is admissible in evidence to prove a divided status 9 M L J. 175. Foll. (Per *Sadasiva Aiyar, J. contra*). It requires registration and is not receivable in evidence even for proving a divided status. 3 I. C. 321 Diss. : 17 M. L J 469 : 13 M. 281 : 6 I. C. 346 Foll (*Sadasiva Aiyar and Spencer, JJ.*) AYYAKUTTI MANKONDAN *v.* PERIASAMI KUNDAN. **1 L. W. 31 : 24 I. C. 771 : 15 M. L. T. 163.**

——S. 17. Cl. 1 (b)—*Partition—Declaration of rights—Statement in partition—Registration—Necessity for.*

A document allotting shares among the several co-owners is none the less a partition deed because it says at the end that as no stamped sheet was available at the time of its execution a stamped sheet would be purchased and a document executed Where a document after reciting a division and describing the properties allotted proceeded to state that the brothers had no connection thereafter, *held* that it is inadmissible without registration. (*Kotwal, A J. C.*) MT. KASHI *v.* PANDURANG. **1923 Nag. 75.**

——Ss. 17 (1) (b) and 49—*Partition deed—No registration—Admissibility.*

A *kararnama* which was in reality a partition deed requires registration if it affects property of over Rs. 100. In the absence of registration, the deed is not admissible in evidence. (*Prideaux, A. J. C.*) ABDUL RAHIM *v.* SHEIKH KAWADOO. **1922 N. 236.**

——S. 17 (1) (b)—*Partition—Compromise—Compulsory registration—Deed effecting division.*

A compromise giving effect to an arrangement

REGISTRATION ACT (XVI OF 1908) S. 17 (1) (b)—Relinquishment or release.

arrived at between the parties about some estate is compulsorily registrable. A document containing a mere recital of past acts and of a past partition or merely declaring the divided status of the parties need not be registered. But when the document itself is a record of property subjected to a division which took place on the date on which it was written and which declares that in certain immoveable properties certain parties had a share and that their former right in certain immoveable properties are extinguished, it falls under S. 17 (1) (*b*) of the Registration Act and is compulsorily registrable. (*Prideau, A. J. C.*) RAMBHAROZA *v.* SUKHDAS. **54 I. C. 804.**

——S. 17 (1), (b) and (c)—*Partition—Completed—Partition—Receipt.*

Law does not require writing to complete a partition which has already been effected by Panchayats. A receipt for possession of some land allotted to one of the parties in a partition already effected by Panchayats is not compulsorily registrable. (*Brockman, A. J. C.*) FAKIRA *v.* TULSIRAM. **45 I. C. 854.**

Relinquishment or release.

——Ss. 17 (1) (b) and 49—*Relinquishment—Agreement to surrender property—Subsequent letter affirming it—Registration.*

Where the manager of a Hindu joint family estate entered into an agreement with his co-sharers that on proof of losses in the management of the estate they should pay their share of such losses and if they be not paid when demanded, their shares in the estate would pass to the former: *Held*, that the agreement by itself was sufficient to transfer the shares upon the event happening as contemplated, and that a subsequent letter to the manager admitting the loss and surrender was not an operative conveyance which required registration. (*Lord Buckmaster*). PANDURANG KRISHNAJI *v* MARKANDEYA TUKARAM.
26 C. W N. 201 : 18 N. L R. 1 : 20 A. L. J. 305 : 5 N. L. J. 6 : 15 L. W 486 : 42 M. L. J. 436 : 30 M. L. T. 249 : 24 Bom. L. R. 557 : 49 I. A. 16 : 35 C. L. J. 409 : 8 U. P. L. R. 85 : (1922) P. C. 20 (P. C.).

——S. 17 (1) (b)—*Relinquishment or release—Release of right to sue for declaration—Not compulsorily registrable.*

An agreement by the reversioners of a Hindu whereby they agreed to forego their right to sue for a declaration that a deed of gift executed by a widow in favour of certain persons was not binding after death, does not convey any right, title or interest nor does it purport to operate to create or extinguish any right, etc., and therefore is not compulsorily registrable within S. 17. (*Tudball and Rafique, JJ.*) BHANA *v.* GUMAN SINGH.
40 All. 384 : 44 I. C. 629. 16 A. L. J. 191.

——Ss. 17 (1) (b) and 49—*Relinquishment—Compromise petition—Order of Revenue Court—Mutation proceedings—Transfer of property under compromise—Compromise unregistered, if admissible in evidence.*

A dispute before Revenue Court as to the entry of names in the Revenue Register, between a

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b)—Relinquishment or release,

reversioner and the daughter of the last holder, was compromised by which the reversion was to pay off certain incumbrances created by the parents of last holder and the daughter in her turn gave up possession of the disputed lands and also her claim to mutation. The compromise petition was filed and the order was made accordingly. The reversioner failed to carry out his part of the compromise and the daughter sued for recovery of the land she had given up. Except the petition to the Revenue Court and the order of the Revenue Officer, there was no evidence that the daughter had transferred her interest in the property *Held*, that the mutation proceedings not being judicial proceedings and the order of the Revenue Officer not a decree and both the petition and the order, being u registered were inadmissible in evidence and consequently there was no legal evidence of any transfer of interest by the daughter to the reversioner. (*Richards, C. J. and Tudball and Rafique, JJ.*) JAGRANI *v.* BISHESHAR DUBE. **38 All 366 : 35 I. C. 701 : 14 A. L. J. 449 (F. B).**

——S. 17 (1) (b)—*Release of rights in immoveable property must be registered.*

Where in a partition suit between 4 out of 8 brothers a *razinamah* purported to divide their mother's share after her death among the 4 contesting parties and the other brothers attested the same, *held*, that this could not operate as a release of the attesting mother's rights in their mother's share, for want of registration. (*Rankin, J.*) SASHI BHUSAN *v.* HARI NARAIN. **66 I. C. 705 : 25 C W. N. 990.**

——S. 17 (1) (b)—*Relinquishment.*

A document by which an interest in immoveable property worth less than Rs. 100 is relinquished, need not be registered. (*Teunon and Newbould, JJ.*) SORMAN FAKIR *v.* MOOLLA ABDUL AZIZ. **57 I. C. 949.**

——S. 17 (1) (b)—*Relinquishment.*

Agreement declaring absence of title to tank. An agreement by which one party declares that he has no title to land more than Rs. 100 in value requires registration although it might be doubtful whether any title to the land existed in the declarant. (*Shadi Lal and Le Rossignol, JJ.*) KISHEN CHAND *v.* MUNICIPAL COMMITTEE OF AMRITSAR. **39 P R. 1919 : 51 I. C. 391 : 80 P. L R. 1919.**

——Ss. 17 (1) (b) and 49—*Relinquishment—Relinquishing interest—Registration.*

A document relinquishing rights and interests in land and a building over it, is compulsorily registrable. If not registered it is inadmissible in evidence. (*Broadway, J.*) ITBAR *v.* WILAYAT. **50 I. C. 922.**

——S. 17 (1) (b)—*Relinquishment—Document relinquishing rights in property.*

Registration of a document relinquishing rights in immoveable property of over Rs. 100 and indicating a clear intention that title should pass to the releasee is a convevance and not a mere agreement to convey and is compulsorily registrable.

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b)—Relinquishment or release.

(*Shadi Lal and Le Rossignol, JJ.*) GOPI RAM *v.* RAM DHAN. **10 P. W. R. 1918 : 44 I. C. 228 : 157 P. L. R. 1917.**

——S. 17 (1) (b)—*Relinquishment—Letter reciting delivery of possession.*

A letter reciting certain facts regarding certain property to the effect that the writer has delivered possession and has nothing to do with certain property, is not an instrument which by itself purports or operates to create or declare any right, title or interest in the property and hence does not require registration. (*Scott-Smith, J.*) KAJUMAL *v.* PARAMA NAND. **40 I. C. 455.**

——S. 17 (1) (b)—*Relinquishment--Surrender of reversionary rights—Adverse possession.*

An agreement whereby a reversioner surrenders his reversionary rights in immovable property of the value of Rs. 100 or upwards is compulsorily registrable since it amounts to an extinguishment of the right in the immovable properties. 11 I. C 211. Foll.; 30 B. 304, not foll. (*Rattigan, J.*) HAKAM SINGH *v.* INDAR. **12 P. L. R. 1915 : 27 I. C. 699 : 18 P. W. R. 1915.**

——S 17 (1) (b)—*Relinquishment by widow—Admissibility of unregistered deed.*

The right of a widow to hold possession of land left by her husband till death or remarriage amounts to "a right, title or interest" in that land within S. 17. An agreement by a widow relinquishing her life-estate in such land in favour of her husband's collaterals is compulsorily registrable, and if unregistered would be inadmissible in evidence. (*Shah Din and Scott-Smith, JJ.*) SHAHAB DIN *v.* PANAH BIBI **97 P. W. R. 1912 : 14 I. C. 749: 92 P W. R 1912.**

——S. 17 (1) (b)—*Relinquishment of reversioner's interest – Value above Rs. 100—Registration, if compulsory.*

The relinquishment of a reversioner's interest, the present value of which is ascertained at Rs. 100 or above, requires compulsory registration. (*Johnstone, J.* KHAIRTI *v.* MATAB. **135 P. W. R. 1911 : 11 I C. 211 : 214 P. L. R. 1911.**

——Ss. 17 (1) cl. (b) and 2, cl. (11)—*Relinquishment of portion of mortgaged debt—Registration.*

An agreement by a mortgagee relinquishing a portion of the mortgaged debt requires registration under S. 17 (1), cl. (b) of the Act. 4 Bom. 235 ; 42 Cal. 546 Dist. (*Abdur Rahim and Napier, JJ.*) CHUNDOORU LAKSHMANA SATTY *v.* CHENCHURAMAYYA. **7 L. W. 229 : 44 I. C 132 : (1918) M. W. N. 262 : 24 M. L. J. 79.**

——S. 17 (1), (b)—*Relinquishment—Usufructuary mortgagee.*

A relinquishment by a usufructuary mortgagee of his right to take possession, need not be registered. 13 M. L. J. 500 Fol. (*Tyabji, J.*). BANGARU MUTHU VENKATAPPA NAYANIVARU *v.* GOLLA CHINNABA NAIDU. **31 I. C 565.**

——S 17 (1) (b)—*Release — Compromise—Showing release of co-parcener's right, admissibility of—Without registration.*

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b)—Relinquishment or release.

If the compromise, properly construed, evidences an actually effected release of a coparcener's right in the family property it is admissible in evidence and it evidences only an agreement to give a release, then also it does not require registration. (*Miller and Sankaran Nair, JJ.*) SALLAPPA KOUNDAN *v.* GURUMOORTI 26 I. C. 790 : 27 M. L. J. 396

——S. 17 (1) (b)—*Relinquishment—Covenant to pay annuity—Agreement to relinquish ownership in default of annuity—Enforceability of.*

Under an unregistered deed a covenantor after acknowledging his ownership of the immovable property under a prior conveyance, agreed to pay a certain annuity to another. In the event of default he agreed to relinquish his ownership in the property. *Held*, the agreement can be enforced for the payment of the annuity and for specific performance of the agreement to relinquish, but the document being unregistered no suit can be maintained for possession (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KARNAM PARTHASARATHY *v.* KARNAM BARATHAMMA. 16 I. C. 881.

——S. 17 (1) (b)—*Relinquishment of claim to immovable property over Rs.* 100.

A document containing consent to a disposition of property and a former renunciation of a claim, whether legally correct or not, is release and must be registered when pertaining to immovable property of the value of Rs. 100 or over. 30 Bom. 304, Dist. (*Skinner, A.J.C.*) ATMARAM *v* LALA. 10 I. C. 733 : 7 N. L. R. 36.

——S. 17 (1) (b)—*Release — Surrender or release, if required to be registered.*

Agreements of surrender or release were not unenforceable in Oudh for want of registration, before the enforcement of the Act in Oudh in 1871 (*Lindsay and Kanhaiya Lal, A. J. Cs.*) BHARAT SINGH *v.* BALBHADDAR SINGH. 20 I. C. 429

Sale.

——S. 17 (1) (b)—*Sale or mortgage.*

The construction of a sale-deed and an agreement to reconvey the property, must be put according to the actual contents of the documents. Where the Court finds from the extrinsic evidence and circumstances, the relation of the written language to the facts, it may conclude that the sale-deed and the agreement to reconvey constitute a mortgage. (*Macleod, C. J. and Heaton, J.*) NAMDEV SATVASHET *v.* DHONDU SADASHIV. 22 Bom. L R. 979 : 58 I. C. 406 : 44 B. 961.

——S. 17 (1) (b)—*Sale—Agreement to sell—Registration.*

Held that the general sense of the document was that it was an agreement to sell and it did not create or declare any rights in immoveable property. Consequently it was not compulsorily registrable (*Broadway and Harrison, JJ.*) INDER SINGH *v.* DYAL SINGH. 1924 L. 337.

——S. 17 (1) (b)—*Sale—Agreement to sell and agreement to execute a sale-deed.*

Where one party received a part of the consideration and agreed to sell his house and later on, on receiving the full consideration, agreed to execute sale-deed, the two documents one of agreement to sell and the other of agreement to execute a sale-deed did not require registration. (*Wilberforce and Martineau, JJ.*) GHULAM MOTI-UD-DIN *v.* UMAR DIN. 63 I. C. 22.

——Ss 17 (1) (b) and 49—*Sale—Repurchase—Endorsement on sale-deed—Inadmissibility for want of registration.*

Where defendants pleaded that resale by the plaintiffs of the land in suit, to them and reference was made to a receipt for a consideration said to have been endorsed on the back of the original sale-deed. *Held* that the receipt was not admissible in evidence and oral evidence could not be allowed to prove repurchase. (*Shadi Lal, J.*) BAGGU *v.* TARA SINGH. 5 P. L. R. 1919.

——S. 17 (1) (b) and (c)—*Sale—Promise to sell by regular deed and acknowledgment of earnest-money.*

S. 17 (1) (*b*) of the Act does not require the registration of a promise to sell by a duly executed deed together with acknowledgment of the receipt of earnest-money. 6 I. C 645 Dist (*Johnstone, C. J. and Scott-Smith, J.*) SHARAF ALI KHAN *v.* JAGANDAR SINGH. 37 I. C. 132 : 98 P. R. 1916.

——S. 17 (1) (b)—*Sale—Unregistered sale-deed—Admission of sale by vendor—Evidence—Mutation proceedings admissible to prove but not the sale-deed.*

T, one of four brothers sold to one of them B, his whole holding by an unregistered deed. The Revenue authorities found that the sale was in favour of all the three brothers of T, and accordingly effected mutation of that holding in the name of his three brothers in equal shares. B took possession of nearly the whole of the land, R a third brother, got a decreee for his third share on the strength of the mutation and unregistered sale-deed admitted in evidence. *Held*, that an unregistered deed of sale of immovable property worth Rs. 100 or more cannot be admitted in evidence to affect the interest of a third person who was no party to the deed, though the seller himself admits the sale. (*Broadway, J.*) RAM SINGH *v.* BATAN SINGH. 78 P. L. R. 1917 : 36 I. C. 374 : 110 P W. R. 1916.

——S. 17 (1) (b) *Sale — Sale—Sale for less than Rs.* 100.

A sale deed of immovable property which is subject to a mortgage is not compulsorily registrable if the consideration excluding the mortgage-money is less than Rs 100. (*Johnstone, J.*) LEHNA SINGH *v.* SANTA SINGH 9 P.W.R. 1912 : 13 I. C. 852 : 135 P. L. R. 1912.

——Ss. 17 (1) (b) *and* 49—*Sale—Registered sale-deed, contemporaneous unregistered agreement to re-convey—Admissibility of evidence*

Where properties are sold under registered sale-deed and on the same day the vendee executed an unregistered document to reconvey the properties in favour of their vendors, the unregistered agreement is a document affecting immovable property requiring registration under S. 17 (1), Cl. (b) of the Registration Act, and consequently is inadmissible under S. 49 for the purpose of

REGISTRATION ACT (XIV OF 1908), S. 17 (1) (b) —Sale.

showing that the agreement along with the absolute conveyance constitutes a mortgage by conditional sale. (*Wallis, C.J. and Seshagiri Aiyar, J.*) PUTTI SESHA AIYA *v.* KUPPACHAR.
26 M. L. T. 291 : 49 I. C. 699: 10 L. W. 1 : (1919, M. W. N. 87

——— ——Ss. 17 (1) (b) and 49 (c)—*Sale-deed—Property less than Rs.* 100.

An unregistered deed of sale of lands for less than Rs 100 though not operative under S. 54 of T. P. Act, where delivery has not been made to the vendee, is admissible to prove the contract of sale. The rule is not affected by the provision in S 49 (*c*), Regn. Act, which relates only to documents compulsorily registrable under S 17 of the Act. 33 M. 1158 Dist. (*Bakewell and Phillips, JJ.*) POOMALAL UDAIYAN *v.* KARUPPA SERVAI. **34 I. C. 921 : (1916) 2 M. W. N. 136.**

——— S. 17 (1) b—*Sale—Receipt—Agreement to sell.*

Where an unregistered document is a receipt and an agreement to sell, it could be admitted in evidence without registration. (*Ayling and Tyabji, JJ.*) KENDAPANENI KOTAYYA *v* GANGARU SESHAYYA. **21 I. C. 778 : (1913) M. W. N. 995 : 14 M. L. T. 495.**

———S 17 (1) (b)—*Sale—Unregistered sale-deed for Rs.* 20—*Admissibility.*

An unregistered sale-deed for Rs 20 is admissible in evidence so far as the provisions of Registration Act are concerned, but under the Transfer of Property Act it does not create a title. There is nothing to prevent the vendee from proving a title by delivery of possession as required by S.54 of Transfer of Property Act. 8 C. P. L. R 1 Foll. A document, which purported to be a sale-deed for the validity of which registration is not essential, may be regarded as an agreement to sell on the principle laid down in 5 Bom. 143. (*Mittra, A.J.C*) BAPU *v* S.A. No.185 OF 1916 DATED. 30TH NOV. 1916. **1922 Nag 58.**

———Ss. 17 (1) (b) and 49—*Sale—Agreement for redemption—Registration, necessity for*

Where there is an outright sale of property executed and registered a subsequent agreement providing for redemption upon payment of the price is in essence a mortgage and it cannot be enforced unless registered. (*Maung Kin, J.*) CHAING KYWAI *v.* MA OO. **1 Bur. L. J 223: 11 L. B. R. 456 : 1923 R. 52.**

———S. 17 (1) (b)—*Sale—Agreement to re-sell if compulsorily registrable.*

An agreement to re-sell a property for the same price creates a right of redemption for that amount and is compulsorily registrable. (*Parlett. J.*) MA THIN *v.* A. M. YASSIM. **31 I. C. 890.**

Scope of.

———S. 17 (1) (b) – *Scope of—Agreement creating right of pre-emption—Registration.*

An agreement creating a right of pre-emption is not compulsorily registrable under S. 17 of the Regn.Act. 24 M. 449 foll. 42 A. 206 diss. (*Shah, A. C. J. and Crump, J.*) TRIBHUVAN *v.* BAI KHUSAL. **47 Bom. 283 : 25 Bom. L.R. 79 : 1923 Bom. 226.**

———S. 17 (1) (b)—*Scope of—Document declaring heirship not within section.*

REGISTRATION ACT (XIV OF 1908), S. 17 (1) (b) —Transfer of future interest.

Where the document merely declares B. to be an heir of S it does not fall within the purview of S. 17 (1) (b). (*Broadway and Moti Sagar, JJ.*) BAJ SINGH *v.* PARTAP SINGH. **1933 Lah. 497 (2).**

———Ss. 17 (1) (b) and 49—*Scope of—Agreement embodying a complete contract—Right to come into existence in future.*

The right, title or interest, whether vested or contingent, must be a present and not a future right, title or interest in order that it may come under S 17 (1) (b) and it must itself purport or operate to create the right, etc. contemplated by the section. A document which recites that a certain contract had already been entered into and that in the event of certain happenings a certain future right would accrue in favour of certain person does not fall within the purview of S. 17 (1)(b) of the Registration Act. S.17 read with S. 49 must be very strictly construed and the benefit of any doubt should be given in favour of the document not being compulsorily registrable. 89 P.R 1903; 16 P. R. 1896 Rel. (*Broadway and Abdul Raoof, JJ.*) RAM DAS *v.* NADIR SHAH. **69 I. C. 608: 1 Lah. L. J. 79.**

———S. 17 (1) (b)—*Scope of—Documents extinguishing rights—Registration.*

A document which purports to extinguish the executant's rights as mortgagee of more than Rs. 100 in value is compulsorily registrable. (*Shah Din and Le Rossignol, JJ.*) DYAL SINGH *v.* GIAN SINGH. **55 P. W. R. 1915 : 27 I. C. 769 : 142 P. L. R. 1915.**

———Ss. 17 (1) (b) and 49—*Scope of.*

The words "create," "limit," "assign" or "extinguish" in S. 17 (*b*) of the Act, imply a definite change of legal relation to property by an expression of will embodied in the document. The word "declare" implies a declaration of will and not a mere statement of fact. (*Lindsay, J. C. and Stuart, A. J. C.*) SATROHAN LAL *v.* NAGESHAR PRASAD. **35 I. C. 770 : 19 O. C. 75 : 3 O. L. J. 339.**

Transfer of future interest.

———S. 17 (1) (b) (o) 2 (v)—*Transfer of future interest—Agreement to reconvey is not compulsorily registrable.*

An agreement for reconveying property when demanded does not require registration and hence evidence of it can be given. (*Shah, A. C. J. and Crump, J*) SANGAWA GURUBASAPPA *v.* HUCHANGOWDA GOWDER. **25 Bom. L. R. 1207 : 1924 Bom. 174 : 48 Bom. 166.**

———S. 17, Cl. (1) (b)—*Transfer of future interest—Consent of reversioner*

Assent of reversioner to alienation in writing was not compulsorily registrable as the executant had no more than *spes successionis* (*Beman and Macleod, JJ*) ABDUL SAHEB GANDIGIVAD *v.* MALLIKARJUNAPPA SHIVA MURTEYA. **38 Bom. 224: 22 I. C. 292: 15 Bom. L. R. 1142.**

———S. 17 (1)(b)—*Transfer of future interest —Entry in* bahi—*Signature.*

An entry in a *bahi* which is not signed by either of the parties is not an instrument creating any rights and is not compulsorily registrable. (*Shadi Lal, C. J. and Martineau, J.*) TIRKHA *v.* SOLHU. **1924 L. 249.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b) —Transfer of future interest.

——— ——S. 17 (1) (b)—*Transfer of future interest —Consent to alienation.*

Consent to alienation by limited owner does not require registration. (*Scott Smith and Harrison, JJ.*) GULAL *v.* MEHUDI AND SHADMAN. **4 L. L. J. 52: 1922 L. 95.**

——— ——S. 17 (1) (b)—*Transfer of future interest —Document merely reciting what has been done in a property.*

A document which does not effect a partition of immoveable property but merely recites what had been done in respect of the property, need not be registered. (*Scott-Smith, J.*) MITA MAL *v.* SHIV RAM **60 I. C. 484.**

———S. 17 (1) (b)—*Transfer of future interest —Agreement by reversioner to transfer his right, whether requires registration.*

An agreement by a reversioner to transfer a portion of the estate which may vest in him in future, to the promisee does not require registration. (*Smith and Martineau, JJ.*) INDAR SINGH *v.* MUNSHI. **56 I. C. 272: 1 Lah. 124.**

——— ——Ss. 17 (1), Cl. (b) and 49—*Transfer of future interest—Statement of existing rights—Registration.*

Where the document in question does not purport to declare or create any right in immoveable property but merely states an existing fact directly or indirectly does not require registration. 5 B. 232; 43 M. 244 followed (*Coutts Trotter and Ramesam, JJ.*) RANGANAYAKI AMMAL *v.* VIRUPAKSHEE RAO NAIDU.
45 M. L. J. 100 : 32 M. L. T. (H. C.) 312 : 17 L. W. 588 : 1923 Mad. 621

———Ss. 17 (1) (b) and 49—*Transfer of future interest—Creation or declaration of interest—What amounts to.*

An agreement to pay "at the time of redemption" all sums expended by the mortgagee on the repair or improvement of the mortgaged property neither creates nor declares any right to add those sums to the price of redemption. That right is created and declared by S. 63 of the Transfer of Property Act. The assent of which that section speaks may be oral or even tacit, which would be impossible if it could be said to be a transaction creating an interest in immoveable property. (*Hallifax, A. J. C.*) RAMBILAS *v.* LAXMINARAYAN. **1922 Nag. 262**

Trusts.

———S. 17 (1) (b)—*Trusts.*

A deed appointing trustees but not vesting property does not require registration. Trustees in this sense are mere superintendents of property. (*Lord Buckmaster.*) MOHAMAD RUSTAM ALI-KKHAN *v.* MUSTAQ HUSSAIN. **42 All. 909 : 47 I. A. 224 : 32 C. L. J. 471 : 18 A. L. J. 1069 : (1920) M. W. N. 565 : 12 L. W. 539 : 28 M. L. T. 220 : 57 I. C. 329 : 39 M. L. J. 263 (P. C.).**

[Affirming 35 I. C. 718 : 14 A. L. J. 554.]

———S. 17 (1) (b)—*Trusts—Lease by trustee.*

In a suit for specific performance of a contract its terms can be proved even from the unregistered *Amalnamah* and by oral evidence. The registration of an *Amalnamah* is optional when

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b) —Miscellaneous.

from its condition the parties' intention of executing a properly registered document to perfect lessee's title, is clear. A Court in decreeing specific performance must ascertain beforehand whether the contract is enforceable specifically and does not involve any breach of trust. The equity Courts would refuse specific performance of a lease entered into by a trustee-lessor of a trust property beyond his authority. (*Mookerji and Beachcroft, JJ.*) MAHAMAD ASMAL KHAN *v.* NUNDA DULAL CHAKRABURTI. **16 I. C. 390.**

———S. 17 (1) (b)—*Trusts—Trustee's title by registration—Destruction after execution.*

Registration of a trust deed in the absence of an intention to the contrary, conveys title to the trustee even if the deed is not delivered. Destruction by the author after registration is ineffectual to destroy trust. 27 C. 7; 28 M. 124 dis. 7 M. 146 fol. (*White, C. J. and Abdur Rahim, J.*) PULAYA CHETTY *v.* VEDACHELLA PILLAI **(1911) 2 M.W.N. 376 : 11 I. C. 24 :10 M. L. T. 44.**

Miscellaneous

———S. 17 (1) (b)—*Will—Writing off amount in lieu of transfer of share requires registration.*

Where in a will it was stated a sum of money was written off in consideration of a share in immoveable property, the document assigns and extinguishes right in immoveable property and if the consideration set off is more than Rs. 100 the document requires registration. (*Piggott and Walsh, JJ.*) FAKIR CHAND *v.* NAUNG RAM. **1924 A. 277.**

———S. 17 (1) (b)—(1864) S. 13—*Ascertainment of value of property transferred.*

The value of the right on the date of the execution of the document determines the question of the registration of a document transferring any right in property. If the value of such a right is more than Rs. 100, then the document ought to be registered and when registered is admissible under S. 13. (*Tudball and Rafique, JJ.*) BANDIDIN *v.* MUNNALAL. **39 I. C. 931.**

———S. 17 (1) (b)—*Waqf—Subsequent trustee-nama appointing a co-mutwalli.*

A Mahomedan under a registered *waqf* constituted himself *mutwalli* of certain trust created thereunder. Subsequently by a trustee-namah he appointed another person to help him as a *co-mutwalli* but did not transfer property to any person or modify the terms of the *waqfnamah* in any way. *Held*, that the trustee-namah was not compulsorily registrable. (*Banerji and Tudball, JJ.*) RUSTAM ALI KHAN *v.* MUSHTAQ HUSAIN. **35 I. C. 718 : 14 A. L. J. 554.**

[Affirmed on appeal 57 I. C. 329 (P. C.).]

———S. 17 (1) (b)—*Security bond—Stay of execution.*

A security bond by a judgment-debtor hypothecating lands worth more than Rs. 100, in pursuance of an order staying execution is registrable under S. 17 (1) (b) 31 Mad. 330 Foll. (*Martineau, J.*) LAHORE SPINNING AND WEAVING MILLS CO., LTD. *v.* UTTAM CHAND. **53 I. C. 463 : 122 P. R. 1919.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b) Miscellaneous.

A registered instrument is not essential to validate a surrender by a tenant to his landlord. (*Walmsley and Shamsul Huda, JJ.*) ABDUL MAJID *v.* HARI CHARAN HALDAR. **53 I.C. 17.**

——S 17 (1) (b)—*Applicability— Endorsement—Receipt of payment.*

Endorsements or receipts of payments passed by mortgagees to mortgagors do not fall within S. 17 and unless where they are so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property, they do not come within the section and do not require registration (*Mookerjee and Rankin, JJ.*) JOGENDRA NATH SUKUL *v.* SAFIUDDIN SHEIKH. **1924 C. 379.**

——S 17 (1) (b)—*Document declaring existing facts.*

Document declaring existing facts does not require registration. (*Robertson and Beadon, JJ.*) THAKAR SINGH *v.* UJAGAR SINGH. **8 P. W. R. 1913 : 18 I. C. 583 : 26 P. L. R. 1913.**

——S. 17 (1) (b)—*"Declare," meaning of.*

Per *Seshagiri Aiyar, J.*—The declaration mentioned in S. 17 must have the legal consequences contemplated by the parties and should not be mere statement of what has taken place between the parties. A mere letter by mortgagor to mortgagee which is merely an evidence of transaction does not itself create or declare any right to immoveable property within S. 17 (b) (*Abdur Rahim, Offg C. J. and Seshagiri Aiyar, J.*) P.M. A. MUTHIA CHETTY *v.* KOTHANDARAMASWAMI NAIDU. **(1916) 2 M. W. N. 221 : 4 L. W 472 : 35 I. C. 864 : 31 M. L. J. 347.**

——S. 17 (1) (b)—*Release—Compromise petition reciting release of a co-parcener's rights—If admissible without registration.*

A compromise petition showing an effected release of or an agreement to release, a co-parcener's right in a family property, is admissible in evidence without registration. 20 A. 171 ; 33 M. 102 ; 36 M. 46, Foll. (*Miller and Sankaran Nair, JJ.*) SELLAPPA GOUNDER *v.* GURUMOORTI. **26 I. C. 790 : 27 M. L. T. 396.**

——Ss. 17 (1) (b) and 49—*Unregistered letter converting the sale of the previous day into a mortgage or depriving it of its legal effect—Whether admissible in evidence.*

A letter written to say that a sale executed the previous day is in effect a mortgage or that it conveys no title, is one that "affects immoveable property" under S 17 of the Registration Act and is not admissible in evidence without registration. (*White, C. J., Sankaran Nair and Oldfield, JJ.*) PYDAH VENKATACHALAPATHY GARU *v.* MATHU VENKATACHALAPATHY. **(1914) M W. N. 178 : 1 L. W. 157 : 23 I. C.409 : 26 M. L. J. 151.**

——S. 17 (1) (b)—*Agreement to refer to arbitration—Admissibility of, without registration.*

Where the parties have settled the terms and put them in the agreement to refer the matter to arbitration, *held* that the agreement was inadmissible in evidence for want of registration. (*Evans, J. C. and Lindsay, A. J. C*) RAGHUBIR SINGH *v.* UMRAO SINGH. **13 I. C. 500.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (c).

——S. 17 (1) (b)—*Agency—Transfer of immoveable property of more than Rs. 100 in value—Agency—Registration.*

There is nothing in the T. P. Act or in the Registration Act to show that an agent, to transfer an interest in immoveable property worth more than Rs. 100 in value, must be empowered by a registered document. (*Parlett and Ormond, JJ.*) MA MO *v.* MAHOMED BACKER HAMADANER. **43 I C. 536.**

——S. 17 (1) (b)—*Option to purchase—Registration*

An option to purchase, not being an interest in land, requires no registration according to S. 17 of Registration Act. (*Ormond and Twomey, JJ.*) MA SHWE U *v.* MAUNG PO LA. **37 I. C. 91 : 9 Bur. L. T. 177.**

——S. 17 (1) (c)—*Un-registered receipt—Admissibility*

Mortgagee passed an unregistered receipt. "The bond is returned: no money remains due ;" it is admissible so far as it refers to the full payment of money The expression "no money remained due" does not extinguish the mortgage. (*Karamat Hussain and Tudball, JJ*) PIARELAL *v.* MAKHAN. **34 All. 528 : 16 I. C. 179 : 10 A L J. 25.**

——S. 17 (1) (c)—*Receipt acknowledging consideration for sale--If compulsorily registrable.*

In the absence of a sale-deed or mutation order a receipt executed by a vendee in favour of the vendor acknowledging price of sale of land of the value of more than Rs 100 requires compulsory registration. (*Shadi Lal, J.*) AHMED *v.* RAJA. **39 I. C. 44 : 50 P. W. R 1917.**

——S. 17 (1) (c)—*Construction of.*

Unless a document is clearly bought within the purview of S 17, its non-registration is no bar to its admissibility. The portion in a receipt for a decree-debt dealing with the release of immoveable property is distinct and separate from that acknowledging receipt of the sum paid on account of the decree. The fact that the decree-holder wrote out a receipt for the whole amount and stated by way of addendum that he had given up his title to the property, should not make any difference. (*Shadi Lal, J.*) ANNIN LAL *v.* RAMJI LAL. **39 I. C. 15 : 12 P. L. R. 1917.**

——S. 17 (1) (c)—*Receipt of earnest money.*

Under S. 17 (1) (c) of the Act the receipt of earnest moneys is required to be registered. (*Johnstone, C. J. and Scott-Smith, J.*) SHARAF ALI KHAN *v.* JAGANDAR SINGH. **37 I. C. 182 : 98 P. R. 1916.**

——S. 17 (1) (c)—*Receipt showing mortgage extinguished.*

A receipt which indicates not merely payment of the mortgage money, but mentions the fact of a new agreement entered into on the sale of the execution requires registration under S. 17 of the Act and is inadmissible without it. 9 Bom L. R. 254 Foll. ; 3 M 53, Dist (*Sadasiva Aivar and Hannay, JJ.*) DUPAGUNTLA SUBBA RAO *v.* GOLLAPUDI ETHIRAJULU. **26 I.C. 360 : (1915) M. W. N. 33.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

——— —S 17 (1) (d).

See also REGISTRATION ACT, S (1) (b)—LEASE.

——— **Ss. 17 (1) (d) and 49**—*Agreement to lease —Creation of future rights.*

An agreement to grant lease of certain lands upon the happening of a future uncertain event is not an "agreement to lease" within S. 2 (7) of the Registration Act, and need not be registered under S. 17 (1) (d). A lease or agreement to lease in order to be in these provisions must effect an actual demise and operate as a lease *in praesenti.* 37 Cal. 828, approved. (*Lord Buckmaster.*) RANI HEMANTA KUMARI *v.* MIDNAPUR ZEMINDARI CO., LTD **45 C. 485: 22 B.L.R. 485 : 24 C.W.N. 177: 46 I. A. 240 : 17 A. L. J. 1117 : (1920) M. W. N. 66 : 27 M. L. T. 42 : 11 L. W. 301 : 53 I. C. 534 : 37 M. L. J. 525 (P.C.).**

——— **Ss. 17 (1) (d) and 49** — *Memorandum — Reclamation lease—Entry into possession--Admissibility of.*

Where a person enters into possession of a jungle land under a reclamation memorandum fixing the terms of the tenancy, the memorandum is inadmissible in evidence if unregistered. (*Mr. Amer Ali.*) PORT CANNING CO AND LAND IMPROVEMENT CO. *v.* KALYANI DEBI.

46 I. A. 279 : 37 M. L J. 578 : 17 A L J. 1061 : 1 U. P. L. R. (P.C.) 91 : (1920) M W. N. 160 : 52 I. C. 522 : 24 C. W. N. 369 : 11 L. W. 296 (P. C.).

——— **Ss. 17 (1) d and 49**—*Agreement to lease—Correspondence—Registration – Necessity for—Oral and written lease—Distinction.*

A letter written by plff. to deft. was as follows "The period will commence from the 1st of December. 1918, and before that date a proper lease will be executed and registered. *This letter,* a copy whereof signed by you has been kept by me, *will be binding upon both of us so far as the main conditions are concerned.* Full details will be given in the coming lease." The parties had in fact written to each other identical letters. *Held* this letter in terms stated that the letter really embodies the terms and conditions agreed upon, and that it was the letter which was to be the binding. formal unalterable record of the conditions. *Held* that S. 17 of the Regn. Act applied and that as it had not been registered it was inadmissible in evidence ; and once that the document was cut out from the case, nothing was left for the plaintiff to rely upon. (*Mears, C. J, and Banerji, J.*) NURMAHOMED *v.* NATWAR LAL.

45 A. 220 : 1923 A. 112

——— **S. 17 (1) (d)**—*Lease—Indefinite period—Determinable at any time on certain conditions—Necessity for registration.*

Where under the terms of a lease the lessee could have continued for an indefinite period but there was no certainty that the lease would last beyond one year. *Held,* that the lease was not one for a term exceeding one year. and was not therefore compulsorily registrable. (*Mears, C. J. and Banerji J.*) KASHI NATH *v.* ABDUR. RAHMANKHAN. **L. R. 3 A. 196 : 20 A. L. J 211 : 1922 A. 54.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

——— **S. 17 (1) (d)** — *Notification by Govt.—Registration Act subsequently coming into force —Effect of.*

Govt. issued a notification exempting certain agricultural leases from registration in 1885 and the notification was neither modified nor cancelled after passing of the Regn. Act of 1908. *Held,* the notification was still in force in view of S. 24 of the General Clauses Act (X of 1897) and the unregistered lease was admissible in evidence. (*Rafique and Piggott. JJ.*) HAZARI SINGH *v.* TIRBANI SINGH. **28 I. C. 577 : 12 A L. J. 792.**

——— **S. 17 (1) (d)** — *Kabuliyat for indefinite period—Act XX of* 1866, *S.* 17.

A kabuiliyat that is executed not for any period expressly but, which shows from its contents more than one year, requires registration and if not registered is not admissible in evidence. (*Griffin, J.*) MITIGAN *v.* ALI BAKSH.

10 I. C. 314 . 8 A. L. J. 609.

——— **S. 17 (1) (d)**—*Applicability.*

Where a lease provided for cultivation of land yearly by the lessees, giving the landlord power of re-entry on occurrence of a particular named event, and there was no date fixed for the expiry of the tenancy, *held,* that this was not a lease giving the landlord authority to resume possession at his will and was therefore compulsorily registrable, 8 B. 493 Dist Test is whether the option to terminate the lease is with the tenant or with the landlord. 2 Bom. L. R. 488, Ref. (*Batchelor and Heaton, JJ.*) DHURABHAI BHULDAS PATEL *v.* MOHAN LAL MAGAN DAL SHAH.

41. Bom 458 : 39 I. C. 625 : 19 Bom. L. R. 285.

——— **S. 17 (1) (d)**—*Lease—Registrability—Test.*

In considering whether a lease is compulsorily registrable or not the test to be applied is whether there was a present demise for a year only or for a period of more than one year. Where a lease was for one year but gave the lessee option to continue his tenancy the existence of the option does not create a lease for a term exceeding one year, and as such the document is not compulsorily registrable. (*Mookerjee and Chotzner, JJ.*) FAIJUDDIN *v.* ASRAB ALI.

37 C. L. J 475 : 1923 Cal. 670.

——— **Ss. 17 (1) (d) and 49**—*Agreement to lease —Unstamped and unregistered—Suit for specific performance lies.*

A suit for specific performance lies when the lease essential for the completion of the contract has not been executed, and if there is a valid enforcible contract ; either party is entitled to call upon the other to complete the transaction by the execution and registration of the document of title. This is so even if the correspondence between the parties is inadmissible in evidence without registration. 42 C 801 ; 39 M; 509 ; 19 C.L.J 213, referred to. 22 C.L.J 42, distinguished (*Mukerji and Chotzner, JJ.*) BEJOY CHANDRA SINHA *v* HOWRAH AMTA LIGHT RAILWAY CO., LTD. **38 C. L. J. 177 : 1923 C. 524.**

——— **S. 17 (1 (d)**—*Lease—Agreement for lease —Record of oral lease—Agricultural land—Registration—Necessity for.*

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

A solenamah which was for all intents and purposes a mere record of certain agreement which the parties had come to out of Court for the settlement of their differences existing at that time and whereby the plaintiffs agreed to accept the defendant as tenant with certain rights and a certain rate of rent and to give effect to which a formal document in the shape of a kabuliyat would in future be executed by the defendants, is not a lease or agreement to lease and is not compulsorily registrable. 39 C. 663. Ref. The document was in effect merely a record of an oral agreement between the parties which was reduced to the form of writing only by way of a memorandum. (*Suhrawardy and Cuming, JJ.*) ALAM MULLA *v.* SURENDARA KUMAR. **1923 Cal. 432.**

——**Ss. 17 (1) (d) and 49**—*Agreement to lease—Unregistered—Delivery of possession to lessee—Effect of—Doctrine of part performance—Estoppel against statute.*

An agreement to lease intended to operate as a present demise is a lease within the meaning of cl. (d) of S. 17 of the Registration Act, 1908, and as such is inadmissible in evidence in a suit for specific performance of its terms, under S 49 of the Act, if it is not registered even though the tenant is in possession under the said agreement. Cases of part performance under S. 4 of the statute of frauds have no application to those arising under S. 49 of the Registration Act, 1908, as the positions under the two Acts are quite different The plaintiff who was in possession of certain premises under a previous tenancy expiring in December 1916, on the expiry of the said tenancy entered into negotiations for a further tenancy, with the landlords, the Mondol defendants the terms of which were educed into writing. This document, dated 15th January 1917, which was unregistered, purported to be in form a memorandum of agreement but was intended to operate as a present demise of the said premises to the plaintiff for five years from 1st January 1917 and was held to be a lease within the meaning of cl (d) of S. 17 of the Registration Act, 1908. In May 1919 the Mondol Defendants sold the said premises to the Lahiri Defendants who had full notice of the unregistered instrument of 15th January 1917 and of its terms. On the 29th May 1919, the Plaintiff was given notice by the Lahiri Defendants to quit by the 30th June 1919, on the allegation that he was a monthly tenant. The Plaintiff brought a suit for the specific performance of the said agreement in terms of the unregistered document

Held that the document, dated 15th January 1917, was not admissible in evidence in a suit for specific performance, under S. 49 of the Registration Act as it was not registered As there was as no other evidence before the Court of the terms of the said agreement, there could not be a decree for specific performance.

There cannot be an estoppel against the prohibition of a statute and English cases under the statute of frauds have no application to this country 47 Cal 435 and 47 Cal. 280; rel., 21 Ch. D. 9; 2 C L. J. 343; L R 8 A C. 467; 11 C L. J. 548· 25 C. W. N. 220 ; 24 C W. N. 463; 39 Cal. 663; 47 Cal. 280 (P. C.), referred to. (*Rankin, J.*)

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

SANJIB CHANDRA SANYAL *v.* SANTOSH KUMAR LAHIRI. **26 C W.N. 329 : 49 Cal. 507 : 1922 Cal. 436.**

——**S. 17 (1) (d)**—*Bainapatra is not agreement to lease.*

A *bainapatra* containing a promise to grant a *putni* lease again (with effect) from the date of the *patra* and to exchange *patta* and *kabuliat* before 30th *Aghran* does not effect a present demise but only gives a right to obtain a putni lease on certain conditions. It was not an agreement to lease and therefore does not require registration (*Teunon and Newbould, JJ.*) HARINATH *v.* PROMOTHO NATH.

64 I. C. 747 : 25 C. W. N. 550.

——**S. 17 (1) (d)**—*Lease—Oral agreement.*

An oral agreement to grant a permanent lease is valid though there is no stipulation as to the time of commencement of the lease. (*Mookerjee and Roe, JJ.*) KAILAS CHANDRA *v.* BEJOY KANTA LAHIRI. **50 I. C. 177 : 22 C W. N. 190.**

——**S. 17 (1) (d)**—*Landlord and tenant—Compromise petition varying rate of rent whether admissible without registration.*

A document which embodies a contract for variation of rent in respect of a lease is in essence a lease and is inadmissible in evidence without registration. It does not even constitute a valid and operating contract between the parties if not registered. (*Mookerjee and Walmsley, JJ.*) BAGHA MOWAR *v.* RAM LAKHAN MISSER. **41 I. C. 804 : 27 C. L. J 107.**

——**S. 17 (1) (d)**—*Permanent tenure—Registered lease—Necessity of.*

Though land is agricultural land situate outside a town and let out for the purpose of growing thatching grass, therein a permanent tenure cannot be created under the B. T. Act or any other Act save by a registered instrument. (*Fletcher and Newbould, JJ.*) HASISWARI DEBI *v.* HARI NATH CHAKERVARTHY. **40 I C. 100.**

——**S. 17 (1) (d) and (2), (v). and (vi)**—*Agreement in compromise petition to grant permanent lease of property not subject to suit—Agreement, part of consideration of compromise—Decree passed on petition—Petition, if agreement for lease.*

Per *Mookerjee, J.*—Although an agreement in writing, which is not a present demise, but only an agreement for a lease, is (having regard to the term 'lease' as defined in S. 2 of the Act) required to be registered if the term exceeds one year, and the exemptions provided in Cls. (*h*) and (*i*) to S. 17 of the Act of 1877 do not apply to leases. S. 49 of the Act does not preclude its being received as evidence of any transaction not affecting such property. It can therefore be proved by the plff. in a suit for specific performance of the agreement to grant the lease. Where a compromise petition recited that the parties, as part consideration for the compromise agreed to let certain properties not in suit to the deft. on certain terms and where a decree in terms was passed. *Held* that the petition was not in itself an agreement to lease as it was a mere recital of the terms agreed upon and it was admissible to prove the agreement to lease. Documents in Cls. (*e*) to (*n*) of S 17 of Registration Act of 1877 are excepted from Cls. (*b*) and (*c*) and not from Cls. (*a*) and (*d*), as these documents come

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

within the document mentioned in Cls. (*b*) and (*c*) and not within (*d*) and (*a*). (*Mookerjee and Beachcroft, JJ.*) HEMANTA KUMARI *v* MIDNAPUR ZEMINDARI. **22 C. L. J. 44 : 28 I. C. 879 : 19 C. W N 347.**
[On appeal *see* 42 Cal. 485].

——S. 17 (1) (d)—*Memo of arrangement—Admissibility in evidence.*

A memorandum embodying an arrangement for reclamation of land is not a demise of property and is admissible in evidence without registration. Where there is no provision in it for enhancement of rent after a certain maximum, *held*, that the tenure is not enhanceable after the specined maximum is reached (*Mookerjee and Beachcroft, JJ*) KATYAYANI DEBI *v.* PORT CANNING LAND AND IMPROVEMENT CO. **25 I. C. 274 : 19 C. W. N 56.**

——S 17 (1) (d)—(1877) S. 17 (*h*)—Amalnamah—*Construction of.*

Where the intention of the parties to an *Amalnamah* was that as soon as possession was taken under the document, the title of the grantee should commence, *held*, that it was an agreement to lease within S. 17 (*h*) of the Act and that it was therefore compulsorily registrable. 7 C. 703. (F B), Foll. (*Jenkins, C. J. and Mookerjee, J.* ELAHAI BAKSH *v.* HUKUM BAKSH.
18 C. W. N. 38 : 20 I C. 907 : 19 C. L. J. 464.

——S. 17 (1) (d)—*Agreement to vary rent—Registration—Compulsory.*

Agreement to reduce rent payable under a registered lease must be registered and a letter to the effect cannot be admitted in evidence under S. 49 if unregistered. 39 C. 284, Foll. (*Sharfuddin and Coxe, JJ.*) GANENDRA MOHAN CHOWDHURY *v.* GAYA PRASAD TEWARI. **16 I. C. 52.**

——S 17 (1) (d)—*Agreement to reduce rent.*

A document embodying an agreement for reducing the rent as per previously existing lease registered under the Act, must be registered and also a document varying the amount of rent under a previous lease registered as before and also the incidents of such payments must also be registered. (*Jenkins, C. J., Woodroffe, Mookerjee, Carnduff and Chatterjee, JJ.*) LALIT MOHAN GHOSE *v.* GOPALI CHANK COAL CO., LD.
39 Cal. 284 : 14 C L. J. 411 : 12 I. C. 723 : 16 C. W. N. 55 (F. B.).

——S 17 (1) (d)—*Agreement to lease—Necessity for registration.*

The plaintiff sued on the strength of a document which alleged that the defendant had acknowledged the receipt of Rs. 25 as earnest money and agreed to lease to plaintiff two bighas and odd of land for five years on an annual rental of Rs. 180. The plaintiff asked for specific performance or for damages in the alternative. *Held*, that the document on which the plaintiff's claim was based was not merely a receipt for earnest money but was an agreement to lease, that it was inadmissible in evidence to prove the contract without registration and that consequently no oral evidence in support of the contract was admissible. The plaintiff's suit therefore was unsustainable. (*Le Rossignol and Zafar Ali, JJ.*) NANAK CHAND *v* MAHOMED ZAHUR-UD DIN.
4 Lah. 44 : 5 Lah L. J. 257 : 1924 Lah. 27.

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

——S. 17 (1) (d)—*Strict construction—Lease—Period not fixed—Monthly rent—Registration—Necessity.*

S 17 of the Registration Act, being a disabling section, must be strictly construed and that unless a document is clearly brought within the purview of that section its non-registration is no bar to its admissibility in evidence. A lease of plff.'s hut was entered in his book, and the entry was that plff. had let the hut to the deft. who was to pay 8 annas per mensem by way of rent and in the event of a default in payment of the rent, the tenant was liable to be ejected. *Held*, that the lease was not one for a period exceeding one year within S. 17 (1) (*d*) of the Registration Act and did not require to be compulsorily registered. (*Shadi Lal, C. J. and Harrison, J.*) ATTRA *v.* MANGAL SINGH. **2 Lah 300 : 4 Lah. L. J. 1 : 27 P. L. R. 1922 : 1922 Lah. 43.**

——S. 17 (1) (d)—*Deed not merely an agreement but an actual contract of sale.*

A contract of sale must be registered, and a decree of specific performance cannot be obtained in the case of unregistered deed, nor can the plaintiff be allowed to take possession as vendees under a completed sale where the sale is denied, oral evidence being excluded by S. 91 of the Evidence Act. (*Chevis and Abdul Raoof, JJ.*) PARMESHRI DEVI *v.* AUTAR SINGH.
67 I. C. 144 : 3 Lah L J. 173.

——S. 17 (1) (d)—*Lease for so long as the tenant continues to pay rent—Registration is necessary.*

Where the recitals of the lease were as follows: "So long as Tajuddin occupies the shop the rent shall not be raised nor lowered nor shall I eject him but in case of his refusal to pay the rent I shall have to turn him out. Accordingly this *kirayanama* is written for record in case of need." *Held*, it was not a mere memorandum but was the agreement itself entered orally and then reduced to writing and being a lease not limited to a year was inadmissible in evidence if it were not registered and oral evidence could not be adduced. (*Chevis, A. C. J.*) KARIM BAKSH TAJUDDIN *v.* NATHA SINGH. **3 Lah. L J. 14.**

——S. 17 (1) (d)—*Lease—Provision for ejectment on failure to pay.*

Where a lease fixed a monthly rent and provided for ejectment on failure to pay but where rents were made payable annually, *held*, the lease was a monthly one and did not require registration. (*Le Rossignol, J.*) MANGAL SINGH *v.* ATRA.
60 I. C. 226 : 3 Lah. L. J. 222.

——S. 17 (1) (d)—*Lease for an indefinite period—Registration, if necessary.*

Only a lease for more than a year or from year to year in express terms is compulsorily registrable and a lease for an indefinite period which could be terminated by either party at the end of any month need not be registered. (*Johnstone and Le Rossignol, JJ.*) UMAR BAKSH *v.* BALDEO SINGH **97 P. R. 1915 : 32 I. C. 35 : 193 P. W. R. 1915.**

——S. 17 (1) (d)—*Agreement to mortgage or lease—Registration.*

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

Held that the *Swami bhogam* deed in question was an agreement to grant a mortgage and not an agreement to grant a lease and as such did not require registration. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MEENAKSHI SUNDARA MUDALIAR *v.* RATHNASAMI PILLAI.

41 Mad. 959 : 8 L. W. 438 : 24 M L. T. 315 : (1918) M. W. N. 811 : 49 I. C. 291 : 35 M. L. J. 489

——S. 17 (1) (d)—*Lease constituted by a number of documents.*

S. 17 does not apply to a lease constituted by a number of documents none of which can be regarded as a lease if taken singly. (*Benson and Sundara Aiyar, JJ.*) CHITRAVELU SEKVAI *v.* SAMANNA AIYAR. **35 I. C. 108.**

——Ss. 17 (1) (d) and 49—*Unregistered lease.*

An unregistered lease for three years is inadmissible in evidence to prove a tenancy or its terms, but payment and receipt of rent by landlord may be proved to establish tenancy from year to year and the rents. (*Sadasiva Aiyar and Moore, JJ.*) GOVINDASWAMI *v.* RAMASWAMI AIYAR. **3 L. W 408 : (1916) 2 M W. N. 79 : 34 I. C. 6 : 30 M L. J. 492.**

——S. 17 (1) (d) —*Correspondence.*

Where correspondence consisting of a number of letters goes together to make up a lease of immoveable property for more than one year that correspondence is a lease and requires registration. (*Ayling and Napier, JJ.*) MORGAN *v.* FERNANDEZ. **3 L. W. 370 : (1916) 1 M. W. N. 373 : 19 M. L. T. 377 : 33 I. C. 439 : 30 M. L. J. 519.**

——S 17 (1) (d)—*Agreement to lease—Receipt containing agreement to accept rent-deed, if compulsorily registrable.*

A document which, besides being a receipt for money paid, contains an agreement to accept a rent deed, is an agreement to lease and is inadmissible in evidence without registration. (*Sadasiva Aiyar and Napier, JJ.*) SREEKISAN PITTY *v.* KOTA NAMMALWARAYYA. **29 I. C. 246.**

——S. 17 (1) (d)—*Oral agreement to lease—Possession under—Ejectment.*

Possession of a lessee under an oral agreement to lease which could be specifically enforced against the lessor, cannot be disturbed by the lessor or a purchaser from him. 11 C. L. J. 543 ; 21 M. 291 ; 2 C. L. J. 343, Ref. (*Kumaraswami Sastri J.*) CUNNIAH CHETTY *v.* ELAMANDA CHETTI. **27 I. C 877 : 2 L. W. 152**

——S. 17 (1) (d)—*Oral agreement to lease—Eviction of lessee—Estoppel.*

Where there is only an oral agreement to lease and not a lease registered under S. 17, there is no lease and the supposed landlord is not estopped from evicting the tenant. (*Ayling and Tyabji, JJ.*) GOPALA KRISHNA AIYAR *v.* SUKIRTHA THEENTHARA. **24 I. C. 790**

——S. 17 (1) (d) and (b)—*Lease for two years—Enjoyment of toddy—Undertaking not to cut leaves.*

A document purporting to be a " lease for two years.....for enjoyment of toddy, palmyra fruit, etc., the palmyra trees " in a garden but whereby the leaves of any could not be cut is neither a lease of immoveable property nor one creating an interest therein. 6 M. H C R. 71 ; 20 M. 58 12 W. R. 366. Dist. (*White, C. J. and Oldfield, J.*) NATESA GRAMANI *v.* TANGAVELU GRAMANI. **38 Mad. 883 : 15 M. L. T. 237 : 23 I. C. 102: (1914) M. W. N 327.**

——S. 17 (1) (d)—Proviso—*Rent in kind.*

The proviso to S. 17, Cl. (1) (*d*) of the Registration Act, is not confined to cases where the rent is payable in money ; it applies also where the rent is wholly or partly payable in grain. (*Abdur Rahim and Sundara Aiyar, JJ.*) SAKKI REDDI APPALASAWMY *v.* PAKURTI VENKATASWAMI NAIDU. **11 M. L T. 405 : 15 I. C. 682. (1912) M W. N. 918.**

——Ss. 17 (1) (d) and 2 (7)—*Agreement to lease—Registration.*

An agreement to lease falling under S. 2 (7) is compulsorily required to be registered under S. 17 (2) only when it creates before the execution of any other document an immediate interest in the property to which the agreement relates. (*Halifax, A. J. C.*) SONOO *v.* BHADARIA. **6 N. L. J. 151 : 1923 N. 171.**

——S. 17 (1) (d)—*Agreement to take a lease—Inadmissibility owing to want of registration.*

A proposal in writing if accepted in writing becomes a lease or at least an agreement to lease and if it is for a period of more than one year it is compulsorily registrable. The fact that the parties intended to execute formal instruments does not entitle them to rely upon an unregistered instrument which is in itself operative as a lease. (*Mittra, A. J. C.*) RAJARAMJI *v.* GANESH. **42 I. C. 629.**

——S. 17 (1) (d)—*Rent—Note embodying tenancy-at will—If compulsorily registrable.*

A rent-note evidencing a tenancy-at-will and for no fixed term terminable at the option of the lessor does not require registration. (*Stanyon, A. J. C.*) HAFIZAN *v.* RAHMANKHAN. **39 I. C. 58 : 13 N. L. R 30.**

——Ss. 17 (1) (d) and 49 (c)—Kabuliyat—*Registration.*

A *Kabuliyat* which does not create, etc. any right or title in the property does not require registration and is admissible in evidence. (*Ashworth, J. C.*) AJODHYA SINGH *v.* KAIWAN BABU NAWAB KHUSRO BEGAM. **74 I. C. 582 : 9 O & A. L. R. 321.**

——Ss. 17 (1) (d) and 49—*Agreement—Lease—Registration—Necessity for.*

An unregistered *Hukmnama* with a stamp of one anna affixed thereon, which purports to create a lease without fixed terms and is of a nature of a perpetual lease with the fixity of rent of Rs. 2-8-0 besides cesses, is a document which comes within cl. (d) of S. 17 of the Registration Act and is compulsorily registrable. (*Iwala Prasad, J.*) BHIM BAHADUR SINGH *v.* EMPEROR. **1922 Pat. 10: 1922 P. 265.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (d).

——S 17 (1) (d)—*Unregistered lease—Inadmissible in evidence.*

The Magistrate acted illegally in admitting in evidence a *hukmnama* which was in the nature of a perpetual lease and therefore compulsorily registrable under S. 17 (*d*) of the Registration Act, and as the title of the appellant was based on it, the conviction for theft was improper. (*Jwala Prasad, J.*) BHIM BAHADUR SINGH *v.* EMPEROR. **1 Pat L. T. 121 : 21 Cr. L. J. 374 : 55 I. C. 854 : 2 U. P. L. R. (Pat.) 53.**

——Ss. 17 (1) (d) and (2) (vi)—*Compromise decree—Landlord and tenant—Change in pre-existing terms.*

When a compromise is effected between a landlord and tenant changing the terms of a contract previously existing regarding property of more than Rs. 100 in value it is not affected by S. 17, if it is embodied in a decree of the Court even though the compromise creates rights and liabilities extraneous to the suit. The only case when it applies is when the compromise creates a lease which requires registration under the provisions of the Registration Act. A decree based upon and embodying a compromise, but where no transfer of any interest in land, is effected and which merely changes the terms of the contract on which a tenant was already holding, does not amount to a lease within S. 17 (1) (*d*). (*Mullick and Jwala Prasad, JJ.*) RAM PADARANATH SINGH *v.* SOHRAJ KOERI. **52 I. C. 20 : 4 Pat. L. J. 667.**

——S. 17 (1) (d)—*Lease for one year—Rent fixed—Meaning of.*

A lease for one year with a fixed rent does not create tenancy from year to year, or one reserving a yearly rent so as to require registration under S. 17 (1) (*d*). 8 A. 405 ; 14 B. 320, Ref. (*Maung Kin, J.*) MAUNG AUNG HMIN *v.* MONIANDI SERVAI. **36 I. C. 378 : 10 Bur. L. T. 109.**

——S. 17 (2) (1)—*Petition in a mutation case compulsorily registrable—Admissibility in evidence in civil suit.*

A petition for mere mutation of names based on compromise is not compulsorily registrable and is admissible in evidence in a subsequent civil suit to prove an adjustment of a dispute between the parties. (*Richards, C. J. and Rafique, J.*) SITAL PRASAD *v.* LAL BAHADUR. **38 All. 75 : 31 I. C. 902 : 13 A. L. J. 1122.**

S. 17 (2) (1)—*Mutation case — Compromise petition—Stamp—Registration*

A compromise petition in a mutation case praying that mutation may be sanctioned in accordance with the compromise does not require to be stamped or registered as a transfer of an interest in immoveable property. (*Banerjee, J.*) JAGRANI MISSRANI *v.* BISHESHAR DUBE. **26 I. C. 791 : 12 A. L. J. 1316.**

——S 17 (2) (1)—*Compromise.*

An unregistered compromise dealing with property is not admissible in evidence; if the compromise relates to immoveable property worth more than Rs. 100 and if the compromise is not embodied in a decree or order. (*Stanley, C. J. and Bannerji, J.*) BHAGWAN SEHAI *v.* HARCHAN. **33 All 475 : 10 I. C 843 : 8 A. L. J. 309.**

REGISTRATION ACT (XVI OF 1908), S. 17 (2) (i).

——S 17 (2) (1)—*Kabuliyats and Razinamahs—Registration.*

Although Razinamas and Kabuliyats are not in themselves documents of transfer they are fairly conclusive evidence that transfer has, in fact been made, and they are exempt from registration. (*Beaman and Heaton, JJ.*) NARSO RAMAJI KUDKARNI *v.* NAGAVA ISWARAPPA. **42 Bom. 359 : 45 I. C. 492 : 20 Bom. L. R 358.**

——S. 17 (2)—*Registration—Necessity for—Mortgage—Discharge—Receipt.*

A receipt for payment of any part of the sum due on a mortgage which recites that nothing further is due, extinguishes mortgage by the payment, not by the document, and the latter is merely evidence of the fact of the payment for which parol evidence is admissible if no receipt had passed or by any other documentary evidence that might be available. (*Hallifax, A.J.C.*) PANDURANG *v.* NARAYAN. **76 I.C. 615 : 6 N.L.J. 78.**

——S. 17 (2) (i)—*Razinama and Kabuliyat—If should be registered.*

Razinamas and Kabuliyats are documents between the occupant and the superior holder reciting a transfer which has taken place between the occupant and his transferee and hence do not require registration. Even if they are said to fall under S. 17, they need not be registered unless it is shown that the interest extinguished is of the value of Rs. 100 or upwards. (*Scott, C. J. and Beaman, J.*) IMAM IBRAHIM *v.* BHAU APPAJI JADHAV. **41 Bom. 510 : 40 I. C. 68 : 19 Bom. L. R. 329.**

——S. 17 (2) (i)—(1877), S. 17 (*e*)—"*Composition deed*"—*Meaning—Stamp Act, Art.* 22.

The term "Composition-deed" bears the same meaning as in the Stamp Act and so applies to a transfer of immoveable property and not a new agreement to take fractional payment in settlement of claims. An assignment in trust for the benefit of creditors, the creditors being parties thereto and realising their claims is a "Composition deed" within S. 17 (*e*), Registration Act. A composition deed does not require registration. (*Scott, C. J. and Batchelor, J.*) CHANDRA SHANKER *v.* BAI MAGAN. **38 Bom. 576 : 24 I.C. 730 : 16 Bom. L R. 236.**

——S. 17 (2) (i)—*Composition-deed—Transfer to trustees for payment of debts—Registration.*

The essential test of a composition-deed is that there ought to be compounding of debts due. Where the owner of property transferred it to trustees for the purpose of enabling them to pay off his creditors, and there was nothing to show that there was any settlement with the creditors, that the debtor should pay less than he owed to them and that they agreed to accept that composition, the deed is not a composition-deed but merely a conveyance or a trust deed and is compulsorily registrable (*Chandavarkar and Batchelor, J.*) SHEKHADAM HASANALI *v.* CHANDRASHANKAR. **15 I. C 850 : 14 Bom. L. R. 506.**

——Ss. 17 (2) (i) and 49—*Admission in unregistered* solenama—*If admissible.*

An admission by a party in a *solenama* filed in a certain criminal proceeding which arose out of

a dispute regarding possession of the land is admissible in evidence against the party making it though the *solenama* was not registered. (*Fletcher and Huda, JJ.*) GADADHAR GOSWAMI *v.* NEDHIRAM MODAK. 46 I. C. 442.

——— —S. 17, Cl (2) (i)—*Compromise—Agreement relating to matters not in dispute—Agreement not registered, whether admissible as to those matters.*

Where a compromise agreement related also to matters not in dispute in the suit and the agreement is not registered, it cannot be admissible in evidence as to those matters in a subsequent suit (*Coxe and Chatterji, JJ.*) JANARDHAN MISER *v.* JANAKI KOER. 22 I. C. 687.

——— ———S 17 (2) (i)—*Proceedings in Court.*

Solenama referring to the subject of the claim becomes when recorded, a proceeding of the Court and requires no registration nor stamp duty. (*Jenkins, C. J. and Roy, J.*) AMBIKA CHARAN SHER KAIBARTA *v.* SHRI VATH DATTA. 19 I.C. 551

———S 17 (2) (i)—*Compromise deed--Arrangements about certain estate.*

A compromise deed which gives effect to some arrangement between the parties about an estate is compulsorily registrable. 28 B. 364, Ref. (*Kensington, C.J. and Rattigan, J.*) INDAR SINGH *v.* KARTAR. 26 I. C. 423 : 254 P. W. R 1915

———S. 17 (2) (1)—*Razinamah deed in respect of immoveable property over Rs. 100 in value—Registration whether necessary—Liability of parties not signing the deed.*

A *Razinama* deed which affects immoveable property of the value of Rs. 100 or over, made and filed in Court in which a suit relating to such property is pending does not require registration. Such a *Razinama* binds also parties who, though they do not sign it, stand by and do not object to it. (*Johnstone, J.*) AMIN CHAND *v.* DEVI DITTA. 11 I. C 409 : 90 P. W. R. 1911.

———S. 17 (2) (i)—*C. P. Code, O. XXI, R. 9.*

Registration Act excludes from its operation a deed of compromise affecting immoveable property worth more than Rs. 100 embodied in a petition under O. 21, R. 2 of C. P. Code and recorded by the Court. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) THAZHATHITATHIL POOVVANAYI AYISSA *v* PUTHAN PURAYIL KUNDRON CHOKRU. 43 Mad. 688 : 12 L.W 35 : 39 M. L. J. 77 : (1920) M. W. N 431 : 58 I.C. 554 : 28 M. L. T. 90 (F. B.).

———S 17 (2) (i)—*Compromise affecting land—Non-registration—Effect of.*

A compromise affecting immoveable property cannot be given effect to, if it is neither registered nor incorporated in a decree or order of a Court. (*Sankaran Nair and Spencer, JJ.*) VENKATAPPA NAYANIM *v.* THIMMA NAYANIM VARU. 27 M. L. J. 656 : 27 I. C. 379 : (1914) M. W. N. 900.

———S. 17 (2) (i)—*Petition for compromise—Registration if necessary.*

A compromise petition which is presented to the Court along with a prayer that it be acted

upon, is a pleading and does not require registration even if it leads to the disposal of the suit. (*Miller and Spencer, JJ.*) MANICKAMMAL *v.* RATHNAMMAL. 22 I. C. 35.

———Ss. 17 (2) (v) and 42—*Memo. of Partition—Provision for execution of separate deed in the future as regards properties to be allotted to the members—Registration—Necessity for.*

A *yadast* or memorandum entered into between the members of a joint Hindu family recited the cesser of jointness which amounted to a declaration that from that time forth the parties became entitled to possession and enjoyment of their properties in separate shares ; and it further provided for the execution of a further deed effectuating the partition, in these terms : "A partition deed in terms hereof shall be executed and registered in the office of the Sub-registrar as early as possible ; until then this shall itself be in force." *Held* that the *yadast* was not a document by itself creating, assigning, limiting or extinguishing any right or interest in immoveable property ; it merely created a right to obtain an other document which would, when executed, create a right in the person claiming the relief. Consequently the document was admissible in evidence without registration. (*Mr Ameer Ali.*) RAJANGAM AIYAR *v.* RAJANGAM AIYAR. 31 M. L. T. 156 : 16 L. W. 615 : 4 U. P. L. R. (P.C.) 85 : 27 C. W N. 501 : 21 A. L. J. 460 : 37 C. L. J. 435 : 44 M. L. J. 745 : 1922 P. C. 266. (P. C.).

———S. 17 (2) (v)—*Agreement to mortgage—Registration—Necessity for.*

An agreement by a borrower to create a mortgage on his property is admissible in evidence without registration where the agreement does not by itself create a mortgage or charge on the property. 10 C. 315, followed. (*Shah, J.*) TIRTHDAS GHANSHAMDAB *v.* SADHU SINGH. 25 Bom. L. R. 313 : 1923 Bom. 281 (1).

———S. 17 (2) (v)—*Agreement for reconveyance—Not compulsorily registrable—Specific performance.*

Plff executed a registered sale-deed of a house in favour of the deft. and on the same day deft. passed in favour of the plff. an unregistered agreement to reconvey the property to plff. on repayment of the purchase money. Plff. sued for specific performance of the contract evidenced by the unregistered agreement ; *held*, that having regard to the form of the deed, it was an agreement to reconvey when called upon to do so and it was exempted from registration under exception 5 to S. 17 of the Registration Act, 1908. The plff was entitled to have specific performance of the same. (*Beaman and Hayward, JJ.*) MIR GAZI SAYAD KUT BUDIN *v.* MIA ALI. 38 Bom. 703 : 28 I. C. 132 : 16 Bom. L. R. 582.

———S. 17 (2) (v)—*Receipt for earnest money does not require registration.*

A receipt for earnest money in respect of a contract of sale for more than Rs. 100 which expressly recites that another document was to be executed as a document of title, does not itself

REGISTRATION ACT (XVI OF 1908), S. 17 (2) (v).

create, assign, limit or extinguish any right and is not compulsorily registrable. (*Moti Sagar, J.*) GENDA RAM *v.* RAM CHANDER. **1924 L. 163.**

——— S. 17 (2) (v)—*Agreement to give produce of the land —Registration—Necessity.*

An agreement in consideration of money paid to deliver half the future produce of certain land is not one affecting immoveable property and does not require registration. (*Scott-Smith and Brasher, JJ.*) WALLI *v.* KHUDA BAKHSH. **5 Lah. L. J. 366 : 1924 L. 149.**

——— S. 17 (2) (v)—*Agreement to execute sale —Oral sale—Registration of agreement not necessary.*

A document which does not itself effect a sale but merely gives a right to the vendee to obtain sale free of all incumbrances on the property does not require registration, by virtue of S. 17 (1) (c) (2) (v) of the Registration Act. (*Abdul Raoof and Campbell, JJ.*) PARSHOTAM SINGH *v.* RALLIA SINGH. **4 U. P. L. R (L) 36 : 1922 Lah. 269.**

——— S. 17 (2) (v)—*Agreement to share in property forming subject of litigation in lieu of supplying money is not compulsorily registrable.*

A claim to property does not effect a transfer of property and need not be registered. The right would come into existence, if at all, only on the success of the litigation. 150 P.R. 1889, not foll., 16 P. R. 1895 ; 18 B. 396 ; 7 B. 310 ; foll. (*Scott-Smith and Martineau, JJ.*) INDAR SINGH *v.* MUNSHI. **4 Lah. L. J. 301.**

——— Ss. 17 (2) (v) and 49—*Partition— Share list—Necessity for registration—Oral agreement for execution of a formal document.*

It is open to party to a partition to prove that a "share list" of properties is not the final partition but that it was orally agreed between them that a formal partition deed should be executed later on. If such agreement is proved the share list would be admissible without registration. (*Krishnan and Venkatasubba Rao, JJ.*) GUNDAPANENI GOPPAYYA *v* GUNDAPANENI KRISHNAYYA. **16 L. W. 784 ; 1923 M. 160 (1) : (1922) M. W. N. 533.**

——— S. 17 (2) (v)—*Collateral —Agreement, whether registration necessary.*

Where the defts. agreed to procure a loan of rupees three lakhs for the plffs and the latter excuted the lease deed of certain lands to the former on a low rent in lieu of commission and a document of even date purporting to be an agreement to cancel the lease deed on failure to procure the loan was executed *Held*, that it was exempted under the terms of S. 17 (2) (v) and hence did not require registration. (*Coutts Trotter and Srinivasa Iyengar, JJ.*) JAGANNADHA RAJU *v.* RADHA KRISHNIAH. **(1916) 1 M. W. N. 120 : 32 I. C. 941 : 30 M. L. J. 302**

——— S 17 (2) (v)—*Agreement to give land when successful—If requires registration.*

Where defendant agreed to give half of the land to plaintiff to help him in recovering, the land *held* the agreement did not require to be

REGISTRATION ACT (XVI OF 1908), S. 17 (2) (vi)—Award.

registered as it was to be followed by a registered deed when the gift was actually made. (*Pridcaux, A. J. C.*) SHRIRAM *v.* BABAJI. **1923 Nag. 47.**

——— S. 17 (2) (v)—*Agreement to re-purchase —Not registrable.*

Registration of the agreement is not necessary where after an outright sale, the vendor agrees in writing to re-purchase the land. (*Maz Oung and Duckworth, JJ.*) MAUNG WALA *v.* MG. SHWE GUN. **1 Rang. 472 : 2 Bur. L. J. 188 : 1924 Rang. 57.**

——— S. 17 (2) (v)—*Agreement to reconvey need not be registered.*

The terms of the agreement under which plaintiff claimed a reconveyance were as follows :— "I, Kyaw Zan, have this day the 14th of August 1910 bought for Rs. 200 from Maung Paung and Ma E Bya by registered deed in the names of myself and my wife their house and site and I hereby agree that if the said Maung Paung and Ma E Bya shall within two years pay to me the said principal with interest at the rate of Rs. 2 per cent. *Held*, that agreement of which plaintiff relied did not require registration. (*Heald, J.*) MAUNG PAUNG AND OTHERS *v.* MA ON AND OTHERS. **2 Bur. L. J. 89 : 1923 R. 242.**

——— S. 17 (2) (vi).

Award
Compromise.
Decree, meaning of.
Transfer of decree.

Award.

——— S. 17 (2) (vi)—*Award—Private award not filed in Court.*

A private award not filed in Court is within S. 17 (vi) and is therefore not compulsorily registrable. But if the document purporting to be an award amounts to something more than an award and if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators, the award may thereupon become a document, *e g.*, a partition deed, which is compulsorily registrable. (*Mookerjee and Beachcroft, JJ.*) TEK LAL SINGH *v.* SRIPATI CHOWDHURY. **19 C.L.J. 123 : 20 I.C 860 : 18 C.W.N. 475.**

——— S. 17 (2) (vi)—*Award—Lists of properties allotted at partition—Registration.*

Lists of properties allotted to the members of a joint Hindu family at a partition effected by the arbitrators annexed to the award does not require registration. The mere signature of the parties (*i.e.*) the members of the family on these lists does not remove these documents from the category of an award. 10 P. R. 1917 ; 22 A. 224, Rel (*Broadway and Abdul Quadir, JJ.*) RALIA RAM *v.* DUNI CHAND. **66 I. C. 118.**

——— S. 17 (2) (vi)—*Award—If compulsorily registrable.*

A document amounting to an award does no require registration. 22 I. C. 412, Foll. (*Leslie Jones, J.*) KHAZAN CHAND *v.* HAMIR CHAND. **46 I. C. 685 : 139 P. W. R. 1918.**

REGISTRATION ACT (XVI OF 1908) S. 17 (2) (vi) — Award.

——— S. 17 (2) (vi)—*Award—Applicability.*

An award though not registered or properly stamped is admissible in evidence as the latter defect can be cured by levying the penalty prescribed. (*Scott-Smith and Broadway, JJ.*) BABU GHULAM FATIMA *v.* GHULAM MUHAMMAD KHAN.
125 P. R. 1917 : 39 I. C. 912 : 77 P.W.R. 1917

——— S. 17 (2) (vi—*Award—Award dictated and signed by parties—Validity—Registration, if necessary*

A document, signed by arbitrators as their award, is an award though the settlement was arrived at by the parties and was also signed by them. Such a document need not be registered (*Johnstone and Chevis, JJ.*) WAZIR ALI *v.* MAHBUB ALI. **101 P.W.R 1914 : 134 P.L R 1914 : 22 I. C. 412: 10 P.R. 1917.**

——— S 17 (2) (vi)—*Award signed by parties —Effect of.*

The mere fact that parties have signed an award made by arbitrator does not affect its character as an award. 160 P.L R 1916, Foll. (*Rattigan and Smith, JJ*) JESA LAL *v.* GANGA DEVI. **81 P. R. 1913 : 211 P W.R. 1913 : 20 I. C. 868: 321 P.L.R. 1913**

——— S. 17 (2) (vi)—*Award effecting partition —Partition lists.*

Partition lists of the property divided, which form part of an award, do not require registration. 84 P R. 1907, Rel. on. 71 P.R. 1916, Dist. (*Agnew and Shadi Lal, JJ.*) MULCHAND *v.* UTTAMCHAND. **275 P.L.R. 1913 : 20 I. C. 185: 156 P. W. R. 1913.**

——— Ss. 17 (2) (vi) and 49—*Award filed in Court by parties—Registration.*

The parties to a suit filed an award in Court which was apparently accepted and acted upon by the Court. There was no evidence that the award had been embodied in a decree and the records have been destroyed : *Held.* that the award having been acted upon by the Court does not require registration. 20 All 171, Foll and 36 Mad 46, Dist (*Wallis, C.J and Oldfield, J.*) VAPADIAH NAIDU *v.* THIPPIAH NAIDU.
(1918) M.W.N. 184 : 43 I. C. 697 : 8 L.W. 379.

——— S. 17 (2) (vi)—*Award—Award if compulsorily registrable.*

An award is not compulsorily registrable. 20 I.C. 860 ; 32 I C 465, Rel on. (*Kannaiya Lal, A.J.C*, SHUBRALI *v.* HAFIZAN. **42 I.C. 116: 4 O.L.J. 487.**

——— S. 17 (2) (vi)—*Award—Registration.*

The validity of an award does not ordinarily depend upon the place in which it is executed An award does not require registration and it is not necessary that it should be made a rule of Court. 18 I.A. 73; 18 C. 414, Foll (*Chamier, C.J. and Sharfuddin, J.*) BHAJI KISHORE NATH *v.* MUSST. PARSAN KOER. **1917 Pat 241 : 42 I C. 617 : 2 Pat. L.W. 156.**

Compromise.

——— Ss. 17 (2) (vi) and 49—*Compromise—Decree of Court—Matters outside suit—Recital of C.P. Code, O. 23, R. 3.*

REGISTRATION ACT (XVI OF 1908) S. 17 (2) (vi) —Compromise.

The word " decree " in S. 17 (2) (vi) of the Registration Act is not confined to so much of a decree as is operative under O. 23, R 3 of the C P. Code The object of the registration is to provide for public registration of documents and its provisions have to be construed accordingly. Where on a compromise of a pending suit, it was provided *inter alia* that one of the parties should grant a lease of certain lands not the subject of the suit on a certain contingency, and the agreement between the parties was recorded in a decree of Court under O. 23, R. 3 of the C P. Code. *Held*, that even though the decree might be incapable of execution as a decree *qua*, the lands not included in the suit, it might be received in evidence of the agreement which it embodied. (*Lord Buckmaster.*) RANI HEMANTA KUMARI *v.* MIDNAPUR ZEMINDARI CO., LTD.
46 I.A 240 :22 Bom. L R. 488 : 47 C. 485 : 17 A.L.J. 1117 : 24 C.W.N. 177 : (1920) M W.N. 66 : 27 M.L T. 42 : 11 L.W. 301 : 53 I.C. 534 : 37 M L.J. 525 (P.C).

——— S. 17 (2) (vi)—*Compromise beyond the scope of the suit—Decree not embodying terms of the compromise—Non-registration—Actings of the parties—Part performance—Parties not entitled to resile from compromise.*

In the course of certain proceedings between a mortgagor and mortgagee under mortgage of 1848 and 1871, the parties entered into a compromise in 1873, whereby it was agreed that a portion of the equity of redemption was to be released in favour of the mortgagee who was thenceforth to be the absolute owner thereof and that the mortgagor was to be absolutely entitled to the remainder free of the incumbrance It was also agreed that a conveyance should be executed in respect of the properties agreed to be relinquished by the mortgagor in favour of the mortgagee. No conveyance, however, was executed but the parties had acted on the terms of the arrangement for a long time and enjoyed the properties allotted thereby absolutely as their own.

Held, that as the transaction took place before the T. P. Act, no writing or registration was necessary to validate it and that even if the transaction was defective or inchoate, the conduct of the parties and the actings of the mortgagor had been such as to supply all such defects. (*Lord Shaw.*) MAHOMED MUSA *v.* AGHORE KUMAR GANGULI. **42 Cal. 801 : 17 Bom. L. R 420 : 17 M.L.T. 143 : (1915) M.W.N. 621 : 2 L.W 258 : 19 C W.N. 250 : 21 C.L.J. 231 : 13 A L.J. 229 : 42 I A. 1 : 28 I.C. 930 : 28 M L.J. 548 (P.C).**

——— S. 17 (2) (vi)—*Compromise—Effect—Family arrangement.*

In a mutation proceeding, where the petition is merely to effect mutation in particular manner and not to declare any rights, the petition is admissible as a collateral evidence to show that the settlement had taken place, even if it is not registered as required by law, though it may not effect a valid transfer of rights A contrary view is held that the petition of compromise is an authoritative admission by each party. It is a document of title and is inadmissible in evidence

REGISTRATION ACT (XVI OF 1908) S. 17 (2) (vi) —Compromise.

for want of registration, which is a necessary condition in the case of documents transferring property valued at more than Rs. 100. As family settlement does not necessarily involve the transfer of rights, it is not affected by the provisions of T. P. Act. But as the consideration for such an agreement is a mutual promise made or forbearance shown by the other party, the parties cannot resile from the agreement. (*Piggott and Kanhaiya Lal, JJ.*) BALDEO SINGH *v.* UDAL SINGH. **43 All 1 : 2 U P L R (All.) 202 : 58. I. C. 732 : 18 A. L. J. 877.**

——S. 17 (2) (vi)—*Compromise in execution Court—Registration, if necessary—Admissibility in evidence.*

Where the joint holders of a decree enter into a compromise as to the manner in which the decree should be executed and the executing Court acts upon it, the compromise did not require registration and it is admissible in evidence and binding upon the parties by reason of the order to that effect passed upon it by the Court executing the decree. (*Chamier and Piggott. JJ.*) BHARATH CHAUBE *v.* GAYA CHAUBE, **29 I. C. 418.**

——S. 17 (2) (vi)—*Compromise— Mutation proceedings—Family settlement—Registration.*

A family settlement come to in a mutation proceeding and creating rights in immoveable property does not require registration. 35 A. 502, Full. (*Richards, C J., and Bannerjee, J.*) DAYA SHANKAR *v.* HUB LAL **37, All 105 : 27 I. C. 497 : 13 A. L. J. 21**

——S. 17 (2) (vi)—*Compromise in mutation proceedings - Registration*

A petition of compromise presented to a Court which declares the respective interests of the parties in property exceeding Rs. 100 in value, must be registered before it can be used as evidence of title, unless it is acted upon judicially by the Court. Written instruments are not exempt from registration merely because they evidence or carry out a family settlement Neither does the fact that it is drawn up in the form of a petition and presented to the Court along with a petition, take away the necessity of its being registered, if it is otherwise compulsorily registrable. (*Chamier ,J*) BHAROSA *v.* SIKHDAR. **27 I. C. 97 : 12 A. L. J. 998**

——S. 17 (2) (vi)— *Compromise—Revenue Court—Application in settlement of dispute to Revenue Court for mutation—Registration, if necessary.*

An unregistered application to the Revenue Court for mutation of names by two rival claimants in settlement of a dispute between them is admissible in evidence. (*Griffin, J.*) PEAREY LAL *v.* KOKLA KUNVAR. **18 I. C 766 : 11 A. L J. 157.**

——S. 17 (2) (vi)—*Compromise filed in mutation proceeding—Admissibility.*

The Revenue Court had to deal in a mutation proceeding with a petition of compromise purporting to deal with immovable property worth less than 100 Rupees. In the second appeal, the High Court held that the petition even if it was not registered, was a good document of title and hence ought not to be excluded from evidence. 33 A 728, Dist. (*Piggott, J.*) NIDHAI *v.* BIDESI. **15 I. C. 741**

——S. 17 (2) (vi)—*Compromise— Decree—Registration -Agreement to lease-Part performance.*

Where a compromise agreement operated as a demise it should have been registered. Not having been registered it is *prima facie* inadmissible in evidence as a lease. If the agreement in question is inadmissible as a lease, it is still admissible in evidence so far as it contains an express admission by the defendant in the suit of 1905 of the title of the plaintiffs in that suit as *patnidars.* In respect of such admission, the agreement, if it comes at all within S. 17 of the Registration Act, would fall within Cl. (*b*) or Cl. (*c*) and the exception in sub-S. (2) (vi) would apply to it. Where the Courts below found that the rent at the rate now claimed was paid for a number of years to the plaintiffs in the suit by the present defendant or his father, and that defendant was in possession before the suit and he continued in possession after the suit, but he attorned to the plaintiffs, *Held,* that the relationship of landlord and tenant between the parties was proved and that the rent due was that which the defendant had been paying. (*Richarason and Suhrawardy, JJ.*) SARAT CHANDRA DAS *v.* SARAJINI RUDRAJA. **27 C. W. N. 897 : 1924 Cal. 135.**

——Ss. 17 (2) (vi) and 49—*Compromise decree —Matters outside suit—Registration essential.*

If a consent decree incorporates within itself matters not within the scope of the suit, it is not valid as part of a judicial proceeding, but requires registration (*Rankin. J.*) SHASHI BHUSAN SHAW *v.* HARI NARAIN SHAW. **48 Cal. 1059 : 66 I. C. 705: 25 C. W. N. 990.**

——S. 17 (2) (vi)—*Compromise—Effective as conveyance.*

A compromise which contains matter relating to a suit or covered by its subject-matter and embodied in a decree does not need registration even though the transaction amounts to a conveyance of properties worth more than Rs. 100. (*Sanderson and Duval, JJ.*) JACHIM MONDAL *v* CHENINESSA BIBI. **54 I C. 538: 24 C.W.N 328.**

——S. 17 (2) (vi)—*Compromise in money suit—Mortgaging immoveable property — Registration.*

A compromise petition in a money suit in which the deft. hypothecated certain immoveable property to secure the payment of the decretal amount is inadmissible in evidence without registration as the mortgage was altogether outside the scope of the money suit. (*Fletcher and Shamsul Huda, JJ.*) GOSTA BEHARI DE. *v.* GOSTA BEHARI LUMANTA. **46 I.C. 243.**

——S. 17 (2) (vi)—*Compromise petition—Criminal Court—Agreement to give up possession of lands.*

Where an agreement exists to give up possession of certain land contained in a petition of compromise filed in a criminal case, registration

REGISTRATION ACT (XVI OF 1908), S. 17 (2) (vi) —Compromise.

to be admissible in evidence, is not necessary. (*Fletcher and Newbould, JJ.*) KHUDI BIBI *v.* ABDUL MAJID. **43 I. C. 26**

——S. 17 (2) (vi) — *Compromise—Matter outside suit.*

A compromise so far as it relates to matters extraneous to litigation is inadmissible in evidence without registration. (*Woodroffe and Carnduff, JJ.*) SHAIKH RAFIC *v.* BHAGWAN CHANDHAR DHAR. **25 I. C. 371.**

——S. 17 (2) (vi)—*Compromise of suit—Document not registered—Decree—Effect.*

If a suit adjusted under O 23, R. 3, C. P. C. and the terms of the compromise reduced to writing the document should be registered. But if the decree that is passed records the terms and conditions, the document though unregistered is admissible in evidence. 46 I. A. 240, Ref. (*Scott-Smith and Fforde, JJ.*) GHULAM MUSTAFA KHAN *v.* GHULAM NABI. **4 Lah. 263 : 1923 Lah. 581.**

——S. 17 (2) (vi)—*Compromise—Property extraneous to suit—Necessity for registration.*

A compromise relating to property extraneous to the suit requires registration. 1 C. L. J. 388 and 36 Cal. 193, Foll. 22 Mad. 508; 98 P. R. 1902; 27 P. R. 1906 ; 31 All. 13 and 32 All. 206, Ref. 33 Mad. 102 and 28 All. 78, Dist. (*Scott-Smith, J.*) KARTA SINGH *v.* INDAR SINGH.
51 I. C. 273 : 31 P. R. 1919.

——S. 17 (2) (vi)—*Compromise—Proceedings of Court.*

A compromise recorded by the Court needs no registration and secondary evidence of its contents is admissible. (*Le Rossignol and Wilberforce, JJ.*) GULAB *v.* BADHAWA. **45 I. C. 331.**

——S. 17 (2) (vi)—*Compromise submitted to a Court.*

A compromise submitted to and acted upon judicially by the Court is a step of judicial procedure not requiring registration. (*Scott-Smith and Broadway, JJ.*) GADO GANDA SINGH *v.* BUTA SINGH.
88 P. R. 1917: 42 I. C. 380: 175 P. W. R. 1917.

——S. 17 (2) (vi)—*Compromise petition to Court not presented by parties themselves.*

A deed of compromise which had been executed by the parties in the presence of the Tahsildar was forwarded by the latter to the Civil Court in which the suit was pending. *Held*, that the intention being that the decree should be passed in accordance therewith, the document was merely a petition addressed to the Court and as such did not require registration. (*Scott-Smith and Broadway, JJ.*) HARICHAND *v.* MAGHI MAL. **78 P. R. 1917: 112 P. L. R. 1917: 40 I. C. 675: 95 P. W. R. 1917.**

——S. 17 (2) (vi) — *Compromise* —Razinama, *if requires registration.*

A *razinama* presented to a Court setting forth the terms of the compromise does not require to be registered and is admissible in evidence as such. (*Shah Din and Le Rossignol, JJ.*) MUSAMMAD JEO *v.* JAIMAL SINGH. **90 P. W. R. 1915 : 29 I. C. 311 : 1 P. L. R. 1916.**

REGISTRATION ACT (XVI OF 1908) S. 17 (2) (vi) —Compromise.

——Ss. 17 (2) (vi) and 49—*Compromise filed in Court.*

A compromise petition relating to property in suit, and incorporated in the order of the Court is not compulsorily registrable, and is admissible in evidence without registration. 27 P. R. 1906, Foll. The mere fact that the parties undertake in the petition to execute a deed to assure each other in the properties respecting surrender to them, would not render the petition compulsorily registrable (*Kensington, Offg. C. J. and Rattigan, J.*) MURLIDHAR *v.* GOBINDRAM.
306 P. L. R. 1913: 205 P. W. R. 1913: 20 I. C. 817: 20 P. R. 1914.

——S. 17 (2) (vi)—*Compromise affecting immovable property—Petition under O 21, R. 2, C. P. Code—Registration.*

A compromise affecting immovable property of over Rs. 100 embodied in a petition under O. 21, R. 2, C. P. Code recorded by the Court, is exempt from registration. 36 Mad. 46 and 27 M. L. J. 651 overruled. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) THAZHATHI TATHIL POOVVANAI AYISSA *v.* KUNDRON CHOKRU
43 Mad. 688: 39 M. L. J. 77: (1920) M. W. N. 431: 28 M. L. T. 90: 58 I. C. 554: 12 L. W. 35 (F. B.).

——S. 17 (2) (vi) —*Compromise relating to property not in dispute.*

If the Court takes into consideration the whole of the *Razinamah*, the same must be taken to have been submitted to and judicially acted upon by the Court and becomes part and parcel of the decree and is admissible in evidence without registration. 22 M. 508, rel. on. (*Bakewell and Phillips, JJ.*) ARIYAPUTTURA GOUNDAN *v.* ETTIA GOUNDAN. **6 L. W. 635 : (1917) M. W. N. 751: 42 I. C. 223: 33 M. L. J. 615**

——S. 17 (2) (vi)—*Compromise—Decree based on compromise creating a mortgage on property for the amount and in default sale.*

A decree based on a compromise of parties to suit and creating a mortgage of the property for the amount and directing sale in default of payment within time, falls under S. 17 exception cl. 6 and does not require to be registered. (*Oldfield and Krishnan, JJ.*) KANDULU PEDA SINGA REDDY *v.* KAKUMANU HANUMAYYA. **37 I. C. 764.**

——S. 17 (2) (vi)—*Compromise for exchange —Registration necessary.*

Compromise to exchange bonds filed in Court is merely an agreement to exchange which is to be effectuated by the decree of the Court and therefore it can be admitted in evidence in other proceedings without registration. (*Backwell and Napier, JJ.*) PALAVALASA APPALASWAMI *v.* DANTALWARI NARAYAN. **34 I. C. 446: (1916) 1 M. W. N. 276.**

——S. 17 (2) (vi)—*Compromise*

A razinama embodied in a decree is exempted from registration. A compromise embodied in a decree about properties not in a prior suit between the parties, does not affect the title to such lands. (*Abdur Rahim and Ayling, JJ.*) RAVULA PARTI CHELAMANNA *v.* RAVULA PARTI RAMA ROW
36 Mad. 46: 21 M. L. J. 870: 10 M. L. T. 232 : 12 I. C. 317: 1911 2 M. W. N. 265.

REGISTRATION ACT (XVI OF 1908) S. 17 (2) (vi) —Compromise.

——S. 17 (2) (vi)— *Compromise petition—Registration.*

A petition to record an adjustment, not being the original contract between the parties does not require registration. (*Drake Brockman, J. C.*) MAHOMED ALI KHAN *v.* SHUJAT ALI KHAN. **46 I. C. 913.**

——S. 17 (2) (vi) — *Compromise— Award—Registration.*

Where an award given by arbitrators is in accordance with a compromise made by the parties to a suit and not going beyond the scope of the suit, and the award is made a decree of Court, registration of the award is not necessary. (*Lyle and Ashworth, A J. Cs.*) THAKUR GANDHARP SINGH *v.* NIRMAL SINGH. **6 U. L. J. 529 : 54 I. C 325 : 22 O. C. 300.**

——S. 17 (2) (vi) — *Compromise petition—If compulsorily registrable*

A compromise petition put into the Court with what is settled out of the Court in order to get mutation effected according to it and confined to the subject-matter of the suit, is a step in a judicial proceeding and no registration is necessary. A partition between co-owners need not be effected by a written document and a petition admitting or reciting such a partition is therefore admissible without registration. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SHANKER SINGH *v.* KALKA BAKSH SINGH. **39 I. C. 545: 21 O. C. 346**

——S. 17 (2) (vi)—*Compromise — Document declaring antecedent title.*

S. 17 is aimed at those documents which operate by themselves to confer a fresh title and not at those in which no new interest is created but simply a declaration is made as to an antecedent title of certain persons by way of inheritance. *Held*, that the compromise in question in the course of mutation proceedings was enforceable though unregistered. (*Lindsay, J. C.*) RAMSARUP *v.* BINDESHWARI. **18 O.C. 51 : 27 I. C. 938 : 2 O. L. J. 67.**

——S 17 (2) (vi)—*Compromise—Decree recording terms not relating to suit—Effect.*

A decree recording an agreement as a term of a compromise though not relating to the suit is a judicial record of the agreement of the parties and is admissible in evidence. Such an agreement when it gets recorded in a decree does not require registration and is admissible in evidence. (*Chatterjee and Graves, JJ.*) MAHIBIR MISSER *v.* NANDAKISHORE MISSER. **27 I. C. 640: 27 C. L. J. 583.**

——S. 17 (2) (vi)—*Compromise — Mutation proceedings—Executive acts—Unregistered compromise—Not admissible*

A revenue Court acts executively in mutation proceedings and an unregistered Razinamah filed therein is not admissible in evidence in a Civil Court though a statement made therein will be admissible (*Stuart, A. J C.*) MAHADEO SINGH *v.* JAGMOHAN SINGH. **25 I. C. 34.**

——S. 17 (2) (vi)—*Compromise decree.*

When a suit is disposed of according to the settlement which contains matters outside the scope of the suit, then registration of that is not necessary. (*Das and Adami, JJ.*) ARUNBATI KUMARI *v.* RAM NIRANJAN. **58 I. C. 299 : 2 Pat. L. T. 38.**

REGISTRATION ACT (XVI OF 1908), S. 17 (2) (vi) —Decree, Meaning of.

——S 17 (2) (vi)— *Compromise decree—Registration.*

A compromise dealing with matters within and without the scope of the suit and duly recorded is admissible in evidence without registration. A compromise not itself creating a lease is admissible in evidence without registration. In order to bring a case within S. 17 (2) (vi), not only the order, but the pleadings resulting in such order, may be looked into. (41 C. 493, P C. Ref. to) (*Chapman, Atkinson and Ali Imam, JJ.*) CHARU CHANDRA *v.* SAMBHU NATH. **3 Pat L J. 255: 4 Pat. L. W. 393 : 46 I. C. 358 : 1918 Pat. 193 (F. B.).**

——S. 17 (2) (vi) and (1) (d)—*Compromise—Variation of terms of a lease—Compromise not incorporated in decree.*

A compromise entered into between landlord and tenant but not incorporated in the decree and which on a fair construction of its terms appeared to be a lease and not merely an agreement to create a lease, requires to be registered under S. 17 (1) (d) of the Regn Act and is inadmissible in evidence without registration. (*Imam, J.*) SRIKISHUN LAL *v.* SHEOBALAK GOPE. **44 I. C. 638: 4 P. L. W. 247.**

——S 17 (2) (vi)—*Compromise—Properties not comprised in suit—Decree —Admissibility without registration.*

Where a suit for partition was compromised by which each deft., admitted the plfi's right to certain portions of the claim made by him, in consideration of the plff.'s admitting the claim of each of the deft.'s, for certain property which each deft. desired to retain and the compromise related to properties not the subject of the suit was incorporated in the decree. *Held*, that the compromise did not require to be registered even though it dealt with property not included in the suit. Such a decree, although not registered, is evidence of an agreement between the parties under which lands have been allotted to each. 22 Mad 508. Foll. (*Chapman and Jwala Prasad, JJ.*) KARU MIAN *v.* TEJOMIAN. **3 Pat L J. 43 : 43 I. C. 282 : 3 Pat. L. W. 141.**

Decree, Meaning of.

——S. 17 (2) (vi)—*Decree, meaning of—Scope of—Appliction to pleadings, etc.*

S. 17 of the Registration Act has no application to proper judicial proceedings whether of pleadings or orders of the Court. Hence a compromise incorporated into a decree of the Court is admissible in evidence in a subsequent suit though not registered. 22 M. 508, P. C ; 20 A. 171 P.C Foll. (*Ayling and Tyabji, JJ.*) SANKARANVELU PILLAI *v.* MUTHUSAMI PILLAI. **18 M L. T. 497 : (1915) M W. N. 956 : 31 I. C. 260. 29 M. L. J. 779.**

——S. 17 (2) (vi)—*Decree, Meaning of.*

Simple recital by a Court in its proceedings or inclusion in pleadings does not fall within S. 17.

REGISTRATION ACT, (XVI OF 1908), S. 17 (2) (vi) —Transfer of Decree.

(*Abdur Rahim and Ayling, JJ.*) RAVALA PARTI CHELAMANNA *v.* RAVULAPARTI RAMA ROW.
36 Mad. 46 : 21 M. L. J 870 : 12 I. C 317 : 10 M. L. T. 232 : (1911) 2 M. W. N. 265.

Transfer of Decree.

——S. 17 (2) (vi) and (1) (b)—*Transfer of decree—Registration—Immoveable property.*

A transfer of a decree for sale of mortgaged property does not create an interest in immoveable property and so the deed of transfer is not compulsorily registrable. 1 B. 267 : 15 I. C. 853 Dist (*Tudball and Piggott, JJ.*) MUMTAZ AHMAD *v.* SRI RAM.
35 All. 524 : 21 I. C. 462 : 11 A. L. J. 815.

—— S. 17 (2) (xi)—*Mortgage — Agreement relinquishing a portion of principal and interest —Whether registration necessary.*

An agreement by which a mortgagee relinquishes a part of the principal and all interest present and future on the mortgage, is compulsorily registrable. Such an agreement cannot be regarded as an acknowledgment of payment within the meaning of the exception in S 17 (2) Cl XI of the Act. (*Richards, C. J. and Banerjee, J.*) GOBARDHAN SAHI *v.* JADHU NATH RAI.
35 All. 202 : 19 I. C 449 : 11 A. L. J. 253.

——S. 17 (2) (xi)—*Mortgage bond—Receipt showing simple interest charged—Admissibility —Evidence Act, S. 92.*

A receipt showing that only simple and not compound interest is to be charged on a mortgage bond is admissible in evidence though the bond contained a provision for payment of compound interest. The receipt operates as full acquittance for the money paid and does not require registration. (*Holmwood and Chapman, JJ.*) KHILASH CHANDRA NATH *v.* SHEIK CHENU.
30 I. C. 804 : 42 Cal. 546.

——S. 17 (2) (xi)—*Mortgage—Endorsement.*

Transfer by mortgagee of his right for Rs. 100 or more by endorsement must be registered according to S. 17 (*Chevis, J.*) HANIF SHAH *v.* MURAD ALI.
102 P. W R 1912 : 16 I. C. 125: 132 P. L. R. 1912.

——S. 17 (2) (xi)—*Endorsement on a registered deed.*

Under S. 17 an endorsement on a registered mortgage deed merely acknowledging receipt of the mortgage money is not compulsorily registrable as such an endorsement is at most a memorandum containing a hint that redemption has been effected. It does not contain a contract of redemption. (*Johnstone, J.*) PIRBHU DIAL *v.* RISAL SINGH.
37 P. W. R. 1911 : 10 I. C. 846 : 111 P. L R. 1911

——S. 17 (2) (xi) and (1), (2).

Endorsement of payment on mortgage documents is exempt under S. 17 (2) (xi) from registration and is admissible in evidence though not registered. 26 I. C. 360, Dist. (*Ayling and Napier, JJ.*) BOMMANABAYINA KOTINAGULU *v.* RAMARAJU ANKOYYA.
6 L. W. 44 : 40 I. C. 893 : (1917) M. W. N. 447.

REGISTRATION ACT, (XVI OF 1908), S. 17 (3).

——S. 17 (2) (xi)—*Receipt of full payment—Mortgage deed returned.*

A receipt stating that the amount due on the mortgage is received in full, and the mortgage deed is returned, does not on its face purport to extinguish the mortgage, and therefore registration is not necessary, such a document being exempted under S 17 (2) (xi). (*Fox, C. J. and Twomey, J.*) MAUNG PO TE *v.* MAUNG SHWE KO.
35 I. C. 373 : 10 Bur. L. T. 35.

——S. 17 (3)—*Adoption deed reserving life-interest to mother—Registration, if compulsory.*

A deed executed shortly after an adoption by a widow by which a life-interest in immoveable property, worth more than Rs. 100 was created in favour of the widow, requires registration. (*Beaman and Macleod, JJ.*) PRISAH KASIMSABITAGI *v* GURAPPA BASAPPA KADIGI.
38 Bom. 227 : 24 I. C. 716 : 16 Bom. L. R. 111.

——S. 17 (3) —*Authority to adopt—Whether document a will.*

A Hindu about three weeks before he died, executed a document which was headed a statement that it was a will in favour of the executant's wife, by it the executant, after stating that he had long been seriously ill and had no issue, said, " I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This Will has been executed by my consent." The document was not registered. After the executant's death his widow adopted a son to him. *Held*, that the document was merely an authority to adopt and not a will and was therefore required to be registered by the last provision in S. 17 of the Registration Act of 1877. (*Lord Phillimore.*) BHIMADEO *v.* BEHARI DEO.
44 Mad 733 : 48 I. A. 482 : 41 M. L. J. 648 : 14 L. W. 398 : 64 I. C. 458 : (1921) M W. N. 713.

——S. 17 (3) — *Authority to adopt contained in a minor's Will.*

An authority to adopt contained in a will need not be registered, though the executant be minor and the bequests invalid. (*Wallis, C. J, and Moore, J.*)KONDAPALLI VIZIYARATHNAM *v.* MANDAPAKA SUDARSANA RAO. **(1920) M. W. N. 684 : 60 I. C. 146 : 12 L. W, 596.**

——Ss. 17 (3) and 49—*Authority to adopt—Execution outside British India—Registration.*

S. 17 (3) of the Registration Act does not apply to an authority to adopt, executed in a Native State by a person domiciled in that State. S. 49 of the Registration Act does not render the document inadmissible in evidence for want of registration. (*Wallis, C. J. and Sadasiva Aiyar, J.*) RAJA KEESARA VENKATAPPAYA *v* RAJA NAYANI VENKATARANGA RAO.
43 Mad. 288 : 59 I. C. 978 : 38 M. L. J. 149.

——S. 17 (3)—*Will—Authority to adopt—Destruction.*

A mere authority to adopt though revokable and taking effect on the death of the person conferring the authority, cannot be considered a will and requires to be registered under S. 17 (3). To

REGISTRATION ACT (XVI OF 1908), S. 17 (3).

make it a will the mere description of the document as a will is not sufficient and it is necessary that it should be a disposition of property, in addition to the authority to adopt. The mere appointment of a manager or guardian to manage the estate during the minority of the boy adopted, is not a disposition of the property sufficient to satisfy the definition of a will. 20 Mad. 467; 27 Mad. 30. Ref. (*Wallis, C. J. and Seshagiri Aiyar, J.*) JAGANNADHA GAJAPATHI *v.* KUMJA BEHARI DEO. **25 M. L. T. 204 : (1919) M. W. N. 52 : 49 I. C. 929 : 9 L. W. 385.**

——— S. 17 (3)—*Will—Authority to adopt—Registration.*

A document is not a will simply because it is called a will. Where a document gives a widow a power to adopt, and provides that in case of dispute between her and the adopted son, the widow should take a life-interest in the property, it is an authority to adopt requiring registration for its validity and not a testamentary disposition. (*Miller and Sankaran Nair, JJ.*) SANTHANA SOORAMMA *v.* SANTHANA MANGAYA. **18 I. C. 1006 : (1913) M. W. N. 199.**

——— S. 17 (3)—*Authority to adopt—Registration—Compulsory.*

A document giving a Hindu widow authority to make an adoption requires registration. (*Mitra and Prideaux, A. J. Cs.*) RUSTAM RAO *v.* DINKAR RAO. **55 I. C. 38**

——— S. 18—*Transfer of property—Value under Rs. 100 Unregistered document—Admissible to prove character of possession.*

Per. Mecleod, J.—In cases of transfer of property under the value of Rs. 100 if the transfer is effected by delivery of possession accompanied by an unregistered document, that document can be adduced in evidence in order to show what was the character of the possession given by the vendor of the land to the purchaser (*Beaman and Macleod, JJ.*) DAWAL PIRAN SHAHA *v.* DHARMA RAJARAM. **19 Bom. L. R. 622 : 41 I. C. 273 : 41 B. 550.**

——— S. 18—*Registration of Will—Effect.*

A Will, the registration of which is optional under S. 18, and which has been made legally proved, can operate in respect of all property mentioned in it, which the testator was competent to bequeath though it is illegally registered. (*Hallifax and Prideaux, A. J. Cs.*) MURLIDAS *v.* HARIDAS. **62 I. C. 246 : 4 N. L. J. 46.**

——— Ss. 20 and 35—*Interlineation—Denial of execution.*

Where there was an interlineation at the end of the deed and the parties were not prepared to admit it the Sub-Registrar is justified in refusing to register the deed. The executant must be taken to have denied the execution within S. 35 of the Registration Act. (*Wallis, C. J. and Tyabji, J.*) VEERAPPA CHETTIAR *v.* VISVANATHA IYER. **30 I. C. 507 : (1915) M. W. N. 543**

——— Ss. 20 and 72—*Refusal to receive document.*

REGISTRATION ACT (XVI OF 1908), S. 23.

Semble.—If a Sub-Registrar merely refuses to take up a document for registration, no appeal will lie to the Registrar against the order. 21 B. 699, Ref. (*Sundara Aiyar and Ayling, JJ.*) YELAMBAL ACHI *v.* GOVINDASAMI ODAYAR. **15 I. C. 370 : (1912) M. W. N. 412.**

——— S. 21—*Description of property—Immaterial error.*

S. 21 merely provides that the registrable document should contain a sufficient description to identify the same and the registration will not be vitiated by an immaterial error in such description. (*Richards and Banerjee, JJ.*) PARSOTAM DAS *v.* PATESSI PRATAP NARAIN SINGH. **35 All. 250 : 18 I. C. 923 : 11 A. L. J. 241.**

——— Ss. 21 and 22—*Description of property—Sufficiency of—Registration.*

Where a compromise agreement between the parties recited that "all the immoveable properties pertaining to the family of the executants mentioned in Sch. A described herein below shall be divided into four equal shares" and the division was to take place six months after the execution of the document, *held*, that the description as family property was sufficient for the identification of the property for purposes of registration. 10 M. L. J. 104; 13 M. L. J. 303, Ref. (*Phillips and Devadoss, JJ.*) APALACHARYULU *v.* RAMACHANDRA CHARYULU. **16 L. W. 287 : 1923 Mad. 81.**

——— S. 21—*Document presented without map.*

The registration of a document without the map referred to therein is ineffective. 18 Cal. 556, Rel. (*Maung Kin, J.*) CAMPBELL *v.* MAUNG PONYEIN. **43 I. C. 455.**

——— S. 21 (1)—*Description, unsatisfactory.*

Once a sale-deed is registered, it cannot be deemed to be a nullity merely because there was no specification of property within S. 21 of the Regn. Act. (*Richards, C. J. and Banerjee, J.*) BENI MADHO SINGH *v.* JAGAT SINGH. **16 I. C. 337 : 10 A. L. J. 33.**

——— S. 21 (2)—*Description of house in town.*

The proper description of houses in towns for purposes of registration is by the street in which they are situated and the number which they bear in the street. (*Lord Moulton.*) HARENDRA LAL ROY *v.* HARI DASI DEBI. **41 Cal. 972 : 1 L. W. 1050 : 41 I. A. 110 : 27 M. L. J. 80 : (1914) M. W. N. 462 : 16 M. L. T. 6 : 18 C. W. N. 817 : 19 C. L. J. 484 : 16 Bom. L. R. 400 : 23 I. C. 637 : 12 A. L. J. 774 (P.C.).**

——— Ss. 23 and 87—*Document presented beyond time—Registration is invalid*

Obiter :—*Per Sadasiva Aiyar, J.*—The registration of a document presented beyond the period prescribed by S. 23 to 26 of the Registration Act is invalid. It is not a mere irregularity under S. 87 of the Act. (*Wallis, C. J. and Sadasiva Aiyar, J.*) RAJA KESARAVENKATAPPAYA *v.* RAJA NAYANI VENKATARANGA RAO. **43 Mad. 288 : 59 I. C. 978 : 38 M. L. J. 149.**

REGISTRATION ACT (XVI OF 1908), S. 23.

——— S 23—*Presentation—Parties cannot extend time for.*

No agreement for the postponement of the registration of an executed document beyond the time allowed by the Registration Act for the purpose can be enforced. Registration of an executed document can only be enforced by proper proceedings under the Registration Act, followed, if necessary, by a suit under S. 77 of the Registration Act, but not by a suit of any other kind. 16 M. 347 . 6 M. L. J. 263 , 42 M. 822 followed (*Hallifax, A. J. C.*) CHAGAN LAL *v.* KASHI RAM. **1923 Nag. 76.**

——— **Ss. 25 and 77**—*Document presented after four months—Discretion—Civil Courts.*

A Civil Court will decline to direct registration of a document not presented for registration within four months as required by S. 23 and there is no order of the Registrar extending the time. 5 C 820, Foll. 21 B. 699, Ref. (*Scott Smith and Shadi Lal, JJ.*) JAHANGIRI MAL *v.* KANSHI RAM. **39 P. R. 1917 : 64 P. L. R. 1917 : 123 P. L. R 1917 : 41 I. C. 64 : 112 P. W. R. 1917**

——— **S. 25 (1)**—*Refusal to excuse delay in presentation.*

Whether the order refusing to excuse delay in the presentation of a document for registration is one passed by the Sub-Registrar after his communicating about it to the Registrar or one passed by the Registrar on application directed to him, it is a refusal to excuse delay under S 25 (1) which give ground for a civil suit under S. 77. *Per Seshagiri Aiyar, J.*—An order refusing to excuse delay in the presentation of a document for registration under S. 25 (1) of the Registration Act is an order refusing to register the document, which furnishes ground for a civil suit under S 77. 10 M. L J 104 fell, 31 Bom. 699, Dist. (*Per Bakewell, J.*) Refusal to excuse delay in presentation of document does not amount to a refusal to register it. 21 Bom 699, Foll 10 M. L. J. 104, Dist. (*Seshagiri Aiyar and Bakewell, JJ.*) GANGADHAR MUDALI *v* SAMBASHIV MUDALI. **19 M. L T. 397 : 34 I. C. 769 : (1916) 2 M. W. N. 38.**

——— **Ss. 28 and 49**—*Fictitious entry of property—Registration not valid.*

Where for purposes of registration, a small parcel of land was included in a mortgage bond, in which the mortgagor had no interest and the parties never intended that it should be part of the security, such an insertion is a fraud upon the registration law and no registration obtained by means thereof is valid. (*Viscount Finlay.*) BISWANATH PRASAD *v.* CHANDRA NARAYAN. **48 Cal. 509 : 63 I. C. 770: 48 I. A. 127 (P.C.).**

——— **S. 28**—*Property in Dt. M. included to effect registration in that district—Fraud.*

A mortgage bond purported to transfer property in Dt *D* But a property in Dt. *M* was included in the bond to effect registration in the Dt. *M* and it was found that the property in the Dt. *M.* was never intended to form part of the security. *Held* the act of including the property in Dt. *M.* amounted to fraud on the law of Registration and hence the registration was invalid. 41 Cal. 972 cited. (*Viscount Finlay.*) MATHURA PRASAD *v.* CHANDRA NARAYAN. **9 A. L. J. 385 : 33 C. L. J. 440 : 23 Bom L. R 629 : (1921) M. W. N. 370 : 14 L. W. 1: 29 M L. T. 413 : 2 Pat. L.T. 397 : 60 I. C. 833: 25 C. W. N. 985 : 40 M. L. J 489.**

REGISTRATION ACT (XVI OF 1908), S. 28.

——— **Ss. 28, 49 and 87**—*Fictitious property—Inclusion of, to give jurisdiction to Registrar—Original side—High Court.*

Where in order to obtain registration of a mortgage at the office of the Sub-Registrar of a particular district (where no part of the property mortgaged is in fact situate) the parties make a fictitious entry of an item of property purporting to be within that district, the entry is a fraud on the Registration Law and the registration itself is invalid. The same considerations apply to the jurisdiction of a Court in a suit to enforce the mortgage and such fictitious item will be totally ineffective to give jurisdiction to a Court which would not have had jurisdiction but for the inclusion of the fictitious property. (*Lord Moulton*) HARENDRA LAL ROY *v.* HARI DASI DEBI **41 Cal. 972: 1 L. W. 1050: (1914) M. W. N. 462: 41 I A. 110: 16 M. L. T. 6: 18 C. W N 817: 19 C. L. J. 484: 16 Bom. L. R. 400: 23 I.C. 637: 12 A. L. J. 774: 27 M. L J. 80.**

——— **S. 28**—*Inclusion of property not the mortgagor's—Knowledge of mortgagee necessary for invalidity.*

Where the mortgagor represented to the mortgagee that he (the mortgagor) was the owner and the proprietor of the said land and it is not proved that the mortgagee knew at the time of taking the mortgage that the land in question did not belong to mortgagor. *Held*, the mortgagor cannot take advantage of his own fraud by pleading that the mortgage deed was not registered at the proper place. (*Rafique and Piggott, JJ.*) SYED MAHOMED *v.* LALA PURSHOTAM SARAN. **1922 All. 231.**

——— **S. 28**—*Inclusion of property not belonging to executant with a view to give jurisdiction to registrar—Effect of.*

Where an item of property which was not owned by the vendor and not intended to be conveyed is included in a sale deed merely for the purpose of obtaining registration of the deed in a district where none of the property actually intended to be conveyed is situate, such registration is invalid and does not operate to confer title. 41 C. 272 (P.C.) 39 A. 523 Rel. on. (*Richards C.J. and Banerjee, J.*) RAM LAL *v.* TAMKIN BANO. **41 All. 385 49 I. C. 543: 17 A L. J 363.**

——— **S 28**—*Property included in mortgage deed within jurisdiction—Vendor having no title—Fraud.*

In a mortgage deed certain immoveable property was included which actually existed within the jurisdiction of the registering officer but the mortgagor had no title thereto. *Held*, that the registration was not vitiated by the fact of the mortgagor's want of title when there was no knowledge on the part of the mortgagee and no collusion between the mortgagor and the mortgagee. (*Piggott and Walsh, JJ.*) PAHLADI LAL *v.* MUSAMMAT LARAITI. **41 All. 22: 48 I. C. 200 : 16 A. L. J. 871.**

REGISTRATION ACT (XVI OF 1908), S. 28.

——S. 28—*Evasion of—Property not belonging to vendor entered in sale-deed—Sale deed invalid.*

A sale deed is invalid and does not pass title to the vendee, where a certain property is included in a sale-deed which at the date of sale was not the property of the vendor and was only made use of for the purpose of evading the Registration Law. (*Piggott and Walsh, JJ.*) MANGALI LAL *v* ABIDYAR KHAN. **41 I. C. 3: 39 All. 523: 15 A. L. J. 550.**

——Ss. 28, 32, 49 and 60—*Registration in wrong office.*

A document is not registered in accordance with the Act if no part of the property is situate within the jurisdiction of the Registrar who registers the deed. 23 A. 233 (P. C.) Foll. (*Tudball, J.*) JAGANNATH *v.* RAM NATH. **26 I. C. 52: 12 A. L. J. 913**

——S. 28—*Registration at wrong office.*

Registration in a sub-district in which the property is not situated is "without" jurisdiction and is invalid. 23 A. 233 P. C. Ref. (*Richards, C J. and Tudball, J.*) BANSRAJ SINGH *v.* RAJBANS BARTHI. **24 I. C. 451: 12 A. L. J. 918.**

——S. 28—*Place of registration—No property in—Effect of.*

A person who has no property in a particular district cannot validly register a bond in that district. The Registrar of the district has no jurisdiction to register that bond and such a bond does not create any liability against any person 41 C. 972 P. C Ref. (*Sharfuddin and Coxe, JJ.*) UDIT NARAIN CHOWDHURI *v.* MATHURA PRASAD. **29 I. C. 413.**

——S. 28—*Registration at office of registry having no jurisdiction—Effect of.*

Where a deed is registered at a place where no part of the property concerned was situate the registration is without jurisdiction and the deed inadmissible in evidence. 41 Cal. 972, 49 I. C. 343; 26 C. W. N. 369 ref. (*Broadway and Abdul Qadir, JJ.*) HAR BHAGWAN *v.* HUKAM SINGH. **4 Lah. L. J. 245: 3 Lah. 242: 1923 Lah 243.**

——Ss. 28, 29—*Mortgage deed—Inclusion of item merely to give jurisdiction to registering officer—Fraud—Personal covenant to repay in deed—Claim to enforce—Limitation—Registration of deed as regards covenant not invalid.*

Where it was found that a portion of the property included in a mortgage deed did not belong to the mortgagors, was not really intended to be mortgaged and was included in the deed merely to give jurisdiction to the registrar who registered the mortgage deed, *held* that there was a fraud on the Registration Law, and that the registration of the deed obtained by means thereof was invalid. The mortgage in the case contained a personal covenant to repay and a question arose as to the period of limitation applicable to a claim to enforce that covenant, that is whether the covenant was a registered covenant within the meaning of Article 116 of the Limitation Act.

REGISTRATION ACT (XVI OF 1908), S. 28.

Held, that, as, under S 29 of the Registration Act, a deed containing only such a covenant could be registered at any place, the registration of the deed in regard to the covenant, was valid the covenant was a registered covenant, and a claim to enforce the same was governed by the 6 years' period provided for by Art. 116. (*Phillips and Devadoss, JJ.*) DRONAMARAJU RAMA RAO *v.* K. VEDAYYA. **44 M L. J 373 : 46 Mad. 435: (1923) M. W. N. 166: 32 M L. T. H. C.) 222: 17 L. W. 695: 1923 Mad. 447.**

——S. 28—*Inclusion of property for purposes of registering document in wrong place.*

If an inclusion of a property of small value in comparison to others, is made a security for the purpose of getting the document registered by a particular Sub Registrar that motive of inclusion cannot be said to be in fraud or violation of the Registration Act so as to affect the validity of the document. (*Abdur Rahim and Moore, JJ.*) RAMANATHAN CHETTIAR *v.* MUTHU KUMARU **12 L. W 754 : 58 I. C. 849 : (1920) M. W. N. 487.**

——S. 28—*Interpolation of fresh property for purposes of registration—Consent of mortgagors and attesting witnesses.*

With the consent and knowledge of the mortgagor and in the presence of the attesting witnesses an item was put in the mortgage to avoid delay in registration and to get the document registered in an office near the place where the mortgagor was living. *Held*, the inclusion of the item was not a fraud on the Registration Law and did not invalidate the document. (*Seshagiri Aiyar and Moore, JJ.*) SANKARAN NAMBIAR *v.* NARAYANAN TIRUMUNPU. **43 Mad 405 : 11 L. W. 192 : (1920) M W N. 205 : 55 I. C. 86 : 38 M. L. J. 251.**

——S. 28—*Property entered, not intended to be sold—Sale, validity of.*

A sale deed comprising also a property in a district not intended to be sold but to have registration in that district is a fraud on registration and being void conveys no title. A suit to recover possession from the vendee falls under Art. 144 and not under Art. 44 of Sch. I of Limitation Act. (*Spencer and Krishnan, JJ.*) GOKARKUNDA *v.* GOKARKUNDA. **43 Mad. 436 : 11 L. W. 394 : 56 I. C. 519 : 38 M. L. J. 327.**

——S. 28—*Place of registration—Inclusion of property with a view to give jurisdiction.*

Where property not intended to be conveyed is included in a sale-deed merely for the purpose of facilitating registration in an office which has no jurisdiction otherwise to register the deed, the registration is invalid and void. 42 Cal 972 Foll. (*Sadasiva Aiyar and Kumaraswami Sastri, JJ.*) RAMNAIK *v.* NAGAMUTHU NACHIAR. **22 M. L. T. 516 : 43 I. C. 515 : 7 L. W. 33.**

——S. 28—*Registration at wrong office—Validity—Error of procedure.*

Registration of document in a Sub-Registrar's Office within whose sub-district no portion of the property is situate does not render the registration

REGISTRATION ACT (XVI OF 1908), S. 28.

invalid. All errors of a Registrar, antecedent to registration must be regarded merely as errors of procedure not affecting the validity of the instrument registered. 24 W R. 75 (P C) Ref.; 1 A. 465 (P. C) Ref. (*Benson and Sundara Aiyar, JJ.*) VEERAPPA CHETTY *v.* KADIRESAN CHETTY.
(1913) M. W N. 525 : 14 M L T. 237 : 20 I. C. 385 : 24 M. L. J. 664.

——S. 28—*Fictitious entry of property so as to give jurisdiction.*

If property which the mortgagor does not possess and does not intend to mortgage is intentionally sought to be included in the mortgage for the purpose of obtaining registration in a district in which no part of the property actually charged or intended to be charged in fact exists, it is a fraud on the Registration Law, and the registration is invalid. 41 C. 972 P. C. Foll. (*Drake Brockman, J. C. and Kotval, A. J. C.*) BANSI *v* SHEO SHANKAR PURI. **55 I. C. 66.**

——S. 28—*Wrong inclusion of property—Effect.*

The registration of mortgage-deed of property not owned by the mortgagor to the knowledge of the mortgagee but intentionally to get the deed registered in a place in which the property really charged is not situate is invalid 41 C 972 P. C. Rel. (*Batten, A. J. C.*) URKUDYA *v.* DOMA. **50 I. C. 764 : 15 N. L R. 75.**

——S. 28—*Non-existence property—Registration officer having no jurisdiction.*

At the time the sale was executed in favour of the plff. the vendor had no title whatever in a plot which was entered in the sale deed merely to enable its registration to be made in a certain place. *Held*, that the burden of proving that the entry regarding that plot was not a fictitious entry was cast on the plff. The plaintiff having failed to discharge that burden it must be held that the sale-deed was invalid, as the registration was collusive and fraudulent. 41 Cal. 972 (P. C) Foll ; 39 A. 523; 41 All. 22 Dist. *Lindsay, J.*) JADUNATH KUNWAR *v.* DHARAM NARAIN.
23 O. C. 38 : 7 O. L J. 36 : 55 I. C. 511 : 2 U. P. L. R. (J. C.) 37.

——Ss. 28, 32 and 5—*Registration at proper office—Burden of proof*

The burden of proving that the registration of a document is invalid, because it has not been registered at the proper registration office is on the party alleging it. According to S. 5 of the Act transfers of jurisdiction for purposes of registration should be declared only by notifications under that Act. Per *Roe, J.* Where a person alleges that the description of the property given in a registered deed is incorrect, the burden of proving the incorrectness would lie on him under S 114 of the Indian Evidence Act. (*Chapman and Roe, JJ.*) ISHAWARDHARI SINGH *v.* RAMANI MOHAN GHOSH
39 I. C. 143 : 3 Pat. L. W. 325.

——Ss. 28 and 29—*Registration in district where transferor had no property.*

REGISTRATION ACT (XVI OF 1908), S. 31.

In the absence of fraud on the part of the transferee or collusion between the transferor and the transferee, the mere fact that the transferor had no title only to the property which would give jurisdiction to the office where the document was registered would not be a bar to the Registrar's jurisdiction. (*Roe and Jwala Prasad, JJ.*) RAM DEI *v* CHANDRABALI BIBI.
44 I C. 399 : 4 Pat. L. W. 237.

——S. 28—*Place of registration—Wrong inclusion of property—Collusion.*

Where there is any fraud or collusion between the parties for the purpose of giving jurisdiction to a particular Sub-Registrar to register a document by including property which does not exist, this is sufficient to invalidate the registration. But registration is not invalid if the property described exists, merely because it transpires that the transferor though acting in a perfectly *bona fide* manner, has ceased to have an interest in the property. 41 C. 972 Dist.; 14 C.W.N. 532, Foll. (*Miller, C J. and Coutts, J.*) MUSAMMAT RAM DEI *v.* RAM CHANDRABALI DEBI.
52 I. C. 446 : 4 Pat. L. J. 433.

——S. 29—*Registration at wrong office—False statement—Jurisdiction of Registrar—Invalid deed.*

A false statement concerning certain property to which the vendor had no right was made in a sale deed in order to give jurisdiction to the Sub-Registrar who otherwise had no jurisdiction to register the deed. *Held*, that the registration was invalid and the deed was void for want of proper registration. 16 A. 259, Foll. (*Karamat Husain and Tudball, JJ.*) AJMAT ALI *v.* SITALABUX PAUL.
16 I. C. 108 : 9 A. L. J, 766.

——S. 29—*Inclusion of small item so as to give jurisdiction—Property in existence.*

Where the parties to a mortgage document intended a particular property however small in value as compared with rest, to be part of the security although the motive for its inclusion might be to have the document registered by a particular Sub-Registrar that motive cannot in any way be said to be in fraud or in violation of the Registration Act, and the document must be held to have been duly registered. 41 Cal. 572 expl. (*Abdur Rahim and Moore, JJ.*) RAMANATHAN CHETTIAR *v.* MUTHUKUMARU.
(1920) M. W. N. 487 : 58 I. C. 849 : 12 L. W. 754.

——S. 31—*Place of registration.*

Ordinary documents are permitted to be registered under S. 31 at the Office of Registrar or Sub-Registrar or at the executant's residence, while it is otherwise in the cases of extraordinary ones, which can be validly done at places other than these. Thus registration in an ambulance car, Court-house, or in a train or at a railway station or on a journey, when there is a necessity, *e g.*, registration of a will is not invalid.

REGISTRATION ACT (XVI OF 1908), S. 32.

(*Stuart and Kanhaiya Lal, A. J. Cs.*) MAHARAJA RANA SIR UDAI BHAN SINGH *v.* ESTATE OF PRINCE BASDEO SINGH.

58 I. C. 906 : 23 O. C. 275.

——S. 32—*Provisions are imperative.*

Provisions of S. 32 are imperative and unless a document presented for registration is presented by one of the persons described in the section, mere presentation does not give to the Registrar the indispensable foundation, of his authority to register it, and the registration, if made, is invalid. 42 I A 22, Foll (*Viscount Cave*). MA SHWE MYA *v.* MAUNG HO HNAUNG.

49 I. A. 395 : 31 M. L. T. 304 : 17 L. W 213 : 50 C. 166 : 37 C. L. J. 343 : 27 C. W N. 533 : 44 M. L. J 732 : 2 Bur. L. J. 264 : 1922 P. C. 359 (P. C.).

——Ss. 32, 83 and 75—*Presentation by agent—Acceptance for registration—Presumption—Refusal of Registrar to register—Appeal—Order for registration—Effect of—Subsequent presentation if necessary.*

A Sub-Registrar to whom a mortgage was presented for registration by a person holding a power of attorney from the mortgagor refused to register the document on the ground that the mortgagor did not attend to admit execution under S. 45 of the Registration Act. On appeal the Registrar ordered registration of the document. The Sub-Registrar accordingly registered it. Subsequently an objection was raised that the original presentation was invalid and that the document was not duly presented even at the time it was registered. *Held*, that the endorsement of the Sub-Registrar that the document was validly presented raised a presumption that the power of attorney was duly executed and that the document having been originally validly presented a fresh presentation was unnecessary before it was registered in pursuance of the order of the Registrar (*Lord Buckmaster*). CHHOTEY LAL *v.* COLLECTOR OF MORADABAD.

31 M. L. T 284 : 49 I. A. 375 : 44 All. 514 : 27 C.W N. 477 : 21 A. L. J. 361 : 37 C. L J. 377 : 25 Bom. L. R. 655 : 18 L W. 124 : 9 O. & A. L R. 450 : (1923) M.W.N 873 : 1923 P. C. 279 (P.C.).

——Ss. 32 and 34—*Gift deed to minor married woman—Presentation for registration by father—Husband alive.*

On the marriage of a minor woman, the father ceases to be her natural guardian and the husband takes his place. The father therefore is neither an assignee nor a representative of the woman within the meaning of S. 32 of the Act and presentation by him of a deed of gift in favour of his minor daughter, is not a proper presentation, within the meaning of S. 34, and registration of the deed on presentation by him is invalid, illegal and a nullity. (*Lord Atkinson*). PADMAVATHI *v.* SHRINIVASA.

68 I. C. 754 : 14 L. W. 575 (P. C).

——Ss. 32, 33 and 61—*Presentation of document by unauthorised person.*

It is the duty of the Courts in India not to allow the imperative provisions of the Registration Act to be defeated when it is proved that an agent

REGISTRATION ACT (XVI OF 1908), S. 32.

who presents a document for registration has not been duly authorized. If a person is ill and unable to attend at the proper Registration office to present for registration, execution in the presence of the Registrar is not necessary; all that the Registrar has to do is to satisfy himself that the document has been voluntarily executed. A document was presented for registration by an unauthorized person who stated the executant was ill and deposited the fee for the Registrar to visit the executant or issue a commission for his examination to ascertain if the document had been voluntarily executed. The Registrar visited the executant at his house and he admitted execution and requested that after registration the document be given to his attorney. *Held*, that the executant was the real presentor and the registration was therefore valid. 42 I. C. 22 d st. (*Lord Phillimore*). BHARAT INDU *v.* HAKIM MUHAMMAD HAMID ALI KHAN.

18 A. L. J. 717 : (1920) M W. N. 413 : 28 M. L. T 98 : 13 L. W. 4 : 47 I. A. 177 : 58 I. C. 386 : 42 A. 487 : 25 C. W. N. 73 : 22 Bom. L. R 1362 : 2 U. P. L. R. 179 : 39 M. L. J. 41 (P. C.).

——S. 32—*Presentation.*

The Act will be sufficiently complied with if a person competent to present the document for registration is present before the Sub-Registrar and assents to the registration. (*Richards and Tudball, JJ.*) ATMA RAM *v.* UGRA SAIN.

35 All. 134 : 18 I. C. 697 : 11 A L. J. 99.

——S. 32—*Presentation by son of executant.*

A presentation of a document for registration by the son of a person not authorised to present it as provided by S 32, is not a valid presentation. (*Richards and Banerji, JJ.*) BULDEO *v.* EDWARD GARDNER. 18 I. C. 286.

——S. 32—*Presentation by servant—If valid.*

Presentation for registration by a servant of the mortgagee in the presence of the mortgagor who assents to it is a valid presentation. 34 A. 335 Foll; 34 A 331; 23 A 233 Cons. (*Richards, C. J. and Banerji, J.*) KRITA KISHEN *v.* HARNAM CHAND. 35 All. 72 : 17 I. C 465 : 10 A. L. J. 510.

——Ss. 32 and 33—*Presentation by husband of a pardanashin lady.*

Presentation for registration by the husband of the executant who had no authority to make the presentation is a nullity even though the executant is a pardanashin lady. 23 A. 233 foll. (*Richards, C. J., Knox, Banerjee, Tudball and Chamier, JJ.*) KHALILUDDIN *v.* BANNI BIBI.

35 All. 34 : 17 I. C. 274 : 10 A L. J. 440 (F.B.).

——Ss. 32, 33 and 87 and Evidence Act, S. 114—*Presumption of authority.*

It is a rebuttable presumption by the Court that a registered document was presented for registration by a duly and legally authorised person If it is proved that an attorney with a general power unauthenticated under S. 33 of the Registration Act and without conferring power of

registering documents, presented a document for registration, the presumption of the validity of the registration proceedings is rebutted. The fact that the executant was present at the time of registering a document and admitted its execution is unable to justify the inference of the executant's presence at the time of its actual presentation for registration. The presumption of validity of a proper registration must be given effect to, if it is not sought to prove the absence of proper authority of the *karinda* of the executant presenting a document at the time of its presentation for registration. (*Griffin and Chamier, JJ.*) JAMBU PRASAD *v.* AFTAB ALI KHAN.
34 All. 331 : 15 I. C. 881 : 9 A. L. J. 420 :
[On Appeal *see* 28 I. C. 422 : 37 All. 49. (P. C.).]

——— **S. 32**—*Presentation by unauthorised person—"Presented," meaning of.*

Where all the executants of a deed are present at the Registrar's office and acquiesce in the handing over of the document to the Registering officer by an unauthorised person, the document is duly "presented" within the meaning of the Act. In order to decide whether a document was duly presented, the Court has to consider the attending circumstances of the case. (*Richards, C. J. and Banerji, J.*) NATHUMAL *v.* ABDUL WAHID KHAN. **34 All. 355 : 14 I. C. 812 : 9 A. L. J. 362.**

——— **S. 32**—*Presentation by father of executant in presence of executant—If valid.*

Presentation by the father of the executant of a document who is a lady and admission of execution then and there before the Sub-Registrar is a valid presentation within the meaning of S. 32 (*Richards, C. J. and Tudball, J.*) WILAITI BEGAM *v.* FAZAL HUSAIN KHAN.
13 I. C. 961 : 9 A. L. J. 148.

——— **Ss. 32 and 60**—*Certificate of Registration—Effect of—Evidence Act, (I of 1872), S. 114—Presumption.*

The certificate of due registration on a bond raises strong presumption in favour of due registration and the Court is bound to admit it in evidence unless proof is given that it did not comply with the provisions of the Law. 23 A. 233 P. C 1 A. 465 P. C. Ref. (*Richards, C. J. and Banerji, J.*) RAMCHANDRA DAS *v.* FARZAND ALIKHAN.
34 All. 253: 13 I. C. 531: 9 A. L. J. 188

——— **S. 32**—*Authority to sign.*

Where it was urged that the father had no authority to sign on behalf of the son but the want of authority did not appear on the endorsement of the Sub-Registrar. *Held*, whether a man signs expressly as agent or whether he is expressed to sign on some other person's behalf, that makes no substantial difference. In each case he signs *prima facie* as agent. (*Marten and Pratt, JJ.*) SHRIDHAR LAXMAN *v.* JANARDHAN.
1923 Bom. 37.

——— **Ss. 32, 34 and 35**—*Admission of execution by some of the executants—Registration not valid.*

Ss. 32 to 35 of the Registration Act have been very carefully designed to prevent forgeries and the procurement of deeds by fraud or undue influence. It is necessary to insist on strict compliance with them. Where only one of the executants of a deed appeared before the Registrar and admitted execution and the others did not, the deed has no legal operation as a deed executed and registered by other executants. A document duly presented for registration can be registered only in respect of the executants who appear personally or by a representative and admit execution. If the document is registered upon the appearance and admission of one of the executants only, there is no effective registration as regards the other executants who neither appear, nor admit execution. (*Mookerjee and Chotzner, JJ.*) J. D. EZEKIEL *v.* ANNADA CHARAN SEN.
36 C. L. J. 109 : 50 C. 180 : 1923 C. 35.

——— **Ss. 32 and 33**—*Presentation by agent.*

Presentation of document by agent not duly authorized is not proper presentation though its execution and registration is admitted by the executants. (*Scott-Smith and Abdul Raoof, JJ.*) AMIR BEGAM *v.* HUSSAIN BIBI. **58 I. C. 333 : 2 Lah. 5.**

——— **S. 32**—*Presentation of deed of adoption by natural father of minor adoptee is valid.*

Per *Sadasiva Aiyar, J.* The natural father of a minor boy adopted by a widow in pursuance of a written authority to adopt given by her husband is competent to present that document for registration on behalf of the minor. (*Wallis, C. J. and Sadasiva Aiyar, J.*) RAJA KEESHARA VENKATAPAYA *v.* RAJA NAYANI VENKATA RANGA RAO. **43 Mad 288 : 59 I. C. 978 : 38 M. L. J. 149.**

——— **Ss. 32 and 33**—*Deed in possession of mediators—Registration.*

Where a document is in the possession of mediators and could have been obtained and presented for registration by one of the parties, the other party is not liable unless the non-registration was due to any default on his part. 16 M. 341, Dist.; 22 I. C. 941; 20 M. 19, Ref. (*Oldfield and Tyabji, JJ.*) PONNUSAWMY *v.* MUTHUSAWMY. **29 I. C. 585.**

——— **S. 32**—*Presentation by agent of a deed executed by him for principal.*

A deed executed and signed by an agent for the principal and presented beforethe Registrar by the Agent himself who admits execution thereof, is said to be presented by the actual executant himself and is not to be supposed to be one presented under S. 32 (c) of the Act. (*Stanyon, A. J. C.*) MOTILAL *v.* GANGA BAI. **31 I. C. 867 : 11 N. L. R. 177.**

——— **S. 32**—*Presentation—Representative.*

Registration is intended to be a contemporaneous publication of a transaction as a guard against the subsequent fraud or alteration. A document can be registered by a legal representative when the executant does not or cannot appear, registration will be effected, even if consideration is denied on proof of execution. Registration of a deed is something different from the validity thereof and from the value of the title of the executant to the property affected by the deed. (*Stanyon, A. J. C.*) BHIORAJ *v.* NARAYAN. **27 I. C. 861 : 11 N. L. R. 4.**

REGISTRATION ACT (XVI of 1908), S. 32.

——Ss. 32 and 87—*Presentation by ammuktar—Registration—Defect in—Effect of.*

Improper registration of a document or an error on the part of a Registrar, does not affect its validity. The presentation of a document for registration by a person holding an ammukhtarnamah empowering him to do all acts relating to the executant's estates in Courts and offices, and in "in the District Registration Office," etc. is a presentation by a person duly authorised. (*Chitty and Panton, JJ.*) BISWANATH BHATTACHARJEE *v.* GOVINDA CHANDRA. **23 C. W. N 534 : 51 I. C 88 : 29 C. L. J. 305.**

——Ss. 32 and 47—*Executant present before Registrar—Presentation by another.*

Where the executant of a document is present before the Registrar and presentation of the document to the Registrar is made on his behalf and with his assent it is not at all material under S. 47 by whom the physical act of handing over the document is performed 28 M. L. J. 577 Dist (*Kanhaiya Lal and Daniels, A. J. Cs.*) SATRHAN SINGH *v.* GANGA BAKSH SINGH **6 O. L. J. 39: 49 I. C. 375 : 1 U. P. L. R. (J. C) 24.**

——S 32—*Presentation by agent—Endorsement as to presentation by—Presumption.*

Where the endorsement showed that the document was presented by an agent who produced his power of attorney which was duly authenticated by the Sub-Registrar and there was no evidence that it did not contain the usual power. *Held*, that the mortgage was duly registered. (*Robinson, C. J. and May Oung, J.*) DOWSON BANK, LTD. *v.* C. R. V. V. CHETTY FIRM. **1 Rang. 121 : 1923 R. 254.**

——Ss. 32 and 33—*Presentation— Presumption—Burden of proof.*

The presentation of a document by a person without authority renders the registration invalid, notwithstanding the presence and acquiescence of the party entitled to present it. 37 A. 49 Foll. The presumption of due registration of document arising from the certificate of registration loses much of its weight by the apparent presentation of document by a person other than the person signing the endorsement. Where an agent presents a document for registration the principal must show that the agent held a power of attorney recognizable under S. 33 of the Act. (*Ormond and Twomey, JJ.*) A. M. V. CHETTY FIRM *v* SUBAYA. **37 I. C. 26 : 9 Bur. L. T. 197.**

——Ss. 32 and 35—*Presentation by minor.*

Presentation of an instrument by a minor for registration is not invalid if he has a claim thereunder (*Maung Kin, J.*) CHETTY FIRM *v.* MA ON SHWE. **33 I. C. 33**

——S. 32 (a) and (b)—*Presentation by agent of mortgagee not authorised by statute Presence of mortgagor and admission of execution, if cures defect—Provisions imperative.*

A Registrar or Sub-Registrar under the Regn. Act has no jurisdiction to register a document unless he is moved to do so by a person who has executed it or claims under it or by the representative or assign of such person or by an agent of such person, representative, or assign

REGISTRATION ACT (XVI of 1908), S. 34.

duly authorised by a power of attorney executed and authenticated in the manner prescribed by S. 33. Where the document is presented for registration by an agent not so authorised the executant who attends merely to admit that he had executed it cannot be treated for the purpose of S 32 of Act III of 1877 as presenting the deed for registration. The terms of Ss. 32 and 33 of the Act are imperative. One object of those sections and Ss 34 and 35 of the Act was to make it difficult for persons to commit fraud by means of registration under the Act and it is the duty of Courts in India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it. (*Sir John Edge.*) JAMBU PERSHAD *v.* MUHAMMAD NAWAB AFTAB ALI KHAN. **37 All. 49 : 42 I A 22 : 17 M. L. T 148 : (1915) M W. N. 592 : 19 C. W. N. 282 : 21 C. L. J 218 : 2 L. W 277 : 13 A. L. J. 129 : 17 Bom. L. R. 413 : 28 I. C. 422 : 28 M L. J. 577 (P. C.). [On appeal from 34 All. 331 : 15 I. C. 881 : 9 A. L. J. 420].**

——S. 32 (b)—"*Representative,*" *Meaning of.*

The term "representative" in S. 32 refers to the legal personal representative or (by virtue S. 2) the guardian or committee of the persons described and does not include a clerk or agent. (*Viscount Cave*). MA SHWE MYA *v.* MAUNG HO HNAUNG. **49 I. A. 395 : 31 M. L. T. 304 : 17 L. W 213 : 50 C. 166 : 37 C L. J. 343 : 27 C W N 533 : 44 M. L. J. 732 : 2 Bur. L. J. 264 : 1923 (P. C). 359 (P. C.).**

——S 33—*Execution of document by person having power of attorney—Presentation for registration.*

Where a person having a power of attorney executes a document he is entitled to present it for registration as the executant under S. 32 (*a*). S. 33 applies only where the person presenting is the General Attorney of the person executing. (*Daniels, J.*) MT. AISHA BIBI *v.* CHHAJJU MAL. **1924 A 148.**

——S. 33—*Purdanashin lady—Attendance before Registrar not necessary.*

A purdanashin lady executing a power of attorney is not bound to personally attend at the Registrar's office. The Sub-Registrar may attest the execution of the power of attorney after he has been satisfied as to its voluntary execution. The fact of attestation raises a presumption that he was so satisfied. (*Coutts and Das, JJ.*) RAM LAL SINGH *v.* MT. BIBI SHAHRUNNISSA. **3 Pat. L. T 442 : 1922 P. 559.**

——S. 34—*Deed of gift in favour of minor married girl presented by latter's father—Registration is illegal.*

Two deeds of gift executed by *K* in favour of his niece *A*, who was a minor and married to his adopted son were presented for registration by *A's* father and registered : *Held*, that upon *A's* marriage her father ceased to be her natural guardian and never having been

REGISTRATION ACT (XVI OF 1908), S. 34.

appointed her legal guardian was not her assignee or her representative within the meaning of S. 3 of the Registration Act, 1877 Nor was he within the meaning of S. 34 of the Act, the representative, assign or agent duly authorised on behalf of *K*. The registration of the deeds was therefore illegal, and void, with the consequence that the deeds themselves were void and unenforceable (*Lord Atkinson*). AMBA *v.* SHRINIVASA KAMATHI. **26 C W. N. 369 : 14 L. W. 575 ; 1922 P. C. 135.**

——S. 34—*Execution on behalf of oneself and another—Presentation.*

If a document is executed by one of two parties on behalf of himself and the other, he can present it for registration, the registration is not invalid for non-appearance of the other party. (*Mookerjee, Fletcher and Richardson, JJ.*) GOPESWAR PYNE *v.* HEM CHANDRA BOSE. **57 I. C. 226 : 31 C. L. J. 447.**

——Ss 34, 87—*Registration contrary to S. 34—Effect.*

Non-compliance with the provisions of S. 34 of the Registration Act, in registering a document, is a mere defect in procedure which is cured by S. 87 of the Act. (*Evans, J. C. and Lindsay, A. J. C*) RAMJI MAL *v.* WAZIR HUSAIN. **11 I. C. 925 : 14 O. C. 207.**

——S. 35—*Defect in procedure not fatal.*

No act in good faith will invalidate registration merely because of defect in procedure. (*Lord Dunedin.*) KANHAIYALAL *v.* NATIONAL BANK OF INDIA, LTD. **4 Lah. 284 : 45 M. L J. 497 : 33 M. L. T. 349 : 25 Bom. L. R. 1208 : 50 I. A. 162 : 1923 P. C. 114 (P. C.).**

——S. 35—*Denial of execution—Illiteracy.*

Statement by the illiterate executant of a sale-deed, that he sold only a part of the property and not the whole mentioned in the sale-deed. before the Sub-Registrar amounts to a denial of execution under S. 35 (3) of the Act. (*Rossignol, J.*) WAZIRA *v.* MUHAMADI. **37 P. R. 1918 : 124 P. L. R. 1918 : 45 I. C 161 : 66 P. W. R. 1918.**

——S. 35—*Execution by minor.*

An instrument executed by a minor cannot be admitted to registration. (*Wallis, C. J.. Abdur Rahim and Srinivasa Aiyar, JJ.*) RAGAVACHARIAR *v.* SRINIVASA RAGHAVACHARIAR. **40 Mad. 308 : 20 M. L. T. 407 : (1916) 2 M. W. N. 363 : 36 I. C. 921 : 31 M. L. J. 575 (F.B.)**

——S. 35—*Endorsement as to age of executant—If proof of age.*

The endorsement by a Registering Officer in the document that the executant described himself as major is no proof that he was so, inasmuch as a Registering Officer is not bound to record the age of executant, under the Act. (*Lindsay, J. C. and Rafique, J.*) MUHAMMAD HUSAIN *v* LALJI SINGH. **25 I. C. 648 : 1 C. L. J 366**

——Ss. 35, 58, and 87—*Defect in procedure—Not fatal to registration*

The executants of a document refused to present it for registration and the grantee under the document presented it for compulsory registration. Summonses were issued to the executants who duly appeared and objected to registration. Thereupon registration was refused. On appeal to the District Registrar and after a remand by him the document was registered under S 58 (2) of the Registration Act. *Held*, that any irregularity or error in the procedure of the Registrar subsequent to the presentation of the document did not vitiate the registration, and that it was cured under S. 87 of the Registration Act 15 B. L. R 288 ; 4 I A. 166 ; 23 A 233 ; 26 A. 57, Ref. (*Robinson, C. J and May Oung, J.*) S. M. A. R. CHETTY FIRM *v.* KO TEIK KA. **1 Rang. 22 : 2 Bur. L. J. 69 : 1923 Rang. 176.**

REGISTRATION ACT (XVI OF 1908), S. 36.

——S. 35 (3)—"*Assign,*" *if includes donee.*

An 'assign' of the executant under S. 35 (3) of the Act includes a donee under a gift deed, in the event of the donee personally admitting the execution before the Registering officer, a deed of gift can be registered under S. 35 of the Act. (*Fletcher and Teunon, JJ.*) AKSHOY CHANDRA *v.* MANMATHA NATH. **37 I. C. 362 : 20 C. W. N. 1345.**

——Ss. 36 and 34—*Limitation—Validity.*

A deed is validly registered though it is presented for registration after the period fixed but the delay is excused owing to production of a false certificate of illness of the executant (*Richardson and Walmsley, JJ.*) PROBHAT CHANDRA SHOME *v.* SHASHDHAR KUMAR GHOSE. **40 I. C. 215.**

——Ss. 35 (3) and 87—*Admission of execution by one of several executants—Registration.*

The registration of a document on the admission of execution by one of several executants is irregular. *Quere.* Whether the irregularity may be cured by S. 87 of the Registration Act. (*Jwala Prasad, J.*) SHEL WAZIR ALI *v.* MUSSAMMAT MAHIMUNNESSA. **43 I. C. 777 : 4 Pat. L. W. 72.**

——S. 35 (3)—*Denial of execution by alleged executant.*

A Registrar cannot register a document whose execution is not admitted by the executant. (*Roe and Jwala Prasad, JJ.*) EBADUT ALI *v.* MAHOMED FAREED. **3 Pat. L. W. 226 : 35 I. C. 56 : (1917) Pat. 40.**

——Ss. 36 and 77—*Refusal to register for failure to summon heirs of executant—Suit for declaration of a right to register.*

A document in favour of plff. was presented by plff. to the Sub-Registrar for registration after the death of the executant. Registration was refused on the ground that the heirs of the executant had not been summoned by plff. under S. 36, Regn Act. Plff. appealed to the Dt. Registrar, who dismissed his appeal. *Held*, that registration being refused on grounds other than denial of execution, a suit to enforce registration of the document would lie. (*Griffin and Chamier, JJ.*) HAYAT ALI *v.* MUHAMMAD SADIQ. **16 I. C. 97 : 9 A. L. J. 756.**

——Ss. 36, 73 and 77—*Registration—Non-attendance of executants—Refusal—Appeal.*

REGISTRATION ACT (XVI OF 1908), S. 41.

Where the parties to a document did not appear and the Sub-Registrar refused to register it on instructions from the Registrar and the latter refused to entertain an appeal. *Held*, that a suit to compel registration was maintainable as the refusal by the Sub-Registrar was not due to denial of execution and as the order on appeal by the Registrar was a dismissal of the appeal 16 C. 189 Dist (*Griffin and Chamier, JJ.*) KHADIM HUSSAIN *v.* BHARAT SINGH. **34 All. 315 . 14 I. C. 433 : 9 A. L. J. 234**

———S. 41, cl. (2)—*Enquiry by Sub-Registrar into truth of will—Deposition of witnesses—Admissibility in subsequent suits.*

Depositions made before a Sub-Registrar holding an enquiry into the genuineness of a will sought to be registered are admissible in evidence in a subsequent suit as the witnesses before the Registrar were liable to be cross-examined under the rules. (*Wallis, C. J. and Seshagiri Aiyar, J.*) LANKA LAKSHMANNA *v.* LANKA VARDHAMMA. **42 Mad. 103 : 35 M. L. J. 657 : (1918) M. W. N. 913 : 49 I. C. 638 . 9 L. W. 98.**

———S. 47—*Operation of registered deed, date of—Suit for Zar-i-chaharum.*

Where a house was sold on 20-1 1909 and the sale-deed presented for registration on 21-1-1909, registration completed on 29-1 1909, and a suit for Zar-i-chaharum brought on 28-1-1915. *Held*, that the suit was time barred the right to sue having accrued to the plaintiff from the date of the sale and not from the date of completion of registration. (*Piggott and Walsh, JJ.*) BINDESHRI *v.* SOMNATH BHADRY. **35 I. C. 347 : 14 A.L. J. 382.**

———S. 47—*Two sale-deeds—Conflict—T. P. Act*, S. 41.

When two deeds are executed one after the other and the second one is registered before the first, the first deed (the one which is earlier in date) must prevail over the other, under S 41, T P Act should not be construed so as to conflict with S 47, Registration Act. (*Chamier, J.*) MATHURAKALWAR *v.* AMBIKA DAT. **25 I. C. 725 : 12 A. L. J. 993.**

———S. 47—*Priority of registration—Priority of execution -Conflict between.*

A mortgage-deed executed prior to a deed of sale but registered after the registration of the latter within the time limited by the Registration Act, has priority over the deed of sale. (*Fletcher and Newbould, JJ.*) AMID ALI *v.* ABDUL MEA MOZUMDAR. **42 I. C. 616.**

———S. 47—*Date of operation of a Kabala and priority of title in case of different Kabalas.*

A duly registered *Kabala* operated from the date of its execution and not from the date of its registration. Thus, there being two different Kabalas one later than the other in favour of two different persons in respect of the same property, title under the first has priority over title under the second though the second is registered prior to the first and possession is delivered under it. 6 B. 165; 8 B. 182 not foll. 29 Bom. 42 ; 11 Cal. 121; 13 I. C. 653, Foll. (*Chatterjee and Newbould, JJ.*) RAJANI NATH DAS *v.* OFAJUDDI MULLA **37 I. C. 817 : 22 C. W. N. 318.**

REGISTRATION ACT (XVI OF 1908), S. 48.

———Ss. 47 and 50—*Priority.*

Where a mortgage was executed and attested on January 19th, 1908, and another mortgage was executed and registered on January 22nd and the first mortgage was registered on the 23rd and its date was altered to the 23rd; *Held*, that the 1st mortgage was entitled to priority. (*Mookerjee and Carnduff, JJ.*) JADHUNANDAN *v.* COER KALLYAN SINGH. **15 C. L. J. 61 : 13 I. C. 653 : 16 C. W. N. 612.**

———Ss. 47, 74 and 75—*Priority—Sale—Enquiry under S. 74—Sale-deed executed and registered in the interval.*

A sale-deed executed earlier but registered later owing to proceedings under Ss. 74 and 75 of the Act takes effect as against a deed executed and registered in the interval. (*Martineau, J.*) HARDWARI MAL *v.* SHAMBHU NATH. **52 I. C. 99 : 7 P. L. R. 1919.**

———S. 47—*Priority of—Registered—Documents—Effect.*

S. 47 of the Registration Act gives the deed priority over a subsequent deed registered before the deed in suit was registered provided the previous one is registered within four months of its execution (*Reid, C J.*) BHAGWAN SINGH *v.* HARDIA SINGH. **153 P. W. R. 1912 : 185 P. L. R. 1912 : 16 I.C. 29 : 105 P. R. 1912.**

———Ss. 47 and 50—*Suit on unregistered mortgage-deed—Attachment of mortgaged properties, after execution but before registration of another mortgage-deed—Priority.*

Where unregistered mortgage is sued upon and the mortgaged properties attached between the dates of execution and registration of a mortgage-deed the unregistered mortgage does not acquire priority over the registered mortgage either by reason of the decree thereon or by an attachment order obtained in that suit (*Abdur Rahim and Ayling, JJ*). VEERAKUTTI KOUNDAN *v.* RAMASAWMI ASARI. **32 I. C. 431.**

———S. 47—*Date of operation of registration.*

Under S. 47 a registered deed operates from the date of its execution. (*Ormond, J.*) MAUNG SAN MIN *v.* SANNA. **27 I. C. 802 : 8 Bur. L. T. 98.**

———S. 48—*Priority—Effect of possession—Notice.*

When the usufructuary mortgagee of certain property purchased by an unregistered deed of sale the equity of redemption and subsequently another person purchased the same by a registered sale-deed the latter could claim no priority over the former if he was aware of the possession of the former, and did not make enquiries as to the nature of his possession. (*Holmwood and Chapman, JJ.*) UMESH CHANDRA *v.* UMESH CHANDRA. **18 I. C. 46.**

———S. 48—*Priority—Registered gift—Prior oral sale.*

Where a previous oral sale is made of certain property to the knowledge of a person who subsequently takes a registered deed of gift it is not open to the latter to impeach the oral transfer

REGISTRATION ACT (XVI OF 1908), S. 48

previously made or to claim the benefit of S. 48 of the Registration Act. (*Abdul Raoof, J.*) YAKUB JAN *v.* RAHMAT NUR. 52 I. C. 245 : 132 P. R. 1919.

——S. 48—*Registered mortgage or mortgage by deposit of title deeds.*

A mortgagee who holds a registered deed of mortgage cannot claim priority over an earlier mortgage created by deposit of title-deeds as the English doctrine of the real estate prevailing over the equitable estate does not obtain in India where there is no distinction between legal and equitable estates. (*Rattigan and Rossignol, JJ.*) MRS. JESSIE MOYLE STEWART *v.* BANK OF UPPER INDIA, LTD. 31 P. R. 1916 : 34 I. C. 937 : 215 P. W. R. 1915.

——S. 48—*Oral gift—Subsequent mortgage of same property—Priority.*

S. 48 of the Regn. Act, gives a subsequent registered mortgage preference over a prior oral gift not accompanied by delivery of possession. 10 P.R. 1900 Foll.; 9 M. 267 Dist (*Johnstone, C.J. and Chevis, J.*) DOST MOHAMMAD KHAN *v.* DOST MUHAMMAD KHAN. 30 P. R. 1916 : 34 I. C. 920 : 21 P. W. R. 1915.

——S. 48—*Priority — Oral and registered mortgage.*

An oral mortgage is postponed to a registered mortgage. (*Twomey, J.*) MAUNG SEIN *v.* NGWE NU. 6 L. B. R. 144 : 19 I. C. 2 : 6 Bur. L. T. 72.

——S. 48—*Registered sale—Prior oral gift with possession—Notice.*

A, the owner of a house worth more than Rs. 100, gave it to the deft. in satisfaction of a debt, and put the deft. in possession *A* sold the house afterwards by registered deed to the plff. who sued for possession. *Held*, that as the house was given over to deft. in satisfaction of a debt, and the deft. was in possession, the plff. must have had notice of deft's. constructive right. (*Ormond, J.*) MAUNG SIT YIN *v.* MAUNG BIN. 12 I. C. 905 : 4 Bur. L. T. 127.

——S. 49.

Affecting such property
Collateral fact.
Compromise petition.
Construction
Essential terms.
Moveable and immoveable.
Possession under unregistered deed.
Miscellaneous

Affecting such property.

——Ss. 49, 17 (1) (b)—*Affecting such property—Memorandum of deposit of title-deeds.*

Where a mortgage by deposit of title-deeds was followed by writing accompanying the deposit but which was not registered, *held*, that the writing was inadmissible in evidence and that the mortgage was ineffective (*Macleod and Coyajee, JJ.*) CHUNNILAL SOMESHWAR BHATT *v.* VITHALDAS KARSANDAS. 24 Bom. L.R. 502 : 1922 B. 440.

——S. 49—*Affecting such property—Unregistered agreement to lease—Inadmissible in evidence in a suit for specific performance.*

REGISTRATION ACT (XVI OF 1908), S. 49—Affecting such property.

An unregistered agreement to lease which is meant to take effect as a present demise cannot be received in evidence in a suit for specific performance of its provisions when the document comes under S. 17 (1) (d) and is hit by S. 49 (c) of the Act. (*Rankin, J.*) SANJIBCHANDRA *v.* SANTOSH KUMAR. 49 Cal. 507 : 1922 C. 436.

——S. 49 (c)—*Affecting such property—Unregistered sale of equity of redemption.*

An unregistered sale of an equity of redemption cannot be admitted in evidence to prove the sale or the satisfaction of the debt. (*Chitty and Walmsley, JJ.*) HUSTAMA *v.* JAMIER. 52 I.C 558 : 23 C W. N. 513.

——S. 49 (c)—*Affecting such property.*

A decree for specific performance of an agreement to lease does not affect the land. It is an ordinary decree of the Court of Equity, which according to the ordinary rules acts *in personam* and the execution of the decree is not by affecting the land but by suitable process against the deft. if he is in contempt with reference to the decree of the Court. (*Fletcher and Newbould, JJ.*) HARINATH BANNERJEE *v.* PRAMATHA NATH. 42 I. C. 633.

——Ss. 49 and 17—*Affecting such property—Unregistered lease—Possession.*

A lease for more than 1 year being compulsorily registrable under S. 17 it cannot be admitted in evidence of any transaction affecting the property and therefore, it is inadmissible even for proving the demise. (*Coxe and Teunon, JJ.*) KANAI MANDAL *v.* SAYAMA CHARAN. 10 I.C. 892.

——S. 49—*Affecting such property—Lease-deed.*

An unregistered deed of lease compulsorily registrable is not admissible in evidence. Oral evidence to prove the terms is excluded (*Broadway and Abdul Qadir, JJ.*) LALA MOTI SAGAR *v.* DHANNA MAL. 1922 Lah. 329.

——S. 49—*Affecting such property—Admissions, unregistered deed.*

In an ejectment suit, if the deft. admits the terms of the lease, the production of the document is unnecessary and an unregistered lease does not affect the deft's. admission. (*Shadi Lal and Martineau, JJ.*) BANARSI DAS *v.* BUL CHAND. 57 I. C. 262 : 2 U. P. L. R. (L.) 121.

——Ss. 49 (c) and 17—*Affecting such property—Immoveable property—Unregistered deed.*

An unregistered sale-deed of immoveable property of the value of Rs. 100 or more is not admissible in evidence to affect the interest of a person who is not a party to the deed. (*Broadway, J.*) RAM SINGH *v.* BATAN SINGH. 110 P. W. R. 1916 : 36 I.C. 374 : 78 P. L. R. 1917.

——Ss. 49 and 17 (1) (b)—*Affecting such property—Document partitioning immovable property above Rs 100—Non-registration.*

Where a document which purported to convey property more than Rs. 100 in value was not registered. *Held*, that the document was inadmissible in evidence for any purpose tending to

REGISTRATION ACT (XVI OF 1908), S. 49—Affecting such property.

indicate the ownership or possession of it (*Chevis and Le Rossignol, JJ.*) JAIMAL *v.* BELI RAM. **35 P.R. 1916 : 33 I.C. 948 : 52 P. W. R. 1916**

——S 49—*Affecting such property—Meaning of.*

An unregistered document of partition dividing the properties by metes and bounds which is inadmissible for want of registration to prove that partition is admissible in evidence to prove a unilateral declaration of an intention to divide thereby. 23 M. L. T. 307 ; 19 M. L. J. 228 : 30 M. L.J. 404 foll. 30 M.L.J. 62 : 30 M.L.J. 404 doubted. Per *Spencer, J.*—S. 49 of the Registration Act has to be read in the light of S. 17 of the same Act and S. 91 of the Evidence Act. If this is done the word affecting will be seen to be only a compendious term expressing "purporting or operating to create, declare, assign, limit or extinguish whether in present or in further, any right, title, or interest whether vested or contingent." (*Spencer and Venkatasubba Rao, JJ.*) ATLURU SARASWATAMMA *v.* ATLURU HANDAYYA. **18 L. W. 418 : 46 Mad. 349 : 44 M. L. J. 45 : 1923 Mad 297.**

——S. 49—*Affecting such property.*

The establishment of a title by adverse possession is a transaction affecting immoveable property. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) MUTHU KARUPPAN SAMBAN *v.* MUTHU SAMBAN. **38 Mad. 1168 : 25 I. C. 772 : 1 L.W. 754 : 16 M L T. 344 : (1914) M. W. N. 768 : 27 M. L J. 497.**

——S. 49 *Affecting such property—Unregistered deed*—Benami *transactions.*

A document simply proving that another document was only a *benami* one is admissible in evidence even if unregistered as it is not used as evidence of any transaction affecting land. (*Ayling and Hannay, JJ.*) YERRAGUNTLA SESHACHARLU *v.* MUKUMALLAH CHINNIAH. **25 I. C. 721.**

——Ss 49 and 17—*Affecting such property—Compromise—Covenant to pay.*

Under an unregistered compromise deed the deft. admitted his ownership of certain lands under a prior conveyance covenanted to pay a certain annuity and on default, to relinquish the property. *Held*, that the deed could be enforced so far as the claim for payment of the annuity and for specific performance of the agreement to relinquish were concerned but not in respect of the claim for possession. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KARNAM PARTHASARATHY *v.* KARNAM BARATHAMMA. **16 I. C. 881.**

——Ss 49 (a) and 50—*Affecting such property—Unregistered sale-deed.*

An unregistered sale-deed with respect to immoveable property creates no interest in the purchaser and cannot prevail against a subsequent registered sale deed-even with notice of the minor unregistered deed. 29 M. 336 F B. (*Benson and Abdur Rahim, JJ.*) HAJEE ZACKARAYA SETT *v.* CHUNU PANDARAM. **9 I C. 55 : 9 M.L.T. 270.**

REGISTRATION ACT (XVI OF 1908), S. 49—Collateral fact.

——S. 49—*Affecting such property—Deed of partition—Want of registration.*

Where the case was based really on the *Kararnama*, which was virtually a deed of partition affecting the property valued over Rs. 100. *Held*, without registration it was inadmissible in evidence because the evidence in the case did not go to prove that it was acted on, and it was produced to prove no collateral purposes. (30 M L J. 382 ; 30 M. L. J. 62 ; 15 M. 336. (*Prideaux, A.J.C.*) ABDUL RAHIMAN *v.* SK. KAWADOO. **1922 Nag 236.**

——S. 49 (c)—*Affecting such property—Whether lessee under unregistered lease can resist ejectment.*

A lessee cannot resist an ejectment by relying upon the lease which serves him in possession for an indefinite period and the registration of which is thus compulsory inasmuch as the unregistered lease does not under law affect the land it relates to. (*Baillie, S. M and Twedy, J. M.*) RAM PRASAD *v.* SARJOO. **26 I.C. 542 : 1 O.L.J. 585.**

——S. 49—*Affecting such property—Unregistered partition deed—Admissibility—Oral evidence.*

Where a partition deed has been acted upon, a suit for specific performance is maintainable and the deed though unregistered is admissible in evidence as proof of partition. (*Das and Macpherson, JJ.*) NAND LAL MAHTON *v.* DHANUKDHARI MAHTON. **4 Pat. L T 657 : 1924 P. 244.**

——S. 49—*Affecting such property—Unregistered mortgages—Loss of document—Secondary evidence.*

Secondary evidence of a lost unregistered document affecting an interest in an immoveable property and therefore required to be registered is not admissible in evidence of any transaction affecting such property. But such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land. (*Ormond, C.J.*) MA PAN *v.* MA SHWE TINT. **44 I. C. 91.**

Collateral Fact.

——S 49—*Collateral fact.*

Though S. 49 of the Registration Act debars the admissibility of an unregistered document affecting immoveable property it can treat it as evidence and may still be admissible for a collateral purpose such as the question as to the date on which possession was taken. (*Piggott and Walsh, JJ.*) ABDULLAH KHAN *v.* MAHAMMAD MAQBUL HUSAIN. **45 A. 565 : L R. 4 A 260 : 21 A L.J. 538 : 1923 A. 603 (2).**

——S. 49 (c)—*Collateral fact—Nature of possession.*

A deed of relinquishment in respect of immovable property though unregistered is admissible in evidence not for the purpose of proving the transfer but for the purpose of showing the nature of the possession held by a party. (*Tudball and Walsh, JJ.*) JHAMPHU *v.* KUTRAMANI **39 All. 696 : 42 I. C. 713 : 15 A. L. J. 761.**

REGISTRATION ACT (XVI OF 1908), S. 49—Collateral fact.

——S. 49 (c) —*Collateral fact—Partition.*

An unregistered deed of partition may be used to evidence the fact of partition but not its terms. (*Scott, C. J and Beaman, J.*) CHOTALAL ADIT RAM *v.* BAI MAHAKORE. **41 Bom 466 : 40 I. C. 83 : 19 Bom L. R. 322.**

——S. 49—*Collateral fact—Unregistered gift —Admissibility—Nature of possession.*

An unregistered deed of gift of immoveable property exceeding Rs. 100 could not affect any immoveable property contained therein or be received as evidence of any transaction affecting the property. But it could be admitted in evidence for a collateral purpose, *viz.*, the nature of the donee's possession. (*Mookerjee and Buckland, JJ.*) JAGANNATH *v.* CHANDNI BIBI. **26 C. W. N 65 : 67 I. C. 31 : 34 C. L. J. 432.**

——S. 49 (c)—*Collateral facts—Proof.*

Where the purchaser of property worth more than Rs. 100 is given possession under an unregistered sale, the deed of sale is admissible to prove the fact of possession. (*Teunon and Choudhuri, JJ.*) JAINADDIN *v.* SALIMADDIN MUNSHI. **57 I. C. 965.**

——S. 49 (c) — *Collateral fact — Personal liabilities—Unregistered agreement to lease.*

Although an unregistered agreement for the permanent demise of a land cannot be used in evidence for the purpose of affecting the land it is not inadmissible in evidence for any purpose whatever. It can be looked at for adjusting the personal liabilities of the parties in a suit for its Specific performance. (*Fletcher and Newbould, JJ.*) HARINATH BANNERJEE *v.* PRAMATHANATH DEY. **42 I. C. 633.**

——S. 49 (c)—*Collateral fact—Possession.*

Where an immoveable property of less than Rs. 100 in value is sold by delivery of possession and an instrument of sale is also executed but not registered, the instrument is admissible as evidence under S. 91 of the Evidence Act to show the nature and terms of the transaction ; though it confers no title to the property. (*Richardson and Walmsley, JJ.*) JUMAN *v.* MAHOMED NABI-NEOAZ. **41 I. C. 779 : 21 C. W. N. 1149.**

——S. 49—*Collateral fact.*

So far as a document of family settlement declares what the shares of the parties are to be hereafter its registration is compulsory and in order to show what those shares are to be it is inadmissible in evidence but it is admissible for the purpose of showing what the original shares were. (*Scott Smith and Moti Sagor, JJ.*) KARAM CHAND *v.* MT. HAR KOUR. **1923 Lah. 371.**

——S. 49—*Collateral fact.*

An unregistered deed of lease for more than a year, although inadmissible in evidence as a lease, or for proving title, it may be admitted for proving an admission contained therein. (*Shadi Lal, C. J. and Wilberforce. J.*) DEVI DAYAL *v* WAZIR CHAND. **61 I. C. 328 : 3 U. P. L. R. (Lah.) 44.**

——S. 49 (c)—*Collateral fact—Nature of property—Unregistered deed.*

REGISTRATION ACT (XVI OF 1908), S. 49—Collateral fact.

It is not open to a party to refer a deed of sale which is inadmissible in evidence for want of registration for the collateral purpose of ascertaining the nature of the property sold. (*Broadway, J.*) GODHA RAM *v.* PARMA NAND. **61 P.L.R. 1919.**

——S. 49—*Collateral fact—Nature of possession—Unregistered gift*

An unregistered deed or gift which is inadmissible in evidence for want of registration is inadmissible even for a collateral purpose, *e.g.*, for the purposes of proving that the donee took possession and held adversely the property from the date of gift. (*Shah Din, C. J.*) SUJAN DAS *v.* GANDA MAL. **44 I C 889 : 13 P W R 1918.**

——S. 49—*Collateral fact Covenant to pay dower—Amount of dower—Unregistered document.*

An unregistered deed of a sale executed on the date of the marriage in lieu of dower purporting to convey properties in lieu of Rs. 1,000 fixed as dower, is admissible in evidence to prove the collateral purposes : (1) of the amount of dower and (2) the personal obligation to pay that sum. (*Broadway, J.*) MUHAMMAD BAKSH *v.* MUSSAMMAT AMIR BEGAM. **44 I. C. 837 : 23 P. R. 1918.**

——S. 49 (c)—*Collateral facts—Payment of earnest money—Applicability of S. 49 of Registration Act in suits for refund of earnest money.*

An unregistered document required to be registered under S. 17 of Registration Act, can be admitted in proof of payment of earnest money in a suit for refund of earnest money, S. 49 of Registration Act not being applicable to such a suit. (*Shadilal and Broadway, JJ.*) CHHUTTAN LAL *v.* MULCHAND. **18 P. R. 1917 . 37 I. C. 822 : 28 P. W. R. 1917.**

——Ss. 49 (c) and 17 (1) (a)—*Collateral fact—Nature of possession—Unregistered gift.*

An unregistered instrument of gift requiring registration under S. 17 (1) (*a*) is inadmissible in evidence to prove the gift or to prove the adverse possession of the donee from the date of gift. No secondary evidence of such gift could be produced. (*Reid and Chevis, JJ.*) JAMAN *v.* CHANDIYA RAM. **69 P W. R. 1913 : 48 P. R. 1913 : 18 I. C. 918 : 196 P. L. R. 1913.**

——S. 49 (c) *Collateral fact—Nature of possession—Lease for less than a year—Admissibility to prove character of possession.*

An unregistered lease for less than a year can be admitted in evidence for proving that the occupation of the lease premises was permissive and not adverse. S. 4 of the T. P Act would not make S. 107 of the Act. part of S. 17 of the Registration Act so as to make a lease for less than a year compulsorily registrable if it is to be used as evidence of the permissive character of lessee's possession. (*Wallis, C.J., Ayling and Krishnan, JJ.*) RAMA SAHU *v.* GOWRO RATHO. **12 L. W. 649 : (1920) M W. N. 711 : 59 I. C. 350 : 29 M. L. T. 10 : 44 M. 55 : 39 M. L. J. 639 (F.B.).**

——S. 49—*Collateral fact—Contract to sell —Unregistered sale-deed for less than one hundred rupees—Admissibility to prove contract of sale.*

REGISTRATION ACT (XVI OF 1908), S. 49—Collateral fact.

An unregistered deed of sale of immoveable property for less than one hundred rupees though inoperative under S 54 of Transfer of Property Act where delivery has not been made is still admissible in evidence to prove the contract of sale (*Bakewell and Phillips, JJ.*) POOMALAI UDAYAN *v.* KARUPPA SERVAI.
34 I. C. 921 : (1916) 2 M. W. N. 136.

——— **Ss. 49 (c) and 17 (b)**—*Collateral fact—Division of status.*

Where a document of partition that ought to be registered is not registered, it is inadmissible in evidence to prove even the divided status of the members of the family. (*Wallis, C. J., Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) AYAKUTTI MANKONDAN *v.* PERIASAMY.
2 L. W 1184 : 31 I. C. 615 : 3 M. L. J. 404.

——— **Ss. 49 (c) and 17**—*Collateral fact—Rent agreed—Admissibility of unregistered lease to prove occupation rent.*

An unregistered lease is not only inadmissible under S. 49 to prove a lease, but also to prove rent agreed to be paid. (*Tyabji, J.*) GOVINDASWAMI PILLAI *v* RAMASAMI AIYAR.
18 M. L. T. 483 : 31 I. C. 604 : 2 L. W. 1186.

——— **Ss. 49 (c) and 17**—*Collateral fact.*

For determining what would be a fair occupation rent of the property demised, an unregistered lease, compulsorily registrable, is not admissible. 35 M. 63, Foll. 31 A 276, Dist. (*Tyabji, J.*) ANNAMALAI CHETTY *v.* POOSARI SUPPIA. **2 L. W. 1016 : 31 I. C. 279 . (1916) 1 M. W. N. 5 .**

——— **S. 49**—*Collateral fact—Nature of possession—Unregistered sale deed.*

An unregistered sale deed is not admissible even for showing the nature of possession of the vendee. 17 M. L. J. 469, Foll. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) MUTHUKARUPPAN SAMBAN *v.* MUTHU SAMBAN.
38 Mad. 1158 : 1 L. W. 754 : 16 M L. T. 344 : (1914) M. W. N. 768 : 25 I. C. 772 : 27 M. L. J. 497.

——— **S. 49 (c)**—*Collateral fact—Nature of possession—Admissibility of unregistered lease.*

A lease compulsorily registrable is inadmissible without registration to prove the nature of the possession. (*Sankaran Nair and Bakewell, JJ.*) YURUVA VENKATA *v.* MADI VEERAMMA.
23 I. C. 376 : 15 M. L. T. 192.

——— **Ss. 49 (c) and 2 (7)**—*Collateral facts—Agreement to lease, proof of.*

An agreement to lease is a transaction affecting immoveable property and therefore requires registration. An unregistered lease-deed cannot also be used as evidence of an agreement to lease. (*Sadasiva Aiyar and Tyabji, JJ.*) VASUDEO REDDY *v.* NALLAPPA. **15 M L. T. 220 : 23 I. C. 336 : 1 L. W. 296.**

——— **S. 49 (c)**—*Collateral fact—Nature of possession.*

Per Abdur Rahim, J.—The Registration Act prevents documents of certain classes having any effect unless they are registered and does not deal with questions of evidence pure and simple. An unregistered document can be admitted to prove the circumstances in which the property came to be in possession 17 M. 456, Foll. *Per Miller, J*—An unregistered document is inadmissible in evidence to prove the nature of the possession or the circumstances in which a person came into possession of the property. (*Abdur Rahim and Miller, JJ.*) MUTTA VENCATACHALAPATHY *v.* PYINDA VENKATACHALAPATHY GARU.
17 I. C. 987 : 12 M. L. T. 579 : 23 M. L J. 652.

——— **S. 49 (c)**—*Collateral facts—Unregistered sale—Contract of sale.*

If an unregistered sale deed contains a promise to execute a sale deed on stamp papers it is admissible in evidence in a suit for specific performance. (*Sundara Aiyar and Sadasiva Iyar, JJ.*) MANGAMMA *v.* RAMAMMA. **37 Mad 480 : 12 M. L. T. 262 : 16 I C. 587 : (1912) M. W. N. 917.**

——— **S. 49 (c)**—*Collateral fact—Damages for use and occupation—Unregistered lease.*

An unregistered lease deed which is compulsorily registrable, and which is not admissible in evidence to prove its terms is admissible to prove collateral matters such as damages for use and occupation. (*Benson and Sundara Aiyar, JJ.*) SWAMINATHA MUDALI *v.* SIVIGAMI ACHI.
11 I. C. 23.

——— **S. 49**—*Collateral fact—Unregistered deed admissible to prove agreement.*

Unregistered lease could be accepted as evidence that the parties had come to an agreement that a lease was to be given. (*Hallifax, A J. C.*) MAKTUMBI *v.* ANANT RAM. **1923 Nag. 73.**

——— **S. 49 (c)**—*Collateral facts—Lease unregistered—Covenant to pay for improvements—Admissibility.*

An unregistered lease is admissible in evidence to prove a collateral fact but this must be independent one and not based on the conditions in the instrument. An unregistered lease is inadmissible to prove a covenant to pay compensation for improvements by the lessee. (*Mitra, A. J. C.*). KALICHARAN *v.* LAL INDAR SINGH.
48 I C. 923 : 15 N. L. R. 31.

——— **S. 49 (c)**—*Collateral fact—Unregistered lease—Relationship of landlord and tenant.*

Though a lease may be inadmissible in proof of its terms, it may still be used to prove the relationship of landlord and tenant. (*Stanyon, A. J. C.*) RAGHOBA *v.* PALHOBA. **45 I C. 217.**

——— **S. 49 (c)**—*Collateral fact—Relationship of landlord and tenant—An unregistered lease.*

An unregistered deed of lease is inadmissible to prove the terms governing the relationship of landlord and tenant; but such relationship may be shown by other evidence. (*Batten, A. C J.*) ANJUMAN ISLAMIA *v.* HISAMAL. **22 I. C. 65 : 9 N. L. R. 179.**

——— **S. 49 (c)**—*Collateral fact—Lease unregistered.*

An unregistered lease though not admissible to affect the property leased, is yet admissible in evidence for collateral purposes, *i. e.*, to explain the

REGISTRATION ACT (XVI OF 1908), S. 49—Collateral fact.

circumstances under which the lessee got into possession. (*Kanhaiya Lal, A. J. C.*) RAM SARUP *v.* SURAJ DIN. **30 I. C. 258 : 2 O. L. J 276**

——S. 49—*Collateral facts—State of mind—Registered instrument—Admissibility of, to prove collateral purpose.*

An unregistered instrument, though inoperative as a deed of transfer of property, can be looked at for a collateral purpose, for example to ascertain the executant's state of mind on or about the time of its execution. (*Piggott, J C. and Lindsay, A. J. C.*) MIR SYED HUSAN *v.* TAIYABA BEGAM. **26 I. C. 547 : 1 O. L. J 591.**

——S. 49—*Collateral facts—Unregistered sale—Contract of sale—Unregistered sale-deed in evidence of contract affecting property.*

Where there is a contract in itself affecting property, an unregistered sale-deed is inadmissible in evidence to prove the contract. (*Sharfuddin and Roe, JJ.*) MADHURSAH *v.* ZHAG SAH **1 Pat. L. J. 455 : 37 I. C. 994 : 2 Pat. L. W. 441.**

——S. 49 (c)—*Collateral fact—Nature of possession—Unregistered lease.*

An unregistered lease is inadmissible in evidence to prove the permanent nature of the tenant's possession. (*Maung Kin, J.*) MAUNG PO O *v.* R. MUNIANDY SERVAI. **42 I. C. 375**

Compromise petition.

——S. 49—*Compromise petition to Court—Unregistered compromise deed in mutation proceeding—Admissibility in evidence—Order of Revenue Court based on such compromise, if confers title.*

An unregistered deed of compromise in a mutation proceeding is not admissible in evidence of title by reason of S 49 of the Registration Act; an order of a Revenue Court based on such a deed also confers no title. (*Knox and Piggott, JJ.*) RUSTAM ALI KHAN *v.* GAURA. **33 All. 728 : 12 I. C. 109 : 8 A. L. J. 918.**

——Ss. 49 and 17 (2) (6)—*Compromise petition to Court—Whether requires registration.*

A petition to the Court does not require registration and is admissible in evidence where the Court impliedly incorporates the terms of the petition into its decree. 22 M. 508 (P.C.) Ref. The petition forms a part of the pleadings and is incorporated as such into the judicial record. (*Rattigan and Leslie Jones, JJ.*) ROBERT SKINNER *v.* JAMES SKINNER. **91 P. R. 1915 : 31 I. C. 537 : 211 P. W. R. 1915**

——S. 49—*Compromise petition to Court—Decree dealing with properties other than those in suit.*

So far as a compromise decree relates to properties within the scope of the suit it operates as *res judicata*, but when it relates to properties outside the scope of the suit, if the terms of the compromise are embodied within the decree it is evidence of an agreement to transfer an interest in the property. In such a case the compromise petition need not be registered 22 M. 508; 1 C.L. J. 388; 7 C. L. J. 492 Ref. (*Mullick, J.*) BISSESWAR RAM *v.* MAHADEO PAHAN. **1 Pat. L. J. 208 : 36 I. C. 290 : (1917) Pat. 161.**

REGISTRATION ACT (XVI OF 1908), S. 49—Essential terms.

Construction.

——S. 49—*Construction.*

The provisions of S. 49 of this Act do not affect the admissibility of the evidence regarding the contract of sale of immoveable property of less than one hundred rupees where the deed is not registered and delivery of possession has not been given because S. 49 relates only to documents compulsorily registrable under S. 17. 25 I C. 772 : 38 M. 1158 Dist. (*Bakewell and Phillips, JJ.*) POOMALAI UDAYAN *v* KARUPPASERVAI. **34 I.C. 921 : (1916) 2 M.W. N, 136.**

——Ss. 49, 59 to 61—*Construction—"In accordance with the provisions of the Act"—Scope of.*

The words "In accordance with the provisions of the Act" in S 49 of the Act refers only to the sections relating to procedure on admitting to Registration, *i e.*, Ss.59 to 61 and not to admission to registration. The certificate is generally conclusive of the registration, though it may be set aside in case of fraud. Wrong acceptance of a document does not invalidate registration. (*Benson and Sundara Aiyar JJ.*) VEERAPPA *v.* KADIRESAN. **(1913) M. W. N. 525 : 24 M. L. J. 664 : 20 I. C. 385 : 14 M. L. T. 237.**

——S. 49 *Construction.*

The non-registration of a compulsorily registrable document leads to two consequences, (1) it is inadmissible in evidence of any transaction affecting immoveable property and (2) it cannot affect immoveable property comprised therein. The entry of an unregistered but compulsorily registrable agreement in a decree or order of Court would be relevant to prove the agreement. (*Abdur Rahim and Ayling, JJ.*) RAVULA PARTI *v.* RAVULA PARTI. **36 Mad 46 : 21 M. L. J. 870 : 10 M.L T 232 : 12 I. C, 317 : (1911) 2 M.W N. 265.**

——S. 49—*Construction—Optional registration.*

A deed of gift or transfer of *sir* land without reservation of occupancy rights and of other property as well, would be wholly inoperative and wholly inadmissible in evidence only by reason of the provisions of S. 49, which apply only to documents of which registration is compulsory under S, 17 of the same Act. They do not forbid the operation or admissibility in evidence of documents of which registration is optional under S. 18, and a Will is such a document. Provided therefore that the Will has been properly proved, it can operate in respect of all property mentioned in it which the testator was legally competent to devise, even if it was illegally registered. (*Hallifax and Prideaux, A. J. Cs.*) MURLIDAS *v.* HARIDAS. **62 I. C. 246.**

——S. 49—*Construction.*

The Registration Act excludes from evidence unregistered documents of certain value A registered deed of sale not only *makes* the transfer but also proves it. (*Stanyon, A J. C.*) DINANATH *v.* MANBODHI. **36 I. C. 547 : 12 N. L. R. 139.**

Essential terms.

——Ss. 49 and 17—*Essential terms—Proof—Sale of land under Rs. 100 in value—Secondary evidence, if admissible.*

REGISTRATION ACT (XVI OF 1908), S. 49—Essential terms

Per Beaman, J. (*Macleod, J.*, contra)--Neither the original unregistered sale deed of sale of property for less than Rs. 100 nor secondary evidence of it is admissible to prove the sale which however could be proved by proving delivery of possession. (*Beaman and Macleod, JJ.*) DAWAL *v.* DHARMA. **41 Bom. 550 : 41 I. C 273 : 19 Bom. L. R. 622**

——S. 49—*Essential terms—Unregistered lease—Oral evidence.*

An unregistered lease-deed is not admissible to prove that the property to which it relates was leased for three years nor can oral evidence of the lease terms be given (*Leslie Jones and Wilberforce JJ.*) NIADAR MAL *v.* RANK. **63 I. C. 90.**

——Ss. 49, 17—*Essential terms—Evidence Act, S. 91—Unregistered agreement to lease—Suit for specific performance—Damages.*

An agreement to lease, being unregistered is inadmissible in evidence and is also a bar to the reception of evidence both as regards a claim for specific performance and a claim for damages. 35 M. 63 Foll ; 17 M. 456. Not foll. (*Wallis, C. J and Oldfield. J.*) STREERAMULU NAIDU *v.* RAMASWAMI MUDALIAR. **42 I. C. 948 : 33 M. L. J. 596.**

——S. 49—*Essential terms—Unregistered lease—Evidence.*

A essential term of a tenancy cannot be proved by an unregistered lease-deed which is inadmissible for want of registration, nor by any secondary evidence. (*Ayling and Tyabji, JJ.*) KANDURI VENKATA SESHAYA *v.* ADAM SAB. **25 I. C. 661.**

Moveable and immoveable.

——S 49—*Moveables and immoveables—Unregistered document—Admissibility as regards moveables.*

The fact that the agreement relating to both immoveable and moveable property had not been registered does not prevent the party entitled from suing on that document in respect of the moveable property. 15 Mad. 336, Foll. 18 Bom. 92 Foll. (*Scott, C. J. and Hayward, J.*) HANMANT *v.* RAMABAI. **51 I. C. 954 : 21 Bom. L. R. 716.**

——Ss. 49 and 17, 18—*Moveables and immoveables.*

Settled rule is that a document which as a whole requires registration contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which ex-hypothesi do not affect immoveable property of value of Rs. 100 or upwards. (*Beaman, J.*) HOPEMILLS, LTD. *v.* KOVASJI, J. READY MONEY. **10 I. C. 748 : 13 Bom. L. R. 162.**

——S. 49—*Moveable and immoveable property.*

An unregistered deed of conveyance of immoveable property and moveable property is not admissible in evidence even in regard to the moveable property if there be no separate or distinct transaction concerning the moveables and the document has been read as one whole. 68 P. R 1886; 15 M. 336 Foll. Though an unregistered document may be admissible for a collateral

REGISTRATION ACT (XVI OF 1908), S. 49—Possession under unregistered deed.

purpose it cannot be used to establish directly title in any part of the property conveyed. 4 L. B. R. 803 ; 9 L B. R. 383 Dist. (*Shadilal and Jones, JJ.*) BEVAN PETMAN *v.* GANESH DAS. **49 P. R. 1916 : 144 P. W. R. 1916 : 34 I C. 542 : 149 P. L. R. 1916.**

——S 49—*Moveables and immoveables—Unregistered document.*

Where a document has the effect of turning joint tenancy into tenancy in common it needs registration and could not affect immoveable property unless registered nor does it affect moveables unless they were intended to be separated apart from immoveables. (*Wallis, C. J., Sadasiva Aiyar and Seshagiri Aivar, JJ.*) POTHI NAICKAN *v.* NAGGANNA NAICKEN. **30 M. L. J. 62 : 19 M. L. T 50 : (1916) 1 M W. N. 79 : 32 I. C. 486 : 3 L. W. 115 (F.B.).**

——S. 49 (a)—*Moveables and immoveables—Documents creating charge on.*

Where a document creating charge over moveables and immoveables is not registered, it will only deprive the promisee of his rights in the immoveable property but will not affect his rights in the moveable property. 32 M. 410 Ref. (*Ayling and Seshagiri Aiyar, JJ.*) PUSAPATI VENKATA PATHIRAJU *v.* VENKATA SUBHADRAYYAMMA. **47 I, C, 568.**

——S. 49—*Moveable and immoveable—Unregistered partition deed.*

Where the document is indivisible and purports to renounce all further claim to any estate it is not admissible to prove partition even of moveable property. (*Duckworth and Pratt, JJ.*) MG. PO LUN *v.* MA E MAI. **1 Bur. L. J. 111 : 1923 B. 57.**

Possession under unregistered deed.

——S. 49—*Possession under unregistered deed—Sale un-registered—Rights of vendor—Ejectment by vendor.*

A vendee claiming title under a sale deed which for want of registration cannot be admitted in evidence if in possession is a trespasser and he can be ejected from the property by a subsequent vendee under a registered deed of sale. (*Shah Din, J.*) UTTAM CHAND *v.* JANGI RAM. **111 P.R. 1918 : 48 I. C. 390: 24 P. L R. 1919.**

——S. 49—*Possession under unregistered document—Deed of exchange, unregistered.*

A person in possession of immoveable property under an unregistered deed and hence with a defective title must be regarded as a trespasser and can be ejected. 34 M. 64 Ref. (*Kensington and Beadon, JJ.*) UTTAM SINGH *v.* BASANTA. **203 P. L. R. 1913 : 19 I. C. 236 : 155 P.W.R. 1913.**

——S. 49—*Possession under unregistered partition deed,*

Notwithstanding the existence of an unregistered deed of partition oral evidence as to the factum of partition and the nature of the possession of the parties can be adduced. (*Dhobley, A. J. C.*) LAXMAN BHAT *v.* BANABAI. **64 I. C. 906.**

REGISTRATION ACT (XVI OF 1908), S. 49—Miscellaneous.

Miscellaneous.

——S. 49—*Misrepresentation.*

No misrepresentation by a party can be construed in a case where the other knowingly continues in the possession of the subject-matter of the contract, promised to be conveyed after the lapse of period evidenced by an unregistered instrument which is inadmissible in evidence. (*Macleod. C. J. and Heaton, J.*) NAMDEO SATVASHET SHIMPI *v.* DHONDU SADASHIVA.

22 Bom. L. R. 979 : 58 I. C. 406: 44 B. 961.

——S. 49—*Unregistered lease—Suit on—Decree may be given on admission of defendant.*

It is enough if the deft. admits in his written statement of the terms of a lease compulsorily registrable but not registered. (*Shadi Lal and Martineau, JJ.*) BANARSI DAS *v.* BUL CHAND.

3 Lah. L. J. 253.

——S. 49—*Sale— Deed inadmissible for want of registration—Claim for possession.*

Where there is not merely an agreement to sell but an actual contract of sale which is unregistered, the plaintiff cannot sue for specific performance of an agreement to sell ignoring the sale.

The plaintiff cannot be allowed to turn round and plead that he should be allowed to take possession as vendee under a completed sale because the sale is denied and the plaintiff is debarred from proving the deed itself, it being inadmissible for want of registration, and other evidence being barred by the provisions of S. 91 of the Evidence Act. (*Chevis and Abdul Raoof, JJ.*) PARMESHRI DEVI *v.* AUTAR SINGH.

67 I. C. 144: 3 Lah. L. J. 173. 4 U. P. L. R. (L) 59 :

——S. 49—*Narrative of facts.*

A document purporting to create an equitable mortgage is admissible though not registered, if it is only a narrative of the facts constituting the mortgage. It is an agreement to mortgage when something remains to be done by the parties to complete the transaction. When however a document sets forth the time of a contract in such a way that the terms can be said to have been reduced to the form of a document it is compulsorily registrable and inadmissible if unregistered. 20 W.R. 150, Dist. (*Wallis, C.J. and Phillips, J.*) SWAMI CHETTY *v.* ETHIRAJULU NAIDU.

40 Mad 547 : 34 I. C. 853 : 3 L W. 585 : (1916) 2 M. W. N. 84.

——Ss. 49 (c) and S. 17—*Unilateral declaration of intention.*

An unilateral declaration of intention by a member of an undivided family to get divided is sufficient to affect a partition. Such a declaration embodied in an instrument in writing prior to the division by metes and bounds does not amount to a transaction within the meaning of S. 49 and is hence admissible in evidence without registration. 35 A. 80 P.C.; 43 C. 1031 P.C. Foll. 30 M. L. J. 62 Expl. (*Sadasiva Aiyar and Spencer, JJ.*) SIKHAMANI PANDITTAR *v.* AMMANI AMMAL.

40 I. C. 36.

REGISTRATION ACT (XVI OF 1908), S. 50.

——S. 50—*Priority*—Bona fide *purchaser without notice.*

An unregistered mortgage cannot be enforced against a *bona fide* purchaser under a registered deed without notice of incumbrance. (*Griffin and Chamier, JJ.*) SHER SINGH *v.* DURGOPAL.

18 I C. 724.

——S. 50—*Priority—Registered and unregistered deed.*

A person claiming under a registered sale deed though from a purchaser under an unregistered sale has priority over a previous purchaser under an unregistered sale 16 I. C 625 ; 6 B. 193, Foll. (*Richards, C.J. and Tudball, J.*) ISHRI SERSHAD *v.* GOPI NATH.

34 All. 631 : 17 I. C. 19 : 10 A. L. J. 222.

——S. 50—*Applicability.*

To attract the provisions of S. 50 of the Regn. Act, the executant of the two conflicting deeds need not be one and the same person. (*Chamier, J.*) RAM LAL *v.* BACHCHHA SINGH.

16 I. C. 625: 10 A. L. J. 114.

——S. 50—*Priority—Notice.*

A subsequent registered sale will take effect against a prior unregistered mortgage if the vendee had no notice of the mortgage. (*Karamat Hussain, J.*) BACHALAL *v.* HANUMAN.

10 I. C. 233.

——S. 50—*Registered and unregistered documents, priority.*

The purchase under a subsequent registered mortgage does not extinguish an earlier unregistered mortgage The debt could be recovered from the money if any, after satisfying the registered mortgage. S. 50 does not invalidate an unregistered mortgage nor extinguish the rights of such a mortgagee. (*Griffin and Chamier, JJ.*) DHANPAT SINGH *v.* BUDH SINGH.

35 All 271 : 19. I C 783 : 11 A. L. J. 291.

——S. 50—*Priority—Registered and unregistered documents— Notice —Possession with third person—Inquiry, absence of.*

S. 50 of the Act, does not apply where the person claiming title under a subsequent registered document has notice of the title created by a prior unregistered document. 8 C. 597 ; 6 B. 515; 8 A 540 ; 16 M. 148, F ll. When the transferee is put on inquiry by the knowledge that a third person and not the transferor, is in possession of the property, and he does not choose to make inquiry, his rights as a transferee will be subject to the rights of the person in possession. 16 I. C. 811 ; 19 I C 9 Rel on. (*Mookerjee and Beachcroft, JJ.*) MAGU BRAHMA *v.* BHOLIDASS

19 C. L. J. 352 : 20 I. C. 195: 18 C. W N. 657.

——S. 50—*Priority—Notice*

A registered document is entitled to priority over an unregistered document in the absence of proof of notice of the unregistered instrument. The onus lies on the person alleging such notice. 16 C. P. L. R 95 Rel on. (*Stanyon, A, J. C.*) FAKIRA AND RAMJI *v.* JASWANT RAJ DAULAT RAM MARVADI.

42 I. C. 393.

REGISTRATION ACT (XVI OF 1908), S. 50.

——————S. 50—*Registered and unregistered mortgages.*

No priority can be claimed in respect of an unregistered mortgage deed when the subsequent mortgage is registered. (*Kanhaiya Lal, A. J. C.*) GAJADAR LAL *v.* GHULABA. **30 I C 388: 2 O. L. J. 368.**

——————S. 50—*Priority—Registration by fraud.*

S 50 of the Registration Act has no application in cases where the registered deed is obtained by fraud and the party holding the registered deed has no claim to priority by virtue of the section, the object of which is to put an end to fraud. (*Jwala Prasad, J.*) DHANI MAHTO *v* RAMBIRO RAI. **49 I C. 839.**

——————S. 50—*Unregistered sale-deed—Delivery of possession—Subsequent registered sale—Priority.*

A prior unregistered sale-deed, which is not compulsorily registrable but accompanied by delivery of possession is not invalidated by a subsequent registered sale. The person claiming under the prior unregistered deed must not only prove the deed but also the delivery of possession. A title which has once vested by virtue of a deed if it be unregistered cannot be divested by a subsequent registered document. (*Jwala Prasad, J.*) ASGAR ALI *v.* DOST MOHAMMAD. **44 I. C. 354.**

——————S. 51—*Document entered in wrong book—Effect on registration.*

Registration in the wrong book is no valid registration especially where that was at the instance of the parties to the document. 18 M. 364, 35 C. 845, Foll. (*Broadway, J.*) UDHAM SINGH *v.* BHAGAT SINGH. **55 I. C. 213.**

——————Ss. 52, 58 and 60—*Endorsement—Evidentiary value of*

A statement, the endorsement of which cannot be made under S. 52 or 58 cannot be proved by a certificate from the Registrar. (*Chamier, J. C.*) MUNI *v.* SHIAM BIHARY. **14 O. C. 80 : 10 I. C. 718**

——————S. 52 (1)—*Endorsement of—Presentation.*

The fact that the signature of the executant of a document does not appear immediately under the registration endorsement as to presentation, but only lower down under the endorsement as to execution will not make presentation invalid. (*Richards, C. J. and Lyle, J.*) KABUL SINGH *v.* HARI NARAYAN. **20 I. C. 678 : 11 A. L. J. 617.**

——————S 57 (5)—*Secondary evidence of a mortgage deed.*

A copy of the deed granted under the section is admissible in evidence. (*Kanhaiya Lal and Kendall, A. J. Cs*) SALEHA BIBI *v.* OUDH COMMERCIAL BANK, LTD, **36 I. C 673 : 3 O. L. J. 482.**

——————Ss. 58 and 60—*Certificate of registration is not evidence of admission of execution.*

There is nothing in S. 58 of the Registration Act requiring a registering officer to endorse an admission of execution. Consequently a certificate of registrations is not evidence of such

REGISTRATION ACT (XVI OF 1908), S. 60.

admission even though the admission is in fact specified in the endorsement. 19 O C. 23 : 38 A. 1 ; 17 C 903 Foll. 20 O. C. 18 : dissented. (*Martineau, J.*) MUHAMAD HASSAN *v.* SAHORA. **1924 L. 389.**

——————S. 58—*Evidence Act, S. 32 (2)*

If the Sub-Registrar is dead, the endorsement made by him under S. 58 of the Registration Act read with S 32 (2), Evidence Act, may be admitted, being an entry made by him in the discharge of his professional duty. (*Kendall and Daniels, A. J. Cs*) AJUDHIA PRASAD *v.* JAGANNATH BAKSH SINGH. **38 I. C. 605 : 20 O. C. 18.**

——————S. 60—*Certificate—Effect of.*

Where there is a presentation of a document by a person not authorised the registration is void and of no effect notwithstanding the certificate. (*Sir John Edge*) JAMBU PRASHAD *v.* MUHAMMAD NAWAB ASTAB ALI. **37 All. 49 : 42 I. A. 22 : 19 C. W N 282 : 13 A. L. J. 129 : 17 M L. T. 148 : 21 C. L. J. 218 : 2 L. W. 277 : 17 Bom. L. R. 413 : (1915) M. W N. 592 : 28 I. C. 422 : 28 M. L. J 577 (P C.).**

——————S. 60—*Sale deed—Proof of—Certificate of registering officer of admission of execution is not sufficient—Evidence of executant attesting witness or writer—Necessity.*

Where in a suit on a sale deed the plff relied simply on the certificate of the Registering Officer without examining the executant or any of the attesting witnesses or writer of the deed, *held*, that the certificate only showed that the person purporting to sign the deed admitted his signature and in the absence of any further evidence that would not be evidence if the necessary link in the chain that the person who admitted execution was the person who could give title to plff. (*Macleod, C. J. and Crump, J.*) MARUTI BALAJI POSTIL *v.* DATTU. **25 Bom. L. R 192 : 1923 Bom. 253.**

——————S. 60—*Registrar's certificate—Proof of execution.*

The endorsement of a Registrar is no proof under S. 60 of the Regn. Act to prove the execution of a document Whether all documents requiring attestation or not are required to be proved to have been executed, that is signed by the party making the transfer. (*Lindsay, J. C.*) HORI LAL *v.* THAKUR BHAGWAN BAKHSH. **34 I. C. 281 : 19 O. C. 23.**

——————S. 60 (2)—*Endorsement—Value of.*

The endorsement of the registering officer is only evidence of the facts mentioned by it after the provisions of the section have been complied with a certificate issued for registration. Where the very question to be decided is whether those provisions have been complied with and whether there was a valid registration, S. 60 (2) does not apply. (*Piggott and Walsh, JJ.*) COLLECTOR OF MORADABAD *v.* MAQBUL RAHMAN. **40 All. 484 : 45 I. C. 37 : 16 A. L. J. 313.**

REGISTRATION ACT (XVI OF 1908), S. 69.

——Ss. 69 and 87 R. 174—*Registrar interested in property registered—Validity of—Registration.*

A registration, by a Registrar acting in good faith, though having interest in the property registered, is valid. The disability created by R. 174 is a mere question of procedure. (*Lord Buckmaster,*) MOHAMAD RUSTAM ALIKHAN *v.* MUSTAQ HUSSAIN.

12 L. W. 539 : 28 M. L T. 220 : 57 I C. 329 : (1920) M W N. 565 : 42 All. 609 : 47 I. A. 224 : 32 C. L. J. 471 : 18 A. L. J. 1089 : 39 M. L. J. 263.

——Ss. 71, 72, 76 and 77—*Document not registered owing to non-appearance of executants in time—Suit to compel registration lies.*

Where a sub-registrar refused to register a document presented in time owing to the non-appearance of the executants to admit execution in time and on appeal, the District Registrar also confirmed the order, a suit to compel registration under S. 47 of the Regn. Act is maintainable. The order passed by the Registrar was one under S. 72 of the Act. Scope of Ss. 34 and 71 to 77, Registration Act, considered. (*Shah, A. C. J and Crump. J.*) FATTECHAND ANANDRAM *v.* UMAJI.

47 Bom. 290 : 25 Bom. L. R. 45 : 1923 Bom. 187.

——Ss. 71, 72, 73, 76 and 77—*Failure to appear to admit execution—Refusal by Sub-Registrar to admit document—Application to Registrar—Mention of wrong provision— Suit for registration.*

The executant did not appear before the Sub-Registrar and he refused to register the document. The grantee then moved the Registrar by an application falling under Ss. 71 and 72 of the Regn. Act, although it was one under S. 73 and was accompanied by a copy of the reasons recorded by the Sub-Registrar under S. 71 for refusing to register, and verified as required by S. 73. The facts were all stated in the application. The application was dismissed and a suit was brought under S. 77 for having the document registered. *Held*, that the suit was maintainable. The scope of a suit under the Regn. Act depends upon the proved or admitted facts and circumstances, and not upon erroneous mention of a section of the statute in an application to the Registrar Failure on the part of the executant to appear and admit execution of a document amounts to denial of execution. 5 C. 445 ; 16 C. 189; 25 C. 93, Rel. (*Mookerjee and Beachcroft, JJ.*) BECHUN SAHU *v.* SYED ALI RASUL. **16 I. C. 614.**

——S. 71—*Refusal to register—Document returned—Order of refusal not endorsed—Effect of.*

The act of a registering officer returning a document on the ground of the executant's failure to appear is equivalent to a refusal to register, though the order of refusal is not actually written thereon. 23 M. 389, Ref. (*Miller and Tyabji, JJ.*) SIVARAMA PATTAR *v.* EDATHIL MADATHIL V KRISHNA IYER. **15 M. L. T 233 : 23 I. C. 23. 26 M. L. J. 397.**

REGISTRATION ACT (XVI OF 1908), S. 72.

——Ss. 72, 76 and 77—*Refusal to register—Refusal to admit to registration or accept for registration—Distinction—Remedy by suit.*

There are three different expressions used in the Act, refusal to register, refusal to admit for registration and refusal to accept for registration. S. 72, where it says, that "An appeal shall lie against an order of the Sub Registrar refusing to admit a document for registration," refers to or case when registration has been refused rather than to cases where a Sub-Registrar have declined to accept a document at all at the first stage of his proceedings; in other words, refusal to admit to registration and refusal to register are the same thing. The Act, however, evidently intended some distinction between refusal to accept for registration and refusal to register. S. 19 of the Act lays down that the registering officer shall refuse to register a document which is in a language which he does not understand. S. 20 lays down that a registering officer may in his discretion refuse to accept for registration a deed in which an interlineation, erazure, etc occurs. S.21 again uses the expression "accept for registration" in prescribing the conditions necessary for the proper description of property to which a document relates. Where a Sub-Registrar refused to register a document mainly on the ground that the document was vague, that it was not executed in counter-part, and that execution was denied, there is a clear and unmistakeable refusal to register and one which was made not at the preminary hearing but after a regular proceeding to which both the parties had been summoned. (*Pipon, J. C*) MT. BIBI AIMNA *v* MAHOMED RUKAN ALAM. **73 I. C. 182:**

——Ss. 72, 76 and 77—*Refusal to register—Dismissal of appeal by Registrar—Suit to enforce registration.*

If a Sub-Registrar refuses to register a document as presented out of time, and on appeal the Registrar rejects the appeal, the order of the latter is tantamount to refusing to order the document to be registered and a suit under S. 77 of that Act to enforce registration is maintainable. (*Sanderson, C. J. and Woodroffe, J.*) UMESH CHANDRA GHOSH *v.* NISTARINI DASI.

54 I. C. 562 : 24 C. W. N. 304.

——Ss. 72, 73 and 76—*Refusal of Sub-Registrar to register document—Failure to appear—Appeal—Application under S. 73—Dismissal for default—Power of Registrar to restore.*

Refusal of the Sub-Registrar to register a document upon the wilful failure of the executant of the document to appear before the Sub-Registrar is not appealable to the Registrar as such failure amounts to a denial of execution within S. 72. The party presenting the deeds should in such cases apply to the Registrar under S. 73 to direct registration. On an application under S. 73 being dismissed for default, the Registrar can restore the matter and re-hear the case, at least before he finally disposes of the matter

REGISTRATION ACT (XVI OF 1908), S. 73.

under S. 76. (*Fletcher and Newbould, JJ.*) ANILA DEBI *v* MONI MOHAN MOOKERJEE.
41 I. C. 57.

——— Ss 73, 77—*Suit for compulsory registration Maintainability.*

Where on a deed being presented for registration the Sub-Registrar summoned the executant and on his failure to appear refused to register the same, and thereupon the Registrar was moved by an application purporting to be under Ss. 72 and 73 of the Registration Act but without the verification required by the latter section and that too was dismissed: *Held*, a suit lay under S 77 to enforce compulsory registration. The mere absence of verification as required by S. 73 (2) did not make the application one not in conformity to the provisions of that section, as the defect is merely one of form and not of substance (*Abdul Raoof and Moti Sagar, JJ.*) UTTAM SINGH *v.* MT RUTTAN DEVI.
5 Lah L. J. 217 : 1924 Lah. 28.

——— Ss. 73 82 and 83-*District Registrar-Refusal to sanction prosecution--Power of High Court to interfere.*

Where a District Registrar in reversal of the order of a Sub-Registrar, refuses to sanction the prosecution of the executant of a sale-deed under S 73 of the Registration Act, there is no jurisdiction in the High Court to interfere as the District Registrar had acted not as a Civil Court. The remedy of the aggrieved party was by a petition to the Board of Revenue. (*Adami, J.*) HARI BUX RAM *v.* CHEDDI PANDE 23 Cr. L. J. 415 : 1923 P. 155

——— Ss. 73 and 87--*Order of refusal to register set aside by Registrar—Order setting aside sent down to Sub-Registrar Procedure, if proper.*

Where a Registrar after setting aside an order of refusal to register made by a Sub-Registrar sent it down himself to the latter instead of returning it to the applicant to make a fresh application for registration, it was held that the method was a defective procedure and did not vitiate the proceedings. (*Richards, C J. and Banerji, J.*) RAMCHANDRA DAS *v.* FARZAUD ALI KHAN. 34 All. 253 : 13 I. C. 531 : 9 A. L. J. 188

——— Ss 73, 74 and 77—*Application for registration—Order of dismissal for absence, if one under S. 77,*

An order of dismissal of an application for registration of a document made owing to the absence of parties is an order of refusal within the meaning of S 77 of the Act 13 C. 264, Foll. (*Banerjee and Tudball, JJ.*) ABDUL HAKIM KHAN *v.* CHANDAN. 34 All. 165 : 13 I. C. 83 : 9 A. L J. 4.

——— S. 74—*Special Registrar—Power to record statement of witnesses in inquiry under S 74.*

A special Registrar acting for the Registrar under rules framed by the Inspector-General of Registration, is a person authorised by law to record the statements of witnesses in an inquiry under S. 74 of the Act. (*Sharfuddin and Richardson. JJ.*) JEKALI SHEIKH *v.* TAIBAUNESSA BIBI.
20 I. C. 661 : 18 C. W. N 605.

REGISTRATION ACT (XVI OF 1908), S. 77.

——— Ss. 74, 75 and 84—*Registration—Enquiry, nature of—Procedure.*

The enquiry under S 74 of the Act is intended to be a summary one. The result of a criminal trial under S. 83 of the Act wherein the Criminal Court has jurisdiction to enquire into the fact of execution of a document, may be considered by the Registrar in an enquiry under S. 84. 24 C. 755, Expl. (*Roe and Coutts, JJ.*) ARZHAR HUSSAIN *v.* SAWLAL MARUDDI. 46 I. C. 878.

——— S. 75—*Registered sale—Forgery.*

Where a Court finds that a deed of sale registered under S. 75 of the Act is forged, the question of burden of proof cannot arise. (*Coxe and Richardson, JJ.*) BADRI NARAIYAN *v.* KODOSHAH.
28 I. C. 138.

——— S. 75—*Gift deed — Registration after donor's death.*

The registration of a deed of gift by the donee after the donor's death is valid, even without the consent of the donor's legal representatives. (*Abdur Rahim, Offg C J. and Seshagiri Aiyar and Phillips, JJ.*) VENKATI RAMA REDDI *v.* PILLATI RAMA REDDI. 40 Mad. 204 : 4 L. W. 465 : 20 M. L. T. 450 : 38 I. C. 707 : (1917) M. W. N. 112 : 31 M. L. J. 690.

——— Ss. 75 (2) (3) and 77—*Decree directing registration—Limitation for application to register is 30 days.*

Where a Civil Court passes a decree in a suit under S. 77 of the Registration Act, directing the registration of a document, the document must be presented for registration within 30 days of the date of decree. (*Das and Adami, JJ.*) MIRZA MAHOMED ISMAIL BEG *v.* SRICHARAN DAS.
1 P. 146 : 1922 P. 408.

——— Ss. 76, 77 and 25—*Dismissal of appeal —Cause of action,*

Per Seshagiri Aiyar, J.—The application to the Registrar may also be regarded as an original petition to him under S. 76 and his dismissal of the appeal is in effect a refusal to direct the Sub-Registrar to register the document which will furnish a cause of action under S. 76. 10 M. L. T. 104. Foll. 21 Bom. 699. Dist. (*Seshagiri Aiyar and Bakewell, JJ.*) GANGADHARA MUDALI *v.* SAMBASIVA MUDALI. 19 M. L. T. 397 : 34 I. C. 769 : (1916) 2 M. W. N 38.

——— S. 77—*Suit under—Validity of document not relevant.*

In a suit for compulsory registration of a sale-deed, the Court has only to consider the genuineness and not the validity of the deed. (*Ryves and Gokul Prasad JJ.*) RAM GHULAM *v.* MENDA
60 I. C. 869 : 19 A. L. J. 224.

S. 77—*Decree for registration—No admission of execution necessary — Compromise—Effect of.*

No admission of execution is necessary for a decree for registration under S. 77 of the Act but where a decree is consented to by the executant, it may be tantamount to an admission of execution. (*Walmsley and Buckland, JJ.*) PANCHANAN MISRA *v.* APORNA. 63 I. C. 785.

REGISTRATION ACT (XVI OF 1908), S. 77.

——S. 77—*Dismissal of application for registration—Suit to enforce registration*

The dismissal of an application for registration owing to the failure of the applicants to appear before the Sub-Registrar is equivalent to a refusal to register and it does not take away the right of suit under S 77 to enforce registration. (*Fletcher and Duval, JJ.*) ABIRJAN BIBI *v.* GOLE MAHOMED **54 I. C. 570.**

——S. 77—*Suit under—Extension of time—Limitation Act*, S. 14.

The period prescribed in S. 77 of the Registration Act, for a suit cannot be extended under S. 14 of the Limitation Act. (*Sanderson C. J., Woodroffe, Mookerji, Chatterji and Newbould, JJ.*) KALIUDDIN MOLLA v. SAHIBUDDIN MOLLA. **24 C. W. N. 4 : 30 C. L. J. 455 : 54 I. C 705 (F. B).** [**Confirming 54 I. C. 228 : 24 C. W N. 29.**]

——S. 77—*Suit under—Extension of period—Proceedings in wrong Court.*

As Ss. 71 to 77 of the Registration Act lay down a complete procedure where registration is refused and as S.77 limits the period within which a suit is to be brought to 30 days: the said period cannot be extended under S. 14 of the Lim. Act on the ground of prosecution of proceedings in good faith in a Court not having jurisdiction in the matter. (*Chaudhuri and Cuming, JJ.*) KHAGENDRA NARAYAN ROY BARMAN *v.* BAMANI BARMANI. **54 I C. 228 : 24 C. W. N. 29.**

——S. 77—*Suit to enforce registration—Procedure.*

Before a plff. can institute a suit under S 77 of the Registration Act to enforce registration of a document he must follow strictly the procedure prescribed by the Act, for obtaining registration of documents. (*Mookerjee and Beachcroft, JJ.*) NAZIRUDDIN MIDDA *v.* SIDHOO MIA. **44 I. C 361 : 27 C. L. J. 538.**

——S. 77—*Suit—Scope of—Validity of document.*

A suit under S. 77 is limited to two points : (1) whether the document has been executed and (2) whether the requirements of the law for registration of document are complied with. In such a suit the plff. would get a decree if the document was in fact executed by the deft. though it was not a *bona fide* document. The Court is not however concerned with the questions where the document is valid and freely executed. 14 C. W. N. 12, Fol. (*Newbould, J.*) JOGENDRA NATH DATTA CHOWDHURY *v.* HARIDAS CHONG. **35 I. C. 778.**

——S. 77—*Suit for—Registration of document—Executed under misapprehension.*

A document purporting to be a sale deed of certain properties by *purdanashin* women but which comprised other properties as well, is not properly executed, so that a suit for registration of the document will not lie. (*Imam and Chapman, JJ.*) ABDUL HAKIM *v.* JAMILA KHATUN. **23 I. C 10.**

——S. 77—*Suit—Limitation*

A suit for the registration of deeds filed within 30 days from the order of refusal to register on an application for review of a previous application for registration which was struck off, is within time. (*Chitty and Teunon, JJ.*) SAJAD *v.* SARODA PRASAD CHOWDHURY. **17 C. W. N. 585 : 18 I. C 450 : 18 C. L. J 45.**

——S. 77—*Suit for registration of document—Last day a holiday—Suit filed next re-opening day—General Clauses Act (X of 1887), S. 7—General Clauses Act (I of 1897), S. 10.*

If a Registrar refused to register a document on 29th Nov. and on the 30th day after the Court was closed and the plff. instituted on the next re-opening day a suit under S 77 of the Registration Act, the suit should be held to be properly instituted in view of the previous decisions of the Court and the implied sanction of legislature by the General Clauses Act. (*Jenkins C. J. and N.R. Chatterjee, J.*) AHMAD BAKSH *v.* BABAR ALI. **14 I. C. 173 : 16 C. W. N. 721.**

——S. 77—*Time how reckoned.*

30 days are to be counted from the date on which the order is communicated to him. (*Woodroffe and Teunon, JJ.*) MATABAR MULLAH *v.* SHASHI BHUSHAN. **12 I. C 33 : 16 C. W. N. 20.**

——S 77—*Suit under—Question as to validity of document not relevant.*

In a suit under S. 77, the Court must enquire only whether the ostensible executant signed and delivered to the other party the document which was brought for registration and it cannot enter into any question as to the validity of the document. (*Leslie Jones and Martineau, JJ.*) REMAL DAS *v* JANNAT. **3 U P. L. R. (Lah.) 66 : 62 I. C 789 : 2 L. 202.**

——S. 77—*Suit to enforce registration—Deed creating charge on land already mortgaged—Punjab Alienation of Land Act*, S. 9 (3).

In a suit under S. 77 of the Registration Act to enforce registration of a deed of mortgage, which though it purported to create a further charge in the lands already mortgaged actually created a charge upon other lands also which had not previously been mortgaged. *Held*, that the mortgage deed in dispute was not merely an additional charge upon lands already mortgaged but was an entirely new deed. It was correct to refuse to register it as contravening the provisions of the Alienation of Land Act. (*Scott-Smith and Martineau, JJ.*) NARAIN DAS *v.* SAHIB BANO. **1 Lah L J. 212.**

——S. 77—*Sub-Registrar's refusal to register—Failure to appeal to Registrar—Suit, if maintainable.*

A refusal by the Registrar to order a registration is a condition precedent to a civil suit brought under S. 77 of the Registration Act. As in this case the Sub-Registrar's refusal to admit to registration had not been appealed against to the Registrar, the suit was not competent. (*Shah Din, C. J and Le Rossignol, J.*) HARKISHEN SINGH *v.* SARMUKH SINGH. **102 P. R. 1917 : 169 P. W. R. 1917 : 43 I C. 294 : 7 P L. R. 1918.**

REGISTRATION ACT (XVI OF 1908), S. 77.

——— S 77—*Order refusing to order the document to be registered—Ambiguous passage — Limitation—Starting point.*

Where a Registrar ordered that either a new and clear sale-deed should be made or a note be added making the ambiguous passage quite clear' *Held*, that this was an order refusing to register the document. The expression "making of the order" in S. 77 does not mean merely recording the order of refusal in writing but also communicating it to the party concerned so as to bind him, and that the starting point for limitation of a suit is the date of plff.'s actual knowledge of the order except where he wilfully neglects to get knowledge in which case the date will be that when he would have got knowledge. 28 B. 8 Rel. (*Scott Smith and Shadi Lal, JJ.*) KIRPA RAM *v.* ASA SINGH. **41 P. R. 1917 : 41 I. C. 76 : 55 P. W. R. 1917.**

——— S. 77—'*Refusal to register,' meaning.*

An order of a Registrar refusing to accept a document for registration on the ground that it was time-barred, is a 'refusal to register' within the meaning of S. 77. There is no substantial distinction between the two within the meaning of S. 77 read with Ss. 76 and 72 10 M. L. J. 104 and 26 M. L. J. 307, Fol. 7 M. 735 Dist. 21 B. 699; 18 M. 265 and 18M 99 Not foll. The time for filing a suit under the section should be counted from the date of the appellate order of the Registrar refusing to register under S. 72 or 76 and not from the date of any prior order refusing to extend time. (*Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.*) GANGADHARA MUDALI *v* SAMBASIVA MUDALI. **40 Mad. 759 : 40 I. C. 192 : 33 M. L. J. 51.**

[Affirming on appeal the Judgment of *Seshagiri Aiyar J.* in **19 M L. T. 597 : 34 I. C. 769 : (1916) 2 M. W. N. 38.]**

——— S. 77—30 *days how reckoned.*

The 30 days mentioned in S. 77 of the Act is to be reckoned only from the time the judgment is drawn up and signed by the Judge and not from the time the judgment is pronounced (*Sankaran Nair and Tyabji, JJ.*) MUTHIA CHETTY *v.* SUPPAN SERVAI. **38 Mad. 291 : 20 I. C. 914 : 14 M. L. T. 160.**

——— S. 77—*Function of Registrar under S. 77 —Suit under—Parties.*

A registering officer or Court has nothing to do with the legal effect of a document but only has to satisfy himself that the document was executed by the person by whom it purports to have been actually signed The proper deft. in a suit brought under the Registration Act is the person who actually signs or marks the document in token of execution whether for himself or on behalf of another, and is the person executing the document under Ss. 32, 34, 35, 58 and 73 of the Registration Act. A person who executes a document in favour of another compulsorily registrable, is bound to assist in the registration of it irrespective of its validity. (*Stanyon, A. J C.*) MOTILAL *v.* GANGA BAI. **31 I. C. 867 : 11 N. L. R. 177.**

REGISTRATION ACT (XVI OF 1908), S. 82.

——— S. 77—*Suit under—Conditions precedent.*

For a suit to lie under S. 77, the following requisites are necessary : (1) The presentation by a person authorized to present the document to the Sub-Registrar ; (2) a refusal to register by the Sub-Registrar ; (3) an appeal within time to the Registrar ; (4) a refusal by the Registrar ; and (5) the institution of the suit within time. (*Pipon, J. C.*) MT. BIBI AIMNA *v.* MAHOMED RUKAN ALAM. **73 I. C. 182.**

——— Ss. 82 and 83—*Trial without permission —Acquittal—Second trial with permission—Cr. P C., S* 403

No prosecution for an offence under S. 82 of the Act can be commenced without the permission of the Officer referred to in S 83. The acquittal of an accused on the ground that the permission required by S. 83 was not got, does not bar his second trial for the same offence after the requisite permission is got inasmuch as, to bar a second trial, the order of acquittal must have been passed by a competent Court. (*Lindsay, J.*) MOHAN LAL *v.* EMPEROR. **22 Cr. L. J. 750 : 64 I. C. 142: 19 A. L. J. 813.**

——— Ss. 82 and 83—*Prosecution and sanction.*

S. 83 of the Act lays down that a prosecution for any offence under the Act coming to the knowledge of the Registering Officer in the official capacity may be commenced by or with the permission of certain Registration Officers specified in the section. The word "Sanction" is not used at all. All that is required before a prosecution under the Registration Act can be commenced is that permission should be given by a Registration Officer mentioned in S. 83 of the Act. (*Knox, J.*) HUSAIN KHAN *v.* EMPEROR. **15 A. L. J 136 : 18 Cr. L. J. 546 : 39 I. C. 690 : 39 All. 293.**

——— Ss. 82 and 83—*Sanction—Jurisdiction.*

No prosecution of an offence under S. 82 can be initiated without the permission of some Registering authority mentioned in S. 83 37 A. 107, Foll (*Richards, C. J.*) HUSSAIN KHAN *v.* EMPEROR. **14 A. L J. 412 : 17 Cr. L J. 465 : 36 I. C. 145 : 38 All. 354.**

——— S 82—*Offence under — Elements of— Fraudulent or dishonest intention—Sanction to prosecute.*

Fraudulent or dishonest intentions are not a necessary ingredient of an offence under S 82 of the Regn. Act, 40 M. 880 : 11 C. 566 Foll. An identifying witness must be in a position to depose without the possibility of error to the identity of the person he is identifying. Merely stating that he knows that a person is so and so, because he has been so told by some other person and with no actual knowledge of the facts would make the identifying witness liable to the penalties of S 82 of the Registration Act. (*Prideaux, A. C. J.*) NILKANATH RAO *v.* EMPEROR **23 Cr. L. J 303 : 1922 Nag. 86.**

——— S 82 (c) and (d)—*Conviction on comparison of thumb impressions is not legal.*

REGISTRATION ACT (XVI OF 1908), S. 82.

Where the conviction of false impersonation was based solely on the comparison of the thumb impression on the questioned document with that of the thumb impression of the accused taken in Court: *Held*, that the very fact of taking of a thumb impression from an accused person for the purpose of possible manufacture of the evidence by which he could be incriminated is in itself sufficient for setting aside the conviction (*Das and Bucknill, JJ.*) BAZARI HAJAM *v* EMPEROR. **(1922) Pat. 46 : 4 U. P.L. R. (Pat.) 1 : 3 Pat. L. 1. 526 : 1 Pat. 242 : 23 Cr. L. J. 638 : 1922 P. 73**

——— **S. 82**—*Offence under—Sanction if necessary.*

No sanction is necessary for a prosecution under S 82, Registration Act. (*Pratt, J.*) MAUNG SAING *v.* EMPEROR. **1 Rang. 299 : 1924 R. 213.**

——— **Ss. 83 and 82**— *Prosecution by private person is not barred.*

S. 83 does not bar the prosecution by a private person, for an offence under S. 82 of the Act without the sanction of the Registration Authorities. (*Ayling and Spencer, JJ.*) PALANI GOUNDAN, *In re* **13 L. W. 195 : (1921) M W. N 144 : 29 M. L. T 141 : 62 I. C. 582 : 22 Cr. L. J. 566 . 40 M. L. J. 211.**

——— **S. 83**—*Sanction—Necessity of.*

For the institution of proceedings by a private person for offences under the Act the permission of the officers specified in S. 83 is not a preliminary requisite. The words 'may be commenced' in the section do not exclude complaints by private persons. (*Ayling and Napier, JJ.*) *In re* PERAMU NADATH.

40 Mad. 880 : 21 M. L. T. 118 : 18 Cr. L. J. 416 : 38 I. C. 976 :5 L. W. 414.

——— **S. 87**—*Document duly stamped and registered—Effect.*

If a document, presented to the Court appears to be duly stamped and registered, the Court cannot take cognizance of any irregularity in its registration. (*Devar, J.*) SHIVLAL *v.* TRICUMDAS MILLS CO., LTD.

36 Bom. 564 : 14 I. C. 353 : 14 Bom. L. R. 45.

——— **S. 87**—*Hypothecation registered but not stamped—Admissibility.*

Where a registering officer having examined a document presented to him for registration came to the conclusion that being a letter of hypothecation accompanying a bill of exchange it was exempt from duty under Art. 40 Ex. (2) and accordingly certified on the bill of exchange that it was properly stamped and registered, the letter of hypothecation without requiring any further duty to be paid in respect of it. *Held*, under S. 87 of the Registration Act improper registration could not possibly affect the validity of the document. 15 B. L. R 228 and 1 All. 265 Ref. (*Chitty and Panton, JJ.*) BISWANATH BHATTACHARYA *v.* GOVINDA CHANDRA. **29 C. L. J. 305 : 51 I C. 88 : 23 C. W. N. 534.**

——— **S 87**—*Fraud on Registrar—Effect of.*

Fraud on the Registrar effecting registration of a document is equivalent to non-registration. (*Daniels, A. J. C*) KALKA *v.* MATHURA DAS. **50 I. C. 220 : 21 O. C. 341.**

REGULATION (BENGAL) (I OF 1886), S. 8.

——— **S. 90**— Rajinama *notices under the Revenue Code need no registration.*

Rajinama notices in respect of alienated lands under S. 74 of the Revenue Code are exempt from registration under S. 90 of the Act. (*Macleod, C.J. and Fawcett, J.*) SHIDRAJ BHOJRAJ DESAI *v.* DARI SANTARAM MALI. **45 Bom 898 : 61 I. C. 464 : 23 Bom. L. R. 272.**

——— **S. 90**—*Exemption from registration.*

A *Rajinama* by a Khatidar of unalienated lands subject to S. 74, Bombay Land Revenue Code, abandoning his rights to another subject to the payment of Revenue need not be registered under S. 90, Registration Act. (*Scott, C. J and Heaton, J.*) MOTIBHAI JIJI BHAI *v.* DESAI BHAI GOKAL BHAI. **41 Bom. 170 : 38 I. C. 838 : 18 Bom. L. R. 976.**

——— **S. 90 (1) (d)**—*Lease by Government—Registration.*

The words 'grants' of assignments of interest in S. 90 (1) (d) of the Registration Act include a lease by Government. 36 A. 176, Diss. (*Seshagiri Aiyar and Bakewell, JJ.*) HALLINGAL MOOSA KUTTY *v.* SECRETARY OF STATE **43 Mad. 65 : 53 I. C. 345 : 37 M. L. J. 332.**

——— **S. 90 (d)**—*Lease by Secretary of State—Registration—Not necessary—Proprietary right to the structure but not in the soil.*

A lease granted by the Secretary of State does not require registration in view of the provisions of S 90 (d) of the Registration Act read with Ss.4 and 107 of the Transfer of Property Act. A grant of a proprietary right in the structure but not in the soil is a right that runs with the land (*Wazir Hasan, A. J. C.*) RAGHO PRASAD *v.* SECRETARY OF STATE. **9 O. L. J. 629 : 1923 Oudh 114.**

REGISTRY, SEPARATE.

See (1) LOCAL ACTS.
(2) REGULATIONS.

REGULATIONS.

See also under RESPECTIVE PROVINCES.

REGULATION (BENGAL) (XVII OF 1806).

——— *Notice to* de-facto *guardian—Notice to* de facto *guardian of foreclosure proceedings*

Notice under the above regulation served on the *de facto* guardian of a minor in respect of foreclosure proceedings in a mortgage by conditional sale, is enough whether he is so descibed or not (*Johnstone, C. J. and Le Rossignol, J.*) JOWALA SINGH *v.* TULSA RAM.

78 P. R. 1915 : 31 I. C 212 : 173 P W. R. 1915.

——— **(I OF 1886).**

——— **Ss. 8 (1) (b) and 39 and 62**—*Applicability.*

S. 8, sub-section (1), Cl. (b), applies to a case where a person had acquired land directly settled with him by the Govt. and also where he has obtained it from the original grantee by transfer, succession or otherwise as also to a case where the land has been settled with the Govt. before the Regulation, for a term of more than 10 years. (*Mookerjee and Carnduff, JJ.*) HEDLOT KHASEA *v.* KA RAU KHASIANI.

13 I. C. 377 : 15 C. L. J 241.

RE-HEARING.
See C. P. CODE, S. 151 ; Os, 41, 47

RE-IMBURSEMENT.
See (1) CONTRACT ACT, Ss 69 AND 70.
(2) T. P. ACT, Ss. 72 AND 76.

RELATIONSHIP.
See (1) EVIDENCE ACT, S. 32
(2) LANDLORD AND TENANT.

RELEASE
See also (1) LANDLORD AND TENANT.
(2) REGISTRATION ACT, S. 17.
(3) STAMP ACT, S. 55.

———*Oral—Validity of inference from conduct—Writing unnecessary.*

A surrender or reliquishment of a lease does not require to be in writing but can be inferred from the Acts of the parties.(*Fletcher and Huda, JJ.*) BENGAL COAL CO., LTD *v.* MANO RANJAN BAGCHI. **44 I C. 297 : 22 C W. N. 441.**

———*Effect of—Title cannot pass by*

Title cannot pass by a mere release where the law requires a conveyance. 33 C. 967 Full. Where a partner gives a release to his copartners and the latter brings a suit for moneys due to the firm, *Held* that the claim could not be maintained as there was no assignment of the interest of the partner in favour of the plffs., that no title vested in them under S 180 of the T. P. Act and that they could not maintain the suit. (*Mookerjee and Beachcroft, JJ.*) DHARAM CHAND BOID *v.* MONJI SHARU. **16 I. C. 440 : 16 C. L. J. 436.**

———*Nature of—If operates as a conveyance.*

A release is at best only an admission by the executing party that he has no interest in the property and does not operate as a conveyance. (*Mookerjee and Carnduff, J.*) NARAK LAL *v.* LHAGO LAL. **13 I. C. 455 : 22 C. L. J. 380.**

———*Effect of—Title it passes.*

Relinquishment of an interest is valid to pass title in the absence of satisfactory proof that there was no intention to convey any interest under the document. (*Tyabji and Phillips, JJ.*) UPPARA HANUMANTA *v.* PEDDAPALLI SAMACHARLU. **33 I. C. 188 : (1916) 1 M. W. N. 9.**

———*Will — Legatee — Surrender of right under—Bequest.*

It is open to a person entitled to an absolute estate under a bequest by his father to surrender his rights thereunder and allow his brothers to share equally with him in the estate. (*Lindsay and Kanhaiya Lal, A. J. Cs.*) BHARATH SINGH *v.* BALABHADHAR SINGH **20 I. C. 429.**

———*Effect of—Not a conveyance.*

The deed of relinquishment does not confer a title and title to land cannot pass by admission when the statute requires a deed. 33 C. 967 : 16 C L. J 437 Ref. (*Ross, J.*) MUNSHI GOVIND PRASAD *v.* LALA JAGDIP SAHAI. **1 Pat. L. R. 316**

See also UNDER MAHOMEDAN LAW AND HINDU LAW. **1924 P. 185.**

RELIEF—Practice.
See (1) C. P. CODE, O. 7 R. 7.
(2) PRACTICE—PLEADIGS—RELIEF.

RELIGIOUS ENDOWMENTS--Alienation by manager.

RELIGIOUS BROTHERHOOD.
See (1) HINDU LAW.
(2) MAHOMEDAN LAW.

RELIGIOUS COMMUNITY.
See (1) HINDU LAW.
(2) MAHOMEDAN LAW.

RELIGIOUS ENDOWMENTS.
See also (1) HINDU LAW.
(2) MAHOMEDAN LAW.
Alienation by manager.
Dedication.
Founder's rights.
Idol.
Management of trusts.
Mutt.
Trustee.
Miscellaneous.

Alienation by manager.

———*Alienation by manager —Permanent Lease—Necessity—Presumption—Lapse of time.*

There is no absolute prohibition against the grant of a permanent lease by the Manager of a religious endowment. Such a lease can be granted for strict necessity and though the burden is on the alienee or lessee to prove such necessity, yet the long lapse of time between the alienation and the challenge of its validity raises a presumption that the original grant was made in the exercise of the extended powers of the manager, *i.e.*, for necessity. 19 M. 485 Ref. (*Lord Buckmaster*) BAWA MAGNIRAM SITARAM *v.* SHETH KASTAI BAI MANIBAI.
46 Bom. 481 : 26 C. W. N. 473 : 30 M. L. T. 268 : 49 I. A. 54 : 20 A L. J. 371 : 24 Bom. L. R. 584 : (1922) M. W. N. 319 : 42 M L. J. 501: 35 C. L. J. 421 : 1922 P. C. 163 (P. C.)

———*Alienation by manager.*

A gift by the manager of temple property in the form of a Sanad purporting to make an allowance of Rs. 2.5 yearly from generation to generation out of the Devasthan funds, cannot be given effect to even as against the temple estate beyond the lifetime of the grantor *Macleod, C. J. and Crump, J.*) RAMACHANDRA MAHADEO *v* NARAYANRAO. **1923 Bom. 296 (2).**

———*Alienation by manager--Excess of authority—Possession of alienee if adverse.*

Where the manager of a religious endowment grants a permanent lease in a case where he was not authorised, the possession of the lessee is not adverse to the endowment during the life of the head. 44 M. 821 Ref. (*Mookerjee and Cuming, JJ.*) GAJENDRA NATH DEY *v.* MOULVI ASHRAF HOSSAIN. **27 C W. N. 159 : 36 C. L. J. 48 : 1923 Cal. 130.**

———*Alienation by manager —Necessity—Proof of.*

Alienation to be valid against the reversioners is required to be supported by proof *aliunde* that they were made for valid and legal necessity. The same rule applies in the case of *Shebaits* and other persons who have no authority to alienate property except for preservation of the estate which they represent. Unavoidable necessity

RELIGIOUS ENDOWMENTS— Alienation by manager.

must be established in order to justify absolute alienation or grants of perpetual leases of endowed property. (*Spencer and Venkatasubba Rao, JJ.*) MEETHALE CHALIL PARKUM V. KELUKUKUP *v.* K. P. P. RAMAN NAIR **1924 M 247.**

——*Alienation by manager—Debts—Necessity—Borrowing by trustee—Decree against temple funds.*

Where the trustee of a Hindu temple borrows money on a simple bond for temple necessity contracting to repay the debt out of temple funds the creditor is entitled to a decree against the funds of the temple in respect of the debt. 32 M. L. J. 250 Dist: 31 Mad. 47 : 43 Mad. 795 : 15 L. W 72 Foll (*Ayling and Krishnan, JJ.*) SUNDERASAN CHETTY *v.* VISVANATHA PANDARASANNADHI AVERGAL. **45 Mad. 703 : 16 L. W. 83 : 31 M. L. T. 66 (H. C.) : (1922) M. W N. 444 : 43 M L. J 147 : 1922 Mad. 402.**

——*Alienation by manager— Necessity — Onus of proof Mahant—Chela Positions of—Right to contest alienation by Mahant.*

In the case of a mortgage granted over the security of endowed property by theMahant thereof, it lies upon the mortgagee or those claiming through him to prove that the debt was a necessary expense of the institution itself. It is not uncommon in the case of celibate ascetics to take a minor as disciple in order that he might succeed to the office of Mahant after the death of the then Manant Where property is purchased from the income of an *asthan* it is trust property. A chela or disciple can protect the property of the endowment either by virtue of his interest as a possible future successor of the estate or by virtue of his being a person interested in the endowment. If he acts in the former capacity he is entitled to a declaration under S. 42 of the Sp. Rel. Act because a sale of the property would affect his contingent right. If he acts as a member of the public interested in the endowment he can adopt the procedure prescribed by O. 1, R. 8, C. P. Code. Being a disciple he has at all events, a contingent right to succeed to the officer of Mahant on the death of the present holder of the office and he can take steps to protect the endowed property against any acts of waste committed by the present holder of the office or against any threatened sale in execution of a decree not legally enforceable against the endowment. (*Kanhaiya Lal, J. C.*) BISHUNATH BHARATHI *v.* CHAUDHRI HAR SARUP.
8 O. L. J. 395 : 1922 Oudh 142.

——*Alienation by manager—Necessity.*

Where the title to property is vested in Mahants an alienation by a Mahant, in the absence of legal necessity, will enure only for his lifetime. It will be open to each of them to challenge an alienation which is invalid, limitation running from the date of the death of the preceding Mahant. (*Das and Bucknill, JJ.*) MAHANT RAMRUP *v.* LAL CHAND MARWARI. **1 Pat. 475 : 3 Pat. L. T. 352 : 1922 P. 243.**

——*Alienation by manager—Lease of trust properties.*

RELIGIOUS ENDOWMENTS—Dedication.

Leases granted by a Mahant in the ordinary course of management of the estate are binding on his successors. There is no difference in this respect between the karta of a joint family and a Mahant.40 M. 709, dist. 6 M.I.A. 393, Ref (*Jwala Prasad, A. C. J. and Das, J.*) MAHANTH JAI KRISHNA PURI *v.* BHUKHAL GOPE.
6 P. L. J. 638 : (1922) Pat. 113 : 1922 P. 165.

Dedication.

——*Dedication—Proof—Conduct — Private and public trusts.*

A man can create a private trust by building a temple and an idol and endowing it with funds or income for strictly private purposes not merely retaining the management and control in the hands of himself and his family, but restricting the enjoyment to himself and his family and he may out of the warmth of his heart allow other persons outside the original beneficiaries, to enjoy from time to time the advantages thereby created. But in such a case especially with a temple and idol publicly constituted and publicly accessible in which the appearance may be what one may describe as ambiguous,one would expect and ought to insist upon clear evidence of permission given or license given and permission withheld, because it is equally true that a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and in that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication by conduct. Once he has shown his intention to dedicate, the matter passes out of his hands and the beneficiaries to whom the use is dedicated, have a right in such use. Where there is no express deed of dedication or document creating the trust the courts have to depend almost entirely upon the history of the place and the user by people generally from time to time, to decide whether it is private or was intended to be a public trust (*Walsh and Ryves, JJ.*) RAM DAS *v.* MUSSAMMAT BASANTI.
20 A. L. J. 789 : 1922 All. 519.

——*Dedication—Charitable gift—Perpetuity—Application of income.*

Perpetuity is not necessary to a charitable gift. A donation may be a charity, and an endowment. But if the donation can wholly be applied as income it is unnecessary in considering whether it is charitable and thus within the exception to the rule against prepetuities. (*Marten, J.*) THE ADVOCATE-GENERAL OF BOMBAY *v.* YUSUFALLI EBRAHIM. **24 Bom. L. R. 1060.**

——*Dedication—Religious purpose.*

Planting of holy trees is a dedication for a religious purpose,if it is done on a spot consecrated for that purpose. The mere fact it is called debutter does not show its true nature beyond doubt. (*Mookejee and Rankin, JJ.*) CHANDRA MOHAN GANGULI *v.* JNANENDRA NATH BANNERJEE.
27 C. W. N. 1033 : 1924 C. 400.

——*Dedication—Restrictions on successors—Validity.*

The son of the founder of an endowment by a deed of trust dedicated a piece of land for locating the deity and declared that the deity should

RELIGIOUS ENDOWMENTS—Dedication.

not be removed therefrom till a similar or better habitation wa found. *Held*, the condition was for the benefit of the deity and as such was quite valid. If however circumstances should change, the Court on a proper application can pass orders as it thinks fit. (*Sanderson, C.J. and Richardson, J.*) PRADYUMNA KUMAR MULLICK *v.* PRAMATHA NATH MULLICK. **27 C.W.N. 684 : 1923 Cal. 708.**

———*Dedication — Formalities— Inference from conduct*

The execution of a document is not essential to constitute a valid dedication. Dedication of property to an idol can be inferred from user and from the long application of the proceeds of the property and from family conduct. 8 W.R. 42; 18 B 247 ; 30 C. 1003, Ref. (*Mookerjee and Chotzner, JJ.*) RAMBRAHMA CHATTERJEE *v.* KEDAR NATH BANERJEE. **36 C. L. J. 478 : 1923 Cal. 60.**

———*Dedication—Succession to Guru—Presumption as to dedication.*

The property of a *Sadhu* cannot necessarily be presumed to be devoted to religious purposes for the reason that it descended from *Guru* to *Chela*, A secular property, even if acquired by a *Sadhu*, does not change its character unless dedicated for a special purpose, religious, charitable, etc. (*Broadway and Zafar Ali, JJ.*) KISHAN DAS *v.* LACHHMAN SINGH

5 Lah. L. J. 351 : 1923 Lah. 544.

———*Dedication—Evidence of—User—Rights of inheritance.*

Where it is found by the Courts below that certain property had been set apart for a shrine and had been in the possession of a trustee of the shrine, the inference is that the property belongs to the religious institution and is therefore not recoverable by the heirs of the founder. (*Shadi Lal and Dundas, JJ.*) MT. DAROPDI *v.* LAL CHAND. **4 Lah. L. J. 67 : 1922 Lah 320 (1).**

———*Dedication—Vague—Bequest to charity and spread of Hindu religion—Sanskrit language.*

Per Spencer J.—A trust for the spread of Hindu religion is vague and indefinite. A trust for the spread of Sanskrit language is definite but a trust for the spread of Hindu religion for Sanskrit learning as the trustees might deem fit is vague and unenforceable. *Per Devadoss J:*—A bequest for the spread of Hindu religion as well as that for the spread of Sanskrit language is vague and unenforceable. Authorities on the point reviewed. (*Spencer and Devadoss, JJ.*) SRI GADICHERLA VENKATANARASIMHA RAO GARU *v.* NAYAPATHY SUBBA RAO.

46 Mad. 300 : 32 M L. T. (H C.) 47 : (1923) M. W. N. 111 : 17 L. W. 31 : 1923 Mad 376.

———*Dedication—Writing not necessary — User of income*

Dedication need not necessarily be by deed. Long user of income from a certain source for charitable purposes will be evidence of dedication. (*Spencer and Kumaraswami Sastri, JJ.*) TADI BULLI TAMMIREDDI *v.* GANGIREDDY.

45 Mad. 281 : 30 M. L. T. 323 (H. C.) : 16 L. W 55 : 42 M. L J. 570 : 1922 Mad. 236.

RELIGIOUS ENDOWMENTS—Founder's rights.

———*Dedication—Absolute or partial—Performance of services—Evidence of conduct.*

Where a donor gifted lands, to a deity in a Hindu temple for the conduct of daily *naivedyam* and *deeparadana* by a specified archaka and concluded by saying that the said archaka and his sons and grandsons should enjoy the same for ever and render the services to the deity : *Held*, that the donee was the deity itself and the archaka was not entitled to the surplus income from the remaining after the performance of the services. It would be dangerous to hold that if the trustees of religious trusts have for many years been applying the income to their own personal use the Court must construe the trust deed in the light of such conduct. (*Abdur Rahim and Moore, JJ.*) MUTTRYI SRINIVASACHARYULU *v.* DINAVAHI PRATYANGA RAO. **64 I. C. 816 : 30 M. L. T. 101 (H. C.).**

——— *De* [illegible] *plication of income—Long period.*

The mere fact that the proceeds of any land were being applied in varying quantities and at recurring intervals to the maintenance of a temple is insufficient to show that the lands have been dedicated to it. The onus lies on the party who sets up the case to show that the property has been inalienably dedicated to a temple or idol 2 Cal. 341 ; 8 W. R. 42 ; 18 W R 399, Foll. (*Batten, J. C.* MUKUND SINGH *v.* MAHANT PREMDAS. **1922 Nag. 122.**

———*Dedication—Proof—Application of income to trust.*

The mere application of the income of a property to support a *thakurdwara* for a long time is insufficient to prove that the property is endowed (*Daniels and Wazir Hasan, A.J.Cs.*) RADHAKISHEN *v.* JAMNA PRASAD. **61 I. C. 956 : 8 O. L. J, 127.**

———*Dedication to public—Evidence.*

Mere evidence of public worship alone cannot justify a presumption that a public dedication has been made. Each case must be decided with reference to the particular facts consistent or inconsistent with private ownership. (*Kincaid and Raymond, JJ.*) GOVERDHANGI *v.* VISHINGI. **63 I. C. 370 : 15 S. L. R. 38.**

Founder's rights.

———*Founder's rights—Devolution of trusteeship.*

When the worship of an idol has been founded the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. 17 C. 3 ; 32 C. 129 ; 35 A. 283 ; 11 C. L. J. 2 ; 40 C. 251 ; 29 A. 663 ; 22 C. L. J. 404 ; 36 A. 161, Rel, In the application of this rule it may not always be easy to determine who are the founders. One person may provide the site of the temple another may build the temple and establish the idol, while a third may dedicate property for the performance of the daily services of the idol. Where the owner of the site relinquishes

his right in the land, he may not be a founder unless he indicates at the time, expressly or impliedly, that he will associate himself with others in carrying out the objects of the foundation. *Prima facie* all the persons who establish the worship are entitled to take part in the management. If a number of persons provide the original endowment, they together constitute the founder. But persons who subsequent to the foundation furnish additional contributions do not thereby become joint founder; their benefaction is regarded as nothing beyond an accretion to an existing foundation. 24 M. 219; 7 M. 499; 17 C. 3, Ref. The shebaitship is vested in the founder and his heir unless he has disposed of it otherwise equally in the case of private and public endowments. No distinction between the two classes of cases has been drawn in this respect in the judicial decisions. 18 A. 277; 11 C. L. J. 2; 40 C. 251; 5 C. 228; 40 M. 612, Rel. Consequently whether a foundation is public or private the threefold principle is applicable, namely, (i) the devolution of the trust on the death or default of each trustee depends upon the terms on which it was created, of the usage of the particular institution where no express trust-deed exists; (ii) the worship of the idol is vested in the founder and his heirs, in default of evidence to show that he has disposed of it otherwise; (iii) and where a shebait appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management reverts to the founder and his representatives even though the endowment has assumed a public character. The *indicia* of a public temple discussed 18 B. 721; 11 A 18; 18 M. L. T. 543; 4 L. W 228, 4 L W 444; 27 M.L.T. 11, Rel (*Mookerjee and Cholzner, JJ.*) ANANDA CHANDRA CHAKRABARTI *v.* BROJA LAL SINGHA. **50 C. 292 : 1923 C. 142**

——— *Founder's rights— Righ to appoint trustees and provide for management and administration – Usage of the institution—Participation in offerings.*

Where the worship of an idol has been founded the shebaitship of the idol is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. 17 C. 3 : 32 C. 129 : 35 A. 213; 20 C. W. N. 314, Rel. The founder is competent to provide for the government and administration of the trust and can give directions for its management not inconsistent with its character as a religious or charitable trust. The test in each case is whether the direction of the founder is inconsistent with the nature of the endowment as a religious or charitable trust. The proof of the intention of the founder becomes almost conclusive, when the usage is immemorial. The intention may be presumed from a number of instances extending over a limited period, if they are made out by clear and unambiguous evidence. Where the founder of an endowment prescribed the line of succession the shebaitship in the descendants of his sons and also directed that the descendants of his daughters would be entitled to participate in the bhog offerings dedicated to the idols established by him. *Held*, that it was competent to him to do so. (*Mookerjee and Cholzner, JJ.*) RAMBRAHMA CHATTERJEE *v.* KEDAR NATH. **1928 Cal. 60.**

——— *Founder's rights—Founder cannot alter line of succession.*

In the absence of an express reservation in the deed of gift it is not competent to the founder of a debutter or his heirs to make a change in the order of succession of shebait. (*Woodroffe and Cuming, JJ.*) GOURIKUMARI DASI *v.* RAMANIMOYI DASI. **50 Cal. 197 : 26 C. W. N. 920 : 1923 Cal. 30.**

——— *Founder's rights—Right of, to provide for management—Trusteeship.*

Ordinarily the founder of a trust is entitled to provide for the management of the trust and to reserve to himself and his heirs the power to appoint trustees; but if he exercises that power and appoints a trustee, the trustee cannot be removed except in the manner provided in S. 92, C. P. Code. (*Lindsay and Kanhaiya Lal. JJ.*) PUTTU LAL *v.* DAYA NAND. **20 A L. J. 712: 44 A. 721 : L. R. 3 A. 455: 1922 A. 499.**

Idol.

——— *Idol—Rights to sue on behalf of—Person interested.*

In suits to recover property dedicated to an idol the real plaintiff is the idol and the person suing on behalf of the idol is not personally interested in the suit any more than is the next friend or guardian of a minor. A manager of the property of an idol has a sufficient interest to sue for the recovery of its properties from a trespasser. 38 A. 735. Ref. (*Ryves and Daniels, JJ.*) SHEORAMJI *v* SRI RIDHNATH. **45 A. 319 : 21 A L. J. 148 : L. R. 4 A 128 : 1923 A. 160.**

——— *Idol—If can be gifted away.*

Per *Richardson, J.* :—It is difficult to understand how an image considered as a legal or spiritual entity can properly be said to be the subject of gift. (*Sanderson, C.J, and Richardson. J*) PRADYUMNA KUMAR MULLICK *v.* PRAMATHA NATH MULLICK. **27 C. W. N. 684 : 1923 Cal. 708.**

——— *Idol — Appointment of shebait—What constitutes.*

Where a person was appointed manager of the worship of an idol in pursuance of an agreement settling differences between members of the family, the person so appointed does not become shebait and he could not recover any amount out of pocket expenses made by him. (*Maclean, C.J. Harrington and Fletcher, JJ.*) TRIGUNA SUNDARI DASI *v.* RADHARANI DASI. **37 C. L. J. 20 : 1923 C. 97.**

——— *Idol—*De facto *manager—Right to sue trespasser for ejectment.*

Where a person has been recognised as the *de facto* manager of the property of an idol, he is entitled to sue to eject a trespasser and take other steps for protecting the idol's property. (*Newbould and Ghose, JJ.*) HARI MOHAN MODAK *v.* RAMESWAR DAS. **64 I. C. 737.**

——— *Idol—Right of worshipper to remove idol and substitute another.*

RELIGIOUS ENDOWMENTS—Idol.

It is not competent to an individual worshipper of a village temple, not being its trustee or a manager, to remove an idol alleged to be cracked and substitute therefor a new idol made by himself. (*Oldfield and Devadoss, JJ.*) GOLLA CHAKRAPANI *v.* KATNENI LAKSHMANAPERUMALU
17 L. W. 62 : (1923) M. W. N 89 : 44 M. L. J. 90 : 1923 Mad. 369 (1).

———*Idol—Right of worship—Special right—Proof of—Usage.*

The public are entitled to worship the idol of a temple at the temple itself. But a person may possess a special right of worship as a civil right of worship at a particular place, but there must be distinct evidence to prove it and *mamool* or usage may be examined to decide whether any such right exists. But the mere fact that worship was offered at a particular place for a number of years is insufficient in the absence of other evidence to prove the right (*Sundara Aiyar and Phillips, JJ.*) ANKAPATI SUBBA REDDI *v.* TIPPANA NARAYAN REDDI GARI SUBBA REDDI
10 M. L. T. 428 : 12 I. C. 537 : 21 M. L. J. 1027.

Management of trusts.

———*Management of trust—Dharmakarta of temple—Position and powers of—Conversion of trust property—Falsification of accounts—Removal.*

The dharmakartha of a Hindu temple is in law a trustee. His position is not that of a shebait of a religious institution or of the mahant of a mutt These functionaries have a much higher right with larger power of disposal and administration and they have a personal interest of a beneficial character. 27 M. 435, Ref. But a dharmakarta is literally no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee. Where the discoverable origins of property show it to be trust property the onus of establishing that it has legitimately come into the trustee's own rights is heavily upon the trustee who must show by the clearest and the most unimpeachable evidence the legitimacy of his personal acquisition. Where the trustee of a Hindu temple set up an unfounded assertion of private ownership in himself of the properties of the temple and resisted the recovery of those properties for the trust which he administered and supported that assertion by the concoction of false accounts filed as evidence in the case, he is guilty of seriously reprehensible conduct and is unfit to be retained in office of trustee. (*Lord Shaw.*) T. P. SRINIVASACHARI *v* C. N. EVALAPPA MUDALIAR.
45 Mad. 565 : 16 L. W. 247 : 24 Bom. L R 12 4 : L. R. 3 P. C. 213 : 36 C L. J. 524 : 49 I. A. 237 : 31 M. L T. 1 (P C) : 21 A. L. J. 250 : 27 C.W.N. 317 : 43 M.L.J. 526 : 1922 P.C. 325 (P.C).

———*Management of trust — Founder's widow—Powers of — Testamentary disposition —Plea of* jus tertii *in defence.*

The manager appointed by the founder of a Hindu endowment failed to take up the office, and the founder's widow took up the management. She died leaving a will by means of which

RELIGIOUS ENDOWMENTS—Management of trusts.

she appointed a third party to succeed her as a manager. In a suit by the founder's heirs for a declaration that the testamentary appointment was invalid, *Held*, on her husband's death, she had a right as representing her husband's estate to make another appointment to take effect immediately ; but she had no power to make herself manager for her life first and then a testamentary disposition provide for the management after her death. *Per Walsh, J.*— A plea of *jus tertii* cannot be set up in this class of cases. (*Walsh and Piggott, JJ.*) GOSWAMI PURAN LALJI *v.* RAS BEHARI LAL. **20 A. L. J 527 : L. R 3 A. 334 : 44 A. 590 : 4 U.P L. R. (A). 119 : 1922 A. 285.**

Management of trust—Suit by, in his capacity a manager for recovery of money due to temple—Temple owing money to the manager — Effect of.

Plff. sued as manager of a Hindu temple alleging himself to be hereditary trustee thereof, for the recovery of certain moneys due to the temple. In the course of the plaint the plaintiff stated that he had spent moneys out of his pocket for the temple and that he was entitled to be reimbursed in respect of those moneys. The trial Court took an undertaking from the plff. that he was recovering the money only on behalf of the temple and passed a decree in his favour as manager. The appellate court without going into the merits of the case dismissed the suit holding that the plaintiff claimed adversely to the temple as he was in effect trying to appropriate the moneys himself. *Held*, that the decree of the trial court was correct as the plaintiff was suing in terms as the manager of the temple. (*Shah, A. J. C. and Crump, J.*) VINAYAK SHIV RAO *v.* ATMARAM RAYAJI.
24 Bom L.R. 1308 : 1923 Bom. 170.

——*Management of trust—Establishment of thakur for worship—Removal by succeeding shebaits Validity of.*

Where the worship of a Thakur was founded by M and properties were also dedicated for its worship but no condition as to the location of the Thakur was imposed by M it is not open to any subsequent shebait to impose restrictions which would fetter those who, subsequently, as heirs of the founder become shebaits. It is competent to one of the heirs of the founder to remove the Thakur from the Thakurbari during his turn of worship 17 C. 3, Ref. (*Greaves, J.*) PROMATHA NATH MULLICK *v.* PRADYUMNA KUMAR MULLICK.
26 C. W. N. 909 : 1923 Cal. 99.

———*Management of trust—Contract with shebait—Does not terminate on death of shebait.*

Contracts by the *shebait* of a Thakur in respect of dedicated property entered into as shebait do not terminate on the death of such *shebait* and can be enforced by the successor of *Shebait.* (*Chatterjee and Newbould, JJ.*) DASARATHI CHATTERJEE *v.* ASIT MOHUN GHOSH.
59 I. C. 126 : 24 C. W. N. 879.

———*Management of trust—Temple—Right of trusteeship—Usage.*

Where the site on which a temple is built was purchased in the name of one member of a Hindu

RELIGIOUS ENDOWMENTS—Management of trusts.

family that by itself does not show he was the sole founder and hence trusteeship is not solely vested in his family. Where even before the new temple was built, the family worshipped an idol which was later on installed in the new temple, the old foundation which was vested in the family still remains intact. In the absence of evidence to show the rules of succession, the usages of the institution and conduct of parties should be looked to. (*Krishnan and Ramesam, JJ.*) NARAYANAN CHETTY *v.* ELAYAPERUMAL.
1924 M. 400.

——— *Management of trust—Acts of predecessor when binding on successor—Commutation of rent.*

Succeeding trustees of a charity are not estopped from reverting to the *waram* rate in repudiation of an arrangement for commutation into a fixed money rent entered into with the tenants by the preceding trustees. 37 M L.J. 698 Ref. (*Ayling and Ramesam, JJ.*) SUNDARARAJACHARIAR *v.* ALI MAHOMED ETHIBAR KHAN SAHEB
44 M. L. J. 649 : 1923 Mad 661.

——— *Management of trust—Village temple—Suit for possession of property.*

As regards property bequeathed to an idol or shrine, though it nominally vests in the idol or shrine, the right to possess the property is in some human being or beings, *viz.*, the trustee or manager and if there is none such, in the worshippers. In the absence of a trustee or manager it is open to the worshippers with the permission of the Court under O. 1, R. 8, C. P. C., to sue for recovery of possession of the properties belonging to the religious charity from a trespasser. 37 M. L. J. 554, Ref. 27 M. L. J. 270, Dist. Where persons claiming to be the lawful trustees of a village charity are proved to have acted as trustees without any dispute for a number of years, it is a legitimate inference that they had been lawfully appointed or that their self-appointment had been ratified and adopted by the beneficiaries (*Schwabe, C. J. and Wallace, J.*) RANGASWAMI NAIDU *v.* KRISHNASWAMI IYER.
32 M. L. T. (H.C.) 133 : (1923) M. W. N. 84 : 17 L. W. 147 : 44 M. L. J. 116 : 1923 Mad 276 (2).

——— *Management of trust — Kattalai in Hindu temple.*

Kattalai in a Hindu temple are independent trusts and are not subject to the supervision of the Devasthanam Committee. (*Phillips and Ramesam, JJ.*) KANDASAMI IYER *v.* SIVA CHIDAMBARAM.
16 L. W. 340 : 31 M. L. T. 217 : (1922) M.W.N. 704 : 1923 M. 209.

——— *Management of trust—Association of strangers in management.*

It is not competent to the trustee of a religious endowment to introduce a stranger into the trusteeship as joint trustee without committing a breach of trust. (*Spencer and Krishnan, JJ.*) KOTASSERI E V SANKARAN NAMBI *v.* KANHOLI D ANTHERJENAM.
16 L. W. 26 : (1922) M. W. N. 428 : 43 M. L. J. 572 : 1922 Mad. 269.

RELIGIOUS ENDOWMENTS—Mutt.

Mutt.

——— *Mutt—Succession—Sanyasis — Chela—Repudiation—Effect of.*

According to the religious law and custom, a chela or disciple entirely repudiated by his *guru* for misconduct becomes an utter outcaste, the tie of discipleship is entirely broken and the repudiated chela is in no way entitled to succession, either as a *chela* to the guru who has repudiated him or as a *gurubhai* to any lawful chela whom the aforesaid guru may thereafter initiate. (*Rafique and Piggott, JJ.*) MAHANT JAGANNATH GIR *v.* TRIGUNANAND.
L. R. 3 A. 466.

——— *Mutt—Head of, position of—Trustee—Scheme—Power of courts to frame.*

The Acharya of Swaminarayan Temple at Vadtal was held to be a trustee to whom S. 92, C. P. Code, would apply. The Mahant or manager of a Math is not a trustee in the strict sense of the term but he does hold a fiduciary position. (*Marten and Pratt, JJ.*) SHRIPAT PRASAD *v.* LAKSHMIDAS.
25 Bom L. R. 747 : 1924 B 193.

——— *Mutt—Succession— Nomination—Designation of heir by the Guru—Initiation ceremony.*

Where the guru of a Math designates clearly a particular person as his heir, such person is entitled to succeed to the guruship, even though no formal ceremony of initiation has taken place in the guru's lifetime. (*Macleod, C. J. and Shah, J.*) KRISHNAGIRI TRIKAMGIRI *v.* SHRIDHAR KAVLEKAR.
46 Bom. 655 : 24 Bom. L. R. 140: 1922 Bom. 202.

——— *Mutt — Succession — Removal of the mahant.*

A mahant is the head of any Hindu Dera or religious institution and succession to the office may be hereditary in which case the successor would be a mahant. The only law as to mahants, their offices, functions and duties is to be found in custom and practice, which is to be proved by testimony 11 M. I. A. 405, 428 App. A self-constituted sangat cannot exercise supervision or control over the math or mahant. A custom entitling the worshippers to control the appointment or succession of mahants or to remove them without invoking the aid of law must be proved. (*Broadway and Abdul Qadir, JJ.*) FATEH SINGH *v.* BUR SINGH.
65 I. C. 842.

——— *Mutt — Head of—Debts borrowed by—Binding nature—Creditor's rights.*

The head of a mutt cannot alienate the mutt properties unless constrained to do so by unavoidable necessity. It is not sufficient to show the debt is shown to have been incurred for mutt purposes and not for the head's private purposes in order to make it binding on the properties. Except for unavoidable necessity, the head of a mutt cannot create any interest in the mutt property to enure beyond his life-time. Properties in the hands of a madathipathi will not be liable for the debts of his predecessor if the borrowing was not for a justifiable purpose or he had enough funds in his hands at the time of the loan. (*Krishnan and Ramesam, JJ.*) LAKSHMINDRA THIRTHA SWAMIAR *v.* VIBHUDAPRIYA THIRTHASWAMIAR.
44 M. L. J. 187 : 17 L. W. 274 : 1923 Mad. 288.

RELIGIOUS ENDOWMENTS—Mutt.

——Mutt—Head of—Powers of alienation—Legal necessity

The Mahant of an endowment is the proprietor of the property although he holds these properties in trust. He has very large administrative powers over the affairs of the asthan and undoubtedly has power to sell or mortgage the property in case of need or for the benefit of the asthan. That being so, it is impossible to maintain that he has no saleable interest in the properties of the asthan. Where therefore a mahant in order to defend his title as against a rival claimant borrowed large sums of money and the creditors in execution of decrees on these debts sold in execution the properties of the asthan *held* that the purchasers at the execution sale had acquired a valid title to the property in question, the debts having been contracted for necessary purposes. (*Das and Bucknill, JJ.*) KEDAR NATH GOENKA *v.* MAHANTH JAGAR NATH DAS. **1 Pat. L. R. 73. 1924 P. 300.**

——Mutt—Head of —Mahant—Marriage—Forfeiture of office.

In the case of Sitarmarthi Asthan the marriage of the mahant does not entail the forfeiture of his office. The fact that there has been no instance of a marriage on the part of a mahant is strong evidence of a custom against marriage. (*Das and Bucknill, JJ.*) MAHANT RAGHUNATH DAS *v.* SHEOKUMAR MISSIR. **1923 P. 309.**

——Mutt— Succession—Asthan—Mourasi—Mutt—Devolution of office—Custom of mahants

A mourasi asthan is one in which the office or mahant is hereditary and apart from custom devolves upon the chief disciple of the existing mahant. By the rules of the Satlakha Asthan in mouza Satlakha in the Muzeffarpore Dt. the senior bairagi chela on the death of the mahant is entitled to succeed to the mahantship. The principal chela or pupil is entitled to succeed on the death of the presiding mahant of a mourasi or hereditary matt. If the principal pupil be personally unfit to succeed or be disqualified by one of the grounds of disqualification specified in the shastras, then the presiding mahant should in his lifetime select a properly qualified pupil to succeed him. 6. S. D.A. Beng. 262 foll. Different customs prevail in different mutts and where such are proved to exist they must govern, the order of succession. The mere fact that a mahant has professed to appoint a successor does not prove the existence of such a power. (*Muller, C. J. and Jwala Prasad, J.*) MAHANTH JAGERNATH DAS *v.* JANG BAHADUR RAI.

4 Pat. L. T. 285 : 1923 Pat. 33 : 1923 P. 218 (2).

——Mutt Head of a—Position of.

The head of a mutt is not a trustee, except as to any specific property proved to have vested in him for a specific and definite object. (*Das and Bucknill, JJ.*) MAHANT RAMRUP *v.* LAL CHAND MARWARI. **1 Pat. 475 : 3 Pat. L. T 352 : 1922 P. 243**

Trustees.

——Trustee—Acts of majority—When binding on trust—Omission to consult some trustees—Effect of.

RELIGIOUS ENDOWMENTS—Miscellaneous.

In the case of religious endowments with many trustees or uralans, the general rule is that all of them are entitled to be consulted before any act is done in the management of the trust property. The act of the majority of the trustees in granting a lease of the trust property will be binding on the trust only when all the trustees are consulted and their wishes ascertained after mutual discussion. The mere fact that one of the trustees obtains a benefit from his trust does not abrogate the rule. (*Oldfield and Ramesam, JJ.*) MATAMULLA MANIKOTH PATTAM CHANDU *v.* KUTTIZIL RAYIRU. **15 L. W. 264 : 1922, M W.N. 172 : 42 M. L. J. 280 : 1922 Mad. 2.**

Miscellaneous.

——Archakas—Position of.

The pujari or archaka is no the shebait of the temple; he is appointed by the shebait as the purohit to conduct the worship; but that does not transfer the rights and obligations of the shebait to the purohit and he is not entitled to be continued as a matter of right in his office as pujari. 16 W. R. 99; 25 C. W. N. 201; 15 M. 183; 42 M. 618; 35 M. 631 Rel. (*Mookerjee and Chotzner, JJ.*) ANANDA CHANDRA CHAKRABARTI *v.* BROJA LAL SINGHA. **36 C. L. J 356 : 50 C. 292 : 1923 C. 142.**

——Debutter property—Family trust—Right of beneficiaries to put an end to the trust.

Where there is a private family debutter, the shebaits cannot by their dealing give the property a different turn. It is the members of the family interested who by their consent may convert the debutter property into secular property and who are the members of the whole family, male and female, interested in the worship of which the shebaits are merely managers. (*Woodroffe and Suhrawardy, JJ.*) MONMOHAN GHOSH *v.* SIDHESWAR DUBEY, **27 C. W. N. 218 : 1923 Cal. 177.**

——Founder—Who is—Right to shebaitship—Rights of pujari or priest.

Where the worship of an idol has been established by the ancestors of a lady she is not the original founder; nor can she be regarded as a founder because of her subsequent benefaction which is nothing beyond an accretion or addition to the existing foundation. 7 M. 499; 24 M. 219 Ref. When the worship of an idol is founded, the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution, 17 C. 3; 32 C. 129; 35 A. 283 Rel. The shebait appoints the purohit to conduct worship but that does not transfer the management of debutter estate from the shebait to the purohit, 16 W. R 99; 25 C. W. N. 201 Ref. (*Mookerjee and Rankin, JJ.*) KALI KRISHNA RAY *v.* MAKHAN LAL. **27 C. W. N. 411 : 50 Cal. 233 : 1923 Cal. 160.**

——Dharmasala—Public or private property—Evidence of treatment.

The widow of the deceased member can claim possession of her husband's share of a Dharmasala which had always been treated by the members of a Hindu family as private property and

she cannot be ejected therefrom A finding that a Dharmasala has always been treated as private property by the members of the family is a finding of fact binding on the Court in second appeal. (*Wilberforce and Abdul Kadir, JJ.*) SADHU DAS *v.* MUSHTAQ SHAH SINGH. **3 Lah. L. J. 514**

——*Golden Temple, Amritsar*—Granthi—*Succession to property acquired by—Judgment in previous suit—Admissibility of.*

A '*Granthi*' of the Golden Temple at Amritsar can spend the income of the office in any manner he pleases and any acquisition out of such income can be disposed of as he pleases and is inheritable by his sons in the ordinary way unless dedicated to religious purposes and a presumption as to dedication arises when one *granthi* succeeds another to the exclusion of the heirs of the latter, (*Scott-Smith and Abdul Raoof, JJ.*) INDAR SINGH *v.* FATEH SINGH. **1 Lah. 540 : 59 I. C. 734 : 64 P. W. R. 1921.**

——*Archaka—Hereditary archaka—Position of.*

Hereditary archakas are only servants of the temple subject to the disciplinary jurisdiction of the trustee They have a right of suit if they are improperly prevented from performing the duties of their office or dismissed without good and proper reasons. The possession of the temple and its properties by an archaka is only that of servant and the trustee can take possession of them. Hindu Law treats hereditary archakaship as immoveable property. 35 M. 631 ; 36 B 94 ; 45 B. 234 Ref. (*Deva Doss, J.*) SRI VANAMAMALAI JEER SWAMIGAL *v.* PERIA VENKATARAMANA CHARIAR. **(1922) M. W. N. 442 : 16 L. W. 931 : 1922 M 183.**

——*Offices of archakas and trustees should be separate.*

Generally speaking it is desirable that the offices of archaka and trustee should be separate, for it is only then that the work of the archaka could be properly supervised. (*Abdur Rahim and Moore, JJ.*) MUTTEYI SRINIVASACHARYULU *v.* DINAVATHI PRATYANGA RAO. **64 I. C. 816 : 30 M. L. T. 101 (H. C.).**

——*Crown—Grant—Appointment of trustee by the temple committee.*

On resumption of a religious endowment owing to mismanagement, a temple committee was appointed for satisfactory arrangements for the due performance of the services of the temple. Appointment of a trustee by the committee to manage the temple and the properties in such a case is valid as the Government can invest the temple committee with that power. (*Seshagiri Aiyar and Moore, JJ.*) PILLAIMUTHU PILLAI *v.* VEYINRAMUTHU PILLAI. **59 I. C. 183 : 12 L. W. 324.**

——*Mahant, removal of—Suit for restoration, if lies.*

Where the removal of a Mahant from Office was amply justified by his acts and omissions, he cannot ask to be restored merely because the persons who removed him were not authorized to

proceed in the manner in which they acted. (*Das and Bucknill, JJ.*) NIAMAT ALI *v.* YAD ALI SHAH. **63 I. C. 849 : 6 Pat. L. J. 408.**

RELIGIOUS ENDOWMENTS ACT (XX OF 1863).

——*Temple Committee—Power to appoint trustee temporarily.*

Per Wallis. C. J.—A Temple Committee constituted under Act (XX of 1863) can appoint a trustee temporarily

Per Sadasiva Aiyar, J.—Temporary appointments of trustees can be made only in emergent and exceptional cases and then only till the Committee has reasonable time to fix upon a suitable person to fill up the vacancy permanently. (*Wallis, C. J. and Sadasiva Aiyar, J.*) GOVINDARAJA MUDALIAR *v.* SABAPATHY MUDALIAR **61 I. C. 783 : 13 L. W. 158.**

——Ss. 3 and 4—*Suit against trustee or manager for removal.*

It could not have been intended by the Legislature that where there is a Committee appointed under S. 3 which controls the trustee, Manager or Superintendent, a suit may be instituted not merely against the Committee, but independently of the Committee against the trustee, Manager or Superintendent for his removal. The fact that a Committee has been appointed under S. 3 and the Committee has worked for many years without protest and challenge is *prima facie* evidence that the endowment is of the character described in S. 3 of the Act. 12 M. 366 Rel. (*Mookerjee and Beachcroft, JJ.*) BHEEMA RAUT *v.* DURGA PRASAD SINGH. **40 Cal. 323 : 16 I. C. 908 : 17 C. L. J. 183.**

——Ss. 3 and 4—*Kattalai—Temple Committee cannot interfere in.*

Though a temple may be subject to the control and superintendence of a Temple Committee, that fact does not give the Committee any right of supervision over the Kattalai which is an independent trust. (*Phillips and Ramesam, JJ.*) KANDASWAMI IYER *v.* SIVACHIDAMBARAM CHETTIAR. **16 L. W. 340: (1922) M. W. N. 704 : 1923 Mad. 209.**

——Ss. 3 and 14—*Rules for guidance of trustee—Dismissal of trustee*

Per *Napier, J.*—A Temple Committee has power to frame rules for the guidance of trustee, but the rules should not intringe on the rights of the trustee arising by virtue of his trust and power of management. The rules should not reduce the trustee to the position of a servant of the Committee. Any such rule is *ultra vires.* A Committee can investigate charges against a trustee and failure of the latter to attend and to offer explanations amounts to breach of duty. Before his dismissal on this ground he should be given an opportunity to defend himself. (*Sadasiva Aiyar and Napier, JJ.*) SUNDARA RAMA SASTRI *v.* ANANTHA KRISHNA NAIDU. **38 I. C. 695 : 5 L. W. 672.**

——S. 3—*Trustees appointed by Government—Rights of Committee.*

In a suit by a Temple Committee for a declaration that the suit temple was subject to its control and should be managed by a trustee appointed by it, the committee must prove that the right of

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S. 3.

appointing trustee vested in it. The fact that Government officials exercised supreme control over the management of the temple would not suffice. In the absence of the evidence of the fact that Govt appointed the trustees it is insufficient to prove the right of appointment, because, under the Common Law, the sovereign has the right to appoint trustees when there were not found persons competent to make such appointment. A wrongful assumption by the Govt. of the power to appoint a trustee, is not sufficient to bring the temple within S 3. (*Sankaran Nair and Oldfield, JJ.*) PIRAMANAYAGAM PILLAI *v.* AMBALAVANA PANDARA SANNADHI.

28 I. C. 833 : 2 L. W. 371

——— S 3—*Temple Committee - Power to appoint additional trustees*

A Temple Committee appointed under Act XX of 1863 has a discretionary power to appoint additional trustees to a temple under its superintendence and such appointments can only be questioned on the ground that the power was not exercised reasonably and in good faith. (*Ayling and Trabji, JJ.*) TIRUMALAIYAPPA PILLAI *v.* VENGU AIYAR.

28 I. C. 556 : (1915) M W. N. 280.

———Ss 3 and 4—*One trustee hereditary—Rest appointed by Committee—Subject to Committee—Right to call for accounts*

Per Wallis, C. J.—A temple of which one of the trustees is a hereditary trustee and the other trustees are appointed by the Committee comes under S. 3 of the Act XX of 1863. Some of the decisions have unduly fettered the powers of the Committee which it was intended by the Legislature it should possess, *viz.*, those conferred on the Board of Revenue by Reg VII of 1817 *Per Seshagiri Aiyar, J.*—It is doubtful if the decisions that lay down that no account can be called for from hereditary trustees are right. Nature and scope of territorial jurisdiction discussed. (*Wallis, C. J and Seshagiri Aiyar, J.*) SITHARAMA CHETTY *v.* SIR S. SUBRAMANIA AIYAR.

39 Mad. 700 : 19 M. L. T. 23 : 3 L W. 43 : 32 I. C. 211 : 30 M. L. J. 29

——— S 5—*Temporary manager—Court when can appoint.*

When a District Judge, without enquiring whether property was or was not under the management of any trustee. Manager or Superintendent at the time when the Act was passed and was transferred to such trustee. etc., by the Local Government, passed an order appointing the Collector as temporary Manager. *Held*, that the order was without jurisdiction and was liable to be set aside. (*Mears, C. J. and Sulaiman, J.*) MAHANT BASDEO GIR *v.* PREETAM GIR.

43 All. 50 : 18 A. L. J. 897 : 58 I. C. 162 : 2 U. P. L. R. (All) 275.

——— S. 5—*Application under—Order appealable.*

An order passed on an application under S. 5 is not a decree and therefore no appeal lies against such order. (*Mears, C. J. and Sulaiman, J.*) MAHANT BASDEO GIR *v.* PREETAM GIR.

43 All 55 : 18 A. L. J. 676 : 57 I. C. 484 : 2 U. P. L. R. (All.) 239.

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S. 10.

——— S 5—*Decree under, does not bar suit under S. 92, C P C*

A decree under S. 5 of the Act does not bar a suit under S. 92 of the Civil Procedure Code. (*Mookerjee and Buckland, JJ.*) SAHAYRAM *v.* KHAGENDRA.

63 I. C. 418.

——— S. 5—*Temple Committee's power—Dismissal of Dharmakartha—Grounds for—Validity.*

Under powers vested in the Temple Committee under Act XX of 1863, they cannot dismiss a Dharmakartha for not voluntarily rendering accounts, for failure to voluntarily furnish security or mere absence from the temple locality. An illegal order of dismissal cannot be validated by subsequently calling for accounts or for security. (*Miller and Abdur Rahim, JJ.*) ABHINAVOTHANDA VIDYARANYA BARATHI SWAMI *v.* BHEEMA ROW.

18 I. C 58 : 24 M. L. J. 358.

———Ss. 7, 9, 10 and 12—*Temple—Originally subject to the Committee of one taluq—Lands assigned to another taluk in Rev redistribution—Former Committee to have jurisdiction.*

Where lands belonging to a temple were originally in one taluq and subject to the Devasthanam Committee of that taluk and later on for revenue purposes the lands were assigned to another taluq in another Dt., the first Devasthanam Committee continues to have jurisdiction over the temple. (*Abdur Rahim and Ayling, JJ.*) RANGAPPA *v* KARNAM BHIMAPPA.

39 Mad. 949 : 36 I. C. 284 : 31 M. L. J 360.

———Ss. 7, 12—*Powers of Temple Committee—Vacancy—Effect.*

The powers in a Committee are not suspended by the occurrence of a vacancy among its members. 34 Mad. 1, Diss. 39 C 304 Appl (*Wallis, C. J. and Seshagiri Aiyar, J.*) SITHARAMA CHETTY *v.* SIR S. SUBRAMANIA IYER.

39 Mad. 700 : 19 M. L. T 25 : 3 L W 43 : 32 I. C. 211 : 30 M. L. J. 29.

——— S. 7—*Status of Committee—Suit by some only of the members.*

The Committee under S. 7 is a corporation having a legal entity and is similar in all respects to every other corporation. If one member is dead, the survivors can act until another is appointed. (*Mullick and Atkinson, JJ.*) MOHAMMED HASAN *v* NAZAR MOHAMED.

1 Pat. L. J. 437 : 38 I. C. 13 : 3 Pat. L.W. 31.

——— S. 8—*Improper or unfit person appointed—Remedy for his removal.*

If a District Judge appoints, against the clear intention of the Act under S 8, an improper and unfit person by reason of his religious qualifications or moral conduct, such person could be removed by proceedings equivalent to proceedings by *Quo warranto* in England. (*Sadasiva Aiyar and Napier, JJ.*) SUBBIER *v.* ABBOY NAIDU.

18 M. L T. 469 : 31 I C. 502 : 2 L. W. 1099 : 29 M. L. J 671.

——— S. 10 *Temple Committee—Vacancy—Election not held within three months—Order to fill up vacancy—Appointment by Committee—Order of appointment by Dt. Court*—Ultra vires—*Revision—C. P. Code, S. 115.*

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S 10.

Where on the occurrence of a vacancy in a Temple Committee, the remaining members of the Committee have failed to fill it up by holding an election as provided by S. 10 of Act XX of 1863 and they have been ordered to fill up the vacancy forthwith, they must themselves make the appointment The Civil Court has no power, after the expiration of the said three months, to direct the remaining members of the Committee to fill up the vacancy by election or to validate the appointment of the person so elected. If the Court does so, the order is without jurisdiction and is open to revision by the High Court under S. 115, C. P Code 6 M. L. J. 1 Dissented from. 11 M 25, 14 I A. 160 Dist. (*Lord Atkinson*) BALKRISHNA UDAYAR *v.* VASUDEO AIYAR. **40 Mad. 793 : 15 A. L. J. 645 : 2 Pat. L W. 101 : 25 C L J. 143 : 19 Bom. L R 715 : (1917) M. W N 628 : 6 L W. 501 : 22 C W. N 50 : 11 Bur. L T. 48 : 44 I.A. 261 : 40 I.C. 650: 33 M LJ. 69 (P.C.) :**

[On appeal from 14 M. L T. 354 : (1913 M. W. N 842 : 21 I. C. 451 : 38 Mad. 594: 25 M L. J. 536]

——— **S. 10**—*Order under Review—Inherent power.*

There being no explicit provision in the Act for a review, a Dt. Judge has no power to review an order passed by him under S. 10. Nor has he any inherent power to do so. 40 Cal. 552 ; 33 Mad. 65 ; 22 Cal. 419. Rel. (*Oldfield and Seshagiri Aiyar, JJ*) ANANTA RAJU SHETTY *v.* APPU HEGADE. **53 I. C. 56 : 37 M. L J. 162.**

——— **S 10**—*Appointment of Committee member—R 94, Civil Rules of Practice—No application—C. P C., S 115*

Neither R 94 of the Madras Civil Rules of Practice (Moffusil) as to taking evidence nor S. 141, C P. C., has application to proceedings under S. 10 by the District Court for the appointment of a Committee member. No revision under S. 115, C. P C lies against the order of the Dt. Judge making an appointment under that section nor should a well-considered order be revised under S. 15 of the Charter Act. (*Sadasiva Aiyar and Napier, JJ.*) SUBBAIYAR *v.* ABBOY NAIDU. **29 M L J. 671 : 18 M L. T 469 : 31 I. C. 502 : 2 L W. 1099**

——— **S. 10**—*Scope of— Order after three months to fill up vacancy—Election by members—Order upholding election.*

The object of S 10 of the Religious Endowments Act is to prevent a deadlock in case the Committee do not do their duty in holding an election by ordering the remaining members to fill up the vacancy if the Court does not itself appoint : and where after three months the Court orders the remaining members to fill up the vacancy the Committee cannot elect. (*White, C.J. and Oldfield, J.*) VASUDEO AIYAR *v.* DEVASTHANAM COMMITTEE, NEGAPATAM **38 Mad. 594 : 14 M. L. T. 354 : (1913) M W N. 842 : 21 I. C. 451 : 25 M. L J. 536 : [On appeal 40 I. C. 650 : 40 Mad. 793 (P. C.)].**

——— **S 11**—*Temple Committee members, if trustees—Contribution.*

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S. 14.

The members of a Temple Committee are not trustees ; but if they usurp the trustee's functions they become liable as trustees *de son tort* for all acts of breach of trust. The law that the right of contribution as between co-trustees is not applicable to members of a Temple Committee, does not apply to such cases. (*Benson and Sadasiva Aiyar, JJ.*) RAMANATHAN CHETTIAR *v.* SAMINATHAAIYAR. **12 M. L. T. 155 : 14 I C. 520 : 23 M. L. J. 278.**

——— **Ss. 12 and 13** — *Temple Committee — Management of temple—Archaka disobeying trustee under orders of Committee.*

A Devasthanam Committee has no power to interfere with the acts of the temple trustee in a question of purely temporal honours to definite persons either under S. 16 of the Endowments and Escheats Regulation (VII of 1817) or under S 12 of the Religious Endowments Act. An *archaka* of a temple is bound to obey the orders of the trustee and not those of the Committee in those matters (*Bakewell and Odgers, JJ.*) NILI RANGASWAMI MUDALIAR *v* KARI KRISHNA BATTACHARIAR, **54 I. C. 281 : 10 L. W 616.**

——— **S. 14**—*Lease by Mutawalli — Suit by worshipper to declare invalidity of, is not within the section.*

A suit by two worshippers of a mosque for a declaration that a permanent lease granted by the mutawallis is void and inoperative does not fall within purview of S. 14 of the Religious Endowment Acts, nor of S. 92 of the Civil Pro. Code. Worshippers in the vicinity have a special right over and above those of the general public and they are competent to maintain a suit under O. 1 R 8. of the C. P. Code even in the absence of special damage. A suit contemplated by S. 14 is a suit instituted primarily against the trustee, manager, or superintendent of a mosque, temple or religious establishment or the members of any Committee appointed under the Act and the only relief that can be asked for in such suits is a decree directing the specific performance of any act by such trustees, managers, etc , a decree for damages and costs against them and a decree directing their removal. (*Chatterjee and Huda, JJ.*) ASHRAF ALI *v.* MAHAMMAD NURAJJAMA. **49 I C, 355 : 23 C. W. N 115.**

——— **S. 14**—*Sole surviving member of committee—Suit for removal—Neglect of duty—Death of member pending litigation—Cause of action—Substitution of heir or members of new Committee—Suit against manager, trustee or Superintendent.*

A suit was brought under S. 14 against the sole surviving member of a Committee appointed under S. 3 of the Act for his removal for neglect of duty. *Held*, that the relief claimed was purely personal, and the cause of action did not survive against his heir on his death during the litigation. The members of the new Committee appointed after his death could not be substituted or added as parties. The suit against the trustee, manager or superintendent covered by S 14 is a suit against a trustee, manager or superintendent to whom the endowed property has been transferred

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S 14.

under S. 4. (*Mookerjee and Beachcroft, JJ.*) BHEEMA RAUT *v.* DURGA PRASAD SINGH.
40 Cal 323 : 16 I. C 908 : 17 C. L. J. 183.

——Ss 14 and 18—*Public trust.*

Where the object of a *Dharmasala* is that *Granth* should be read daily and no member of the *Sikh* community behaving properly can be excluded and where the *Granth* is to be remunerated partly at least from Govt. grants, it is a public institution. 14 M. 1 Dist. So a suit for the removal of the manager must have sanction according to S 18. 95 P. R. 1900; 18 A. 227; 19 A. 104; 23 B. 659 ; 7 C 767; 8 C. 32, Foll. 19 C. 275. Dist (*Chatterjee and Maude, JJ.*) BASAWA SINGH *v.* BHAGWAN KUAR. **181 P. W. R. 1912 : 17 I. C. 270 : 216 P. L. R. 1912.**

——S 14—*Property granted for religious service Duty to account for proceeds.*

Where lands are granted for a service to be performed, *viz.*, the upkeep of a mosque and its buildings andthe performance of religious services therein the grantee or his descendants need not strictly account for the disposal of the income of the lands so long as the services are performed properly. (*Spencer and Ramesam, JJ.*) MAHOMED HUSSAIN SAHIB BAHADUR *v.* MAHOMED ABDUL RAHIM BEG SAHIB. **(1922) M W. N. 74 : 15 L W. 241 : 42 M. L J. 272 ; 1922 Mad. 8.**

——Ss. 14 and 15— *Temple Committee—Dismissal of trustee--Inquiry—Mode of—Circulation of papers - Suit for damages for wrongful dismissal Defences.*

A Temple Committee has the power of suspending or dismissing a temple trustee for sufficient cause, but the power must be exercised at a meeting of the members of the Committee duly convened. An order of suspension passed on the opinion of the members recorded on papers sent to them for circulation is illegal and *ultra vires* especially if there were dissenting members. In a suit by the plff. trustee who was so suspended for a declaration that his suspension from the office was illegal and for damages it would not be a good answer to the suit to show that there were sufficient grounds for suspending the plff. A person in the enjoyment of a public office like that of a temple trustee is entitled to damages against co-operators who were parties to his wrongful removal from office. 7 Mad. 466, Foll. (*Wallis, C. J and Kumaraswami Sastri, J.*) VENKATA NARAYANA PILLAI *v.* PONNUSWAMY NADAR. **41 Mad. 307 : (1917) M. W. N. 839 : 22 M. L. T. 454 7 L. W. 85 : 43 I. C 205 : 33 M L J. 660.**

——Ss. 14 and 18—*Suit instituted by four persons with leave of Court—Death of one pendente lite—suit if abates.*

A suit instituted by four persons under S. 14 of Act XX of 1863 with leave of Court under S. 18 of the Act does not abate by reason of death of one of the plffs. during the pendency of such suit. 38 M. 1192 ; 29 M. L. J. 231 ; 40 M. 110 ; 13 I. C 232, Dist. 37 A. 296, Diss. 19 M. 47, Foll. (*Ayling and Sadasiva Aiyar, JJ.*) PANA LANA ANA ALAGAPPA CHETTIAR *v.* RAVANNA MANA PANA CHANA MUTHIA CHETTIAR. **41 Mad. 237. (1917) M. W. N. 740: 41 I. C. 745: 33 M. L. J. 173.**

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S 18.

——Ss. 14 and 18—*Suit to enforce trustee to perform duties.*

Persons having interest in a temple can sue for a declaration that the trustee must carry out certain duties. Where individual persons claim, as citizens,rights of worship or performing certain festivals in a temple, no sanction of the Advocate-General or Dt. Judge is necessary as the case is one for direction that the officer in charge of the trust should perform the duties according to usual practice (*mamool*) (*Seshagiri Aiyar, J.*) KADIRVELU CHETTY *v.* NANJUNDIER.
35 I. C. 88 : 3 L. W. 512.

——Ss. 14 and 18—*Removal of trustee.*

A suit for the removal of a trustee may be instituted with the leave of the Court under the authority of S. 140. (*Krishnaswami Aiyer and Ayling, JJ.*) GHULAM AHMED *v.* SHAHA MAHOMED USUF. **9 M. L. T. 301 : (1911) 1 M.W N. 142 : 9 I. C. 168: 21 M. L. J. 450.**

——S. 18—*Suit for removal of trustees of wakf—C. P. Code, Ss. 92 and 93.*

Suit for removal of trustees of *wakf* requires sanction of the Advocate-General and not leave of Court under S. 18 of the Act. A person seeking relief under the Act can get only that much relief beyond which he must seek the help of C.P. Code, Ss. 92, 93, the proper parties to the suit being the trustees only. (*Chatterjee and Richardson, JJ.*) MAKHALACHOR RAMHA *v.* FAIZUR RAHMAN CHAUDHURY. **35 I. C. 880.**

——S. 18—*C. P. Code, S. 92—Suit by temple trustee.*

A suit by a temple trustee to recover the amount due by deft. under the terms of the trust cannot be maintained without leave as the suit is not exempt from S 92, C. P. Code or S. 18, Religious Endowments Act. (*Ayling, Coutts-Trotter and Kumaraswami Sastri, JJ.*) SAMINATHA PILLAI *v* SUNDARESA PILLAI. **29 M L. T. 267 : 62 I. C. 911 : 14 L. W. 238.**

——S. 18—*Sanction under— Discretion of Court—Costs.*

S. 18 of the Rel. End. Act gives the Court a very wide discretion in regard to matters coming under it and the mere fact that the District Judge has overlooked some of the serious allegations contained in the petition for sanction does not justify the High Court in interfering in revision with the order of the Lower Court. In the absence of anything to show that the charges were unfounded and the petitioner acted negligently or inconsiderately with a view to annoy or harass and not *bona fide* in applying for sanction, the petitioner will be entitled to be paid his costs out of the trust property. (*Seshagiri Aiyar, J.*) SHUNMUGA OTHUVAR *v.* VEERARAGHAVA PILLAI. **2 L. W. 346 : 28 I. C. 637 : (1915) M. W. N 274.**

——S. 18—*Sanction granted to two persons—Suit by one.*

Where sanction is given to two persons, one of them alone cannot sue without getting the sanction amended, the sanction being a condition precedent and the object of requiring sanction

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S 18.

being to protect managers from vexatious suits. (*Sankaran Nair and Spencer, JJ*) VENKATESH MALLIA *v* BAMMAMMAPALLI RAMAYYA HEGADE.
38 Mad. 1 92 : 26 I. C. 202 : 27 M. L. J. 24 .

——S. 18 —*Leave once refused whether may be sub equently granted.*

The leave of the District Court under S. 18 of Act XX of 1863 once refused may subsequently be granted on a fresh petition to that effect on proper grounds. (*Sundara Aiyar, J.*) *In re* MANDAPPAYE. **12 I. C. 128 : (1911) 2 M. W. N. 167.**

RELIGIOUS FREEDOM ACT.

See CASTE DISABILITIES REMOVAL ACT (1850).

RELIGIOUS OFFICE.

See also (1) HINDU LAW—RELIGIOUS OFFICE.
(2) MAHOMEDAN LAW — RELIGIOUS OFFICE.

—— ——*Hereditary office—Surrender—Rights of the other members of the family—Right to transfer office*

Hereditary offices, whether religious or secular, are treated by the texts as indivisible. But modern custom has sanctioned such partition as can be had of such property by means of the performance of the duties of the office and the enjoyment of the emoluments by the different co parceners in rotation. The office remains in the family and the transfer by one member of his share to another member of the family could not be considered in any way objectionable. It would only reduce the number of members who are entitled to the office and a share in the emoluments. If all the members of the family agree to give up the duties of performance of worship and receiving emoluments, there could be no objection to their doing so But there is a great difference between the whole group of members surrendering their rights to the grantor and one member purporting to give up his right to the grantor which would cause an interference with the rights of the other members of the family. The duties of the office and the emoluments appertaining thereto remain with the family of the original grantee and those members of the family, who wish to retain the office and share the emoluments, are entitled to do so, and if one of the members of the family wishes to get rid of his duties as well as his rights he could only do so in favour of the remaining members of the family, and he cannot evade the ordinary rule as to alienations by purporting to surrender his share to the original grantor or put in other words, the alienations of a share by one member of the family is invalid whether it is made in favour of an outsider altogether or whether it is made in favour of the original grantor of the office. (*Macleod, C.J. and Crump, J.*) RAGHUNATH VITHAL BHAT *v.* PURNANAND. **47 Bom. 529 : 25 Bom L. R. 207 : 1923 B. 358**

—— ——*Evidence of dedication*

Properties dedicated to the office of *Granthi* of the darbar sahib are inherited by the person who succeeds to the office. But properties acquired by the *Granthi* out of his own income and which

RENT SALE.

are not dedicated to the office descend to his natural heirs. Where properties descend from one *granthi* to another to the exclusion of natural heirs, the presumption is that they were dedicated to religious uses. (*Scott-Smith and Abdul Raoof, JJ.*) INDAR SINGH *v.* FATEH SINGH.
59 I. C. 734 : 1 Lah. 540.

—— ——*Emoluments—Division of, not invalid.*

A temporary division of lands forming the emoluments of a religious office among the joint trustees is not *per se* objectionable especially if it tends to convenient management. 27 M. 199. Foll. (*Spencer and Ramesam, JJ*) MAHOMED HUSSAIN SAHIB *v.* MAHOMED ABDUL RAHIM BEG SAHIB.
(1922) M. W. N. 74 : 15 L W. 241 : 42 M. L. J. 272 : 1922 Mad. 8.

RELIGIOUS INSTITUTIONS.

See RELIGIOUS ENDOWMENTS.

RELIGIOUS TRUSTS.

See RELIGIOUS ENDOWMENTS.

RELINQUISHMENT.

See (1) LANDLORD AND TENANT.
(2) REGN. ACT, S. 17.
(3) STAMP ACT, S. 55.

REMAND.

C.P.C., Ss. 105, 107, 151 AND O. 41, RR. 23, 25.

REMAINDER.

See T P. ACT, Ss. 19—24.

REMAINDERMAN.

See (1) SUCCESSION ACT.
(2) T. P. ACT.

RE-MARRIAGE.

See (1) HINDU LAW—WIDOW.
(2) HINDU WIDOWS' RE-MARRIAGE ACT.

RENT.

See LANDLORD AND TENANT.

RENT CHARGE.

See (1) LANDLORD AND TENANT.
(2) LOCAL ACTS.

RENT FREE TENURE.

See (1) LANDLORD AND TENANT.
(2) LAND TENURES.

RENT SALE.

See also (1) LANDLORD AND TENANT.
(2) LOCAL TENANCY ACTS.

——*Validity of—Fraud of purchaser—Annulment of incumbrances.*

It is an abuse of statutory provisions for sale of tenures in execution of decrees for rent to bring about designedly a sale under such circumstances so that the right of under-tenure holders might be destroyed, an unencumbered title conveyed to the purchaser, and the maximum of benefit conferred upon the defaulter. In such a case the transaction is a private sale. Though the purchaser joined in the fraud after default had been made he cannot by reason of his entering into the agreement before the sale which was the

RENT SALE.

machinery by which the fraud was to be carried out and with knowledge thereof, be permitted to enjoy to the detriment of others the benefits which result to a purchaser at a sale for arrears of rent or revenue. 10 M. I. A. 540 ; 12 C. L. J. 336 ; 18 W. R. 240. Ref. (*Chatterjee and Panton, JJ.*) TEJENDRA CHANDRA DHAR v. DURGADAS DUTT.
1923 Cal. 324.

———*What passes under.*

Both in a sale in execution of money decrees and in a sale in execution of rent-decrees the right, title and interest only of the *jagirdar* in the tenure passes and consequently one who purchases first prevails against subsequent purchasers. (*Jwala Prasad and Ross, JJ.*) BINANAND SAWATI v. THUROO MAHTO
(1923) Pat. 249 : 4 Pat. L. T. 659 : 1923 P. 592.

REPEAL.
See INTERPRETATION OF STATUTE.

REPRESENTATION.
See (1) EVIDENCE ACT, S. 115.
(2) T. P. ACT, S. 41.

REPRESENTATIVE
See C. P. CODE, Ss. 2 (11) 47 AND O. 22.

REPRESENTATIVE SUIT.
See C. P. CODE, O. 1, R. 8.

REPUTE.
See (1) EVIDENCE ACT, S. 112.
(2) HUSBAND AND WIFE.
(3) LEGITIMACY.

REPUTED OWNERSHIP
See (1) EVIDENCE ACT, S. 110.
(2) POSSESSION.

RELEVANCY.
See EVIDENCE ACT.

REQUISITES FOR GIFT.
See (1) HINDU LAW—GIFT.
(2) MAH. LAW—GIFT.
(3) T. P. ACT.

RES-JUDICATA.
See C. P. CODE, S. 11.

RESIDENCE.
See C. P. CODE, Ss. 16 AND 20.

RESIDUARY LEGATEE.
See (1) PROB. AND ADM. ACT, Ss. 105—111.
(2) SUCCESSION ACT, Ss. 154, 166.
(3) WILL.

RESTITUTION.
See C. P. CODE, Ss. 144 AND 151.

RESTITUTION OF CONJUGAL RIGHTS.
See also HUSBAND AND WIFE.

———*Marriage—Proof of factum and validity—Onus on plff.—Mahomedan Law.*

In a suit by a Mahomedan husband for restitution of conjugal rights, if the wife denies that a valid marriage was performed, the plaintiff should establish, by legal evidence, either that his marriage was contracted with the consent of

RESTITUTION OF CONJUGAL RIGHTS.

the girl's lawful guardian or that the girl herself having reached majority under the Mahomedan law contracted the marriage of her own account. (*Lord Atkinson.*) ATKIA BEGAM v. MUHAMMAD IBRAHIM.
6 L. W. 26 : 21 C. W. N. 545 : 10 Bur. L. T. 79 : 36 I. C. 20 : (1917) M. W. N. 261 (P. C.).

———*Defence—Cruelty—Civil and criminal cases against wife.*

Where the husband had instituted various civil and criminal cases against his wife and has suspected her fidelity, the wife has reasonable ground for believing that her health and safety would be endangered if she returned to her husband's custody and plaintiff was not entitled to a decree for restitution of conjugal rights against his wife. (*Piggott and Walsh, JJ.*) HAMID HUSAIN v. KUBRA BEGAM.
40 All. 332 : 44 I. C. 728 : 16 A. L. J. 182.

———*Defence—Cruelty—Wife—Right to desert husband.*

Cruelty in a degree which renders it unsafe to return to her husband justifies a desertion by a Hindu wife and is a good defence to a suit for restitution of conjugal rights. (*Rafiquo, J.*) BHAWANI PRASAD v. SUBHAGI.
25 I. C. 728 : 12 A. L. J. 995.

———*Legal cruelty—Effect of.*

A husband is not entitled to a decree for restitution of conjugal rights even on terms of his going and living with his wife in her father's house where the danger and apprehension of cruelty and ill-treatment of the wife is not removed. 11 M. I. A. 551 ; 29 A. 222 : A. W. N. (1892) 77, Ref. (*Sunder Lal, J.*) MUSSAMMAT KURSHEDI BEGAM v. KHURSHED ALI.
25 I. C. 213 : 12 A. L. J. 1065.

———*When decree should be passed—Cruelty.*

Where there is a legal cruelty the Court is justified in refusing to make a decree for restitution of conjugal rights. (*Banerji, J.*) LAL MUHAMMAD v. SHAKURAN.
18 I. C. 867.

———*Decree—Injunction against parents of wife not to harbour her.*

While decreeing suit for restitution of conjugal rights, the Court should not issue any injunction to the parents of the wife restraining them from keeping her under their roof. (*Macleod, C. J. and Heaton, J.*) BAI JAMNA v. DAYALI MAKANJI.
44 Bom. 454 : 57 I. C. 571 : 22 Bom. L. R. 214

———*Consent of girl who had attained puberty—Burden of proof.*

Under the Mahomedan Law although there is a presumption that a girl who had attained the age of 15 years has also attained puberty, there is no converse presumption that a girl who has not reached that age has not attained puberty. Where a Mahomedan sued for restitution of conjugal rights and the wife pleaded that the marriage was invalid inasmuch as she had attained the age of puberty before marriage but did not give consent, *Held*, that as the defendant relied

RESTITUTION OF CONJUGAL RIGHTS.

entirely on the legal presumption and not on the physical fact of puberty, the presumption of puberty did not arise as her age was less than 15 (*Newbould and Dunal, JJ.*) SRIMATHI HALALONNESSA *v.* KHONDAKAR RAJAB ALI. **53 I. C. 94.**

——*Decree—Form of.*

In a suit for restitution of conjugal rights the Court could give the plaintiff a declaration that the defendant was his wife and direct the other defendants not to obstruct her in returning to her husband. It is not open to the Court to decree the husband, possession of the wife but it should merely direct the wife to return to her husband (*Bancroft, J.*) ERFANUDDIN MOLLA *v.* BADAN SHEIKH. **51 I. C. 583.**

——*Liability of plff. to provide residence.*

To succeed in a suit for restitution of conjugal rights the plaintiff must provide a suitable residence for his wife. (*Fletcher and Shamsul Huda, JJ.*) AHMED ALI *v.* JUNNATUNESSA **46 I. C. 491.**

——*Defence to suit.*

Where plaintiff after dismissal of suit for restitution of conjugal rights for not providing a house and not paying dower removed the defects before argument in appeal, plaintiff's suit should be decreed. (*N. R. Chatterjee and Newbould, JJ.*) IMAM ALI PATWARI *v.* ARFATUNNESSA. **32 I. C. 707.**

——*Proof of requirements of a valid marriage.*

In a suit for restitution of conjugal rights by a Mahomedan husband against his wife the requirements of a valid marriage must be established. The judgment of the Lower Court not stating who gave consent on behalf of the infant girl is defective. (*Jenkins, C. J and Mookerjee, J.*) HANU SHEIKH *v.* JURRO SHEIKH. **23 I. C. 921 : 19 C. L. J. 216.**

——*Delay — Discretion — Marriage with minor girl.*

Plaintiff was married to the defendant in 190? when she was 12 years of age. In 1918 the plaintiff sued for restitution of conjugal rights. *Held*, that though there was considerable delay in the institution of the suit it was satisfactorily explained and that the plaintiff was entitled to a decree for restitution of conjugal rights. (*Shadi Lal and Broadway, JJ.*) MT. DAULAN *v.* ABDUL HAG. **5 Lah. L. J 95.**

——Chaddar Andazi—*Woman surprised into—Discretion of Court.*

A decree for restitution of conjugal rights is within the discretion of the Court and where a widow who may have been surprised into a *chaddar andazi*, without delay repudiates it, the husband's claim for restitution should not be decreed. (*Wilberforce and Abdul Qadir, JJ.*) RAM JAWAI *v.* GOKAL CHAND. **64 I. C. 150.**

——*Defence—Danger to health of the wife.*

A husband is entitled to the society and companionship of his wife but before a Court can be asked to compel a reluctant wife to return to her husband's custody it must be shown that there is no legal ground to justify the wife's refusal to live with her husband. One such ground is that the health or safety of the wife is likely to be endangered if she is forced to return to her husband's house. (*Rattigan, C. J.*) GANGA SINGH *v.* MUSAMMAT DHANNO. **15 P. W. R. 1920 : 54 I. C 383 : 7 P. L. R. 1920.**

——*Suit for—Injunction—Auxiliary relief—Court fee and jurisdiction.*

The valuation of a suit for restitution of conjugal rights against the wife and for an injunction against her relations is that for the principal claim, *viz.*, the restitution is conjugal rights, the claim for an injunction being merely an auxiliary relief. A Munsif of the 1st class has jurisdiction to hear a suit of the above description valued at Rs. 200 for purposes of Court fee and Rs 1 000 for purposes of jurisdiction. 28 P. W. R. 1919, Ref. (*Chevis, J.*) KAHAMAT BEG *v.* MUSSAMMAT SHAH BEGAM **49 I. C. 749 : 21 P. R. 1919.**

——*Minor wife—Discretion of Court—Wilful refusal.*

If one or both of the spouses, is or are, on account of minority or other reasons incapable of discharging the conjugal duties, the Court may refuse to grant a decree for restitution of conjugal rights. 128 P. R. 1892 and 35 P. R. 1894, Ref. But the mere refusal of a minor wife is not sufficient ground for the dismissal of a husband's suit for restitution of conjugal rights. 215 P. L. R. 1912, Dist. (*Shadi Lal and Wilberforce, JJ.*) GIRDHARI RAM *v.* SITAN BAI. **49 I. C. 698 : 23 P. R. 1919.**

——*Refusal of relief—Mere disagreement between husband and wife.*

Mere disagreement between the families of husband and wife is no sufficient ground to refuse restitution of conjugal rights, especially where the marriage had been consummated. 17 I. C. 254 : 34 I. C. 538, Dist. (*Wilberforce, J.*) BAJID *v.* SATTO. **48 I. C. 231 : 182 P. W. R. 1918.**

——*Decree for—Discretion how to be exercised.*

A Court has discretion to refuse a decree for restitution of conjugal rights but the refusal must be based on sound principles, a decree ought not to be refused for other causes than those which justify a wife in refusing to return to her husband. These latter include failure to pay prompt dower as in the case of a Mahomedan, cruelty, gross neglect of marital duties and connivance at the wife's adultery for a long period. (*Scott Smith, J.*) NIAZ ALI *v.* SAID JAN. **46 I. C. 112 : 67 P. W. R. 1918.**

——*Reference to arbitration—Relief discretionary - Delegation by Court.*

It is entirely within the discretion of a Court to grant or refuse restitution of conjugal rights. But the Court cannot delegate this right of exercising discretion to arbitrators nor can it refer the entire suit to arbitration. (*Shadi Lal, J.*) KALABATU *v.* PRABH DIAL. **80 P. W. R. 1918: 45 I. C. 163 : 78 P. L. R. 1918.**

RESTITUTION OF CONJUGAL RIGHTS.

——*Grounds for refusal—Deft. minor.*

Where in a suit for restitution of conjugal rights the defendant was found to have been a minor at the time of marriage and that the consummation had not taken place and that the plff. had neglected to assert his marital rights for a long time, it would be a proper exercise of discretion to refuse restitution. The grant of a decree for restitution of conjugal rights is discretionary with this Court, 82 P. R. 1908 and 11 M. I. A 551, Foll. (*Shadi Lal and Jones, JJ.*) ZIADA *v.* JOWAI. **46 P. R 1916 : 134 P. W. R. 1916 : 34 I. C. 538 : 148 P. L R. 1916.**

——*When decree to be passed--Apprehension —Breach of peace.*

Indian Courts should not pass a decree for the custody of a woman's person when the strained relations between the parties threaten a breach of the peace. (*Frederick, J*) KARAM JAN *v.* ABDUL JABBAR. **166 P. L. R. 1913 : 19 I. C 475 : 121 P. W. R. 1913.**

——*Refusal of wife to live after puberty.*

A Hindu girl married before puberty could not be compelled to live with her husband if after attaining puberty she is omitting to do so. (*Johnstone, J.*) KALAWANTI *v.* BUKHAN. **187 P. W. R. 1912 : 17 I. C. 254 . 215 P. L. R. 1912.**

——*Suit by husband—Defence of cruelty—What is—English law—Applicability of.*

Cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in, would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. Wherein a suit by a husband for restitution of conjugal rights it was found that he had falsely charged his wife with having attempted to poison him, that he had addressed her using the vilest epithets on several occasions, that he had generally treated her with loathing and disgust, that he threatened to push her by a low-caste man if she came back to his house, *Held*, that the husband was not entitled to a decree for restitution of conjugal rights. Great care should be exercised in importing wholesale into India the strict principles of the Ecclesiastical Law of England embodied in the decisions of English Courts. (*Phillips and Devadoss, JJ*) KONDAL RAYAL REDDIAR *v.* RANGANAYAKI AMMAL. **46 Mad. 791 : 18 L. W 465 : (1923) M. W. N. 499 : 45 M. L. J. 186 : 1924 Mad. 49**

——*Keeping a low-caste mistress*—Bona fides—*Laches*—"*Legal cruelty*"—*English and Mahomedan law.*

It is no defence to a suit by a Mahomedan against his wife for restitution of conjugal rights that the husband was keeping a low-caste mistress, that there has been considerable delay in the filing of the suit and the same is not *bona fide*. A husband will not be deemed guilty of legal cruelty towards his wife, unless his conduct is such as to render future co-habitation more or less dangerous to her life, or limb, or mental or bodily health. There is no difference between the English law and the Mahomedan law in this respect. 11 M. I A. 551, Foll. : 29 A 222, Dist. (*Ayling and Seshagiri Aiyar, JJ.*) THEKKATHIL MOOSA *v.* VALIYAKATH FATHUMA **(19.5) M. W N. 836 : 30 I C 924 : 2 L W. 894.**

——*Defence—Sullen husband—Wife's ill-health.*

Neither the ill health of the wife nor the fact that the parent of the wife had at one time refused to give the husband the custody of his wife is a defence to suit for restitution of conjugal rights by the wife. (*Bakewell, J.*) KUPPAMMALL *v.* KUPPANNACHARI. **24 I. C. 380 : 26 M. L. J. 363.**

——*Proof of marriage—Presumption.*

In a suit for restitution of conjugal rights, very strict proof of marriage is essential but in the absence of proof to the contrary, presumption as to the necessary marriage ceremonies will be raised from general evidence of marriage. 28 Cal. 37 and 12 Cal. 140, Dist. (*White, C. J. and Oldfield, J*) SIVARAMA PILLAI *v.* VEERAPPA PILLAI. **23 I. C 828.**

——*Decree for—Whether granted despite plff.'s want of* bona fides.

Courts will not be justified in refusing restitution to the husband because there was some sort of ill-treatment in the early stages of married life, especially when the parties have made up their differences and agreed to live together afterwards. Proof of recent ill-treatment alone would be a bar to relief. Suits for restitution by a husband would not be lacking in *bona fides* because he does not wish to pay separate maintenance allowance to the wife ordered by a Magistrate. The suit would have to be decreed if otherwise the husband is entitled. (*Abdur Rahim and Sundara Aiyar, JJ*) PEDAPATI DURGAYYA *v.* PEDAPATI MANIKYAM. **16 I. C. 808.**

——*Refusal—Grounds for.*

A decree for restitution of conjugal rights can be refused only on grounds which would justify the wife in refusing to return and live with her husband, as for example habitual physical cruelty. (*Hallifax, A. J. C.*) DAMODHAR GANESH *v.* PARBATI. **1924 N. 72.**

——*Suit for, nature of.*

A suit for restitution of conjugalrights is essentially different from a suit for dissolution of marriage or for declaration as to an accomplished divorce. (*Wasir Hasan, A. J. C.*) MUHAMMED HAMID-UL-LAH KHAN *v.* FAKHRJAHAN BEGAM. **8 O.L.J 650 : 1922 Oudh 109.**

——*Decree for—Manner of enforcing.*

A person who has got a decree against his wife who is under the age of majority for restitution of conjugal rights, can enforce the same by filing an application for execution and it is for the executing Court to decide whether it should be enforced by the imprisonment of the wife or not. He cannot apply no such case for being appointed the guardian of his wife. (*Scott, J.*) ASIBAI *v.* GIRDHARI RAM. **67 I. C. 882 (B) : 3 P. L. J. 293.**

RESTITUTION OF CONJUGAL RIGHTS.

———*Defence—Cruelty—Use of liquor.*

That the husband was addicted to the use of alcohol and that he occasionally beat his wife when he was drunk, is no defence to a suit for restitution of conjugal rights where it is not proved that the husband is habitually the worse or habitually beats the wife or assaults her with brutality. (*Stuart, J. C.*) GILLI *v.* HIRA LAL. **40 I. C. 674 : 4 U. L. J. 112.**

———*Jurisdiction of Civil Courts—Defence—Shiah School.*

The Civil Courts in India have the same jurisdiction as was exercised by the Khazi or the umpires. A plea of legal cruelty on the part of the husband is a valid defence to a suit for restitution of conjugal rights even among Shiahs. A plea of legal cruelty could be sustained only when there is actual violence of such a character as to endanger personal health or safety or where there is a reasonable apprehension of such violence. 13 A. 126; 21 B. 610; 10 B. 601, Dist. 8 W.R. 3 (P.C.) Ref to. (*Rafique, A. J. C.*) JAFAR HUSAIN *v* HASAN ARA BEGUM **13 I. C. 609 : 15 O. C 159.**

———*Suit for—Defence of invalidity of marriage—Duty of Court.*

When in a suit for restitution of conjugal rights the validity of the marriage itself is disputed it is not enough to find that the marriage took place leaving it to be presumed that the rites and ceremonies necessary to constitute a legal marriage in the particular case. It must find specifically what these rites and ceremonies are and whether they were performed. (*Mac Coll, J.*) RAMPIAYAR *v.* DEVA RAMA. **1 Rang. 129 : 1923 R. 202.**

———*Custom —Chins— Husband suffering from leprosy.*

A custom among the Chins, bars the right of a husband to a decree of conjugal rights, if he is suffering from leprosy and has not been cured. (*Hartnoll, J.*) PA PAR *v.* NGA HO. **11 I. C. 783 (1) : 4 Bur. L. T. 165.**

———*Cause of action—Demand—What is a proper demand.*

In suits for restitution of conjugal rights it is essential that previous to the institution of the suit there should be a demand for restitution in proper conciliatory form. A demand accompanied by a threat of legal proceedings is not a proper demand. (*Robinson, J.*) EZRA *v.* EZRA. **54 I. C. 65 : 12 Bur. L. T. 120.**

———*Apostacy of wife—Effect of*

A Mahomedan cannot get a decree for restitution of conjugal rights against a wife who was converted from Mahomedanism. (1885) S L J B. 368. Foll.; (1875) S. L. J. R. 40. Ref. (*Ormond, J.*) ALI ASGHAR *v.* MI KRA HLA **8 L. B. R. 461 : 36 I C. 279 : 9 Bur. L. T. 261.**

———*Divorce when granted—Cruelty—Petty quarrels—Caprice.*

A divorce cannot be granted on mere caprice or on petty quarrels not amounting to cruelty or ill-treatment. (*Parlett, J.*) MAUNG KYA YAIN *v.* MA NYO. **23 I. C. 380 : 7 Bur. L. T. 16.**

REVENUE JURISDICTION ACT (X OF 1876), S. 4.

———*Right of husband to use force.*

Both under the English and the Indian law, although it is the duty of the wife to reside and cohabit with her husband, the husband has no right to use force or violence to enforce this right even when the refusal of the wife is without reasonable cause. (*Crouch and Fawcett, A. J. Cs.*) EMPEROR *v.* RAMLO. **12 S. L. R 29 : 47 I. C. 807 : 19 C. L. J. 955.**

———*Maintenance.*

Where a decree for restitution has been disobeyed the wife cannot make a claim for maintenance against the husband. (*Abdul Raoof, J.*) MT. AMIR BIBI *v.* NUR MAHOMED. **1924 Lah. 244.**

———*Defence—Non-payment of dower.*

Where the marriage has been consummated non-payment of maintenance and dower is no defence to a suit for restitution of conjugal rights. (*Hayward, A. J. C.*) MAHOMED DAD MAHOMED *v.* FATIMA. **24 I.C. 881 : 7 S. L. R. 138.**

RESTORATION OF SUIT OF APPEAL.

See CIVIL P. C., O. 9, R. 41.

RESTRAINT OF TRADE.

See CONTRACT ACT S. 27.

RESTRAINT ON ALIENATION.

See (1) DEED—CONSTRUCTION.
(2) T. P. ACT, S. 10.
(3) WILL, CONSTRUCTION.

RESULTING TRUST.

See TRUSTS ACT, Ss. 80 TO 94.

RESUMPTION.

See (1) GRANT, INAM.
(2) LANDLORD AND TENANT.

RETAINER.

See LEGAL PRACTITIONER.

RETRACTED CONFESSION.

See EVIDENCE ACT, Ss. 24, 133.

RE-TRIAL.

See C. P C., O. 41, Rr. 23, 25.

RETROSPECTIVE EFFECT OF STATUTES.

See INTERPRETATION OF STATUTES.

RETROSPECTIVE EFFECT OR OPERATION.

See INTERPRETATION OF STATUTES.

RE-UNION.

See HINDU LAW—(*a*) PARTITION; (*b*) RE-UNION.

REVENUE.

See RESPECTIVE LOCAL ACTS.

REVENUE COURT.

See JURISDICTION—CIVIL AND REVENUE COURT.

REVENUE JURISDICTION ACT (X OF 1876)

———*Manager, not a Revenue Officer.*

The manager of encumbered estates in Sind is not a Revenue Officer and no finality attaches to his orders. (*Pratt, J C and Crouch, A.J.C.*) GEHIMAL *v.* MANAGER, INCUMBERED ESTATES IN SIND. **32 I. C. 616 9 S. L. R. 167.**

———S. 4—*Saranjam lands resumed—Suit for possession.*

S. 4 does not bar a suit to recover possession of Saranjam lands resumed by Govt. (*Batchelor*

REVENUE JURISDICTION ACT (X OF 1876), S. 6.

and Shah, JJ.) GURURAO SHRINIVAS HEBBIKAR *v.* SECRETARY OF STATE FOR INDIA.
41 Bom. 408 : 39 I. C. 65 : 19 Bom. L. R. 117.

——— S. 6—*Mistake of law—Effect.*

A Revenue Officer, who makes an attachment etc., is not liable in damages if he makes a *bona fide* mistake of law as to the extent or nature of his powers (*Scott, C. J. and Heaton, J.*) DALU CHAND *v.* GULA BHAI. **34 I. C. 198 : 18 Bom. L. R 323.**

——— S. 11—*Right of suit where law gives appeal—Cause of action—Ejectment—Order—Suit on title—Lim. Act, Art. 14, if applicable.*

The order of a Collector permitting the ejectment of a person being appealable under the Revenue Jurisdiction Act, a suit would be barred where the cause of action is only such order. But where a person is actually ejected by the Collector, a suit would lie as there is no provision in the Act, for an appeal from a physical act of ejectment. (*Pratt, J. C. and Crouch, A. J. C.*) SULTAN MAHOMED SHAH *v.* SECRETARY OF STATE.
10 I. C. 223 : 5 S. L. R. 46.

REVENUE PAYING ESTATE.

See (1) COURT FEES ACT, S. 7 (V).
(2) LOCAL ACTS.

REVENUE RECORDS.

See also EVIDENCE ACT, S. 35.

——— *Entries—Alteration pending suit will not affect plaintiff's rights.*

Where a person's name is recorded in the Revenue papers in regard to a specific share of land and he brings a suit for the recovery of profits of that share the fact that, pending the suit alterations have been made in the papers regarding the amount will not affect the plff.'s right inasmuch as, at the time of suit and during the years for which profits are claimed his name stands recorded in regard to that share. (*Mears, C. J. and Banerji, J.*) MUBARAK FATIMA *v.* MUHAMMAD QULI. **63 I. C. 976 : 19 A. L. J. 732**

——— *Entries in—Presumption of correctness.*

Entries in Revenue Records are presumed to be correct, until they are rebutted. (*Leslie Jones and Moti Sagar, JJ.*) MT. JAIKUAR *v.* LABHU
4 Lah. L. J. 207 : 1922 L. 163.

——— *Entries in—Presumption of correctness.*

In the absence of any evidence to the contrary the entries in the revenue papers must be deemed to be correct. (*Wazir Hasan, A. J. C.*) DURGA *v.* RAM PADARATH. **65 I. C. 749 : 8 O. L. J. 495.**

REVENUE RECOVERY ACT (BEN. ACT, 1890).

——— S. 5—*Sale of estate not in arrears—Jurisdiction of Collector—Title of real owner, is not affected.*

A Collector acts without jurisdiction in selling estates which are not in arrears under the Revenue Sale Law, as his power is restricted to a sale of estates and shares which are in arrears only. The real owner's title is not affected by the

REVENUE SALE.

sale by the Collector of an estate not in arrears. (*Coutts and Adami, JJ.*) SHAIK MOHAMMAD WAHEED *v.* MT. SUNDER BASI KUAR.
1922 P. 445.

REVENUE SALE.

——— *What passes under—Person in adverse possession must surrender possession to purchaser.*

On the failure of an owner to pay the Government assessment his estate or interest in the land is forfeited or rather determined and under a sale for arrears of revenue. What is sold is not the interest of the defaulting owner but the interest of the Crown subject to the payment of the Government assessment. A person in adverse possession who occupies the land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale confirmed, and if the land is not so surrendered he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession. (*Mookerjee and Cholzner, JJ.*) JOBEDA KHATUN *v.* TULSI CHARAN DAS. **36 C. L. J. 472 : 1923 C. 82.**

——— *Purchaser—Rights of—Person in adverse possession.*

A purchaser at a sale for arrears of revenue does not derive his title from the defaulting proprietor but takes the estate from the person as it stood at the time of its inception as a permanently settled estate. A person in adverse possession who occupies the disputed land without paying rent to the defaulting proprietor is bound to surrender possession of the lands to the purchaser at the revenue sale if the sale is confirmed. Otherwise he would be liable for mesne profits. (*Mookerjee and Panton, JJ.*) RAJA SASHIKANTA *v.* RAJA SARAT CHANDRA. **70 I. C. 6 : 34 C. L. J. 415.**

——— *Caveat emptor—Rule of.*

The rule of caveat emptor does not apply to sales made for arrears of Govt. revenue. The purchaser has to be refunded the money and costs if the sale is set aside. (*Fletcher and Richardson, JJ.*) AMAR KRISHNA SHAHA *v.* ABDUL JALEL MIYAN. **48 I. C. 500.**

——— *Residency Taluk—Suit for possession—Burden of proof.*

Where separate accounts were opened with different sharers in respect of specified portions of a taluk, the remainder being left as the residency Taluk, the plaintiff who purchases the residency taluq in a revenue sale for default of payment of revenue, has to prove that the lands in suit appertain to that taluk and must succeed on the strength of his own title, the suit being one in ejectment. (*Jenkins, Mookerjee and Beachcroft, JJ.*) BIRENDRA KISHORE MANIKYA BAHADUR *v.* BHOIRAB CHANDRA CHAKRAVARTI.
27 I. C. 12 : 20 C. L. J. 296.

——— *Purchaser—If representative-in-interest of defaulting proprietor.*

A purchaser of an entire estate sold for recovery of arrears of revenue due therefor is not a representative in-interest of the defaulting proprietor (*Mookerjee and Beachcroft, JJ.*) ASKORAN SATIA *v.* SATISHCHANDRA. **24 I. C. 281.**

REVENUE SALE.

—— —*Sale of larger share than one in default —If prejudices p ff's rights.*

Where a larger share of land than the one in default was put up for sale by the Revenue authorities, it is an act without jurisdiction and so the plff's rights would not be prejudiced 25 C. 833; 38 C. 537; 25 C 876: 35 C 636, Rel. on. (*Mookerjee and Teunon, JJ.*) GANGAPERSAD *v.* IRASHADALI KHAN. **13 I. C. 959: 15 C. L. J. 54.**

——*Irregularity—Inadequacy of price.*

The Court need not as a matter of law, draw the inference that inadequacy of price was due to irregularity in the sale proceedings. (*Coxe and Chatterjee, JJ.*) GANGADAR DAS *v.* BHIKARI CHARAN DAS.

13 I. C. 403: 16 C. W N. 227.

——*What passes under.*

A purchaser at a revenue sale gets only the right, title and interest of the defaulting proprietor. (*Jwala Prasad and Ross, JJ.*) RAMNANDAN SAHAY *v.* JAIGOBIND PANDAY.

2 Pat. 839: 1924 P. 213.

REVENUE SALE LAW (XI of 1859).

——*Sale of taluk for default of revenue—Caveat emptor.*

Where the instalments of revenue dues are actually sent to and received by the Collector before the due date and the land was nevertheless actually sold under provisions of the Revenue sale, as the Collectorate were not aware as to which land the payment was made. *Held*, that it was not a valid sale. The rule of *Caveat Emptor* does not apply to rules made for Govt. revenue. When the sale is set aside, the purchaser has to give back the land with mesne profits and costs of the suit by which it was set aside. (*Fletcher and Richardson, JJ.*) AMAR KRISHNA SHAH *v.* ABDUL JALEL MIYAN.

42 I. C. 500

——S. 2—*Residency Taluq—Suit for possession—Burden of proof*

Where separate accounts were opened with various other individuals in respect of specified portions of a taluk, and these being certain other specified portions of land left as residency taluk, the plaintiff who purchases the residency taluk in a revenue sale for default of payment of revenue, has to prove that the lands in suit appertain to that taluk and must succeed on the strength of his own title, the suit being one in ejectment. (*Jenkins, Ashutosh Mukerjee and Beachcroft, JJ.*) BIRENDRA KISHORE MANKIYA BAHADUR *v.* BHOIRAB CHANDRA CHAKRAVARTI.

27 I. C. 12: 20 C. L J. 296.

——S. 6 and Bengal Act (VII of 1868)—*Proclamation not posted in time—Irregularity or illegality.*

The omission to post the proclamation of a Revenue sale in the Collectorate, one month before the sale amount merely to an irregularity and not an illegality vitiating the whole proceedings and the aggrieved person must prove that he sustained injury. 26 C. 66; 21 C. 70, Foll.; 11 C. 200, Not foll; 7 C W. N. 377; 2 C. L J 325; 30 C. 1, Dist. (*Coxe and Chatterjee, JJ.*) GANGADHAR DAS *v.* BHIKARI CHARANDAS.

13 I. C. 403: 16 C. W. N. 227.

——Ss. 10 and 11—*Sharers in some villages only in an estate—If can claim separate accounts.*

Shareholders in only some villages in an estate cannot claim to have a separate account under S 10 or 11 of the Act. 21 W. R. 38, Foll. A proprietor not recorded as a sharer of a joint estate in a joint tenancy within the meaning of S 10 or as a recorded sharer having a specific portion of the estate within the meaning of S. 11, but as a proprietor of an undivided interest over a portion of the estate within the meaning of S. 70 of Land Registration Act, 1876, is not entitled to claim the benefit of the exception in S. 53 of the Revenue Sale Law Act in favour of sharers with whom the Collector has opened separate account. (*Brett, Mookerjee and Vincent, JJ.*) MAHAMMAD MEHDI HASSAN KHAN *v.* SHEOSHANKAR PERSHAD SINGH. **39 Cal. 353: 13 I. C. 353: 14 C. L. J. 552: 16 C. W. N. 817.**

——S. 37 Prov.—*Raiyat coming occupancy tenant and* vice versa—*Enhancement of rent.*

The Proviso to S. 37 refers primarily to raiyats holding at fixed rates. A person entering on the tenancy as a raiyat at fixed rates may not thereby become an occupancy tenant, but an occupancy raiyat will not lose his rights as such by a grant of fixed rent *Quaere*:—Whether S 37 proviso permits a purchaser at a revenue sale to enhance the rent of an occupancy raiyat. (*Holmwood and Chapman, JJ.*) ABDUL GANI *v* MAKBUL ALI. **42 Cal. 745: 22 C. L. J. 223: 31 I. C. 19: 20 C W. N. 185.**

——S. 37—*Annulment—Protected taluq.*

A taluq derived and descended from an ancient taluk which was recognised at the permanent settlement is protected from annulment under S. 37. (*Caspersz and Doss, JJ.*) NUBENDRA KISHORE ROY *v.* DURGA CHARAN.

10 I. C. 287: 15 C. W. N. 515.

REVERSIONER.

See HINDU LAW—
(1) REVERSIONER. (2) WIDOW.

REVIEW.

See C. P. C., S. 114, O. 47.

REVISION.

See (1) C. P. C., S. 115.
(2) LETTERS PATENT.
(3) PROV. SM. C CT. ACT, S 25.

REVISION PETITION.

CONVERSION INTO MEMO. OF APPEAL.
See (1) C. P. CODE, S. 115.
(2) PRACTICE.

REVOCATION.

See (1) CONTRACT ACT, Ss. 2—8.
(2) PROBATE AND ADMN. ACT, S. 50.

RIGHT OF APPEAL.

See (1) APPEAL.
(2) C. P. C., O. 43 ; S. 2.

RIGHT OF ASSIGNEE.

See ASSIGNMENT.

RIGHT OF ELECTION.

See T. P. ACT.

RIGHT OF FORECLOSURE.

See (1) C. P. CODE. O. 34.
(2) MORTGAGE.

RIGHT OF GUARDIANSHIP.

See GUARDIAN AND WARD—MINOR.

RIGHT OF OCCUPANCY.

See (1) LANDLORD AND TENANT.
(2) LAND TENURES.
(3) MAD. EST. LAND ACT.
(4) TENANCY ACTS.

RIGHT OF REPLY.

See (1) C. P. CODE.
(2) EVIDENCE ACT.
(3) PRACTICE.

RIGHT OF SUIT.

See also (1) C. P. C., SS. 9. AND 47, O. 2, R. 2.
(2) CONTRACT.
(3) DECREE.

——— *Money paid under legal process.*

Money paid under legal process is not a voluntary payment. A deposit under S. 14 of Beng Patni Regn. VIII of 1819, to avert sale can be recovered. (*Viscount Haldane.*) JAYTI PRASHAD SINGH DEO BAHADUR *v.* KUMUD NATH.

46 Cal. 1 : 45 I. A. 108 : 16 A. L. J. 569 : 5 Pat. L. W. 64 : (1918) M. W. N. 441 . 24 M. L. T. 86 : 28 C. L. J. 165 : 8 L. W. 186 : 22 C. W. N. 1009 : 20 Bom. L. R. 806 : 45 I. C. 827 : 35 M. L. J. 347 (P. C.).

[On appeal from 27 I. C. 526 (Cal).]

——— *Surety bond—Security for performance of decree on appeal—Obligee not named in bond.*

Where a person becomes liable as a surety for the performance of any decree that might be made on appeal and executes a bond to the Court, the Court is not a juridical person and cannot assign the bond. A separate suit on the bond is not maintainable. The liability of surety has to be determined in original suit itself by making him a party and the successful party can enforce the liability under the decree. (*Lord Phillimore.*) RAJ RAGHUBAR SINGH *v.* JAI INDRA BAHADUR SINGH.

42 All. 158 : 46 I. A. 228 : 22 O. C. 212 . 6 0 L. J. 682 : 13 L. W. 82 : 55 I. C. 550 : 18 A. L. J. 263 : 22 Bom. L. R. 521 : 36 M. L. J. 302 (P. C.).

——— *Suit to recover money paid under decree does not lie.*

It is not competent to a person to institute a suit for the recovery of money paid to the deft. under a prior decree of Court on the allegation that the suit in which that decree was passed was a false one and was supported by false evidence. In the absence of proof of fraud and collusion in the obtaining of the prior decree, its finality cannot be questioned. 37 A. 535 ; 32 A. 145 Ref. (*Rafique and Lindsay, JJ.*) SHEO PRASAD *v.* SRI PAL.

20 A. L. J. 254 : L. R. 3 A. 249 : 1922 A. 167.

——— *Money had and received—Basis of action—Principles underlying.*

Where a sub broker entered into transactions with plff on behalf of deft.'s brokers and got large sums as advance and used them for settling his own account with defts, *held*, that no suit is maintainable by plff. against defts. for the money. (*Fawcett and Coyajee, JJ.*) MORARJI PREMJI GOKULDAS *v.* MULJI RANCHHOD VED & CO.

25 Bom. L. R. 1014: 1924 B. 232.

——— *Minor—Contract by guardian—Suit on such contract.*

It is open to a minor to either affirm or disaffirm contracts entered into by his guardian but not binding on him. It is the right of the guardian protecting the interests of the minor to sue on such contracts on his behalf. When such a suit is brought, it is the duty of the Court to entertain it and dispose of it according to law and not on grounds of expediency, real or supposed. If the Court refuses to give relief on the ground that the suit can be brought by the minor after he has arrived at the age of majority, then the minor's interest may be seriously prejudiced by reason of important evidence disappearing by the time the suit is brought. (*Chandavarkar and Batchelor, J.*) VENKATARAMANBHAT *v.* BADNANABH PARANBAT.

15 I.C. 835 : 14 Bom. L. R. 393.

——— *Declaratory decree—Suit on, will lie.*

Where the relief claimed in the suit has already been granted by the decree in a prior suit and could be obtained in execution, it is not open to the plaintiff to institute a fresh suit for the same relief. A merely declaratory decree declaring the rights of the parties merely is incapable of execution. In such a case a separate suit will lie. (*Mookerjee and Cholzner, JJ.*) SYAMA CHARAN DAS *v.* SATYA PRASAD CHAUDHURI.

36 C. L. J. 101 : 1923 C. 252.

——— *Contract—Stranger to—Cannot enforce.*

It is not open to a stranger to a reference and award to enforce a provision in his or her favour in the award. (*Broadway, J.*) DIWAN CHAND *v.* BISHEN DAS.

67 I. C. 919: 2 Lah. L. J. 255.

——— *Grounds for suing—Appeal inconvenient.*

That the course of appeal is inconvenient or difficult is no ground to bring a suit. (*Reid, C. J. and Kensington, J.*) MUNICIPAL COMMITTEE, AMBALA *v.* MOHENDRA SINGH. **118 P. L. R. 1911 : 38 P. R. 1911 : 9 I. C. 1000: 97 P. W. R. 1911 :**

——— *Absence of—Deft.'s case weak.*

When the plff. has no right to sue, his suit

RIGHT OF SUIT.

must fail, however weak the deft.'s case may be. (*Johnstone, J.*) HAYAT BAKSH *v.* GAUHAR.
54 P. L. R. 1911 : 9 I. C. 339 :
195 P. W. R. 1911 :

———*Institution of suit by person not entitled —Continuance by proper persons.*

A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake. 30 M. 419; 43 M. 707, Rel. (*Spencer and Venkatasubba Rao, JJ.*) PANCHAKKAL *v* EDATHIL.
16 L. W 826: 1922 M W. N 827 :
1923 Mad. 180 (L.

———*Partition—Provision for expenses—Marriage of daughter.*

If in a partition deed provision is made for the marriage of a daughter of the family she can sue to enforce the provision though she was no party to the partition deed. (*Oldfield, J.*) SUNDARARAJA IYENGAR *v.* LAKSHMI AMMAL.
24 I. C. 943: 38 Mad. 788.

———*Consent of deft. cannot confer.*

Where in a suit, an issue is framed as to plaintiff's rights to maintain it, the mere consent of the deft. while being examined as a witness to plaintiff's recovering the amount, will not be sufficient to entitle the plaintiff to maintain the suit. (*Benson and Sundara Aiyar, JJ.*) MALAIKOLANDU CHETTI *v.* PERIA PILLAI 10 I. C 351.
(1911) 2 M. W N. 393.

———*Societies—Membership—Enforcement.*

No suit lies by a member of the public against the Managing Committee of a society or institution, which is managed by public subscriptions, to enforce the right to subscribe and to be admitted to the privilege of membership (*Lindsay, J. C.*) ABHOY PADO BOSE *v.* MANAGING COMMITTEE 34 I C. 263: 19 O. C. 15

RIGHTS AND LIABILITIES OF PARTNERS.

See (1) CONTRACT ACT.
(2) PARTNERSHIP

RIGHTS AND LIABILITIES OF PURCHASERS.

See (1) CONTRACT ACT.
(2) T. P. ACT.

RIGHTS AND LIABILITIES OF SURETY.

See CONTRACT ACT.

RIGHT TO BEGIN.

See also CIVIL PROCEDURE CODE.

———*Reference to High Court under the Income-Tax Act.*

Under the Income Tax Act, the objector, who questions the assessment has the right to begin and has the right to reply. (*Mookerji, Fletcher and Chaudhuri, JJ.*) KILLING VALLY TEA CO *v.* SECRETARY OF STATE. 48 Cal. 161:
61 I. C. 107: 32 C L. J. 421.

———*Accretion to banks—Ownership of.*

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made (*See* Regulation II of 1825). If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. (*Lord Phillimore*) (KUMAR) NARESH NARAYAN ROY *v.* SECRETARY OF STATE FOR INDIA. 45 M. L. J. 444 : 50 Cal. 446 :
(1923) M W. N. 511: 50 I. A 121:
32 M. L. T. 162 L. R. 4 (P C.) 50 :
28 C. W. N. 453: 1923 P. C. 1 (P. C.).

RIGHT TO GIVE IN MARRIAGE.

See HINDU LAW—MARRIAGE.

RIGHT TO MAINTENANCE.

See (1) HINDU LAW.
(2) MAH. LAW.

RIGHT TO PARTITION.

See HINDU LAW—PARTITION.

RIGHT TO POSSESSION.

See POSSESSION

RIGHT TO REOPEN SETTLED ACCOUNT.

See ACCOUNTS SETTLED—REOPENING OF.

RIGHT OF WAY.

See (1) EASEMENT.
(2) EASEMENTS ACT, SS. 13 AND 14.
(3) HIGH WAY.

RIGHT, TITLE AND INTEREST.

See (1) C. P. C., O. 21, R. 92.
(2) EXECUTION SALE.

RIPARIAN OWNERS.

See also (1) FISHERY.
(2) JALKAR.
(3) RIPARIAN RIGHTS.

———*Alluvion and diluvion—Ownership of bed.*

Though the banks of a public navigable river belong to the respective owners, the bed belongs to Govt. But any accretion to the bank goes to the owners of the banks. So also any land submerged and emerged again goes to the owners of the banks. (*Lord Buckmaster*) HARDAS ACHARYYA CHOWDHRY *v.* SECRETARY OF STATE FOR INDIA. 22 M. L. T. 438: 26 C. L. J. 590:
(1918) M. W. N. 28: 43 I C. 361:
20 Bom. L. R. 49 (P. C.).

———*Rights and duties of—It is open to a riparian owner to protect himself against extraordinary floods.*

The right of any other person is not in question in such a case as each one has a right to prevent a possible sudden danger. Every riparian owner should so conduct the operations in his property as not to injuriously affect those above or below him. To put up a dam to enable one to better cultivate field is not an ordinary agricultural operation. (*Wallis, O. C. J. and Seshagiri Aiyar, J.*) GOPAL KRISHNA YACHANDRULA VARU *v* SECRETARY OF STATE
156 M. L. T 597: 2 L. W. 45:
26 I. C. 800: 28 M. L. J. 98.

RIPARIAN OWNERS.

——— *Surface water—Twenty years user not proved.*

The surplus water of defendant's tank was allowed to flow in a channel in a village where plaintiff was lessee. Plaintiff sued for unlawful interference with his right by cutting a *bund* and taking water from within the village. Defts. were only taking water from the same tank through different water course. *Held*, plaintiff could get no relief as they had a right to uninterrupted flow of surface drainage water as no user for 20 years was proved (*Sankaran Nair and Ayling, JJ.*) ORR *v.* MEYYAPPA CHETTY.

24 I. C. 935: 1 L. W. 363.

——— *Damages—Action for infringement of right—Proof of damage unnecessary.*

A riparian owner seeking to restrain another riparian owner from diverting the water of a stream beyond his riparian tenement, need not prove that he has suffered any damage nor is it a defence to such an action that the plaintiff's land is amply irrigated independently of the stream. 24 C. 865 Foll. (*Maung Kin, J.*) MAUNG KAW LA *v.* MAUNG KE. **9 Bur. L. T. 183: 35 I. C. 356: 8 L. B. R. 556.**

——— *Rights of—Water for irrigation.*

A riparian proprietor can take as much water as he requires for ordinary purposes, but for purposes of irrigation he can take only a reasonable quantity. (*Mc Coll, A. J. C.*) NGA PI *v.* NGA KYAN THA. **26 I. C. 974: 7 Bur. L. T. 282.**

RIPARIAN PROPRIETORS.

See (1) FISHERY.
(2) JULKAR.
(3) RIPARIAN RIGHTS.

RIPARIAN RIGHTS.

——— *Law relating—Madras Presidency.*

The law of the Madras Presidency as to rivers and streams differs in some respects from English law, and it is quite possible that the former law recognises some proprietary right of the Government in water flowing in them. 32 M. 141, Ref. (*Lord Parker*) KANDUKURI BALASURYA PRASADHA ROW *v.* SECRETARY OF STATE.

40 Mad. 886: 44 I. A. 166: 33 M. L. J. 144: 22 M. L. T. 76: 15 A. L. J. 697: 21 C. W. N. 1069: (1917) M. W. N. 556: 19 Bom. L. R. 751: 6 L. W. 341: 2 Pat. L. W. 260: 41 I. C. 95: 26 C. L. J. 290 (P. C.).

[On appeal from 8 I. C. 67: 34 Mad. 295.]

——— *Fishery—English law, how far applicable in India.*

There are numerous differences in the physical, historical and social conditions of India which make the English law inapplicable to circumstances of this country. The grantee of an exclusive fishery in a tidal and navigable river is entitled to follow the river if it changes its course as by a sudden eruption. (*Lord Sumner.*) SRINATH ROY *v.* DINABANDHU SEN.

42 Cal. 489: 41 I. A. 221: 18 C. W. N. 1217: (1914) M. W. N. 654: 1 L. W. 733: 16 M. L. T. 319: 12 A. L. J. 1193: 20 C. L. J. 385: 25 I. C. 467: 16 Bom. L. R. 901 (P. C.).

RIPARIAN RIGHTS.

——— *Public and navigable river—Test of.*

The test for determining whether a river is a public navigable river or not is whether or not river is navigable for boats at all seasons of the year. The question of size may not be without importance but speaking generally the presumption in the one case is that the bed belongs to the public or is public domain and in the other that the bed belongs to private proprietor. In the absence of any other evidence than that afforded by a *thak* or survey map these natural presumptions may be sufficient to displace the contrary evidence of the map. 30 Cal. 291, 29 C. L. J. 590 and 46 Cal. 390, Rel. (*Richards and Greaves, JJ.*) SECRETARY OF STATE FOR INDIA *v.* PRAFULLA NATH TAGORE. **58 I. C. 886: 24 C. W. N. 809.**

——— *Zemindars—Public navigable river—Dry land, appearing on bed—Through Recession—Whether part of Zemindar's property.*

Pltf. who sued for a declaration that land recently the beds of these rivers but now dry by reason of the rivers receding from their beds were included in their permanently settled estates must prove their allegation that at the date of the permanent settlement of their adjoining zemindari in 1793 they were narrow channels. (*Mookerjee and Walmsley, JJ.*) PRAFALLA NATH TAGORE *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

24 Cal. W. N. 639: 57 I. C. 29: 31 C. L. J. 320.

——— *Title to bed of river—Riparian owners—Can claim up to half the bed—Navigable rivers—Test of.*

By the common law of this country the right to the soil of a non-navigable river flowing through the estate of different proprietors belongs to the riparian owners *ad medium filum aquae.* A boundary given as the road of the river is the middle of the road or river. Therefore permanently settled estates bounded by a non navigable river include half of the bed of the river. The test as to whether a river is navigable or not, is to see if boats can pass on it at times of the year. (*Fletcher and Shamsul Huda, JJ.*) MAHARAJA OF BURDWAN *v.* SECRETARY OF STATE FOR INDIA.

46 Cal. 390: 46 I. C. 305: 22 C. W. N. 872.

——— *River changing course—Old course—Fishing right.*

If a river has changed its course the old dry course of the river must be deemed to be private property and the owner of the soil is entitled to all *Bheels* or ponds, gulls or *Damooshes* in which water remains, but which do not communicate with the river except in the time of floods. (*V. R. Chatterjee and Smither, JJ.*) SASAI KANTA ACHARJEE *v.* KUNJA MOHAN MOITRA. **41 I. C. 425: 23 C. W. N. 63.**

——— *Artificial water course—Easement—Natural right.*

The right to water flowing through artificial courses is right of easement, and must rest on some grant or some arrangement, either proved or presumed from, or with the owners of the land from which the water is artificially brought, or in some legal origin. It is quite distinct from the natural right, which, is a natural incident to the ownership of land, and entitles *prima facie* each

successive riparian proprietor to the unimpleaded flow of water of a natural channel in its natural course, and to its reasonable enjoyment as it passes through his land. In the case of artificial water course where no easement or customary right enjoyed by the plaintiff has been proved only diminution of supply (and not complete stoppage) will not entitle plaintiff to an injunction. Until plaintiff proves that he has used the whole water of the watercourse as of right. S. 26 of the Limitation Act does not avail him. (*Campbell, J.*) BELA SINGH *v.* BALI RAM.

1923 Lah. 257 (2).

———*Stream, what is.*

A 'stream' denotes a body of water having a continuous flow in one direction. Water not so flowing but becoming dissipated in the earth's strata and simply percolating through or along those strata until it issues from them at a lower level is not a stream and the principles regulating the rights to water flowing in defined channels do not apply to such water An owner through whose lands such water passes is entitled to appropriate as much of it as he requires without regard to the requirements of owners lower down. (*Martineau, J.*) NAGINA SINGH *v.* MALHI.

64 I. C. 158: 3 Lah. L. J. 555.

———*Ownership of river bed—Tidal and navigable rivers—Presumption—Lankas in Krishna river.*

As regards the portion of a river-bed where a river is both tidal and navigable, there is a very strong presumption that it belongs to the Crown; where however the river is not tidal, the question whether the bed must be presumed to belong to the Government or the riparian owners on either bank, will depend on the fact whether the river is navigable in the legal sense. 41 M. 840 F. B., Rel. on. A river in India is not navigable in the legal sense unless it is navigable throughout the year. 42 C. 489; 46 C. 390 Rel. Per *Burn, J.*—Conditions in Madras are so dissimilar from those in Great Britain that the English Common Law rules as to the ownership of river-beds should not be applied here without modification and public rights should be recognized in the beds of rivers which are navigable but not tidal. The *lankas* and *kedlanas* formed in the bed of the Krishna river at a place where it was navigable only for about 4 months in the year belonged to the riparian owners on either bank and not to the Government (*Sadasiva Aiyar and Burn, JJ.*) SECRETARY OF STATE FO INDIA *v.* VENKATANARASIMHA NAIDU. **11 L. W. 206: 27 M. L. T 147: 58 I. C. 689: (1920) M. W N. 209.**

———*Ownership of bed and banks—Presumption—Accretion—Right to.*

Accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords. It is part of the common law of India that the ownership of river-beds *usque ad medium filum aquae* is presumed, to vest in the riparian owners. But the presumption is capable of being rebutted. 41 Mad 840 and 42 Mad. 239 Ref. A person does not lose his title to land by its mere submersion under water so long as the land is identifiable. Non-resistance to *vis major* such as flood which causes the change of a river course, cannot be treated as evidence of acquiescence or of abandonment of rights by a riparian owner. (*Spencer and Krishnan, JJ*) OLAPPAMANANNA NANAKAL *v.* SECRETARY OF STATE FOR INDIA.

55 I. C. 770.

———*River belonging to Govt.—Cess if leviable from Zemindar after forfeiture.*

Where a portion of bed and banks belong to the Zamindar, that portion does not belong to Govt. so as to entitle it to levy water-cess, Where Zemindar was under an obligation to supply water free of charge, the Government is not precluded on succeeding to the Zamindari on forfeiture from levying water cess. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SECRETARY OF STATE *v.* MAHARAJA OF BOBBILI. **30 M. L. J. 163: 19 M. L. T. 6: (1915) M. W. N. 1025: 32 I. C. 279: 3 L. W. 119.**

———*Malabar rivers—Right of Govt. to beds of rivers.*

Per *Sankaran Nair, J.*—(*Sadasiva Aiyar, J. dissenting*).—The ownership in the beds of non-tidal and non-navigable rivers in Malabar is in the private riparian owners *usque filum aquae* or *ad medium filum aquae* and not in the Govt. 17 C. 814 P.C. Ref. to. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) MUKKASSA NAIR VEETIL *v.* SECRETARY OF STATE **15 M. L. T. 247: 1 L. W. 307: 24 I. C. 547: (1914) M W. N. 521: 26 M. L. J. 385.**

———*Water course—Ownership in bed of natural water course—Having lands on both sides of the channel—Whether sufficient proof.*

In the case of a natural water course, the person claiming the bed of the stream against the Government has to prove that he is the owner. The fact that the plff. is shown to be the owner of lands on both sides of the stream in a document to which the Government is not a party is not sufficient to establish his ownership. (*Benson and Munro, JJ.*) KRISHNA BHATTA *v.* SECRETARY OF STATE. **21 I. C. 720: 25 M. L. J. 161.**

———*Surface water — Easement— Natural right.*

No claim can be made either as a natural right or as an easement by prescription except to water flowing in a defined channel, and no such claim can be made to the surface water. Whether a particular water is surface water or not, is a question of fact to be determined by circumstances. Well-defined existence arising from an ascertained source is the test against any water being the surface water. The right to water in a stream is sustainable even though the water in the stream is not sufficient for the purpose claimed or it flows to the plff.'s land only indirectly. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) ADINARAYANA *v.* P. RAMUDU. **37 Mad. 304: 12 M. L. T. 637: 17 I. C. 648: 24 M. L. J. 17.**

———*Water course—River-bed—Ownership of—Rights of Government — Burden of proving ownership by others.*

In the Madras Presidency, the bed of river is vested in Govt. and the burden of proving private ownership lies upon him who asserts it. The digging of pits in the sand and taking water from

RIPARIAN RIGHTS.

the river to water trees belonging to a person is not an act of ownership entitling that person to claim the bed of the river. (*Benson and Bakewell, JJ.*) PAPULA NARAYANASWAMI NAIDU *v.* PENSULANI KAMIAPPA NAIDU.
(1912, M. W. N. 496 : 14 I. C. 261 : 24 M. L. J. 36.

——*Government—Ownership of water.*

Waters in rivers are presumably vested in Government. (*Benson, Sundara Aiyar and Miller, JJ.*) *In re* CHOKKALINGAM PILLAI.
11 M. L. T. 162 : 13 Cr. L. J. 131 : 13 I. C. 819 : (1912) M. W. N. 119.

——*Rights of riparian owners are natural rights.*

The right of a riparian owner does not depend on the ownership of the soil of the stream. It belongs to him as a natural right incident to the right to the land adjoining the river. It is not based on prescription or presumed grant. So long as the river has a natural origin and flows in a known channel his right to use its water when it flows along side his land is unaffected. In addition to this right he may, when the water recedes, have an easement to go across the land of another but such user can be claimed only by virtue of prescription or custom. (*Kanhaiya Lal, A. J. C.*) LACHMI NARAYAN *v.* GANGA BAKSH.
7 O. L. J. 268 : 59 I. C. 364 : 2 U. P. L. R. (J. C.) 103.

——*Obstruction of public river.*

No riparian owner is entitled to obstruct a public river. (*Kanhaiya Lal, A. J. C.*) JAGANNATH *v.* CHANDRIKA PRASAD. 21 Cr. L. J. 55 : 54 I. C. 407 : 6 O. L. J. 616.

——*Natural and artificial streams.*

The rights of riparian owners to natural streams are *jure naturae*, incident to the ownership of the soil of the land abutting upon the stream. The rights to water flowing through artificial water-courses are rights of easement and must rest on some grant or arrangement, proved or presumed, where the channel of a stream continues as a definite water-course up to a certain point, and then spreads along certain fields but again runs as a definite course, the identity of the water is not destroyed and is subject to riparian rights. (*Das and Adami, JJ.*) RAM KRIPAL SINGH *v.* HANUMAN SINGH. 6 Pat. L. J. 6 : 59 I. C. 929 : 2 Pat. L. T. 122.

——*Water course—Right to enjoyment—Incidents of.*

The incidents of a natural stream apply also to an artificial water course supplied with water from a natural stream and the riparian proprietors of the water-course have the same rights as if it were a natural stream. (*Chapman and Jwala Prasad, JJ.*) KRISHNA DAYAL GIR *v.* BHAWANI KOER. 3 Pat. L. W. 5 : 43 I. C. 235 : 3 Pat. L. J. 51.

——*Nature of—What may be treated as.*

A riparian owner has a right to treat running water as a natural stream from its source to the lower end of his land, where water is flowing from a known source past his land in a defined

RIWAJ-I-AM.

channel which is not artificial, though the water does not empty itself in a lake or river and the right which he has to the use of such water is a natural right. 28 B. 105 Ref. to. A person owning land which is not in the bank of a river or stream cannot have the rights of riparian owner nor can a owner occupying land on the bank of a stream use the water from the stream for the purpose of land which is on the bank. 7 B. 209 ; 53 W. R. 385 ; 22 M. 236. Ref. to. (*Maung Kin, J.*) MUANG KAW LA *v.* MAUNG KE.
9 Bur. L. T. 183 : 35 I. C 356 : 8 L. B. R. 556.

RISK-NOTE.

See RAILWAYS ACT, S. 72.

RIVAL DECREE-HOLDERS.

See (1) CIVIL PRO. CODE.
(2) EXECUTION.

RIVERS AND RIVER BEDS.

See RIPARIAN RIGHTS.

RIWAJ-I-AM.

See also CUSTOM (PUNJAB).

——*Entries in—Strong evidence of custom recorded.*

Entries in a *riwaj-i-am* are strong evidence of the custom recorded therein. (*Mr. Ameer Ali,*) BEG *v.* ALLAH DILLA. 44 Cal. 749 : 44 I. A. 59 ; 19 Bom. L. R. 388 . 12 P. W. R 1917 : 21 M. L. T. 310 : 38 I. C. 354 : 45 P. R. 1917 : 15 A. L. J. 525 : 21 C. W. N. 842 : 26 C. L. J. 175 : 32 M. L. J. 615 (P. C.).

——*Entries in—Evidentiary value.*

An entry in a riwaj-i-am is a strong piece of evidence in support of the custom it propounds and where it is opposed to the general customary law may be taken as sufficient to set up a custom at variance with the general law and to shift the burden of proof. (*Broadway and Abdul Raoof, JJ.*) NANDOO SINGH *v.* BALJIT SINGH.
5 L. L. J. 203 : 1924 Lah. 93.

——*Evidentiary value of—Custom.*

Riwaj-i-am is a strong piece of evidence in support of the custom therein declared. (*Broadway and Moti Sagar, JJ.*) SAMAIL *v* AHMADA.
4 Lah. 189 : 1923 Lah. 517.

——*Entry opposed to custom—Value of.*

A statement in a *riwaj-i-am* opposed to general custom and unsupported by instances, possesses very little evidentiary value. (*Scott Smith and Zafar Ali, JJ.*) BUDHA *v.* MT. FATIMA BIBI.
4 Lah. 99 : 1923 Lah. 401.

——*Entry in—Custom—Contrary to—Onus of proof.*

The burden of proof is thrown by an entry in the Riwaj-i-am that Shastras are followed in the matter of adoption on the party alleging that an adoption of a stranger with reference to a collateral is invalid as according to the Hindu Law it is quite valid. A custom making the adoption invalid is extremely unlikely. (*Leslie Jones and Broadway, JJ.*) GANESH DAS *v.* KANSHI RAI.
3 Lah. L. J. 461.

RIWAJ-I-AM.

———*Correctness of entries in—Presumption.*

According to a statement in the Riwaj-i-am of the Ludhiana District, a sonless daughter-in-law succeeds along with a son, and the entry is sufficient to throw the onus on the son to prove that a daughter-in-law is excluded by a son. (*Broadway and Martineau, JJ.*) JAGIR SINGH *v.* MT. SANTI. **3 Lah. 181 : 1922 Lah. 389.**

See also 3 Lah. 237.

———*Entries in—Value of.*

Entry in Riwaj-i-am is a strong piece of evidence in support of the plaintiff's claim and is not opposed to Customary Law. (*Scott-Smith and Harrison, JJ.*) AHMAD *v.* MT. BANO. **3 Lah. 40 : 1922 Lah. 114.**

———*Entries in—Value of.*

The *riwaj i-am* contains merely an expression of opinion which cannot be raised to the dignity of a custom. In the absence of practice unless for a sufficiently long period and recognized as binding by the members of the community. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND *v.* ROSHNI BAI. **68 I. C. 92 : 2 Lah. L. J. 178.**

———*Rules refer to ancestral property.*

The rules laid down in Riwaj-i-am, refer to ancestral and not self-acquired property unless there is a distinct provision to the contrary. (*Le Rossignol and Wilberforce, JJ.*) FATIMA BIBI *v.* SHAHA NAWAJ. **2 Lah. 98: 60 I. C. 509 : 3 Lah. L. J. 162.**

———*Entries in—Value of.*

The *riwaj-i-am* carries with it a certain presumption of correctness but the presumption is rebuttable ; when positive instances are given, the *riwaj-i-am* cannot be regarded as overriding them. (*Broadway and Beaman, JJ.*) GULAM MUHAMMAD *v.* GUAHAR BIBI. **54 I. C. 419 : 18 P. W. R. 1920.**

———*Entries in—Evidentiary value of—Proof of custom.*

A *riwaj-i-am* is a public record and statements contained therein form strong evidence of the custom affirmed therein, even when they are unsupported by instances, provided they are not opposed to the general custom of the country. (*Scott-Smith, J.*) SANUN RAM *v.* ALLAH BAKHSH. **53 I. C. 435 : 133 P. R. 1919.**

———*Entries in—Value of—Custom.*

An entry in a *riwaj i-am* has special value in that it gives expression to opinion of males in favour of the rights of females at a time when no litigation was expected. (*Shadi Lal and Wilberforce, JJ.*) SAIDE KHAN *v.* AMIR-UN-NISSA. **109 P. W. R. 1918 : 45 I. C. 966 : 94 P. R. 1918.**

———*Entries in—Value to be given to.*

Statements in a *riwaj i-am*, when opposed to the general custom are of very little weight unless supported by instances. (*Chevis and Leslie Jones, JJ.*) WAZIRA *v.* MARYAN. **84 P. R. 1917 : 151 P. W. R 1917 : 42 I. C. 358 : 3 P. L R. 1918.**

RIWAJ-I-AM.

———*Entry—Nature.*

An entry in *riwaj-i-am* must be understood as being strictly limited to the case set out in the question. (*Shah Din, C. J. and Le Rossignol, J.*) MUHAMMUD BAKSH *v.* KARM ILAHI. **104 P. L. R. 1917 : 82 P. W. R. 1917 : 40 I. C. 246 : 101 P. R. 1917.**

———*Entry in—Family custom.*

Indefinite entry in *riwaj-i-am* as to the question of custom of adoption among Hindu Jats in Sheshna, Dt. Ludhiana, has no effect. (*Shah Din, J.*) BISHAN SINGH *v.* KISHNI. **38 I. C. 636 : 29 P. R. 1917.**

———*Entry regarding succession—No discrimination between ancestral and self-acquired property.*

The entry in *riwaj-i-am* about landed property and succession to it without discrimination between ancestral and self-acquired property, is to be taken to apply to ancestral property. (*Johnstone, C. J.*) RAJ KUAR *v.* TALOK SINGH. **38 P. R. 1916 : 33 I. C. 992 : 99 P. W. R. 1916.**

———*Succession—Interpretation of entry.*

The answer to the question of *riwaj i-am* of settlement that no share is ever taken by the sister or her son, refers only to cases of succession in the presence of collaterals (*Shadi Lal and Leslie Jones, JJ.*) RALLI *v.* RALLA. **79 P. W. R. 1916 : 33 I. C. 783 : 85 P. R. 1916.**

———*Evidentiary value of, to prove special custom.*

The *Riwaj-i-am* entry, in the absence of instances to support it, is not sufficient evidence to show that a special custom, opposed to the ordinary general custom of the province, is followed either generally or even to such an appreciable extent as to take it as proved. (*Kensington and Chevis, JJ.*) KARIMAN *v.* FATAL MOHAMMAD. **152 P. W. R. 1912 : 164 P. L. R. 1912 : 14 I. C. 532 : 85 P. R. 1912.**

———*Evidentiary value of.*

The value of an entry in the *riwaj-i-am* depends upon the instances quoted in support of it. (*Robertson and Shah Din, JJ.*) KURI *v.* DAS RAJ. **57 P. W. R. 1912 : 13 I. C. 448 : 102 P. L. R. 1912.**

———*Entries in—Evidence of custom.*

A *Riwaj-i-am* of 1907 presumably represents the custom of 1906 more accurately than one 20 or 30 years old. (*Reid, C. J. and Johnstone, J.*) TAJA *v.* JATTA. **72 P L. R. 1911 : 12 I. C. 955 : 257 P. W. R. 1911.**

———*Gurdaspur Dt.—Chundawand rule.*

The *Riwaj i-am* of the Gurdaspur Dt. for the Chundawand rule is not entitled to any weight because no specific instances are cited therein to support the said rule. (*Shah Din, J.*) IDA *v.* RAHIM BAKSH. **58 P. R. 1911 : 45 P. L. R. 1912 : 12 I. C. 857 : 202 P. W. R. 1911.**

RIWAJ-I-AM.

——— *Evidentiary value.*

Riwaj-i-am supported by large number of expression of opinions is very important (*Johnstone and Shah Din, JJ.*) ISHAR KUAR *v.* RAJA SINGH. **29 P. R 1911 : 94 P. L. R 1911 : 9 I. C. 608 : 124 P. W. R. 1911.**

ROAD.
See HIGHWAY.

ROAD-CESS AND PUBLIC WORKS CESS ACT (IX B. C. of 1880.)

——— **S. 20**—*Road-cess Return*—Bhaoli *land not mentioned—Rent.*

The landlord is not debarred from claiming produce rent for the leased land by the fact that *bhaoli* is not mentioned with respect to any land in the Road cess return. (*Jwala Prasad, J.*) NAND LAL SINGH *v.* RAMPHAL SINGH. **59 I. C. 875.**

ROAD CESS RETURNS.
See EVIDENCE ACT, S. 35.

ROBAKARIES.
See EVIDENCE.

RULES OF PRACTICE.
See (1) HIGH COURT RULES.
(2) PRACTICE.

RYOTI LAND OR VILLAGE.
See (1) BENGAL TENANCY ACT.
(2) MADRAS ESTATES LAND ACT.

RYOTWARI TENURE
See LAND TENURE—RYOTWARI.

SAJJADANASHIN.
See MAH. LAW.

SALARY.
See C. P. CODE, S. 60.

SALE.
See (1) CONTRACT ACT, S. 55.
(2) T. P. ACT, S. 54.

SALE CERTIFICATE.
See C. P. CODE, O. 21, R 94.

SALE IN EXECUTION.
See (1) EXECUTION SALE.
(2) C. P. CODE, S. 47, O. 21, RR. 66—90.

SALE IN INVITUM.
(1 C. P. CODE O. 21, RR. 66—90.
(2) EXECUTION SALE.
(3) REVENUE SALE.
(4) T. P ACT, S 5.

SALE OF GOODS.
See CONTRACT ACT, SS. 76—123.

SALT ACT (XII of 1882).

——— **S 27**—*Importation—When an offence.*

There is nothing in S. 27 to bear out the contention that importation into a part of the territories mentioned in S 1 is to be taken as meaning only importation from outside those territories and not importation from one part of the territories into another part. Meaning of "importation" considered. (*Martineau, J.*) SITA RAM *v.* EMPEROR, **69 I. C. 460 : 23 Cr. L. J. 732.**

SEA CUSTOMS ACT (VIII OF 1878), S. 79,

SALVAGE.
See SHIPPING.

SANCTION.
See C. P. CODE, S. 92.

SANYASI.
See HINDU LAW—SUCCESSION.

SAPINDAS.
See HINDU LAW—SUCCESSION.

SARANJAN INAM.
See LAND TENURE.

SARBHARAKAR
See (1) LAND TENURE.
(2) LOCAL ACTS.

SARVAMANIAM.
See GRANT.

SCHEDULED DISTRICTS ACT (XIV of 1874).

——— **S 6**—(*Act XI of 1846*), *S. 4- Rules made under the Act—Offence committed in Nala State —Jurisdiction of Agent for the Mewas Estates— —High Court—Power of, to call for additional evidence on appeal by accused—Cr. P. C., S. 438.*

The Agent for Mewas Estate can try the case of a murder committed at the village in the Nala State. The High Court of Bombay can hear an appeal of an accused convicted by the Agent (S. 4 of Act XI of 1846 and Rule 44 made thereunder) and, if necessary, can under the provisions under S. 428 of the Cr. P C obtain any additional evidence. (*Scott. C. J. and Heaton, J.*) EMPEROR *v.* KHALPA RANCHEE. **17 Cr. L. J. 533 : 36 I. C. 581 : 18 Bom. L. R. 789.**

SCHEME SUIT.
See (1) C. P CODE, S. 92.
(2) REL. END. ACT, S. 18.

SEA CUSTOMS ACT (VIII of 1878).

——— **S. 19 (9)**—*Proclamation under—Legality of.*

Under the Sea Customs Act, the Government can prohibit the export of specified articles or things but description of different commodities *ejusdem generis* under a vague description, is not enough (*Beaman, J.*) KARL ETTLINGER AND CO. *v.* CHAGANDAS AND CO **40 Bom 301 : 33 I. C. 205 : 17 Bom. L. R. 1087.**

——— **S. 20**—*Customs duty—Railway Company - Property vested in Government—Importation of stores from England.*

The property of the Great Indian Peninsular Railway consisting of the railways, works, etc., having been transferred to and vested in the Secretary of State, no customs duty is leviable under S. 10 of the Sea Customs Act, 1878, on stores purchased abroad and imported into India by the Great Indian Peninsular Ry. Co. for the use of their undertaking. (*Macleod, C. J and Crump, J.*) SECRETARY OF STATE FOR INDIA *v.* G. I. P. RAILWAY. **25 Bom. L. R 470 : 1923 Bom. 423.**

——— **S. 79**—*Cargo Boat, rules of—The Rangoon port, rule 1—"Ply," meaning of—"Plying for landing and shipping of merchandise within port", meaning of.*

SEA CUSTOMS ACT (VIII OF 1878), S. 182.

The word "ply" in rule 1 means to do an action repeatedly and not necessarily plying for hire. The words "plying for landing and shipping of merchandise within port" need not be restricted in meaning to both landing and shipping merchandise within port. They mean boats which ply for the landing and boats which ply for shipping or both. (*Ormond, J.*) MG PO HA *v.* EMPEROR. **12 Cr. L. J. 476 : 12 I. C. 84 : 4 Bur. L. T. 215**

——— **S. 182**—*Confiscation and penalties—Adjudication—Procedure.*

The Sea Customs Act contains no provisions with regard to the adjudication of confiscation and penalties which can be made by Customs Officers under S. 182. These officers must, therefore, proceed according to general principles, which are not necessarily legal principles, for the purpose of arriving at a conclusion when such an inquiry is instituted. (*Macleod, C. J. and Shah, J.*) MAHADEV GANESH *v.* SECRETARY OF STATE FOR INDIA **46 Bom 732 : 24 Bom. L. R. 245 : 1922 Bom. 30.**

SECOND APPEAL.

See C. P. CODE, Ss. 100, 104, O. 41 AND O. 42.

SECONDARY EVIDENCE.

See EVIDENCE ACT, Ss. 65, 91.

SECRETARY OF STATE.

——— *Status of — Act of Parliament (22 Geo. III, Ch. 45)—Any other person—Doctrine of* ejus dem generis *—Public service —Source of payment and place immaterial—Construction of Act—41 Geo III, c. 52, S. 4 not surplusage.*

The Secretary of State for India is one of His Majesty's five principal Secretaries of State, and as such can discharge most if not all of the duties of the other four, as they can discharge most, if not all, of his duties. He is an officer of the British Government in the fullest sense. A contract is none the less made with the Secretary of State though he has to obtain the concurrence of others (members of his Council) before making it, and that he and they are designated by status as liable to be sued or to sue on it as a corporate body. The personality of the Secretary of State is not merged in any corporation by the statute 1858, for the better Government of India nor in that of the Council. (*Lord Chancellor.*) SIR STUART SAMUEL, *In the matter of.* **19 I. C. 765 : 17 C. W. N. 735 (P. C.).**

——— *Suit against, for damages for wrong order of Magistrate is not maintainable.*

A Magistrate is not a servant or agent of the Secretary of State. A suit for damages is not maintainable against the latter for the erroneous order of the latter. (*Rafique and Piggott, JJ.*) PANCHAETI AKHARAMAHA NIRBANI *v.* THE SECRETARY OF STATE FOR INDIA. **20 A. L. J. 420: 44 A. 573 : 1922 A. 276.**

——— *Vatandar Patil— Dismissal of—Suit to declare dismissal illegal— Bombay Revenue Jurisdiction Act* (1876), *S.* 4.

A suit by a *Vatandar Patil*, with life interest in the Patiliki Vatan, to declare his dismissal illegal and forfeited vatan land is barred by the

SECRETARY OF STATE.

Bombay Revenue Jurisdiction Act (1873), S. 4. (*Macleod, C. J. and Heaton, J.*) RACHANGAUDA IRANGAUDA PATIL *v.* SECRETARY OF STATE FOR INDIA. **54 I. C. 129 : 21 Bom. L. R. 1155.**

——— *Tort—Libel.*

A suit cannot be brought against the crown for libel, (*i. e.*) for damages for defamation. (*Mookerjee and Beachcroft, JJ.*) RAMDAS HAZRA *v.* SECRETARY OF STATE. **18 C. W. N. 106 : 16 I. C. 922 : 17 C. L. J. 75.**

——— *Tort of servants—Liability for.*

A Secretary of State cannot be *held* civilly liable for tortious acts committed by Police officers in the performance of the duties imposed upon them by the Legislature. 28 Bom. 314 ; 9 C W N. 497 Ref. (*Rattigan, C. J. and Abdul Raoof, J.*) JAMESYMONDAS EVANS *v.* SECRETARY OF STATE FOR INDIA. **54 I C. 950 : 143 P. R. 1919.**

——— *Liability of Government for illegal acts of its officers.*

The Govt. is not liable for illegal orders of its servant under a statutory power conferred upon him. The Collector could not be treated as the agent of the Govt. of Madras for illegal orders nor could Govt. ratify that act. That grounds of public policy require that a Govt should not be liable for the tortious acts of its agents or servants other than those done in case of transactions into which an ordinary private firm can enter. A Dt. Magistrate's order does not make him personally liable unless it was malicious or was done with a view to injure plff.'s legal right. (*Sadasiva Aiyar and Bakewell, JJ.*) RASS *v.* SECRETARY OF STATE FOR INDIA. **39 Mad. 781 : 31 I. C. 224 ; 29 M. L. J. 280.**

——— *Tort—Liability—Negligence of servants in keeping gravel on a military road—Maintenance of the road by P. W. Department—Injury to plaintiff—Government of India Act* (1833), *S.* 4.

Plaintiff's carriage was capsized by one of its wheels running over a heap of gravels stacked on a military road maintained by the Public Works Department by a contractor. In a suit by the plaintiff for damages against the Secretary of State, *held*, that the provisional maintenance of roads, especially military roads, is one of the functions of the Government though in India it is now largely delegated by statutes to Municipalities and Local Boards, that the act complained of cannot be said to have been done in the conduct by Government of undertakings which might have been carried on by private persons and no claim for damages lay. Test laid for ascertaining liability of the Government in tort cases reviewed. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SECRETARY OF STATE *v* A. COCK CRAFT. **39 Mad. 351 : 27 I. C. 723 : (1915) M. W. N. 39.**

——— *Liability for torts by Madras Government.*

The Secretary of State is not liable for a libel published by the Madras Government, unless it was published under his orders, or on his behalf or ratified by him. The Madras Government

has no authority from the E. I. Company or Secretary of State to commit torts or to ratify those committed by others. (*Wallis, J.*) A. M ROSS *v.* SECRETARY OF STATE.
37 Mad. 55 : (1913) M. W. N. 758 : 19 I. C. 363 : 24 M. L. J. 429.

———*Corporation.*

The "Secretary of State" is merely a name under which the Government is to be sued and does not refer to either an individual or a corporation (*Sadasiva Aiyar and Sundara Aiyar, JJ.*) SECRETARY OF STATE *v.* KALE KHAN.
37 Mad. 113 : (1912) M. W. N 786 : 16 I. C. 947 : 12 M. L. T. 224 : 23 M. L. J. 181.

———*Master and servant—Tort committed by Government servant—Liability.*

The Secretary of State for India in Council can be held liable for the torts of Government servants in India. (*Crouch and Hayward, A.J.Cs.*) MATHRADAS *v.* SECRETARY OF STATE.
11 I. C. 58: 5 S. L. R. 82.

SECURITY FOR COSTS.
See C. P. CODE, O. 25, AND O. 41, R. 10.

SELF-ACQUIRED PROPERTY.
See HINDU LAW—JOINT FAMILY.

SEPARATE ACQUISITION.
See HINDU LAW—JOINT FAMILY.

SERVANT, DOMESTIC.
See MASTER AND SERVANT.

SERVICE INAM.
See GRANT.

SERVICE OF NOTICE.
See (1) T. P. ACT, SS. 83, 84 AND 106.

SERVICE OF SUMMONS.
See C. P. CODE, O. 5.

SET OFF.
See C. P. CODE, O. 8, R. 6.

SETTING ASIDE.
See (1) C. P. CODE, O. 22, R. 91.
(2) DECREE.
(3) LIM. ACT, ARTS. 44 AND 91.
(4) MINOR.

SETTLED ACCOUNT.
See ACCOUNTS SETTLED.

SETTLEMENT.

———*Talukdar—Settlement by Govt.*

Where an estate comprising a taluk S. and many other taluks was sold for arrears of Govt. Rev., and purchased by the Govt who continued to hold the estate as a Khas mahal and for a number of years, temporary settlements were made as regards taluk S. with the Talukdars, and finally in 1869 the taluk was separately assessed with Govt Rev. and formed into a separate estate with a separate *towji* number and settled with the talukdars. *Held*, that the effect of the settlement was to convert the taluk into a separate estate paying revenue to Govt. and that the

settlement having been made with and accepted by the Talukdars, the talukdari interest did not continue to exist. (*Macpherson and Banerji, JJ.*) KALI CHANDRA *v.* RAM HARI DEY.
12 I. C. 462 : 14 C. L. J. 310.

———*Child's portion—Vesting of—Presumption.*

Unless there is anything to the contrary, the presumption in marriage settlements is that a child's portion vests at marriage in the case of a daughter and at majority in the case of a son unless there is anything to the contrary. (*Twomey, C. J and Young, J.*) COHEN ESTHER *v.* E. I. COHEN. 10 L. B. R. 196 : 59 I. C 806 : 13 Bur. L. T. 78.

SETTLEMENT RECORD.
See EVIDENCE ACT, S. 35.

SHAH JOG HUNDI.
See NEGOTIABLE INSTRUMENTS ACT, S. 5.

SHAM-TRANSACTION.
See (1) BENAMI.
(2) PRO. INS. ACT, S. 36.
(3) T. P. ACT, S. 53.

SHAMILAT.
See also (1) CO-SHARER.
(2) CUSTOM (PUNJAB).

———*Co-sharer asserting exclusive rights to abadi land is liable to ejectment.*

No proprietor can use common land in such a way as to affect the rights of all the co-sharers. The co-sharers asserting individual rights to a piece of *abadi* land which they do not possess are liable to eviction for this act of trespass cannot be remedied at partition. (*Wilberforce, J.*) GARHIA *v.* MAYA RAM. 64 I. C. 9

——— *What is—Share of joint holding.*

Land which belongs to the whole village or a *taraf* is shamilat, but not the land jointly held by only against a small number of proprietors. Therefore, the words *mai hissa shamilat* in a sale-deed do not include the share in the joint holding. (*Chevis, J.*) BASKAT RAM *v.* IMAM DIN.
3 Lah. L. J. 451.

———*Gift of land—Right in shamilat created afterwards—Effect.*

Where the deed of gift did not convey rights in the shamilat to the donee there being no shamilat in existence on the date of the gift but rights in shamilat being created afterwards all the proprietors including the donee become entitled to it proportionately to their proprietary holding. (*Martineau, J.*) AHMAD YAR *v.* MAHOMED ALI.
3 Lah. L. J. 445.

——— *Ejectment decree—Judgment-debtor becoming co-sharer by purchase—Effect.*

A person against whom a decree for possession of a specific portion of the *Shamilat* has been got by a co-sharer cannot avoid that decree by becoming a co-sharer by purchase and continuing in possession of that specific portion. (*Broadway and Wilberforce, JJ.*) KHUSHAL PURI *v.* RAHMAT ULLAH. 63 I. C. 894.

SHAMILAT.

———*Adverse possession by co-sharer—Elements to be proved.*

A co-sharer claiming adverse possession over *shamilat* land must show (1) exclusive possession, (2) open assertion of the exclusive ownership or some overt act showing an intention of holding the land exclusively as his own. The retention by the Revenue authorities of the names of the other co-sharers after the adverse possession by one has begun does not prevent time running against them. Even a decree in their favour unaccompanied by possession and effective assertion of rights will not help them. (*Abdul Raoof and Moti Sagar, JJ.*) HANS RAJ *v.* MANLU. **63 I. C. 881.**

———*Sale of Khewat land—Second sale with rights of the* Shamilat—*Rights of second purchaser.*

A sold certain Khewat land to *B* who sold it to *C* The second sale deed provided that all the rights of the vendor in respect of the land passed to the purchaser. *A* then sued for declaration that no share in the *shamilat* had passed either to *B* or *C*. *C* then sued *B* for compensation out of the khewat land of *B*. *Held*, that *B* did not purport to sell any *shamilat* to *C* and therefore *C's* suit must fail. (*Scott-Smith, J.*) MULLICK KHAN *v.* BHOLA RAM. **60 I. C. 459.**

———*Passing of share in—Deed construction.*

The question whether a particular transaction carries with it a share in the *Shamilat* area is one of intention and is to be gathered from the terms of the deed, surrounding circumstances and conduct of the parties. (*Shadilal and Broadway, JJ.*) GULLU *v.* KHUDA BAKHSH. **38 I.C. 120.**

———*Right to—Adna maliks—Questions of law—Determination of right of* ala *and* adna-maliks—*Partition*—Wajib-ul-arz.

The question of the rights of *ala* and *adna maliks inter se* is one of law to be decided upon all the facts before the Court. The *adna maliks* of village patti Allanwala, Tahsil and Dt. Jhang, have no share in the village *shamilat*. The *wajib-ul-arz* in the case merely lays down a basis or mode of partition and does not create any right to share in the *shamilat*. 33 P. R 1903 : 113 P.R. 1901 : 75 P. W. R. 1910 ref. (*Scott-Smith and Broadway, JJ.*) SULTAN AHMED *v.* PARSA RAM. **36 I. C. 634 : 2 P. R. 1917.**

———*Khewat land—Sale of—Share in* shamilat *Burden of proof.*

Shamilat is not a mere accessory to the Khewat land of a proprietor. Therefore the sale of the latter does not convey any right in the former. 113 P.R. 1901 : 75 P.W.R. 1901, ref. The alienee must prove that a share of the *shamilat* has been sold to him along with the Khewat land. 10 P.R. 1894 diss. 57 P. R. 1915, dist. 36 M 453: 36 P. R. 1899, ref. (*Scott-Smith and Broadway, JJ.*) SAHEB *v.* BAKTHAWAR **36 I. C. 601 : 3 P. R. 1917.**

———*Rights in—Alienation of Khewat rights.*

In general where the intention of the alienor of *khewat* rights is to place the alienee in the same position as himself, the conclusion is that *shamilat* rights also pass unless they are expressly reserved. But where the sale is to an outsider or money-lender and when there is no clause that *shamilat* rights have passed, the rights do not pass. (*Robertson, J.*) SHER *v.* DALAH. **186 P. L. R. 1913 : 19 I. C. 641 : 131 P W. R. 1913.**

———*Village road — Encroachment by a member of the proprietary body, if authorised.*

A member of the proprietary body is not authorised to encroach upon the shamilat land in a village intended for a road. Such an encroachment may be the subject-matter of a suit for ejectment and restoration without any special damage being proved to have been sustained by the plffs. (*Reid, C. J.*) ACHHAR SINGH *v.* BADHAWA SINGH. **9 P. R 1912 : 11 I. C. 404 : 84 P W R. 1911.**

SHAMILAT LAND.

———*Not accessory to Khewat holdings.*

The *Shamilat* lands are not accessories to the Khewat holdings. (*Broadway and Zafar Ali, JJ.*) ZAIDA *v.* RAJA. **1923 Lah. 350.**

———*Not accessory to khata.*

Rights in the *shamilat* of a village are not accessory to the land held by a proprietor and a sale of the latter does not convey the *shamilat* rights unless there is an intention to the contrary. (*Raoof and Moti Sagar, JJ.*) SHANKAR DAS *v.* MALI. **63 I. C. 746.**

SHAM TRANSACTION.

See BENAMI.

SHARE-HOLDER.

See COMPANIES ACT.
COMPANY.

SHEBAITS.

See HINDU LAW—(*a*) RELIGIOUS ENDOWMENT.
(*b*) RELIGIOUS OFFICE.

SHIAHS.

See MAH. LAW.

SHIKMI TENURE.

See LAND TENURE.

SHIPPING.

———*Prize Court—Condemnation of ship—Owner having commercial domicil in enemy country—Naturalized neutral.*

On the declaration of war between Great Britain and Turkey a ship belonging to the applicant was condemned as enemy property. The applicant though a naturalized neutral had a commercial domicil in Turkey till the outbreak of war. He claimed the ship as owner. *Held* that he could succeed only on proof of an intention to divest himself of his status as enemy subject. (*Lord Sumner.*) THE KARA DENIZ, *In re.* **46 B. 857 : 25 Bom. L. R. 116 : 1922 P. C. 371.**

ON APPEAL FROM **53 I. C. 372 : 21 Bom. L. R. 934.**

———*Bombay High Court—Service on ship—Writ of summons—Warrant of arrest.*

It is not essential under the Admiralty Rules to issue a writ of summons, in addition to issuing warrant for arrest. Not that a writ can never be issued in an Admiralty suit, but it is unnecessary if a warrant of arrest is issued. (*Marten, J.*) FREEMAN *v.* SS. CALANDA. **24 Bom. L. R. 1167 : 1923 Bom. 51.**

SHIPPING.

——*German ship—Capture—Three miles from port—'Port'—Meaning — Hague Convention No. VI, 1907, Arts 1, 2 and 3.*

The word 'port' as used in the VI Hague Convention does not mean a port in the sense of a fiscal or customs port but means a place where ships are in the habit of coming for the purpose of lodging or unloading, embarking or disembarking, and therefore a German ship lying within three miles of the harbour of Bombay cannot be seized as if it were in the port of Bombay and Arts. 1 and 2 of the VI Hague Convention did apply. (1916) 2 A. C. 183 foll. (*Marten, J.*) THE RHEINFELS, *In re.* **54 I. C 444: 21 Bom. L R. 1116.**

——*Prize—Vessels belonging to neutral—Hostile—Commercial domicil—Condemnation of vessel.*

A vessel belonging to the claimant—a neutral—but whose commercial domicil is in an enemy country, entered the port of Bombay before the outbreak of war. She was seized as a prize *Held*, that the vessel must be condemned as lawful prize, because on the outbreak of war the claimant's commercial domicil was Turkish and he was engaged in trade in enemy territory and at the time of the capture he had no intention of removing that domicil to a neutral country and to prevent the vessel from reaching enemy territory. (1916) 2 A. C. 77; (1918) A. C 578, rel. (*Macleod, C.J.*) KARADENIZ, *In re.* **53 I C. 372: 21 Bom. L. R. 984**

See ON APPEAL **46 Bom. 857: 25 Bom. L. R. 116 (P. C.)**

——*Charter party—Mortgagee taking security with notice of charter party—Positions of charterer—Non-specification of lay and cancelling dates.*

The position of the charterer, where the mortgagee took his security with notice of the charter party, is stronger than when the mortgage was prior to the charter party. An agreement for the letting of a ship to a charterer implies that she shall not be employed for any other person or purpose during the currency of the charter party provided the charterer is ready to supply the cargo. Where twelve charter parties for twelve consecutive voyages were signed by the parties, the fact that the lay and cancelling dates have not been specified in the charter parties does not make the contract incomplete. (*Scott, C.J. and Batchelor, J.*) ARDREW YALE AND CO. *v.* ARDESHIR BOMANJI DUBASH. **24 I C. 758: 16 Bom. L. R. 178.**

——*Under-writer—Rights.*

Where, in the opinion of competent authorities on the report of the wreck, it is found necessary to sell the cargo, the public sale *per se* vests the proceeds of the sale in the under-writer (*Davar, J.*) KANJI DWARAKDAS *v* HARIDAS PURUSHOTAM. **36 Bom. 484: 12 I. C. 837: 13 Bom. L R. 1211.**

——*Wages of mariner—Liability of master.*

Mariners have a three-fold security for their wages, they may proceed against the owner; secondly they may proceed against the vessel and thirdly may sue the captain of the ship. Consequently even though a mariner has been appointed by the owner of the estate he is entitled to recover his wages against the master of the ship Consequently the master of the ship can sue for the recovery of his wages and messing charges together with the wages and messing charges of the chief engineer and other mariners in the ship. (*C. C. Ghose, J.*) MORRIER *v.* LAL RAGHUMULL. **50 Cal. 29: 1923 Cal 439**

——*Prize—Effect.*

Where a ship is condemned as a prize, the crown can impose the freight as a lien on the goods which are released (*Sanderson, C.J. and Mookerjee, J.*) MADHORAM HURDEO DASS *v.* V. G C. SETT. **45 Cal 28: 21 C. W. N. 670: 40 I. C 383: 26 C. L. J 62.**

——*Prize—Confiscation of cargo in enemy ship.*

A German ship was captured at sea after the declaration of war and condemned. Claims were submitted on account of goods shipped before the war by the British subjects to British merchants and goods shipped by Brtish subjects to German merchants. *Held*, that in determining the question of liability to confiscation, regard must be had to the property in the goods and not to the risk except as it may assist the Court in deciding the question, "To whom the goods belonged at the time of capture". In the circumstances of the case, the bills of lading being still with the sellers, the property had not passed to the buyers, though goods might have been appropriated towards the contract and that they were liable to confiscation. (*Jenkins, C. J.*) *Re* CARGO *Ex SS. Rappenfels.* **30 I. C. 174: 42 Cal. 334.**

——*Arrest of ship—Trespass—Damages—Maritime necessities—Action* in rem.

An ordinary suit for mere trespass did not lie for the arrest of a ship. There is no trace of any such suit in the books. The arrest of the ship is a judicial act of the Court and an ordinary step in an action *in rem*, so, where it constitutes a legal grievance, it is not an independent wrong, but an integral part of an action *in rem* in which there was malice, or its equivalent, entitling the aggrieved person to seek compensation either in the admiralty proceedings or by separate action. But the arrest by the Marshal of Calcutta as an officer of the Court, and the subsequent detention by the Court do not constitute a detention due to the default of a party. The English decisions must be the guide in dealing with the maritime matters in India. (*Jenkins, C. J and Stephen, J.*) MADRAS STEAM NAVIGATION CO. *v.* SHALIMAR WORKS, LTD. **28 I. C. 463: 42 Cal 85.**

——*Bill of lading—Shortage—Onus of proving is on plaintiff.*

Where the Bill of lading expressly stated "weight, contents, and value when shipped unknown" in a suit for damages for short delivery the burden of proving shortage is on the plaintiff. (1917) 2 K. B. 679 followed (*Krishnan, J.*) SUBRAMANIA CHETTY *v* THE BRITISH INDIAN STEAM NAVIGATION CO., LTD. **17 L. W. 363: 1923 Mad. 523 (1).**

SHIPPING.

———*General average—Claim for—Cause of action—Forum.*

A claim for general average contribution is sustainable only when the vessel reaches a port safely. Each owner of a sacrified interest must contribute to all the sacrifices in whatever order of time they may have occurred. The time of jettisoning is not to be taken as the time, when the value of the goods is to be ascertained but the time of reaching the port of discharge. furnishes the starting point. A claim for general average may be made at the place where the voyage has safely ended (*Phillips and Krishnan, JJ.*) RAJABHAI NARAYAN *v.* KAREM MOHAMAD.
47 I. C. 708 : 35 M. L. J. 189 : (1918) M.W.N. 521 : 24 M.L.T. 209.

———*Admiralty Court Act* (1861), *Ss.* 5 *and* 35 (*Act of* 1840), S. 6—*Claim for necessaries supplied to ship—Jurisdiction.*

Claim for necessaries can be enforced in a Colonial Court of Admiralty by a suit *in rem* and such a suit can presumably be instituted in any Admiralty Court within whose jurisdiction the ship happens to be at the time when the suit is instituted. Before there can be an action *in rem* there must be a personal liability on the part of the owner. Though necessaries supplied to a ship are *prima facie* presumed to have been supplied on the credit of the ship this *prima facie* presumption may be rebutted by evidence of fact going to show that the person who has supplied or paid for the necessaries looked for payment to the person at whose instance he furnished the supplies or advanced monies and not to the owner of the ship. Under the English admiralty law party who supplied necessaries to a foreign ship acquires a lien on the ship for the amount disbursed. (*Heald and May Oung, JJ.*) THE OWNER OF THE STEAMSHIP *v.* BIRD & CO.
1 Rang. 78 : 1923 R 163

———*Bill of lading—Date of—Evidence of shipment.*

The date on a bill of lading is very strong *prima facie* evidence of the date of shipment. (*Ormond, Offg. C. J.*) OOMERSEE RAISEE CO. *v.* HARDIMAN. **42 I. C. 382.**

———*Bill-of-lading—Loss of—Shipping company's rights and duties.*

The shipping company are bound to deliver the goods to the person who proves that he is the owner and the consignee of the goods notwithstanding the fact that he is unable to produce the bill-of-lading. The company cannot, after notice from the consignee not to do so, deliver the goods to wrong person though he may produce the bill-of-lading. But where the consignee alleges loss of the bill-of-lading, the company is entitled to be satisfied that loss is *bona fide.* (*Ormond, J.*) ENG LONG AND CO. *v.* B. I.S-N. & CO., LTD
24 I. C. 70 : 7 Bur L. T. 92

———*Bill-of-lading—Conditions in—Validity—Carrier by sea.*

It is open to a carrier by sea to limit his liability by an express contract to that effect. The Indian law also is the same. A condition excluding liability for damage done by the negligence of the servants of the carrier is valid. (*Hayward, A. J. C.*) MOASAJI AHMED *v.* ASIATIC NAVIGATION.
45 I. C. 168 : 11 S. L. R. 106.

———*Bill-of-lading—Port Trust.*

The Karachi Port Trust in landing cargo from the ship in virtue of statutory powers and in delivering the cargo landed to different consignees, are intermediaries and act as the agent of the ship owner in carrying out his instructions whenever there arises under the bill-of-lading a dispute as to the method of delivery of any portion of the cargo landed to a particular consignee. The equitable rule of proportion is applied in cases of mixture of unidentifiable cargo belonging to different owners caused by accident with respect to the sound and unsound portions of the whole mixture. An exception in the bill-of-lading protecting the ship-owner from liability for marks made by the shipper for identifying the cargo, throws the onus on the shipper to prove that a particular bag claimed forms part of his and not that of any other consignee ; if contents of sugar bags are lost by bad stitching the ship owners is excused under the bill-of-lading even though it states that it was received in a sound condition. (*Fawcett, A. J. C.*) BOMBAY COMPANY, LIMITED *v.* KARACHI PORT TRUST.
42 I. C. 659 : 11 S. L. R. 29.

SHIP, SHIPMENT, SHIPPER.
See SHIPPING.

SHIVAIJAMA TENURE.
See LAND TENURE.

SHRINE.
See HINDU LAW—REL. ENDOWMENT.

SHROTRIEM.
See (1) GRANT.
(2) HINDU LAW.
(3) MADRAS ESTATES LAND ACT, S. 3.

SIGNATURE.
See DEED—EXECUTION.

SIND COURTS ACT (BOM. ACT XII OF 1866).

———S. 16—*Pleader — Misbehaviour — Misconduct not connected with profession.*

The jurisdiction of the Judicial Commissioner under S. 16 of the Sind Courts Act extends not only to professional misbehaviour but to general misconduct. While the jurisdiction is unlimited, the Court is reluctant to take cognisance of misconduct not connected with the office of pleader unless it is morally disgraceful or shows that the individual is not a proper person to hold that office. (*Pratt, J.C., Crouch and Hayward, A J. Cs.*) *In re* MR M. PLEADER. **19 Cr. L J. 322 : 44 I. C. 338 : 11 S. L. R. 81 (F. B.).**

———S. 16—*Pleader— Misbehaviour— Filing second complaint.*

A pleader as an officer of the Court should not deceitfully circumvent but be should honestly and loyally uphold the practice of the Court and cooperate in the orderly and pure administration of justice. He should take pains to master his instructions and the law relating to them so as to eliminate all inaccuracies. He should bring to the notice

SIND COURTS ACT (BOM. ACT XII OF 1866), S. 16.

of Court, prior unsuccessful proceedings by same party in the same or another court. 27 I. C 924 ; 35 M. 543 at p. 551 P. C. Foll. (*Hayward, J C. Crouch and Fawcett, A. J. Cs.*) M. PLEADER *Re-enquiry Against.*

41 I. C. 643 : 18 Cr. L. J. 819 : 11 S. L. R. 12.

——— S 16—*Pleader—Vakalatnama executed by pleader but purported to be by party—Professional misconduct.*

It is professional misconduct of a serious kind for a pleader to present in Court a vakalatnama purporting to have been executed by his clients while really it was done by himself; such an act is an attempted deception practised on the Court. (*Hayward, J. C., Leggatt and Woley Cohen, A. J. Cs.*) MR G. PLEADER. *In re.* **12 Cr L. J. 390: 11 I. C. 254 : 4 S. L. R 242.**

——— S. 16—*Rules under—Pleader's license—Scope.*

Under the rules under S. 16 Pleaders' licenses relate both to Civil and Criminal Courts. A pleader licensed to practise in the Civil and Criminal Courts of one district cannot as of right practise in the Courts of another district. (*Hayward, J.C. and Legatt, A J.C.*) KIMATRAI *v.* EMPEROR. **19 Cr. L. J. 118 : 9 I. C. 717 : 4 S. L. R. 207.**

SIND COURTS CRIMINAL CIRCULARS.

——— Chap. V, R. 22—*Magistrate, duty or to proceed die in diem—Checking unnecessary examination.*

It is the duty of a Magistrate to insist on the trial proceedings from day to day as required by rule. The Court can check prolific examination and cross-examination of witnesses, in the exercise of its inherent power. (*Hayward, J. C.*) SOLOR, F. W. *v.* EMPEROR. **18 Cr. L. J. 834 : 41 I. C. 658 : 11 S. L. R 27.**

——— Chap. V, R. 22—*Lengthy examination of witnesses and adjournments*

In criminal cases lengthy examination of witnesses and adjournments to suit the convenience of counsel ought not to be allowed as they would amount to denial of justice. (*Hayward, J. C.*) JEHANGIR FEROZSHAH, *v.* GANGARAM NAUMAL. **18 Cr. L, J. 54 : 37 I. C. 38 : 10 S. L. R. 148.**

SIND COURT RULES.

——— App VI, Cl (g)—*Pleader's fees—Test case.*

Where the defts. made plfi.'s suit a test case for deciding important questions bearing upon their right of disposal of waste lands and hence the trial was made intricate and prolonged, the pleader's fee ought to be assessed under cl. (g) of Appendix VI of the Rules of the Court, and the low value put by plff. on his injunction is only one of the circumstances to be taken into consideration. 4 S L. R 37, Dist. (*Pratt J C. and Crouch, A J. C*) THE KARACHI MUNICIPALITY *v.* SHAMOO LADHA. **30 I. C. 19 : 9 S. L. R. 10**

SIND INCUMBERED ESTATES ACT (XX OF 1896).

——— Ss. 8 and 9—*Adjudicated insolvent—Protection—Suit by mortgagee.*

Section 9 of Act XX of 1896 is not limited to proceedings pending or decrees asked for against the debtor but extends to all proceedings then pending in respect of the debts and liabilities mentioned in S. 8 which *inter alia* refers to all debts and liabilities to which the debtor is subject. A suit pending against the mortgagor who has obtained protection must be stayed notwithstanding the mortgagor had been adjudged insolvent before the protection order, and the mortgagee plff. offered to limit his claim to the mortgaged property. (*Pratt, J. C. and Fawcett, A. J. C.*) PINIAL SHAH *v.* ABDULLA. **30 I. C. 25 : 9 S. L. R. 48.**

SIND JUDICIAL COMMISSIONER'S RULES.

——— Ss 15, 17, 31, 32—*Award by manager—Finality of Liquidation scheme—An appeal.*

An award by the manager under Ss. 15, 16 is final, and can only be varied by the Commissioner on appeal under S. 32. The liquidation scheme cannot vary the award The jurisdiction of the Manager under Ss. 15 and 16 is a special jurisdiction and does not arise unless the terms of the statutes are complied with. The Manager under the Act cannot award future interest subsequent to the order of management under rule 4 as such interest is solely in the discretion of the Commissioner under R. 12 (*Pratt, J. C and Crouch, A. J. C.*) TEJUMAL *v.* COLLECTOR OF LARKANA. **42 I. C. 6 : 11 S. L. R. 49.**

——— S 28—*Prohibition against alienation—Repeal of Act in 1906, effect of—Private alienation—Collusive sale—Setting aside—Limitation.*

The prohibition against alienation took effect already in 1881 when the estate was placed in the hands of the manager of the incumbered estate under Sind Incumbered Estates Act of 1881 that is, long before the repeal of the Act in 1906 and so the limited estate created by the surrender in 1881 could not be converted into a full estate on account of the Repealing Act of 1906 by reason of section 6. Sub-section A of the General Clauses Act of 1897, S. 28 of the Sind Act of 1881 applies only to voluntary alienation of parties. An alienation collusively made as if through Court is nevertheless a voluntary alienation. For a suit to set aside an alienation by the heirs of a person to whom the Act applies limitation runs from death of the alienor. (*Pratt. J. C. and Hayward, A. J. C.*) MR. MAHOMED KHAN *v.* POHUMAL MOTUWAL. **21 I. C. 514 : 7 S. L. R. 55.**

——— S. 29—*Alienation beyond lifetime invalid—No title in alienee, after death.*

The share of a person, who is under the protection of the manager cannot be alienated beyond the term of his natural life under S 29, (*Pratt, J. C. and Crouch, A. J. C.*) TEKOMAL *v.* DIN MAHOMED. **10 I. C. 550.**

SIND JUDICIAL COMMISSIONER'S RULES.

——— Rr. 23, 24 and 27—*Costs- Remand—Order—Costs in the cause—Power of lower Court.*

When a case is remanded for fresh decision and costs of appeal are directed to be costs in the cause, the lower Court when passing its decree has no power to alter the order of the Appellate Court as to costs and to allow costs not shown in the order of the Appellate Court. The expression "successful party" in R. 23 of the Rules of Court means the party who, as a result of the Court's judgment, is entitled to formulate a claim for

SIND MUNICIPAL ACT (III OF 1904), S. 96.

costs against another party ; it does not include a party obtaining success in proceedings before another Court (*Pratt, J. C. and Crouch, A. J C.*) MATHRADAS *v.* THE SECRETARY OF STATE. **15 I. C. 828 : 5 S. L. R. 254.**

SIND MUNICIPAL ACT (III OF 1904).

—— —— **S. 96**—*" Any building," meaning of.*

The words 'any building" in S 96 are wide enough to cover a building in a private Mahal (*Fawcett, J. C. and Kemp, A. J. C.*) EMPEROR *v.* JANU FAKIR. **15 S. L R. 171 : 23 Cr, L. J. 343 : 1922 S. 22.**

SIR LAND.

See also LOCAL ACTS.

——*Alienation by Co sharer—Effect.*

A co-sharer cannot alienate permanently the *sir* which is recorded separately in his name for purposes of cultivation. Revenue Courts have the right to declare such leases invalid. (*Fremantle, J M.*) DUKHI KOERI *v.* LOKNATH SINGH. **L. R. 3 A. 225.**

SLANDER.

See TORT—DEFAMATION.

SOCIETIES REGISTRATION ACT (XXI OF 1860).

——*Managing Committee's right to refuse subscriptions.*

No suit lies by a member of the public against the managing committee of a society or institution which is managed by public subscriptions to enforce the right to subscribe and to be admitted to the privilege of membership. (*Lindsay, J. C.*) ABHOY PADO BOSE *v.* MANAGING COMMITTEE ESE. **34 I. C. 263 . 19 O. C. 15.**

SOHAQ GRANT.

See (1) GRANT.
(2) HINDU LAW—IMPARTIBLE ESTATE.

SOLDIERS (LITIGATION) ACT (XII OF 1915 .

—— —— **Ss. 4 and 8**—*Person serving under war conditions—Decree against—Right to set aside*

Where a deft. serving under war conditions when the case was tried and was not represented by any person duly authorised to appear on his behalf, it was the duty of the Court to give notice to the prescribed authority. Default to comply with the provisions of the law entitles the said deft. within 3 months from date on which he ceased to serve to apply to have the decree passed against set aside. Such decree should be set aside against all defts. when the decision proceeds upon a common ground. (*Shadi Lal. J.*) SOBHA SINGH *v* THAKAR SINGH. **94 P. R. 1917 : 43 I. C. 272 : 172 P. W. R. 1917.**

——(IX OF 1918).

——**S. 11**—*Plaintiff ceasing to be soldier at the date of suit is not within section.*

S. 11 embraces only those cases in which the plaintiff is an Indian soldier at the time of institution of the suit, and the mere fact that he was a soldier for some time during the period of limitation prescribed for the suit does not benefit him if he has ceased to be a solider on the date of the institution of the suit. (*Shadi Lal, C. J. and Le Rossignol, J.*) PIARA SINGH *v.* MULA MAL. **5 L. L J. 551 : 4 Lah. 333 : 1923 Lah. 655.**

SONTHAL PARGANAS ACT (XXXVII OF 1858).

SOLDIERS ORDINANCE (II OF 1915).

——**Ss. 2 and 9**—*"Serving under war conditions"—Meaning of—Court—Duty of, when in doubt,*

" Serving under war conditions" does not necessarily mean serving abroad. When the Court is in doubt as to whether a party can be said to be serving under war conditions or not, it ought to refer the matter to the prescribed authority and act on the certificate given by such authority. (*Bevan Petman, J.*) GURBACHAN SINGH *v.* RALLARAM. **56 I. C. 947.**

SOLICITOR.

See LEGAL PRACTITIONER.

SOLICITOR'S CLERK.

See LEGAL PRACTITIONER.

SONTHAL PARGANAS.

——*Pradhan.*

The Pradhan is not a tenure holder but combines the attributes of head *Raiyat* and *Ijardar.* (*Coutts and Sultan Ahmed, JJ.*) RAM CHARAN SINGH *v.* E. W. BERRY. **2 U. P L. R (Pat.) 7 : 5 Pat L. J. 656 : 58 I. C. 43 : 1921 Pat. 8.**

SONTHAL PARGANAS ACT (XXXVII OF 1858).

——*Jurisdiction—Mortgage of land partly situate in Sonthal Parganas and partly elsewhere.*

A suit to enforce a mortgage of lands situate partly in Sonthal Parganas and partly elsewhere is maintainable only in Sonthal Parganas Courts. The duty of the Court exercising the jurisdiction would be to enforce the rules as to usury contained in S 6 of the Bengal Regulation III of 1872. (*Lord Moulton.*) MAHA PRASAD SINGH *v.* RAMANI MOHON SINGH. **42 Cal. 116 : 41 I. A 197 : 18 C. W. N. 994 : 16 M L T. 105 : (1914) M. W. N. 565 : 1. L W. 619 : 20 C. L. J. 231 : 25 I. C. 451 : 16 Bom. L. R. 824 : 27 M. L. J. 459 (P C.).**

——**S. 2**—*Courts of Dy. Collector, Sub-divisional officers and Dy. Commissioners—High Court's power to interfere—High Courts Act,* S. 15.

The appellate jurisdiction of the High Court does not extend to the Courts of Sub. Dy. Collectors, Sub-Divl. officers, and Dy. Commissioners so that the High Court cannot interfere with proceedings of these Courts under S. 15 of the High Courts Act, 1851. (*Mookerjee and Beachcroft, JJ.*) DARBARI PANJEARA *v.* BHATHI ROY. **41 Cal. 915 : 18 C. W. N. 575 : 23 I. C. 883 : 19 C. L. J. 294.**

——**S. 2 Proviso**—*Sonthal Parganas Regulation (V of 1893), S. 27—Suit worth more than Rs. 1,000—Sub-Judge, order of—Revision—High Courts Act,* S. 15.

SONTHAL PARGANAS ACT CIVIL RULES.

Under the Sonthal Parganas Act civil justice is administered by certain officers subject to the directions of the Lieutenant-Governor but under proviso to S. 2 all civil suits over Rs. 1,000 in value shall be determined according to the general law as if the Act had not been passed. The High Court can under its general powers under clause 15 of the High Courts Act interfere with the orders of the Subordinate Judge in Sonthal Parganas in suits of the value of over Rs. 1,000. The word 'suits' include also proceedings in execution. (*Coxe and D. Chatterjea, JJ.*) SARDARI SHAH *v.* HUKUMCANI. **41 Cal. 876 : 22 I. C 848 : 18 C. W. N. 662.**

SONTHAL PARGANAS CIVIL RULES.

——R 36—*Object—Sale of property under attachment to pay decree-holder—Latter cannot question validity.*

The rule solely and specifically protects a decree-holder. Where the judgment debtor sells his property under attachment to pay the decree-holder, he cannot question its validity and a suit by the vendee for possession is not barred by this rule. (*Miller, C J., Mullick and Bucknill, JJ.*) LAL SHAHA *v.* KADO MAHTO **6 Pat L. J. 85 : 60 I. C. 849 : 2 Pat. L. T. 345 1921 Pat. 66 (F.B.).**

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872.)

——S. 3—*Suit for enhancement of rent—Jurisdiction.*

There is no law in the Sonthal Parganas under which a suit for enhancement of rent can be brought in a Civil Court. (*Coxe and Imam, JJ.*) KALIDAS PANDEY *v.* KRISHNA DHAN CHOSE **24 I. C. 1.**

——Ss. 5 and 6—*Applicability and scope of—Settlement—Completion of—Power of ordinary Civil Courts—Interest—Maximum allowable.*

The effect of the amendment of the Sonthal Parganas Act by S. 5 of the Amending Act of 1918 was to exclude for the future the jurisdiction of the Civil Courts to try cases relating to any land in the Sonthal Parganas only during such period as that land should be under settlement the period bring reckoned from the time when the land is notified as under settlement to the time where the settlement is notified as completed.

The restrictions as to interest contained in S. 6 of the Regulation of 1872 are binding upon the ordinary Civil Courts locally situated outside the Sonthal Parganas but exercising jurisdiction over property within that area. The section applies even when no settlement operations are going on All Courts wherever they may be locally situate having jurisdiction in the Sonthal Parganas must, when exercising jurisdiction in cases arising within the Sonthal Parganas follow the rules relating to usury set out in the section. 41 C. 116, Foll The intention of the Legislature in enacting S. 6 of the Act was that the amount decreed should not be such as to increase the total liability for interest on the bond beyond the amount of the principal debt. Therefore the interest recoverable in a suit on a mortgage should be limited to the amount of the principal of the original debt of loan after crediting the interest already paid. (*Miller, C. J. and Bucknill, J.*) HARI PRASAD SINGHA *v.* SOURENDRA MOHAN SINHA. **3 Pat. L. T. 709 : 1922 P. 450.**

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872), S. 9.

——S. 5—*Institution of suit in Civil Court—Bar.*

S. 5 of the Sonthal Parganas Regulation, 1872, as it stood in 1907 was a bar to the institution of any suit in the ordinary Civil Courts in regard to any land or any interest in or arising out of land in the Sonthal Parganas so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette to have been completed and concluded. 42 Cal. 116 (148) P.C Foll. (*Chapman and Atkinson, JJ.*) SHAHDEO NARAYANDEO *v.* KUSUM KUMARI. **46 I. C. 929.**

——S. 6—*Contract evading provisions of, if enforceable.*

A contract between a borrower and a lender for the repayment of the interest of the principal sum borrowed, though in effect a subtle device for the purpose of evading S. 6 of Regn. III of 1872 is not invalid. The Court must enforce the contract in accordance with the provisions of the Regulation regulating the rate at which interest is to be allowed. (*Sanderson, C. J. and Chatterjee, J.*) ATIKULLA MUNSHI *v.* AZIMUDDIN HAJI. **40 I. C. 415.**

——S. 6—*Decree passed outside against person residing within parganas—Interest—Rule of Damdupat.*

S. 6 of the Regulation is not applicable to a money decree made by a Court outside the Sonthal Parganas against a person resident within the Sonthal Parganas. The Court making the decree is not bound in such a case to regard the rule of Damdupat. Cl. (*b*) of S 6 does not prohibit a Court in Sonthal Parganas to which a decree is sent for execution from realising the full interest decreed even though it offends against the rule of Damdupat. 42 Cal. 116, dist. (*Mullick and Imam, JJ.*) KUNJA BEHARI SINGH *v.* TARPADA MITRA. **49 I. C. 374 : 4 Pat. L. J. 49.**

——S. 6—*Interest—Compound—Decree.*

S. 6 is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to the interest upon the principal advanced and the costs of the suit. Under that section the total interest decreed on any debt or loan should not in any case exceed the principal. The decree must set forth an amount due on the latest date of payment. (*Roe and Coutts, JJ.*) RANI KISHOBATI KUMARI *v.* KUMAR SATYA NIRANJAN CHAKRABARTI. **47 I. C. 179 : 1918 Pat. 305.**

——S. 6—*Debt—Mortgage—Usufructuary.*

A usufructuary mortgage is a debt or liability within the meaning of S. 6 of the Regulation. (*Sharfuddin and Roe, JJ.*) CHIRONJI LAL CHOWBEY *v.* DOULTRA. **41 I. C. 677 : 2 P. L. W. 20.**

——Ss 9, 11, 25—*Settlement Officer's decision—Effect.*

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872), S. 10.

S. 11 of the Regulation only means that the Settlement Officer's decision shall have the force of a decree of Court only as between the parties in existence at the time of the order and S. 9 only contemplates the ascertainment and record of existing interests and rights. Therefore a suit by the plaintiff who was only a possible reversioner to a Hindu widow at the time of the order for a declaration of title and for possession, on the ground that the widow of the defendant colluded and the latter got himself recorded as proprietor, is not barred under S. 25 of the Regulation. (*Stephen and Mookerjee, JJ.*) KANGAL CHANDRA MANDAL *v.* MADHU SUDAN MANDAL.
20 I. C 417 : 17 C. L. J. 587.

——— **Ss. 10 and 11**—*R. 27 framed under* S. 10 —*Applicability.*

Rule 27 framed under S. 10 of the Regn. was made to meet the peculiar customs of the Sonthal and does not apply to all persons settled and resident in the Sonthal Parganas. Rule 27 applies only to suits before Settlement Officers. (*Holmwood and Chapman, JJ.*) MAHARAJI MAMRICK *v.* SUFAL MANJHI.
18 I. C. 115 : 18 C. W. N. 333.

——— **Ss. 11, 25**—*Question of tenancy—Civil Courts jurisdiction.*

The Civil Courts in Sonthal Parganas have no jurisdiction to determine the question whether the defendant is, or is not, a tenant of the land in dispute 18 C. 146, Rel. on. (*Holmwood and Sharfuddin, JJ.*) RAM NARAIN OR (RANJAN) *v.* SATISH CHANDRA SINGH. **20 I. C. 503 : 17 C. L. J. 599.**

——— **Ss. 11 and 25-A**-*Suit to determine whether plff. or deft is tenant.*

In a suit for declaration of title to immoveable property and for correction of an entry in the record of rights prepared under the Regulation the question in dispute is whether the plff. or the deft. is the tenant of the land. This matter should be settled by the Settlement Courts under S. 11 and a Civil suit does not lie except under S 25-A and as the suit does not fall within the scope of the section, the suit is not maintainable. (*Mookerjee and Beachcroft, JJ.*) DIGAMBARDAS *v.* JATINDRA BALA DASI.
19 I. C. 874 : 19 C. L J. 232.

——— **Ss. 11 and 25 A**—*Decision of Settlement Court—Civil Suit disputing when will lie.*

Per Bucknill, J—S. 11 gives the decision of a Settlement Court the force of a Civil Court's decree and as such it is void if obtained by fraud. Where fraud is alleged S. 11 does not bar a civil suit which would have the effect of disputing the accuracy of the Record-of Rights. *Per Mullick, J.*—The plain meaning of S 11 is that except as provided by S 25-A no jurisdiction is left in the civil Court. The only way out is an application to the Revenue authorities within the time prescribed by the Regulation for a revision of the entry either on the ground of fraud or any other ground. The decision of a Settlement Officer under Regn. III of 1872 is a decree and is not a nullity though it is obtained by fraud. It should be formally set aside by a separate suit for the purpose. (*Miller,*

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872), S. 25.

C. J., Mullick and Bucknill, JJ.) HARE KRISHNA SEN *v.* UMESH CHANDRA DUTT.
6 Pat. L. J. 373 : 2 Pat L T. 528 : 3 U. P. L. R. (Pat) 57 : 62 I. C. 962 : (1921) Pat. 209 (F. B)

——— **Ss. 11 and 25 A**—*Publication of record of rights—Certificate of—Suit in Civil Court—Jurisdiction of Settlement Court.*

S. 11 of the Regn. bars every suit regarding any matter decided by any Settlement Court, except such suits as are brought to contest the finding or record of the Settlement Officers where only the right of Zemindars or other proprietors as between themselves are concerned, provided they are brought within 3 years from the date of the publication of the Record of Rights. When the question in controversy between the parties does not involve the determination of the rights of the Zemindars or other proprietors between themselves, the decree under S. 11 cannot be avoided by a suit under S. 25 A. But where the question in controversy does not involve the determination of such rights the decree under S. 11 can be avoided by a suit. S. 11 operates in every case to give every decision and order of the Settlement Courts the force of a decree and S. 25-A enables a party affected by such decisions and orders to sue for setting aside such decisions and orders provided the rights decided fall within the class of rights mentioned in S. 25-A. The publication of the Record of Rights in accordance with law is immaterial. (*Das and Adami, JJ.*) DWARKA PRASAD *v.* JAI VARHAM. **1922 P. 322.**

——— **S. 14**—*Notice under—Minors.*

The notice provided by S. 14 is to the people of the village irrespective of age or intelligence and, as the law makes the Record-of-Rights conclusive proof of the rights and interests therein recorded, the defts. could not be called upon to prove the service of the required notices. (*D. Chatterjee and Walmsley, JJ.*) SHANKER PERSHAD JHA *v.* BABU LAL JHA. **28 I C 241 : 19 C. W. N. 499.**

——— **Ss. 25 and 11**—*Record of Rights—Entry in—Suit to set aside—Fraud.*

A suit lies to set aside an entry in the record of rights under the Regulation on the ground of fraud. (*Das and Adami, JJ.*) SHIB SARAN SHAH *v.* RAMESWAR DE **(1920 Pat. 363.**

——— **Ss 25 and 25-A**—*Record of Rights—Suit challenging record—Special limitation—Lim. Act* S. 29—*Minors.*

The policy of Regulation III of 1872 was to have a complete record of rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters provided for in the regulation. A suit for partition more than 3 years after the entry in the Record of-Rights so far as it regarded the proprietary rights in the land was barred by limitation under S. 25-A of the Regulation. The Limitation Act is applicable to the Sonthal Parganas, but S. 29 of the Lim. Act saves all provisions of local laws as to limitation and does not therefore affect the three years rule under S. 25.A of the Regula-

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872), S. 25.

tion. The Regulation does not make any exception in favour of minors and the minority provisions of the general Limitation Act have reference to the periods of limitation prescribed in that Act. The notice provided by S. 14 is to the people of the village irrespective of age or intelligence, and as the law makes the Record-of-rights Rconclusive proof of the rights and interests therein recorded the defts. could not be called upon to prove the service of the required notices. (*Chatterjee and Walmsley, JJ.*) SHANKER PERSHAD JHA v. BABU LAL JHA. **28 I. C. 241 : 19 C. W. N. 499.**

——— **S. 25, 25-A**—*Patniaar, suit by—Patnidar if proprietor.*

A suit by a patnidar who is not a Zemindar for a declaration that the deft. patnidar had fraudulently caused some land to be recorded as his own in the Record-of-Rights is barred by sections 25 and 25 A. A patnidar is not a proprietor within the meaning of S 25. (*Coxe and Chatterjee, JJ.*) DIGAMBARDAS v. HARENDRA NARAYAN. **26 I. C. 992 . 20 C. L. J. 112.**

——— **Ss. 25 and 25A**—*Proprietor Decision of Settlement Court—Finality of.*

S. 25 A of Reg. III of 1872 is limited to suits where only the rights of *Zemindars* and other proprietors as between themselves are in controversy. A person who holds a derivative title under a *Zemindar* is not a proprietor The decision of a Settlement Court under S. 25, sub. S (1) is conclusive, till it has been set aside by some method known to law at the instance of any person prejudicially affected thereby. (*Mookerjee and Beachcroft, JJ.*) SHIB NARAIN MOOKERJEE v. S. P CHATTERJEE. **27 I. C. 84 : 20 C. L. J 220**

——— **Ss. 25 and 25 A**—*Record-of-Rights—Suit for declaration of title in share of* Shikmi Ghatwali kharposh *grant—Forum*

Where the plaintiff sues for declaration of title and registration of his name in the settlement records in a share of *Shikmi Ghatwali kharposh* grant and it is found that rent is payable to the *Ghatwalis* and not directly to the Government the suit is not cognisable by a Civil Court. (*Fletcher and Richardson, JJ.*) MEMO DEO v. PARBATI KUMARI. **20 C. L. J. 103 : 27 I. C. 5 : 19 C. W. N. 549.**

SOVEREIGN.

See (1) ACT OF STATE.
(2) CROWN

SPECIAL DAMAGE.

See (1) DAMAGE.
(2) HIGHWAY.
(3) TORT.

SPECIAL MARRIAGE ACT (III OF 1872).

——— **Ss. 10, 16 and 17**—*Brahmo does not cease to be a Hindu.*

A Hindu, within the meaning of the Probate and Administration Act, by becoming a Brahmo does not cease be a Hindu. (*Greaves, J.*) JNANENDRA NATH ROY, *In the Goods of.* **26 C. W. N. 799 : 49 C. 1069 : 1923 C. 265.**

SPECIAL OR SECOND APPEAL.

See C. P. CODE., S 100.

SPECIFIC MOVEABLE.

See LIM. ACT, ART. 49.

SPECIFIC PERFORMANCE.

See also SP. REL. ACT, SS. 12 TO 30.

——— *Condition precedent.*

If the happening of a certain event is a condition precedent to the specific performance of a contract it must be fulfilled before the person under obligation is compelled to perform his part of the contract. (*Lord Atkinson.*) GIRIBALLA DASI v. KALIDAS BHANJA. **33 C. L. J. 57 : 39 M. L. J 329 : (1920) M. W. N. 653 . 2 U. P. L. R. (P. C.) 146 · 29 M. L. T. 1 : 25 C. W. N. 320 : 57 I. C. 626 : 22 Bom. L R. 1332. (P. C.)**

——— *Equity—Vendor and vendee—Agreement to sell—Payment by instalments—Default—Forfeiture on default—Penalty.*

Even where time is essence of the contract and a party has failed to perform his part of the contract, a Court of Equity may decree specific performance if justice so demands ; but where the parties have expressly provided that the rule was not to apply to them the court will refuse relief except where they have expressly or by necessary implication waived the previous provisions. An agreement to sell provided that payment be made by instalments and on default the contract be forfeited and determined at the option of the vendor, time being agreed to be the essence of the contract. On default being made the vendor by notice cancelled the contract. The purchaser sued thereupon for specific performance and relief from forfeiture. It was held that specific performance cannot be decreed but the stipulation for forfeiture being penalty, the vendee should be relieved against it. (*Viscount Haldane.*) STEEDMAN v. DRINKLE. **33 I. C. 323 : 8 L J. (P. C) 79.**

——— *Contract for the sale of land—Time not of the essence.*

In the case of a contract for the sale of land time is not of the essence unless expressly so stipulated at the time of the contract. Failure to keep to the dates assigned will not disentitle a party to a relief unless the delay has been gross. Cases examined. (*Viscount Haldane.*) JAMSHED KHOODARAM IRANI v. BURJORJI DHUNJIBHAI. **40 Bom. 289 : 43 I A. 26 : 30 M. L. J. 186 : 3 L. W. 239 : 19 M. L. T. 184 · 14 A. L. J. 225 : 18 Bom. L. R 163 : 23 C. L. J 358 : 20 C W. N 744 : 32 I. C. 246 : (1916) 1 M. W. N. 229 (P. C.).**

——— *Delay.*

An unexplained delay for one year or even less is sufficient to negative the rights of a party to obtain specific performance. (*Marten and Fawcett, JJ.*) SHANKAR SAKHARAM v. RANTANJI PREMJI. **47 B. 607 : 25 Bom. L R 328 : 1923 Bom. 441.**

——— *Decree—Execution.*

Decree for specific performance is capable of execution by defendant as well as plaintiff. (*Macleod, C.J. and Coyajee, J.*) KARIMABIBI DAUDBHAI v. ABDEREHMAN SAYAD BANN. **24 Bom. L. R 496 · 48 B. 990 : 1923 Bom. 26.**

SPECIFIC PERFORMANCE.

——— *Contract for sale of land—Time made the essence of the contract by notice—Notice unreasonable.*

Vendee is entitled to reasonable notice for completing the contract within a definite time. If the state of circumstances do not justify the period of the notice for the performance the notice is unreasonable. The vendee is entitled to specific performance of the contract in such case. (*Macleod, C.J. and Shah, J.*) MUSSA MAHOMED *v.* MOTILAL. 24 Bom L. R. 203 : 1922 B. 14

——— *Part-performance—Contract to sell.*

Deft. agreed to sell to plft. a house and some land and an agreement was written on an unstamped paper ; the paper was lost. The plaintiff was put in possession of the land and an unregistered deed of sale was executed in his favour in respect of the house. *Held*, that there was part performance and the Court must decree specific performance. (*Macleod, C. J. and Shah, J.*) HIRALAL *v.* SHANKAR. 23 Bom L. R. 506 : 62 I. C. 637 : 45 Bom. 1170

——— *Time when essence of the contract.*

Where under the terms of an agreement to sell, the vendor was to submit the title deeds within certain time and the vendee to give a final reply within another fixed period of time, while the purchase itself was to be completed within a certain time, and delay was caused by the vendor himself. *Held*, in a suit for specific performance that time was not of the essence of the contract. (*Ghose and Panton, JJ.*) KRISHNA CHANDRA DEY *v.* GRAHAM. 50 Cal. 700 : 27 C W. N 693 : 1923 Cal. 694.

——— *Suit for—Right of either party to contract.*

A suit for specific performance lies when the lease essential for the completion of the contract has not been executed and if there is a valid enforceable contract either party is entitled to call upon the other to complete the transaction by the execution and the registration of the document of title. (*Mookerjee and Cholmer, JJ.*) BIJOY CHANDRA SINGH *v.* HOWRAH AMTA LIGHT RY. 38 C. L. J 177 : 1923 Cal. 524.

——— *Decree for—Date of operation—Intermediate transfer—Effect.*

Where a suit for specific performance of a transfer of property is decreed, title to the property relates back to the date of the agreement and no intermediate conveyance will affect the title of the decree-holder. (*Mookerjee and Buckland, JJ.*) JOHAR MULL *v.* BHUPENDRA NATH BASU. 34 C. L. J. 79 : 49 Cal. 495 : 1922 Cal. 412.

——— *Agreement to grant lease "hereafter"—Whether putting off execution of the deed is refusal to perform contract.*

After the conclusion of an agreement to grant a permanent lease 'hereafter' the prospective lessor asked for postponement of the grant of lease which was agreed to. *held* that the postponement did not amount to a refusal to perform, nor a recission of the contract. (*Fletcher and Chatterjee, JJ.*) KALIDAS BHANGA *v.* GIRIBALA DASI. 23 I. C. 360.

SPECIFIC PERFORMANCE.

——— *Suit for—Prayer for possession.*

A suit for specific performance may also ask for possession to be given to the plaintiff. (*Mookerjee and Beachcroft, JJ.*) FATEH CHAND *v.* NARSINGDAS. 16 I. C. 988 : 22 C. L. J. 383.

——— *Suit for dismissal—Decree for refund of deposit though not asked for.*

A suit for specific performance may be dismissed, without attacking any necessary implication that the refund of purchase money should also be refused. (*Carnduff and Chapman, JJ.*) RAGHUNATH SAHAY *v.* CHANDRA PROTAP SINGH. 15 I. C. 268 : 17 C. W. N. 100.

——— *Contract to re-sell to the vendor—Rule of construction of Indian contracts.*

Where the purchaser of a piece of land enters into an agreement to re-sell that plot of land to the vendor in case the vendor builds a house on it within a stipulated period and afterwards refuses to abide by it, the vendor is entitled to a decree for specific performance of the contract. The contracts of the people of India ought to be liberally construed. 18 W. R. 81 P. C. Foll. (*Jenkins, C. J. and N. R. Chatterjee, J.*) NARAIN CHANDRA MUKHERJEE *v.* MOHENDRA NATH MUKHERJEE. 14 I. C. 820 : 15 C. L. J. 332.

——— *Minor—Benefit—Complete contract.*

Specific performance which is not beneficial to a minor will not be decreed. Where there is no consensus as to the terms of a contract a suit for specific performance of such a contract will not lie. (*Abdul Raoof and Lumsden, JJ.*) BAHADUR CHAND *v.* MUHAMMAD ISMAIL. 4 Lah. 408 : 1924 Lah. 181.

——— *Time—If essence of contract.*

In a contract for the sale of land even where a time is fixed for the performance of the contract, the substance of the agreement should be considered to find whether time was to be of the essence of the contract. (*Martineau and Moti Sagar, JJ.*) SADIQ HUSAIN *v* ARUP SINGH. 4 Lah. 327 : 5. L. L. J. 462 : 1924 Lah. 151.

——— *Unregistered contract of sale.*

A decree of specific performance cannot be obtained in the case of unregistered contract of sale which is compulsorily registrable (*Chevis and Abdul Raoof, JJ.*) PARMESHRI DEVI *v.* AUTAR SIN. 67 I. C. 144 : 3 Lah. L. J. 173.

——— *Decree for—Form of—Contract for sale—Decree fixing time for payment by vendee and directing execution of registered conveyance on such payment—Propriety of—Extension of time—Powers of original and appellate Court.*

A decree for specific performance of a contract for sale provided (*a*) that upon payment by the plaintiffs of a sum named within 2 months from the date of the decree, the first defendant do execute and register a proper deed of conveyance of the properties in the schedule and (*b*) that upon payment the first defendant do put the plaintiffs in possession of the said properties together with all the title deeds. *Held* that the decree was in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and

SPECIFIC PERFORMANCE.

necessary orders therein including in appropriate cases, extension of the time fixed for payment of the amount fixed by the decree. Equally has the appellate Court in an appeal from the decree power to extend the time. Observations on the appropriate form of decree in a suit for specific performance of a contract for sale, and upon the rights of and remedies open to the vendor or vendee in case of default by the opposite party. (*Schwabe, C. J and Wallace, J.*) ABDUL SHAKER SAHIB *v.* ABDUL RAHIMAN SAHIB.
46 Mad. 148 : 44 M.L.J 107 : 17 L.W. 216 : (1923) M W.N. 1 : 1923 Mad. 284.

———*Conveyance executed but not registered —Suit for fresh conveyance not maintainable.*

When once a conveyance is duly executed and delivered to the purchaser but it is not registered owing to the latter's neglect or omission a suit for specific performance does not lie and a fresh conveyance cannot be enforced. (*Ayling, O.C J and Odgers, J.*) SUBBARAYA PILLAI *v.* DEVASAHAYAM PILLAI. **(1922) M.W.N. 70.**

———*Jurisdiction to grant is independent of the Sp. Rel. Act.*

In localities where the Specific Relief Act is not in force, the cases of specific performance are governed by rules of justice, equity and good conscience. The jurisdiction to grant specific performance is independent of the Specific Relief Act (*Spencer and Srinivasa Aiyangar, JJ.*) JAGANNADA *v.* DEENABHANDHU.
63 I. C. 114: 13 L W. 591.

———*Contract Act, S. 25—Contract for sale of land—Time for performance — Extension of—Subsequent fixing of time limit—Default.*

On the 7th February 1914, an agreement for the sale of certain lands was entered into and the purchase money was to be paid and the sale completed about the end of April. The vendee being unable to find the money the time for completing the sale was from time to time extended until on 14th December 1916 the vendor gave a notice calling upon him to pay the purchase money within a week. The vendee failing to comply therewith the vendor cancelled the contract The vendee brought a suit for specific performance and contended that reasonable time was not given to him in making time the essence of the contract and that his previous conduct was not relevant in judging the reasonableness of the time *Held*, that the contention failed. (*Sadasiva Aiyar and Burn, JJ.*) ABDUL RAZAK *v* MESSRS BROWN & CO. **27 M. L T. 131 : 11 L.W 473 : 57 I. C. 485 : (1920) M. W. N. 290**

———*Contract to sell—Pleading and proof—Variation—Effect.*

The mere fact that the contract prayed is different from that set up in the plaint will not entail a dismissal of a suit for specific performance thereof. (*Sadasiva Aiyar and Napier, JJ.*) SHUNMUGAM CHETTY *v.* SUBBA REDDY. **31 I.C. 1.**

———*Son of a Hindu party raising questions of his liability for father's obligations—Whether Court can go into.*

SPECIFIC RELEIF ACT (I OF 1877), S. 9.

If in a suit against a Hindu for specific performance of an agreement, his son raises any question as to his liability to fulfil his father's obligations the Court will go into and decide such questions. *Sadasiva Aiyar and Tyobji, JJ.*) TIRUVENKATACHARIAR *v.* VENKATACHARIAR.
23 I.C. 621 : 26 M.L.J. 218.

———*Decree, form of.*

A decree for specific performance of a contract to sell should direct the person in whom the property vests to execute a conveyance. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) CHAMARTI SURYAPRAGASA RAYADU *v.* ARABDHI LAXMINARASIMHA CHARYALU. **23 I. C. 560 : 26 M L J. 518.**

———*Central Provinces Court of Wards Act (XXIV of 1899), S. 16 (2) (b)—Contract by guardian—No benefit to minor.*

The words "for the preservation and benefit of such property" in S. 16 (2) of the Court of Wards Act should be interpreted in the light of the usual powers of guardians to bind the estates of minors.

A decree for specific performance of a contract for sale made by a guardian should not be passed against a minor unless the Court is certain that the agreement and its enforcement are both for the benefit of the minor (*Batten, A.J.C.*) PURANLAL *v.* VENKATRAO GUJAR.
45 I. C. 192.

———*Contract of sale—Suit for—Possession—Whether can be prayed for.*

In a suit for specific performance of contract of sale, a claim for delivery of possession may be made unless it is contrary to the contract. (*Mullick and Sultan Ahmed, JJ.*) LEKHANDAN *v.* JANKI SINGH. **5 Pat. L J 314 : 56 I C. 322 : 1 Pat.L.T. 325 : 2 U P.L.R (Pat) 108 : 1920 Pat. 266.**

SPECIFIC RELIEF ACT (I OF 1877).

———*Applicability—Scheduled Districts Act (XIV of 1874).*

The Sonthal Parganas, being a scheduled district within the meaning of Act XIV of 1874, Specific Relief Act, does not '*proprio vigore*' extend to that area, but a prayer for the specific performance of a contract can be granted on principles of justice, equity and good conscience 30 I C. 365. Foll. (*Mullick and Atkinson, JJ.*) SATYA NARAYAN CHAKRAVARTI *v.* DWARAKA NATH SADHU. . . **40 I.C. 174 : 2 Pat. L.J. 379 : 1 Pat. L. W. 738.**

———S. 9.

Appeal
Applicability and scope of
Claim for mesne profits
Constructive possession.
Co owners.
Dispossession in due course of law.
Regular suit.
Review.
Scope of inquiry.
Miscellaneous.

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Appeal.

Appeal.

——— S. 9—*Appeal—Decree under—Execution proceedings—Order not appealable.*

No appeal lies against an order passed in execution of a decree made under S. 9 of the Sp. Rel. Act, as the term suit in the section includes an execution proceeding on the basis of the decree. (*Mookerjee and Walmsley JJ.*) KANAILAL GHOSE *v.* JATINDRA NATH CHANDRA. 45 Cal. 519 : 42 I. C. 711 : 26 C.L.J. 325 : 22 C.W.N. 446.

——— S. 9—*Appeal—Decree under—Execution—Order not appealable.*

An order passed in execution of a decree under S. 9, Specific Relief Act is not appealable. (*Scott-Smith, J.*) WARIS *v.* FATEH DIN.

1923 L. 105.

——— S. 9—*Appeal—Order in execution of decree under, is not appealable.*

An order passed in execution of a decree under S. 9 of the Specific Relief Act, is final and no appeal lies *Held*, that in the present case the decision, dealt with the title of the house, and had no bearing upon the question of possession, which was the only matter to be determined in the suit under S. 9. Hence the order of the District Judge was set aside. (*Shadi Lal, J.*) JAHANGIR SINGH *v.* HIRA SINGH.

5 P.W.R 1917 : 39 I.C. 379 : 18 P.L.R. 1917.

——— S. 9—*Appeal—Order in execution of decree under S. 9.*

No appeal lies against an order made in execution of a decree passed under S. 9 as such decree is not itself appealable. 28 I C. 282, Ref. (*Shadi Lal, J.*) JAHANGIR SINGH *v.* HIRA. 39 I.C. 375: 4 P.W.R. 1917 : 21 P.L R. 1917.

——— S. 9—*Appeal—Execution—Order in—Limitation.*

No appeal lies from an order made in execution of a decree under S. 9 having regard to the provisions of S 9 of the Sp. Rel. Act nor any review shall be allowed. (*Rossignol, J.*) MOFUZALI *v.* BIRJINAND KIRAT.

45 P.L.R. 1915 : 28 I. C. 282 : 201 P.W.R. 1915.

Applicability and scope of.

——— S. 9—*Applicability and scope of—Order under nature of—suit for—Injunction.*

The object of S. 9 of the Sp. Rel. Act is to discourage people from taking the law into their own hands however good their title may be. 8 B. 371 Ref. It provides a summary and speedy remedy for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if so advised. 13 A 527 Ref. A person against whom an order is made under S. 9 of the Act can sue for a declaration of title and for an injunction restraining the opposite party from interfering with his possession 4 Cal. 580 Dist. (*Coyajee, J.*) MAHI DODDATAMMA MARKUNDI *v.* SANLAYA RAM KRISHNA PAI. 24 Bom. L.R. 768 1922 Bom 216.

——— S. 9—*Applicability and scope of—Dispossession—Order under S. 144, Cr. P Code—Effect of.*

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Applicability and scope of.

The effect of an order under S 144, Cr. P. C., is not to disturb either title or possession though it may prevent the exercise of rights which a person in possession would otherwise be entitled to exercise during the continuance of the said order. If a person so prevented by an order under S. 144, Cr. P C. is dispossessed he can sue under S. 9 of the Sp. Rel. Act. (*Teunon, J.*) NASIRAN BIBI *v.* SALIM AKANDA. 64 I C. 572.

——— S. 9—*Applicability and scope of—Suit under—Cr. P. Code, S. 145 (4)—Order of attachment.*

Prior to a suit under S. 9 of the Specfic Relief Act in proceedings under S. 145 of the Cr. P. Code, the properties were attached and an order had been made adverse to the plff. *Held*, that the suit was not maintainable. Per *Huda, J* But for an intervening attachment under S. 145 (4) of the Cr. P. Code, a mere order under S. 145 is not sufficient to deprive the plff. of his right to relief in a suit under S 9 of the Sp. Rel. Act (*Teunon and Huda, JJ.*) AZIMUDDIN AHMED *v* ALAUDDIN.

43 I. C. 153 : 22 C. W. N. 931.

——— S. 9—*Applicability and scope of—Incorporeal rights.*

S. 9 takes out of the operation of the Act rights classed as "incorporeal rights" though they are 'immovable property' 19 Cal. 544 ref. to. (*Chatterjee and Richardson, JJ.*) SITAL CHANDRA CHAUDHURY *v.* ALLEN J. DELANNEY. 34 I. C. 450 : 20 C. W. N. 1158.

——— S. 9—*Applicability and scope of—Possession of adhiar—If protected.*

An adhiar is very largely a tenant for the purpose of the Sp. Relief Act. (*Woodroffe and Newbould, JJ.*) DEB NATH DAS *v* RAM SUNDER BARMAN. 31 I. C. 579: 19 C. W. N. 1205.

——— S. 9—*Applicability and scope of—Suit for possession—House built on land, if can be removed.*

An order allowing the plff. to remove the house built on land by deft. is beyond the jurisdiction of the Court under S. 9 of the Sp Rel. Act, and the Court cannot do more than make an order with respect to possession of land. (*Stephen and Chatterjee, JJ.*) RAHMATULLA *v.* MOFIZULLA.

28 I. C. 473.

——— S. 9—*Applicability and scope—Suit by tenant against landlord.*

A suit under S. 9 by a tenant to recover possession of land from which he has been unlawfully ejected is not barred by the provisions of the Chota Nagpur Tenancy Act, S 139. (*Woodroffe and Carnduff, JJ.*) KHETRA NATH *v.* PERUBAURI.

13 C. L J. 2.0. 9 I. C. 478: 15 C W. N 387.

——— S. 9—*Applicability and scope of—Suit by licensee—Maintainability.*

A licensee of land if dispossessed by a trespasser is entitled to maintain a suit under S. 9 of Sp. Rel Act. (*Stuart, J. C.*) SITARAM *v.* JAGAN NATH.

17 I. C. 469· 15 O. C. 317.

——— S. 9—*Applicability and scope of—Tenant's suit*

S 9 of the Sp. Rel. Act is not applicable to a suit by a tenant against the landlord for recovery

SPECIFIC RELIEF ACT (I OF 1877). S. 9—Applicability and scope of.

of possession. (*Chamier, J. C. and Evans, A. J. C.*) FATEH MUHAMMAD *v.* BHAVANI SHIKH.
9 I. C. 751: 14 O. C. 60.

——S 9—*Applicability and scope of.*

S. 9 does not apply to a suit wherein plffs. claim as mortgagees in possession and defts. plead redemption and Court finds on evidence in favour of plff. (*Parlett, J.*) MG LU MG *v.* MAUNG MAUNG PU.
7 Bur. L. T. 10: 23 I. C. 367: 7 L. B. R. 86.

Claim for mesne profits.

——S. 9—*Claim for mesne profits, if can be made in a suit under.*

A claim for mesne profits ought not to be made in a suit under S. 9 of the Sp. Rel. Act, because the question of title (considered apart from possession) could not be directly decided in that suit and a relief which depends on title (such as a claim for mesne profit) could not be given therein. (*Sadasiva Aiyar and Hannay, JJ.*) THAVASI *v.* ARUMUGAM. **2 L. W. 157 : 28 I. C. 1 : (1915) M. W. N. 170 : 30 M. L. J. 326.**

——S. 9—*Claim for mesne profits.*

The mere fact that mesne profits cannot be recovered in a suit under S. 9 does not prevent the Court from granting restoration of possession. (*Oldfield, J.*) YALA MANCHIL PURNAYYA *v.* PAMU RAMASWAMY. **25 I. C. 802. 16 M L T. 190.**

Constructive possession.

——S. 9—*Constructive possession—Possession of Thakur Bari of a temple—What is.*

Plaintiff appointed a pujari of a Thakur Bari, defrayed the expenses of worship, repaired the building and had the key of the door of the Thakurghar with him. *Held*, that the possession of the plff. was such physical possession as to attract the operation of S. 9 of the Sp Rel. Act, notwithstanding that the Thakur Bari, as a residence of deity, was open to the public (*Teunon and Newbould, JJ.*) NARENDRA NATH LAHIRI *v.* CHARU CHANDRA BOSE. **44 I. C. 497.**

——S. 9—*Constructive possession—Symbolical possession.*

Where the plff. in a possessory suit is not able to prove his title and alleges that symbolical possession only was with him, the suit must be dismissed and the deft.'s title should not be investigated by the Court. (*Coxe and Ray, JJ.*) SATYANDRA NATH MISRA *v.* SHEIKH LATIF KHAN.
21 I. C 118.

——S 9—*Constructive possession—Landlord and tenant.*

The point raised is whether dispossession of a tenant is an ouster of a landlord, and the landlord can bring a possessory suit under S. 9 of the Sp. Rel. Act. (*Chitty and N. R. Chatterjee, JJ.*) AKHIL CHANDRA DEY *v.* AKHIL CHANDRA BISWAS.
10 I. C, 455: 15 C. W. N. 715.

——S. 9—*Constructive possession—Possession of servant, not protected.*

S. 9 of the Sp. Rel. Act is intended to provide a summary remedy for cases of dispossession within 6 months where the Court will direct the restoration of possession irrespective of the title of the

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Co-owners.

parties. The possession of a servant is that of his master and a Court has no jurisdiction to decree possession in a suit by a servant against his master. The position of archaka in a Hindu temple is that of a servant of the trustee 35 M. 631 Ref. (*Devadoss, J.*) SRI VANAMAMALAI JEER SWAMIGAL *v.* PERIA VENKATARAMANA CHARIAR.
(1922) M W. N. 422: 16 L. W 931: 1922 Mad. 183.

——S. 9—*Constructive possession—Suit for possession—Scope of—Enquiry.*

Not only physical but constructive possession is sufficient to sustain a suit for possession under S. 9 of the Sp. Relt Act. Constructive possession goes with title. (*Drake Brockman, J. C.*) GULAM *v.* SHEODIN RAM **48 I. C. 415.**

——S. 9—*Constructive possession—Dispossession of tenant if dispossession of landlord—Attornment by tenants to stranger.*

Though a mere attornment by a tenant in actual possession to another person coupled with a refusal to pay rent to the proprietor does not amount to the dispossession of the proprietor under S. 9, yet actual dispossession of tenant by a trespasser is the dispossession of his landlord and entitles the landlord to a relief under S. 9. (*Stuart and Kanhaiya Lal, A. J. Cs.*) NIHAL SINGH *v.* RAGHURAJ BAHADUR SINGH. **18 O C. 353: 32 I. C 202: 3 O. L. J. 588.**

Co-owners.

——S. 9—*Co-owners—Joint possession—Suit for.*

A man in joint possession in immoveable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole. Such joint possession can be restored by the procedure under the section if the plff. had been dispossessed in the manner and within the time mentioned in the section. 19 P. W R. 120. dist. (*Chatterjea and Chapman, JJ.*) MT. AJIMAN BIBI. *v.* REASAT SHAIKH. **28 I. C 670 : 19 C. W N 1117.**

——S. 9—*Co-owners—Possession—Explained Dispossession as to whole whether co-sharer entitled to sue for possession of his share.*

S. 9 of the Sp. Rel Act refers to exclusive possession and a Court cannot grant joint possession, so that a party entitled to half a share cannot sue for possession, thereof when the dispossession is as to the whole (*Stephen and Chatterjee, JJ.*) HARI NARAIN DAS *v.* ELEMJAN BIBI.
19 C. L. J. 117 : 23 I. C 618 : 19 C. W. N. 120.

——S. 9—*Co-owners—Dispossession—Suit on the strength of possessory title.*

Where one co-sharer has been cultivating one field and another co-sharer other fields, one sharer cannot dispossess the other against his will from the field of which he has possession. 108 P. R. 1889 (1) and 13 P. R. 1910 (2) referred to. Though the dispossessed co-sharer might have sued under S. 9 of the Sp. Rel. Act he is not bound to do so and he can rely upon his possessory title even after the period of 6 months has expired. (*Scott-Smith, J.*) GANESA MAL *v.* IBRAHIM.
53 I. C. 569 : 104 P. R. 1919.

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Co-owners.

——— —S. 9—*Co-owners—Joint possession.*

Joint possession cannot be decreed under S. 9. 19 C. L. J. 117, Foll. 3 M. 250 Dist (*Oldfield and Tyabji, JJ.*) KUTHAN *v.* KULLA VANDU
31 I. C 720 : 29 M. L. J. 760.

———S 9—*Co-owners—Suit by trespasser in possession—Other co owners not parties, effect of.*

S 9 of the Sp. Rel. Act is wide enough to include the case of a co-owner of property seeking to be restored to the possession jointly with a trespasser of property from which the latter has ousted his co-owners along with him even though those other co-owners do not claim possession of their shares. Nor are such co-owners necessary parties to the suit. 19 C. L. J. 117 diss. 19 C. W. N. 1007 Foll. (*Hallifax, A. J. C.*) RAMACHANDRA FATE *v.* SHRIDAR. **5 N. L. J. 161 : 18 N. L. R. 71 : 1922 Nag. 115.**

———S. 9—*Co owners—Possession.*

S. 9 of the Sp. Rel. Act applies to cases where a co-owner in possession of property jointly with other co-owners is dispossessed by the latter. (*Batten, A. J. C.*) GHOORI *v.* SITHU.
44 I. C. 557.

———S. 9—*Co-owner—Possession of defined parcels—Possession through tenant.*

A suit under S. 9 is maintainable by one co-owner in possession of specific portions of survey numbers. A landlord whose tenant has been dispossessed can bring a suit against a third party, S. 9 being applicable to constructive possession 28 M. 288, Foll. (*Pratt, J. C. and Hayward, A.J. C*) SAHIBRA KHYO *v.* JUMRAOMAL.
12 I. C. 190 : 5 S. L. R. 42.

Dispossession in due Course of Law.

——— S. 9—*Dispossession in due course of law.*

A dispossession by a legal process or under provision of law which ought not to have been applied is not a dispossession in due course of law within S. 9 of the Act. (*Stephen and Chatterjee, JJ.*) ROSHAMULLAH *v.* HAZIR MAHMUD
18 I. C. 727.

———S. 9—*Dispossession in due course of law.*

Plaintiffs Nos. 1 and 2 were in possession of the property in suit through there burgadars the plaintiffs Nos. 3 and 4. But in a suit brought by the deft. against the plffs. Nos. 1 and 2 the latter falsely stated that they were not in possession, that suit was decreed and in execution the plaintiffs Nos. 3 and 4 were dispossessed The plaintiffs then brought this suit for possession under S. 9. *Held* that the dispossession of the plaintiff was in due course of law was as contemplated by S 9. (*Chitty and N. Chatterjea, JJ.*) HARAN CHANDRA PAL *v.* MADAN MOHAN.
11 I. C. 740 : 15 C. W. N. 956.

———S. 9—*Dispossession in due course of law—Ejectment by landlord.*

A third person who dispossesses the landlord between one tenant's quitting and another tenant's coming in can be ejected under S. 9 of the Act. (*Parlett, J.*) SAN HLA BAW *v.* HLA PAW.
37 I. C. 20 : 9 Bur. L. T. 172.

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Regular Suit.

Regular Suit.

———S. 9—*Regular suit—Revision.*

A High Court will not interfere in revision when there is another remedy open to the applicant and therefore no application for revision of an order of dismissal of a suit under S. 9 will lie inasmuch as the plaintiff has a remedy by a regular suit on title. (*Tudball, J.*) RAMANAND *v.* SHEO BALA. **63 I. C. 809.**

———S. 9—*Regular suit—Wrongly dealt with as under S. 9—Appeal Procedure.*

Where a suit based upon title is wrongly dealt with by the trial Court as a suit under S. 9 of Sp. Rel. Act the decision is appealable and the Appellate Court should send it back to the trial Court to be dealt with as a suit upon title, and not dismiss the suit in toto, (*Tudball, and Abdul Raoof, JJ.*) NARAIN DAS *v.* HET SINGH.
40 All 637 : 46 I. C 923 : 16 A. L. J 611.

———S. 9—*Regular suit—Plffs. failure to prove title—Relief under S. 9 if can be granted.*

A person who sues for possession on the basis of his title cannot get a decree for possession under the first paragraph of S. 9. (*Richards, J.*) PAL AHIR *v.* ASGHAR HUSAIN. **10 I. C. 145 : 8 A L. J. 404.**

———S. 9—*Regular suit—Suit on possessory title—Defences to.*

"In a suit based upon possessory title the deft. may have grounds for opposing the claim not open to him in suit brought by the real owner". (*Kumaraswami Sastri and Phillips, JJ.*) VENKATASAMI NAICK *v.* KALI SAMTAN.
33 I. C. 167 : (1916) 1 M. W. N. 110.

———S. 9—*Regular suit—No bar to—Suit for mesne profits.*

A suit for possession under S. 9 of the Sp Rel. Act is no bar to a subsequent suit for mesne profits as the causes of action are different. (*Prideaux, A. J. C.*) JANARDHAN GANESH *v.* RAMCHANDRA.
46 I. C. 885.

———S. 9—*Regular suit—No bar of.*

S. 9 of the Sp. Rel. Act is no bar to a suit for possession against a trespasser instituted beyond 6 months after dispossession by a person who has been in peaceful possession of his land even for a period short of the statutory period of 12 years. (*Chamier, C. J. and Sharfuddin, J.*) SAHODRA KUER *v.* GOBERDHAN TIWARI.
1 Pat. L. W 327 · 2 Pat. L. J. 280 : 39 I. C. 458 : (1917) Pat. 164.

———S. 9—*Regular suit—No bar to.*

A person not suing under the section when first dispossessed, can after the summary relief under the section is barred by time to file a regular suit for ejectment under S. 110, Evidence Act. As soon as he proves dispossession, the deft. must prove his title. (*Mullick and Atkinson, JJ.*) HARADHAN MANDAL MODAK *v.* ISWAR DAS MARWARI: **2 Pat. L. J. 61 : 38 I. C 797 : 3 Pat L. W. 258.**

———S. 9—*Regular suit—No bar to.*

No one though entitled to sue under S. 9 of the Sp. Rel. Act is bound to do so and he can always

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Review.

bring a regular suit founded on title either in addition to or instead of the suit under that section (*Parlett, J.*) MG LU MG v. MAUNG MAUNG PU. **7 Bur. L. T. 10 : 23 I. C. 367 : 7 L. B. R. 88.**

Review.

——— S. 9—*Review.*

A decision passed forthwith in a suit under S. 9 is not open to review by S 9 itself (*Sadasiva Aiyar, J.*) CHIDAPATRI SOMAYYA *In re.* **31 I. C. 307 : 2 L. W. 1067.**

Scope of Inquiry.

———S. 9—*Scope of inquiry—Deft.'s right to set up title.*

In a suit under S. 9, the deft. will not be allowed to plead or to prove title in himself as he would be entitled to do in suits apart from S. 9 of this Act. In the latter class of cases, the deft. will be allowed to plead and prove title but if he fails to do so plff. can get a decree even though he is able to prove nothing more than possession by himself of the property in suit up-to-date or ejectment by the deft. (*Piggott, J.*) MAKHDOOM BAKSH SHAH v. HASHIM ALI. **29 I. C. 210.**

——— S 9—*Scope of inquiry—Suit for possession and for damages if lies Appeal against decree in such suit whether allowed.*

A claim for damages ought not to be joined with a claim for recovery of possession under S. 9 of the Sp. Rel Act. Where such a claim is joined and a decree is passed in the suit an appeal lies from such a decree. (*Piggott, J.*) NAZIR AHMAD v. ABID ALI. **11 I. C 38 : 8 A. L. J. 910**

———S. 9—*Scope of inquiry.*

Prior peaceable possession furnishes a good title as against a mere trespasser. If a true title may be defeated by twelve years' adverse possession by a trespasser, there is nothing shocking to sense of justice in a legislative rule that the period of limitation for a suit by a mere trespasser or squatter to recover possession should be six months from the date of his dispossession. 15 C. W. N. 163; 41 Cal. 394 Dist. (*Richardson and Suhrawardy, JJ.*) NABA KISHORE TILAKDAS v. PORA BEWA. **50 Cal 23 : 1922 Cal. 198.**

———S. 9—*Scope of inquiry.*

Only possession and dispossession is to be proved by plaintiff under S. 9, Sp. Rel. Act and not title. (*Fletcher and Walmsley, JJ.*) HARI MOHAN ROY v. KHALIL BEHARY. **48 I. C. 433.**

———S. 9—*Scope of inquiry—Suit for possession.*

Mere previous possession is sufficient in a suit under the section. (*Sanderson, C. J., Woodroffe and Mookerji, JJ.*) RAMACHANDRA SIL v. RAMAN MANI DASI. **38 I. C. 890: 20 C. W. N. 773.**

———S 9—*Scope of inquiry— Jurisdiction—Enquiry into title, C. P. C., S. 115*

The Court has no jurisdiction to go into the question of title in a possessory suit under S 9 of the Sp. Rel. Act and an order against the plff. found to be in possession within six months on the ground of want of title is without jurisdiction

SPECIFIC RELIEF ACT (I OF 1877), S 9—Scope of Inquiry.

and is revisable under S. 115 of C. P. C. (*Chitty and Teunon, JJ.*) RANI DOYAL SAMONTA v. UPENDRA NATH SAMONTA. **18 I. C. 298: 17 C. W. N. 501.**

——— S. 9—*Scope of inquiry—Limitation Act, (XV of 1877) Art 3*

The only point to be determined in a suit under S. 9 of the Act is whether the plaintiff was dispossessed and whether the suit is brought within six months from the date of dispossession but if there was no possession of the plaintiff's and therefore no dispossession, the suit must be dismissed (*Jenkins, C. J. and Chatterjee, J.*) JENAN CHANDRA NAG DAS v. LOCH MOHAN. **13 I. C. 541.**

———S. 9—*Scope of inquiry—Suit against trespasser.*

Plaintiff sued for possession describing defendants as trespassers. The defendants replied that they were not trespassers but had acquired a good title by sale. This sale on which they relied was then impugned, by the plaintiff and shown not to be binding on him inasmuch as it was not for his benefit. *Held*, that the defendants were shown to have no title and the plaintiff was entitled as a matter of right without having to prove his own title. 78 P. R. 1902, Foll. 17 P. R 1912 Ref. *Abdul Raoof and Harrison, JJ.* AMAR CHAND v. RAM RAKH. **67 I.C 941 (2) : 3 Lah. L. J. 402.**

——— S. 9—*Scope of inquiry.*

In a suit under S 9 the Court can only enquire whether the plaintiff was in actual peaceable occupation and was forcibly dispossessed within six months before suit. (*Sadasiva Aiyar and Spencer, JJ.*) RAMAMURTHI v. KUNCHUNVARTHY VENKATA SITARAM CHANDRA ROW GARU. **22 I. C. 279: (1914) M W. N. 95.**

——— S. 9—*Scope of inquiry—Illegal possession—Evidence Act, S. 110— Nature of possession—Presumption.*

Section 9 of the Specific Relief Act in no way controls the operation of S. 110 of the Indian Evidence Act. It has no concern whatever with title but is merely a law for restoring a possession which has been disturbed otherwise than in due accordance with law and it can properly be used to eject even a true owner who has disturbed a peaceful possession. The possession which attracts the presumption of ownership is juridical possession obtained *nec vis nec clam, nec precario, ab adversario* and it stands valid against all the world except the person legally entitled. (*Stanyon, A.J.C.*) SAMBHASHEO v. MAHADEO. **27 I. C. 506 : 10 N. L. R. 188.**

——— S. 9—*Scope of inquiry—Decision in a suit under section.*

In a suit expressly brought under the section, neither the Court nor the defendant has any power to enlarge the scope of that suit or to treat it as if it were an ordinary suit resting on ground of title (*Kanhaiya Lal, A. J. C.*) MUHAMMAD HAIDAR v WAZIR ALI. **41 I. C. 974: 20 O. C. 237.**

——— S. 9—*Scope of inquiry—Plaintiff entitled to decree on admission of defence—Cause of action.*

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Scope of Inquiry.

The question whether there is a cause of action or not does not depend upon the admission of the defendant. Where the plaint discloses a cause of action, the plaintiff is entitled to get a decree on the admission of the defence. (*Ross, J.*) BAUL DAS MISRA *v.* DIGAMBAR KURI.
65 I. C. 644 : 1921 Pat. 297

——S. 9—*Scope of inquiry—Suit for possession—Occupancy right.*

In a suit on possessory title the Court decrees the suit only when it finds the plaintiff in peaceful possession before dispossession, the plaintiff's previous possession being in law sufficient proof of title. In a suit under S. 9 of the Sp. Rel. Act, the Court is empowered to go only into the question of dispossession within six months before and not into the deft.'s title. 20 C. 834; 26 M. 514 Foll. (*Pratt, J.*) MA SAW *v.* MAUNG SAWE GAN.
1 Bur. L. J 165: 11 L B. R. 415: 1923 R. 54.

Miscellaneous.

——S. 9—*Possession—Suit on invalid title—Mortgage of occupancy holding.*

A person who has taken a usufructuary mortgage over an occupancy holding, in contravention of the provisions of the law, will not receive the assistance of the Courts in a suit for recovery of possession based on title, such title being *exhypothesi* invalid. The mortgagee could however sue to be put back into possession under S.9 of the Sp. Rl. Act without pleading her title at all. (*Piggot and Walsh, JJ.*) SHEO ZOORKOERI *v.* MT. KAUSILLA. **20 A.L.J. 972 : 1923 A. 81 (1).**

——S. 9—*Suit for possession of land and crops—Decree—Removal of crops before execution—Subsequent suit for damages.*

Plaintiff obtained a decree under S 9 of the Sp. Rel. Act, for possession of certain lands with crops. The crops had been removed in the meantime before execution. The plaintiff brought a suit for recovery of the price of the crops *Held*, that the defendants could not by cutting and removing the crops annul the effect of the possessory decree, and that they were liable though they denied plaintiff's title. (*Richards, C. J. and Tudball, J.*) MUNNA SINGH *v.* AUSAN SINGH.
41 All 108: 48 I. C. 422: 16 A L. J. 924.

——S. 9—*Persons dispossessed if should be co-plffs.*

It is not necessary that all dispossessed persons must be co-plaintiff's in a suit in ejectment against a trespasser. It is enough if they are parties either as plaintiffs or as defts. (*Mookerjee and Carnduff, JJ.*) DEBENDRA NATH *v.* BINDHUBALA DASI. **13 I. C. 125.**

——S. 9—*Possession of adhiar—If protected.*

An adhiar is very largely a tenant for the purpose of the Sp. Relief Act. (*Woodroffe and Newbould, JJ.*) DEB NATH DAS *v.* RAM SUNDER BARMAN. **31 I. C. 579. 19 C. W. N. 1205.**

——S. 9—*Suit under— Material irregularity—Retrial.*

Where in a suit for possession under S. 9 the Court misunderstood the plaintiff's position and ignored material evidence, and did not distinguish between possession and use or occupation.

SPECIFIC RELIEF ACT (I OF 1877), S 12.

Held, that all these constituted material irregularity so as to necessitate a retrial (*Reid, C J. and Rattigan, J.*) O'BRIEN *v.* ABDUL RAHMAN.
28 P W. R. 1912: 13 I. C 6: 14 P. L. R. 1912.

——S. 9—*Joint possession—Decree for, not to be given.*

In a suit under S 9 of the Sp. Rel. Act it is not open to the Court to decree joint possession. 29 M.L.J. 760 F B, 19 C W.N. 1117, Rel. (*Devadoss, J.*) SRI VANAMAMALAI JEER SWAMIGAL *v.* PERIA VENKATARAMANA CHARIAR.
(1922) M. W. N. 422 16 L. W. 931: 1922 M. 183.

——S. 9—*Cause of action.*

Seeking remedy by regular suit within 6 months does not alter nature of suit and does not turn suit into one under S. 9. (*Parlett, J.*) MG. LU. MG *v* MAUNG MAUNG PU.
7 Bur. L. T. 10: 23 I. C. 367: 7 L. B. R 88.

——S. 11—*Suit for delivery of specific moveables.*

In order to enable a person to obtain delivery of specific moveable property by suit and enforce the decree obtained by the stringent methods provided in O 21 r. 31 of the C. P Code, he should allege and prove facts which give him a right to compel the delivery of the specific moveables under the provision of S. 11 of the Sp. Rel. Act. (*Wallis, C. J., Ayling and Sadasiva Aiyar, JJ.*) VENKATASUBBA ROW *v.* THE ASIATIC STEAM NAVIGATION CO. OF CALCUTTA **39 Mad 1. 29 M L. J. 342: (1915) M W N. 644: 2 L. W 805: 30 I C. 840: 18 M. L. T 236 (F.B.).**
[On appeal from 24 I. C. 676.]

——S. 12—*Contract for sale of land—Time—Relief against stipulation.*

Courts of equity look at the substance as distinguished from letters of agreements and administer justice accordingly ; but they would not exercise their jurisdiction where the parties have expressed their agreements in clear terms unless the parties have subsequently waived them. (*Viscount Haldane*) STEEDMAN *v.* DRINKLE.
33 I. C 323 : 85 L. J. P. C. 79 (P.C.).

——Ss 12 and 17—*Suit for balance of mortgage money.*

A suit to recover the unpaid consideration for a mortgage is a suit for specific performance of an agreement to lend money on a mortgage and has been held not to lie 2 M. 79 ; 43 C. 59 Foll. (*Abdur Rahim and Bakewell, JJ.*) RAJAGOPALA AIYAR *v.* DAWOOD ROWTHER. **37 P. R. 1918 : 66 P W R. 1918 : 45 I. C. 161: 124 P L. R. 1918.**

——Ss 12, 18 and 35—*Purchaser's right.*

A purchaser may sue for specific performance and ask for an enquiry into the title, by the result of which he will be bound (*Wallis, C. J. and Ayling, J.*) MADURAI CHETTY *v.* BABU SAHEB.
52 I. C 971.

——S. 12—*Contract of loan—Specific performance—Form of decree.*

Ordinarily a suit cannot be brought for specific performance of a contract to pay money. But the case of a vendor is an exception to the

SPECIFIC RELIEF ACT (I OF 1877), S. 12.

general rule and the Court will grant a decree for specific performance of his contract against the purchaser. The form of the decree is that the plff. be at liberty to prepare and execute a conveyance to the deft. as an escrow to be delivered to the deft. on payment of the purchase money within the time limited and the deft. should pay the purchase money after the conveyance is ready. If the contract is that the purchase money is to be paid before execution of the conveyance then the decree must be made accordingly. (*Wallis, C.J. and Seshagiri Aiyar, J.*) BHASHYA KARLU NAIDU *v.* NUNGAMBAKKAM ANDALAMMAL

(1918) M. W. N. 896 : 9 L. W. 1 : 49 I. C. 385 : 35 M. L. J. 89.

——Ss. 12 and 19—*Agreement to give land.*

Where a defendant agreed to give land to plaintiff who was to help him in recovering it, *held*, the agreement should be specifically enforced because the breach of it could not be adequately compensated for. by money (*Prideaux, A. J. C.*) SHRIRAM *v.* BABAJI. 1923 Nag. 47.

——S. 12—*Report of Jury—If can form basis of suit.*

A report of a jury constituted under S 139, Cr. P. Code, does not amount to a contract between the parties and cannot be made a basis for a suit for specific performance. (*Jwala Prasad, J.*) SHEONARAIN TEWARI *v.* SAKHI CHAND SAHU.

38 I C. 417 : 18 Cr. L. J. 305.

——S. 12—*Explanation—Scope of.*

If a man promises to deliver land for an agreed price and fails to fulfil his promise, the Court can decree specific performance of the contract (*Twomey, J.*) MA GAUK KYAW *v.* MAGANG.

27 I. C. 732 : 8 Bur. L. T. 101.

——Ss. 12 (c) and 54—*Injunction where pecuniary compensation is adequate—Sale of shares.*

Injunction should not, as a rule, be granted where pecuniary compensation would give adequate relief. The sale of shares held as security by the deft. Co. to which plff. owed large sums, could not be restrained by an injunction (*Paul, J.*) SOLIAPPA CHETTY *v.* SOLIAPPA CHETTY.

11 I. C 807 : 4 Bur. L. T. 165.

——Ss. 14 and 15—*Contract—Vendor and purchaser—Specific performance—Deficiency in property to be purchased—Compensation*

In exercising its jurisdiction over specific performance a Court of Equity looks at the substance and not merely at the letter of the contract.

If a vendor sues, and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. If the purchaser is suing, he may elect subject to conditions of hardship to take all that he can get, and to have a proportionate abatement from the purchase-money. This right applies only to a deficiency in the subject-matter described in the contract, but not to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it, in which case the remedy is

SPECIFIC RELIEF ACT (I OF 1877), S. 14.

recission, or a claim for damages for deceit where there has been fraud or for breach of a collateral contract if there has been such a contract. (*Viscount Haldane.*) RUTHERFORD *v.* ACTON ADAMS.

32 I. C 47 : 84 L. J. P. C. 238 (P.C.).

——S. 14—*Agreement to sell immoveable property—Property charged before sale—Purchaser entitled to compensation*

In a suit for specific performance of a contract to sell even if the plff knows that there was a claim against the defendant for maintenance, there would be nothing in that fact to put the plff on notice that there was an incumbrance on the suit property, and even if the defendant sold the property he would still be liable to provide maintenance out of the sale proceeds which would in spite of the sale retain the character of the ancestral property. The case comes within S. 14 of the Specific Relief Act and the plaintiff is entitled to compensation for the burden which is imposed upon the property he contracted to buy owing to the decree passed for maintenance. (*Macleod, C. J. and Crump, J.*) CHHOTABHAI HIRACHAND *v.* MAGANABHAI NAGINBHAI.

1923 Bom 271.

——Ss 14 and 15—*Description by boundaries.*

Where the property agreed to be sold was clearly described by boundaries, numbers and area, but was found on measurement to be incorrect in area the purchaser cannot claim specific performance with compensation for the area by which the property was found to be less. (*Scott, C J and Hayward, J.*) TATA INDUSTRIALS BANK, LTD *v.* RUSTOMJI BYRAMJI JEEJEEBHOY.

57 I. C. 957 : 22 Bom. L. R. 849.

——S. 14—*Contract to sell portion of joint family property—Specific performance.*

Where the vendee of a share of joint family property bought it on the assurance of the vendor that he was competent to sell the property held by himself and his co-sharers. *Held*, that though the vendor was not competent to bind his co-sharers specific performance should be decreed against his own share of the property and he could not escape the obligation because he had acted in excess of authority 11 C. L J. 346 Rel. (*Mookerjee and Walmsley, JJ.*) SHAMA CHARAN KOTAL *v.* KUMAD DASI.

42 I. C. 378 : 27 C. L. J. 611.

——S. 14, C.P.C., O. 26—*Agreement to sell—Price not fixed.*

In cases where there is an agreement to sell but the agreement is silent as to the price, it is the duty of the Court while ordering specific performance to determine by itself or through a commissioner the price which should in reason be paid. An agreement for the sale of a whole house may be enforced specifically to the extent of the vendor's share therein when it is found that he is only part owner of it. *Rattigan and Beadon, JJ.* SAI AMAT RAI *v.* TULSI DAS.

71 P. L. R. 1914 : 22 I. C 517 : 109 P.W.R. 1914.

——S. 14—*Applicability of—Deficiency in extent—Execution of conveyance.*

SPECIFIC RELIEF ACT (I OF 1877), S. 14.

The rule enunciated in S. 14 holds good even where the deficiency in area is discovered after the execution of the conveyance and the vendee is entitled to compensation. (*Sadasiva Aiyar and Napier, JJ.*) GANGA VENKATAREDDY *v.* JAMAL AHMED SAHIB.

29 M. L. J. 122 : 18 M. L. T. 364 : 29 I. C. 394 : (1916) M. W. N. 422.

——— **S. 14**—*Covenant of title—Compensation not assessable in money—Enforceability of contract.*

The vendor under a contract to sell lands undertook to give security against any claim set up by the reversioners in future *Held* that the contract could not be specifically enforced as the portion of it relating to security cannot be compensated for in money under S. 14 of the Act. (*Ayling and Hannay, JJ.*) NARAYANA PILLAI *v.* ALAMELU ACHI. **27 I. C. 449.**

——— **S. 14**—*Alienation of property contracted to be sold before performance.*

A contracted to sell land mentioned in a sale proclamation but before he could sell it, a portion of it had been alienated, *Held*, that specific performance of the contract cannot be granted under S. 14, Specific Relief Act. (*Wallis and Sankaran Nair, JJ.*) KOTA KRISHNAYYA *v* MATHERI SUBBAYA. **10 I. C. 678 : 9 M. L. T. 318.**

——— **Ss. 14 and 15**—*Application.*

Sections 14 and 15 of the Sp. Rel. Act refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties ; they do not apply to the case where the obstacle to the full performance is known to the parties and no provision is made to meet it Where the performance of a contract is dependant on the consent of a third person and such consent cannot be obtained specific performance will not be decreed even of so much of the contract as is possible on abatement of consideration or even the full stipulated consideration. (*Batten, A. J. C.*) SARDA PERSHAD *v.* SIKANDAR.

34 I. C. 461 : 12 N. L. R. 69.

——— **Ss. 14, 17 and 21**—*Minor—Contract to sell property by de facto guardian—Specific performance- Transferee for value Right of pre-emption if a defence to suit for specific performance.*

When a *de facto* guardian contracts with a third party for the sale of a minor's property the Court will not, in the absence of sanction, direct the fulfilment of the contract as against the minors as this will amount to sanctioning a plain breach of trust on the part of the *de facto* guardian. No distinction can be drawn between a contract for purchase and a contract for sale. The decision of the Judicial Committee in 39 C. 232 (P. C.) rests on the broader ground that it is quite impossible for the Court to decree specific performance against a minor. The operation of S. 27 b) of the Specific Relief Act is confined to cases where the contracts are in the first instance enforceable as against the parties to the contract. The liability of a person claiming under a party to the contract rests upon that antecedent liability of a party to the contract, and arises by reason of the fact

SPECIFIC RELIEF ACT (I OF 1877), S. 15.

that as such transferee he takes the subject to the transferor's pre-existing contractual obligation ; and in the absence of a pre-existing contractual obligation, it seems that the case entirely fails as against the transferee. It is quite clear that no contract can be enforced as against a transferee unless the transferee has notice of the original contract. Notice of the original contract must mean notice of an existing obligation under the contract; and where the contract is itself unenforceable it is impossible to maintain the view that the contract can be enforced as against a subsequent transferee. As a rule the Court will not compel specific performance of a contract unless it can execute the whole contract. Where, however, the contract is in substance divisible, there is nothing to prevent the Court from carrying into effect that part of it which is capable of being fulfilled. Where the subsequent purchaser of property is one who has a right of pre-emption the Court will not decree specific performance against him. (*Das and Foster, JJ.*) SHIEKH ABDUL HUQ *v.* MD. YEHIA KHAN.

4 Pat. L. T. 553 : 1924 P. 81.

——— **S 15**—*Incomplete contract —Specific performance not to be granted.*

Where there is no completed contract between the parties, a Court cannot decree specific performance. When plff sued to enforce specific performance of a contract for sale of certain land by the first and second defendant and it was found that the second defendant had never agreed to sell, the contract cannot be specifically enforced. (*Chatterjea and Panton, JJ.*) RAM SARAN ROY *v.* SHOSHI BHUSAN GHOSE. **65 I. C. 594.**

——— **S. 15**—*Agreement to sell by manager of joint family—Contract not binding—Specific performance.*

Specific performance of a contract to sell land by a manager of a joint Hindu family which is not binding on the other members cannot be granted under S. 15 of the Act, as against the whole property but can be granted only against the share of the alienor and that too, on payment of the whole consideration agreed upon. (*Wallis, C.J., Oldfield and Kumarasami Sastri, JJ.*) BALUSAMI AIYAR *v* LAKSHMANA AIYAR

44 Mad 605 : 13 L. W. 562: 29 M L T. 306 : (1921) M. W. N. 316 : 63 I C 374 : 41 M L. .. 129 (F. B.).

——— **Ss. 15 and 16**—*Contract to sell whole house—Vendor possessing only a half—Specific performance.*

Where a person on behalf of himself and as agent for another agreed to sell a house in which each of them had one half-share and it was found he had no authority to sell the half-share of the other. *Held*, that the plaintiff was only entitled to a decree for specific performance for half of the house on condition of paying the full price agreed upon for the entire house. (*Richards, C. J. and Banerji, J.*) MAHMUD ALI *v.* YAWAR BEG **29 I. C. 628 : 13 A. L. J. 739.**

——— **Ss. 15 and 16**—*Co-parcener's agreement to sell—Specific performance.*

SPECIFIC RELIEF ACT (I OF 1877). S. 15.

One member of a joint Hindu family cannot agree to sell joint property without the consent of the others and such an agreement, if made, cannot be specifically enforced. (*Griffin, J.*) SEETLA SAHAI *v.* THAKUR DIN
20 I. C. 247 : 11 A. L. J. 456.

——Ss. 15 and 18—*Contract for sale by manager—Specific performance—Damages.*

Where a person is jointly interested in an estate with another person and deals with the entire property, specific performance will not be granted against him as to his share, the plff.'s remedy being only by way of damages. (*Jenkins, C. J. and Mukerjee, J.*) SHEIKH ABUL RAHMAN *v.* JADUNANDAN SINGH JHA. **21 I. C. 528 : 18 C. L. J. 344.**

——S. 15—*Contract to sell—Pardanashin-woman—No independent advice—Consideration inadequate—Straitened circumstances—If can be enforced.*

Where a contract for sale was entered into with a semi-illiterate pardanashin woman and it is found that she had no independent advice in the matter, that the consideration was entirely inadequate and it is also found that the allegation by the vendee that he had paid consideration was false. *Held*, that the contract cannot be specifically enforced. Where a contract to sell was entered into by a widow and her executor in pursuance of a power given to her by her husband's will but later on the probate was revoked, it was held that if the contract was one which could otherwise be specifically enforced, it can be enforced against the widow's interest in the property provided there is nothing in the plff.'s conduct amounting to abandonment, waiver or acquiescence and the deft.'s position has not been altered by the plff.'s delay in bringing the suit. (*Coxe and Teunon, JJ.*) KEDAR NATH *v.* MANU BIBI. **13 I. C. 879 ; 16 C. W. N. 247.**

——Ss. 15 and 16—*Joint Hindu family—Agreement to sell by members—If can be specifically enforced against share of same.*

Specific performance of an agreement to sell cannot be enforced against the share of an undivided member of a Mittakshara joint Hindu family. Before partition the members have no share to convey. The remedy of the aggrieved party lies in damages against the said co-sharer. (1895) 12 B. 683 Rel. on. (*D. Chatterjee, J.*) JADU NANDAN SINGH *v.* ABDUL RAHAMAN.
11 I. C. 892 : 16 C. W. N. 93.

——S. 15—*Contract to sell by member of joint family—Part performance.*

A person is entitled to a specific performance of a contract by a member of Hindu family to sell his share of the property but not to a decree for part performance. Conveyance of a portion is not such a part of the contract as he can perform within the meaning of S. 15 of the Act. 26 M. 74 ; 32 M. 320 ; 37 M. 387, dis. 33 M. 359 ; 26 M. L. J. 576 ; 27 M. L. J. 409, foll. (*Sankaran Nair and Spencer, JJ.*) DUVVUR SUBBA *v.* KAKUTURU VENKATASAMI. **38 Mad. 1187 : 26 I. C. 983 : 16 M. L. T. 370.**

SPECIFIC RELIEF ACT (I OF 1877). S. 16.

——Ss. 15, 16 and 18—*Contract for sale by manager—Suit for specific performance.*

In a suit for specific performance of a contract for the sale of joint family property by the father, it is open to the Court to grant a decree as regards the share of the father alone. *Obiter* the liability of the sons might be determined in the suit if the plff. asks for it. (*Ayling and Tyabji, JJ.*) KONDAPANENI KOTAYYA *v.* GANGARAM SESHAYYA (1913) **M. W. N. 995 : 21 I. C. 778 : 14 M. L. T. 495.**

——S. 15—*Contract by manager—Not binding on others—Right to specific performance.*

Where the manager of a joint Hindu family contracted to sell family lands and the contract was not binding on the other members. Specific performance could not be decreed even against the manager. 26 M. 74 ; 32 M. 320. not foll. 33 M. 359 ref. (*Wallis and Ayling, JJ.*) NAJIAH *v.* VENKATARAMA SASTRULU **37 Mad. 387 : 16 I. C. 623 : 14 M. L. T. 199.**

——Ss. 15 and 17—*Part performance of contract.*

Specific performance of a part of the contract affecting some of the properties in an undivided Hindu family cannot be ordered under S. 17 but in a case falling under S. 15 the Court can grant part performance as the word "may" in that section confers a discretion upon the Court. 33 M. 359; 32 M. 320; 26 M. 74 dist. (*Sundara Aiyar and Spencer, JJ.*) GOVINDA NAICKEN *v.* APTHASAHAY AIYAR. **37 Mad. 403 : (1912) M. W. N. 87 : 11 M. L. T. 87 : 13 I. C. 471 : 22 M. L. J. 257.**

——S. 15—*Right to specific performance—Act does not apply after performance of contract.*

A right to specific performance lies at the discretion of the Court, and can only be claimed subject to the conditions laid down in S. 15 of the Sp. Rel. Act. But after the parties perform the contract by executing a sale-deed and delivering possession, the rights of the parties are not subject to the Specific Relief Act but by the Transfer of Property Act which clearly entitles the plaintiff to damages for breach of agreement. (*Mitra, A. J. C.*) SHALIGRAM *v.* NARAYAN
4 N. L. J. 221.

——S. 15—*Scope of—Conveyance, executed—Effect of.*

S. 15 of the Sp. Relief Act applies only before the contract has been executed, but if it has been performed by the execution of a sale-deed and delivery of possession the rights of the parties are governed by S. 55 of the T. P. Act. (*Mitra, A.J. C.*) SHALIGRAM SADASHEO PANDE *v.* NARAIN.
45 I. C. 669.

——S. 16—*Contract divisible—Specific performance as to part can be given.*

Where after an agreement to sell two plots of lands, it was discovered that one of them belonged to the vendor's wife, the vendee can under S. 16 Specific Relief Act claim performance of so much of the contract as related to the vendee's own plot with a proportionate abatement in the price settled upon. The question whether a contract is divisible or not is one of construction

SPECIFIC RELIEF ACT (I OF 1877), S. 16.

depending on the facts of each case. (*Ghose and Panton, JJ.*) KRISHNA CHANDRA DEY *v* GRAHAM. 50 Cal 700 : 27 C. W. N 693 : 1923 Cal. 694.

——S 16—*Contract for sale of land—Co-owners—Specific performance of portion.*

When some persons combine to sell property, which some of them own in part with other persons individually, the vendee can claim enforcement of the contract as against some portions only of the property, if the portions claimed can reasonably be enjoyed independently of the remainder. (*Abdur Rahim and Oldfield, JJ.*) SUBRAHMANIA AIYAR *v.* KALYANASUNDARAM AIYAR. 53 I.C. 283.

——S. 17—*Specific performance—Variation of agreement.*

Where the plff. called upon the deft. to perform a contract different from the real agreement between them, he cannot claim performance thereof. (*Mookerjee and Beachcroft, JJ.*) RAJA BAIKUNTH NATH *v.* BENODE BEHARI 51 I. C 13 : 29 C. L J. 256.

——Ss 17 and 18—*Void transaction—Sanction—Driving third party to suit.*

A Court cannot sanction a transaction devoid of any legal effect, nor can it compel a party to do an act the effect of which would be to compel a third party to bring a suit. (*Sundara Aiyar and Spencer, JJ.*) GOVIND NAICKEN *v.* APATHSAHAYA AIYAR. 37 Mad. 403 . (1912) M. W. N. 87 : 11 M. L. T. 87 : 13 I. C. 471 : 22 M. L. J. 257.

——S 18—*Contract of sale—Compensation for misrepresentation as to subject-matter.*

If a vendor sues and can convey substantially what the purchaser has contracted to get the Court will decree specific performance with compensation for any small and immaterial deficiency if the vendor has not, by misrepresentation or otherwise disentitled himself to his remedy. If the purchaser is suing, he may elect subject to conditions of hardship to take all that he can get and to have a proportionate abatement from the purchase-money. The right does not apply to a claim to make good representation about that subject-matter made, not in the contract, but collaterally, in which case the remedy is rescission, or a claim for damages for deceit where there has been fraud. In cases of specific performance a Court of Equity looks at the substance and not merely at the letter of the contract. (*Viscount Haldane.*) RUTHERFORD *v.* ACTON ADAMS. 32 I. C. 47 : 84 L. J. (P. C.) 238 (P. C.)

——S. 18—*Contract for sale by disqualified person—Subsequent removal of disqualification—Effect of.*

A judgment-debtor selling the property while the Collector is exercising powers under S. 325-A., C. P. C., must convey the property to the purchaser after the Collector's management ceases and his incompetence to sell it is removed 34 B. 175, Dist (*Scott, C. J and Russell, J.*) MAGNIRAM *v.* BAKUBAI RAKHAMA LOHAR. 36 Bom. 510 : 16 I. C. 570 : 14 Bom. L. R. 598.

——S. 18—*Contract of lease—Specific performance—Possession outstanding.*

SPECIFIC RELIEF ACT (I OF 1877), S. 19.

Possession of property by the mortgagee after the mortgage term is over does not render the mortgagor's title to the property defective and he can compel a lessee to accept specific performance of a contract of lease. (*Sanders n, C J. and Panton, J.*) KUNJ BEHARI GHOSE *v.* LALIT MOHAN SINGH ROY. 50 I. C. 154.

——S. 18—*Specific performance — Concurrence of other persons.*

Plff. contracted with deft. and his landlord that plff. would give a plot of land to the landlord in exchange for that held by deft. under the landlord, that plff. was to be given actual possession of the plot held by deft. and that deft. was to get an equal plot from the landlord out of the lands got by him in exchange from plff., deft. received the money but refused to vacate. *Held*, that on the deft's. landlord giving him a plot out of the lands given by plff. in exchange, deft. was bound to vacate and give possession to plff. (*Chatterjee and Newbould, JJ.*) KANGALI DEBI *v.* ICHAMOYI DEBI. 35 I. C. 840.

——S. 18—*Agreement to purchase property in shares—No steps taken to pay purchase money—Right to specific performance*

Where an agreement to purchase is, through the inability of one of the parties to find the purchase-money, practically abandoned, he cannot turn round and claim specific performance though he may be entitled to recover any advance that he might have paid (*Mookerjee and Caspersz, JJ.*) MADAN MOHAN SINGH *v.* GAJA PROSAD SINGH. 11 I. C. 228 : 14 C. L. J. 159.

——S. 18 (a)—*Contract Act, S. 56, para. (2)—Agreement to re convey land purchased at Court auction.*

Where the deft and purchaser at Court auction agreed to convey the property purchased to plff. after applying for cancellation of the sale, on condition of the plff. depositing Rs. 100 before a certain date, and failed to get the sale cancelled according to the agreement in spite of the plff.'s depositing the sum, *held* in a suit for specific performance of the contract, that the deft.'s failure to apply for cancellation of the sale did not make the contract impossible of performance, that the deft. was still liable to perform the contract and that money would not afford adequate relief in the case. (*Spencer and Phillips, JJ.*) NATARAJA PADAYACHI *v.* NAGAMUTHU PADAYACHI. 37 I. C. 761.

——Ss 19 and 21 (b)—*Contract to file Jama Wasil papers—If enforceable.*

A contract by a lessee to prepare and file a set of Jama Wasil baki papers with the lessor every year falls under S. 21 (*b*) of the Sp. Rel. Act and cannot be specifically enforced. In the absence of proof of actual loss suffered, the plff. cannot get any relief in the alternative for damages in the suit for specific performance of the contract. (*Fletcher and Newbould, JJ.*) BHAGWANDAS *v.* SURENDRA NARAIN SINGH. 42 I. C. 521.

——Ss. 19 and 21 (a) - *Contract for purchase of a money claim—Claim becoming barred—Compensation.*

SPECIFIC RELIEF ACT (I OF 1877), S. 20.

Plff. sued for specific performance on a contract by the defts. to purchase from them a money claim which the plff. had against another. The defts. had made default and on the date of the suit the claim had become barred *Held*, that though the contract was not specifically enforceable by virtue of S. 21 (*a*) of the Sp. Rel Act, the plffs. were entitled to compensation under S. 19, though there was no specific prayer to it in the plaint. 43 I. C. 990 (P.C.) Dist. (*Wallis, C. J. and Spencer, J.*) OOKRJEE COWASJEE OOMRIGAR *v.* SABAPATHY MUDALIAR **9 L. W. 471: 51 I. C. 908 : (1919) M. W. N. 714.**

——S 20—*Agreement to pay damages—Not a bar for specific performance.*

Agreement to return the earnest money and pay damages if a contract of a sale is broken does not preclude a suit for specific performance being instituted by the vendee. (*Martineau and Moti Sagar, JJ.*) SADIQ HUSAIN *v.* ANUP SINGH **4 Lah 327 : 5 L L. J. 462 : 1924 Lah. 151.**

——S. 21—*Agreement to lease—Failure to mention the date from which the lease is to run.*

Specific performance of an agreement to lease cannot be decreed if the date from which the term is to run is not fixed either expressly or impliedly. (*Lord Atkinson.*) GIRUBALA DASI *v.* KALIDAS BHAIYA, **29 M L. J. 1 : 33 C. L J. 57 : 39 M. L. J. 325 : (1920) M. W. N. 653 : 57 I. C 626 : 2 U. P. L. R. (P C.) 146 : 22 Bom. L R. 1332 : 25 C W. N 320 (P. C.).**

——S. 21—*C. P. Code, Sch. II Para 18—Party to an agreement to refer to arbitration, if can sue independently on title.*

A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on title. (*Piggott, J.*) SHEOBAHU *v.* UDIT NARAIN. **24 I. C. 490 : 12 A. L. J. 757.**

——S 21—*Arbitration—Refusal to perform contract to refer to arbitration.*

Refusal to perform contract to refer to arbitration on the part of a person is a bar to a suit by him only when the other party has not acquiesced therein and thus annulled the contract by mutual consent. The proper procedure for the other party to observe is to file the award under C.P.C. Sch. II, Para 18. Inaction on his part for a length of time amounts to lapse of the contract. 18 A. 577; 11 B. 199 ; 12 M. I. A 112 Cons. (*Stanley, C. J., Banerji and Griffin, JJ.*) RAM KUMAR SINGH *v.* JAGAN MOHAN SINGH. **33 All 315 : 9 I. C. 80 : 8 A. L. J. 66 :**

——S. 21—*Agreement to enter into contract.*

A document which is merely an agreement to enter into a contract cannot be specifically enforced. (*Marten, J.*) GOVIND *v.* HARICHAND. **50 I. C. 403 : 21 Bom. L. R. 302.**

——S. 21—*Scope of—C. P. Code Sch. II Para. 22*

S. 21 of the Specific Relief Act is limited by paragraph 22 of Schedule II of C. P Code and does not apply to any agreement to refer to arbitration or to any award governed by Sch II, C.P.C. (*Mookerjee and Fletcher, JJ.*) ABDULLAH *v.* SAFIULLAH. **64 I. C. 204**

SPECIFIC RELIEF ACT (I OF 1877), S. 21.

——S 21—*Contract—Specific performance.*

Formal document not executed where the parties agree to the execution of a formal lease the draft of which is to be approved by them, specific performance can be decreed though the draft is not drawn up. (*Richardson and Huda, JJ.*) BIJOYA KANTA LAHIRY CHOWDHRY *v.* KAILASH CHANDRA BHOWMIK. **46 Cal. 771 : 52 I. C. 575 : 23 C. W. N. 563.**

——S. 21—*Reference—C. P. C., Sch. II.*

S. 89 (1) C. P. C. renders the concluding provision of S 21 of the Sp. Rel Act inapplicable to arbitration agreements and awards governed by Sch. II. C. P. C. (*Mookerjee, Chitty and Walmsley, JJ.*) DINABANDHU *v.* DURGA PRASAD. **46 Cal 1041 : 23 C. W N. 716 : 51 I. C. 80: 29 C. L. J. 399.**

——S. 21—*Arbitration—Refusal—Filing of suit.*

Where two days after concluding an agreement to refer their disputes to arbitration, one of the parties instituted the suit. *Held* per *Fletcher, J.* That the filing of a suit was not a refusal within the meaning of S. 21 of the Sp. Rel Act, Per *Shamsul Huda, J.*—Neither demand nor refusal need be expressed and both may be implied. The institution of the suit in circumstances which showed that plff. was determined not to go to arbitration amounted to a refusal to perform the contract to arbitrate. 8 All. 57, Cons. (*Fletcher and Huda, JJ.*) DURGA PRASAD JANA *v.* DINABANDHU JANA **44 I. C 279 : 22 C. W. N. 362.**

——S. 21, Proviso—*Arbitration—Revocability—Good and sufficient cause—Delay in commencing arbitration proceedings.*

When a person has agreed with another that all matters in controversy between them should be referred to arbitration, it is not open to him to resile from the agreement unless for good and sufficient cause. Delay of six months in commencing the arbitration proceedings, in the absence of proof that a party made any effort at all to push forward the proceedings before the arbitrators and that he was not himself responsible for the delay, is not good and sufficient cause to withdraw from arbitration Therefore, under S. 21 of the Sp. Rel. Act, the party cannot sue in respect of a debt which he had contracted to refer. (*Brett and Richardson, JJ.*) RAMACHANDRA PAL *v.* KRISHNA LAL PAL. **17 I. C. 600 : 17 C. W. N. 351.**

——Ss. 21, 56 and 57—*Contract of service, if can be specifically enforced—Injunction if can be granted restraining company from dispensing with services.*

A servant cannot enforce a positive contract of service and he cannot obtain an injunction restraining the master from dispensing with service except in a given manner or until after a particular period; his only remedy if he is wrongfully dismissed is to sue for damages. (*Chitty, J.*) N. C. SIRCAR *v.* BARABHONI COAL CO., LTD. **13 I. C. 868 : 16 C. W. N. 289.**

——S. 21—*Arbitration—Agreement to refer bar of suit—C. P. C., Sch. II, para. 18.*

SPECIFIC RELIEF ACT (I OF 1877), S. 21.

The Arbitration Act applies to a case where a suit could be instituted in a presidency town if the matter submitted to arbitration were the subject of a suit. Consequently the last 37 words of the saving clause of S. 21 of the Sp. Rel. Act do not apply to an agreement to refer to arbitration in such a case. When no application for stay of suit under S. 19 of the Arbitration Act under para. 18 of Sch. II, C. P. C., is made, the existence of the agreement to refer to arbitration does not bar the suit under S. 21 of the Sp. Rel. Act. (*Shah Din and Chevis, JJ.*) TAPESSIER AND COMPANY *v.* NASIRUDDIN. **37 P. R. 1912 : 15 I. C. 402: 130 P. W. R. 1912.**

——S 21—*Agreement to refer to arbitration —Burden of proof*

Where the plea to a suit for recovery of money under an agreement is that the agreement provided that disputes should be referred to the arbitration of a person named therein and that his decision should be binding and that the plffs. had refused to so refer the dispute, the burden of proof rests with the deft. (*Shah Din and Chevis, JJ.*) UDHA SINGH *v.* BESHEN SINGH. **35 P. L. R. 1911 : 25 P. R 1911 : 9 I. C. 736 : 55 P. W. R. 1911.**

——S 21—*Arbitration—Suit pending reference to C P. C., Sch. II, para. 22.*

A contract to refer a dispute to arbitration confers on the parties a right to have the question decided by arbitrators and not by suit It is a substantive right and section 21 bars a suit pending disposal of the reference. 33 A 315 Ref. Per *Richards, J.*—The repeal of section 21 by para. 22 Sch. II of the C. P. C. does not effect a right which had accrued under the former Act, when the contract to refer was made before the new Code came into force. The death of an arbitrator without disposing of the reference removes the bar created by S. 21 and restores the right of suit to the parties and the time runs from the date of the arbitrator's death under Art. 120, Sch. I, Limitation Act. (*Wallis, C. J. and Seshagiri Aiyar, J.*) DORAISAMI PADAYACHI *v* VAITHILINGA PADAYACHI. **41 I. C. 581 : 33 M. L J. 46.**

——S. 21—*C. P. Code, Sch. II, para 22.*

After the enactment of para. 22, Sch. II, C. P. Code, S. 21 of the Sp. Rel. Act has no application to any agreement to refer to arbitration or to any award to which the schedule applies. (*Twomey, J.*) MA YON *v.* MAUNG KIYA GAING **35 I. C. 710 : 9 Bur. L. T. 98**

——S. 21—*Arbitration—Scope of section.*

The proviso to S. 21 refers only to incohate and abortive arbitration and not to a contract which has been admittedly carried out. (*Twomey, J.*) SAN NYEIN *v.* MA KYAW. **33 I. C. 554 : 8 L. B. R. 157.**

——S. 21—*Suit on bond or contract—Nature of.*

Suit to recover money payable under a bond or contract is not one for specific performance ; it is one for compensation for breach of contract. (*Pratt, J. C.*) SOMJI MAL *v.* TODO MAL. **19 I. C. 376 : 6 S. L. R. 148.**

SPECIFIC RELIEF ACT (I OF 1877), S. 21.

——S. 21 (*a*)—*Contract to pay money.*

An agreement to pay money by instalments cannot be specifically enforced and compensation in money for non-performance of the agreement is an adequate relief. (*Karamat Husain and Chamier, JJ.*) **12 I. C. 952 : 8 A. L. J. 1282.**

——S. 21 (a)—*Contract of loan—Specific performance.*

A contract to lend or borrow money on a mortgage will not be specifically enforced at the instance of the lender or borrower. (*Mookerjee and Richardson, JJ.*) SHAIK GALIM *v.* SADARIJAN BIBI. **43 Cal. 59 : 19 C W. N. 1332 : 29 I C. 621 : 21 C. L. J. 532.**

——S. 21 (a)—*Contract to pay money—Specific performance.*

A suit will not generally lie for specific performance of a contract to pay money. But the case of a vendor is an exception and the Court will grant the vendor specific performance of the contract against the purchaser. The suit would be a suit for specific performance and not a suit for damages if the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards. (*Wallis, C. J. and Seshagiri Aiyar, J.*) BASHYA NAIDU *v.* ANDALAMMAL. **9 L. W. 19 : 49 I. C. 385 : (1918) M. W. N. 896 : 35 M. L. J. 89.**

——S. 21 (a)—*Suit for payment of balance of mortgage money.*

Where a person had advanced part of the consideration agreed upon for executing a mortgage and sued for specific performance on payment of the balance. *Held*, that no specific performance should be decreed and that the lender was only entitled to damages for breach of contract if the borrower was ready to pay off the advance at once. If not, specific performance should be decreed on payment of the balance. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MEENAKSHI SUNDARAM MUDALIAR *v.* RATHNASWAMI PILLAI. **41 Mad. 959 : 8 L. W. 438 : 24 M L T. 315 : 49 I. C. 291 : (1918) M W. N. 811 : 35 M. L J. 489.**

——S. 21 (c)—*Incomplete contract cannot be enforced.*

A contract of letting by defendants to plaintiff was in these terms : " We (defts.) agree to rent to H. (plff.) our building under construction at Plot No. 3 Ballard Estate for a period of 5 years and 5 years' option at a monthly rent of Rs. 1,500 from the completion of the same subject to the conditions and entering into a regular lease. A deposit of 3 months' rent is paid on signing of this contract. " In a suit by plaintiff for specific performance *held*, that the writing did not evidence a concluded agreement as it was impossible for the parties to draw up a formal lease on its basis The words "subject to the conditions and entering into a regular lease" made "the entering into a lease " a condition precedent to the parties coming to a complete agreement. The documents could not possibly be specifically enforced It was merely the result of preliminary negotiations which defined a portion of the terms to appear

in the lease as eventually settled, while it left a great many of the terms to be agreed upon thereafter, so that the final agreement between the parties depended on a regular lease which was to be executed. (*Macleod, C. J. and Coyajee, J.*) SIMON REUBEN *v.* HAJI SHAIKH MAHOMED.
24 Bom. L. R. 466 : 1922 Bom. 404.

——S. 21 (c)—*Contract uncertain—Question of fact.*

Per *Woodroffe, J.*—The Court will not enforce a contract the terms of which are uncertain. Uncertainty is a question of fact arising on the document and on the oral evidence adduced. (*Jenkins, C. J., Woodroffe and Mookerjee, JJ.*) J. I. J. HYAM *v.* ME GUBBAY. **32 I. C. 53 : 20 C. W. N. 66 (F. B.)**

——S. 21 (c)—*Vague claim—Original claim unsustainable—Relief on amended claim—Discretion of Court—Meaning of.*

Where the plaintiff has asked for specific performance of an agreement and it is found that the claim was excessive he may be allowed to succeed on the basis of an alternative claim for a more limited right. But if he gives evidence in support of the original claim which is found unsustainable he cannot succeed on a different claim contrary to his own evidence. (*Mookerjee and Caspersz, JJ.*) GAJ KUMAR CHAND *v.* LACHMAN RAM. **10 I. C. 503 : 14 C. L. J. 627**

——Ss. 21 (c) and 24-A — *Contract — Essential terms not agreed on—Party, guilty of breach.*

In the absence of complete agreement between the parties as to the essential terms of the contract of lease, the latter cannot be specifically enforced. The party breaking a contract is not entitled to specific performance thereof and the other party can refuse to perform his part of the contract. (*Robertson and Shah Din, JJ.*) SRI-KRISHNA DAS *v.* THE PUNJAB NATIONAL BANK, LTD. **87 P. W. R. 1913 : 18 I. C. 911 : 149 P. L. R. 1913.**

——S. 21 (c)—*Contract—Vague—Unenforceable*

An agreement in a lease to pay a particular rate of rent which is so vague as not to make it clear what the intention of the parties was, cannot be enforced. (*Ferrard, S. M. and Harrison, J. M.*) RAM BARAN SINGH *v.* PUJA SINGH
55 I. C. 923 : 2 U. P. L. R. (B. R.) 29.

——S. 21 (e)—*Contract of lease in excess of trustee's powers will not be enforced.*

A Court of equity will not grant specific performance when a trustee has entered into a contract for a lease which is in excess of his powers or has entered into a contract for renewal which is *ultra vires*. (*Mookerjee and Cuming, JJ.*) GAJENDRA NATH DEY *v.* MOULVI ASARAF HOSSAIN.
36 C. L. J. 48 : 27 C. W. N. 159 : 1923 C. 130.

——S. 21 (e)—*Lease by trustee.*

In a suit for specific performance of a contract its terms can be proved even from the unregistered *amalnamah* and by oral evidence. The registration of an *amalnamah* is optional when from

its condition the parties' intention of executing a properly registered document to perfect the lessee's title is clear. A Court in decreeing specific performance must ascertain beforehand whether the contract is enforceable specifically and does not involve any breach of trust. The Equity Courts would refuse specific performance of a lease entered into by a trustee lessor of a trust property beyond his authority. (*Mookerjee and Beachcroft, JJ.*) MAHAMAD ISMAL KHAN *v.* NUNDA DULAL CHAKRABURTI. **16 I. C. 390.**

——S. 21 (g)—*Workman's Breach of Contract Act (XIII of 1859)*

A contract binding the debtor to work for the creditor for more than 3 years and for no other person cannot be enforced under Act XIII of 1859. 22 I. C. 742, Foll. (*Chevis, J.*) EMPEROR *v.* AMIR BAKSH. **61 P. L. R. 1914 : 24 I. C. 159 : 15 Cr. L. J. 423 : 22 P. W. R. 1914 (Cr.)**

——S. 21 (h)—*Contract embodied in document—Document set aside by Court—Specific performance.*

Where a suit for specific performance of a contract to grant a lease was brought on the basis of an agreement embodied in a *solenamah* filed in the Court which was subsequently set aside by the Court, *Held*, that there was no contract subsisting, which the plaintiff could put before the Court for enforcement. The plaintiff could not fall back upon some verbal agreement to grant the lease. (*Chitty and Smither, JJ.*) JIBAN KRISHNA CHAKRAVARTHI *v.* RAMESH CHANDRA DAS.
44 I. C. 225.

——S. 22—*Delay—Discretion of Court to refuse*

A lapse of nine years is fatal to an action for specific performance unless the plaintiff can show that the defendant is entirely to blame for the delay or that the real right of action had accrued only a short time before the proceedings were instituted. (*Lord Buckmaster.*) MA SHWE MYA *v.* MAUNG MO. **(1921) M. W. N. 396. 48 I. A. 214 : 63 I. C. 914 : 4 U. B. R. (1921) 30 : 30 M. L. T. 28 (P. C.).**

——S. 22—*Contract for sale of land—Delay.*

Time is not of the essence of a contract to sell immoveable property unless expressly so stipulated at the time of the contract. Failure to keep to the dates assigned will not prevent a party from claiming specific performance unless the delay has been very gross. Case-law considered. (*Viscount Haldane.*) JAMSHED KHODARAM IRANI *v.* BURJORJI DHUNJIBHAI.
40 Bom. 289 : 43 I. A. 26 : 30 M. L. J. 186 : 3 L. W. 239 : 19 M. L. T. 184 : 14 A. L. J. 225 : (1916) 1 M. W. N. 229 : 18 Bom. L. R. 163 : 23 C. L. J. 358 : 32 I. C. 246 : 20 C. W. N. 744 (P. C.).

——S. 22—*Contract for sale of equity of redemption to mortgagee—Onerous terms—No fraud or misrepresentation—Grant of relief.*

Although an agreement for sale of the equity of the redemption by the defendant mortgagor to the plaintiff mortgagee contained onerous terms, yet, as neither fraud nor misrepresentation by the

SPECIFIC RELIEF ACT (I OF 1877), S. 22.

plaintiff was proved and the terms of the sale were not unconscionable, and as the plaintiff was not shown to have taken improper advantage of his position or of the defendant's difficulties, the Court below exercised a right discretion in granting a decree for specific performance. (*Mr Ameer Ali.*) G. W. DAVIS *v.* MAUNG SHWE GO. **38 Cal. 805 : 38 I. A. 155 : 15 C W. N. 934 : 13 Bom. L. R. 704 : (1911) 2 M. W. N. 79 : 14 C. L J. 200 : 4 Bur. L. T. 229 : 8 A. L J. 1193: 10 M L. T. 455 : 11 I. C. 801 : 21 M. L. J. 1127 (P C.)**

——S. 22—*Minor—Specific performance*

No Court would be justified in enforcing specific performance against a minor when such enforcemen would be to his detriment. (*Banerjee and Piggott, JJ.*) IMAMI *v.* KALLU. **38 All 433 : 34 I C. 298 : 14 A. L. J. 645.**

——S. 22—*Delay—Refusal of specific performance.*

A plaintiff guilty of continuous delay is not entitled to a decree for specific performance. (*Banerji, J.*) ABDUL AZIZ *v.* NARAIN DAS TEWARI. **21 I. C. 35.**

——S 22—*Specific performance of contract—Undue advantage to plff.—Hardship to defts.—Discretion of Court.*

The Court can refuse specific performance of the contract conferring an undue advantage on the plff. and causing a hardship to the deft. not anticipated at the time of the contract (*Banerji, J.*) GULLA MAL *v.* CHUNI LAL. **17 I. C 732 : 10 A. L. J. 498.**

——S. 22 *Suit for specific performance or return of deposit—First claim given up—Effect.*

An agreement to sell being not fulfilled plaintiff filed a suit for specific performance and in the alternative for return of deposit money and damages. During the course of the suit he gave up the first claim. On account of depreciation of value, the vendor who had throughout refused to convey and thus committed a breach of contract, expressed his willingness to execute the conveyance. *Held* under the circumstances, the contract which was not performed within the reasonable time fixed there was a breach ; and though the suit was filed on the basis of a subsisting agreement, plaintiff could withdraw his claim to specific performance and confine its claim to damages, etc. and that such withdrawal was not a repudiation entitling the defendant to refuse the return of the deposit money. (*Fawcett and Coyajee, JJ.*) KARSANDAS KALIDAS *v.* CHHOTALAL MOTICHAND. **25 Bom L. R 1037 : 1924 Bom. 119.**

——S 22—*Specific performance—Tender—Necessity for—Agreement to reconvey.*

In a suit for specific performance of an agreement to reconvey it would be proper for the plff. to tender the money or bring it into Court with his plaint. But having regard to the facts that the negotiations went on for several months, that the suit was filed before the 3 years had expired, and also the fact that the defts. had been in possession of a portion of the villages when they undertook to reconvey to the plff. the Court refused to apply the strict law as to tenders and directed defts. to reconvey on payment of the consideration money. (*Macleod, C.J. and Coyajee, J.*) TRIBHOVANDAS VANJIVANDAS *v.* BALMUKUND DAS. **24 Bom. L R 434 : 1923 Bom 15.**

——S. 22—*Delay in completing sale—Right to make time essence of contract—Earnest money—Return of.*

In a contract to purchase land, the defendant on receipt of earnest money agreed to complete the sale in two months. This not being fulfilled and after a waiting of 6 months, plaintiff called upon defendant to complete the sale within 3 months, failing which he brought his suit for return of earnest money, etc. *Held*, he was entitled to make time the essence of the contract at that stage and was not bound to wait till deft. could place himself in a legal position to do his part of the contract. Also, the defendant could not after the suit being filed demand specific performance, but was liable to return the earnest money with interest. (*Shah, A. C. J. and Crump, J.*) KARSANDAS PURSHOTTAMDAS *v.* GOPALDAS. **25 Bom. L. R. 1144 : 1924 B. 282.**

——S. 22—*Specific performance—Discretion of Courts.*

In every suit for specific performance Courts of Equity have a free discretion limited by those general principles which require all Courts of Justice to act in accordance with sound judicial principles and not upon mere caprice and sentiment. What the Court has to look to is whether in the exercise of its discretion the agreement is one which ought to be specifically enforced having regard to the fact whether the enforcing of the contract would not inflict more injury upon the deft. than confer benefit on the plff. (*Beaman, J.*) GANGABAI *v.* SONABAI. **40 Bom. 69 : 28 I. C. 544 : 17 Bom. L. R. 303.**

——S 22—*Delay—Alteration in value of property Discretion of Court.*

Where plff.'s delay in filing a suit for specific performance of contract to grant a patni lease to him has caused a material alteration in the value of the property, the cause led the tenants to hope that the lease would never be given and to agree to pay enhanced rent in order to prevent it from being given, the matter is not *status quo* at the time of the suit and specific performance will not be granted. (*Sanderson, C. J. and Richardson, J.*) MAHARAJ BAHADUR SINGH *v.* SURESH CHANDRA ROY. **34 C. L. J. 364.**

——S. 22—*Discretion of Court—Grounds for refusal of specific performance.*

A suit for specific performance of a contract of sale cannot fail merely by incomplete description of the properties contracted to be sold especially when the property is identified and reasons for incomplete description are explained (*Walmsley and Greaves, JJ.*) JANKI NATH SARKAR *v.* INNA TENNESSA BIBI. **57 I. C. 763.**

——S 22—*Delay—Bar to relief.*

If the plff. causes such a long delay as to the evidence of abandonment he cannot ask for specific performance. Nor can he do so where time was originally or has subsequently been made the essence of the contract between the

parties, in other cases specific performance can be granted. (*Mookerjee and Roe, JJ.*) KAILAS CHANDRA BAHUMICK *v.* BEHJOY KAULA LAHIRI. 50 I. C. 177 : 22 C. W. N. 190.

——— S. 22—*Non-disclosure by grantee of default.*

Specific performance of a contract to grant a lease cannot be refused on the ground that the grantee did not disclose before the contract, that he had defaulted in previous transactions with the grantor. (*Fletcher and Smither, JJ.*) BIRENDRA KISHORE *v.* HASHMAT ALI. 46 I. C. 508

———S. 22—*Discretion of Court—Contract—What plffs. must prove—Piff.'s omission to tender balance of consideration, a suit for specific performance of.*

The requisites for the plff.'s success in a suit for specific performance of a contract being (1) his performance or his readiness and willingness all along to perform the terms of the contract and (2) his readiness and willingness to do all matters to be thereafter done, a failure of the plff. in any of these respects will afford a good defence to the suit to the opposite side. Failure of the plff. to tender the balance of the consideration for the contract on or before due date goes against him in a suit for specific performance of the contract, in spite of proof that the deft. would not have accepted such tender even if actually made. (*Mookerjee and Roe, JJ.*) MANIK CHANDRA *v.* ABHOYCHARAN GOPE. 37 I. C. 257 : 24 C. L. J. 90.

——— S. 22—*Contract alleged different from contract proved—Damages*

When a plaintiff has alleged a contract of which he seeks specific performance and fails to establish it, the Court will not make a decree for specific performance of a different contract (*Mookerjee and Roe, JJ.*) NILAKANTA ROY *v.* LALIT MOHAN. 29 I. C. 989 : 19 C. W. N. 933.

——— S. 22—*Completed contract—Sale of immoveable property—Honest mistakes of transferee—Delay—Hardship*

Where a contract for sale of immoveable property was completed and subsequently the property was sold to a third party who under an honest mistake that the original transaction had fallen through purchased it, *held*, that his honest mistake is no ground for his resisting a suit for specific performance by the 1st purchaser, unless the bargain is so unconscionable that its performance would be inequitable. A delay of one month in the institution of suit does not justify a refusal of relief by way of specific performance (Cases cited.) Clause (ii) of S. 22 of the Act contemplates a case where the vendor has entered into a contract without full knowledge of the circumstances. Mere improvidence or inadequacy is no hardship unless the bargain is so hard as to be unconscionable and its peformance inequitable; but if the hardship were brought upon by himself the Court will not give him relief. Where under a contract for sale of immoveable property the transaction was to be completed in three months, within which the vendor was to produce the will under which she claimed and which however, she failed to produce, the vendee could enforce specific performance from the end of the three months, not only against the vendor but also against the subsequent transferee (*Mookerjee and Beachcroft, JJ.*) HARADHONE DEB NATH *v.* BHAGABATI DASI. 41 Cal. 852 : 19 C. L. J. 420 : 23 I. C. 214 : 19 C. W. N. 89.

——— S. 22—*Specific performance—Granting of—Discretionary.*

The granting of specific performance is purely discretionary with the Court and in so doing the Courts generally apply equitable consideration and not merely look at the terms of the contract. A contract therefore may be perfectly valid in land, yet there may be a want of equality and fairness about it, which would justify a refusal to specifically enforce it. (*Carnduff and Richardson, JJ.*) GOVINDA CHANDRA CHAKRAVARTI *v.* NANDA KUMAR DAS. 22 I. C. 910 : 18 C. W. N 689.

———S. 22—*Power of attorney given to husband by* pardanashin *lady—Purchase money.*

Where a contract for sale was entered into by the husband of a *pardanashin* lady who had given a power of attorney and it is shown that the purchase money was far less than that given by a subsequent purchaser and that the variation of time of performance of the contract was not assented to by the lady, *held*, that the Court could refuse to enforce such a contract. (*Mookerjee and Carnduff, JJ.*) JANKI PERSHAD SINGH *v.* YAHIA HASSAIN, 13 I. C. 637 : 16 C. L. J. 119.

——— S 22 – *Scope.*

The circumstances stated in S. 22 of the Sp. Rel. Act are illustrative and not exhaustive. The relief under Sp. Rel. Act lies in the discretion of the Court only in so far as it must necessarily judge, whether under the circumstances of the case, the contract is or is not an equitable one; but if it is determined that the contract is fair and reasonable and the conduct of the plff. has not been unconscious there is no room for such discretion. An agreement in order to be executed must be certain and definite; but that is sufficiently certain which can be made certain A contract which although not illegal, is detrimental to the public welfare, should not be enforced in equity. (*Mookerjee and Casperszz, JJ.*) GAJ KUMAR CHAND *v.* LACHMAN RAM. 10 I. C. 503 : 14 C. L. J. 627.

——— S 22—*Laches—Mere delay not evidence of abandonment.*

Mere delay, which is short by the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right, is no bar to a suit for specific performance unless it is shown to have prejudiced the defendant. (1922 Lah. 461, Foll.) (*Moti Sagar, J.*) GOPALI RAM *v.* CHAUDHURI DEWAK RAM. 1923 Lah. 694.

———S. 22 – *Discretion of court.*

Courts have an absolute discretion to decree specific performance or not and where a decree would be a source of constant trouble and friction between the parties and might even become nugatory, Courts ought not to grant it. (*Moti Sagar. J.*) GENDA RAM *v.* RAM CHANDER. 1924 Lah 163.

SPECIFIC RELIEF ACT (I OF 1877), S. 22.

——S. 22—*Specific performance— Discretion to refuse when plff. may get unfair advantage*

Under section 22 of the Specific Relief Act the Court may properly exercise its discretion where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part. Where the plaintiff, at the time when the contract was made, *held* an unfair advantage owing to the fact that the defendant's faculties were enfeebled, the Court might refuse specific performance. (*Broadway and Brasher, JJ.*) SHER SINGH *v.* UDHAM SINGH.
72 I. C. 586 : 5 Lah. L. J. 307.

——S. 22—*Delay—Effect of— Abandonment of contract—Intention.*

In cases of specific performance delay may, in certain cases, be evidence of abandonment or acquiescence, but on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of defendants does not disentitle the plff. to sue for specific performance. 33 C 683 foll. (*Abdul Raoof and Campbell, JJ.*) JAUGAL SINGH *v.* GULAM MAHOMED. **3 Lah. 376 : 4 U. P. L. R. (Lah.) 100 : 1922 Lah. 461.**

——S. 22—*Discretion—Long delay.*

A delay of nearly three years in bringing a suit for specific performance of a contract of sale coupled with the fact that the plffs. accepted payment of a debt due to them by the vendor from the subsequent vendee is a waiver of their claim to sue for specific performance. 27 All. 678 : 29 Bom 234 ref. (*Scott-Smith and Martineau, JJ.*) LACHHMAN DAS *v.* KHARKH SINGH. **51 I. C. 704 : 57 P. R. 1919.**

——S. 22—*Delay—Contract to sell—Vendee's delay.*

The grant of a relief by way of specific performance of contract of sale is discretionary and such relief will not be granted to plaintiff who has been guilty of gross carelessness and delay (*Kensington, C. J. and Chevis, J.*) MAHARAJ DAS *v.* GIAN SINGH. **52 P. W. R. 1915 : 27 I. C. 481 : 128 P. L. R. 1915**

——Ss. 22 and 35—*Specific performance—Grounds for refusing—Discretion of Court—Some of the interested persons not joining as plaintiffs but made defendants—Delay in suing—Tender of price—Waiver.*

Where on the vendor being asked to take the amount required to be paid to him by the vendee under the contract, the former said he would not do so. *Held*, that the vendor must be deemed to have waived and dispensed with any actual tender. The mere fact that some of the persons entitled to the benefit of a contract of sale refuse to join as plaintiffs in a suit for specific performance thereof by the others and are therefore added as defendants, is not a ground for not granting specific performance. Delay when a ground for refusing specific performance. (*Schwabe, C. J. and Wallace, J.*) ABDUL SHANKER SAHIB *v.* ABDUL RAHIMAN SAHIB. **44 M. L. J. 107 : 46 Mad. 148 : 17 L. W. 216 : 1923 M. W. N. 1 : 1923 Mad. 284.**

SPECIFIC RELIEF ACT (I OF 1877), S. 22.

——S. 22—*Contract Act*, S. 55—*Contract to sell—Delay.*

Considerable lapse of time after the agreed date is a good ground for refusing specific performance of a contract. 40 B. 289 (P. C.) Ref. to. (*Spencer and Phillips, JJ.*) MARUDANAYAGAM PILLAI *v.* MUNISAMY PILLAI. **37 I. C. 776.**

——S. 22—*Discretion.*

Though properties are sold for a sum considerably less than their value, but there is no evidence of any fact unknown to or concealed fraudulently from the vendor of which the vendee was aware or of the use of undue influence, specific relief should be granted. (*Oldfield and Sadasiva Aiyar, JJ.*) NARASINGA RAO *v.* RANGASWAMI.
(1916) 2 M. W. N. 191 : 35 I. C. 871 : 4 L. W. 397.

——S. 22—*Delay—Waiver.*

A suit for specific performance instituted 20 months after the date of the contract cannot be decreed the ground of waiver. (*Sadasiva Aiyar and Napier, JJ.*) MULPURI VEERAYA *v.* SANAGAVARAPU SIVAYYA. **26 I. C. 121 : 27 M. L. J. 482.**

——S. 22—*Contract to sell — Discretion of Court to refuse—Exception*

A Court can refuse specific performance of a contract to sell, when plff fails to prove in full the agreement set up by him ; this rule does not apply where plff. does not deliberately put forward a false claim. (*Sankaran Nair and Bakewell, JJ.*) NAZARETH *v.* JAFFER MEGHJI SHET.
23 I. C. 623 : (1914) M. W. N. 339.

——S. 22—*Sale deed executed but not registered owing to vendee's fault.*

Where a sale deed duly executed was not registered owing to the vendee's default in allowing the time for registration to expire (by not presenting it for registration in view of the vendee's inconveniences) he is not entitled to a decree for the execution and registration by the vendor or another sale-deed. (*Sankaran Nair and Ayling, JJ.*) SUBBA REDDI *v.* VISWANATHA REDDIAR.
22 I. C. 941.

——S. 22—*Discretion — Beneficiary not a party—Effect of.*

The jurisdiction to decree specific performance is discretionary and the failure of a beneficiary under the contract to join in a suit to enforce the contract is an important factor in deciding how that discretion is to be exercised. (*Ayling and Tyabji, JJ.*) KONDAPPANINI KOLAYYA *v.* GANGARAU SESHAYYA. **(1913) M. W. N. 995 : 21 I. C. 778 : 14 M. L. T. 495.**

——S. 22—*Delay in instituting suit.*

Delay in instituting a suit for specific performance is not fatal to the suit unless it can be shown that the delay has prejudicially affected the deft. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) ABDULKHADIR *v.* NAGASARUPU.
17 I. C. 399 : (1912) M. W. N. 1004.

——S. 22—*Contract of sale—Title doubtful—Specific performance cannot be granted.*

Where the plff.'s title is not free from doubt and there is a great probability of litigation ensuing against him, or when the title appears to

SPECIFIC RELIEF ACT (I OF 1877), S. 24.

have been conveyed on behalf of minors who might possibly repudiate the deed relating to the property, specific performance cannot be granted to him against the defendant. The Court's unwillingness to allow such a claim is increased where the title depends upon a question of fact to be proved by oral testimony of witnesses whom it may be difficult to find or who may be dead or out of jurisdiction. (*Halliax and Macnair, A. J. Cs.*) BALLABHDAS *v* KANHAIYA LAL.
64 I. C. 97 : 4 N. L. J. 10.

——S. 22—*Discretion of Court.*

Plaintiff is not entitled to specific performance if he delays till the end of the limitation period unnecessarily. (*Hallifax, A. J. C.*) MUNIR MOHAMMAD *v.* RAMA. **58 I. C. 23 (N).**

——S. 22—*Specific performance—Delay—Damages—Mere delay in instituting a suit for specific performance, is not sufficient to defeat the plff.'s suit.*

It must be of such a character as to give rise to an inference of the abandonment of the right or should disclose any prejudice to the deft. In a suit for specific performance of a contract in the first instance and for damages in case the Court found any difficulty in granting the relief. *Held* that in the absence of any special damages the relief sought in the first instance, *viz.*, specific performance should be granted (*Imam, J.*) MUSAMMAT BATULAN *v* NIRMAL DAS.
44 I. C. 244 : 4 Pat. L. W. 192

——S. 22—*Delay no bar unless defendant prejudiced.*

In the absence of anything to show an abandonment of a sleeping over of rights to the detriment of third parties, delay short of the period of limitation does not matter in suits for specific performance. To operate as a bar to relief, delay must be of such a character as either to prejudice the defendant or lead him to the belief that plaintiff has waived his rights. *Kennedy, J. C. and Raymond, A. J. C.*) BEGRAJ *v.* ALISHER
16 S. L. R. 278 : 1923 Sind 50.

——S. 22—*Delay—Two years—Contract for the sale of land.*

In the case of a sale of land if plff. fails to sue for specific performance within 2 years after the expiry of the period fixed for the completion of the sale, this delay debars the plff. from suing for the same. To give him his relief would enable him to take advantage of the rise and fall of the market. (*Kemp, A. J. C.*) NAROO SHANKAR *v.* RAJUMAL **15 S. L. R. 21.**

——S. 22 (2)—*Laches in instituting suit—Contract to sell—Failure by vendor to perform his part of contract.*

Mere laches or delay, even where it is up to the hilt of the limitation period is not always evidence of waiver or abandonment and is no ground for refusing specific performance. (2 A. L.J. 405, dist). A vendor bound under the terms of an agreement to sell, to execute and register a proper conveyance, before he can demand balances of purchase-money commits a breach of contract, if he demands such payment, before

SPECIFIC RELIEF ACT (I OF 1877), S. 22

executing a conveyance (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) CHAMARTI SURYAPRAKASARAYADU *v.* AKABDHILKASH MINABASINCHARYALY.
23 I. C. 560 : 26 M. L. T. 518.

——S. 23—*Contract—Specific performance—Stranger.*

The question whether a person deriving a benefit under a contract to which he is no party can sue to enforce it, is one to be decided on rules of justice, equity and good conscience *Held*, that a creditor was entitled to sue for the debt from an alienee of the debtor who had undertaken to pay off the debt. 32 A 410 P. C. rel. English cases cited. (*Jenkins, C. J. and Mockerjee, J.*) DEB NARAIN DUTT *v.* RAM SADHAN MANDAL
41 Cal. 137 : 17 C. W. N 1143 : 20 I. C. 630 : 18 C. L. J. 603.

——S. 23—*Contract by guardian for—Enforceability by minor—T. P. Act, S. 55 (1) (d)*

It is not within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. The minor in such a case is not bound by the contract. The minor, on attaining majority, cannot obtain and enforce specific performance of the contract. 39 C. 252 (P. C.) Fol. 40 M 308, F.B. and 42 M 185, Ref. 23 M L. J. 610 Not foll. (*Spencer and Bakewell, JJ.*) CHIDAVARAPU NARAYANA ROW *v.* VENKATASUBBA ROW.
(1920) M. W. N 159 : 27 M. L. T. 264 : 55 I. C. 377 : 38 M L. J. 77.

——S. 23—*Assignment—What contracts are assignable.*

All contracts capable of specific performance excepting those of the class prohibited by S 25 of the Specific Rel. Act are assignable. In S. 23 of the Specific Rel. Act the words "representative in interest" include an assignee of an interest. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) NOCHAT KISHAKKE MADATHIL VENKATESWARA AIYAR *v.* KALLOOR ILLATH RAMAN NAMBUDRI.
3 L. W. 435 : 33 I. C. 656 : 19 M. L. T. 329.

——S. 23 *Benamidar—Contract by—Specific performance.*

In a suit for specific performance it is not a valid defence that the person who entered into contract has no beneficial interest but is a benamidar. (*White, C. J. and Sankaran Nair, J.*) CHITIBABU ADENNA *v.* GARIMALLA JAGGARAYADU.
29 I. C. 12 : 28 M. L. J 617.

——S. 23—*Contract by manager—Minor members can enforce.*

Contract for sale by manager of a joint Hindu family can be enforced by the minor members. (*Hallifax, A. J. C.*) THAKUR HARGOVIND *v.* MEHTAB SINGH. **18 N. L. R. 67 : 1922 Nag. 193.**

——S. 23 (a)—*Third party—If can enforce.*

A hypothecation bond executed by A to B for a consideration including the amount due by A to C a third party, cannot be enforced by C, he being no party to the bond. (*Ayling and Tyabji, JJ.*) ISWARAM *v.* TARAGAN **38 Mad. 703 : 23 I. C. 951 : 26 M. L. T. 127.**

——S. 24—*Specific performance—Party in default—Liability.*

SPECIFIC RELIEF ACT (I OF 1877), S. 24

If time is essential in a contract for sale of land, the defaulting party cannot claim specific performance ; on the contrary the other party can make the claim though the default is slight. (*Lord Atkinson*). BRICKLES *v.* SNELL.
38 I. C 123 : 86 L. J. P C. 22 (P.C.).

——S. 24—*Sale of decree—Specific performance—Decree barred before execution of assignment in writing—C P. Code* (1882), S. 232, O 21, *R.* 16.

Where a decree-holder contracts to sell his decree to another, it is his duty to keep the decree alive pending the completion of an assignment in writing in favour of the purchaser. If he allows the decree to become barred, he is no entitled to specific performance of the contract of sale as against the purchaser. L. R. 16 Eq 433, 439 Ref. A Court will not decree specific performance of an agreement if it finds that at the date of suit the plff. cannot complete the agreement by doing what remained to be done under it by him. (*Sir John Eage*) JATINDRA NATH *v.* PEYER DEYE DEBI. **43 Cal. 990 : 43 I A. 108 : 14 A L J. 527 : 20 C. W. N 866 : (1916) 1 M. W. N. 403 : 18 Bom L. R. 509 : 24 C. L. J 67 : 20 M L. T 25 : 3 L. W. 553 : 34 I. C. 69 : 31 M L. J. 248 (P C.).**

——S 24 (b)—*Bilateral contract—Party repudiating cannot enforce.*

In a bilateral contract, the party repudiating his part of the contract cannot enforce it. (*Rafique and Piggott, JJ.*) SHAMSHUL *v.* W. K. PORTER. **24 I. C. 53**

——S. 24 (b)—*Suit—Burden of proof.*

The *onus* lies on the plff. to prove that he was ready to perform his part of the contract. (*Lindsay, A. J. C*) GAJADHAR SINGH *v.* KANDHYA BAKSH. **9 I. C. 243.**

——S. 25—*Part performance of award.*

S. 25 does not apply to a case where an award has been part performed. (*Teunon and Richards, JJ.*) T. C. TWEEDIE *v.* JOGESH CHANDRA.
51 I. C. 999

——S 25 (b) *Marketable title—Vendor and purchaser Contract of sale—Proof of title.*

In the case of a contract for the sale of immoveable property means a title free from reasonable doubt. Whether the doubt under the facts and circumstances of a particular case is reasonable or not must necessarily depend on the nature of the objections and the facts of the case. (*Shah, A C. J. and Pratt, J.*) HAJI OOSMAN HAJI ISMAIL *v.* HAROON SALLEH MAHOMED. **24 Bom. L R. 978 : 1923 B. 148**

——S. 26—*Contract to sell--Subsequent variation of terms—Effect.*

Two Hindu ladies agreed to sell land to plff. and to execute a deed on receipt of the price. At the suggestion of plaintiff they also applied for Letters of Admn. and sanction to sell under S. 90 of Prob. and Admn Act. The Dt. Judge granted the Letters but refused to sanction sale to plaintiff. but he sanctioned sale to defendant as he offered a higher price. In a suit for Sp performance or damages, *held*, that the original contract was

SPECIFIC RELIEF ACT (I OF 1877), S. 27.

impliedly varied by mutual consent, and thus became a contingent contract. As the contingency did not happen the plaintiffs could not get Specific performance. No damages can be awarded as there was no breach of the modified contract.

Per *Mookerjee, J.*—The plaintiff in a suit for specific performance must show that he does not require the other party todo an act which he cannot lawfully do. (*Sanderson, C.J., Woodroffe and Mookerjee, JJ.*) KALI DASEE *v.* NOBOKUMARI DASSEE. **20 C. W. 929 : 36 I. C. 655 : 23 C. L J. 606.**

——S. 26—*Ill.* (*b*)—*Variation as a defence—Proof.*

Where specific performance is asked for, the law provides that plaintiff must do equity and extends the provisions of the Evidence Act by giving the defendant opportunity to prove the variation set up. (*Macleod, C. J. and Coyajee, J*) SUNDAR BAI *v.* DWARKADAS PARHIA.
1922 Bom. 336 (1).

——S. 27—*Contract for sale—Subsequent sale to defts.—Onus on defts.*

Under S. 27 the onus of proving that subsequent vendee was a *bona fide* purchaser without notice lies on the defendant and his subsequently registered sale-deed has no priority over even an oral contract for sale in favour of the plaintiff. (*Richards, C.J. and Rafique J.*) NAUBAT RAI *v* DHAUNKAL SINGH. **38 All 184 : 14 A. L. J. 111 · 32 I. C 953 :**
See also 137 P. W. R. 1918 : 46 I. C. 659 :
Also 26 M L. J. 218 : 23 I. C. 621 :
Also 14 N. L. R. 27 : 43 I C. 940 :
Also 44 I. C. 470 : 4 Pat. L W. 152.

——S. 27—*Notice of contract—Burden of proof.*

Where the defendant is in possession of property under a registered sale-deed, the plaintiff who sets up that the defendant purchased with notice of a contract to sell in plaintiff's favour must prove that there was a prior agreement to sell and that the defendant purchased with notice of the prior agreement. The burden of proof is on the plaintiff to prove notice. The defendant is not bound to prove a negative namely that he had no notice. (*Macleod, C. J. and Crump, J.*) PERKHA LALKHA *v* BAPU KASHIBA.
25 Bom. L. R. 375 : 1923 Bom. 410.

——S. 27—*Constructive notice—Oral agreement followed by delivery of possession.*

Defendant No 1 agreed orally to sell his land to plaintiff who was in possession of it as a tenant, received part payment of the price the balance of which was payable in 5 years, and accepted a rent-note at a rate which represented interest on the unpaid balance. Shortly afterwards defendant No. 1 sold the land to defendant No. 3 who made no inquiry into the nature of the plaintiff's possession. The plaintiff having sued for specific performance of the oral agreement.

Held, decreeing the claim, that as defendant No. 3 made no inquiries of the plaintiff as to the nature of his possession, he must be taken to

SPECIFIC RELIEF ACT (I OF 1877), S. 27.

have had constructive notice of the oral agreement. (*Macleod, C. J. and Shah, J.*) VINAYAK MORESHWAR NATH *v.* GVNOBA HARIBA NAVALE.
1923 Bom. 13.

——S 27—*Agreement to sell property devised can be enforced against devisee.*

Where a testator agrees to sell a house which he has already specifically devised but dies before he completes the sale, it is the devisee, and not the heir, who can be asked by the purchaser to complete the sale by passing a conveyance on receipt of the purchase money. 5 Beav. 1 Dist. (*Macleod, C. J. and Fawcett, J.*) GANGARAMA BHILARE *v.* SAKHARAM BABAJI VANI.
59 I. C. 796 : 22 Bom L. R. 1396.

——S. 27—*Contract of sale—Sp. performance—Suit by purchaser claiming under anterior agreement—Proper party.*

In a suit to enforce specific performance of a contract for sale of land by the execution of a registered conveyance any person in possession of land claiming under an anterior agreement of sale is a proper party to the suit and the decree should be against both of them. (*Mookerjee and Beachcroft, JJ.*) NASIRUDDIN MIDDA *v.* SIDHU MIA.
44 I. C. 361 : 27 C. L. J. 538.

——S 27—*Evidence Act, S. 115—Estoppel—Rule of equity—Occupancy holding.*

Where the plaintiff mortgagee of an occupancy holding obtained a decree on his mortgage and after taking a Hukumnamah from a co-sharer landlord purchased the holding in execution of his decree and became the owner of the land with the landlord's consent and could not be ousted by any subsequent action of landlord. *Held*, S. 27 did not embody the only rule of equity applicable to this case and that S. 115 of the Evidence Act was particularly applicable to this case. (*D. Chatterjea and N. R Chatterjea, JJ.*) HARIMOHUN *v.* RAM NARAIN.
14 I. C. 28

——S. 27—*Agreement to sell—Subsequent sale to a third party with notice.*

When A and B agreed to sell to the plaintiff on receiving earnest money but subsequently sold it to another who had notice of the prior agreement to sell it was held that plaintiff was entitled to possession and to registration of the sale deed. (*Shah Din and Scott-Smith, JJ.*) CHARAGH DIN *v.* AHMAD DIN.
88 P. W. R 1915 : 26 I. C. 497 : 106 P. L. R. 1915.

——S. 27—*Equitable relief—Assignor entitled to such relief—If assignee stands on the same footing.*

The foundation for equitable relief is that a man, owing to the circumstances in which he finds himself was more or less compelled to enter into the onerous bargain from the unconscionable conditions of which he seeks relief. But the position of a voluntary assignee by purchase is different in as much as he has taken over the bargain under no such stress or compulsion. (*Robertson and Chevis, JJ.*) KISHEN SINGH *v.* NARINDER SINGH.
14 I. C. 516 : 250 P. W. R. 1912.

SPECIFIC RELIEF ACT (I OF 1877), S. 27.

——S. 27—*Option to purchase—Sale to third person before acceptance of offer—Effect of.*

An agreement for the sale of certain lands by the 2nd defendant in favour of the plaintiff was as follows :—"In respect of the land which you and others had sold to my mother on 2-10-1902 you executed a cultivation muchillika to me on 10-10-1913 specifying the lands with particulars. The amount mentioned in the said sale is Rs 600 and the amount of loans taken from time to time is over Rs. 200 on payment being made of the total amount of Rs 800 within the 30th Vaigasi of any year. I shall execute a sale-deed to you in respect of the said lands I shall not execute a sale-deed to any other person." Before any offer of payment was made by the plaintiff the first defendant purchased from the 2nd defendant the suit lands and the plaintiff sued to enforce specific performance. *Held*, that as against the first defendant, there was no agreement the specific performance of which could be enforced by the plaintiff. The agreement was merely an offer by the 2nd defendant to sell to the plaintiffs on certain terms, if they choose to avail themselves of the offer which could be withdrawn and did not constitute an agreement to buy. Where the agreement is executory on both sides, with an option to one of the parties to do as he likes, there is nothing more than a standing offer, and when the offer is at an end, *e. g.*, by the promisor selling the subject matter of the offer to a third party, the sale being known to the promisee before there is nothing to accept (*Ayling and Ramesam, JJ.*) EAGALA NAGAPPA NAIDU *v.* MUNUSWAMI IYER.
15 L. W. 409 : 30 M. L. T. 175 : (1922) M W. N. 201 : 1922 Mad. 16 : 42 M. L. J. 432.

——S 27—*Contract for sale—Suit for Sp. performance—Decree of possession.*

It is competent for a Court in a suit for specific performance of an agreement for sale of land to give a decree for possession also where the parties sued, are in possession of the land. (*Abdur Rahim and Spencer, JJ.*) VELAYUDA *v.* KUMARASWAMI.
10 L. W. 201 : 52 I. C. 700 : (1919) M. W. N. 572.

——S. 27—*Enforceability of contract—Day of agreement.*

The enforceability of a contract must be traced back to the day of the agreement and not to the date on which the decree is to be passed. There is nothing in the Hindu law to warrant a departure from this rule. S. 27 embodied a general principle applicable to all persons in this country. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) VENKATESWARA *v.* RAMAN.
19 M. L. T. 329 : 33 I. C. 696 : 3 L. W. 435.

——S. 27—"*Paid his money in good faith*"—*Purchaser having notice of a prior contract to sell before registration—Decree, form of.*

The phrase "Paid his money in good faith" in S 27 does not apply to a person having notice of a prior contract to sell after execution of his sale and before its registration, who does not pay any cash for his sale but takes the sale in adjustment of money due. 36 B 446 Foll. The correct decree is to direct both the vendor and

SPECIFIC RELIEF ACT (I OF 1877), S. 27

the subsequent purchaser to execute a sale deed to the plaintiff. (*Ayling and Hannay, JJ.*) GUDUR RANGA REDDY *v.* GUNDALA PITCHI REDDI.
25 I. C. 973: 1 L. W. 879.

——S. 27—*Possession of lessees is sufficient notice of their rights.*

The possession of a lessee is sufficient notice in law of his right and a purchaser is bound to inquire of him regarding the nature of his right (*Benson and Sundara Aiyar, JJ.*) NANDI REDDY FAKEER REDDY *v.* THIMMAKKA.
22 I. C. 250 (1): 14 M. L. T. 477.

——S 27—*Specific performance—Possession.*

In a suit for specific performance of a contract of sale, the plff. can ask for delivery of possession of the properties. But the Court will decree a claim for a conveyance only in cases where it embodies the substantial part of the agreement and where the Court can direct its execution without regard to the question whether or not its provisions can be specifically enforced. (*Mullick and Sultan Ahmed, JJ.*) DEONANADAN PRASAD *v.* JANKI SING.
5 Pat. L J. 314: 1 Pat. L. T 325:
56 I. C. 322 : 2 U. P. L. R. (Pat.) 108 :
1920 Pat. 266.

——S. 27—*Agreement to sell—Subsequent—Registered sale to third party.*

Where an unregistered sale deed was executed by defendant No. 1 in favour of the plaintiff and where defts. subsequently sold the same property to deft. No. 2 under a registered sale deed and the plff. thereupon sued both the defts., praying for a decree directing deft. No. 1 to register the unregistered deed or to execute and register a fresh sale deed and also for possession of the property in dispute on declaration of the nullity of the transaction between both the defts. *Held*, that the plff.'s suit was under S. 27 a suit for specific performance. (*Sharfuddin and Roe, JJ.*) MADHUR SAH *v* SHAQ SAH. 1 Pat. L. J. 450:
37 I. C. 994: 2 Pat. L W. 441.

——S. 27 (a)—*Contract to sell—Subsequent Registered sale.*

Where sale is disguised as a mortgage, it nevertheless is a good and *bona fide* transfer as against a person who claims specific performance of an earlier contract of sale made with the mortgagor. (*Kanhaiya Lal, A. J C.*) RAM BHAJAN *v.* SHEO DARSHAN. 34 I. C. 386: 3 O. L. J. 162.

——S. 27 (1) (b)—*Suit for specific performance— Inadequacy of consideration and ignorance of pardanashin vendor—Consideration.*

The widow of a deceased Hindu and his executor entered into a contract with the pltf. for the sale to him of certain lands but subsequently sold the lands to another. Plaintiff brought a suit for specific performance, in which the defendants failed to plead inadequacy of consideration and ignorance of the pardanashin vendor. *Held*, that the vendors could not raise the pleas for the first time in appeal. Where under the contract of sale the pltf. was bound to pay the sum recited therein; the question "whether he would be willing to advance such a large sum" is out of place. (*Lord Wrenbury*) NAROTTAM DAS *v.* KEDAR NATH SAMANTA. 6 L W. 68: 41 I C. 957:
21 C. W. N. 665 (P. C.).

——S. 27 (b)—*Notice of prior contract.*

A deft. who has notice of the sale to the plff. before the registration of his contract is completed must fail under S. 27 cl. (b). (*Walsh and Stuart, JJ.*) NAHAL SINGH *v.* SEWA RAM.
40 I. C. 128.

——S 27 (b)—*Registered deed—Notice of prior oral agreement.*

An oral agreement will be protected against a subsequent registered sale deed if the claimant under the latter deed has notice of the oral agreement. (*Knox, J.*) BALDEO PRASAD *v.* PRAGDAS. 18 I. C. 533. 11 A L J. 137.

——S. 27 (b) (Iln. 3)—*Agreement to sell to mortgagee—Sale to third person—Mortgagee's rights.*

The mortgagor agreed to sell the property to the mortgagee but sold it to some third person who made no enquiries as to the mortgagee's interest though the mortgagee was in possession. *Held* the mortgagee could enforce specific performance of the agreement to sell as against the third person. (*Macleod, C. J. and Fawcett, JJ.*) FAKI IBRAHIM *v.* FAKI GHULAM MOHIDDIN
45 Bom. 910: 60 I. C. 956: 23 Bom. L. R. 335.

——S. 27 (b)—*Agreement to sell—Subsequent sale to a different person—Equity— Onus—Registration of possession—Non-payment of consideration—Notice after part-payment.*

Defts. 3 and 4 having contracted to purchase the property from defts. 1 and 2 who had contracted previously to sell it to the plff. were bound to show three things: (1) They were purchasers for value and (2) *bona fide* and (3) without notice. One who owns property subject to a charge can in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge. Notice before the actual payment of the whole of the purchase money, though it may have been secured or before the conveyance is actually executed is binding in the same manner as notice had before contract. A purchaser with notice fails in spite of registration. The purchaser may get notice either before or during the act of purchase. (*Scott, C. J. and Russell, J.*) NIRMAT LAL *v.* VASUDEO
36 Bom. 446 16 I. C. 680 . 14 Bom. L. R. 634.

——S. 27 (b)—*Applicability—Action for possession.*

S. 27 applies only to suits to enforce specific performance of contract and not to actions for possession of land between landlord and tenant or lessor and lessee. (*Newbould, J.*) DEBENDRABALA DASI *v.* LALIT MOHAN GHOSE. 33 I C. 593.

——S. 27 (b)—*Notice—Tenant in possession.*

A person who takes a transfer without inquiry as to the terms on which a tenant is in possession cannot enforce his transfer against the tenant though he has paid consideration

therefor (*Jenkins, C. J. and Mullick, J.*) BABURAM BAG *v* MADHAB CHANDRA PILLAY.
40 Cal 565 : 19 I C 9: 18 C. W. N. 341.
See also 22 I C. 250: 14 M. L. T. 477.

——— S. 27 (b)—*Want of notice prior contract — Onus of proof.*

From the time a contract for the sale of land is entered into the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money a trustee for the vendor, who has a lien upon the land therefor. And every one coming in by subsequent representative title and every subsequent purchaser from him either with notice, becomes subject to the same equities as the party would be to whom he succeeds or from whom he purchased. The onus of proving a *bona fide* purchase for value without notice of the prior contract for sale is on the person setting up. Proof of payment of full consideration for the sale in ignorance of the original contract of sale raises a presumption of good faith. (*Abdul Raoof and Harrison, JJ.*) KANSHI RAM *v.* ISHWAR DAS. 5 L. L J. 150 : 1923 Lah. 108.

——— S. 27 (b)—*Subsequent transferee—Onus of proof* bona fides

In a suit for specific performance of a contract relating to land where the property has been transferred to a third party, the onus is on such transferee under S 27 (*b*) to show he is a *bona fide* transferee for value without notice of the prior contract. (*Abdul Raoof, J.*) BINDRABAN *v.* BODH 69 I. C. 470.

——— Ss. 27 (b), and 56 (f)— *Relief against party claiming under subsequent title—Notice.*

Where S and J sold one of two shops to plff. on certain conditions and subsequently J sold the other shop to the deft. by a sale deed containing the same conditions, and on the deft.'s threatening to break the conditions, plff. sued for an injunction, *held* that it was not necessary that the deft. should have had notice of the conditions in the plff.'s deed inasmuch as the plff. was not suing for the Sp. performance of a contract. (*Jones, J.*) RAM SINGH *v.* RAM SINGH.
39 I C 778: 48 P. W. R. 1917.

——— S. 27 (b)—*Contract to sell—Subsequent conveyance in favour of a third person—Notice of prior contract—Occupation of superstructure.*

In the case of contracts for purchase of immoveable property the general principle of constructive notice is that notice of occupation (of the property purchased) by a person other than the vendor, which indicates that the vendor is not entitled to present possession at once puts the purchaser on enquiry as to the interest that the occupier holds in the property. The usual case is where the property is physically occupied by tenants, and then the purchaser, is by that occupation itself which put him on enquiry, in law affected with notice of the interest which these tenants have in the property. He is by their occupation not affected with notice of more than the term on which they held including any agreement collateral to their leases but is not bound to enquire, nor are they bound to answer to him. They pay rent, so that the purchaser is not in such a case affected with notice of the tenant's or lessor's title or rights. This is the general principle laid down in the English cases and has been embodied in India in S. 27 of the Specific Relief Act. So that where nothing more is known to the purchaser or would be known to him on reasonable enquiry than the fact that certain tenants are in occupation under a tenant right he is not affected with notice of more than the fact as to those tenants rights. But when beyond this the purchaser is directly informed and therefore knows of the occupation of the property by another whether by himself or by his sub-tenants he is equally put upon notice to enter into the interests of that other. This is not extension of the principle above mentioned, but a mere application of it. It makes no difference whether the occupation by another is brought to his notice by physical occupation or by information Where the purchaser is definitely informed that another so in occupation of the property whether by himself directly or through subtenants, he is at once put on enquiry as to the nature of the interest of that other in the property. The absence of such enquiry will fasten the purchaser with all the equities which the occupier holds against the purchaser's vendor. (*Schwabe, C. J. and Wallace, J.*) BABA SAH *v.* HAJEE MAHOMED AKBAR SAHIB. 17 L. W. 541 : (1923) M. W. N. 280 : 32 M. L T. (H C.) 301 : 45 M. L. J 157 : 1923 Mad 563.

——— S. 27 (b) and (c)—*Contract for purchase of land by manager of joint Hindu family—Enforceability against other coparceners—Minors.*

A Hindu father, being the head of a joint Hindu family consisting of himself and his sons one of whom was a minor, contracted to purchase immoveable property, it was not proved that the contract was either necessary or beneficial to the family. In a suit by the vendor for specific performance of the contract against the sons, after the death of their father. *Held*, that specific performance could not be granted because the case did not fall under S. 27 (b) or (c) of the Specific Relief Act and the contract had not been proved positively beneficial to the minor defendant. 31 I. C. 1 ; 4 M. L. J. 9 ; 23 M. L. J. 610, distinguished ; 22 Bom. L. R., 997 followed. (*Phillips and Devadoss, JJ.*) BAPPU *v.* ANNAMALAI CHETTIAR. 17 L. W. 364 : (1923) M. W. N. 218 : 32 M. L. T. (H. C) 203 : 44 M. L. J. 226 : 1923 Mad. 313.

——— S. 27 (b)—*Prior purchaser—Subsequent purchaser under a registered deed—Onus of proving* bona fides.

Where a prior purchaser under an unregistered deed of sale sues the vendor for specific performance and makes the subsequent purchaser under a registered deed, a party to the suit, the onus of proving that he had no notice of the prior transfer and that he purchased *bona fides*, lies on the subsequent purchaser. In such a case S. 27 of the Specific Relief Act and not S. 50 of the Registration Act applies. (*Batten, A. J. C.*) GANGA PRASAD *v.* KHUSHAL CHAND. 43 I. C. 940 : 14 N. L. R. 27.

——— S. 27 (b)—*Prior transfer — Subsequent* bona fide *transferee for value—Burden of proof.*

SPECIFIC RELIEF ACT (I OF 1877), S. 27.

An exception must be proved by the party who pleads it. Where a purchaser sues for specific performance of a contract, the person claiming to be a *bona fide* transferee for value, without notice must discharge the burden which lies on him of proving his *bona fides* and purchase for value without notice. (*Roe and Jwala Prasad, JJ.*) DARAMDEO SINGH *v.* RAM PRASAD SAH 44 I. C. 470 : 4 P. L. W. 152.

——S. 27 (c)—*Contract by other—Enforcement against sons.*

A contract by a father to sell his share in the family property can be enforced against the sons of the vendor. (*Macleod, C. J. and Heaton, J.*) BHAGWAN *v.* KRISHNAJI GANOJI.
22 Bom.L R. 997 : 58 I. C. 335 : 44 Bom 967

——S. 27 (c)—*Notice to some members of joint family—If notice to others.*

Notice to some only of the transferees who are members of a joint Hindu family where it is not shown that they are entitled to represent the others also, is not sufficient notice within the meaning of S. 27 of the Act. (*Mookerjee and Carnduff, JJ.*) JANKI PERSHAD SINGH *v.* YAHIA HOSSAIN. 13 I. C. 637 : 16 C. L. J. 119.

——S 27 (d) and (e)—*Specific performance against company—Discretion.*

Where the Managing Director of a company had no authority to enter into an agreement to grant a permanent lease on behalf of the company and the company repudiated it at the earliest possible opportunity, specific performance cannot be granted against the company, 11 C L J. 346 Relied on. (*Mookerjee and Beachcroft, JJ.*) KHULNA LOAN CO., LTD. *v.* JAHIR GOLDAR.
24 I. C. 209.

——S. 29—*Specific performance—Suit for—Further or other relief—Damages.*

A prayer for such further relief as the nature of the case may require, in a suit by the buyer for specific performance of a contract for the sale of land does not include a claim for damages or a refund of the deposit money in the alternative in case specific performance is refused but means only such further relief as is ancillary to the main specific relief claimed. (*Lord Atkinson.*) BRICKLES *v.* SNELL. 38 I. C. 123 : 86 L. J. P. C. 22 (P.C.).

——S. 30—*Scope of.*

S. 30 merely applies to awards the provisions of Ch V of the Act as to contracts, and does not convert an award into a contract. A suit for specific performance of an award is not a suit for specific performance of a contract. (*Saunders, J. C.*) MAUNG PE TEK *v.* MA SWEMI. 49 I. C. 62 : 3 U. B. R. (1918) 109.

——S. 31—*Mistake in mortgage—Court can give effect to real agreement—Suit for rectification not necessary.*

Where it is proved that what was intended by the mortgagor and the mortgagee alike to be included in the security has been so misdescribed by reason of a manifest clerical error that nothing would pass by the deed and the intention of the parties would be defeated, the Court can give

SPECIFIC RELIEF ACT (I OF 1877), S. 31.

effect to the indisputably real agreement between the parties without driving them to a suit for rectification. 34 C. L J, 256 Rel. (*Mookerjee and Cuming, JJ.*) NANDA LAL AGRANI *v.* JOGENDRA CHANDRA DATTAR
36 C L. J 421 : 1923 Cal. 53.

——S. 31—*Rectification, mistake must be mutual.*

A plaintiff seeking to rectify a deed under S 31 of the Act must prove that there was a prior complete agreement which according to the common intention was embodied in writing but by reason of mistake, the writing did not give effect to the agreement. The mistake must be mutual that is a mistake reciprocal and common to both parties. Where there is a unilateral mistake, no rectification can be granted. Where a mistake in a mortgage deed is embodied in a decree on both sides which has not yet been executed, equity will go back to the original transaction and rectify both the mortgage and the decree so as to conform them with the intention of the parties. (*Mookerjee and Buckland, JJ.*) BEPIN KRISHNA *v.* JAGESHWAR. 26 C. W N. 36 : 34 C. L. J. 256.

——S. 31—*Fraud—Name omitted from conveyance—Suit for possession of share Limitation.*

A plff. who was co vendee of land with defts. but whose name was omitted from the conveyance by the fraud of the defts. can recover possession of his share, even though the limitation period for rectification of the conveyance under S. 31 has expired. (*Mookerjee and Walmsley, JJ.*) ASITULLAH *v.* SADATULLAH.
41 I. C. 747 : 28 C. L. J. 197.
[Affirming 26 I. C. 368. (Cal.)]

——S. 31—*Rectification of contract.*

Where there is no allegation of fraud or mutual mistake or any finding to that effect, the suit is not one for rectification of contract and cannot come under S. 31. (*Mullick, J.*) ASIATULLAH *v.* SADATULLAH. 26 I. C. 368.

——S. 31—*Rectification—Wrong description of property it can be pleaded as a defence.*

S. 31 is only an enabling section. It is open to a transferee to seek relief by rectification under this section, but that is not his only remedy. He can protect his title as deft. without rectification. He can sue for a declaration that the property belongs to him without seeking rectification, in which case he can avail himself of the provisions of Ss 95 to 97 of the Evidence Act. (*Seshagiri Aiyar and Phillips, JJ.*) PALANI VELLAPPA *v.* NACHAPPA. 53 I. C. 379.

——S. 31—*Construction of deed—Mutual mistake rectified by Court after it is established under S. 92, Evidence Act.*

When mutual mistake in the description of mortgaged lands is established by letting in parol evidence under S. 92, proviso (1), the Court will construe the deed as rectified without rectification made under an order passed in a suit brought under S. 3 and give relief provided the rights acquired by third persons *bona fide* and for value,

SPECIFIC RELIEF ACT (I OF 1877), S. 31.

are not interfered with. (*Sadasiva Aiyar and Napier, JJ.*) KOTA CHINA MELLAYYA *v.* KANNEKANTI VEERIAH. 31 I. C. 671 : 3 L. W. 551.

——— S. 31—*Rectification—Plea in defence—Evidence Act, S. 92.*

The combined effect of S. 92 (*a*) of the Evidence Act and S. 31 is that the defendant can resist a suit for possession by pleading his right to rectification of the sale deed (*Seshagiri Aiyar and Napier, JJ.*) RANGASWAMI *v.* SOWRI.
39 Mad. 792 : (1915) M. W. N. 443 : 18 M. L. T 75 : 29 I. C. 588 : 29 M. L. J. 229.

——— S. 31—*C. P. Code, Ss. 152 and 153—Suit for rectification—Wrong survey number.*

Where by mutual mistake of parties a wrong survey number was entered in a mortgage deed and the mistake was continued in the plaint and in the decree thereon, *Held*, that a suit for rectification of the instrument and of the decree would lie and not a motion for amendment under S. 152 or S. 153 of the C. P. C. 15 C. P. L. R. 167; 10 C. W. N 1024; 27 A. 174 Dist ; 8 C. W. N. 473 Rel, upon. (*Batten, A. J. C.*) BALA PRASAD *v.* KANOO.
14 I. C. 407: 8 N. L. R. 13

——— S. 31—*Instrument of unilateral character—Rectification.*

In the absence of proof of mutual mistake the previous rectification of an unilateral instrument like a mortgage deed is not obligatory under S. 31. Oral evidence is admissible to show that the description of the property is a mistake. (*Kanhaiya Lal, A. J. C.*) RADHE LAL *v.* ANGNE. 21 I. C. 429: 16 O. C. 213.

——— S. 31—*Subsequent incumbrancer, when protected.*

A Court will not exercise its equitable jurisdiction to rectify an instrument if it is likely to prejudice a subsequent *bona fide* incumbrancer. (*Jwala Prasad and Ross, JJ.*) MADAN MOHAN PRASAD *v.* LALA SITAL PRASAD. 2 Pat. L. T 64.

——— S. 31—*Decree based on award—Setting aside—Suit, if maintainable.*

A suit lies to rectify a decree based on an award which has been fraudulently altered after publication and before decree. S. 31 permits the rectification of such an award and of the decree which is based on it and which is the formal expression of it. (*Kemp and Raymond, A. J. Cs.*) BHAI CHARINRAI *v.* DEVI BAI. 52 I. C. 9 6: 13 S. L. R. 144.

——— S. 35—*Rescission of contract—Fraud.*

Fraud in the performance and not in making of a contract is no ground for rescission of contract, and restoration of parties to *status quo ante.* (*Scott, C. J. and Chandavarkar, J.*) JAMESETJI *v.* HIRJI BHOJ NAVROJI. 37 Bom. 158: 19 I C 406 : 15 Bom. L. R. 192

——— Ss. 35 and 38—*Contracts—Meaning of.*

The word "contract" in the sections is used in the sense of both executed and executory contracts, *i.e.*, transfers and promises. (*Wallis, C.J., Abdur, Rahim and Srinivasa Aiyangar, JJ.*) RAGHAVA *v.* SRINIVASA RAGHAVA. 40 Mad. 308: 20 M L. T 407 : 36 I. C. 921 : (1916) 2 M. W. N. 363 : 31 M. L. J. 575 (F. B.).

SPECIFIC RELIEF ACT (I OF 1877), S. 38.

——— S. 35—*Grounds for rescission.*

Failure to pay part of the consideration is no ground for rescission of contract, though subsequent conduct of the parties is a ground sometimes. (*Mullick and Jwala Prasad, JJ.*) MAKHANLAL *v.* HANUMAN BAKSH. 1 Pat. L. W. 250: 38 I. C. 877: 2 Pat. L. J 168.

——— S. 35 (b)—*Document stifling prosecution—Setting aside*

A document under which one person agrees to stifle a pending prosecution a non-compoundable offence can be set aside by him The parties in such a case are not in *pari delicto.* (*C. C Ghose and Panton, JJ.*) RAM KUMAR DAS *v.* NANDA KUMAR SHAHA. 75 I. C. 27 : 50 Cal 639.

——— S. 35 (c)—*Decree for specific performance—Delay in paying decree amount—Rescission.*

There are two kinds of relief after judgment for specific performance of which either party to the contract may in a proper case avail himself. He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects. He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract its immediate rescission may be ordered; otherwise, the order will be for rescission in default of completion within a limited time. It is not necessary in such cases to drive the parties to a fresh suit or rescission of the contract. The words "in the same case" in the last para of S. 35 of the Specific Relief Act refer to clause (*c*) and the Court has power to make an order in the suit in which the decree was made. (*Macleod, C. J. and Crump, J.*) KURPAL HEMRAJ *v.* SHAM RAO.
47 Bom. 589 : 25 Bom L R. 234: 1923 Bom. 211.

——— S. 36—*Applicability to a suit for refund of money advanced on a contract found later on to be void*

S. 36 applies only to suits for rescission of contracts and not to a suit for refund of money advanced under a contract discovered subsequently to be void. (*Teunon and Sheepshanks, JJ.*) RAM CHANDRA *v.* GANESH CHANDRA 21 C. W. N. 404.
39 I. C. 78 : 25 C. L. J. 459.

——— S 38—*Provisions of, if can be invoked in the case of undue influence.*

The provisions of S. 38 can be invoked where a transaction is sought to be set aside on the ground of undue influence as it is only a species of fraud in equity. (*Scott, C. J. and Shah, J.*) NARAIN BHAT *v.* AKKUBAI, 33 I. C. 576: 18 Bom. L R. 27.

——— Ss 38 and 41—*Vendor lunatic—Purchaser, right of, to refund of consideration money paid—Equitable relief.*

SPECIFIC RELIEF ACT (I OF 1877), S. 38.

Where a person by payment of consideration money entered into an unenforceable contract for the purchase of property with another who was of unsound mind at the time of the contract. *Held* he cannot get a refund of the money paid, either under the provisions of S. 65 of the Contract Act or Ss. 38 and 41 or on principles of equity. 30 C. 539 (P. C.) Dist. (*D. Chatterjee and Beachroft, JJ.*) DOULAT UD-DIN *v.* DHAMIRAM CHHUTIA.
32 I. C. 804.

——— **Ss 38 and 41**—*Sale by person as guardian not entitled as such—Rights of vendee.*

Although the sale was void *ab initio* as being effected by persons not entitled to act on behalf of the vendor, the vendee is entitled having regard to Ss. 38 and 41 to claim to be restored to their former position. (*Beven Petman, J.*) FATEH KHAN *v.* LANGRA. **68 I. C. 15: 2 Lah. L. J. 184.**

——— **Ss. 38 and 41**—*Minor repudiating transaction—Duty to restore benefit.*

Where a plff. sues to undo a transaction entered into by a guardian in his name during his minority, if the other party has acted in good faith and the plff. or his estate has actually received benefit, the plff. must, as a condition precedent to the setting aside of that transaction, restore the said benefit. If, however, the minor or the quondam minor is the *beatus possidens* and is being sued by the other party a claim against the minor for refund of benefit would fail (*Johnstone, C. J. and Rattigan, J.*) SULTAN SINGH *v.* HASAMAT ULLAH **119 P. W. R. 1915: 109 P. R 1915: 29 I. C. 804: 38 P. L. R. 1916.**

——— **S. 38**—*Minor—He who seeks equity must do equity.*

The rule that a person seeking equity must do equity and restore any benefit derived by him does not apply when the deft. is a minor so as to enable the plff. in whose favour the transaction was effected to claim restoration from the minor. (*Reid, C. J.*) ZUMARUDDIN *v.* PRABHU DIAL **128 P. W. R. 1913: 215 P. L R. 1913: 19 I. C 755. Also 53 I. C. 65 : 15 N L. R. 149**

——— **S. 38**—*Minor—Mortgage by—Void—Duty to refund.*

Where a mortgage is found to be void on account of the minority of the executant the minor is not liable to refund the mortgage money even if he misrepresented his age. 39 I. C. 404, P. C; 43 I. C. 908 Foll. (*Wallis, C. J and Sadasiva Aiyar, J.*) GURUSWAWY *v.* BUDHAKARAN LAL. **10 L. W. 225: 53 I. C. 14 : 26 M L. T. 245.**

——— **Ss. 39 and 42**—*Suit for declaring document to be a forgery.*

A suit for declaring an endorsement on a mortgage deed to be a forgery being in fact a suit for its cancellation is one of the kind under S. 39 of the above Act and S 42 does not apply to it. (*Walsh and Sundar Lal, JJ.*) RAM CHANDRA *v.* GANGA SARAN. **39 All. 103 : 37 I. C. 89 : 14 A. L. J. 980.**

——— **Ss. 39 and 42**—*Suit for declaration—No further relief asked—Effect.*

A brought a suit for declaration that she was owner of a half-share in certain house and that

SPECIFIC RELIEF ACT (I OF 1877), S. 39.

B's sale to C to that extent was not binding on her. It was found that she was not in possession of the house. *Held*, that A's suit was for a declaration only and as she did not pray for the consequential relief *i. e.* possession, her suit must fail. The suit could not be regarded as one for cancellation of a document under S. 39. (*Bannerjee, J.*) KEDAR SAHU *v.* BHAGWANTI. **10 I. C. 1000 : 8 A. L. J. 462.**

——— **S. 39**—*Cancellation—Suit for possession.*

A person suing for recovery of property which he has transferred to another under a deed of exchange which is not binding on him, need not have the deed cancelled. (*Scott, C. J. and Roe, J.*) ANANDAPPA *v.* TOTAPPA.
33 I.C. 441 : 17 Bom. L. R. 1137 (Note.)

——— **S. 39**—*Void document—Need not be cancelled.*

Where a person is induced to execute a document other than that he had undertaken to execute, the document is void and need not be cancelled. If an illiterate man have a deed falsely read over to him and he then seals and delivers the parchment, that parchment is nevertheless not his deed. This doctrine was not confined to the condition of an illiterate grantor and it made no difference whether the grantors were fettered or unfettered. The essential position is that if a grantor or a covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him. Nor is this principle limited in its application to deeds but the doctrine is equally applicable to other written contracts. (*Mookerjee and Chotzner, JJ.*) UMARANNESSA BIBI *v.* JAMIRANNESSA BIBI. **37 C. L. J 499 : 1923 Cal 362.**

——— **S. 39**—*Suit for cancellation of sale—Fraud—Discovery—Limitation.*

A plff. seeking to avoid the statute of limitation on the ground of fraud must, besides setting forth the facts constituting the fraud, state the time when it was discovered to enable the deft. to meet the fraud and the alleged time of its discovery so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made earlier. (*Mookerjee and Beachcroft, JJ.*) SECY OF STATE *v.* RANSIRAM. **35 I. C. 284 : 20 C. W. N. 638.**

——— **S. 39**—*Cause of action.*

Where the plff. has some interest in the land covered by kobalah has clearly a cause of action. (*Coxe and Richardson, JJ.*) BADRI NARAIN *v.* KODO SAH. **28 I. C. 138.**

——— **S. 39**—*Contract Act, Ss. 18 and 19—Rescission of contract.*

A party to a contract can rescind it if it has been based on misrepresentation. (*Holmwood and Chapman, JJ.*) JOGENDRA NATH *v.* CHANDRA KUMAR. **24 I. C. 193 : 42 Cal. 28.**

——— **Ss 39, and 42**—*Suit for declaration that the plaintiff was not liable to pay any sums on the basis of entries in the defendant's bahi not maintainable without seeking consequential relief.*

Where S. 39 of the Specific Relief Act expressly permitted the plaintiff to ask for further relief and the document should be adjudged void and ordered by the Court, to be delivered up and

cancelled, a suit for mere declaration that the plaintiff was not liable to pay on the basis of the entries in defendant's bahi did not lie. 87 P. R. 1910 Referred to. (*Campbell, J.*) SOHAN SINGH v. SANTA SINGH. 1923 Lah. 491.

——S. 39—*Cancellation of transfer—Fraud not carried out.*

Where nothing had been done to carry the fraud into effect at the time when a suit for cancellation of a fraudulent transfer was brought, the plff is not debarred from asking for the relief he claims. 35 Cal. 551 (P. C.) Referred to. (*Rattigan, C. J.*) NABI BAKSH v. MAULA. 53 I. C. 454 : 126 P. R. 1919.

——S. 39—*Scope of.*

The test for granting the plff. a relief under S. 39 is whether he has a reasonable apprehension of serious injury. Where the plff was made to affix her thumb impression to an agreement to refer to arbitration of the contents of which she had no knowledge and the award therein deprived her of her title to certain properties held by her in mortgage. *Held*, there was no valid agreement to refer to arbitration so far as she was concerned and that the award did not bind her, and that there was reasonable apprehension of serious injury so as to entitle her to invoke the aid of s. 39. (*Scott-Smith and Broadway, JJ.*) BABU GHULAM FATIMA v. GHULAM MUHAMMAD KHAN. 77 P. W. R. 1917 : 39 I. C. 912 : 125 P. R. 1917.

——S. 39—*Decree against Waqf property—Suit for declaration of invalidity of.*

A person who alleges a property to be waqf for the sale of which a decree is passed need not get it set aside if he is no party to it but may ask for a declaration that it should not affect the property. (*Shah Din and Scott Smith, JJ.*) AMIN CHAND v. SANT MURLIDHAR. 18 P. R. 1913 : 211 P. L. R. 1913 : 19 I. C. 219 : 161 P. W. R. 1913.

——S. 39—*Cancellation of an instrument—Suit for possession of property.*

The cancellation of an instrument is not compulsory in a suit for possession of property conveyed by the instrument. *Reid, C. J. and Kensington, J.*) MUHAMMAD UMAR ALI v. AMAN ALI. 170 P. W. R. 1911 : 12 I. C. 140 : 201 P. L. R. 1911.

——Ss. 39 and 49—*Mortgage—Non-payment of consideration—Effect.*

A mortgage deed was executed and registered and possession also given to the mortgagee under the deed. The consideration was not paid. *Held* when the deed was registered and possession of the secured properties given, the transaction was complete under S. 58 of the T. P. Act and non-payment of consideration in such a case will not render the transaction void or voidable. The remedy of the mortgagor is to sue for the consideration money. A suit for cancellation of the mortgage would not lie—The lower Court having found that there was no danger of an injury to the mortgagor, a declaration that the consideration had not been paid by the mortgagee was refused. (*Phillips and Kumaraswami Sastri, JJ.*) ABDUL HASHIM SAHIB v. KADER BATCHA SAHIB. 42 Ma. 20 : 24 M. L. T. 478 : (1918) M. W. N. 769 : 8 L. W. 543 : 48 I. C. 370 : 35 M. L. J. 740.

——Ss. 39 and 41—*Minor—Sale—Suit to set aside—False representation as to the age—Estoppel—Refund of consideration.*

A minor is entitled to have a sale executed by him during his minority set aside. *Quære*: Whether even false representation as to his age would disentitle the minor from claiming the relief. Mere silence or conduct in not disputing that he was a major does not deprive the minor of the advantage secured to him by the law. An assertion of an untrue fact must have been made by him. Under S. 41 Court can call upon the minor to refund the consideration he has received before his prayer for cancellation of sale is granted. Apart from the discretion which the statute confers, there is no general rule of equity under which a minor can be compelled to pay compensation to the transferee on avoidance of the transfer. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) MALLACHERUVU RAGAVAYYA v. MALLACHERUVU SUBBAYYA. 43 I. C. 908 : 7 L. W. 124.

——S. 39—*Transfer—No consideration.*

In a suit for cancellation of a sale deed for consideration which was found really not to have passed if the intention of the executant was to transfer the property the failure of consideration will not make the deed void or voidable but will only give the right to its payment with a lien on property until it is paid. 25 B. 10 at p. 18 Foll. (*Ayling and Tyabji, JJ.*) GOVINDASWAMY RAJA v. KUPPAMMAL. 31 I. C. 77.

——S. 39—*Consideration not paid or adequate.*

Non-payment of and inadequacy of consideration are not sufficient to justify the cancellation of a deed of sale. (*Abdur Rahim and Sundara Aiyar, JJ.*) KELARU KOTAYYA v. POLAVARAPPU MULLAYYA. 13 M. L. T. 521 : 19 I. C. 746 : (1913) M. W. N. 637.

——S. 39—*Suit to cancel an instrument—Limitation Act, Art. 91.*

For a suit to cancel a registered instrument, which cannot take effect till after it is registered under S. 39 limitation commences from date of registration and not from date of execution under Art. 91 of the Limitation Act. (*Stuart, J. C.*) ALI MIRZA BEG v. HASAN RAZAKKAN. 39 I. C. 456 : 4 O. L. J. 108.

——S. 39—*Declaratory decree—Principle to be followed—Cancellation of instrument.*

Though the man for the time being in full and peaceable possession of certain property knows that some other person is setting up an adverse claim to the same and has asserted that claim in transactions to which the person in possession was no party and which are on the face of them not binding on him, he would not be entitled to sue for cancellation of the instrument under S. 39 of the Act. (*Piggott, J.C.*) NARENDRA BAHADUR v. BASUDEO MISRA. 14 I. C. 81.

SPECIFIC RELIEF ACT (I OF 1877), S. 39.

——S. 39 *Cancellation—Void document—Both parties to blame—Refusal to cancel.*

As under S. 39, the relief by way of cancellation of a void document is entirely discretionary, the Court of Equity may well refuse to cancel a void document where both the parties to the instrument are guilty of fraud (*Chapman and Atkinson, JJ.*) BINDESHRI PRASAD *v.* LEKRAJ SAHU. 20 C. W. N. 760 : 1 Pat. L. J. 48 : 33 I. C. 71 : 3 Pat. L. W. 405.

——Ss. 39 and 42—*Plaintiff got a money decree, the Court holding that a valid mortgage existed.*

The property was in possession of the vendee from the alleged mortgagor. Plaintiff therefore sued for a declaration that the sale was fraudulent and inoperative. *Held*, plaintiff's proper relief would have been to attach the property and wait till that attachment had been removed and then to have sued to have his right to attach it declared within the statutory period of one year. However he elected to sue before making an attachment and never prayed for a declaration of his right to attach. In this way he failed to have any tangible cause of action whatever. In view of the fact that he had a proper remedy, the declaration sought for should not be made. (*Pratt and Duckworth, JJ.*) MI SAN MA KHAING *v.* SHWE BA. 1 Bur. L. J. 106 : 1923 R. 82 (2).

——S. 39—*Suit for cancellation of deed—No prayer for possession—Subsequent suit for*

Where in a suit for cancellation of a deed, there is no prayer for possession and no leave is taken for filing a separate suit therefor, a subsequent suit for possession is barred by O. II. R. 2 (3) of the C. P. C. (*Maung Kin, J.*) MAUNG OK GAING *v.* MA ON SIN. 33 I. C. 135 : 9 Bur. L. T. 93.

——S. 39—*Who should sue.*

A suit under S. 39 is maintainable only by the person against whom the instrument is void or voidable or to whom it causes injury. (*Parlett, J.*) VASA NARAYANASWAMY *v.* ANTHAYE 26 I. C. 272.

——S. 40—*Endorsement on document, if a document*

The endorsement on a document is itself a document like the several parts of documents under S. 40 of the Sp. Rel. Act (*Walsh and Sundar Lal, JJ.*) RAM CHANDRA *v.* GANGA SAHAN. 39 All. 103 : 37 I. C. 89 : 14 A. L. J. 980.

——S. 41—*Mortgage during minority—Suit for cancellation—Refund.*

The discretion conferred on the Court by S. 41 must be so interpreted and exercised as only to impose upon a plff. seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the parties were reversed and he were the defendant in a suit brought to enforce the instrument according to its terms. In a suit for setting aside a mortgage-deed executed by plaintiff during his minority by his guardian and himself, the Courts below passed a decree conditional on his paying

SPECIFIC RELIEF ACT (I OF 1877), S. 41.

the full consideration of the deed in suit. *Held*, that the minor's contract being void, the plaintiff's suit should have been decreed as brought. (*Piggott, J.*) GAYA PRASAD *v.* SASARAN CHAUDHRI. 29 I. C. 972.

——S. 41—*Minor—Suit to set aside conveyance by—Refund—Discretion.*

Though the Court had a discretion to direct plff. to restore the consideration money under S. 41 of the Sp. Rel. Act, yet it would not do so unless there were very strong circumstances in the case to enable the Court to find that there was an equity in favour of the defendant. Where the defendant took a sale from the minor plaintiff knowing she was a minor, the defendant has no equity in his favour to claim a refund. (*Macleod and Heaton, JJ.*) GURUSHIDDSWAMI *v.* PARAWA DUNDAYA NARENDRA. 44 Bom. 175 : 55 I. C. 271 : 22 Bom. L. R. 49.

——S. 41—*Minor—Sale—Refund of purchase money.*

A minor, who seeks to recover the property sold is bound in equity to refund the purchase money under S. 41 of the Specific Relief Act as a condition precedent to obtaining a decree for possession (*Moti Sagar, J.*) KAPURA *v.* HARDIT SINGH. 1923 Lah. 510.

——S. 41—*Cancellation of a document—Liability for benefits received.*

Where a minor vendor afterwards claims equitable relief the Courts will not grant it unless and until the plaintiff is willing and agrees to restore an benefit he might have received thereunder. But such power will not be used by the Court if the defendant has already received compensation by being in possession and enjoying the produce (*Reid, C. J. and Rattigan, J.*) CHOGHATTA *v.* ASOMAL. 30 P. R. 1913 : 17 I. C. 371 : 270 P. L. R. 1914.

——Ss. 41 and 3—*Suit for possession by true owner—Right to re-imbursement of alienee.*

Where a person having no title to property sells it and the true owner sues to recover possession, the purchaser is not entitled to be reimbursed for the simple debts of the true owner which the vendee has paid out of the sale consideration, before surrendering the property. The right cannot be supported either on general principles of equity or under S. 41. (*Sadasiva Aivar and Napier, JJ.*) AMMANI AMMAL *v.* RAMASWAMI. 10 L. W. 75 : 37 M. L. J. 113 : 51 I. C. 57 : (1919) M. W. N. 866.

——S. 41—*Minor—Alienation by guardian.*

No transaction can be avoided by a minor under the general principles of equity recognised by S. 41 except on the condition that the person benefited by the transaction restores the benefit he has received or makes such compensation as the justice of the case requires (*Kanhaiya Lal and Lyle, A. J. Cs.*) LALA PURSHOTAM DAS *v.* NAZIR HUSAIN. 54 I. C. 846 : 6 O. L. J. 669.

——S. 41—*Minor's contract—Restoration of benefit.*

SPECIFIC RELIEF ACT (I OF 1877), S. 42.

A minor plaintiff praying relief must perform equity. He seeks equity and the Court may therefore under S. 41, Specific Relief Act, require him to restore any property, in his possession which he has obtained, by his misrepresentation. Such compensation does not extend to moneys received and spent by the minor (*Kennedy, J. Cs. Raymond and Kemp, A. J. Cs.*) MT HURI *v.* ROSHAN KHUDABUX. **16 S. L. R. 112 : 1923 Sind 5 (F. B.)**

——— **S. 42.**

Applicability.
Cause of action.
Construction.
Discretion of Court.
Duty of Court.
Further relief.
Interested to deny.
Jurisdiction.
Legal character.
Object of.
Right to property.
Miscellaneous.

Applicability.

——— S. 42—*Applicability of—Suit to set aside compromise decree as being void against minor.*

S. 42 does not apply to a suit instituted by the plfts. seeking a declaration that a decree made in a previous suit where they were minor defts. was not binding on them and claiming to be restored to the position they held prior to the date of the decree. The Court has no discretion to refuse relief to the plaintiff if it finds that the previous decree was obtained without securing a proper representation of the minor defendants. (*Sir John Edge.*) PARTAB SINGH *v.* BHABUL SINGH.
35 All 487 : 40 I. A. 182 : 16 O. C. 247 : 17 C. W. N 1165 : 14 M. L. T. 299 : 25 M. L. J. 492 : 11 A. L. J. 901 : 18 C. L. J. 384 : (1913) M. W. N. 785 : 21 I. C. 288 : 15 Bom. L. R. 1001 (P. C.).

——— S. 42 — *Applicability — Tenants not entitled to declaration against landlords.*

Entries in revenue records as tenants for a long time raise a presumption of correctness which has to be rebutted ; but tenants are not entitled to a declaration under S. 42 against their landlords. (*Leslie Jones, J.*) MT JAI KAUR *v.* LABHU. **4 Lah. L. J. 207 : 1922 Lah. 163.**

——— S. 42—*Applicability.*

To entitle the plff. to succeed it must be shown that his legal character or his right to any property has been denied by the deft. or that the deft. is at least interested in denying it. (*Smyth, Elsime Barkley and Rattigan, JJ.*) BARKAT RAM *v.* JAGAT RAM. **17 I. C. 379 : 249 P. W. R. 1912.**

——— S. 42—*Applicability.*

No suit lies for a declaration of what is not in accordance with facts. (*Abdur Rahim and Sundara Aiyar, JJ.*) DRONAN RAJU RAMAYYA *v.* CHUNDARI PEDAYYA. **10 M. L. T. 118 : 12 I. C. 119 : (1911) 2 M. W. N. 174 :**

——— S. 42—*Applicability—Question of Law.*

No declaration can be grantad on a mere question of law. 30 C 788; 14 I. C. 81 Ref. (*Lindsay, J.C., and Kanhaiya Lal, A.J.C.*) PRAG *v.* MAHAMMAD ABDUL HUSAIN. **25 I. C. 603 : 1 O. L. J. 344.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Applicability.

——— S. 42—*Applicability—Claim suits.*

O 21, R. 63 gives a special right of suit to party whose claim is rejected under O 21, R. 58 and in such a case the proviso to S. 42, Sp. Rel. Act does not apply. (*Miller, C. J and Foster, J.*) BHAGWAN LAL *v.* RAJENDRA PRASAD SAHI.
4 Pat. L. T. 409 : 1923 P. 564.

——— S. 42—*Applicability—Sonthal Parganas.*

As the Specific Relief Act does not apply to the Sonthal Parganas there is nothing in the law apart from that Act which would entitle the court to grant a declaratory decree. Before 1877 the power of the courts in such cases were governed by the provisions of the Civil Procedure Code of 1859 subject to a condition precedent that there were circumstances which might justify the grant of consequential relief. 2 P.L.J. 379 ; 19 W. R. 171 and 23 W. R. 314 followed. (*Dawson Miller, C. J. and Bucknill, J.*) ISWARI PRASAD SINGH *v.* MT. SAHORA KUMARI.
1922 P. 42.

——— S. 42—*Applicability—Recovery of money if and when necessary.*

A suit for a declaration that the defts. were liable to pay a certain amount and that plff. should recover the same if and when the plff. is compelled to pay the same is one for a declaratory decree without a consequent relief for the purposes of the Court Fees Act but the suit not being one contemplated by S. 42 is not maintainable. (*Das and Adami, JJ.*) SHAIKH RAFIQ-UD-DIN *v.* SHAIK ASHGAR ALI. **63 I C 38.**

——— S. 42—*Applicability—Suit to declare a Municipal election invalid.*

It is not in the discretion of the Court to declare or refuse to declare a municipal election invalid. If the case is proved, the Court must pass a decree in favour of the person seeking the invalidity of the election. Evidently a suit for the purpose is maintainable. (*Ross, J.*) AVUDH BEHARI LAL *v.* KESRI PRASAD SINGH. **63 I. C. 6.**

——— S. 42—*Applicability— Injunction—Declaration suit.*

A suit for declaration and injunction is maintainable in the Sonthal Parganas. (*Coutts and Adami, JJ.*) TEKAIT DEO NARAYAN SING *v.* BHUK LAL RAUT. **1 Pat. L. T. 699 : 57 I. C. 196 : 2 U. P. L. R. (Pat) 150: (1921) Pat. 38.**

——— S. 42—*Applicability—Claim suits—C. P. Code, O. 21, R 63.*

In a suit for a declaration under O. 21, R. 63, C. P. C., that a sum of money deposited in Court in execution of a decree in favour of A and attached by deft. in execution of a decree against A was the property of plaintiff. *Held*, that the suit was not barred by the proviso to S. 42. The plff. was not bound to sue for the payment of money to him and the consequential relief which it was possible for him to claim, *viz.*, that the decree was really the plff's., had in fact been claimed. (*Mullick and Atkinson, JJ.*) HARI LAL SAHU *v.* RANCHI MINISTERIAL OFFICERS' URBAN CO-OPERATIVE CREDIT SOCIETY. **3 Pat L. J. 189 : 4 Pat. L. W. 138 : 43 I. C 396 : (1918) Pat. 141.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Applicability

——S. 42—*Applicability—Claim suit—Claim in execution of decree—Objection—Suit.*

A decree-holder may independently of O. 21, R. 63 institute a suit for a declaration that certain property attached by him is the property of the judgment-debtor. It does not come within the proviso to S. 42 of the Sp. Rel. Act. (*Maung Kin, J.*) MAUNG BA KYAW *v.* LAN. **45 I. C. 972 :**
Also **9 Bur. L. T. 199 : 34 I. C. 125**
Also **10 P. R. 1912 : 74 P. L. R. 1912 : 14 I. C 510 : 267 P. W. R. 1912**

Cause of Action.

——S 42—*Cause of action—Maintenance—Grant of village—Payment of revenue.*

A taluqdar granted a village for the maintenance of a junior member of the family on the understanding that the talukdar himself would pa the Govt. revenue Subsequently he alienated a lot of other villages out of the Taluqdari estate. In a suit by the maintenance holders for a declaration of charge, *held* that under the arrangement the grantor undertook a personal liability to pay the revenue of the villages granted and it was not intended to charge the remainder of the taluk with such obligation. Where there is no allegation in the plaint that the grantor had not ample property to carry out his undertaking there was no cause of action for the suit. (*Mr. Ameer Ali.*) SUNDERLAL *v* RAMJILAL
24 C. W. N. 929 : 16 N. L. R. 114 : 28 M. L. T. 319 : 47 I. A. 149 : (1920, M. W. N. 447 (P. C.)

——S. 42—*Cause of action—Decree for profits by Revenue Court in favour of recorded co-sharer—Suit for declaration of illegality of decree.*

H mortgaged certain property to four persons, one of whom was the predecessor of defendant B. B transferred a part of his share to his wife and both B and his wife afterwards sold their share to S and another. Possession was, however, not given as the whole of the purchase money was not paid. B and his wife sued S and another for the unpaid purchase money obtained a decree which was discharged in 1913. Their names were on the revenue papers before that date and they sued *lambardar*, who was a representative of the mortgagor, for their share of profits, for those years obtained decree in 1913 and 1915 and realised the amounts decreed In 1911 the representatives of H had deposited the mortgage money in court for payment to Mr. and Mrs. B but on the court refusing to order payment, as there was a dispute between B and S. had withdrawn. The mortgagors then redeemed their property from S. and another and sued B and his wife for refund of the profits paid to them under decrees of 1913 and 1915 on the ground that the decrees were unlawful *Held*, that B and another being recorded co-sharers on the dates in respect of which decrees for profits were made, the decrees were good and the suit was not maintainable. (*Banerji and Wallace, JJ.*) MAHABIR PRASAD *v.* BASANT LAL.
70 I. C. 444 : 17 A. L. J. 1028.

——S. 42—*Cause of action—Fraud by minor.*

Where a minor induces another to advance money by mortgage of his property, on a fraudulent misrepresentation as to his age, he can sue for a declaration that the mortgage is void provided he returns the exact sum received at the time of contract. (*Walsh and Ryves, JJ.*) GIRADHAR *v.* PIAREY LAL **19 A. L. J. 578 : 62 I. C. 258 : 3 U. P. L. R. (All.) 51.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Cause of action.

——S. 42—*Cause of action—Denial of title.*

The denial of title referred to in S. 42 must be communicated to the plff. in order to give him a cause of action. A claim or statement denying title not communicated to the owner cannot save the statute of limitation running against him. (*Walsh, J.*) MAHABIR RAI *v.* SARJU PRASAD RAI. **43 I. C. 175.**

——S. 42—*Cause of action—Denial of right—Suit for declaration by plff—When no creditor has claimed title in the property.*

A suit for a declaration that the property seized in insolvency proceedings is the plff's, is misconceived, as no such declaration can be granted against a creditor who has not claimed or the debtor who has become insolvent or even against the Receiver. (*Piggott and Walsh, JJ.*) PITA RAM *v.* JHUJAR SINGH. **33 I. C. 798 : 15 A. L. J. 861.**

——S. 42—*Cause of action—Declaratory suit—Hindu widow—Will—Suit by reversioner.*

It is not competent to a reversioner to sue for a declaration that a will executed by a Hindu widow is void, because there is no alienation. 27 A. 14 ; 26 A. 238, Ref. (*Chamier and Piggott, JJ.*) UM RAO KUNWAR *v.* BADRI. **37 All. 422 : 29 I. C. 302 : 13 A. L. J. 551.**

—— Ss. 42 and 52—*Cause of action—Declaration—Rights and liabilities of mortgagor and mortgagee.*

The suit was by a mortgagor against his usufructuary mortgagee of his shop and the tenants occupying the shop under the usufructuary mortgagee for an injunction to raise the rental or to deduct the excess he would get by an increased rental from the mortgagors. The agreement was that if the mortgagee got less rent, the mortgagor would make up and pay him but if he got more rent, he (the mortgagor) should be given the excess. In the circumstances of the case it was held that the suit as brought was not maintainable as there was no allegation that over a specified period of time the mortgagee had been persistently and without reasonable cause been letting the shops mortgaged for less than their fair letting value. (*Chamier and Piggott, JJ.*) RUSHAN LAL *v.* MOOL CHAND.
27 I. C. 697 : 13 A. L. J. 85.

——S. 42—*Cause of action—Denial of right—Stipulation not to redeem.*

Where there are two mortgages in favour of the same person and there is a stipulation to the later mortgage that the mortgagor would not redeem the earlier without redeeming the later, and the mortgagor denies the right of the mortgagee under the later mortgage, the mortgagee can sue for a declaration of his right. (*Piggott, J.*) RAMCHARAN *v.* JAGAN BEHARI LAL.
24 I. C. 737.

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Cause of action.

——S. 42—*Cause of action—Limitation—Plff. in possession.*

Where plfs. who had been wrongly recorded as ex-proprietary tenants in 1888 applied in 1905 for correction of the village papers and it was dismissed in 1904 and the defts. in 1912 applied under S. 36 of the Land Revenue Act for assessment of rent on the land held by the plffs. *Held* that the deft.'s application to the Revenue Court gave a fresh cause of action to the plffs. and that a suit for declaration of their proprietary title was not barred. 20 A. 35 (F.B.); 31 A. 9 Dist. (*Chamier and Rafique, JJ.*) ALLAH JILAI *v.* UMRAO HUSSAIN. **36 All. 492 : 24 I. C. 535 : 12 A. L. J. 810.**

——S. 42—*Cause of action—Mortgagee to pay off prior mortgage—No proper attestation—Suit for declaration of charge will lie.*

Where A lent a sum of money to B to pay off a mortgage on B's property and B executed a mortgage in favour of A but it was invalid for want of due attestation, A is entitled to a declaration that he has a charge on the property to the extent of the money advanced (*Macleod, C. J. and Fawcett, J.*) CHOTALAL KARSANDAS *v.* VISHNU GANESH. **45 Bom. 597 : 60 I. C. 903 : 23 Bom. L. R. 84.**

——S. 42—*Cause of action—Person not a party to litigation and not affected thereby—Suit to declare decree fraudulent—Parties Injunction—Consequential relief.*

A landlord obtained an *ex parte* decree against a person alleged to be tenant and put the holding to sale in execution. The tenancy was purchased by a stranger. The plaintiff who was not a party to those proceedings instituted a suit for declaration that the decree and sale were fraudulent and did not affect him who held the tenancy under certain persons holding under the landlord. It was found that the decree and sale were fraudulent. *Held*, that the plaintiff's suit was maintainable and a prayer for an injunction to protect the plaintiff's possession was unnecessary. 13 B. 34, 38 M. 1102 Ref. To such a suit the representatives of the alleged tenant against whom the *ex parte* decree which was obtained were not necessary parties. (*Mookerjee and Chotzner, JJ.*) MOHESH CHANDRA MISRA *v.* NISTARINI DASSYA **27 C. W. N. 449 : 1923 Cal. 382.**

——S. 42—*Cause of action—Dismissal of suit on ground of no cause of action—Propriety.*

A suit for a declaration of title to and confirmation of possession in a certain plot of land on the allegation that deft. had threatened to take possession thereof with a prayer for a temporary injunction in which the defence is that the title is with the deft. cannot be dismissed on the ground that the plaint discloses no cause of action. (*Teunon and Richardson, JJ.*) ADYANATH RAY *v.* BISESWAR DASS. **46 I. C. 503**

——S. 42—*Cause of action—Plff.'s title and previous possession—Suit to establish.*

A suit for a declaration to establish title to a village and to a streamlet which lies within it owing to disturbance in the plff.'s possession by deft.'s people catching fishin it, is maintainable; even a temporary disturbance is a sufficient ground for such a suit (*Chamier, C. J. and Sharfuddin, J.*) SHAHDEO LAL BHAGAT *v.* KESHO MOHAN THAKUR. **35 I. C. 916 : 20 C. W. N. 1274.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Cause of action.

S. 42—*Cause of action.*

A mere attachment is a sufficient invasion of a right to confer a cause of action. (*Coxe, J.*) AKHOY KUMAR *v.* NARAIN DEY. **9 I. C. 663.**

——S. 42—*Cause of action—Attachment of property is not.*

There can be no doubt that an attachment infringes the right of the judgment debtor and has the effect of placing the property *in custodia legis*, but it does not by itself amount to an infringement of the rights of the reversioners to the property. It is possible, nay it is probable, that the attachment will lead to an alienation, and if the alienation is not confined to the period of judgment-debtor's life-time, the plaintiffs (reversioners) will then be entitled to impeach the alienation. It is, however, clear that where no alienation has so far been made, the mere attachment does not give the plaintiffs (reversioners) a cause of action for a declaration that their rights will not be affected. (*Shadi Lal, C. J. and Lumsden, J.*) CHET RAM *v.* SPEDDING & CO., LTD. **5 Lah. L. J. 234 : 1924 Lah. 52.**

——S. 42—*Cause of action—Compromise by proprietor—Suit by sons for declaration of invalidity—Customary law.*

In cases governed by customary law it is open to the sons of a proprietor to maintain a suit for a declaration that a compromise entered into by their father should not affect their reversionary rights after their father's death. Although a compromise entered in good faith binds a man's heirs but they are entitled to challenge the compromise on the ground that it was not entered into in good faith. 97 P. R. 1906 Ref. (*Scott-Smith and Brasher, JJ.*) UJAGAR SINGH *v.* SUCHA SINGH. **5 Lah. L. J. 266 : 1924 Lah. 35.**

——S. 42—*Cause of action—Attachment of ancestral property—Declaratory suit—Custom.*

A suit for a declaration at the instance of reversioners does not lie when ancestral property has been merely attached in execution of a decree with a view to a sale but has not been sold. 18 P. R. 1908, Dist. (*Sevan Petman, J.*) WARYAM SINGH *v.* NARAIN DAS. **52 I. C. 157.**

——S. 42—*Cause of action.*

In a suit for declaration a plff. has no cause of action if the plaint only alleges that the defts. claimed as co-sharers, denying the plff.'s exclusive proprietary right without there being any actual invasion of plff.'s right. (*Johnstone and Shah Din, JJ.*) BUDHA KHAN *v.* MOHAMMAD. **31 I. C. 287 : 133 P. W. R. 1915.**

——S. 42—*Cause of action—Suit for setting aside will during lifetime of testator.*

A suit will not lie for a declaratory decree setting aside a will during the lifetime of the testator. (*Shah Din and Scott-Smith, JJ.*) NURKHAN *v.* BHAKTAWAR. **30 P.L.R. 1915 : 27 I. C. 574 : 200 P. W. R. 1915.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Cause of action.

— S. 42 *Cause of action—Some tenants acknowledging pltf.'s title and some deft.'s.*

Pltfs. were in possession of some of the lands and defts in possession of others; some tenants acknowledged pltfs. and some defts; *held*, that a suit lies for a declaration that mutation of the land in deft.'s name was null and void. 15 M. 307 ; 5 P. R 1908 ; 99 P. L. R. 1908; 29 P. W. R. 1908; 100 P. R. 1913 Ref. (*Rattigan and Shadi Lal, JJ.*) MOHAMMED UMAR v. NAWAB DIN. **217 P. L. R. 1914 : 24 I C 678 : 127 P. W. R. 1914**

——— S. 42—*Cause of action—No cloud on title.*

As long as there is no cloud thrown on title, the plaintiff is not entitled to any declaration. (*Spencer and Ramesam, JJ.*) SOUNDARATHAMMAL v. NARAYANASWAMI AIYAR. **42 M. L J. 567 : 31 M L. T. 50 : 15 L. W. 639 : 1922 M. 306.**

——— S. 42—*Cause of action—Declaration of right to appear in village Courts.*

An order passed by an officer debarring a person holding *vakalatnama* to practice in village Courts is illegal and a suit to declare such a right lies at common law if not covered by S. 42. (*Ayling and Tyabji, JJ.*) RAMCHANDRA ROW v. SECRETARY OF STATE. **31 I. C. 310 : 39 Mad. 808.**

— S. 42—*Cause of action.*

A pltff. whose title is threatened by evidence being created against him will have a cause of action under S. 42. (*Oldfield and Seshagiri Aiyar, JJ.*) GANDLA PEDDA NAGANNA v. SIVANAPPA. **38 Mad 1162 : 16 M. L. T. 310 : 26 I C. 232 : 27 M L. J. 520.**

——— S. 42—*Cause of action in—Denial of title—Subsequent acts if constitute different causes of action.*

In a declaratory suit based on the ground of deft.'s denial of title of the pltff. there is only one cause of action namely denial of title; and acts done subsequently by the deft. in consequence of such denial do not create or give a fresh cause of action under S. 42. 10 A. L. J. 413, 36 M. 383, Dist (*Ayling and Sadasiva Aiyar, JJ.*) THIRUMALA RAO v. KADEKAR DURGI SHETTEHI. **(1914, M. W. N. 197 : 22 I. C. 883 : 1 L. W. 134.**

——— S. 42—*Cause of action—Petition by widow to revenue authorities for transfer of patta.*

A petition to the revenue authorities by a Hindu widow for transfer of patta in respect of the husband's lands to another person's name would not by itself furnish a cause of action for a declaratory suit by the reversioner as such petition does not amount to the assertion of a right to the property sought to be affected. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) BAGGU SINNAVANNA v. ITRAGULU CHINNAYA. **17 I. C. 375.**

——— S. 42—*Cause of action—Authority to adopt.*

No suit by a reversioner will lie for a declaration that an authority to adopt given by the husband is fabricated as it is only a preparation and

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Cause of action.

does not of itself affect the reversionary right. (*Benson and Sundara Aiyar, JJ.*) SREEPADA v. SREEPADA. **35 Mad 592 : 12 I. C 176 : (1911) 2 M W. N. 194.**

——— S. 42—*Cause of action—Female—Mutation of names—Suit by reversioner.*

Where a Hindu female who had succeeded to her father's property had a portion of it mutated the name of the defts. and the predecessor in title of one of the defts. had retained a portion of it to herself. *Held* that though there was a transfer of possession, the mutation order had not the effect of transferring the property nor could the words accompanying the transfer, throw a cloud upon the reversioner's title, and so there was no cause of action for the suit. (*Mitra, A J. C.*) UJARIA v. ROSHANLAL. **60 I. C. 343 : 16 N. L. R. 209.**

——— S. 42—*Cause of action—Denial of title—Entry in revenue register.*

A man is not bound to sue for a declaration of his title merely because some casual denial of his title is made, *e. g.*, by an entry unfavourable to him and favourable to the taluqdar in the revenue registers which in no way affects him in the enjoyment of his rights of property. The refusal of the Revenue Courts to disturb the entry in the revenue registers casts a cloud on the pltff.'s title and gives him a cause of action to bring a suit to have the cloud cleared (*Lindsay, J C*) SRI RAJ KUNWAR v GANGA PRASAD. **23 O C. 46. 7 O. L. J. 74 : 55 I. C. 893 : 2 U. P. L. R. (J. C.) 91.**

——— S. 42—*Cause of action—Finding of Revenue Court*

In ejectment proceedings before a Revenue Court reject the contention of the person sought to be ejected that he was an under proprietor and not tenant, the landlord has no cause to sue in a Civil Court for a declaration that the said person was not an under-proprietor. (*Lindsay, J. C.*) MUHAMMAD ABDUL HASAN KHAN v. SANGAM LAL. **42 I. C. 194 : 4 O. L. J 502.**

——— S. 42—*Cause of action— Entry in Revenue Records—Limitation*

Where pltff.'s title is made doubtful by reason of an entry in the Revenue registers and he seeks relief by a declaratory suit, limitation for such a suit runs from the date on which the entry was made. (*Lindsay, J. C.*) ALI HUSSAIN KHAN v. BAINDI. **34 I. C. 775 : 3 O. L. J. 226.**

——— S. 42—*Cause of action — Ejectment—Cancellation of notice by Revenue Court—Jurisdiction of Civil Court.*

In a suit to contest a notice of ejectment, defts. claimed to be under-proprietors of the land and the notice was cancelled by the Revenue Court on the ground that they were not mere tenants, *held* that the landlord had a good cause of action to go to the Civil Court for a declaration that the defts, do not possess any under-proprietary rights. (*Lindsay, J. C. and Kanhaiya Lal A. J. C.*) RAM ASRE v. RAJA MUHAMMAD ABDUL HASAN KHAN. **30 I. C 218 : 2 O. L. J. 241.**

See also **34 I. C. 304 : 3 O. L. J. 191.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Cause of action.

——S. 42—*Cause of action -Declaration that deft is not proprietor—Limitation.*

The cause of action for a suit for a declaration that deft. is not the proprietor or under proprietor and that he is liable to ejectment accrues only when the contrary is put forward by the tenant as a substantial defence in ejectment proceedings in Revenue Court. A Civil Court is entitled to declare that a person is or is not an agricultural tenant, though the Revenue Court has exclusive jurisdiction to determine the nature of the tenancy. A decree for a declaration by the owner of half of a village that deft. is neither a superior nor an inferior proprietor in the village can lie if the mortgagee in possession of the other half is impleaded as deft. (*Lindsay J. C. and Stuart, A. J. C.*) RAM AUTAR *v.* ATUL HASSAN KHAN.
28 I C. 307 : 2 O. L. J. 131.

——S. 42 -*Cause of action — Transfer of portion of holding—Declaration that transfer is invalid by landlord.*

A landlord is not bound to recognise a division of a tenure of holding or a distribution of the rent payable in respect thereof. A transfer of a portion of an occupancy holding without the landlord's consent is an attempt to violate those rights or to throw a cloud upon them so that a landlord is entitled to sue for a declaration that such a transfer is not binding upon him 24 I. C. 152, 1 C. W. N. 162. Rel. (*Jwala Prasad J.*) BAPU RAMA VIJA SINGH *v.* BIBI WAZERUNNISA.
49 I C. 439.

Construction.

——S. 42—*Construction.*

The powers given by S. 42 ought not to be extended beyond what the law absolutely requires. (*Smyth, Elsmie, Barkeley and Rattigan, JJ.*) BARKAT RAM *v.* JAGAT RAM.
17 I. C. 379: 249 P W. R. 1912 (F. B)

——S. 42—*Construction—Discretion of Court.*

S. 42 is not exhaustive of the declaratory suits entertainable by Courts. A person owning properties and residing within the area of local body has a substantial interest in its proper constitution and can bring a suit for declaration of the invalidity of the election of a member of the Board The Court however has a discretion to grant or refuse the declaration sought for, and may refuse it in a proper case even though the election is invalid. (*Sadasiva Aiyar and Spencer, JJ.*) LAKSHMINARASIMHA SOMAYAJI IYAR *v.* RAMALINGAM PILLAI. **39 M. L J. 319 : 12 L. W 202 : (1920) M. W. N. 519 : 59 I. C. 245 : 28 M. L. T. 205.**

——S 42—*Construction—Not exchaustive—Suit to set aside alienation of trust property.*

S. 48 is not exhaustive of a case in which declaratory decree can be made. A suit by the worshippers of a temple for a declaration that an alienation by the trustee is invalid is maintainable (*Abdu Rahim and Ayling JJ.*) VEERAMACHANENI RAMASWAMI *v.* SOMA PICHAYYA. **45 Mad. 410 : 1920 M. W. N. 393 : 58 I C. 585 : 38 M L. J 226**

——S. 42—*Construction.*

The section must be construed liberally and illustrations (*e*) and (*f*) show that it includes suits

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Discretion of Court.

by a presumptive reversioner for a declaration that alienations by a Hindu widow are not binding on them and also suits to declare that an adoption is invalid. (*Wallis, C. J. and Coutts Trotter, J.*) BAPPAYYA *v.* AKAMMA. **36 I. C. 255.**

——S. 42—*Construction—Section if exhaustive.*

S. 42 is not intended to be exhaustive as regards the circumstances under which declaratory suits can be maintained. 42 M. 270 P. C Ref. (*Sadasiva Aiyar and Napier, JJ.*) RAMAKRISHNA *v.* NARAYAN PATTAR. **39 Mad. 80 : 27 M. L. J. 634 : 26 I. C. 883 : 1914 M. W. N. 912.**

Discretion of Court.

——S. 42—*Discretion of Court— Settlement on long standing dispute*

The discretionary power which Courts possess to grant a declaratory decree should be exercised to put an end to disputes which have lasted a considerable time. (*Mr Ameer Ali.*) RANI INDAR KUAR *v.* THAKUR BALDEO BAKSH SINGH.
39 M. L. J. 115 : 28 M. L T. 334 : 25 C. W. N. 170 : 7 O. L. J 439 : 23 O. C 291 : 57 I. C 397 : 18 A. L. J. 1057 (P. C.).

——S. 42—*Discretion of Court—Declaratory relief—Jurisdiction to grant—Statutory remedy Bengal Act, III of 1899, Ss. 341 and 617 — Demolition of buildings.*

Under the provisions of the Calcutta Municipal Act (III of 1899) the Corporation of Calcutta has power to remove a building encroaching on public land subject to a liability to pay compensation for the building if it is proved to have been erected before 1863. The Court of Small Causes has exclusive jurisdiction to assess the compensation, as a special tribunal. The Corporation declined to admit the owner's right to compensation on the grouud that the building was erected after 1863 and proceeded to demolish it. The owner brought a suit in the ordinary Civil Court, *Held* that the Court had a discretion to make a declaration that the building was erected before 1863 and that the owner was entitled to compensation. (*Lord Chancellor.*) JOSEPH *v.* CORPORATION OF CALCUTTA **44 Cal. 87 : 20 M. L. T. 383 : 18 Bom L. R. 878 : 24 C. L. J. 498 : (1916) 2 M. W. N. 544 : 21 C. W N. 194 : 5 L. W 199 : 36 I C. 912 : 43 I. A. 243 : 32 M. L. J. 631 (P. C.).**

——S. 42—*Discretion of Court.*

To grant a declaration decree which is nothing more than a stepping-stone for further litigation and is of no practical effect is not a proper exercise of the discretion of Court. (*Piggott and Walsh, JJ.*) ALI JAFAR *v.* FAZAL HUSAIN KHAN.
20 A. L. J. 557 : 44 A. 622 : 4 U. P. L R. (A) 131 : 1922 A. 349.

——S 42—*Discretion of Court.*

It is always in the discretion of the Court to grant or refuse a declaratory decree. (*Rafique and Piggott, JJ.*) LALA RAM RAGHUBIR LAL *v* DIP NARAIN SINGH. **45 A. 311 : L. R. 4 A 380 : 9 O. & A. L. R. 349 : 21 A. L. J. 168 . 1923 A. 287.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Discretion of Court.

——S 42—*Discretion of Court.*

The Court has a discretion to grant or refuse declaratory relief An Appellate Court will not interfere unless the discretion has been exercised arbitrarily or wrongly. (*Rafique and Lindsay, JJ.*) BALBHANDER PRASAD *v.* PRAG DATT.
42 All. 492 : 50 I. C. 938 : 17 A. L. J. 765.

——S. 42—*Discretion of Court—Declaration sought by auction-purchaser—When cannot be granted.*

A purchaser at an auction sale of immoveable property cannot sue for a declaration if in addition to his refusing to accept the draft sale-deed presented by the vendor he keeps quiet for a long time till the property is sold to another person. (*Banerjee and Piggott, JJ.*) IMAM *v.* KALLU.
38 All. 433 : 34 I C. 298 : 14 A. L. J, 645.

——S. 42—*Discretion of Court—Decree for relief different from that claimed in plaint—Landlord and tenant—Adverse possession.*

When a plaintiff seeks a declaration of a specific character and fails to establish the fact whereon such declaration can be founded he is ordinarily not entitled to a different declaration but the Court may, if the defendant is not taken by surprise, grant the plaintiff a declaration different from the relief sought in the prayer clause of the plaint. 5 C. 949, Ref. A purchaser of a holding after having been in possession for upwards of 12 years and having acquired title thereto by adverse possession cannot, when it is found that the interest acquired by him was not a permanent tenancy but a non-transferable occupancy right only, obtain a declaration that he has become the holder of a non-transferable occupancy right in respect of that holding. 35 C. 570; 43 C. 748, Ref. (*Sanderson, C. J. and Mookerjee, J.*) NABIN CHANDRA *v.* NILKAMAL.
36 I. C. 11 : 25 C. L. J. 537.

——S. 42—*Discretion of Court.*

Per Mookerjee, J.—The Court is not concerned with the object or motive of the party who comes into Court in assertion of his alleged right and he is not to be refused a declaration merely because he seeks it with a view to influence the opinions of the executive authorities. But the position is different when the declaration sought can be based only on the investigation of a question which is by statute or otherwise expressly excluded from the cognizance of the Civil Court. (*Jenkins, C J., Mookerjee and Holmwood, JJ.*) HEMENDRA NATH *v.* UPENDRA NARAIN.
43 Cal. 473 : 20 C. W. N. 446 : 32 I. C. 437 . 22 C. L. J: 419.

——S. 42—*Discretion of Court.*

Where the plaintiff the assignee of a lease by A to B sued for a declaration that the lease was a permanent, heritable and transferable one, that the rent was fixed in perpetuity and that A was bound to recognise the plaintiff as tenant. *Held*, that a declaratory decree may be properly granted in this case so that the point in dispute between the parties may finally be set at rest. (*Newbould and Ray, JJ.*) NAN MOHUN GHOSE *v.* EQUITABLE COAL CO., LD. **24 I. C. 144 : 18 C. W. N. 596.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Discretion of Court.

——S. 42—*Discretion of Court—How exercised.*

A decree under S. 42 is only discretionary and would depend on the circumstances of each case; so that while a declaration that a widow's alienation is not binding may be granted at the instance of a remote reversioner, even if the immediate reversioner, *viz.*, the daughter of the widow is alive, it will not be granted if the remote reversioner is an old man of 50 with no chance of succeeding to the estate. (*Coxe and Chatterjee, JJ.*) BALDEO *v.* SHAMDHURE. **23 I. C. 809.**

——S. 42—*Discretion of Court.*

The Court has a discretion to grant or refuse to grant a declaration under S. 42 of the Act according to the circumstances of the case, *e.g.*, that an election is invalid on account of irregularity. (*Fletcher, J.*) BHUPENDRA NATH *v* RAMAJIT SINGH. **20 I. C. 676 : 41 Cal. 384.**

——S. 42—*Discretion of Court—Decree declaratory—Decree always depends on discretion.*

If a declaratory suit challenging an alienation of ancestral holding is barred, so far as near collaterals are concerned, distant collaterals who are minors cannot be put forward to bring the suit within the time. (*Chitty and Chatterjee, JJ.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* BHAGWAN CHANDRA ROY. **10 I C. 531 : 15 C. W N. 758.**

——S. 42—*Discretion of Court—Chance of succession—Remote—Effect.*

When the chance of succession of the plaintiff is very remote, Court may refuse a declaration. (*Shah Din J.*) LASHKAR KHAN *v.* SHAH DIN.
33 I. C. 997 : 26 P. W. R 1916.

——S. 42—*Discretion of Court—Futility of relief.*

A declaratory decree which may be futile or cannot ensure the rights of the plaintiff to succeed to the suit property should not be granted. (*Rattigan and Chevis, JJ.*) TAWAKAL SHAH *v.* JIWA SHAH. **56 P. W. R. 1913 : 18 I. C. 511: 129 P. L R. 1913.**

——S. 42—*Discretion of Court.*

A declaration which is of no practical use to plaintiff ought not to be granted. (*Rattigan and Shah Din, JJ.*) RAM NARAIN *v.* RAM KISHEN.
46 P R. 1911 : 108 P. W. R. 1911 : 10 I. C. 515 : 179 P. L. R. 1911.

——S. 42—*Discretion of Court—Persons not parties to suit in which declaration is sought——Declaration in favour of.*

Plaintiffs (representatives of the pattadars and the mirasidars of a village) sued for a declaration that the sale of the plaint land (alleged to be blacksmith's unenfranchised inam) to the third defendant by defendants 1 and 2 inamdars (until shortly before suit, when they were removed from service by the plaintiffs) was void and to recover possession of the land from the third defendant. The decree for possession was refused because defendants were found to own the kudivaram of the land. *Held*, that the grant of a declaration under S. 42 of the Specific Relief Act being discretionary, the Court ought not, in view of the

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Discretion of Court.

fact that plaintiffs had not appointed others in the place of defendants 1 and 2 and might in fact never appoint anybody else to use its discretion to make the declaration. (*Oldfield and Odgers, JJ.*) ELLAPPA NAIDU *v.* BOOLOGACHARY.
(1922) M. W. N. 180 : 16 L. W 531 : 42 M. L. J. 359 : 1922 Mad. 97.

——S. 42—*Discretion of Court—Declaration that plff. is the next reversioner and not the deft*

The grant of declaratory relief is discretionary with the Court. There is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner at the date of the institution of the suit, a decision which may serve no useful purpose as both the claimants may be dead and a different person may be entitled to succeed when the succession actually opens. Where the plaintiffs sued for a bare declaration that they were the next reversioners of a deceased Hindu and that the defendant was not entitled to usurp the character of the next reversioner, *held*, that the suit was not maintainable. 45 Cal. 510, Ref. (*Wallis, C. J. and Seshagiri Aiyar, J.*) RAMA RAO *v.* SURYA RAO.
42 Mad 219 : 25 M. L. T. 184 : 49 I. C. 835 : 9 L W. 329 : 36 M L. J. 169.

——S. 42—*Discretion of Court.*

While indicating the character of right which may be declared by the Court of law, s. 42 leaves it to the discretion of the Court to grant or refuse the relief claimed. (*Ayling and Seshagiri Aiyar JJ.*) BOBBA PADMANABHUDU *v.* BOBBA BUCHAMMA.
47 I C. 702 : 8 L. W. 335 : 35 M. L. J. 144.

——S. 42—*Discretion of Court—Exercise of*

The Court has discretion in granting declarations in declaratory suits The discretion should be exercised on a consideration of the facts (*Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J.*) VENKAT ROW *v.* TULJARAM ROW
5 L. W. 482 : 38 I C 270 : (1917) M W N 30

——S. 42—*Discretion of Court—Suit for declaration—Decree.*

A declaratory decree is a matter for discretion for the Court. (*Spencer and Phillips, JJ.*) THENIRKULAM MUTHUSAMI IYER *v.* KALYANIAMMAL.
40 Mad. 818 : 21 M L T. 93 : 38 I. C. 223 : 5 L. W. 284: *Also* 1 O. L. J. 496. 25 I. C. 908. 15 O. C. 354.
See also 38 Mad. 1162 : 16 M. L. T. 310. 26 I. C. 232 27 M L. J. 520.

——S. 42—*Discretion of Court Claim of arrears of rent improperly added.*

If a prayer for a declaration of title is added to the substantial claim for arrears of rent with the improper object of ousting the jurisdiction of the Revenue Court and the suit is filed in a Civil Court, the Court will not allow the plaint to be amended so as to be in a position to grant the declaration, but will dismiss the suit 12 I. C. 430, Foll. (*Sadasiva Aiyar and Moore, JJ.*) SUBBANA ACHARIAR *v.* GOPALA KRISHNA ACHARI
34 I. C. 354.

SPECIFIC RELIEF ACT (I OF 1877), S 42—Duty of Court.

S 42—*Discretion of Court.*

The Court will not go to help a plaintiff, who produced a number of fraudulent deeds to cheat creditors, to obtain a declaration that some portion of the alleged consideration passed between the parties to the fraud. (*Benson, Offg C. J and Abdur Rahim, J.*) LAKSHMINARAYANA NAIDU *v.* SOMASUNDARAM PILLAI.
17 I. C. 602 : 12 M L. T. 534.

—— S. 42—*Discretion of Court—Declaratory decree—Grant of.*

When substantial relief cannot be granted, a declaratory decree ought not to be granted. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) BASAVESWARASWAMI *v.* HAVALIJI HUSSAIN.
38 Mad 6 : 12 M L T. 405 : 17 I. C. 158 : (1912) M.W. N. 1080 : 23 M. L. J. 479.

—— S. 42—*Discretion of Court—Merits of the case to be heard.*

The question of discretion possessed by the Court in the matter of granting declaration could not be considered until the case had been heard on its merits. (*Stuart and Kanhaiya Lal A J Cs.*) AMARCHAND PAL *v.* SECRETARY OF STATE.
27 I. C. 354 : 17 O. C 369.

——S. 42—*Discretion of Court—Declaration as to proposition of law*

The granting of a declaratory decree under S. 42 is a matter of discretion and the Court cannot be asked to give a declaration which merely affirms a proposition of law. (*Piggott, J. C.*) NARENDRA BAHADUR *v.* BASUDEO MISRA.
14 I. C 81.

—— S. 42—*Discretion of Court—Substantial injury.*

The granting of relief is discretionary under the section and the Court is not to grant it unless there is substantial injury. (*Coutts and Das, JJ.*) CHHAKOWRI *v.* SECRETARY OF STATE FOR INDIA.
52 I. C 990 : (1920) Pat. 1.

Duty of Court

——S. 42—*Duty of Court—Title to land—Nature of right to be ascertained*

A Court ought not to declare the title of any party to a piece of land without ascertaining what the nature of that title is. (*Fletcher and Teunon, JJ.*) HARI KRISHNA DAS *v.* DINOR KINLA.
29 I. C. 355

—— S. 42—*Duty of Court—First Court's duty*

It is the duty of the first Court to decide whether the suit is barred by the proviso to S 42. (*Shah Din and Chevis, JJ.*) GANESH LAL *v.* BENI PERSHAD.
1 P. R. 1911 : 47 P. L. R. 1911 : 9 I. C 673 : 22 P. W. R. 1911.

——S. 42—*Duty of Court Denial of title not averred in plaint.*

The plff. should not be allowed to prosecute the claim on the ground of the denial of his alleged title by the deft which was not in the plaint. (*Ayling and Napier, JJ.*) SUBBAYA NADAN *v.* AIYAVOO REDDI.
(1917) M. W. N 70 : 37 I C. 977 : 5 L. W. 752.

——S. 42—*Duty of Court — Failure to prove damage—Dismissal of suit.*

When there is sufficient cause of action for a declaratory relief, the Court must declare the plffs

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Duty of Court.

right and not dismiss the suit for declaration because the plff. failed to prove the additional plea of damage. (*Lindsay, J. C.*) BAKHTAWAR SINGH *v.* DHARAM SINGH **34 I. C. 9 : 3 O. L. J. 40**

——— S. 42—*Duty of Court—Subsequent events—Consideration of.*

The plff. in a declaratory suit must establish his title though the deft. may not pretend to be able to establish any title in himself. The appellate Court in such suit has only to consider the question whether the decision of the Lower Court is correct with reference to the state of affairs at the time the suit was instituted and cannot take into consideration the bearing, on the title of the contending parties of the facts which came into existence, after its institution 21 Mad 136 Rel. (*Evans and Lindsay, A. J. Cs.*) INDRA BIKRAM SINGH *v.* CHANDIKA BAKHSH SINGH. **11 I. C. 676 : 14 O. C. 170.**

——— S. 42—*Duty of Court—Declaratory relief.*

A declaration likely to be infructuous should not be made. (*Mullick and Jwala Prasad, JJ.*) HILL *v.* SATAN SINGH. **50 I. C. 857 : 4 Pat. L. J. 312.**

Further relief.
Amendment of Plaint.
Cancellation of document.
Injunction.
Joint possession.
Meaning of.
Partition.
Possession with deft.
Possession with plff.
Possession with third party.
Redemption
Suit to set aside decree.
Miscellaneous.

Further relief—Amendment of Plaint.

——— S. 42 (Proviso)—*Further relief—Amendment of plaint.*

A suit only for declaration of right to property sought to be partitioned without asking for possession would be amended afterwards and could not be dismissed at once. (*Teunon and Skeepshanks, JJ.*) JAGATTARINNI DASI *v.* PRAFULLA CHANDRA GHOSE. **35 I. C. 792.**

——— S. 42—*Further relief—Amendment of plaint—Suit for declaration that decree passed against plaintiff shall not affect him.*

The plaintiff appealed *Held* (*a*), that a declaration suit that a certain decree being based on fraud shall not affect the plaintiff's rights and for any other relief which the Court might deem fit to grant was one for a declaration only. 20 Bom 736 and 30 Cal. 788 Ref.; (*b*) that a suit for mere declaration was not competent in this case unless followed up by a prayer for consequential relief by injunction or otherwise. 38 Mad. 522 and 29 I. C. 132 Ref; (*c*) that the Court ought to have allowed the plff. an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise; and (*d*) that the mere prayer for general relief is not necessarily a prayer for consequential relief so as to make the suit

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Cancellation of Document.

out of the class of suits for a declaration only. (*Shadi Lal and Dundas, JJ.*) BUA DITTA *v.* LADHA MAL. **65 P. W. R. 1921.**

——— S. 42 (Proviso)—*Further relief—Amendment of plaint—Suit for a declaration that decree against plff. is void—Court Fees Act, S. 7 IV (c).*

Plff. sued for a declaration that a certain decree was fraudulently obtained and should not affect his rights and for other relief which the Court might grant *Held*, that the suit was one for a declaration only, and it was not competent in this case unless followed up by a prayer for consequential relief by injunction or otherwise. The Court ought to have allowed the plff. an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise. (*Shadi Lal and Dundas, JJ.*) BUA DITTA *v.* LADHA MAL. **54 I.C. 833 : 2 U. P. L. R. (Lah.) 37.**

——— S. 42—*Further relief—Amendment of plaint.*

Where a plff. has a right to a declaration against one person and a right to consequential relief against another he is not bound to join the latter as deft. in the declaratory suit but can sue for a declaration without asking for further reliefs. S. 42 does not require a plff. to include persons against whom he may have a right to consequential relief. Where an objection to a declaratory suit on the ground that he does not ask for consequential relief is taken on appeal for the first time the Court must remand the suit allowing the plff. to amend the plaint The Court should not dismiss a suit without allowing an opportunity for amendment. (*Robinson, J.*) S. T. K CHETTY *v.* BALASUNDARAM. **13 Bur. L. T. 100 : 59 I. C. 809 : 10 L.B. R. 198.**

——— S. 42 (Proviso)—*Further relief—Amendment of plaint in appeal.*

Where the maintainability of a suit for declaration without consequential relief is in issue in the first Court and the plff does not amend the plaint, he does so subject to the risk of an adverse decision, and cannot ask for the amendment in appeal 15 M. 255 : 26 C. 845 Ref ; 15 M. 15 Dist. (*Ormond and Twomey, JJ.*) MAUNG SOK KYUN *v.* MA SHWE YU. **36 I. C. 611 : 10 Bur L. T. 241.**

——— S 42 (Proviso)—*Further relief—Amendment of plaint—Failure to ask possession.*

If the relief of possession is not asked and the plaint is not amended before the issues and if it is found that plff was not in possession the suit is liable to be dismissed. 1 M. 40 Foll. (*Twomey and Ormond, JJ.*) FLEMING SHAW & CO. *v.* SADIRAM JAMNADAS. **32 I. C. 564 9 Bur. L. T. 90.**

Further Relief—Cancellation of Document.

——— Ss. 42 (Proviso) and 39—*Further relief—Cancellation of document.*

The question whether a plff. must sue for cancellation of a document, under which the deft. in possession claims, depends upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the deft. to prove circumstances establishing its validity. (*Scott C. J. and Rae, J.*) ANDAPPA *v.* TOTAPPA. **33 I.C. 441 : 17 Bom. L. R. 1137 (Note).**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Cancellation of Document.

——S. 42 (Proviso)—*Further relief—Cancellation of document—Suit to declare a will, void*

A person left a will in favour of a woman describing her as his wife. His brother's sons brought a suit for a declaration that the will is null and void and that the woman is not widow of the deceased. *Held*, that the will had become operative after the testator's death and that the plaintiff could not ask for a mere declaration but must ask for cancellation of the will. 109 P. R. 1893 Ref. (*Shadi Lal and Leslie Jones, JJ.*) HUKAM SINGH *v.* MT GAYAN DEVI.

87 P. R. 1916 : 127 P. W. R. 1916 : 36 I. C. 95 : 31 P. L. R. 1917.

Further Relief—Injunction.

——S. 42 (Proviso)—*Further relief—Injunction.*

In a suit for declaration of title to land a prayer for injunction upon the defendant is a prayer for consequential relief quite as well as a prayer for confirmation of possession. (*Mookerjee and Chatterjee, JJ.*) DINA NATH DAS *v.* RAMNATH DAS. **34 I. C. 702 : 23 C. L. J. 561.**

——S. 42—*Further relief—Injunction.*

An injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against defendants who are actually in possession. 33 M. 452 : 36 M. 62 Foll. 14 S. L. R. 137 ; 36 M. 364 Dist. (*Kincaid, J. C. and Raymond, A. J. C.*) MANOHERDAS *v.* RAMDAS. **1923 Sind 17.**

——S. 42—*Further relief—Injunction—Court-fee.*

Where plaintiff not only sued for a declaration but asked for a temporary injunction restraining defendant from executing the *ex parte* decree against plaintiff, *held*, that the real relief is perpetual injunction and Court-fee must be paid on it. (*Madgaonker, A. J. C.*) SHRIRAM *v.* FIRM OF DATARAM MUNSHIRAM. **16 S. L. R. 169 : 1922 Sind 20.**

Further Relief—Joint Possession.

——S. 42—*Further relief—Joint possession—Larger portion of land in suit in joint possession of plff. and deft.*

The fact that the land in dispute is in joint possession of the plaintiff and defendant in no way entitles the plaintiff to bring a declaratory suit. The plaintiff who is in joint possession of a greater portion of the land in suit could and should sue for exclusive possession. 101 P. R. 1909 Ref. (*Broadway and Wilberforce, JJ.*) MUSAMMAT SHANKARI *v.* JODHA. **68 I. C. 576 : 3 Lah. L. J. 437.**

——S. 42 (Proviso)—*Further relief—Joint possession—Co-sharer—Suit for declaration of his right to the property.*

A co-sharer in possession of the land can maintain a suit for a declaration of his proprietary rights in it. (*Scott-Smith and Leslie Jones, JJ.*) BALRAM SINGH *v.* BAL DEO SINGH. **42 I. C. 443 : 168 P. W. R. 1917.**

——S. 42 (Proviso)—*Further relief—Joint possession—Suit for declaration.*

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Meaning of.

To get a declaration under S. 42 the plaintiff need not show that he has exclusive possession of the suit property, joint possession is sufficient. But if any portion of the property is seperable from the rest and the plaintiff can prove no sort of possession over that part, he cannot sue for a mere declaration as regards that portion. 15 M. 307 : 21 I. C. 716 Rel. (*Scott-Smith and Shadi Lal, JJ.*) HAKIM *v.* GHULAM JANNAT. **27 P. R. 1917 : 39 I. C. 355 : 52 P. W. R. 1917.**

——S. 42 (Proviso)—*Further relief—Joint possession—Declaratory suit by persons in joint possession.*

Where persons are jointly in possession of the land in dispute, either of them may bring a declaratory suit for title. (*Shah-Din and Smith, JJ.*) LACHMI BAI *v.* HONDI BAI. **100 P. R. 1913 : 7 P. L. R. 1914 : 21 I. C. 719 : 14 P. W. R. 1914.**

——S. 42 (Proviso)—*Further relief—Joint possession—Scramble for possession.*

Where it is not proved in a joint holding that the defendant had collected more than his share of the rents of the village, there is no effective ouster of the plaintiff though the former had taken muchilikas from persons who are admitted by the tenants of both parties. There is only a scramble for possession, therefore the plaintiff's suit for a mere declaration would lie. (*Benson and Sundara Aiyar, JJ.*) BOYANAPALLI VENUGOPAL *v.* POTHAPALLI VENKATA. **12 I. C. 548 : (1911) 2 M. W. N. 384.**

——S. 42 (Proviso)—*Further relief—Joint possession.*

Where the plaintiff is in joint possession of the disputed property through the lambardar, a claim for partition by him is not barred by S. 42 of the Act. (*Lindsay and Kanhaivalal, A. J. Cs.*) BHARATH SINGH *v.* BALBHADHAR SINGH. **20 I. C. 429.**

——S. 42—*Further relief—Joint possession—Suit by some members of a Mitakshara joint family for declaration of their shares in joint family property.*

A suit by some members of a Mitakshara joint Hindu family for a declaration of their share in the joint family property without a prayer for partition by metes and bounds is maintainable and not barred by S. 42. 43 I. A. 15 Ref. (*Chamier, C. J. and Sharfuddin, J.*) ASMAN SINGH *v.* TULSI SINGH. **1 Pat. L. W. 335 : 2 Pat. L. J. 221 : 39 I. C. 173 : 1917 Pat. 131.**

Further Relief—Meaning of.

——S. 42—*Further relief—Meaning of—Additional and alternative reliefs.*

The expression means additional relief and not a relief in the alternative. In a suit for specific performance for the contract of sale of land the expression does not include a claim for damages or refund of the advance money in the alternative. (*Lord Atkinson.*) BRICKLES *v.* SNELL. **38 I. C. 123 : 86 L. J. P. C. 22 (P. C.).**

——S. 42—*Further relief—Meaning of—Right to joint enjoyment and right to partition are distinct incidents of joint property.*

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Meaning of.

"Further relief" in the proviso to S. 42 of the Act means relief to the legal character or rights as to property which the plaintiff is entitled to and whose title or right the defendant denies. It must also be relief appropriate to and necessarily consequent on the right or title asserted. Joint enjoyment and liability to partition are distinct incidents of joint property and therefore a suit for mere declaration of title to a joint enjoyment is enough and relief by way of partition need not be asked for. The proviso to S. 42 does not compel a plaintiff to sue for all the relief that could possibly be granted or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. (*Mookerjee and Buckland, JJ.*) JOYNARAIN *v.* SUCHITRA. **65 I. C. 8 : 33 C. L. J. 592.**

——S. 42 (Proviso)—*Further relief—Meaning of—Jurisdiction.*

Injunction is a consequential relief. The reasonable construction of the proviso to S. 42 is that the further relief which the plaintiff is bound to claim in such relief as he is in a position to claim in an ordinary suit by virtue of the title sought to be established or declared and whether he is in such a position depends upon the circumstances of the case. A suit will not be barred under the proviso unless the Court is satisfied beyond all doubt that the plff. ought to seek further relief and though he has claimed only a mere declaration. (*Mookerjee and Beachcroft, JJ.*) AISA SIDDIKA *v.* BIDHU SEKHAR. **18 I. C. 633 : 17 C. L. J. 30.**

——S. 42 (Proviso)—*Further relief, meaning of—Confirmation of possession, Cr.P.Code, S. 145, order under.*

Confirmation of possession is consequential relief within S. 42 of the Sp. Rel. Act, and can be sought even though the plff. was not in possession on the date of suit. 15 W. R. 95 : 16 W. R. 213; 19 W. R. 18: 22 W. R. 438 Foll. An order under S. 145, Cr. P. Code, has not necessarily the effect of actual dispossession of the unsuccessful party and in a suit by him it is not necessary to ask for recovery of possession. Where a person sues for confirmation of possession, the mere fact that he should have asked for recovery of possession, does not involve the dismissal of his suit. 16 W. R. 27: 24 W. R. 301 : 25 W. R. 168 : 11 C. L. R. 443 and 451 Ref. (*Mookerjee and Beachcroft, JJ.*) JHUMAN KARTI *v.* DEBU LAL SINGH. **16 I. C. 898 : 22 C. L. J. 415.**

——S. 42 (Proviso)—*Further relief, meaning of—Suit for declaration that deft. is not mutawalli.*

Plff. asked for a declaration that a certain wakfnamah was invalid and that defts. had not acquired any valid title as mutawalli, under that document that if the wakfnamah be valid, then the deft. had not been legally appointed as mutawalli. The plff. did not ask for recovery of possession or for the removal of the deft. and the appointment of trustee *Held*, that the suit was incompetent as the plff. being able to seek further relief had not done so. 13 C. 147 ; 1 M. 40 ; 2 B. 230 Rel. The further relief referred to in the proviso to S. 42 is further relief in relation to the legal character or right to any property to which the plff. is entitled and whose title to such character or right the deft. denies or is interested in denying and it must be a relief appropriate to and consequent on the right or title asserted. (*Mookerjee and Carnduff, JJ.*) ERFAN MANDAL *v.* SAMIRUDDIN MANDAL. **15 I. C. 552.**

——S. 42—*Further relief—Meaning of.*

A prayer for general relief is not necessarily a prayer for consequential relief so as to take the suit out of the class of suits for declaration only. (*Shadi Lal and Dundas, JJ.*) BUR DITTA *v.* LADHA MAL. **54 I.C. 833 : 2 U.P.L.R. (Lah.) 37.**

——S. 42 (Proviso)—*Further relief—Meaning of—Suit for declaration that mortgage decree is not binding on plff. and for injunction.*

A minor sued for declaration that a decree passed against her was not binding on the ground that she was sued and the decree obtained against her as a major and for an injunction restraining the deft from executing the decree against her interest in the mortgaged property. *Held*, that the suit as framed was maintainable and that the plff. was not bound to ask for redemption.

Per *Oldfield, J.*—The further relief contemplated by proviso to S. 42 means further relief arising from the cause of action on which the plff's suit for declaration is based. (*Wallis, C. J. and Oldfield, J.*) KANNIAMMAL *v.* SANKA KRISHNA MURTHI. **33 M. L. J. 676 : 43 I. C. 25 : (1917) M. W. N. 790.**

——S. 42 (Proviso)—*Further relief—Meaning of.*

Consequential relief means a substantial remedy in accordance with the title of which declaration is prayed for. A prayer for possession being unwarranted by plaint averments is not a relief consequential upon a declaratory decree. (*Bakewell, J.*) MURZA HYDER ALI SAHIB *v.* HUSSAIN RAZA SAHIB. **24 I. C. 316 : 1 L. W. 398.**

——S. 42 (Proviso)—*Further relief—Meaning of—Suit for declaration that plff's. share is not liable for debt by sons.*

Proviso to S. 42 of the Act refers to the legal character or right to property which is set up in the plaint. Further relief in the proviso is a relief appropriate to and consequent on, the right asserted. A suit by the son of a Hindu father, for a declaration that their shares in the family property are not liable to attachment and sale in execution of a money decree against their father is maintainable even though the deft. is in possession of it as mortgagee from the father. (*Kanhaiya Lal and Kendall, A. J. Cs.*) NARINDRA BAHADUR SINGH *v.* RAM SINGH. **45 I. C. 859 : 5 O. L. J. 133.**

Further relief—Partition.

——S. 42 (Proviso)—*Further relief—Partition—Revenue paying estates—Suit for declaration of share.*

All that Civil Courts could do in respect of a suit for partition of joint family property subject to payment of land revenue is to ascertain the share of plaintiffs and to give them a decree declaring the amount of that share as against the defts. leaving to plffs. to take any steps they might

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Possession with deft.

think proper for the actual partition of their share in the Revenue Court under S. 54 of the C. P. Code. A suit for declaration of the plff.'s share in such property without asking for partition is not barred by the proviso to S. 42. (*Rafique and Piggott, JJ.*) RUPAN RAI *v.* SUBKARAN RAI.
41 All. 207 : 49 I. C. 367 : 17 A. L. J. 112.

Further relief—Possession with deft.

——S. 42—*Further relief—Possession with deft.—Entry in revenue records—Effect of Possession.*

An entry made by the Revenue Court in the Revenue records changing the property into the name of the minor who had just attained majority, whereas the property stood all along in the name of the guardian, amounts in law to dispossession. S. 42 bars suit by the guardian for declaration of title alone. (*Rafique and Piggott, JJ.*) KUMAR UDIT NARAYAN SINGH *v.* DIWAR RANDHIR SINGH. **L. R. 3 A 642.**

——S. 42 (Proviso)—*Further relief—Possession with deft.*

A declaratory suit is barred by the proviso to S. 42 where plff. being out of possession, still does not sue for recovery thereof. (*Rafique and Piggott, JJ.*) ISHWARI SINGH *v.* NARAIN DAT.
36 All. 312 : 23 I. C. 555 : 12 A. L. J. 408.

——S. 42—*Further relief— Possession with defendant.*

A person suing for a declaration that a decree and a sale thereunder is fraudulent and who is not in possession of the same, cannot proceed with the suit, without asking for recovery of possession. (*N. R. Chatterji and Panton, JJ.*) JOGENDRA NATH SEN *v.* TOLIANTNESSA BIBI.
62 I. C. 685

——S. 42 (Proviso)—*Further relief—Possession with deft.—Declaration of title.*

Though disturbance of the title of the plaintiff by the defts. is not proved, a decree for possession in favour of plff. ought to follow a declaratory decree, when the deft. is in possession. (*Beachcroft and Walmsley, JJ.*) LAL MEAH *v.* RAJANI KANTA. **50 I. C. 311.**

——S. 42—*Further relief— Possession with deft.—Suit for mere declaration does not lie.*

When a suit was filed for a declaration of title as regards a number of properties, and the plaint itself showed a right to present possession with respect to some, *held* in the absence of claiming possession also, a suit for a mere declaration was not maintainable. (*Leslie Jones, J.*) MT. JAIKAUR *v.* LABHU **4 L. L. J. 207 : 1922 L. 163.**

——S. 42—*Further relief— Possession with deft.—Mortgagee without possession—Suit for declaration.*

A mortgagee cannot sue for declaration that he is a mortgagee in possession, if he is not in actual possession and if the entry in revenue papers show that he is a mortgagee without possession. (*Rooof and Martineau, JJ.*) NARAIN DAS *v.* JANAT BIBI. **67 I. C. 152.**

——S. 42 (Proviso)—*Further relief—Possession with deft.*

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Possession with plff.

A suit for a mere declaration is bad where possession is with deft and can be claimed by plff. (*Chevis and Broadway, JJ.*) SHIV RAM DAS *v.* BHAG DEVI. **48 I. C. 838 : 118 P.R 1918.**

——S. 42 (Proviso)—*Further relief—Possession with deft.—Suit for declaration of right to manage—Alternative turns—Possession.*

Plaintiff who is out of possession of charity properties cannot confine his suit to a declaratory decree but should ask for possession though he is entitled to the right of management in alternate years only and the Court may not be able to place him in possession by reason of the fact that the opposite party was admittedly rightly in possession during the trial of the suit 33 M. 452; 21 M. L. J. 952 Foll (*Abdur Rahim and Sadasiva Aiyar, JJ.*) APPU PILLAI *v.* PERUMAL PILLAI.
23 M L. J. 118 : 16 I. C. 630 : 12 M. L. T. 168.

——S. 42 (Proviso)—*Further relief—Possession with deft*

A suit for declaration and possession in which declaration is merely introductory to a claim for possession is not a suit under S. 42 of the Sp. Rel. Act. Declaration in such a suit cannot be claimed against a person who does not put forward any claim to the property in suits but who might advance his claims to some other property later on. (*Miller, C. J. and Jwala Prasad, J.*) ASHARFI SINGH *v.* MADHABESHEOAR INDRA NARAIN SAHI. **45 I. C. 665 : 4 Pat. L. W 412.**

——S. 42 (Proviso)—*Further relief—Possession with deft.—Declaratory decree when possession is also required.*

If the plaintiff fails to ask actual or symbolical possession, he being entitled to it, cannot get a declaratory decree. 32 M. 452 Foll; 5 Bom. L. R. 195 Diss. (*Fratt, J. C. and Crouch, A. J. C.*) MIR HUSSAIN BUX *v.* KAUDO. **32 I. C. 689 : 9 S. L. R. 174.**

Further Relief—Possession with plff.

——S. 42—*Further relief—Possession with plaintiff.*

Where some of the members of a joint Hindu family sued for a declaration that an alienation of the joint family properties made by the other members were not binding on them and it was found that the alienees were not in possession, *held* that the plaintiffs being in physical possession with other members of the family of the properties, were not bound to sue for possession and that S. 42 of the Sp. Rel. Act was no bar to the suit. 36 A. 126 Rel. (*Banerjee and Gokul Prasad, JJ.*) KANHAI LAL *v.* JAI LAL.
L. R. 3 A. 632 : 20 All. L. J. 990 : 45 A. 164 : 1923 A. 54.

——S. 42 (Proviso)—*Further relief—Possession with plff.—Rival claimants—Court of Wards in possession on behalf of rightful owner—Suit for declaration.*

Several persons laid claim to Mahantship. The Court of Wards took possession of the estate, and declined to hand it over to any one till he had established his right to the Mahantship *Held*, that the possession of the Court of Wards being possession for the rightful owner the suit for a

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Possession with plff.

mere declaration of the rights of the plffs. without asking for possession was not barred by S. 42 of the Sp. Rel. Act. The Court of Wards was not a necessary party to the suit in such a a case. (*Richards, C. J. and Banerjee, J.*) JAGANNATH GIR *v.* TIRGUNA NAND. **28 I. C. 139 : 13 A. L. J. 252.**

——S. 42—*Further relief—Possession with plff.*

In a suit for declaration of title where plaintiffs are in possession it is for the defendants to prove adverse possession. (*Macleod and Crump, JJ.*) GAVARAWA KOM *v.* MALLANGOWDA. **1923 Bom. 382.**

——S. 42 (Proviso)—*Further relief—Possession with plff.*

A suit under S. 42 for a declaration of plff.'s right to the property left by Hindu widow in the hands of a receiver without a prayer for possession is maintainable as the receiver's possession is to be considered as plff.'s possession. (*Teunon and Sheepshanks, JJ.*) CHINTOMONI PATNI *v.* TARAK CHANDRA. **35 I. C. 17.**

——S. 42 (Proviso)—*Further relief—Possession with plff.—Declaratory suit—Possession partly with plff.*

Plaintiff sued for a declaration that he was the owner of a share of the holding of one *N*. The possession of the land in dispute had been for sometime in a state of flux and deft. and plff. were in possession of certain portions and plff. was co-sharer with *N* in those portions which were in the actual possession of *N*. *Held*, that the suit was maintainable. (*Broadway and Martineau, JJ.*) LABHURAM *v* NATHU. **55 I.C. 32 . 2 U. P. L. R. (Lah) 52.**

——S. 42 (Proviso)—*Further relief—Possession with plff.—Suit by mortgagor for declaration that mortgage is fully paid.*

A suit by a mortgagor in actual possession of the mortgaged property, for a declaration that the mortgage has been paid in full, is maintainable. (*Kensington, Offg. C. J. and Rattigan, J.*) SHER SINGH *v.* DEVI DAYAL. **302 P. L. R. 1913 : 20 I. C. 761: 210 P. W. R. 1913.**

——S 42 (Proviso)—*Further relief—Possession with plff.*

Where plff. holds possession under an order of the Magistrate under S. 146, Cr. P. Code, but possession has been ordered by the High Court to be delivered to deft. and possession is not yet delivered, the plff. can sue for declaration of title without joining the relief for possession 26 C. 8845; 28 M 338 Dist. (*Abdur Rahim and Sundara Aiyar, JJ.*) MALAIYA PILLAI *v.* TIRUMALAI PERUMAL. **36 Mad 62 : 10 M L. T. 277 : 12 I. C. 170: (1912) M. W. N. 161 : 21 M. L. J. 1022.**

——S. 42 (Proviso)—*Further relief—Possession with plff.—Suit for mere declaration.*

In the case of gift by a *pardhanashin* lady where possession has not been delivered, a suit for a mere declaration that the gift is invalid is not barred by S. 42. (*Kanhaiya Lal and Kendall, A. J. Cs.*) NIRAR HUSAIN *v.* ASHRAF-UN-NISSA. **35 I. C. 395.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Possession with third party.

——S. 42 (Proviso)—*Further relief—Possession with plaintiff.*

A person in possession of land can sue for declaration of his title thereto as against a person who has neither title nor possession, and such a suit is not liable to dismissal because a third person alleged to be interested in the land is not made a party thereto. (*Jwala Prasad, J.*) GAJINDRA SINGH *v.* AKAL KOER. **59 I. C. 292.**

——S. 42 (Proviso)—*Further relief—Possession with plff.—What plaint should contain.*

A plaint in a mere declaratory suit must allege that the plff is in possession of the property at the time. (*Fox C. J. and Twomey, J.*) MAUNG BA THAUNG *v.* MA SHIN MIN. **9 L. B. R. 37 : 37 I. C. 15: 10 Bur. L. T. 189.**

Further Relief—Possession with Third Party.

——S. 42 (Proviso)—*Further relief—Possession with third party.*

A plff. who is out of possession can sue for a declaratory decree against persons not in possession if the person in possession had not denied plff.'s right. It is open to a landlord to sue for a declaration of title as against a rival claimant in respect of lands in the possession of tenants. (*Banerji and Ryves, JJ.*) RATAN MOTI *v.* TILAK CHAND. **47 I. C. 856: 16 A. L. J. 666.**

——S. 42 (Proviso)—*Further relief—Possession with third party—Property with receiver.*

A Magistrate attached the property in suit under S. 146, Cr. P C., and appointed the Collector as receiver. One of the parties to the proceedings under S. 145, Cr P.C., brought a declaratory suit and it was held that the suit was properly framed as the plffs. could not demand possession from the defts. (*Chitty and Chatterjee, JJ.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* BHAGWAN CHANDRA ROY. **10 I. C 531 : 15 C. W. N. 758.**

——S. 42 (Proviso)—*Further Relief—Possession with third party—Suit by vendee for declaration—Prayer for possession not necessary.*

It is not necessary to sue also for possession when a purchaser from an absent co-sharer brings a suit for declaration of his title. (*Shadi Lal and Martineau, JJ.*) GOKUL DAS *v.* RANGILAL. **4 Lah. L. J. 462.**

——S. 42 (Proviso)—*Further relief—Possession with third party—Property partly in possession of the Court and of tenants.*

Where the property in suit is partly in the possession of the Court and the remaining portions were occupied by tenants who had not attorned to either party. *Held*, that under the circumstances the declaratory suit was maintainable. 15 Mad. 307 ; 100 P. R. 1913 Ref. (*Shadi Lal and Beman-Petman, JJ.*) KALU RAM PIARILAL. **1 Lah. 92 : 92 P. L. R. 1920 : 55 I. C. 953.**

——S. 42 (Proviso)—*Further relief—Possession with third party.*

S. 42 does not bar a suit for declaration and injunction without any other consequential relief where physical possession is with the third parties, *i.e.*, tenants willing to pay rent to whosoever is the lawful Dharmakarta and not in the

SPECIFIC RELIEF ACT (I OF 1877), S 42—Further Relief—Possession with Third Party.

deft. claiming adversely to the plff. (*White, C. J. and Phillips, J.*) V. RAMADOSS *v.* HANUMANTHA ROW. 36 Mad. 364 : 10 M.L. T 356 : 12 I. C. 449 : (1911) 2 M.W.N. 387 : 21 M L J. 952

——S. 42 (Proviso)—*Further relief—Possession with third party—Property in possession of tenants and lessees.*

The proviso to S. 42 of the Act is no bar to a suit for a declaration of title to lands in the possession of tenants and lessees. (*Fawcett and Raymond, A. J. Cs.*) RAMDAS *v.* AJUDHIADAS. 63 I. C. 685 : 14 S L.R. 137.

——S. 42 (Proviso)—*Further relief—Possession with third party—Land in possession of tenants.*

A suit for a bare declaration is not barred by the proviso to S. 42 of the Act where at the time of the suit, the plff. had let out the plaint lands to tenants and the deft. was not in possession of them. (*Twomey, J.*) MUDIN *v.* ASHA BI. 20 I.C. 660 : 6 Bur. L. T. 135.

Further relief—Redemption.

——S. 42 (Proviso)—*Further relief—Redemption.*

A mere declaratory suit will not lie where the plff. is entitled to claim consequential relief. A suit therefore by a mortgagor for a declaration that a condition in a mortgage is unenforceable does not lie where he can claim possession by redemption. (*Broadway, J.*) SAIDU SHAH *v.* MALAWA RAM. 37 I C. 374 : 115 P. L. R. 1916.

——S. 42—*Further relief Redemption—Consequential relief - Amendment of plaint.*

Where a mortgage and a lease form part of the same transaction and the lease is invalid but the mortgage is binding, it is not open to the mortgagor to sue for a declaration of the invalidity of the lease. He can however be allowed to amend the plaint and convert his suit into one for redemption. (*Krishnan and Ramesam, JJ.*) PUPPOOTH *v.* RAMAN SOMAYAJIPAD. 17 L. W. 558: (1923) M. W. N. 301 : 32 M. L. T. (H. C.) 107 : 44 M. L. J. 515 : 1923 Mad. 553.

——S. 42 (Proviso) - *Further relief—Redemption suit for declaration that mortgage is only binding as to a part.*

A suit by a mortgagor for a declaration that a mortgage is good only to the extent of the part consideration actually paid is not barred by the proviso to S. 42 of the Sp. Rel. Act where the term fixed for redemption has not expired at the date of suit. (*Oldfield and Seshagiri Aiyar, JJ.*) NAVUNNI *v.* RAMASWAMI PATTAR 52 I. C. 738: 10 L. W, 169.

——S. 42 (Proviso)—*Further relief—Redemption—Declaration of right of—Suit for declaration that a mortgagee is a tenant.*

A suit for a declaration that a mortgagee is not a tenant is maintainable but a mortgagor is not entitled to a declaration as to his right of redemption inasmuch as he can bring a suit for redemption. (*Chamier, C.J. and Sharfuddin, J.*) RAM DURAI *v.* HARNAM DAS. 2 Pat. L. W. 223 : 42 I. C. 473 : 3 Pat. L. J. 71.

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Miscellaneous.

Further relief—Suit to set aside decree.

——S. 42 (Proviso)—*Further relief—Suit to set aside decree.*

A suit for a mere declaration without a prayer for consequential relief is maintainable when the suit is to set aside a former declaratory decree on the ground of fraud. (*Fletcher and Teunon, JJ.*) BAGALA SUNDARI DEBI *v.* PROSANNA NATH MUKERJEE. 35 I. C. 797 : 21 C. W. N. 375.

——S. 42 (Proviso)—*Further relief—Suit to set aside decree.*

A suit to declare that a decree is fraudulent and void will not lie unless the consequential relief is also prayed for. (*Spencer and Coutts-Trotter, JJ.*) RAMANADHAN *v.* ANNAMALAI. 29 I. C. 132

——S. 42 (Proviso)—*Further rilief—Suit to set aside decree.*

A suit for a declaration that a decree is a nullity and that it should be set aside is one for a declaration with consequential relief and is governed by S. 7 (iv) (*c*). (*Kotval, A.J.C.*) GOVIND *v.* DHEKLU. 56 I. C 550.

Further Relief—Miscellaneous.

——S. 42 (Proviso)—*Further relief—Pre-emption.*

The right way of asserting a right of pre-emption is not a claim for bare declaration of a right to pre-empt. A mere claim to such a right is not a claim to any right to property within S. 42 of the Act and the right of pre-emption cannot be enforced by a mere declaratory decree as the claim for a declaration must be followed by further relief in order that the order should be effectual. (*Lord Buckmaster.*) CHARAN DAS *v.* AMIR KHAN. 28 M L. T 149 : 18 A. L. J. 1095 : 22 Bom. L. R. 1370 : 47 I. A. 255 : 57 I. C. 606 : 48 Cal 110 : 25 C. W N. 289 : 13 L. W. 49 : 2 U P L. R. (P C.) 124 : 39 M L. J. 195. (P. C.)

——S. 42—*Further relief—Whether necessary in each case.*

Whether it is incumbent upon the plaintiff to ask for consequential relief must depend upon the circumstances of each case. It is plain that there may be cases in which a declaration may be sufficient for his protection. In such an event the plaintiff cannot be compelled to seek a consequential relief. (*Mookerjee and Chotzner, JJ.*) UMARANNESA BIBI *v.* JAMIRANNESA BIBI. 37 C. L. J. 499 : 1923 Cal. 362.

——S. 42—*Further relief—Scope of proviso.*

A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to S 42, Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to S. 42 does not compel a plff. to sue for all the reliefs which

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Miscellaneous.

could possibly be granted or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want. (*Mookerjee and Cholzner, JJ.*) RAMKAMAL BANIK SAHA *v.* SYAM SUNDAR BANIK SAHA.
37 C. L. J. 482 : 1924 C. 411.

——S. 42—*Further relief.*

A suit for a declaration that the defts. have no such tenancy right as is recorded in the Settlement Records by order of the Collector is not bad in the absence of a prayer to set aside the order. (*Woodroffe and Walmsley, JJ.*) MIDNAPUR ZAMINDARY *v.* NARESH NARAIN.
63 I. C. 161 : 33 C. L. J. 317.

——S 42—*Further relief—Suit for declaration of invalidity of mortgage—Scope of section.*

A suit brought for having a mortgage declared to be collusive and ineffective and a decree on such mortgage a nullity and in the alternative for a declaration that a certain part of the property cannot be sold in satisfaction of the charge and concluding with a prayer for granting other reliefs to which the plff. may be found entitled, cannot be said to be a suit under S. 42 of the Specific Relief Act, for obtaining a declaration without praying for any consequential relief. Devices for avoiding Court fees by shaping suits into a declaratory shape cannot be encouraged. S. 42 of the Specific Relief Act sanctions only such declarations which declare a plff.'s title or right to any legal character or property. (*Jenkins, C. J. and Chatterjea, J.*) DEO KALI KOER *v.* KEDAR NATH. **16 C. W. N. 838 : 15 I. C 427 : 39 C. 704.**

——S. 42 (Proviso)—*Further relief.*

Where it is not necessary for the plffs. to ask for any consequential relief the proviso to S. 42 of the Act will not operate as a bar. (*Mookerjee and Beachcroft, JJ.*) BAKTAWAR SINGH *v.* BHUBANO SINGH. **20 I. C. 322 : 17 C. L. J. 468.**

——S. 42—*Further relief—Declaration by a non-party to a decree.*

A person who is not a party to a decree may sue to have it declared void without claiming any consequential relief. (*Broadway and Zafar Ali, JJ.*) MT. NIHAL DEVI *v.* RAI CHUNI LAL
5 Lah. L. J. 357 : 1923 Lah 373.

——S. 42—*Further relief—Shifting possession—Suit for declaration will lie.*

A co-sharer in possession of certain portions of the common land either individually or exclusively can sue for declaration of title against another co-sharer and it was found that possession of the land in dispute had been in a state of flux. 100 P. R. 1913 ; 15 M. 307 ; 21 M. L J. 952; 26 C. 11 ; 118 P. R. 1918, Rel. (*Broadway and Martineau, JJ.*) LABHU RAM *v.* NATHU. **4 Lah L. J. 504.**

——S. 42 (Proviso)—*Further relief—Decree allowing redemption—If mortgagee entitled to sue for declaration of a further charge on land.*

A mortgagee aggrieved by an order of redemption passed by the Collector under the Punjab Redemption of the Mortgagee's Act, 1913, may sue for a declaration that there is a further charge on the mortgaged land and is not bound to sue for recovery of the additional mortgage money to which he claims to be entitled and S. 42 of Sp. Relief Act is no bar. 51 P. R. 1897 ; 14 I. C. 510, Ref (*Shah Din, C J.*) BALVANT RAI *v.* GHERU.
85 P. R. 1917 : 157 P. W. R. 1917 : 39 I. C 451 : 5 P. L. R 1918.

——S. 42 (Proviso)—*Further relief.*

A suit for a declaration by the proprietors of a *patti* that they have a right to collect village dues and that certain other persons, already settled in the *patti*, have no such right is not barred by the proviso to S. 42. (*Robertson and Rattigan, JJ.*) KAMIRA *v.* LALU. **110 P. R. 1912 : 17 I. C. 907 : 30 P. L. R. 1913.**

——S. 42—*Further relief—No applicability to claim—Suit.*

Proviso to S. 42 of the Specific Relief Act has no application to suits instituted under the provisions of S. 283, Civil Procedure Code, 1882. (*Rattigan, J.*) SAHIB DIAL *v.* LAJPAT RAI
10 P. R. 1912 : 74 P. L. R. 1912 : 14 I. C. 510 : 267 P. W. R. 1912.

——S. 42—*Further relief—Suit for mere declaration of validity of adoption and of reversionary right.*

Where in a suit by reversioners to declare an adoption valid, to declare their reversionay rights and to declare that an alienation was invalid it was held by the Court below that the alienation was valid but that the plffs. were entitled to the other declarations. *held*, the Court below was right (*Phillips and Odgers, JJ.*) L TCHAMMA *v.* APPANNA. **14 L. W. 302 : 41 M L. J. 386 : 70 I. C. 190 : (1921) M W. N. 771.**

——S. 42 (Proviso)—*Further relief—Omission to ask.*

A Court should not throw out a suit on the ground that it is barred by the proviso to S, 42 unless it is quite clear that the plff. ought to seek further relief which he has failed to claim. 17 C. L. J. 30, ref. The further relief contemplated in S. 42 is such relief as flows directly from the declaration sought for and such as a plff. will be able to claim in an ordinary suit by virtue of the title sought to be declared. A dismissed trustee and priest of a temple having a fresh worship is not bound to sue for the joint possession of the temple and its properties, he not being entitled to their possession at the date of the suit. The persons in possession of the temple and its properties on the date of the suit must be held to be holding the properties on behalf of all the trustees and his exclusion was improper and therefore the declaration will be sufficient relief as to the plff's right of possession when his turn comes (*Ayling and Krishnan, JJ.*) SIVARAMALINGA *v.* SABHARATNA. **25 M. L. T. 361 : (1919) M W. N. 216 : 9 L. W. 357 : 51 I. C. 822 : 36 M. L. J. 624.**

——S. 42 (Proviso)—*Further relief—Prior mortgagee's suit for declaration that sale under decree or subsequent mortgage must be subject to his right.*

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Further Relief—Miscellaneous.

A mortgagee sued for declaration that the mortgaged property should be sold under a decree for sale obtained by a subsequent mortgagee, subject to his own prior mortgage. *Held*, that the suit was not competent. Since a prior mortgagee can institute a suit for sale against the subsequent mortgagee, the suit for a mere declaration by the prior mortgagee would be opposed to the proviso to S 42 of Sp. Rel. Act. (*Sundara Aiyar and pencer, JJ*) NARNA BALAYYA *v.* RUDRAVARAM VENKATAPPA. **11 M. L T. 190 : 15 I. C. 221 : (1912) M. W. N. 414.**

——S. 42—*Further relief—Not asked effect—Declaratory relief—Power of Courts to grant.*

It is now well settled that the power of the Courts in India to entertain suits of a civil nature does not carry with it the general power of making declarations, except in so far as such power is expressly covered by the statute. The plaintiff cannot sue for a mere declaration when a consequential relief is open to him. 49 I.C. 355; 2 I. A. 169, Ref. (*Mullick and Ross, JJ.*) MAULAVI MAHOMED FAHIMUL HUQ *v.* JAGAT BALLAV GHOSH. **2 Pat. 391 : 4 Pat. L. T. 675 : 1923 P. 475.**

——S. 42 (Proviso)—*Further relief.*

A Court will not grant a declaration if the real object of the suit is to get a declaration which will enable the plff. hereafter to seek further relief to which plff. is at present entitled. (*Mullick and Atkinson, JJ.*) SHEO ROTAN RAI *v* BHIRGOON RAI.

2 Pat. L. J. 481 : 41 I. C. 375 : 1 Pat. L. W. 784.

——S 42 (Proviso)—*Further relief—Declaratory suit by real owner—Invalidity of mortgage*

A declaratory suit by a real owner that a mortgage by a person in possession does not affect the property, is not repugnant to the proviso to S. 42 of the Sp. Rel. Act (*Twomey, J.*) MAUNG HMWE *v.* MA LUN AUNG.

11 I. C. 855 : 4 Bur. L. T. 186.

Interested to deny.

——S. 42—*Interested to deny—Deft. denying plff.'s right after suit.*

Where deft. denies the plff.'s right to property not before the suit but after its institution, the deft. is interested to deny within S. 42. (*Scott, C. J, and Russell, J.*) MURWANJI *v.* SECRETARY OF STATE. **16 I. C. 714 14 Bom. L. R. 654.**

——S. 42—*Interested to deny—Right to kill ones own cattle.*

Where deft has been interested in denying the plff. right to kill his cattle a suit under S. 42. Sp. Rel. Act will lie. (*Coxe and Mullick, JJ.*) MAHADEO PRASAD *v.* NABI BAKSH. **25 I. C. 104.**

——S. 42—*Interested to deny.*

In a suit for a declaration that defts. were plff.'s ryots and for an injunction against some of them restraining them from interfering with rights of the plaintiff it was found that some of the defendants had not made an overt denial of the plff.'s rights, yet they were acting in concert and sympathy with those who had, and all the defendants were acting in collusion. *Held*, that the whole body of the defendants were interested to deny plaintiff's title within S. 42. (*Lindsay, J. C.*) JANKI SARAN *v.* WIDOW OF MAHOMED SADIQ. **2 U P.L R. (J.C) 106. 56 I C, 720 : 7 O. L. J. 258.**

Jurisdiction.

——S 42—*Jurisdiction.*

A suit for a declaration that a decree by a competent Court is null and void does not lie. (*Banerji and Walsh, JJ.*) MAHABIR PRASAD *v.* BASANT LAL. **17 A. L. J 1028.**

——S. 42—*Jurisdiction—Declaration that decree is* ultra vires *cannot be given.*

A suit for a declaration that a decree is *ultra vires* cannot be maintained. (*Lindsay and Wazir Hasan, A.J. Cs.*) KISHEN DAYAL *v.* DY. COMMISSIONER PARTABGARH.

59 I. C. 566 : 23 O.C. 342.

——S. 42—*Jurisdiction—Suit in Civil Court or cancellation or declaration of invalidity of lease held valid by Revenue Court.*

A perpetual lease was upheld by the Revenue Courts. A suit was then brought for a cancellation of the lease or for a declaration of its invalidity on the ground that it was a forgery or that it was executed by a person who had no authority to execute the same. *Held*, that the decision of the Civil Court on either of those points could not affect the validity or otherwise of the decision of the Board of Revenue in regard to a matter with which it was competent to deal and that a declaratory decree conflicting with the decision of a competent Court having exclusive jurisdiction to decide the matter should not be granted (*Kanhaiya Lal, A.J.C.*) BADRI *v* KHURSHED ALI KHAN. **41 I. C. 15 : 20 O. C. 182.**

——S. 42—*Jurisdiction.*

A sale-deed provided that the lands should remain in the proprietary possession of the vendor free from liability for the payment of rent (Bila Lagani). The vendee obtained, however, from the Rev. Court decrees against the vendor for arrears of rent. Subsequently the vendor sued in the Civil Court for a declaration that the land was not liable to pay the revenue, or any other demand and for damages as the words "Bila Lagani" implied that the land was to be liable to pay the revenue if any that might be assessed on the land. *Held*, that the declaration could not granted as it would trench on the jurisdiction of the Rev. Court 12 O. C. 164 dist., and damages could not be granted as it practically meant a refund of the amounts decreed by the Revenue Court. 7 A. L J. 1064. Ref. (*Kanhaiya Lal, A. J. C.*) RAGHUNATHI *v.* RAM RATAN.

39 I. C. 133 : 4 O. L. J. 68.

Legal Character.

——S. 42—*Legal character—Declaratory suit—Hindu reversioner—Alienation by Hindu widow.*

When a Hindu widow in possession of her husband's estate executes a deed of gift purporting to convey an absolute interest in the property to one of the reversioners to the exclusion of the other presumptive heirs, those

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Leagl Character.

heirs though still reversionary and though they may never get any title (because events may preclude them from doing so) may have a declaration as to the effect of the deed. Such a declaration will necessarily involve a finding that the plffs. are the reversionary heirs. 39 Mad. 634 Dist. (*Lord Parker.*) SAUDAGAR SINGH *v.* PARDIP NARAYAN SINGH. 45 Cal. 510 : 4 Pat L. W. 52 : 23 M. L. T. 31 : 16 A. L. J. 61 : 7 L. W. 146 : 27 C. L. J. 186 : 22 C. W. N 436 : (1918) M. W. N. 323 · 20 Bom. L. R. 509 : 45 I. A 21 : 43 I. C. 484 : 34 M. L. J. 67 (P.C.).

——S. 42—*Legal character— Reversioner—Decree not to be granted*—Brutem fulmen.

During the lifetime of a Hindu widow, a reversioner is not entitled to a declaration that he is the next reversioner to the estate, although he might, in such capacity, sue on behalf of the whole body of reversioners for prevention of waste, etc., by the widow and for protection of the estate.

Where the next reversioners sue the widow in possession alleging waste, mismanagement, etc., but failed to prove their allegations, it is not competent to the Court under cover of a prayer " for further relief " to grant a declaration that they are the next reversioners even though the widow disputed their title as such at the trial. 31 I. A. 67 Dist. 42 I A. 129 Ref. (*Lord Shaw.*) JANAKI AMMAL *v.* NARAYANASAMI AIYAR. 39 Mad. 634 : 43 I. A. 207 : 20 M. L. T. 168 : 14 A. L. J. 997 : (1916) 2 M. W. N. 188 : 20 C. W. N. 1323 : 16 Bom. L. R. 856 : 24 C. L. J. 309 : 4 L. W. 530 : 37 I. C. 161 : 31 M. L. J. 225 (P.C.).

——S. 42—*Legal character—Suit for declaration by reversioners—Grant of probate—Effect of.*

The Court's power to make a bare declaration of title is derived from S 42 of the Sp. Rel Act and regard must be had to its precise terms. Probate of a will granted to the widow of a testator under the Prob. and Admn. Act after hearing the objections of the next reversioners thereupon instituted suit for a declaration that they were the next reversioners to the estate of the testator and, as such, entitled to apply for revocation of the probate. *Held*, that the suit was not maintainable, as having regard to the decision that the will was genuine, the plaintiffs were not entitled to " a legal character or right to property " within S. 42 of the Sp. Rel. Act 2 I.A. 169, 191 Dist: I.A. Supp. Vol. 149, 162 Rel. The will having been affirmed in a Court exercising appropriate jurisdiction, the propriety of that decision could not in the circumstances be impugned by a Court exercising any other jurisdiction. (*Sir Lawrence Jenkins.*) SHEOPRASAN SINGH *v.* RAMNANDAN PRASHAD SINGH. 43 Cal. 694 43 I. A. 91: 14 A. L. J. 466 : 20 C. W. N. 738 : 18 Bom. L. R. 397 : 23 C. L. J. 621 : (1916) 1 M. W. N. 419 : 20 M. L. T. 1 : 3 L. W. 544 : 33 I. C. 914 : 31 M. L. J. 77 (P.C.).

——S. 42—*Legal character—Suit by Hindu reversioner during life-time of limited owner.*

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Legal Character.

A Court will not grant a bare declaratory relief that the plaintiff is the nearest male reversioner during the life-time of the widow or other heiress. (*Lindsay and Ryves, JJ.*) MUNNU LAL *v.* RAJA RAM 20 A. L. J. 282 : L. R. 3 A. 247 : 1922 All. 100.

——Ss. 42 and 54—*Legal character—Right to receive offerings.*

The plffs who were Mahomedans claimed to receive alms given by a pious Hindu at a spot called 'Kubrighat' on the ground that they were interfered with in the enjoyment of that right by the defts. *Held*, that the plffs. had no legal status as they were mere beggars and had no legal character entitling them to the declaration and that their claim to receive the alms was not a right to property so as to justify a grant of an injunction. (*Tudball and Sulaiman, JJ.*) BANSI *v.* KANHAIYA 18 A. L. 983 : 59 I. C. 659 : 43 All 159.

——S. 42—*Legal character—Honorary office—Secretary of Association—Dismissal.*

A suit by the plaintiff who is the honorary Secretary of an Association rendering voluntary and gratuitous services, for a declaration that a resolution dismissing him is null and void, is not maintainable. 39 A. 527 Ref. (*Chamier and Piggott, JJ.*) MAHARAJ NARAIN SHEOPURI *v.* SHASHI SHEKHERESHWAR ROY. 37 All 313 : 29 I. C. 53 : 13 A. L. J. 455.

——S. 42—*Legal character—Widow in possession—Suit for declaration as to the nature of her possession—Whether S. 42, a bar.*

Where a widow's possession is admitted, a suit for a declaration that she *held* it as a widow of a deceased member of Hindu joint family and not as heir to a separated member is not barred by S 42 of the Sp. Rel. Act. (*Tudball and Rafique, JJ.*) RAM MANOHAR SINGH *v.* DIBRAJ KUNVARI. 36 All. 126 : 23 I. C. 252 : 12 A. L. J. 66.

——S. 42—*Legal character—Agra Tenancy Act*, S. 22.

Where during the life time of B. his daughter's son sued for a declaration that he was in joint possession with B of a certain fixed rate holding and a certain occupancy holding, *held*, that in view of S. 22 of the Agra Tenancy Act the plff. had a legal character within the meaning of S. 42 of the Sp. Rel. Act and his suit was therefore maintainable. (*Chamier, J.*) MAHENDRA MISRA *v.* KEDAR PANDE. 14 I. C. 746 : 9 A. L. J 788.

——S. 42—*Legal character, includes right of franchise—Election—Suit to set aside—Maintainability.*

The words "legal character" in S. 42 of the Act. do include the right of franchise and the right of being elected as a Municipal Commissioner. The plaintiff, who was unsuccessful as a candidate for election as a Municipal Commissioner, sued for a declaration that the election, being in contravention of the plaintiff's right and its franchise, right of election and right of being present at the polling place, was not according to law proper and valid and was *ultra vires.* and that the election of the defendants was illegal, and

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Legal Character.

he further prayed that they should be restrained by injunction from forming the Municipal Board. *Held*, that although the words "legal character" in S. 42 of the Specific Relief Act have been held to be wide enough to include the right of franchise and also a right of being elected as a Municipal Commissioner, it was doubtful whether, regard being had to the form of the suit and the declarations asked for, the case came within the words of the section and as such triable by the Court. Assuming that the Court had inherent jurisdiction to entertain the suit, having regard to the circumstances of the case, there was no ground for setting aside the election. (*Sanderson, C. J. and Cholzner, J.*) THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KOTRUNG *v.* BISSESWAR GHOSE. **68 I. C. 229 : 26 C. W. N. 91.**

——S. 42—*Legal character—Suit by voter against Municipality.*

A suit for injunction by a voter against the Chairman of a Municipality for his refusal to insert his name in the register of voters on technical grounds is maintainable under C. P. C, S. 9. (*Teunon and Newbould, JJ.*) MOLLA ATANOL-UQ *v.* CHAIRMAN OF MANIKOTTA MUNICIPALITY. **24 C. W. N. 969 : 57 I. C. 960 : 48 Cal. 378.**

——S. 42—*Legal character—Divorced wife.*

Plff. sued her late husband for a declaration as to her marriage and the legitimacy of her children. *Held*, that the plff. who ceased to have the legal Character of a wife 20 years ago was not entitled to ask the Court to make a declaration as to her marriage, for there was no legal character in having been a wife and been divorced. The decree of the Court below as to the legitimacy of one of the children could not stand, for the mother of a child cannot be said to have a legal character as to whether her child who is not a party to the suit is or is not legitimate. (*Fletcher and Huda, JJ.*) LATIFAN MEAN *v.* MOORTI JANONA. **49 I. C. 366 : 23 C. W. N. 171.**

——Ss 42 and 43—*Legal character—Declaration—Mother—Marriage of minor girl by her uncle—Invalidity.*

Under the Mahomedan Law the mother even when appointed certificated guardian of the person and property of her minor daughter, has no legal character entitling her to a declaration that the marriage of her daughter with a certain person effected by her uncle is not valid. Nor would it be a proper exercise of judicial discretion to make any such declaration when the minor is not a party to the suit inasmuch as under S. 43 of the Act, the decree would not be binding upon the minor. (*Richardson and Beachcroft, JJ.*) SONAULLA SARKAR *v.* TULA BIBI. **45 I. C. 203 : 27 C.L. J 603.**

——S. 42—*Legal character—Declaration of heirship—Whether may be made before succession opens out--Reversioner, if entitled to a declaration that certain deed is invalid.*

A declaratory suit for the establishment of heirship does not ordinarily lie before the succession in regard to which it is claimed has opened out. But a reversioner of a limited estate is however entitled to a declaration that a certain deed is invalid, if the invalidity depends upon facts which may be obliterated by lapse of time (*Stephen and Mullick, JJ.*) JAGDEEP NARAIN *v.* JAIBASI KOER. **22 I. C. 928 : 19 C. W. N. 1191.**

——S. 42—*Legal character—Declaration—Form of.*

S. 42 of the Sp. Rel. Act does not sanction every form of declaration but only a declaration that plff. is entitled to a special legal character or right to property. A plff. is not entitled to a declaration that his dismissal from Govt service was in contravention of the Govt. rules. (*Mookerjee and Beachcroft, JJ.*) RAM DAS HAZRA *v.* SECRETARY OF STATE. **18 C W. N. 106 : 16 I C. 922 : 17 C. L. J. 75.**

——S. 42—*Legal character—Exclusive right to officiate as priest, not to be given.*

Parties who require religious ceremonies to be performed for their benefit are at liberty to choose the priest by whom those ceremonies should be performed. 14 C. W. N. 1057 Rel Therefore when pilgrims on their way to Gava perform the Sradh ceremony of their ancestors on the banks of the *Pumphan* the plaintiffs are not exclusively entitled to act as priests along with the defendants. But a declaration may be obtained by him that a person is entitled to officiate as priest for such pilgrims as may choose to employ him and that he cannot be prevented from exercising his calling. (*Mookerjee and Teunon, JJ.*) DWARKA MISSER *v.* RAM PROTAP MISSER. **16 C. W. N. 347 : 10 I. C. 41 : 13 C. L. J. 449.**

——S. 42—*Legal character—Reversioner of lunatic.*

A suit by an immediate reversioner of a lunatic for a declaration that a mortgage acquired by the manager of the lunatic's estate in his own name belongs to the lunatic, and thus to safeguard his own interests, is maintainable. (*Petman, J.*) VIRSING *v.* HARMANSINGH. **56 I C. 191 : 1 Lah. 137.**

——S. 42—*Legal character—Reversioner.*

Where a minor is the immediate reversioner a next reversioner cannot sue for a declaration on the ground of collusion. (*Shah Din, J.*) KANSHI RAM *v.* SARDANAND. **60 P. R 1916 : 33 I. C. 763 : 80 P. W. R. 1916.**

——S. 42—*Legal character—Right to any property.*

A suit by a brother's son for a declaration that an adoption of a daughter's son is invalid when there are two widows and a daughter living, is not maintainable under S. 42 because (1) the plff. cannot be said to be entitled to any legal character or a right to the deceased's property, (2) the remoteness of plff's title in the life-time of the widow, the daughter and the daughter's son would make it incumbent on the Court to exercise its discretion and dismiss the suit. (*Smyth, Elsmie, Barkley and Rattigan, JJ.*) BARKAT RAM *v* JAGAT RAM. **17 I. C. 379 : 249 P. W. R. 1912. (F. B.).**

——S. 42—*Legal character—Consequential relief—Not asked—Suit by Hindu reversioner.*

A suit by a reversioner for a mere declaration of his right to succeed as the nearest reversioner on

SPECIFIC RELIEF ACT (I OF 1877), S. 42— Legal character.

the death of a Hindu widow is not maintainable. (*Wallis, C. J. and Krishnan, J.*) GURUSWAMI PANDIYAN *v.* CHINNATHAMBIAR.
(1920) M. W. N. 660 : 28 M. L. T. 365 : 39 M. L. J. 529.

———S. 42—*Legal character—Joint right of management of charity—Decree form of.*

Where the plff. brought a suit for a declaration of his right to participate in the management of a public trust jointly with the deft. who was in sole possession and management, the mere fact that there were others who were like the plff. entitled to the joint management but were not made parties to the suit, is not a reason for dismissing plff.'s suit. (*Wallis, C. J. and Seshagiri Aiyar, J.*) MEENAKSHI ACHI *v.* SOMASUNDARAM PILLAI.
(1920) M. W. N. 507 : 12 L. W. 232 : 44 M. 205 : 59 I. C. 464 : 39 M. L. J. 403.

———S. 42—*Legal character—Hindu reversioner—Declaratory suit—Will—Authority to adopt.*

A reversioner although he only represents the whole body of possible reversioners and although their interest is possibly only a *spes successionis* has on their behalf a legal character within S. 42 of the Specific Relief Act and is in a proper case entitled to sue, for a declaration as to the limited nature of a widow's title to her husband's properties where there is a will giving absolute right to the widow. The settting up of a mere authority to adopt by the widow does not give a cause of action (*Sadasiva Aiyar and Napier, JJ*), VELLAVAJULA SURAYYA *v.* SUBBAMMA. **43 Mad 4 : 26 M.L.T. 154 : (1919) M.W.N. 580 : 53 I.C. 498 : 37 M. L. J 405.**

———S. 42—*Legal character—Right of reversioners to get a declaration of their reversionary interest.*

The reversioner to the estate of a male Hindu cannot sue for declaration that they are his next reversioners unless the decision of the question is incidental to the grant of some other relief which they may be claiming. 39 M, 634 Foll. (*Wallis, C. J. and Burn, J.*) KRISHNA THEVAR *v.* RAMASWAMY PANNA. **40 Mad. 871 : (1917) M. W. N. 201. 39 I. C. 263 : 33 M. L. J. 277.**

———S. 42—*Legal character—Reversioner—Alienation by Hindu widow—Declaration of plff's right to inherit.*

A reversioner who disputes the validity of an alienation by a Hindu widow and seeks to have it declared invalid as against him, is not entitled to a declaration that he is entitled to inherit the property after the death of the widow. (*Sadasiva Aiyar and Napier, JJ.*) VEERAMMAL *v.* KAMU AMMAL. **30 I. C. 815 : 2 L. W. 850.**

———S. 42—*Legal character—Personal contract—No suit will lie for a declaration that a valid personal contract subsists.*

A suit for a declaration that plff. is entitled to subscribe to a *kuri* fund does not lie under S. 42 of the Act, as it is not a right to declare a title to a legal character or a title to right to property. (*Sadasiva Aiyar and Napier, JJ.*) RAMAKRISHNA PATTAR *v.* NARAYANA PATTAR. **39 Mad. 80 : (1914) M. W. N. 912 : 26 I. C 883 : 27 M. L J. 634.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42— Legal character.

———S. 42—*Legal character--Declaratory suit by reversioner*

Suit for declaratory relief to avoid waste or alienation which might prejudice the reversioner will lie but not for declaration of his status as a reversioner. Case law discussed. (*Batten and Stanyon, A. J. Cs.*) PARWATI *v.* GOVIND PRASAD. **42 I. C. 737 : 13 N. L. R. 187.**

———S. 42—*Legal character--Declaratory suit—Maintainability.*

A suit is maintainable for a declaration, that a deft. is not the illegitimate son of the plff and that he never had an illicit connection with the deft 's mother. (*Kendall, A. J. C.*) KAILASA *v.* RAGHUBIR. **17 O. C. 331 : 26 I C. 526 : 1 O. L. J. 735.**

———S. 42—*Legal character--Defeated candidate for election.*

The words "entitled to a legal character" in S. 42 of the Sp. Rel. Act does not apply to a candidate defeated at an election (*Stuart, J. C.*) SUNDAR LAL *v.* MUHAMAD FAIQ. **18 I. C. 122 : 16 O. C. 36.**

———S. 42—*Legal character — Character or past right.*

A suit for the declaration of past right or character is not maintainable. The right or character must be in existence. (*Roe and Coutts, JJ.*) RAMSUNDAR SAHU *v* RAMNARAYAN SAHU. **48. I. C. 936 : 1919 Pat. 404.**

———S. 42—*Legal character—Trespass.*

S. 42 of Specific Relief Act does not contemplate suit by persons having no title at all. A suit by a trespasser for declaration that he is a trespasser is not maintainable. (*Roe and Imam, JJ.*) RUGHUBIR PRASAD *v.* MISRI KAHAR. **45. I. C. 305 (Pat.).**

———S. 42—*Legal character—Gayawal gaddi—Declaratory suit.*

A person entitled to a gayawal gaddi which is an heriditary office or a business, can sue for a declaration that he is the lawful holder of the gaddi and for possession of the gaddi and its books. (*Chamier and Mullick, JJ.*) LACHMAN LAL PATHAK *v.* BALDEOLAL TATHWARI.
3 Pat. L W. 136 : 2 Pat. L. J. 705 : 42 I C. 478 : 1918 Pat. 50.

———S. 42—*Legal character—Trespasser.*

The essence of S. 42 is a title vesting in the plff. and no suit will lie by a trespasser for a declaration that he is a trespasser. (*Sharfuddin and Roe, JJ.*) SES LAL SINGH *v.* HALDHAR NARAIN. **3 Pat. L. W. 69 : 35 I C. 441 : 1 Pat. L. J. 95.**

———S. 42—*Legal character—Civil Procedure Code, S. 9—Right to office.*

The right to hold a certain office in a certain place at a certain season of the year confers upon the holder of that right a legal character so as to enable him to bring a suit to maintain such a right under S. 9, C. P. C. But the right to enter a disciple's house when called by him or to enter it as of right though not called, does not create any legal character to maintain a suit for a declaration of such a right. (*Roe and Jwala Prasad, JJ.*) HERA PANDEY *v.* BACHU PANDEY.
1 Pat. L. J. 381 : 35 I. C. 345 : 2 Pat. L. W. 390.

SPECIFIC RELIEF ACT OF 1877), S. 42—Object of.

Object of.

——S. 42—*Object of.*

The object of the section is to perpetuate and strengthen testimony regarding title and protect it from adverse attacks. (*Oldfield and Seshagiri Aiyar, JJ.*) GANDLA PEDDA NAGANNA *v.* SIVANAPPA. **38 Mad. 1162 : 16 M. L. T. 310 : 26 I. C. 232 : 27 M. L. J. 520.**

——S. 42—*Object of—General law—Abstract right.*

The policy of S. 42 is to enable Courts to grant relief where no relief is available at common law and not that declarations should be made of abstract rights exclusive of practical equity. A bare denial of a general right is not such an infringement of a right as to justify the granting of a declaration. 30 All. 181 Dist. A declaratory decree should not be passed when it confers practically no benefit on the plff. (*Lindsay, J. C.*) ORI LAL *v.* MAHOMMED YAKUB. **1 O. L. J. 496 : 25 I. C. 908 : 17 O. C. 354.**

Right to Property.
Cloud on title.
Creditor of Insolvent.
Interest in subject-matter.
Public way.
Reversioner.
Temple property.
Miscellaneous.

Right to property—Cloud on title.

——S. 42—*Right to property—Cloud on title—Covenant or pre-emption or reconveyance—Void as offending the rule against perpetuities.*

It is open to a plff. to sue for a declaration that he is the absolute owner of lands under a sale deed unaffected by the covenants for pre-emption or reconveyance contained in the sale-deed, on the ground that such covenants offend the rule against prepetuities and are therefore void. (*Macleod, C. J. and Kanga, J.*) DINKARRAO GANPATRAO *v.* NARAYAN. **24 Bom. L. R. 449 : 1922 Bom. 84.**

——S. 42—*Right to property—Cloud on title—Mortgagee when can sue to declare title of mortgagor.*

A mortgagee cannot maintain a suit for a declaration of his mortgagor's title to the mortgaged properties so long as his right as mortgagee is not established. (*Chatterjee and Newbould, JJ.*) SRISH CHANDRA CHATTERJEE *v.* BASANTA KUMAR SADUKHAN. **33 C. L. J. 380 : 63 I. C. 514 : 25 C. W. N. 552.**

——S. 42—*Right to property—Cloud on title—Suit for declaration that plff. is owner of properties under partition.*

Where notwithstanding a prior private partition between the plff. and his co-sharers, under which the suit properties were allotted to the plff. the deft. applied to the Revenue authorities for partition, the plff. can sue for a declaration that the properties are his absolute properties not liable to partition any more. (*Chevis and Leslie Jones, JJ.*) ABDULLAH SHAH *v.* MUHAMMAD BAKAR SHAH. **43 I. C. 127 : 12 P. W. R. 1918.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Right to Property—Creditor of insolvent.

——S. 42—*Right to property—Cloud on title—Punjab Land Revenue Act (XVII of 1887), Ss. 117 to 120—Parties directed by Revenue Court to establish their title.*

Where in a partition proceedings before a Revenue Court the parties are directed to establish their right to certain land, a suit for mere declaration of title as co-sharer is maintainable. (*Robertson and Shah Din, JJ.*) PARSRAM *v.* MUHAMMAD YASIN KHAN. **14 P. W. R. 1912 : 13 I. C. 953 : 150 P. L. R. 1912.**

——S. 42—*Right to property—Cloud on title—Suit for declaration of title as owner.*

A suit is maintainable for a mere declaration of title as owner by inheritance, when one party relies on mutation and the other on *girdawari* entries, while the land is in possession of mortgagees or tenants and nobody has received any rent from tenants (*Lalchand, J.*) ABDUL KARIM *v.* SAHIB JAN. **13 I. C. 947 : 13 P. W. R. 1912.**

——S. 42—*Right to property—Cloud on title—Female—Mutation of names—Suit by reversioner.*

Where a Hindu female who had succeeded to her father's property had a portion of it mutated in the name of the defts. and the predecessor in title of one of the defts. had retained a portion of it to herself. *Held*, that though there was a transfer of possession, the mutation order had not the effect of transferring the property, nor could the words accompanying the transfer, throw a cloud upon the reversioner's title, and so there was no cause of action for the suit. (*Mitra, A. J. C.*) UJARIA *v.* ROSHANLAL. **60 I. C. 343 : 16 N. L. R. 209.**

——S. 42—*Right to property—Cloud on title—Plaint not showing cause of action—Defendants attitude—If can be considered.*

Where plaintiff has a title to the property, any tendency on the part of the defendant to cast a doubt on his title is sufficient to entitle him to a declaration of title. Resistance to plaintiff's title, offered by deft. should be considered by the Court and plaintiff given relief. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) BISHU NATH SARAN SINGH *v.* SITLA BAKSH SINGH. **10 O. L. J. 315 : 1924 Oudh 69.**

Right to Property—Creditor of insolvent.

——S. 42—*Right to property—Creditor of Insolvent—Declaratory suit by creditor of insolvent—Leave of Court under S. 16 (2) of the Provincial Insolvency Act.*

A suit by an insolvent's creditors with the leave of Court under S. 16 (2). Provincial Insolvency Act, consented to by other creditors for a declaration that a certain mortgage of his has priority over the other mortgages on the property, is not barred by S. 42 Specific Relief Act. (*Richards, C. J. and Banerjee, J.*) BALMUKUND *v.* BIRJ LAL. **36 I.C. 1004.**

——S. 42—*Right to property—Creditor of Insolvent.*

A creditor of an insolvent can sue for a declaration that certain property belongs to the insolvent and should be brought in as part of the

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Right to Property—Interest in subject-matter.

insolvent's estate available for creditors. (*Fawcett, A. J. C.*) LOUIS DREYFUS & Co. *v.* IAN MOHAMED. **49 I. C. 421 : 12 S. L. R 61.**

Right to Property--Interest in Subject-matter.

——— S 42—*Right to property—Interest in subject-matter—Declaration suit of daughter for invalidity of adoption by mother—If maintainable.*

A daughter merely entitled to maintenance from the property of the deceased, cannot maintin a suit for a declaration that an adoption by the mother is invalid. (*Batchelor, C. J. and Kemp, J.*) GANESH AMRIT *v.* RANGANATH MANOHAR. **46. I. C. 49 : 20 Bom. L. R. 413.**

——— S. 42—*Right to property--Interest in subject-matter—Contingent right.*

A mere contingent right is not sufficient for the granting of a declaration. (*Brett and Chapman, JJ.*) KALIDAS *v.* PROBAT CHANDRA. **18 I. C. 394 : 17 C. W. N. 964.**

——— S. 42--*Right to property--Interest in subject-matter—Duty of Court.*

In a case under S. 42 of the Act the Courts ought not to give the declarations prayed for, where the plaintiff's right is not established. The plaintiff cannot either be given a declaration upon a ground which is not part of and is not in fact consistent with the case. (*Holmwood and Chapman, JJ.*) RAMZAN MISTRI *v.* ZAHUR HUSSAIN. **18 I. C. 241.**

——— S. 42—*Right to property--Interest in subject-matter—Alienee of permanent tenure.*

A person who has purchased a share in permanent transferable tenure is entitled to a declaration of his right to that share and for possession of the same after setting aside a sale held in execution of a decree to which he was not made a party. (*Mookerjee and Teunon, JJ.*) KALI KUMAR *v.* BIDHU BHUSHAN. **10 I. C. 382 : 16 C. L. J. 89.**

——— S. 42—*Right to property — Interest in subject-matter—Right to 'birt'.*

A right of a *purohit* to *birt* or priestly offerings is in law no 'property' at all but at most a mere *spes successionis* which cannot form the basis of a declaratory decree. (*Rattigan and Shah Din, JJ.*) GUR DAS *v.* BHAG. **96 P. R. 1911 : 143 P. W. R 1911 : 11 I. C. 231 : 216 P L. R. 1911.**

——— S. 42—*Right to property—Interest in subject-matter—Possession less than 12 years*

A person in possession for less than 12 years is entitled to a declaration that he is in lawful possession as against a wrong-doer interfering with the possession. (*Miller and Abdur Rahim, JJ.*) AYYAPPA RAJU *v.* SECRETARY OF STATE. **25 I. C. 894 : 37 Mad 298**

——— S. 42— *Right to property— Interest in subject matter—Purchaser from Hindu widow.*

A purchaser from a Hindu widow of property inherited by her from her husband, is entitled to a declaration, that he has the rights possessed by the vendor at the date of sale. Such a sale is not wholly void so as to pass no right to the purchaser. 26 Mad. 334 Ref. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MUTHU PILLAI *v.* CHAKRAPANI CHETTIAR. **16 I. C. 205 : (1913) M. W. N. 37**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Right to Property—Public Way.

——— S. 42—*Right to property — Interest in subject-matter—Contract of sale— Subsequent execution of mortgage.*

A vendee of property in whose favour the vendor has executed an agreement for sale is entitled to maintain a suit for a declaration that a mortgage of the same property, executed by the vendor to a third party subsequent to the said agreement, does not affect his rights. (*Sundara Aiyar, J.*) KINTADU DALAPADU, *In re.* **15 I. C. 457 : (1912) M W. N. 902.**

——— S. 42—*Right to property — Interest in subject-matter—Declaratory suit—When and by whom maintainable.*

Where the plff. has no interest in the subject-matter of the suit, his suit under S. 42 is not maintainable, the only person competent to bring the suit being the proprietor to the subject-matter in dispute. (*Mullick and Jwala Prasad, JJ.*) MAHARAJ BAHADUR SINGH *v.* GAUDARI SINGH. **2 Pat. L J. 323 : 39 I. C. 868 : 2 Pat. L W. 282.**

——— S. 42—*Right to property — Interest in subject-matter—Possessory title.*

Where neither party is able to prove its title to property in dispute it is open to the plff. in possession for some time short of the statutory period to obtain a declaration of his right to the property. (*Maung Kin, Offg, C. J.*) THA LIN *v.* P. K. P, L. PALANEAPPA FIRM. **10 L. B. R. 357 : 64 I. C. 400 : 13 Bur. L. T. 205.**

——— S 42—*Right to property — Interest in subject-matter.*

Where a son lends his father's money with his consent and obtains a pro-note in his name, the father cannot sue for declaration that the pro-note is his. (*Pratt, A. J. C*) MA NYI MA *v.* MAUNG YAN SHIN. **57 I. C. 881 : (1920) 3 U. B. R. 204.**

——— S. 42—*Right to property — Interest in subject-matter—Attaching creditor.*

An attaching creditor withdrawing the attachment cannot sue under O 21, R. 63, but he can sue under S. 42 of the Sp. Rel. Act for a declaration that the property sought to be attached belongs to his judgment-debtor. 1 Bur. L. T. 34 14 Bur. L. R. 135 Ref. (*Maung Kin, J.*) CHAN TAT THAI *v.* MA LAT. **33 I. C. 124 : 9 Bur. L. T. 89.**

Right to Property—Public Way.

——— S. 42—*Right to property—Public way—Playing music in public street—If can be declared as a right.*

Playing music in a public street cannot be claimed or declared as a right. (*Beaman and Heaton, JJ.*) VENKATESH APPASHET *v.* ABDUL KADER. **42 Bom. 438 : 46 I. C. 740 : 20 Bom. L R. 667.**

——— S. 42—*Right to property — Public way —Highway procession — Obstruction — Special damage.*

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Right to Property—Reversioner.

Where a marriage procession passing along a public road is obstructed, an action lies on proof of special damage for a declaration of the right to pass along the road and for an injunction restraining the obstruction. Proof of actual obstruction or the use of violence is unnecessary. It is enough to show that owing to the hostile attitude of the obstructors the procession was not able to pass. (*Oldfield and Phillips, JJ.*) GANAPATHY MOOPPEN *v.* SUBBA NAYAKKAN **23 M. L. T. 258 : 44 I. C. 834 : (1918) M. W. N. 547.**

Right to Property—Reversioner.

——— S. 42—*Right to property—Reversioner—Suit against.*

A transferee from a Hindu widow can get a decree against the reversioners declaring his right as owner of the property transferred so long as the widow is alive. (*Tudball and Lindsay, JJ.*) KANDHAI PANDE *v.* DAECHINA MISRAIN. **60 I. C. 784 : 19 A. L. J 275.**

——— S. 42—*Right to property—Reversioner—Right to declaration—Alienation by widow or alienee from her.*

A Hindu reversioner can sue for a declaration of the invalidity of an alienation made by a transferee from or person holding under a Hindu widow. The nearest reversioner has a right "to the property of the last male owner." "Right" includes a future or contingent right and its denial furnishes him with a cause of action for a suit under S. 42, Sp. Rel. Act. (*Rafique and Lindsay, JJ.*) BALBHANDER PRASAD *v.* PRAG DUTT **41 All. 492 : 50 I. C. 938 : 17 A. L J. 765**

——— S. 42—*Right to property—Reversioner—Gift of husband's estate by widow—Suit by reversioner—Minor.*

A suit for a declaration that a gift by a Hindu widow is not binding on the estate of the last male owner must ordinarily be brought by the presumptive reversionary heir. It may be brought by a distant heir if those nearer in the line of succession are in collusion with the widow or have precluded themselves from interfering. The minority of the nearest reversioner entitled to sue is not of itself sufficient to entitle a distant reversionary heir to maintain the suit (*Piggott and Walsh, JJ.*) GUMARAM *v.* JEHANGIR. **40 All. 518 : 46 I. C. 186 : 16 A L. J. 465.**

——— S 42—*Right to property—Reversioner—Suit for declaration that gift by widow to daughter is invalid.*

In a suit for a declaration by the nearest male reversioner of a Hindu that a gift of the properties by the widow to her daughter and daughter's son is invalid, a decree can be given declaring that the gift to the daughter's son will not bind plff. But no such decree can be given as against the daughter who would inherit on the death of the widow. (*Richards, C. J. and Bannerjee, J.*) JAINT SINGH *v.* GOSAIN. **46 I. C. 85 : 16 A. L. J. 493.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Right to Property—Reversioner.

——— S. 42—*Right to property—Reversioner—Declaration suit maintainable.*

A person died leaving a widow, a daughter and a son. The son died leaving a widow and a son of the latter left as his heir his mother. The mother-in-law of this woman who had no title to the property till then left a will transferring the property of her deceased husband in favour of her daughter. The next reversioners of the lady in possession brought a suit for declaration that the will was void and inoperative. *Held*, that under S. 42 of the Specific Relief Act, they were entitled to maintain the suit. (*Richards and Tudball, JJ.*) MUSAMMAT SHEORAJI *v.* RAMJAS PANDEY. **8 A. L. J. 454 : 9 I. C. 501 : 33 A. 430.**

——— S. 42—*Right to property — Reversioner—Hindu widow—Will.*

Where a Hindu widow sets up a will giving her power to adopt, it is open to a reversioner to sue for a declaration of his reversionary rights and that the will was not genuine. 35 M. L. J. 144 Foll. : 35 Mad. 591 not Foll. (*Wallis, C. J. and Ayling, J.*) MALLAMPALLI SOMAYYA *v.* MALLAMPALLI ANNAPURNAMMA. **42 Mad. 699 : (1919) M. W. N. 794 : 26 M. L T. 139 : 52 I. C. 380 : 10 L. W. 25.**

——— S. 42—*Right to property—Reversioner—Suit for declaration that a will authorising widow to adopt was never executed.*

A suit by a reversioner for a declaration that a will said to have been executed by the last male owner to his widow authorising her to adopt a boy was never executed, is maintainable under S. 42. 45 Cal. 510, P.C. Foll. : 35 Mad. 592 not Foll. (*Ayling and Seshagiri Aiyar, JJ.*) BOBBA PADMANABJUDU *v.* BOBBA BUCHAMMA. **8 L. W. 335 : 47 I. C. 702 : 35 M. L. J. 144.**

——— S. 42—*Right to property—Reversioner.*

The reversioners, in case of an alienation by a widow which jeopardises their right, can sue for a declaration of the reversionary right. 26 All. 606 Dist. (*Sundara Aiyar and Spencer, JJ.*) SUNKARA RAMIAH *v.* SUNKARA SUBBAMMA. **13 I. C. 489 : (1912) M. W N. 70.**

——— S 42—*Right to property—Reversioner—Present interest or not.*

There is nothing to prevent persons to sue as reversioners under S 42 of the Specific Relief Act. (*Ayling, J.*) GOVINDAMMAL *In re.* **12 I C. 80 : 10 M. L. T. 95.**

——— S. 42—*Right to property—Reversioner—Present interest or not.*

A suit under S 42 lies by a reversioner irrespective of the fact whether he has a present interest in the reversion, when his reversionary rights are denied. (*Stuart, A. J. C.*) MANNU SINGH *v.* BACHCHU SINGH. **33 I. C. 183.**

——— S. 42—*Right to property—Reversioner—Mortgage of property by—Suit by widow.*

If a Hindu reversioner mortgages property in the possession of the widow as heir to her hus-

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Right to Property—Temple Property.

band describing himself as the owner of the property, the widow can maintain a suit for a declaration that the mortgage is void against her interest. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) CHANDRA KUAR *v.* RAGHUBAR SINGH. **30 I. C. 198 : 2 O. L. J. 195.**

Right to Property—Temple Property.

——— S. 42—*Right to property—Temple property—Right to birt—Whether property.*

The right of a purohit to birt is no right at all and is not property but a mere *spes successionis* or contingent right which depends on the pleasure of the judgment for its existence. (*Martineau, J.*) BISHIN DATT *v.* KISHEN DITTA. **67 I. C. 439 : 3 Lah L. J. 414.**

———S. 42—*Right to property—Temple property—Suit by worshippers for declaration that alienation of temple properties is invalid—C. P. C., O. 1, R 8.*

Worshippers of a Hindu temple can sue under O. 1, R. 8 of the C. P. C. for a declaration that a permanent lease of the temple properties in favour of the defts, is invalid and not binding on the trust. (*Abdur Rahim and Ayling, JJ.*) VEERAMACHANANI RAMASWAMY *v.* SOMA PITCHAYYA. **43 Mad. 410 : 38 M. L. J. 226 : 58 I. C. 585 : (1920) M. W. N. 393.**

Right to Property—Miscellaneous.

———S 42—*Right to property—Declaration of title—Grant of—Appeal by deft. without title or possession - Improper reversal of decree,*

Where the plff. obtains a decree against three defts. declaring his title to immoveable property of which he is in possession, the decree cannot be reversed or set aside on an appeal by one only of the defts. who on his own admission has no title to the property, and who after that admission becomes an impertinent intervener in another person's affairs. (*Sir John Edge.*) CHANDRAKA BAKSH SINGH *v.* BIKARAM SINGH. **38 All. 440: 20 C W. N. 1149 . 20 M. L. T. 164 : 4 L. W. 288 : (1916) 2 M W. N. 120 : 18 Bom. L R. 846 : 31 M L. J. 505 : 14 A. L. J. 1024 : 24 C. L. J. 291 : 19 O. C. 141 : 35 I C. 958 : 4 O. L. J. 4, (P. C.).**

———S. 42—*Right to property—Declaration of title—Shares purchased by firm—Maintainability of—Decree, form of.*

A suit for declaration of plff.'s title to a half share in a number of shares in a Limited Company purchased out of a fund, belonging to a firm, which was carried on by the plffs. and the defts. but was subsequently dissolved, is maintainable without settling accounts of the partnership business. The Court cannot direct the Limited Company to register the plffs.' names as share-holders but it should instead, direct the defts. to transfer a half of the shares in suit in favour of the plffs and to lodge the transfer together with the share certificates with the company for registration. (*Fletcher and Newbould, JJ.*) BROJONDRA KUMAR SAHA *v.* KALI NATH SAHA. **41 I. C. 77.**

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Miscellaneous

———S. 42—*Right to property—Adoption—Suit by presumptive heir for declaration of its invalidity.*

It is competent to the presumptive heirs of a Hindu to maintain a suit for declaration of the invalidity of an adoption made by the widow of the last male owner. 28 Bom. 294 ; 29 Mad. 390 ; 45 Cal 510 Ref. (*Broadway and Abdul Qadir, JJ.*) RULYA RAM *v.* BADAMO. **4 Lah. L. J 37 : 1922 Lah. 68.**

———S. 42—*Right to property.*

A suit for declaration of title to use property in respect of which an order under S. 144, Cr P. C. is passed, is not maintainable. (*Ayling and Odgers, JJ.*) P. BABA SHAH *v.* K. G. MAHOMED HUSSAIN SAHIB. **42 M. L. J. 179 : 15 L. W 68: 1922 M. 123.**

———S. 42—*Right to property — Madras Estates Land Act* (1908).

The right of a person to be recognized as landholder, under Mad. Estates Land Act, is not a common law right but one created by statute, and if a person seeks to enforce it, the Courts need not impose all the restrictions to which a person seeking the ordinary relief is subjected. (*Oldfield and Seshagiri Aiyar, JJ.*) VENNISAMI THEWAR *v.* CHELLASAMI THEWAR. **13 L. W. 104 . 29 M. L. T. 145 : 62 I. C. 276 : (1921) M. W. N. 193.**

———S. 42—*Right to property—Mortgage by karnavan—Suit for declaration of invalidity—Declaration of charge—Equitable jurisdiction.*

The junior members of a tarwad sued for a declaration that certain mortgages executed by the *Karnavan* were not binding on the *tarwad* and for possession. *Held*, that the result of the Munsif's finding was that the mortgages are not valid as such and that a portion of the money secured benefited the *tarwad*. The mortgagees would be entitled to a charge for that portion and by resorting to the equitable jurisdiction a Court, while declaring a mortgage to be invalid, can also declare a charge to a limited extent. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) ANGADIPEEDI KOYIL EROTH *v.* VALLANTUKALA IBRAYAM HAJI. **12 M. L. T. 264 : 16 I. C. 405 : (1912) M. W. N. 993.**

——— S. 42—*Right to property—Jus tertii not a valid defence.*

Deft. in a suit for declaration of title to property can set up *Jus tertii* when they can show some right in themselves against the plff. or a right in third person through whom they derive such right. They cannot succeed merely by showing superior title in a third person who has absolutely no concern with the suit. (*Jwala Prosad and Ross, JJ.*) EDAL SINGH *v.* RAM BAHORI LAL. **62 I. C. 843 : 2 Pat. L. T. 743.**

Miscellaneous.

———S. 42—*Award—Suit for declaration of invalidity—Arbitration Act, S. 14.*

Where an award of arbitrators has not been filed in court it is competent to the plaintiff to institute a suit for a declaration that the award is not binding on him. S. 14 of the Arbitration Act

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Miscellaneous.

is no bar to the maintainability of the suit. (*Le Rossignol and Campbell, JJ.*) FIRM OF HIRA NAND MURLI DHAR *v.* FIRM OF FLEMING SHAW & CO. 4 Lah L. J. 12 : 1922 Lah. 26.

——— S. 42—*Suit under—Nature—Limitation.*

A suit for declaration of title and confirmation of possession is not a suit for a specific performance and the period of limitation is 12 years. (*Mookerjee and Beachcroft, JJ.*) AKHIL PRODHAN *v.* MANMATHA NATH KAR. 22 I C. 86 : 18 C. L. J. 616.

——— S 42—*Declaratory suit for removal of nomination of mahant.*

A suit lies for removing a mahant, and for declaring the plff.'s right of nominating a new mahant, without any other relief and in such cases removing the mahant would mean only the enabling of the incoming mahant to enforce his right to possession of property. 6 P. R 1895, Foll. 16 Mad. 31; 22 Mad. 117, not Foll. 15 Mad. 15 Dist (*Shah Din and Chevis, JJ.*) TILAK CHAND *v.* RAM CHAND. 37 I. C. 105 : 95 P. R. 1916.

——— S. 42—*Declaratory decree—Act prohibited by criminal law, if can be permitted to be done—Penal Code. S 296.*

A declaratory decree of a Civil Court should not be treated as authorizing an act which is *per se* a criminal offence, but where there is a dispute between two rival religionists and one of them is charged with an offence under S. 296. I. P. C., a decree declaring the rights of either party might be considered in deciding the guilt or innocence of the accused. (*Ayling and Napier, JJ.*) MAHOMED HANIF SAHIB *v.* ANGAPPA MUDALY. 35 I C. 106

——— S. 42—*Nature of declaratory relief available.*

The moment a declaratory suit can be shown to turn on a complicated question of law or fact, *e. g.*, as to who are reversioners or heirs of the property in suit, the suit itself is entertainable under S. 42, Specific Relief Act. (*Chapman and Roe. JJ.*) SARIMAN *v.* SIHNARAIN. 39 I. C. 755 : 1 Pat. L. W. 375.

——— S. 45—*Power of High Court.*

Where the Legislature says that a public officer, even a Revenue officer, shall do a thing and he without cause or justification refuses to do that thing, the Specific Relief Act would be applicable and there would be power in the Court to compel him to give relief to the subject. S. 45 of the Specific Relief Act enables any of the three High Courts to "make an order requiring any specific act to be done or forborne by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or by any Court of Judicature", provided that "such doing or forbearing is under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character" and subject to other certain conditions. The section is not to authorise the High Court " to make any order which is otherwise expressly excluded by any law for the time being in force." (*Lord Phillimore.*) ALCOCK ASHDOWN & CO. *v.* THE CHIEF REVENUE AUTHORITY, BOMBAY. 45 M L J. 592 : 47 Bom. 742 : 33 M. L. T. 267 : L. R. 4 P. C. 188 : 18 L.W. 918 : 25 Bom L. R 920 : 21 A. L. J. 689 : (1923 M. W. N. 557 : 50 I. A 227 : 1923 P. C. 138, (P. C.) [On appeal from 23 Bom. L. R. 1132.]

——— S. 45—*Reference to High Court under S. 51. Income Tax Act—Application to compel, refused—Leave to appeal Letters Patent Bom. Cl. 39.*

Where the petitioners applied to the High Court for an order under S. 45 of the Sp. Rel. Act directing the chief revenue authority to refer a case for the decision of the High Court under S 51 of the Income-tax Act, 1918, and the application was refused by a Division Bench of the High Court, leave to appeal to the Privy Council ought to be granted, where the Division Bench entertained an appeal from the judgment of the single Judge of the High Court. (*Macleod, C. J. and Shah, J.*) ALCOCK ASHDOWN AND CO. *v.* CHIEF REVENUE AUTHORITY. 64 I. C. 959 : 23 Bom. L. R. 1132.

——— S. 45—*Validity of nomination paper—Order of Returning officer—Jurisdiction over—Completion of election.*

The jurisdiction under S. 45, Specific Relief Act, is a discretionary one and is also limited by provisions (*d*) (*e*) and (*h*) to the same section. Where a Returning officer rejected a nomination paper and the aggrieved party moved the High Court under S 45, but meanwhile the election had been completed, no action should be taken as any relief awarded would be incomplete. Also in such cases election petition ought to have been made. (*Sanderson, C. J. and Richardson, J.*) J. N. HALDAR *v.* S N. MULLICK. 28 C. W. N. 127 : 1924 C. 454.

——— S 45—*Change of election roll.*

Application to have a nomination of a candidate declared invalid and for reversion of the election roll, cannot be maintained at a late stage. (*Chaudhuri, J.*) AMULADHAN ADDY *In the matter of.* 50 I. C. 307 : 46 Cal. 132.

——— S. 45—*Mandamus—Calcutta Municipal Act—Sch. IV. Rule 7—Election roll—Application to expunge names—Decision of Chairman.*

It is open to an objector under R. 7 (2) of Sch. IV of the Calcutta Municipal Act whose objection has been dismissed by the Chairman to apply to the High Court under S 45 of the Specific Relief Act for an order directing the Chairman to expunge certain names from the Municipal roll. The decision of the Chairman under the rule is not final as there is no provision expressly to that effect. (*Greaves, J.*) SURENDRA CHANDRA GHOSH *In re.* 49 I. C. 454 : 45 Cal. 950.

——— S 45—*Power of interference by High Court.*

Where a certain person purchases land at an execution sale *be nami* for the judgment-debtor

SPECIFIC RELIEF ACT (I OF 1877), S. 45.

which he himself cannot do legally, the Court will not give him equitable relief by directing the Collector to exercise his powers under S. 167 of the Bengal Tenancy Act nor will the High Court in such a case call upon the Collector under S. 45 of the Specific Relief Act to exercise his authority in any manner whatever. (*Holmwood and Walmsley, JJ.*) MUHAMMAD SADIQ *v* DURGA PRASAD 39 I. C. 189 : 21 C. W. N. 342.

——— S. 45—*Suit to compel inclusion of name in an election roll.*

The High Court has no jurisdiction in a matter in which by statute, *viz.* Bengal Medical Act, S. 27 no suit can lie for an act done in pursuance of the rules framed under S. 38 (*Woodroffe and Coxe, JJ.*) NARENDRA NATH *v.* STEPHENSON. 31 I. C. 618 : 19 C. W. N. 129.

——— S. 45—*Principle underlying jurisdiction under the section.*

The principle underlying jurisdiction under the section is that the proceedings can confer no title not already existing though it may consummate one already existing. The first condition required for proceeding under the section is that there must be a personal right and that an injury is threatened to such right. The five conditions laid down in the section are cumulative and all of them must be fulfilled. No order affecting the right, etc., of any parties concerned in the matter can be made unless they are parties thereto. S. 45 provides an exceptional remedy; being discretionary, it must be exercised with caution and the duty sought to be enforced must be clear and obligatory. "Personal right" is not a right *in rem*. 3 Bom. L. R, 653, Diss. The existence of a legal right is the foundation of every writ of mandamus. Where the duty is conditional on the approval of another person or body being obtained there is no right to the writ, until such approval is given. In all cases where the validity of an appointment is in question no writ can be granted before the validity is declared by suit. (Spelling on Injunctions 2nd ed. p. 1365, Ref.) The writ does not lie to try the title. The writ cannot be made the excuse for obtaining the opinion of the Court on a doubtful point of law. (*Chaudhuri, J.*) *In the matter of* A. RASUL. 41 Cal. 518 : 24 I. C. 404 : 18 C. W. N. 430

——— Ss. 45 and 46—*Declaration—Nature of—Duty of applicants—Specific and legal right—Discretion of court.*

Where an application was made for a declaration under S. 45 of the Specific Relief Act, that a certain order published in the Calcutta Gazette either by the Local Government or by the Board of Examiners of the Pleadership and Mukteardship Examination was *ultra vires* and that the rejection of the applicant's application and certificate of character at the ensuing examination in 1913 was illegal. *Held*, that such declaration could not be granted inasmuch as S. 45 required that the applicant should have a legal and specific right to enforce what he seeks to obtain by a declaration and that he should have tried to exercise that right and should have been refused what he was entitled to have. That it was necessary for the applicant to have stated in his application his endeavours to obtain what he was entitled to have and the refusal be met with. And as these provisions were disregarded not only in form but in substance the application could not be entertained. That the Court has to use discretion in case of such application which cannot be granted if the applicant himself has not done the duty which he ought to have discharged. (*Jenkins, C.J., Richards, Harington and Mookerjee, JJ.*) BOARD OF EXAMINERS *v.* PROBASH CHANDRA ROY. 17 C.L.J. 354 : 17 C. W. N. 1225 : 18 I. C. 527 : 40 C. 588.

——— Ss. 45 and 46—*Mandamus—Declaration—nature of—Applicant to come with clean hands.*

There is no justification in Chap. VIII of the Specific Relief Act for a declaration that the Board of Examiners had acted illegally in not entertaining the petitioner's application and his certificate of character at the ensuing examination for 1913 and that a certain order appearing in the Calcutta Gazette passed by the said Board was illegal. No order under S. 45 should be made unless the applicant shows clearly (1) that he has a specific legal right, (2) that he has claimed to exercise it, and (3) that his claim was refused. An application under that section must be founded on an affidavit setting out these three things and in its absence the application must be dismissed. The grant of declaration under S 45 is in the discretion of the Court and an affidavit with unclean hands will not be encouraged. (*Jenkins, C. J., Richards, Harington and Mookerjee, JJ.*) PROBASH CHANDRA ROY *v.* BOARD OF EXAMINERS. 40 Cal. 588 : 17 C. L. J. 354 : 18 I. C. 527 : 17 C. W. N 1225.

[Reversing on appeal from 18 I. C. 459.]

——— S. 45—*Notes of Magistrate—Power of High Court to direct copy to be given to party.*

The High Court has power to direct a Presidency Magistrate to give copies of his notes to a party applicant entitled to get it. (*Stephen, J.*) EMPEROR *v.* SAILENDRA NATH. 11 I. C. 499. 15 C. W. N. 770 :

——— Ss. 45 and 46—*Mandamus—Enforcement of general law.*

A mandamus will never be granted to enforce the general law of the land which may be enforced by action. A complicated title to property will not be tried in mandamus proceedings. (*Mookerjee and Teunon, JJ.*) KESHO PRASAD SINGH *v.* SLACKE. 38 Cal 553 : 13 C. L. J. 390 : 10 I. C 253 : 15 C. W. N. 503.

——— S. 45—*Mandamus—Police Commissioner acting under Madras City Police Act, S. 41—Decision of a competent Civil Court—Derogation from.*

Petitioner filed a motion in the High Court for the issue of a *mandamus* to compel the Commissioner of Police of Madras to issue a licence to conduct the procession of a Goddess with music along a certain route, the right having been declared by a competent Court. The Commissioner had under S. 41 of the Madras City Police Act (III of 1888) refused on the ground

SPECIFIC RELIEF ACT (I OF 1877), S 45.

that the procession would cause a breach of the peace. *Held*, that the Court cannot interfere with the *bona fide* exercise of the discretion by the Commissioner in the particular circumstance, though it would not permit the refusal to continue indefinitely. But if under colour of exercising discretion the order of the police derogates from a lawful decision of a competent Civil Court, the High Court will compel the police to respect such decision by a writ of *mandamus*. (*Coutts Trotter, J.*) *In re* T. NAGALINGA MUDALIAR. **38 I. C. 927 : 31 M L. J. 426.**

——S. 45—"*Public office,*" *meaning of*

'Public office' in the section means any office created by the legislative or any other lawful authority for the purpose of discharging functions which affect the public generally or any particular section thereof and the words "person holding a public office" in the section include incorporated or constituted body corporate. In the case of public duties to be performed by persons holding public offices, a writ of *mandamus* can be served upon the successor in office of the person who refused to perform his duties and where persons holding the office are a statutory body fluctuating from time to time and who bear an official designation given to them by statute, the proper course is to institute proceedings against the body in its official designation and against each of such persons individually. (*Coutts Trotter and Kumaraswami Sastri, JJ.*) G. A. NATESAN *In re* **40 Mad. 125 : 33 I. C. 847 : 31 M. L. J. 634**

——S. 45—*Land acquisition case.*

The proper remedy of a person who is aggrieved by the action of the Land Acquisition Officer in not referring his case to the judge, is to apply under the section. (*Abdur Rahim, O. C. J. and Seshagiri Aiyar, J.*) MESSRS. BEST AND CO., LTD *v.* DEPUTY COLLECTOR OF MADRAS **20 M. L T. 388 : (1916) 2 M W. N. 348 : 36 I. C. 621 : 4 L. W 535.**

——S. 45—*Application for* mandamus—*contents.*

An application for *mandamus* should state clearly the specific act or forbearance and the individual against whom it is directed. (*Bakewell, J.*) VIJIARAGHAVALU PILLAI *In the matter of.* **24 I. C. 134 : 26 M. L J. 310.**

——S. 45 (a) and (c)—Mandamus—*Powers of High Court—Limits of.*

The High Court should exercise the powers given by S 45 of the Act subject to the conditions specified in the provisos to the section. The conditions specified in provisos (a) to (c) of the section are cumulative. The jurisdiction is discretionary and subject to considerations of the importance of the case or of the principle involved in it of the delay on the part of the applicant or of the merits of the case where remedy would be infructuous, *mandamus* will not issue. (*Sanderson, C. J. and Woodroffe, J.*) MANI LAL NAHAR *v.* MOWDAD. **48 I. C. 736 : 22 C. W. N. 951.**

——S. 45 (d), (e)—"*Specific and adequate remedy*"—*Meaning of—Remedy when complete.*

SPECIFIC RELIEF ACT (I OF 1877), S. 53.

"Specific and adequate remedy" in S. 45 (d) refers not to a general right of suit which must, unless expressly barred, always exist, but to some specific remedy expressly given by a particular act. If the High Court were to express judicial opinion in the course of injunction proceedings that certain land acquisition proceedings were illegal and *ultra vires*, it must be assumed that the Local Government as the Land Acquisition authorities will stay their hands in view of the decision. (*Greaves, J.*) *In re* MANICK CHAND MAHATAB *v.* THE CORPORATION OF CALCUTTA AND THE IMPROVEMENT TRUST. **66 I. C. 600 : 48 Cal. 916.**

——S. 45 (h)—*Income-tax Act*, S. 51—*Application to compel reference under, cannot lie—Government of India Act* S. 106 (2).

S. 106 (2) of the Government of India Act and S 52 of the Income-tax Act prohibit the High Court from entertaining any application under S. 45 of the Specific Relief Act for compelling the Revenue Board to refer the matter to the High Court under S. 51 of the Income-tax Act. Issuing an order under S 45 of the Specific Relief Act is an exercise of riginal jurisdiction under S. 106 (2) of the Government of India Act. (*Wallis, C. J. and Oldfield, J.*) THE CHIEF COMMISSIONER OF INCOME-TAX, MADRAS *v.* THE NORTH ANANTAPORE GOLD MINES, CO. LTD. **44 Mad. 718 : 41 M L. J. 177 : (1921) M. W. N. 502 : 64 I. C. 682 : 14 L. W. 108.**

——S. 46—*Service of rule on party interested to show cause.*

Obiter :—Every rule issued under S. 45 upon an application under S. 45 shall call not only on the public servant, corporation, or inferior Court but also on any other person who may be affected by the act to be done or foreborne to show cause. (*Mookerjee and Teunon, JJ.*) KESHO PRASAD SINGH *v.* SLACKE. **38 Cal. 553 : 13 C. L. J. 390 : 10 I. C 203 : 15 C. W. N. 503.**

——Ss. 52 and 54—*Person building on another's land in spite of protest—Compensation if adequate relief.*

Where a person builds on another man's property against his will and in spite of his protest, pecuniary compensation is no adequate relief and the injured person is entitled to an injunction. 38 Bom. 298 Fol. 33 Cal. 203 : 3 N L R 114 Dist. (*Batten, A. J. C.*) BHAOSINGH *v.* HAZARI. **13 I. C. 862 : 7 N. L. R. 179.**

——S. 53—*Injunction—Suit for.*

If there is any occasional disturbance in the enjoyment of the right of fishery an action is allowable for injunction. If there is exclusion, the proper way is to sue for ejectment. (*Chamier, J.*) SHARIF AHMED *v.* EMPEROR. **12 I. C. 305 : 12 Cr. L. J. 536 : 8 A. L J. 1097.**

——S. 53—*Temporary injunction—Arbitration—Reference under contract—Denial of contract.*

Where a contract is impeached on equitable grounds such as fraud, mistake or surprise, the

SPECIFIC RELIEF ACT (I OF 1877). S. 53.

Court may restrain arbitration proceedings commenced under it by issuing an injunction ; but no such injunction should be granted when the contract is merely denied. The Court would not grant an interlocutory injunction restraining proceedings which are null and futile, although the same may be vexatious 31 W. R. 490 and 8 T. L. R. 281 Foll. L. R. (1895) 1 Q. B. 253 and 11 T. L R 409 Ref. (*Rankin, J.*) SARDARMULL *v.* AGAR CHAND MAHATA. **52 I. C. 588 : 23 C. W. N. 811.**

———S 53—*Temporary injunction—Substantial question in controversy.*

Where a co-owner builds on the land to the prejudice of the other co owner and the latter sues for his only remedy, partition, a temporary injunction should be granted if there is a substantial question in issue to maintain the *status quo* to the necessary extent. 21 I. C 861, Ref. to. (*Mookerjee and Beachcroft, JJ.*) HEMANT KUMAR ROY *v.* BARANAGAR JUTE CO., LTD. **20 C. L. J. 441 : 24 I. C. 313 : 19 C. W. N. 442**

———S. 53—*Temporary injunction—Mandatory form.*

The description of temporary injunctions in S. 53 does not exclude injunction of a mandatory nature. A temporary injunction may be issued to restrain a person from further erection of a building and at the same time direct that he should pull down as much of it as he has erected after he became aware of the institution of the suit. 41 Cal 436, Foll. (*Spencer and Srinivasa Aiyengar, JJ.*) KANDASWAMI CHETTY *v* SUBRAMANIA CHETTY. **41 Mad 203 : 6 L. W. 140 : (1917) M. W. N. 501 : 41 I.C. 384 : 33 M. L. J. 448.**

———S 54.

Cause of action.
Co owners.
Easement.
Encroachment.
General right.
Nuisance.
Scope of.
Waste.
Miscellaneous.

Cause of action.

———S. 54—*Cause of action—Trade mark—Injunction—Points of similarity and dissimilarity—Test.*

The defendant began to sell a certain patent medicine encased in such a way that the ordinary customer might easily think it was another similar one of the plaintiff. In an action for injunction restraining the defendant from so doing, held the test to apply in such a case would be the points of similarity and not the points of dissimilarity. The fact that the plaintiff's medicine was not an efficacious one, was no reason for refusing him the legal protection he claimed. (*Meares C J. and Banerjee, J.*) CHETERPAL SHARMA *v.* JAGANNATH DAS. **44 A. 608 : L. R. 3 A. 344 : 20 A. L. J. 537 : 4 U. P. L R. A) 185 : 1922 All. 178**

———S. 54—*Cause of action—Infringement of right—Use of Trade name.*

SPECIFIC RELIEF ACT (I OF 1877), S. 54—Co-Owners.

A person shall not trade under a name, resembling that of the plaintiff where there is a similarity between two names it is an injury to the plaintiff's rights when the defendant assumes the name complained of. It is not necessary that an intelligent section of people should be deceived, but the public at large. An injunction is granted when there is fear of ordinary people being deceived. (*Mulla, J.*) THE NATIONAL BANK OF INDIA *v.* THE NATIONAL BANK OF INDORE. **24 Bom. L R 1181 : 1923 B. 119.**

———S. 54—*Cause of action.*

Where the order of discharge of trying Magistrate is set aside by the District Magistrate, simply because of difference of opinion, the complainant may sue for injunction in Civil Court. (*Scott-Smith, J.*) NASIR-UD-DIN *v.* ABDUL AZIZ. **17 Cr. L. J. 161: 33 I C. 641: 20 P. W. R. 1916 (Cr).**

———S. 54—*Cause of action—Dismissal of Somudayi—Pleading and proof.*

In a suit by the Uralans of a Malabar dewaswom for an injunction restraining the deft. a Samudayi from interfering with the dewaswom, the plffs. must allege and prove that the Samudayi had been validly dismissed before suit. An injunction cannot be asked for against a person whose employment, whatever its exact nature, entitles him to the exercise of the rights proposed to be restrained, without at first validly terminating the said employment 33. Mad. 162, Dist. (*Oldfield and Seshagiri Aiyar, JJ.*) DAMODARAN NAMBUDRI *v.* GOVINDAN NAIR. **53 I. C 229 : 37 M. L. J. 307.**

Co-owners.

———S 54—*Co-owner—Wrongful use by one co-sharer of joint property—Necessity of proving substantial injury.*

In a suit for an injunction against a co-sharer for wrongful use of a joint land it is not necessary to prove that the plff. is suffering or is likely to suffer substantial injury by such user. 8 All. 115, foll. 9 All. 661, not foll. (*Walsh, J.*) GHASITU *v.* SODHAN SINGH. **32 I C. 690.**

———S. 54—*Co-owners.*

Plff. mortgagees enjoyed the property for several years as tenant-in-common with defts. A suit for permanent injunction against the defts. to restrain them from obstruction is not a suit for partition but a suit for a declaration of the mortgagee's right. (*Chandavarkar and Hayward, JJ.*) BAI SAMARAT *v.* SARDAR SINGH. **12 I. C. 381 : 13 Bom. L. R. 905.**

———S. 54—*Co-owners—Joint Hindu family.*

Injunction should not be granted to one member of joint family against others Where plaintiff is not entitled to sole possession and defendant has a right to part-enjoyment, the proper remedy is a suit for partition and not for injunction. (*Oldfield and Seshagiri Aiyar, JJ.*) SHRINIVASA *v.* NARAYAN. **11 L W. 606 : 56 I. C. 608 : (1920) M. W. N. 364.**

———S. 54—*Co-owners— Common lane—Construction of drain—Nuisance.*

Where one of two co-owners of a lane constructs a drain in it, no injunction can be issued restraining him from doing so at the instance

SPECIFIC RELIEF ACT (I OF 1877), S. 54— Co-owners.

of another co-owner, unless the latter proves the construction of the drain to be a nuisance to him (*Coutts Trotter and Kumaraswami Sastri, JJ.*) LOGAMBAL *v.* VAITHIANATHA IYER.

30 I. C. 768.

——— S. 54—*Co-owners—Building.*

A joint owner cannot prevent by injunction the carrying out of a necessary work by another co-owner, on property held in common. (*Abdur Rahim and Ayling, JJ.*) KUTTAYAN *v.* MAMMANNA RAVUTHAN. **18 I. C. 195 : 35 Mad. 681.**

Easement.

——— Ss. 54 and 55—*Easement—Disturbance—Substantial or trivial—Injunction—Damages—Construction complete pending suit.*

In a case of disturbance of easement the plff. is entitled to an injunction rather than to damages. It is open to him to be content with damages. The law does not concern itself with a disturbance which is trivial or immaterial. Where the plff. comes into Court at once when the disturbance is threatened and the deft. completes his construction pending the suit he does so at his own peril. (*Tudball and Rafique, JJ.*) GAJADHAR *v.* KESHAV LAL. **28 I. C. 962 : 13 A. L. J. 385.**

——— S. 54—*Easement—Obstruction to light and air—Proposed building—Form of order*

Where the plaintiff brings a suit to restrain the defendant from interfering with the access of light and air to his building by a construction proposed by the defendant, the form of decree is not always that contained in form 15 of Appendix B of C.P. Code. It is quite true that it is the form prescribed for a decree in a *quia timet* action asking for an injunction against a building higher than the old level. That form is the common form of injunction which has been used in England ever since the cases of *Yates v Jack*, (1866) L. R. 1 Ch. 295, but it is obvious, when reference is made to the Easements Act that this form is appropriate as expressing what the Court should direct if the plaintiff succeeds in a *quia timet* action. Though the plaintiff may have an easement of light and air for all the windows which obtained light over the defendant's old buildings he has no cause of action against the defendant unless he threatens to disturb his enjoyment of his easement. Therefore if he succeeds in proving that he is entitled to an injunction, restraining the defendant from disturbing the easement, to the enjoyment of which he has been held to be entitled. By S. 32 of the Easements Act, the owner of a dominant heritage is entitled to enjoy an easement without disturbance by any other person. What amounts to an actionable disturbance is defined in S. 33 of the Act. When the defendant is so enjoined it will depend upon the future character of his building whether he has disobeyed the injunction in such a way as to give rise to a right of action. An injunction was issued in the case by "perpetually restraining the defendants from disturbing the easements to which the plaintiff is entitled in respect of the windows of the south wall of the premises mentioned in the plaint which were held to be ancient windows save in so far as they were obstructed by the defendant's

SPECIFIC RELIEF ACT (I OF 1877), S. 54— Easement.

old building," (*Macleod, C. J. and Crump, J.*) BAIKASHI BAI *v.* PURSHOTTAM KESHAVJI.

25 Bom. L. R. 239 : 1923 Bom. 196.

———S. 54—*Easement—Imposition of additional burden - Effect of—Acquiescence.*

A plff. can seek relief by means of an injunction within the period of Limitation against a party seeking to establish an easement against him. There may be cases where it would be inequitable on account of the plff's acquiescence over a period of less than 20 years to grant the relief. If on account of the acquiescence the cost of obeying the injunction would be very much greater than it otherwise would have been, or even prohibitive, then I agree that the court ought to penalise the plff. for his neglect to assert his right earlier. In other cases injunction might be issued. (*Macleod, C. J. and Coyajee, J.*) KASHIBHAI KALIDAS *v.* VALLABBHAI. **24 Bom. L. R. 305 : 1922 Bom. 63.**

——— S. 54—*Easement—Right to catch fish on one's own land--Extent of Injunction.*

Every person possesses a natural right to catch fish, which are *res nullius*, while on his land. A man, who has exercised his natural right of catching fish on his own property for more than 20 years, does not thereby acquire the right to prevent everybody else holding land in the vicinity from exercising a similar right. (*Beachcroft and Walmsley, JJ.*) KALENDER MANDAL *v.* AJIMUDEE MANDAL. **40 I. C. 135 : 21 C. W. N 599.**

———S. 54—*Easement— Right to water of tank declared by decree—Interference.*

When a decree by a competent court grants a right to the use of water in tank to a person, injunction should be granted to restrain the owner from interfering with such right by filling up the tank, on the ground that it was a breeding place of weeds and insects, especially when the party acquiring the easement is willing to clear the weeds. (*Fletcher and Teunon, JJ.*) AUT BEHARY GUDI *v.* RAMESWAR MITRA. **35 I. C. 40.**

——— S 54—*Easement—Light and air—Obstruction to—Erection of buildings—Damages—Discretion of court.*

Where in consequence of the obstruction the plaintiff had less light and air than before to such an appreciable degree as to injure his property in point of value, comfort, convenience, or usefulness according to its character as a residence or a place of business or warehouse an injunction is the proper remedy where substantial and wrongful injury had been done to the plff's rights. 8 P. R. 1909; 308 P. L. R. 1913; 14 C. 839 : 1 L. W 166 Rel. Though it would be possible for the plaintiff to open another window on the opposite wall or one of the other wall and it might be a neighbourly act on his party to meet the defendant in this way, he is not legally bound to do so and is entitled to enjoy the light and air that he has been enjoying through the window for over 20 years. 2 P. R. 1893 Rel. In cases of this kind, injunction is the rule and damages the exception. (1911 1 M. W. N 251 : 8 B. 95 Rel. (*Broadway, J.*) THAKAR DAS *v.* ABDUL HAMID.

67 I. C. 288 : 2 L. L. J. 701.

SPECIFIC RELIEF ACT (I OF 1877), S. 54—Easement.

——— S. 54—*Easement—Wall closing skylight—Damages, whether adequate relief.*

That a person would acquire easement over the property of another by prescription is no reason of preventing him from building up upon his lane provided he does not interfere with the right of another. Deft. built a wall and closed up a sky light in the plff.'s room which was the only aperture for ventilation into the latter's room, and thus rendered the room useless. *Held.* (1) that an injunction may be granted, as a pecuniary compensation would not afford adequate relief; (2) that the demolition of the wall would cause deft. considerable loss was no reason for refusing the plff. the due relief. 2 Bom. 133; 13 Bom. 674; 12 All. 436. (*Shadi Lal, J.*) NARBADA SAGAR *v.* MADAN LAL. **38 I. C. 148.**

———S 54—*Easement—Support—Right to—Actual damage.*

Actual damage is not necessary to entitle a person having the right to support, to an injunction, and the rule requiring damage is applicable only to an action for damages. The rule is not applicable where the disturbance is of a right of easement to superficial support. *Quaere*:—Whether the right of support claimed depends upon whether the structure in respect of which it is claimed is permanent or temporary or upon how long the structure was on the lands. (*Sundara Iyer and Ayling, JJ.*) RAMAKRISHNA IYER *v.* SEETHARAMA IYER. **37 Mad. 527 : 15 I. C. 294 : (1912) M. W. N. 1117.**

———**Ss. 54 and 56**—*Easement—Obstruction to light and air.*

Where there is substantial deprivation of light and air, the proper relief to grant is injunction and not damages. Even if it be possible for the plaintiff to neutralise the effect of the defendant's building by altering his own building, compensation in money is no adequate relief. (*White, C. J. and Sankaran Nair, J.*) RAMANJULU NAIDU *v.* APPAJRANJI AMMAL. **(1911) 1 M. W. N. 251 : 9 M. L. T. 383 : 9 I. C. 417 : 21 M. L. J. 313.**

———S. 54—*Easement—Right to discharge rain water—Form of decree.*

Where a person had enjoyed a right of easement as to the flow of rain water from his house for 40 years, he is entitled to an injunction restraining the opposite side from interfering with the exercise of the right. In granting relief to the holder of easement the Court ought not to place galling restrictions on the opposite side, provided the holder gets what he wants. (*Stuart, J. C.*) RAM LAL *v.* MAKHAN LAL. **55 I. C. 710 : 7 O. L. J. 308.**

———S. 54—*Easement—Right of privacy—Invasion of—Damages*

A mere invasion of plaintiff's right of privacy is in sufficient to entitle him to an injunction. There must be a threat of disturbance sufficient to cause substantial damage to plff. or in other words, it must amount to a nuisance, which in law implies substantial damages. The damage must not be merely sentimental or trifling; but in considering whether the property of the plff. is in fact injured or his comfort or convenience in fact materially interfered with, by an alleged nuisance, regard is had to the character of the neighbourhood and the pre-existing circumstances. (*Fawcett, J. C. and Kemp, A.J.C.*) SHAH MAHOMED *v.* RAMZAN. **66 I. C. 833.**

SPECIFIC RELIEF ACT (I OF 1877), S. 54—Encroachment.

——— S. 54—*Easement—Light and air—Proposed obstruction to—Injunction.*

Where the defendant's proposed building would interfere with the plaintiff's right of easement and deprive the plff.'s rooms of light and air thus rendering them less substantially useful for residence than before and the defendant has not begun to build, an injunction should be granted as damages would not afford adequate relief. (*Pratt, J. C. and Crouch, A J.C.*) HARDAS MAL *v.* KANDABAI. **20 I. C. 544 : 7 S. L. R. 21.**

———S. 54—*Easement — Light and air—Remedy.*

Where the blocking of an aperture for light and air leaves the house as substantially useful as before the case, is for damages and not for injunction. (*Pratt, J. C. and Crouch, A.J.C.*) MOLUMAL *v.* JAVHERMAL. **19 I. C. 908 : 6 S. L. R. 265.**

Encroachment.

——— S. 54—*Encroachment—Trees overhanging—Damage.*

Where trees belonging to one person overhang another's land, the latter has a right to cut off the overhanging portion of the trees and also to maintain an action for an injunction. (*Shah and Kemp, JJ.*) JOSHI *v.* OKA. **43 Bom. 164 : 47 I. C. 629 : 20 Bom. L. R. 826.**

———S. 54—*Encroachment—Suit for mandatory injunction—Limitation Act, Sch. I, Art.* 120.

In a suit for mandatory injunction directing the deft. to restore certain encroached lands to its original condition, it is for the plff. to prove that the encroachments were made within six years prior to suit. The Court cannot act merely on the surmise that the encroachments are recent. Where an encroachment of land has been acquiesced in and no action is taken within a reasonable time, a Court cannot interfere under S. 54 because the party cannot be deemed to have suffered injury. (*Rattigan, J.*) GANDA SINGH *v.* NATHU RAM. **77 P. W. R. 1912 : 13 I. C. 661 : 151 P. L. R. 1912.**

———**Ss. 54 and 55**—*Encroachment—Wall.*

Where the deft. encroached on plff's wall but the plff. could not prove any particular damage, *Held, per Phillips, J.* that plff. was not entitled to a mandatory injunction, but only to some damages. Though a plff. is generally entitled to injunction along with damages in a case of trespass on his immoveable property, yet where he could not prove the extent of the encroachment or any material injury, an injunction should be refused. *Per Abdur Rahim, J.*—Though an injunction, is a remedy in equity and at the Court's discretion, in a case of continuing trespass on plff.'s immoveable property which amounts to an ouster of the plff. from the land encroached upon and plff. is not guilty of laches, the plff. would be entitled to ejectment of deft

SPECIFIC RELIEF ACT (I OF 1877). S. 54—General right.

and mandatory injunction in addition to damages, even though he did not suffer material injury. The maxim *de minimus non curat lex* has no application to the law of trespass. (*Abdur Rahim and Phillips, JJ.*) SOMASUNDARAM CHETTY *v.* BAPPU. **10 M. L. T. 473 : 12 I. C. 635 : 22 M. L. J. 62.**

General right.

——S. 54 (c)—*General right—Right of* Pragwal *to use flag—Injunction.*

The right of *Pragwals* at the sacred, confluence of the rivers at Allahabad is a right both heritable and enforceable at law and a suit for injunction by one *Pragwal* to restrain another from using a similar flag in the exercise of the right, is maintainable (*Piggott and Kanhaiya Lal, JJ.*) BENI MADHO *v.* HIRA LAL.
18 A. L. J. 679: 59 I C 873: 2 U. P. L. R. (All) 227.

——S. 54—*General right—Injunction—Opening door on public street—Objection—Special damage.*

The opening by a person of a door on an old public street cannot be prevented by another unless the latter can show some special damage to himself, even if the soil was originally his property. (*Johnstone, J.*) MAM CHAND *v.* BUD RAM.
179 P. L. R 1914: 24 I. C. 902: 80 P. W. R. 1914.

——S. 54—*General right—Highway procession—Obstruction.*

Every citizen has a right to go in procession in a public street and an infringement of the right will be restrained by injunction. (*Seshagiri Aiyar and Kumaraswamy Sastri, JJ.*) ANDI MOOPAN *v.* MUTHUVIRAMMA REDDI.
29 M. L. J. 91: 29 I. C. 248: 17 M. L. T. 453.

——S. 54 (c)—*General right—Rights to river water—Injunction.*

Each owner through whose land the river flows has a right to use the same, but subject to similar rights of other owners. And therefore an injunction can be granted against an owner restricting him from erecting dams so as to cause material injury to other owners. (*Chamier, J. C.*) SHEO NARAIN SINGH *v.* CHANDRI BAI. **10 I. C. 181.**

——S. 54—*General right—Religious office—Suit to restrain persons from officiating.*

An injunction will not be granted restraining a priest from officiating in private houses. Nor will a suit lie against any member of a family of priests for an account of their earnings as such 1 Pat. L. J. 381 and 20 All. 234, Ref. (*Roe and Coutts, JJ.*) LUTAN PANDEY *v.* PRAYAG PANDEY.
49 I. C. 383: 4 Pat L. J. 53.

Nuisance.

——S. 54—*Nuisance—Noise—Discomfort.*

Though it is correct to say that a person living in a manufacturing town cannot expect the same freedom from noise as a person living in the country, it does not justify a business which involves a violent hammering on iron in a room separated only by a partition wall from the house of the plaintiff. In the latter case, an injunction would be issued restraining the nuisance. (*Daniels, J.*) HULAS RAI *v.* SOHANLAL.
1923 All. 443 (1).

SPECIFIC RELIEF ACT (I OF 1877), S. 54—Nuisance.

——S. 54—*Nuisance—Power of Court.*

Where a nuisance only diminishes the comforts of human life, there is always the question whether the Courts will proceed against the defendant by an injunction or compensate the plff. in damages. (*Beaman, J.*) BAI BHICAIJI *v.* PEROJSHAW JIVANJI.
40 Bom. 401: 38 I. C. 192: 17 Bom. L. R 1040.

——S. 54 — *Nuisance — Offensive smell — Principles on which injunction is granted set out.*

The principles on which a Court acts in granting an injunction in preventing a nuisance likely to be committed, are these:—"The Court will not in general interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when complied with, will result in a ground of action, interfere before any actual nuisance have been committed where it is satisfied that the Act complained of will inevitably result in a nuisance. The plaintiff, however, must show a strong case of probability that the apprehended mischief will in fact arise in order to induce the Court to interfere". There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes to be very substantial. Plaintiffs were the owners of certain houses and a temple frequented by orshippers on one side of the road. On the opposite side the defendants had a jute mill in which there were several sceptic tanks from which it was alleged that offensive smells emanated and complaints had been made from time to time by the plaintiff. In July 1919 the plaintiffs wrote to the defendants stating that they had been informed that the defendants were about to erect another tank opposite to the plaintiff's premises and alleging that nuisance and inconvenience were likely to arise therefrom and asking them to abstain from the erecting the sceptic tank at that particular place. The defendants did not reply to the latter with the result that in August 1919 the plaintiffs brought a suit for an injunction restraining the defendants from constructing the tank. An interim injunction was issued pending the trial and it was established by the evidence that the use of the sceptic tank had been approved by proper authority and by qualified scientific men as a proper system in the neighbourhood and that the new sceptic tank if properly kept would emit no smell and cause no nuisance, *Held* that no injunction could be granted, as it was quite possible by the use of due care to prevent offensive smell emanating from the new tank. The Court however declared that the dismissal of suit was without prejudice to the right of the plaintiff to take such further proceedings as might be necessary in case the new sceptic tank proved to be a nuisance in the future. (*Sanderson, C. J. and Richardson, J.*) AMARENDRA NATH DEY *v.* BARANAGORE JUTE FACTORY CO., LTD. **49 Cal. 1059: 1923 Cal. 271.**

——S. 54—*Nuisance—Working of factory—Restriction on.*

In a suit for an injunction to restrain a nuisance caused by the working of a factory at night

SPECIFIC RELIEF ACT (I OF 1877), S, 54—Nuisance.

if the plaintiff succeeds, the decree should direct the defendant to refrain from carrying on the working of the factory in such a manner as to occasion a nuisance to the plaintiff. An absolute prohibition against the working of the factory during specified hours is unwarranted. (*Broadway and Abdul Qadir, JJ.*) CHIRAGH DIN *v* KARIM BAKHSH. **64 I. C 169.**

——— Ss. 54 and 55 — *Nuisance—Statutory body—Damages—Injunction.*

A plff who has established that his common law right has been invaded is entitled to an injunction to prevent a recurrence of that violation The fact that the Legislature has provided for the payment of compensation for damages caused by the exercise of statutory powers is no bar to the grant of an injunction. (*Twomey, C. J. and Young, J.*) BURMA RAILWAYS CO., LTD. *v.* RANGOON MUNICIPALITY. **10 L. B. R 203 : 59 I. C. 823: 13 Bur. L. T. 62.**

Scope of.

——— S. 54—*Scope of—Injunction when to be granted.*

Before an injunction can be granted, the applicant, must establish a legal right in himself, show an actual or threatened invasion of that right and must prove that the wrongful act complained of or apprehended will be repeated or done, if not restrained by the Court. (*Mears, C.J. and Banerji, J.*) MUHAMMED IBRAHIM *v.* CHANDAN SINGH. **63 I. C. 727: 3 U. P. L. R. (A.) 187.**

——— S. 54—*Scope of—General injunction—Mention of particular acts unnecessary.*

It is always undesirable that an order should be made for bidding a party enjoined generally from doing particular acts If once the Court enjoins the defendant against particular acts there is no limit to the number of acts which might have to be mentioned. The general injunction is sufficient. (*Macleod, C. J. and Crump, J.*) KASHINATH HARI BONDALE *v* VISHWANATH BHIKO. **1923 Bom. 409.**

——— S. 54—*Scope of—Perpetual injunction.*

The plff. in a suit for injunction must prove that the opposite party has done something towards infringing the plaintiff's rights or it is so clear that he is on the point of doing something which will infringe the plff's. right so that there is prospect of irremediable injury being suffered by the plff. unless he takes steps to stop the defendant's action. (*Macleod, C.J and Heaton, J.*) GOVINDLAL MANEKLAL *v.* ICHHA VAGHA. **57 I. C. 414 : 22 Bom. L. R. 723.**

——— S 54—*Scope of—Obligation—Sacred tree—Perpetual injunction.*

'Obligation' under S. 54 of the Act, is a tie bond constraining a person to do or to suffer something ; it implies a right in another person to which it is correlated and it restricts the freedom of the obligee with reference to definite acts and forbearances, but it must be a legal obligation, not merely moral, social or religious to be enforced by a Court of law. Therefore, a perpetual injunction cannot be granted to restrain the execution of a decree for removal of a *nim* tree on the ground that it is a sacred one, for the reason that there is no breach of any obligation, *i.e.* of a duty enforceable by law within the meaning of S. 54 of the Act (*Mookerjee and Panton, JJ.*) BHUDEB MOOKERJEE *v.* KALACHAND. **66 I. C. 536 : 34 C. L. J. 315.**

——— S. 54—*Scope of—Suit in foreign Court about same subject-matter—Injunction not to prosecute not to be granted.*

A defendant in a pending suit should not be restrained from commencing and prosecuting a suit in a foreign Court to enforce rights acquired within the jurisdiction of the foreign Court against the same plaintiff under the law of that foreign country. At any rate it is an essential condition that an injunction should be applied for very promptly and that it should not be applied for after a considerable amount of time and trouble has been expended in the foreign suit. (*Rankin, J.*) TIKAMCHAND SANTOK CHAND *v.* SANTOK CHAND SINGHI. **59 I C. 218 : 24 C. W. N. 735.**

——— S. 54—*Scope of—Temporary injunction—Specific performance of contract for sale—Concealment of facts.*

A temporary injunction will be granted to a plaintiff restraining defts, from selling property to a third person owing to the pendency of a suit for specific performance of contract for sale, where the permission necessary to sell the property was obtained owing to certain facts being not brought to the notice of Court granting it. (*Teunon and Beachcroft, JJ.*) MANARANJAN SADHUKHAN *v.* BIRENDRANATH DUTT. **57 I. C. 847.**

——— S. 54—*Scope of.*

In order to entitle plff. to a perpetual injunction he must establish that the injunction is required to prevent a breach of an obligation as defined in Specific Relief Act, S. 3. But an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding. (*Mookerjee and Fletcher, JJ.*) RAM KISEN JOYDOYAL *v* HOORAN MULL. **56 I. C. 571 : 31 C. L J. 259.**

——— S. 54—*Scope of—Perpetual injunction—Relief when granted—Injury—Mining rights.*

To get an injunction , the plff. must show a strong case of probability that the apprehended mischief will in fact arise He must show that the act complained of, is in fact a violation of his right or at least is an act which if done will necessarily result in a violation of his right. The mere prospect or belief is not sufficient. There must be proof direct or indirect of the existence of an intention in the defendant to do the act complained of. Where a purchaser of the rights of a lessee of a coal mine claims the right to take away the entire coal, the Court is competent to grant an injunction if it is proved that what the purchaser contends he has a right to do, would constitute a breach of the contract between the lessor and the lessee. Where a lessee of a mine works a mine so as to cause subsidence of a surface. he will be restrained by an injunction. (*Mookerjee and Beachcroft, JJ.*) RAMDAS AGHARWALA *v.* BRAJOMOHAN SINGH. **20 C. L. J. 538 : 27 I. C. 244 : 19 C. W. N. 887.**

SPECIFIC RELIEF ACT (I OF 1877), S. 54—Scope of.

——S. 54—*Scope of—Grounds for granting injunction—Discretion of Court.*

On a claim for an injunction the Court has to consider not merely whether the plaintiff's legal right has been infringed or even materially infringed but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement. Where the parties were relatives on bad terms and the suit for injunction was prompted by desire to cause injury to the defendant, the Court would not grant the relief. 18 B. 474 Ref. (*Shadi Lal, C. J. and Campbell, J.*) RAM CHANDRA *v.* RAGHUBIR SINGH.

4 U. P. L. R. (Lah.) 69 : 1922 Lah. 443.

——S. 54—*Scope of—When can be granted.*

A breach whether actual or threatened, by the deft. of some legal right vested in the plffs. is necessary before an injunction can be granted. (*Rattigan and Shah Din, JJ.*) GUR DAS *v.* BHAG

96 P. R. 1911 : 143 P. W. R 1911 : 11 I. C. 231 . 216 P. L. R. 1911.

——S. 54—*Scope of—Injunction—Nature.*

Per Sadasiva Aiyar, J.—(1) An action for injunction is not a 'real action. The distinctions between 'real and personal' actions in the English Law should not be imported into India. (*Sadasiva Aiyar and Bakewell, JJ.*) SELAMBAYI *v.* SANGU PANDITHAN. **35 I. C. 147 : 3 L. W. 642.**

——S. 54—*Scope of—Injunction against community.*

When a community is sued in a representative capacity an injunction against them is not illegal and such an injunction is clearly within S 54 of the Specific Relief Act. 30 Mad 185, Foll (*Ayling and Napier, JJ.*) MAHOMED HANIF SAHEB *v.* ANGAPPA MUDALI. **35 I. C. 106.**

——S. 54—*Scope of.*

An injunction can be granted to prevent an invasion of the rights of any person resting on tort as well as to wrongs arising out of contract (*Jwala Prasad, J.*) RIT LAL *v.* RAGHBIR RAM.

58 I. C. 714.

Waste.

——S. 54—*Waste—Building on land—Injunction Pleadings—Issues*

Where an injunction is sought to restrain deft. from erecting buildings on land alleged to belong to plff. it is essential that the boundaries of the land should be given in order to assist the Court to find out what is actually in dispute and against what portion of the land one injunction is sought to be effected. A map ought to be attached to the plaint and vague descriptions of the boundary ought not to be accepted. Issues should be so framed that the Court may understand the actual points arising for determination and it ought not to be left open to the parties to raise equivocal, ambiguous and evasive issues. (*Chaudhuri and Cuming, JJ.*) RAMSASI ROY *v.* BOLAI LAL SINGH. **53 I. C. 890.**

——S 54—*Waste—Hindu widow—Whether can be restrained from alienating the estate.*

Though ordinarily the reversioners of the last male owner are not entitled to obtain an injunction to restrain his widow in possession of her customary estate from alienating property, it is a proper form of relief when it is found that the widow is committing or is about to commit acts waste as contemplated by law. (*Rattigan, J.*) TAJO *v.* ALDAH DUN. **53 P. W. R. 1916 : 35 I. C. 229 : 124 P. L. R. 1916.**

——S. 54—*Waste—Ameliorating—Injunction suit—Punjab Tenancy Act, S. 77.*

A suit for a perpetual injunction by a land lord against his occupancy tenants, prohibiting the latter from building houses on the tenancy land is cognisable by the Revenue Court only, under S. 77 of the Punjab Tenancy Act. (*Johnstone, Chevis and Shadi Lal, JJ.*) IBRAHIM *v* AKBAR.

104 P. W. R. 1916 34 I. C. 209 : 58 P. L. R. 1917

——S. 54—*Waste — Injunction — Trial Courts' discretion—Power of Appellate Court—Landlord and tenant.*

The relief by injunction under S. 54 is a matter of discretion and if the Court below has exercised its discretion judicially and not arbitrarily the Court of appeal will refuse to interfere. Where land is let to a tenant for agricultural purposes and he begins to erect a mosque or other permanent structure there is at once a case for injunction, as damages in a case like this will not be sufficient relief. Though a landlord in such case can take steps in a Rent Court for ejectment of the tenant from the entire holding, there is no obstacle in the way of his coming to the Civil Court and asking for injunction. (*Lindsay, J.*) KUDA BAKSH *v.* GAURI SHANKAR.

7 U. L. J. 301 : 57 I. C. 476 : 23 O. C. 163.

Miscellaneous.

——S. 54—*Injunction — Interference with right—Acquiescence.*

An owner of *yajman vrithi* is entitled to maintain a suit for injunction against the caste for undue interference with his right. But where the plaintiff has for several years acquiesced in the decision of the caste he is not entitled to seek the protection of the Court against the action of the caste. (*Macleod, C. J. and Fawcett, J.*) GIRJASHANKAR DAJI *v.* MURLIDHAR NARAYAN.

45 Bom. 234 : 59 I. C. 271 : 22 Bom. L. R 1202.

——S 54—*Legal proceedings—Suit in foreign Court about same subject-matter.*

A defendant in a pending suit here should not be restrained from commencing and prosecuting a suit in a foreign Court to enforce rights acquired within the jurisdiction of the foreign Court against the same plaintiff under the law of that foreign country. At any rate it is an essential condition that an injunction should be applied for very promptly and that it should not be applied for after a considerable amount of time and trouble has been expended in the foreign suit. (*Rankin, J.*) TICUMCHAND SANTOKE CHAND *v.* SAUTOKECHAND SINGHI **59 I. C 218 : 24 C. W. N. 735.**

——S. 54—"*No suit shall be instituted"—Meaning of—C. P. Code, S. 80.*

"The words no suit shall be instituted" include suits of every kind Where there is serious and

SPECIFIC RELIEF ACT (OF 1877), S. 54—Miscellaneous.

imminent injury requiring immediate injunction a Court can entertain the suit and issue the injunction without previous notice. (*Chandavarkar and Heaton, JJ.*) SECRETARY OF STATE *v.* GANAN KRISHNA MAVLANKAR. **13 Bom. L. R. 273 : 10 I. C. 639 : 35 Bom. 362.**

——S. 54—*Arbitration—Contract for supply of goods—Breach—Reference to arbitrators pending—Injunction—Contract void as a wagering contract—Discretion.*

Disputes having arisen under the contracts the defts. referred the same to arbitration under an arbitration clause. Plff. brought a suit for a declaration that the contracts were of a gambling and wagering nature and so void under the Contract Act and applied for a stay of the arbitration proceedings. *Held*, under the circumstances, the plff. had no equity which would entitle him to ask for an injunction restraining the arbitration proceedings. 22 C. W. N 535. (*Sanderson, C. J. and Woodroffe, J.*) BAIJNATH *v.* MANSUKARI PANNALAL. **49 I. C. 968 : 23 C.W N. 258.**

——S. 54—*Injunction, suit for—Possession by tenants—If maintainable.*

A suit for an injunction restraining the defendant from collecting the rent of certain property, is not liable to be dismissed merely because, the possession is with tenants and is not sued for. (*Broadway and Wilberforce, JJ.*) KARAM SINGH *v.* VIR SINGH. **63 I. C 776 : 2 Lah 252.**

——S. 54—*Trade name—User by rival company—Pecuniary loss—Charitable companies.*

A company is entitled to obtain an injunction to restrain a new company from carrying the same kind of business as the old company under the name identical with or similar to the plff's company as to be calculated to deceive the persons dealing with the plff. company. The fact that the new company has been registered and the Registrar took no objection to the registration does not preclude the old company from obtaining an injunction to restrain the new company from carrying on the same kind of business as that of the old company under a name calculated to deceive the public. (*Shadi Lal and Dundas JJ.*) GURKHA ASSOCIATION, SIMLA *v.* MAHUMED UMAR. **51 I. C 905.**

——S. 54—*Trespass—Crown—Right of entry in private property to regulate distribution of water—Injunction, grant of.*

Where Government is not owner of water supplied to tanks in a *mitta* by an artificial channel passing through the village, the Revenue officers as agents of the Government cannot enter the mittadar's land without his consent to regulate the supply or distribution of water to his *mitta* and other *Ayan* villages or to execute repairs Such a right can only be exercised without violating the proprietary rights of others and by the use of lawful means. The Government can be restrained by an injunction from committing trespass on the properties of private owners for controlling the distribution of water for purposes of irrigation. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) SECRETARY OF STATE *v.* PALANIAPPA PILLAI. **22 M. L. T. 345 : (1917) M. W. N. 571 : 41 I. C. 24 : 6 L W. 572**

SPECIFIC RELIEF ACT (I OF 1877), S. 55.

——S. 54—*Injunction—Raising of a tank bund and flooding of plff.'s land—Form of injunction.*

Where a plaintiff's land is liable to be more submerged on account of the raising of the tank bund by the defts. and the consequent narrowing of the sluice, the proper form of injunction should be in general terms to use such means at deft's option as would prevent plff's. land from being flooded to a greater extent than before or failing that to direct the deft. to lower the bund of the tank and widen the sluice. Deft. cannot exempt himself from liability on the ground that he performed a statutory duty as that act of his was a source of danger to the neighbour. 28 Mad. 72, Dist. 1 I. A. 364. Expl. (*Abdur Rahim and Sundara Iyer, JJ.*) APPAYA PANTULU *v.* PUVVALA KANTAYYA. **14 I. C. 267.**

——S. 54—*Temple—Right of worship—Injunction.*

Every person who has a right of worship in a temple can maintain a suit against those who interfere with or deny his right. Similarly a suit, by a person for an injunction restraining the defendant from entering a temple on the ground that his presence constitutes a discretion of the temple an interference with the plff's exclusive right of worship. (*Robinson, O. C. J. and Mac Gregor, J.*) SAKLAT *v.* BELLA, **63 I C 963 : 13 Bur. L. T. 188.**

——S. 55—*Injunction—Mandatory—Compliance*—Habeas Corpus.

Where compliance with a mandatory injunction is likely to expose a person to *Habeas Corpus* proceedings in England an order for delivery of children residing in England to their father in India ought not to be passed. (*Lord Parker.*) MRS. ANNIE BASANT *v.* NARAYANIAH. **38 Mad. 807 : 41 I. A 314 : 27 M. L. J. 30 : 18 C W. N 1089 : 1 L. W. 520 : (1914 M. W. N. 585 : 16 M. L. T. 165 : 20 C. L. J 253 : 16 Bom. L. R. 625 : 24 I. C. 290 : 12 A. L. J. 1165 (P. C.).**

——S. 55—*Injunction, Mandatory—Building injuring plaintiff Erection of.*

A mandatory injunction can properly be granted where the defendant erects a building over a public land to the injury of the plfs, interests and in the teeth of opposition. 32 Cal. 303 (P. C.) Dist. (*Tudball, J.*) LANTIRAM *v.* CHHAJU SINGH. **20 I. C. 368.**

——S. 55—*Mandatory injunction—Closing of privy door—Allegation and proof of.*

To obtain an order for injunction for closing the door of a privy, the plff, must allege and prove by direct evidence that inconvenience had been experienced by plff, in a specific manner and on specific occasions. (*Piggott, J.*) PYARI *v.* RAJA RAM. **11 I. C. 45.**

——Ss. 55 and 56—*Easement—Privacy—Injunction.*

In the province of Gujarat there is a customary usage which makes an invasion of privacy an actionable wrong and a man may not open new doors or windows in his house or make any new appertures or enlarge old ones in a way which

SPECIFIC RELIEF ACT, (I OF 1877), S. 55.

will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation. (*Macleod, C. J. and Heaton, J.*) MANEK LAL MOTI LAL *v.* MOHAN LAL NAROTAMDAS. 55 I.C. 949 : 22 Bom. L.R 226.

——— S. 55—*Roots of tree penetrating neighbour's land—Mandatory injunction can be granted.*

Every owner of land is under an obligation not to allow the roots and branches of his tree to extend so as to penetrate his neighbour's land, and in case of breach of such an obligation, it is open to the Court to grant a mandatory injunction for the removal of the nuisance under S 55 of the Act (*Mookerjee and Panton, JJ.*) BHUDEB *v.* KALA CHAND. 66 I. C. 536 : 34 C. L. J. 315.

——— Ss. 55 and 54—*Infringement of right—Damage not essential.*

A plff. though holding under a grant from a Hindu widow whose natural rights are in danger of being infringed or further encroached upon by a new enjoyment on the part of the deft. capable of being converted by user for the prescriptive period into a new right in the latter has a good cause of action, apart from any damage which he may have suffered or is likely to suffer (*Richardson and Walmsley, JJ.*) ERAIJOOL TEA CO, LTD. *v* NAGENDRA NATH. 41 I.C 47.

——— S. 55 - *Temporary injunction—Substantial question in controversy.*

Where a co-owner builds on the land to the prejudice of the other co-owner and the latter sues for his only remedy, partition, a temporary injunction should be granted if there is a substantial question in issue to maintain the *status quo* to the necessary extent. 21 I.C 861, Ref. to. (*Mookerjee and Beachcroft, JJ.*) HEMANT KUMAR ROY *v.* BARANAGAR JUTE CO., LTD. 24 I.C. 313 20 C.L.J. 441 : 19 C.W.N. 442.

——— S. 55—*Mandatory injunction.*

The deft. erected a wall quietly and promptly on the land covered by the footings of a wall belonging to the plff, who immediately brought a suit for a mandatory injunction for the demolition of the deft's wall. *Held*, that the plff was entitled to a decree. *Jenkins, C. J. and Woodroffe. J.*) ABDUL HUSSAIN *v.* RAM CHARAN LAW. 12 I. C. 459 : 38 Cal. 687 : 16 C.W N. 313

——— S. 55—*Injunction to remove a dam—Enjoyment of the flow of water for 30 years proved.*

Since 1888 the plff. irrigated his fields with water led by him through an artificial channel from the Baloti *Nadi* from a public stream. The defts. dammed the Baloti *Nadi* at a point higher up than the plaintiff's intake, and drew off almost the whole of the water into a channel made by them for their fields. The plaintiff sued for an injunction for the removal of the dam and the restoration to him of the normal supply of water. *Held*, that he must succeed because for over 30 years openly and without asking permission of anybody he has enjoyed the full flow of the Nadi and in the absence of evidence that he acted by arrangement or permission he must be held to have enjoyed the easement as of right. (*Shadi Lal C. J and Le Rossignol, J.*) BALI RAM *v.* BELA SINGH 1923 Lah. 594

SPECIFIC RELIEF ACT, (I OF 1877), S. 55.

——— S. 55—*Mandatory injunction—Obstruction to plaintiff's* moris.

The defendant built up a wall against the plaintiff's house by which he completely obstructed the plaintiff's four *moris* on each of his three stories. *Held* the injury to the plaintiff is of a serious character and that neither damages nor re-arrangement of his property would afford any adequate relief *Held* further that the whole of the building need not be demolished but the defendant be directed to open all the *moris.* (*Shadi Lal, C.J. and Le Rossignol, J.*) ATMA RAM *v.* NANAK SARAN DAS. 1923 Lah. 593.

——— S 55—*Erection of building pending suit—Order for demolition.*

A co-sharer has a right in every portion of the land and the other co-sharers are not entitled to build on the common land without the consent of the former. Where a co-sharer brings a suit for restraining the defendant by an injunction from building on the common land and the suit is dismissed and the defendant without waiting for the result of any appeal that might be preferred by the plaintiff built on the land *held* that if a plaintiff succeeded on appeal he was entitled to an injunction demolishing the structure erected by the deft. The deft. could not resist the claim by asking the plaintiff to sue for a partition. (*Marlineau, J.*) HAYAT ALI SHAH *v.* MT. TAJ-UL-NISSA. 1923 Lah. 205.

——— S. 55—*Right of persons in possession to apply for mandatory injunction—Pecuniary relief, omission to sue for.*

A person in enjoyment of a right may apply for an injunction when that enjoyment is interfered with by a person without title. If the injury suffered by the appellants is capable of being adequately healed by a pecuniary compensation, the Court is bound to assert the amount of that compensation and not refer the plaintiff to fresh litigation. (*Le Rossignol, J*) BUTA KHAN *v.* KAMMEE KHAN. 61 I. C. 870.

——— S. 55—*Injunction—Nuisance—Disturbance by assembly of Hindus.*

The Mahomedans have an inherent right to call out the *azam* from the Mosque. Noises made by defts. (Hindus) collectively and continuously at the time of calling out the *azam* for the sole purpose of frustrating the object of the call constituted a nuisance. It was no answer to the suit that the little noise made by each of the defendants personally did not amount to a nuisance. (1894) 3 Ch. 163, Ref. The Mahomedan plaintiffs were entitled to the injunction prayed for because the nuisance caused by the defendants was not a reasonable exercise of their rights. The acts of two or more persons may, taken together constitute such a nuisance that the Court will restrain all from doing acts constituting the nuisance although the annoyance occasioned by the acts of any one of them if taken alone, would not amount to a nuisance. A person has an inherent right to call out the *azam* from the mosque but not the unlimited right of blowing conches and making noise so as to cause nuisance to his neighbours. (*Bevan Petman, J*) JAWAND SINGH *v.* MAHOMEDDIN. 51 I.C. 728 : 1 Lah. 140.

SPECIFIC RELIEF ACT (I OF 1877), S. 55.

——Ss 55 and 56 - *Easement—Injunction—Light and air.*

Where injunction is claimed for a threatened danger to property the plaintiff must, besides showing a violation of his rights, show that he would be inevitably injured in consequence A man is not necessarily entitled to the whole of the accustomed light and air and a neighbour may share in them without diminishing the plaintiff's amenities. (*Agnew, J.*) ARJAN DASS *v.* GANESH DASS. 172 P. W.R. 1913 : 21 I. C. 249 : 308 P. L. R. 1913.

——S. 55—*Injunction — Mandatory —Co-owners—Obstruction.*

Where a narrow lane is the common property of two co owners and one of them put up two *pials* and steps thereby encroaching upon the common lane and making it less convenient for the other to pass through, the aggrieved co-owner is entitled to a mandatory injunction directing the removal of the obstruction. 35 Mad. 648, Ref. 4 C. L. J. 198, Dist. (*Seshagiri Aiyar and Moore, JJ.*) VARANASI SUBBAYA *v.* VARANASI SOMA LINGAM. 27. M. L. T. 176 : 55. I. C. 643. 38 M. L. J. 491.

——S. 55—*Trespass—Building on land.*

In cases of mere trespass the Court may refuse a mandatory injunction but the owner can recover the property with damages including the cost of removal of any building erected. (*Benson and Sundara Aiyar, JJ.*) SIKKINDAR ROWTHAN *v.* MAHOMED ABBUBAKKER ROWTHEN, 21 I. C. 45 : (1913) M. W. N. 648.

——S. 55—*Injunction— Mandatory — Trespass by building wall on plff's land- Want of deligence—Waiver—Relief by way of damages.*

A Court can grant a mandatory injunction to a plff. who complains of the unlawful invasion of his rights by the deft. when the unlawful act does not only obstruct the proper enjoyment of plffs' rights of property, as by interference with light and air, but is likely to deprive him of the property itself. (1909) I Ch. 70, Rel. Even in case of delay in the institution of a suit for injunction, and where damages might be sufficient compensation, the Court has a discretion to grant the injunction if in all the circumstances of the case, it is of opinion that justice between the parties requires it. 22 M L. J. 62 Ref. The fact that plff. objected to the deft.'s improper act will not necessarily entitle him to a mandatory injunction. Where a waiver of his right for an injunction in substitution of a claim for damages might be inferred from plff.'s conduct, the Court may refuse to grant a mandatory injunction. The omission of the plffs to move the Court for a temporary injunction before the construction of the building is not sufficient to deprive the plff. of his right to a mandatory injunction. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) TUMUMLA PEDAYYA *v.* KOPPULA CHINNA APPANNA. 16 I. C. 412 · (1913) M. W. N. 188.

——S. 55—*Alteration of mode of enjoyment.*

When the eaves of a dominant tenement project over the servient tenement and the dominant owner acquired an easement to discharge eaves droppings, an injunction will be granted if the dominant owner by constructing an upper storey projected the eaves beyond the original extent, so as to throw an additional burden on the servient tenement. (*Fawcett, A. J. C.*) AYOOB ISMAL *v.* NAR MAHAMMAD SILEMAN. 28 I. C. 169.

SPECIFIC RELIEF ACT (I OF 1877), S. 56.

——S. 56—*Joint wall—Slight encroachment —Relief to be granted.*

In the case of a joint wall where one of the parties encroached on the other's right by four inches, the proper remedy is not to direct the encroachment to be pulled down but to grant a declaration that the encroachment belonged to the other party. (*Macleod, C, J. and Crump, J.*) DAUDKHAN MUSEKHAN *v.* CHANDULAL KANHAYALAL. 1923 Bom. 370.

——S. 56—*Implied negative agreemente—Breach.*

In an agreement containing simple affirmative words a negative agreement not to do other things at the same time and place is presumed ; and its breach can be compensated for by damages. (*Beaman, J.*) ANDREW YULE AND CO. *v.* ARDESHIR BOMANDEYA. 20 I. C. 844 : 15 Bom. L. R 724.

——S. 56—*Injunction sought—Damages if can be given.*

Permanent injunction may be granted where an actual invasion of a legal right has taken place and is likely to continue further. It is not necessary that the plff. must bring a suit in damages every year. The Court has jurisdiction to give damages where relief by injunction alone is sought. In a suit for injunction no positive evidence, is necessary to show that the defendants intended to invade the right in future. It depends on the particular circumstances of the case. (*Chandavarkar and Hayward, JJ.*) BAI SAMARAT *v.* SARDAR SINGH. 12 I. C. 381 : 13 Bom. L. R. 905.

——S. 56—*Injunction— Mandatory— Trespasser building upon land.*

When a trespasser builds on the land in spite of objections, a mandatory injunction should be issued. 29 Mad. 497, Dist. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) ALLAGAPPAN *v.* KARRUPPA CHETTY. 25 I. C. 503.

——S. 56—*Hindu Law—Purohits choice—Injunction.*

A person who has been engaging the services a particular *purohit* cannot be restrained by injunction from engaging the services of others. 7 Mad. 424, foll. (*Sadasiva Iyer and Seshagiri Iyer, JJ.*) SARIPAKA CHINA MAHADEVA *v.* MUTHURA SURYA PARAKASAM. 1 L. W 389 : (1914) M. W N. 379: 24 I, C. 204 : 26 M. L. J 482.

——S. 56 (Ill. 1.)—*Plaintiff out of possession —Injunction when granted.*

An injunction cannot be granted when the plaintiff is out of possession, unless there is some *privity* between the parties (1849) 7 Hare Rep. 217 68 Eng. Rep. 89; 18 L. J. Ch 163; 13 Jur. 227 ; 82 R. R 76 Rel. A plaintiff who is out of possession cannot sue the trespasser for an injunction but can sue for the recovery of the land. (*Coxe and Roy, JJ.*) BHRAMAR LAL BANDURI *v.* NANDA LAL. 24 I. C. 199 : 18 C. W. N. 545.

SPECIFIC RELIEF ACT (I OF 1877), S. 56.

——S. 56 (b)—*Subordinate Court—Civil and Revenue Court.*

Obiter :—When an appeal lies from a Revenue Court to a Civil Court the power is subordinate to the latter within S. 56 (b) Specific Relief Act. (*Kanhaiya Lal and Daniels, A. J. Cs.*) MAHADEI KUNWAR *v.* BAHI RANI. **50 I. C. 180 : 6 U. L. J. 55.**

——S. 56 (c)—*Order under S 9—Party affected can sue on title and for injunction.*

Where an order under S. 9 of the Sp. Rel. Act is passed against a person in possession he can institute a suit to establish his title to the property and for an injunction restraining the opposite party from interfering with his possesion. 4 Cal. 380 dist. (*Coyajee, J.*) MARI UDDYTAMMA MARKEMDI *v.* SANTAYA RAMAKRISHNA PAI. **24 Bom. L. R. 766 : 1922 Bom. 216.**

——S. 56 (e)—*Injunction—Initiation of Criminal proceedings—Power of Civil Court to restrain.*

The tendency of modern decisions is that even if the court has jurisdiction to restrain Criminal proceedings for the recovery of a penalty imposed by a statute for breach of its enactments, it will not interfere as a general rule. The principle is that though the extreme position cannot be maintained that there is absolutely no jurisdiction in the court to restrain proceedings before a Magistrate, the court will not interfere unless in very special circumstances by way of injunction on declaration of right where the Legislature has pointed out a mode of procedure before a magistrate. It has been maintained, however, that a court of equity may in a proper case interfere by injunction to restrain an act or proceeding, Criminal or Quasi Criminal in form which tends to the impairment of property rights and proceedings for the enforcement of Municipal ordinances. It is also a well-settled rule that it is not the practice of the court to interfere with corporate bodies, unless the powers are manifestly abused by them. (*Mookerjee and Rankin, JJ.*) CORPORATION OF CALCUTTA *v.* BEJOY KUMAR ADDI. **50 Cal, 813 : 38 C. L. J. 360 ; 27 C. W. N. 787 : 1924 Cal. 334**

——S. 56 (h)—*Trade-mark—Infringement—Laches.*

In a suit for injunction against infringement of a trade-mark, *Held* that as the plff, had done nothing beyond sending a notice to the deft. in March 1909 and then stood by and allowed deft. to invest a considerable sum of money in the business and only in June, 1914 brought the present suit he was not entitled to an injunction. (*Scott Smith and Martineau, JJ.*) VARCADOS *v.* MCLEOD. **45 P. R. 1919 : 51 I. C. 434 : 83 P. L. R. 1919.**

——S. 56 (i) — *Injunction, mandatory—Damages adequate remedy.*

Where upon a balance of a convenience, damages will be an adequate remedy, mandatory injunction should not be granted. (*Sankaran Nair and Bakewell, JJ.*) SETHURAM NADIGAI RAO *v.* GOPAL RAO PEISHWA. **23 I. C. 785 : 1 L. W. 166.**

STAMP ACT (II OF 1899), S. 2.

——S. 57—*Contract comprising an affirmative and a negative agreement—Condition subsequent—Injunction.*

Where an agreement contains both an affirmative agreement and a negative, express or implied and there is a condition subsequent qualifying the negative, the negative is enforceable by injunction if the condition is not fulfilled. (*Scott, C.J. and Batchelor, J.*) ANDREW YULE & CO. *v.* ARDESHIR BOMENJI DUBASH. **24 I.C. 758 : 16 Bom. L. R. 178**

——S. 57—*Affirmative agreement implied negative agreement.*

Where along with affirmative agreement there is an implied negative agreement not to do a certain thing, the doing of the latter may be stopped by injunction (*Beaman, J.*) ANDREW YULE & CO. *v.* ARDESHIR BOMANJI. **20 I. C. 844 : 15 Bom L. R. 724.**

——S. 57—*Contract not to serve elsewhere—Breach—Injunction.*

Where there is a contract of personal service coupled with a stipulation that the servant is not to seek service elsewhere during the period of the contract the court can grant an injunction restraining the servant from seeking employment elsewhere in breach of contract, though it is unable to enforce specific performance of the affirmative covenant. (*Robinson, C. J and Heald, J.*) THE INDO-BURMA OIL FIELDS, LTD. *v.* BURMA OIL COMPANY, LTD. **64 I. C. 794 : 11 L. B. R. 26.**

SPES SUCCESSIONIS.

See (1) HINDU LAW—REVERSIONER.
(2) T. P. ACT, S. 6.

STAGE CARRIAGES ACT (XVI OF 1891).

——S 7—*Offence under—Second Class Magistrate can try.*

Held, following 7 P. R. 1879 that a second class Magistrate has no jurisdiction to try an offence under S. 7 of the Stage Carriages Act. (*Chevis, J*) GOBIND RAM *v.* EMPEROR. **65 I. C. 439 : 23 Cr. L. J. 87.**

STAMP ACT (II OF 1899).

——*Construction of—Object of the enactment.*

The Stamp Act being a fiscal statute whose primary object is to secure revenue to the state its object is attained by excluding the unstamped document from evidence and not acting on it. The parties need not be penalised beyond this extent. (*Kennedy, J. C. and Kar, A. J. C.*) NARAINDAS *v.* JASSOMAL. **65 I. C. 37 : 15 S. L. R. 135.**

——S. 2 (1)—*Execution of document—Unsigned instrument.*

Unsigned Burmese instruments made since the Indian Stamp Act came into force, that is since the 1st July 1899 cannot be treated as "executed" for the purposes of the Stamp Law. 7 Bur. L. T. 48 foll. (*Saunders, J. C.*) MAUNG PO DIN *v.* MAUNG PO NYEIN. **66 I. C 360 : (1921) 4 U. B. R. 60.**

——S. 2 (1) (a) and (b) (3) and S. 35—*Adhesive stamp not cancelled—Document not admissible.*

STAMP ACT (II OF 1899), S. 2.

Where a document which must be stamped bears an adhesive stamp but the stamp is not cancelled the document is not admissible under S. 35 (*Jwala Prasad, J.*) BARHAM DEO RAI *v.* RAM KISHUN MAHTON. 60 I. C. 652. 2 Pat. L. T. 184

——— ——Ss. 2 (5) and 36—*Written promise to pay barred debt need not be stamped.*

A written promise to pay a barred debt is not required by any provision under the Stamp Act to be stamped; it is not a bond. Even if it be, when an instrument has been admitted in evidence such admission shall not be questioned at any subsequent stage of the same suit under S 36 of the Stamp Act (*Abdul Raoof and Campbell, JJ.*) DAVID SUTHERLAND CLARK *v.* ROSE GRIM SHAW. 1923 Lah. 481

———S. 2 (5)—"*Bond*"—*Obligation, to pay money—Person becoming liable for another's act*

Defendant took upon himself the liability of another person in respect of a debt of Rs. 1,000 and agreed to get certain land mortgaged to the creditors in lieu of that sum and on failure to do so, to pay the said sum of Rs 1,000 together with interest. *Held*, that the documents was not a bond under S. 2 (5) of the Act. But the definition was not exhaustive. The instrument was a bond with a condition inasmuch as it was attested by witnesses and by it the defendant obliged himself to pay certain sum of money to another, if he did not perform a specified act which he had undertaken. (*Scott Smith, J.*) NAND LAL *v.* KARM CHAND, SHAMIR MAL. 2 Lah. L J. 224.

———S. 2 (5) (vi)—*Attestation—What amounts to—Writer of document—If an attesting witness.*

The attestation referred to in S. 2 (5) (vi) of the Stamp Act means attestation on the face of the instrument. 48 Cal. 61 does not hold that the person who signs as writer of an instrument must be regarded as an attesting witness, but that a person who is present and witnesses execution of a bond and whose name appears in the document though he is therein described merely as a writer of the deed is a competent witness to prove execution. (*Woodroffe, Greaves and Ghose, JJ.*) BIDHA RANJAN MOJUMDAR *v.* MANGAN SARKAR. 49 Cal. 729 : 26 C. W N. 585 : 35 C. L. J 459 : 1922 Cal. 452.

———S 2 (5)—*Security bond.*

Where a Receiver executes a security bond to the Court binding himself and his heirs and as a security thereof pledges immoveable property worth Rs 200, the bond must be stamped as both under the Court Fees Act and under Art. 40 of Sch. I of the Stamp Act as it comes within the definition of a mortgage in S 2 (7) of the Stamp Act. (*Wallis, C. J. Oldfield and Seshagiri Aiyar, J.*) AMIRTHAMMALL *v.* RAMALINGA GOUNDEN. 43 Mad 363 : (1920) M. W. N. 245 : 57 I. C. 184 : 12 L. W. 537 : 38 M. L. J 503

———Ss 2 (5) and 35 (a)—*Bond or promissory note—Penalty and stamp duty.*

A document attested by two witnesses and stamped with an adhesive stamp of one anna, was as follows :- "I promise to pay you or your heirs on demand the sum of Rs. 40, the amount I borrowed from you this day, with interest at 1 per cent per mensem." *Held*, that the document was a bond and not a promissory note, and was admissible in evidence on payment of penalty and stamp duty under S. 35 (*a*) of the Stamp Act. (*Subrahmania Aiyar and Moore, JJ.*) KARARAM RANGIAH *v.* MALA CHENGAMMA NAIDU 43 I. C. 55 . 33 M. L. J. 603.

——— ——S. 2 (5)—*Bond promissory note—Attestation—Construction of document—Penalty.*

A document under which a person has obliged himself to pay money to another which is neither payable to order or bearer nor attested by a witness is not a bond within S, 2 (5). In case of ambiguity as to attestation by a witness of a document, only the document itself must be looked to. (*Chamier, C. J., Chapman and Jwala Prasad, JJ.*) MAHOMAD SADDIK *v.* AMOYA NATH DUTT. 2 Pat. L. W. 525 : 2 Pat. L J. 686 : 41 I. C. 693: 1917 Pat. 345.

———S. 2 (5) (c)—*Bond—Agreement to deliver produce for consideration or in default to compensate.*

An agreement to deliver produce for consideration or in default to compensate the covenantee is not a bond even if it be attested by two witnesses. (*Fox, C. J and Twomey, J.*) COLLECTOR OF RANGOON *v.* MAUNG AUNG BA. 9 Bur. L. T 111 : 33 I. C. 920 : 8 L. B B. 382.

——— ——S. 2 (7)—*Negotiable Instruments Act (XXVI of 1881) S. 5.*

An instrument purporting to receive a sum of money of a depositor with a Bank and specifying the name of the messenger who is to receive payment is only a receipt and not liable to stamp duty. (*Ried, C. J. and Kensington, J.*) STAMP ACT *In re.* 35 P. L. R. 19 2 : 13 I. C. 330 : 184 P. W. R. 1912.

———S. 2, (10)—*Conveyance — Letter reciting previous sale—Admission of consideration,*

A conveyance is an instrument which transfers property from one person to another. A document in the form of a letter reciting an earlier sale and an earlier receipt of consideration therefor is at most a receipt for the consideration and an admission of the sale but is not in itself an instrument of sale or conveyance. The document is not liable to stamp duty (*Rattigan, Le Rossignol and Leslie Jones, JJ.*) RUSTOMJI *v.* EMPEROR. 115 P. R. 1915 : 1 P. W. R. 1918 : 44 I. C. 261 (S B.) 151 P L. R 1917.

——— ——S. 2 (12)—"*Execution*"—*Unsigned document—If liable to stamp duty.*

Under S. 2 (12) "executed" stands for "signature" and an instrument chargeable with stamp duty only on being executed is not liable to duty until it is signed. (*Hartnoll, O. C J. and Ormond and Twomey,*) THE APPLICATION OF CHET PO. *In re.* 7 L. B. R. 77 22 I. C. 75 : 7 Bur. L. T. 48

———S. 2 (14) Art. 5—*Hiring sugar-cane machine—Agreement—Instrument—Stamp.*

An entry in the plaintiff's register signed by the defendant is an instrument within S 2 (14) and being a memorandum of agreement fell within

STAMP ACT (II OF 1899), S. 2.

t. 5 Sch. I of the Stamp Act and required a stamp of 8 annas. (*Knox, Banerjee and Tudball, JJ.*) MUTSADDI LAL *v.* HARKESH. **36 All. 11 : 21 I. C. 601 : 11 A. L. J. 966.**

——S. 2 (15)—*'Instrument of partition' includes—Award.*

An "instrument of partition" includes in its definition award by an arbitrator directing a partition ; if it is not sufficiently stamped as an instrument of partition it is inadmissible in evidence. (*Stuart, J.*) SYED MOHAMMAD HAMEED *v.* SYED MANZUR HASAN. **1922 All. 283.**

——S 2 (15), and Art. 45 (3).—*"Final order" meaning of.*

The words "final order" in S. 2 (15) and Art. 45 (3) in Sch I of the Stamp Act refer to the final order of the lowest Court of original jurisdiction empowered to give an order for partition. (*Knox Tudball and Piggott, JJ.*) STAMP REFERENCE BY THE BOARD OF REVENUE *In re.* **36 All. 137 : 23 I. C. 98 : 12 A. L. J. 113 (P. C.).**

——S. 2 (15)—*Partition—Award before Act II of 1899 came into force—Stamp-duty.*

An award of arbitrators directing a partition executed before the present Stamp Act (II of 1899) came into force will be received in evidence even if it bears a stamp-duty of Rs. 5 only, if the Court is satisfied that it was not put in the form of an award simply to avoid stamp duty because under the Stamp Act of 1879, this was not included in the definition of "instrument of partition." (*Rattigan and Scott-Smith, JJ.*) SUKH DIAL *v.* MANI RAM. **29 P. R 1915. 27 I. C. 489 : 29 P. L. R. 1916.**

—— S. 2 (15) and Art. 45—*Partition instrument—Stamp.*

A document termed a *yadast* was executed at Trivandrum in 1915 by two brothers, bearing a Travancore adhesive stamp of one anna. The brothers divided their properties both in British and Travancore territories. The partition was to take effect from the date of execution of the document the properties were to be enjoyed separately with effect from 14th January 1915 and separate partition deeds were to be executed for the properties in Travancore and British India. *Held*, that under the definition in S. 2 (15) the deed was chargeable as a contract of partition under Art. 45. (*Wallis, C. J., and Krishnan, J.*) KAJANGAM AIYAR *v.* RAJANGAM AIYAR. **11 L. W. 556 : 55 I. C. 965 : 38 M. L. J. 330.**

—— Ss. 2 (15)—*Partition, award directing—Court-fee.*

S 2 (15) lays down that an award or decree directing partition is an instrument of partition and a party deft. executing the decree must pay proper Court-fee payable on his own share. 12 Bom. 98 Dist. (*Abdur Rahim and Kumaraswamy Sastri, JJ.*) PEDA NAGABUSHANAM *v.* PITCHAYYA. **42 I. C. 365 : 6 L. W. 448.**

STAMP ACT (II OF 1899), S 2.

——S. 2 (15)—*Order, when chargeable—Final order.*

To make an order chargeable under S. 2 (15) of the Stamp Act, it must effect an actual division. A decree passed on a razinamah which allots specific properties to the several parties, directs other parties to deliver up possession and provides for the execution of a sale-deed and a lease of certain property, is a "final order" in the suit effecting partition and is chargeable with duty as an instrument of partition. It can also be considered as an instrument whereby the co-owners have agreed to divide property in severalty. (*Backewell, J.*) THIRUVENGADATHAN AIYA *v.* MANGAYYA. **35 Mad 26 : 12 I. C 775 : (1911) 2 M. W. N. 516.**

——S. 2 (15)—*'Final order'—Does not mean a final decree.*

The expression "Final order" in S. 2 (15) of the Stamp Act applies to some order of the Civil Court passed in execution and does not mean a final decree. (*Wallis, J.*) SESHACHELLUM PILLAY *v.* ALWAR CHETTY. **12 I. C. 769 : (1911) 2 M. W. N. 515.**

——S. 2 (16)—*Lease—Counterpart of mortgage*—Marupat.

A *marupat* is a counterpart of a lease executed by a tenant promising certain rent and must be stamped both as a counterpart and as a mortgage (*Wallis, C. J. Ayling and Kumaraswami Sastri, JJ.*) GOVINDAN NAMBUDRI *v.* OTTATHAYIL MOIDEEN. **41 Mad. 469 : 42 I C. 943 : 33 M. L. J. 693 (F.B.).**

——S. 2 (22) and Sch. I, Art. 5—*Undertaking to deliver grain on demand—Stamp.*

A document where in a person gives an undertaking to give a certain quantity of grain on demand does not fall within S. 2 (22) of the Stamp Act, but falls under Sch. I Art. 5 of the Act. (*Daniels, A. J. C.*) ABHAIRAJ KUAR *v.* DATA DIN. **1924 Oudh 106.**

——S. 2 (22)—*Promissory Note—Letter of request for a loan is not a.*

A document written by the defendant to the plaintiff in the form of a letter or *ruqa* ran as follows :—"According to our friendly agreement I would trouble you, as a friend, to get the execution file consigned to the record room at once. As agreed I will pay the remaining Rupees 1,400 by the middle of August without hesitation (talamal) if God wills (Insha Allah Ta' ala). You should rest assured." *Held*, that the document in question was not a promissory note and that it did not require to be stamped as such (*Piper, J.C.*) SAYAD SIKANDAR SHAW *v.* BHAI RAM CHAND SANT RAM. **71 I. C. 968**

——Ss 2 (22) and 35 and Sch. I, Arts. 13 and 49.—*Promissory note—Payable otherwise than on demand—Stamp.*

STAMP ACT (II OF 1899), S. 2.

A document by which the executant undertakes to make certain specified payments towards the sum due under it, and agrees that his failure to do so shall render him liable to forfeit any payments already made is not a promissory note payable otherwise than on demand but only an agreement requiring 8 annas stamp. (*Parlett, J.*) KATCHI ROWTHER *v.* NAINA MOHAMED.
28 I. C. 300 : 8 L. B. R. 155

——— **Ss. 2 (23) and 63**—*Sarkhat—Entries in, of receipts for over Rs. 20—Stamp.*

Each of the entries of receipts of over Rs. 20 in a *sarkhat* left in the hands of the debtor must be stamped as a receipt. (*Tudball, J.*) TULSHI RAM *v.* EMPEROR. **11 A. L. J. 309 : 20 I. C. 216 : 14 Cr. L. J. 392 : 3 5 All. 290.**

——— **S. 2 (24) and Sch. 1, Art. 7**—*Settlement—Appointment.*

Where an instrument was prepared for declaring trusts of certain funds for establishing a charitable institution and the trustee got the money from two sources, *viz.*, (1) Public contributions and (2) donation in a will by certain person for charitable purpose, *Held*, as regards the 1st portion, the instrument was a settlement within S. 2 (24) and as regards the rest, the instrument was an appointment chargeable with a duty of Rs. 15 under Sch. I Art. 7. The provisions of the will amounted to a disposition for a charitable purpose of the money and the trustees in appropriating the money to the trusts declared by the instrument, were exercising the power of appointment conferred by will. (1876) 3 Ch D. 342 : 25 W. R. 277, Rel. (*Scott, C. J., Russel and Rao, JJ.*) ABDULLA HAJI DAWOOD BOWLA, *In re.* **35 Bom. 444 : 11 I. C. 982 : 13 Bom. L. R. 646**

——— **S. (3) (c)**—*Foreign Instruments—Property in British India.*

An instrument executed outside British India and not relating to any property or to any matter or thing done or to be done in British India is not chargeable with stamp duty. (*Thomson, F. C.*) MAWCHI MINES, LTD. *In re.*
48 I. C. 187 : 11 Bur. L. T. 126

——— **S. 4**—*Settlement—Stamp duty.*

To settle disputes between two brothers, one of them executed a deed of gift conveying all his property to the other, while the other undertook to maintain him during his life by another deed. *Held*, the two documents should be regarded as one transaction within the meaning of the word settlement in S. 4, and should be stamped as under the section. (*Knox Rafique and Piggott, JJ.*) MHARAJ SOMESHAR DUTT *In the matter of* **37 All. 264 : 28 I. C. 348 : 13 A. L. J. 335. (F. B.)**

——— **S. 4**—*Second instrument of partition making minor alterations in the first—Stamp.*

Where two persons entered into a family arrangement regarding their joint property and stamped the deed with the full duty payable for a

STAMP ACT (II OF 1899), S. 5.

deed of partition and subsequently they executed another instrument affirming the first with some minor alterations assuming that both the deeds were to remain equally binding on them, *held*, that the first and the main deed having been stamped with the proper stamp fee payable under the Act, the second deed was chargeable with a duty of one rupee only. (*Knox, Rafique and Piggott, JJ.*) SHAMBHU DIYAL. *In the matter of*, **37 All. 159 : 27 I. C. 731 : 13 A. L. J 96 (F. B.).**

——— **S. 5**—*Single instrument relating to distinct matters—Sale deed—Mortgage of other lands as security for due performance.*

In a sale deed the vendor mortgaged the lands not included in the sale as security for due performance of his contract. *Held*, that the deed was not an instrument comprising or relating to distinct matters within S. 5 and need not be stamped both as a sale and as mortgage. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) SECRETARY TO THE COMMISSIONER OF SALT AND ABKARI *In re.* **43 Mad. 365 : (1920) M. W. N. 247 : 56 I. C. 154 : 38 M. L. J 506.**

——— **Ss. 5 and 6 and Sch. I, Arts. 1 and 55**—*Acknowledgment of a debt — Release—Instrument falling under both heads.*

The account books of an agent contained an entry "Due to me Rs. ... " It was followed by a statement of the principal in these words "The balance of the liability is made up of moneys advanced by my agent. . . . . on my behalf. The above dues not include interest due on them. I have examined the several items of account entered herein in detail and I find them to be correct. I hereby release my agent . . . from all claims to account against him by me or any one claiming under or in trust for me . . . I hereby acknowledge the correctness of every one of the items of expenditure". *Held*, that the entries constituted an acknowledgment of debt and should have been stamped with a one-anna stamp. *Per Abdur Rahim. Offg. C.J.* As the document deals with distinct matters, being a release falling under Art. 55 in the latter portion, and an acknowledgment in the former portion of it, should be stamped under S. 5 of the Act. *Per Phillips, J.* As the recital about release relates only to items in respect of which acknowledgment is given, the two matters are not distinct within S. 6, and regarding it as a whole, the document cannot be said to come within the definition of both "release" and acknowledgment.", (*Abdul Rahim, Offg. C.J. and Phillips, J.*) RAMASWAMY IYER *v.* GNANAMANI NACHIAR.
(1917) M. W. N. 121 : 5 L. W. 279 : 37 I. C. 984 : 31 M. L. J. 851.

——— **Ss. 5, Sch 1, Art. 43**—"*Distinct — matters.*"

Agreement to refer a dispute arising out of contract to arbitration is a part of the contract itself. It is not a distinct matter. The whole contract is exempted under S. 5 (*a*) and the documents making the contract need not be charged except on broker's note under Art. 43: 13 C.W.N.

STAMP ACT (II OF 1899), S. 6.

65. Diss from. (*Chitty, J.*) THE BOMBAY CO., LTD. *v.* THE NATIONAL JUTE MILLS CO. LTD.
16 I. C. 153 : 38 Cal. 669.

——— S. 6—*Attested Shahjog Hundi.*

An attested Shahjog hundi comes under S. 6 *i. e.* it is liable to stamp duty under two headings in the Schedule. (*Fletcher, J.*) ASSARAM *v.* KESRI CHAND.
33 I. C 247 : 22 C. L. J. 22.

——— S. 12—*Cancellation of Stamp—Question of fact.—Diagonal lines across stamp.*

The question whether a stamp has been duly cancelled within S. 12 of the Stamp Act is one of fact to be decided by an examination of the stamp itself. The cancellation of the stamp by drawing diagonal lines across it, their ends extending to the paper, is sufficient. 15. I. C. 202 and 108 P. R. 1908, Ref. (*Broadway, J.*) MELA RAM *v.* BRIJ LAL.
54 I. C. 976 : 148 P. R. 1919

——— Ss. 12 and 35—*Hundi bearing adhesive stamps not cancelled—Admissibility.*

A hundi, the adhesive stamps on which are not cancelled, is not admissible in evidence even though the omission to cancel it was due to a mere oversight. (*Kensington, J.*) ALLAHABAD BANK OF INDIA *v.* ABDUL KARIM.
18 P. R. 1912 : 65 P. W. R 1912 : 14 I. C. 512 : 75 P. L. R 1912.

——— S. 12—*Adhesive stamp—Cancellation.*

Where an adhesive stamp on a pro-note or a receipt is cancelled by drawing lines each line extending more or less beyond the edges of the stamp on to the paper on which the document was written, the cancellation is effected in a sufficiently effectual manner. The question is to be determined by looking at the instrument itself (*Piggott, J. C, and Lindsay, A. J. C.*) MOHAMMAD AMIR MIRZA BEG *v.* KEDAR NATH.
15 I. C. 202 : 15 O. C. 58 : *See also* 52 I. C. 974 : 4 All. 169.

——— S 12—*Cancellation of stamp—What is.*

The question whether a particular adhesive stamp has or has not been effectually cancelled so that it cannot be used again is a question that depends on the facts of each case. Drawing lines across the whole stamp extending beyond the edges was a sufficient cancellation within the meaning of S 12. (*Kincaid, J. C, and Raymond, A. J. C.*) PESSUMAL *v.* GAGANMAL
66 I. C. 5 : 15 S. L. R 34

——— S 12 (3)—*Cancellation of adhesive stamp—Lines across the stamps.*

Drawing of lines across an adhesive stamp is a good cancellation provided an intention to cancel is clear from what has been done. (*Scott-Smith and Leslie Jones, JJ.*) KISHORILAL BENARSI DAS *v.* RAM LAL TEK CHAND.
3 Lah. L. J. 170 : 60 I. C. 559 : 3 U. P. L. R. (Lah.) 19.

STAMP ACT (II OF 1899), S. 26.

——— S. 13—*Statutory rules—Rule 7—Promissory note on impressed stamp paper of insufficient value—Blank impressed sheet to make up deficiency—Whether duly stamped.*

Where a promissory note was written on an impressed stamp paper of insufficient value and a blank impressed sheet was added to make up the deficiency, the promissory note was held not duly stamped. (*Wallis, J.*) MOHANLAL KUNIALAL *v.* KESARIMULL.
23 I. C. 110 : 15 M. L. T. 203.

——— Ss. 14 and 15—*Material alteration of instrument—Stamp.*

A material alteration of an instrument even with the consent of parties vacates the original instrument and makes it a new one and a fresh stamp duty must be paid, unless the alteration was made before issue or to correct a mistake, or supply an omission in reference to the original intention of the parties. (*Rigg, J.*) TRIBENI *v.* SAHU.
101 C. 517 : 11 Bur. L. T. 257.

——— S. 14—*Arbitration—Second instrument.*

Where before the acceptance of a reference by a sole arbitrator, the name of another arbitrator is added, it does not amount to a second instrument within S. 14. (*Crouch A. J. C.*) SHAMDAS TEUMAL *v.* KHIMANMAL CHANDUMAL.
29 I. C 602 : 8 S. L. R. 302.

——— S. 16—*Rules under—Irregularity.*

When the duty payable under an instrument is fully paid in the form of Government stamp whether judicial, postal or any other, the instrument should not be classed as unstamped and the irregularity about the stamps of improper description is cured by the Collector's certificate. (*Stanyon and Skinner, A. J. Cs.*) TUKARAM *v.* SONAJI.
10 I C. 702 : 7 N. L. R. 26.

——— S. 19—*Promissory note executed outside British India—Admissibility.*

A promissory note executed outside British India if valid according to the law of that place can be sued on in British India and is admissible in evidence, without any Indian stamp being affixed to the same. 8 M.L.J. 122 and 22 Mad. 267, Foll. (*Seshagiri Aiyar, J.*) KUNHI KOYA HAJI *v.* PANIKKA VITTIL ASSAN BAVA.
52 I.C. 477 : 36 M.L.J. 188 : 25 M L.T. 191.

——— Ss 26, 35, and 61, Art. 35—*Scope of—Lease for ten years on condition of dividing profit of trees planted on the land.*

Where a land was leased for 10 years for being planted with trees, on condition that at the end of the term the trees planted should be cut and sold and the profits of sale divided, deducting expenses of cutting, etc. *Held*, that as the value of the subject-matter was not one which could not be ascertained at date of the execution of the document, S. 26 did not apply to it and it was not liable to stamp duty. *Per Srinivasa Aiyangar, J.* The document was an assignment of the land for a term in consideration of recovering half the proceeds of the trees when they were fit for cutting and was therefore not liable to stamp duty. The document being admitted in evidence could not be called in question in appeal except

STAMP ACT (II OF 1899), S. 26.

under S. 61, Stamp Act. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) KONDAPE SESHAYYA *v.* GRANDHI VENKATA SUBBAYYA. **39 I.C. 448 : 31 M.L.J. 234.**

—— **Ss 26 and 35**—*Mining lease—Royalty in excess of amount covered by stamp—Penalty.*

S. 26 of the Act is subject to and governed by S. 35, and a lessee under a mining lease is entitled upon payment of the penalty to recover the royalty provided for in the lease even though the amount claimed is in excess of the amount covered by the stamp used in the lease. 3 Mad. 342 ; 10 Bom. 239 : 9 Bom. L. R. 122, Ref. There is nothing in S. 35 which necessarily excludes its operation from cases covered by S. 26. It would be a strange result, if an instrument bearing no stamp and therefore not admissible in evidence under S. 35, could be validated by payment of penalty under the proviso of that section, whereas a similar instrument bearing a stamp and therefore admissible and enforceable to a limited extent could in no case be fully enforced even by paying the penalty, or admitted in evidence for proving the full extent of the contract entered into between the parties. The Stamp Act is not based on public policy, but it intends to protect the revenue by excluding proof of the bargain by an instrument unduly stamped. By denying the benefit of S. 35 in the case of mining leases requiring an *ad valorem* stamp, when the value can only be estimated, the State would gain nothing but would suffer loss. S. 35 provides the means by which, in the case of estimate proving deficient, the revenue can be amply protected and the terms of the bargain can be proved and given effect to. (*Miller, C.J. and Mullick, J.*) KUMAR BRAJA MOHAN SINGH *v.* LACHMI NARAIN AGARWALA. **58 I. C. 99 : 1920 Pat. 289 : 2 U. P. L. R. (Pat.) 215 : 5 Pat. L.J. 660 : 1 Pat. L.T. 719.**

——— **Ss. 26 and 35**—*Mortgage—Running account.*

In mortgages creating a charge in respect of running accounts, the maximum fixed is the value of the subject-matter for the purposes of the Stamp Act. (*Twomey, C. J. and Ormond J.*) CHETTY FIRM *v.* MAUNG AUNG BA. **50 I.C. 303 : 9 L.B.R. 217 : 12 Bur. L. T. 1.**

——— **S. 26 and Sch I Art 6**—*Scope.*

The section deals with the amount of interest allowable after a document is admitted, but does not refer to its admissibility. (*Abdur Rahim O. C. J. and Seshagiri Aiyar, J.*) MUTHIAH CHETTY *v.* KOTHANDARAMASWAMI NAIDU. **(1916) 2 M.W.N. 221 . 35 I. C 864 : 4 L. W. 472 : 31 M. L. J. 347**

——— **Ss. 30 and 65**—*Receipt of money by Money Order.*

Mere refusal by the payee of a Money Order to give receipt for the sum sent by the remitter would not constitute an offence under S. 65 of the Stamp Act and S. 30 of the Act does not require a person receiving money to specify the particular purpose of payment. (*Richards, C. J. and Banerjee, J.*) BALMUKAND *v.* EMPEROR. **34 All. 192 : 13 Cr. L. J. 122 : 13 I. C. 778 : 9 A. L. J. 97.**

STAMP ACT (II OF 1899), S. 35.

—— —— **Ss. 32, 37 and 57**—*Collector's certificate—Finality of*

Collector's certificate under S. 42 of the Stamp Act is final as to the admissibility in evidence of a document and the Court has no power to revise the Collector's action except as provided by S. 57 of the Stamp Act. (*Stanyon and Skinner, A. J. Cs.*) TUKARAM *v.* SONAJI. **10 I. C. 702 : 7 N. L. R. 26.**

—— —— **Ss. 33 and 40**—*Value not given in documents—Collector cannot investigate value for the purpose of improving.*

The Collector cannot investigate with an intention of compromise of a deed which is silent as regards such a value and therefore does not require any stamp. Nor can he cause it to be stamped with reference to the value so ascertained (*Piggott, Gokul Prasad and Lindsay, JJ.*) MAHOMED MUZAFFAR ALI, *In the matter of.* **44 A 339 : L. R. 3 All. 89 : 20 A. L. J. 161 : 1922 A. 82.**

—— —— **S. 33**—*Jurisdiction of Court to impound document—Civil Procedure Code, O. 7, R. 14.*

In a suit for recovery of money on a hat chitta which has to be produced along with the plaint under O. 7, R. 14, C. P. C., a bound volume containing this hat chitta along with others was to be produced in Court. The Court finding that the hat chitta on which the claim was founded and many other documents had not been properly stamped, impounded the whole volume under S. 33. *Held*, that the Court could not impound the hat chittas other than the one on which the plff.'s claim was based as they were not produced nor came before it in the performance of its duties. 25 Mad. 528, Dist. (*Mookerjee and Cuming JJ.*) SASHISHI MOHAN SHAH *v.* KUMUD KUMAR BISWAS **21 C.W.N. 246 : 35 I.C. 415 : 27 C.L.J. 525.**

——— **Ss. 33 and 35**—*Procedure under—Criminal Courts.*

Under S. 33 it is optional to the Magistrate to examine or impound the instrument if it appears to be insufficiently stamped. But the prohibition contained in the first part of S. 35 that no instrument chargeable with any duty shall be admitted in evidence for any purpose or acted upon unless it is duly stamped, does not apply to proceedings in a Criminal Court. (*Chitty and Beachcroft, JJ.*) JAGANNATH RAHATGIR *v.* DEOKI NANDAN. **29 I. C. 671 : 16 Cr. L. J. 543.**

—— —— **S. 35.**

See also PROMISSORY NOTE.

—— —— **S. 35**—*Document acknowledging existence of debt—Not admissible without stamp.*

The document in question was in the form of a letter on a printed form in a book kept by the plaintiff. A carbon copy was taken from it and given to the debtor (the defendant). It was addressed to the defendant and after mentioning certain credits and debits concluded with the statement that a sum of Rs. 6,001 was due to the plaintiff from the defendant. This was signed by the defendant. *Held*, that the document was an acknowledgment and was inadmissible in evidence without the stamp required

by Art. 1 of the Stamp Act. (*Ryves and Daniels, JJ.*) RAM DAS *v.* INAYAT ULLAH.
45 A. 374 : 21 A. L. J. 263 : 9 O and A. L. R. 404 : L. R. 4 A. 174 : 1923 All. 297.

——S. 35—*Private International Law.*

A promissory note was executed in favour of the Nawab of Ranipur as such on an unstamped paper the laws in the state not requiring any stamp ; *held*, that the promissory note was admissible in evidence in a British Indian Court as valid instrument according to Indian Stamp Act. (*Stanley, C. J. and Griffin, J.*) AMINA BEGAM *v.* NAWAB OF RANIPUR. 33 All. 571 : 10 I. C. 247 : 8 A. L. J. 566.

——S. 35—*Promissory note—Executed outside British, India—If can be sued upon.*

If the law of a foreign country where a document was executed, simply provides that it shall not be admissible in evidence if not properly stamped, it can be sued upon in a British Court. But if the foreign law provides that the agreement embodied in the document is void for want of proper stamp then it cannot be sued upon in a British Court. (*Batchelor, C. J. and Shah, J.*) DHONDIRAM CHETEA BHUJ *v.* SADASUK SABATARAM. 20 Bom. L. R. 464 : 46 I. C. 174 : 42 Bom. 522.

——Ss. 35 and 37—*Promissory note stamped with four quarter anna postal stamps—Stamps of improper description.*

A demand promissory note stamped with four postal stamps of a quarter anna each, is not duly stamped and not admissible in evidence under S. 35 nor can the stamp be treated as a stamp of improper description within the meaning of S. 37 of the Act. (*Scott, C. J. and Batchelor, J.*) VENKATARAMAN GANPA HEDGE *v.* SHANKARA NARAYAN BHAT. 42 I. C. 947 : 19 Bom. L. R. 862.

——S. 35—*Prohibition against documents chargeable with one anna.*

The insertion of term for the payment of monthly interest on a document which is otherwise a promissory note, is altogether inconsistent with the local notion of a promissory note and so the document is not inadmissible under S. 35. (*Beaman, J.*) PRATAP CHAND GULABCHAND *v.* PURSHOTAM DAS MALJI.
33 I. C. 366 : 18 Bom L. R. 124.

——Ss. 35 and 36 and Sch I, cl. 5 (c)—*Arbitration—Award — Submission not stamped — Effect of—Suit to set aside award—Objection.*

The parties to a pending suit agreed in writing to submit their disputes to arbitration under the order of the Court. The arbitrators gave their award in favour of defendant. The plff. sued to set aside the award on the ground, *inter alia* that the document containing the submission to arbitration was not stamped. *Held*, that the submission having been once admitted by the arbitrators in evidence, its admissibility on the ground of want of stamp could not be questioned by any of the parties thereafter. The award was therefore valid on that ground. Once the instrument was admitted in evidence, it was for all legal purposes as good as it was stamped. (*Sanderson, C. J. and Richardson, J.*) RUNG LAL KALOO RAM *v.* KEDAR NATH KESWARLAL.
27 C. W. N. 513.

——S. 35—*Unstamped Hundis.*

Where certain hundis sued on were rejected as being insufficiently stamped, *Held*, that the plffs. were entitled to sue for the consideration. (*Chitty and Beachcroft, JJ.*) SUDHIR CHANDRA DAS *v.* GOBINDA CHANDRA ROY.
45 Cal. 538 : 41 I. C. 503 : 21 C. W. N. 1043.

——S. 35—*Shohjog Hindi.*

A Shohjog Hundi attested by a witness being a bond within the meaning of the Act, is admissible on compliance with the conditions laid down in S. 35 (*a*). (*Mookerjee and Roe, JJ.*) KESHARI CHAND *v.* ASHARAM.
22 C. L. J. 209 : 33 I. C. 250 : 19 C. W. N. 1326

——S. 35—*Promissory note inadmissible in evidence—Suit on original consideration.*

Where a promissory note is inadmissible in evidence under the law, a claim based on the original consideration may be enforced, provided it has not merged in the note. The loan itself implies a promise to repay. (*Mookerjee and Beachcroft, JJ.*) RAM BAHADUR *v.* DASURA RAM. 19 I. C. 840 : 17 C. L. J. 399.

——S. 35, *Sch. I, Art.* 5—*Document stamped in accordance with practice.*

Documents which have been stamped in accordance with practice which has been recognised by the High Court for long time, though not strictly legal, will be held to be duly stamped. (*Jenkins and Woodroffe, JJ.*) BAIJNATH *v.* AHMED MUSAJI SALEJI.
40 Cal 219 : 18 I. C. 978 : 17 C. W. N. 395.

——Ss. 35 and 36—*Admission of document by trial Court—Penalty—Admission not to be questioned in appeal.*

Where a document alleged to be a promissory note has been admitted in evidence by the trial Court on payment of a penalty, the admission cannot be questioned in the Court of Appeal however erroneous that addmission might have been. (*Shadi Lal, C. J. and Abdul Qadir, J.*) MERA RAM *v.* MT. PREM KAUR. 1923 Lah. 143.

——S. 35—*Insufficiently stamped document is not admissible.*

Document not insufficiently stamped is not admissible in evidence for any purpose whatever. (*Broadway, J.*) JOTI PRASAD *v.* BRIJ RAJ.
52 P. L. R. 1922 :4 U. P. L. R. (L) 97 : 1923 Lah. 29.

——S. 35—*Unstamped document—Secondary evidence of, not admissible.*

S. 35 of the Stamp Act does not cover the case of a copy of a document. Where the primary evidence is inadmissible, secondary evidence of that primary evidence can be in no better position. 18 A. 205 Ref. A clerk of the Court cannot admit a document in evidence ; that is a duty reserved for that Court. (*Le Rossignol, J.*) RAHIM BAKHSH *v.* MAHOMED AYUB.
1922 Lah. 354.

STAMP ACT (II OF 1899), S. 35.

——S 35—*Unstamped bond—Secondary evidence of, not admissible.*

A suit was filed on an unstamped bond. A copy of the same was compared with the original by the court clerk, certified to be correct, filed in court and then the original was allowed to be taken away. Subsequently it was lost. *Held*, production and presentation of a document are not identical with admission and secondary evidence of the contents of an unstamped document, which has been lost or destroyed, can under no circumstances be allowed. 23 Mad. 49 Foll. Where the primary evidence itself is inadmissible, secondary evidence of that primary evidence can be in no better position. (*Shadi Lal, C. J. and Harrison, J.*) MUHAMMAD AYUB *v.* RAHIM BAKSH. **3 Lah. 282 : 5 L. L. J. 172 : 1922 Lah. 401.** [On Appeal from **1922 Lah. 354**]

——S. 35 — *Insufficiently stamped Hundi—Secondary evidence not admissible.*

Where a Hundi being insufficiently stamped becomes inadmissibile in evidence. No secondary evidence of the transaction can be given. (*Chevis and Harrison, JJ.*) CHANDA SINGH *v.* THE AMRITSAR BANK CO. **66 I. C. 201 : 2 Lah. 330.**

——S. 35 — *Evidence — Receipt for bricks supplied—Whether a pro-note—Evidence.*

Under a contract to supply bricks, bricks were supplied and each time they were delivered, a receipt was signed by the deft. showing the amount of bricks supplied, rate to be charged and the sum chargeable. Held, that the document was not a pro-note but a mere receipt for bricks. Even in case of the paper being inadmissible for want of stamp, the plff. could prove the supply of bricks and the amount due *aliunde*. (*Robertson, J.*) LEHRIA *v.* AHAMED DIN. **103 P W. R. 1913 : 19 I. C. 436 : 174 P. L. R. 1913.**

——S. 35—*Unstamped original — Copy, not admissible on penalty.*

A copy of an unstamped original cannot be admitted in evidence on payment of the penalties which can be recovered in respect of the original. 23 Mad. 49 : 30 Mad. 386 : 17 Mad. 473, Foll. (*Reid, C. J. and Rattigan, J.*) NANAK CHAND *v.* MUHAMMAD AFZAL. **33 P. R. 1913 : 11 P. L. R. 1913 : 16. I. C 950 : 279 P. W R. 1912.**

——S. 35—*Hundi—Admissibility—Objection to, when to be raised—Document exhibited.*

Where a docment was marked as an exhibit without a note that it was admitted in evidence and it appeared that it was admitted in evidence tentalively, objection can be taken as to its admissibility at any later stage of the suit on the ground that it was not properly stamped. The presiding Judge was not precluded from considering the point at any time before giving judgment. 12 M. L. J. 351, Dist. A hundi, the stamp on which was not cancelled at the time of its execution, is not admissible in evidence. (*Robertson and Rattigan, JJ.*) SUNDARA DAS *v.* THE PEOPLE'S BANK OF INDIA. **169 P. L. R 1912 : 16 I. C. 834 : 272 P. W. R. 1912.**

STAMP ACT (II OF 1899), S. 35.

——S. 35—*Promissory note unstamped — Suit on original consideration.*

Where a promissory note executed in settlement of accounts between the parties is invalid for want of stamp, the plff. could get a decree on the previous settlement of accounts and the oral agreement to pay. (*Seshagiri Aiyar, J.*) SAMINATHA PATHAN *v.* RADHA KRISHNA PATHAN. **23 I. C. 85 : 15 M. L. T. 243.**

——S. 35—*Pronote unstamped —Decree on original consideration.*

Where a promissory note is inadmissible in evidence for want of stamp, it is not permissible to grant a decree on the original consideration when there was no independent obligation to pay apart from the note. 10 Mad. 94 : 17 M. L. J. 126 Rel. (*Sadasiva Aiyar and Spencer, JJ.*) MUTHU SASTRIGAL *v.* VISWANATHA PANDARA SANNADHI. **38 Mad. 660 : 14 M. L. T. 520 : (1914) M. W. N. 58 : 21 I. C. 864 : 26 M. L. J. 19.**

——S. 35—*Unstamped pro-note.*

If a loan and the pro-note are contemporaneous and form part of one transaction, no suit passed on the original consideration is maintainable if the pro-note is inadmissible for insufficient stamp. (*Benson and Sundara Aiyar, JJ.*) CHINNAPPA *v.* MUTHURAMAN. **10 I. C. 669 : 9 M. L. T. 281.**

——S. 35—*Original instrument lost—Whether a copy of it can be validated by payment of penalty.*

Under the Stamp Act, 1899, only the original unstamped instrument can be validated by the payment of the deficit stamp duty and penalty and then received in evidence. The section does not apply where the original is lost. (*Mitra, A. J. C.*) PENTAYYA *v.* KESHO RAO. **56 I. C. 249 : 16 N. L. R. 68.**

——Ss. 35 and 36—*Acknowledgment unstamped—Admitted in evidence—Limitation.*

An unstamped acknowledgment is inadmissible in evidence even to save limitation. 18 Bom. 64, Diss. 21 Bom. 201, Foll, 'Admitted in evidence' means finally admitted after consideration, or after conscious application of the Court's mind to the question. 12 Bom. L. R. 466 Foll. (*Batten, A. J. C.*) SITA RAM *v.* THAKURDAS. **50 I. C. 781.**

——S. 35—*Adhesive stamp not cancelled—Admissibility.*

Where a document which must be stamped bears an adhesive stamp but the stamp is not cancelled, the document is not admissible under S. 35. (*Jwala Prasad, J.*) BARHAM DEO RAI *v.* RAM KISHUN MAHTON. **60 I. C. 652 : 2 Pat L. T. 184.**

——S. 35—*Bond—Document stamped with one anna—If unstamped or insufficiently stamped.*

Where a document was in reality a bond, but was apparently intended to be a promissory note and as such bore only a one anna stamp, in levying the penalty it should be treated only as insufficiently stamped and not unstamped. Merely because the stamp happens to be of the wrong

STAMP ACT (II OF 1899), S. 35.

kind, the document should not be treated as wholly unstamped. (*Pratt, J.*) THE COLLECTOR OF RANGOON *v.* ABDUL RAHMAN SIRCAR.
11 L. B. R. 316 : 1922 L. B. 27.

——— S. 35—*Suit to set aside award not duly stamped. Plff. whether liable to pay deficiency and penalty.*

Where a plff. sues to set aside an award on the ground of misconduct of the arbitrators ; the plff. cannot be called upon, if it is found that the award is not duly stamped, to make up the deficiency in the stamp and to pay the penalty under S. 35 of the Stamp Act In such a case the plff. is seeking not to act on the award but to prevent its being acted upon. It need not even be put in evidence if the allegations of misconduct can be proved without looking into it. (1838) 4 M. and W. 361, Rel. on. (*McColl, J. C.*) MA SHWE PU. *v.* MAUNG PO DAN.
2 U.B R. (1916) 146 : 39 I.C. 382 : 11 Bur. L. T. 17.

——— S. 35—*Insufficiently stamped deed.*

A plff. having no cause of action apart from an insufficiently stamped pro-note, cannot succeed at all, even though he does not sue on the note and the deft admits execution thereof. 2 L. B. R. 333, Rel. upon. (*Twomey, J.*) BALLY SINGH *v.* BHUGWAN DASS KALWAR. 7 L. B. R. 101 : 25 I. C. 975 : 7 Bur. L. T. 95.

——— S. 35—*Document unstamped—Inadmissible in evidence—Decree or original consideration.*

The question whether a loan was given and taken, can in certain cases, such as those of collateral security, be distinguished from the question of the terms of the loan and of its repayment and where it can be so distinguished, even if the document embodying the terms of the loan is inadmissible for want of stamp, the lender may fall back and sue upon the loan itself and prove it by other evidence. The basis of such an action is not the document, but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed should return the money to the payer. 23 C 861; 24 B. 360; 34 A 158; 16 I. C. 33 Ref. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) NARAINDAS *v.* JASSOMAL. 65 I. C. 37 : 15 S. L. R. 135

——— S. 35—*Submission to arbitration—Stamp*

A contract containing the submission to arbitration is not invalid in default of an eight-annas stamp under S 35 (*Hayward, A. J. C.*) FIRM OF TARACHAND GANSHAM DAS *v.* LOUIS DREYFUS & CO. 35 I. C. 449 : 10 S. L. R. 14.

——— S. 35—*Unstamped promissory note—Executed outside British India.*

A promissory note executed outside British India is admissible in evidence though unstamped, but is liable to duty before admission. (*Pratt, J. C. and Boyd, A. J. C.*) RAM SINGH *v.* PARUMAL. 32 I. C. 582 : 9 S. L. R. 150.

——— S. 36—*Stamp—Presumption as to.*

Where the original of a compromise petition creating a mortgage, on the strength of which

STAMP ACT (II OF 1899), S. 36.

a decree of Court is made, is lost, and a certified copy of the petition is filed, the presumption arises that the original petition was properly stamped. (*Mr. Ameer Ali.*) AHMED RAZA *v.* ABID HUSAIN 38 All 494 : 43 I A. 264 : 18 Bom. L. R. 504 : 14 A. L J. 1099 : 20 M. L. T. 441 : 24 C L. J. 504 : (1916) 2 M. W. N. 548 : 21 C. W. N. 265 : 5 L. W. 153 : 39 I. C. 11 : 1 Pat. L. W. 90 (P. C.).

[Affirming 19 I. C. 445 : 11 A. L. J. 506.]

——— S. 36—*Document admitted--Admissibility whether can be questioned subsequently.*

Once a document is admitted in evidence no further question can arise under the section as to its admissibility on the ground that it was not duly stamped. (*Griffin and Ryves, JJ.*) ABID HUSAIN *v.* ASHGAR HUSAIN. 11 A L. J. 506 : 19 I. C. 445 :

[Affirmed on appeal
39 I. C. 11 : 38 All. 494 (P. C.)

——— S. 36—*Admission of document in evidence—Admissibility not to be questioned on appeal.*

When a document has been admitted in evidence in the trial Court, it cannot be called in question in the same suit on the ground that the document was not duly stamped 13 B. 449; 18 B. 737 Ref. (*Macleod, C. J, and Crump, J.*) BALA RAGHU DHANWADR *v.* BHIKU GENU.
25 Bom. L. R. 450 : 1923 Bom. 412 (2)

——— S. 36—*Applicability—Document executed before the Act.*

S. 36 of the Act is applicable to documents executed before the Act and the admission of such a document in evidence cannot be subsequently objected to on the ground that it was insufficiently stamped. (*Teunon and Newbould, JJ.*) NILRATAN MITRA *v.* ABDUL GAFUR GAZI.
59 I. C. 3 : 32 C. L. J. 75.

——— S. 36—*Admission of document—Question not to be raised.*

Where the Court of first instance admits a letter of hypothecation in evidence, the High Court is precluded from taking exception to it as being insufficiently stamped. *Held* also, that it did not lie in the mouth of executant of the letter or his heirs who was responsible for the proper stamping of the document, to plead that the contract was not binding upon him because he had succeeded in defrauding the Revenue authorities. (*Chitty and Panton, JJ.*) BISWANATH BHATTACHARJEE *v.* GOBINDA CHANDRA DAS
23 C. W. N. 534 : 51 I. C. 88 : 29 C. L. J 305.

——— S. 36—*Acknowledgment if should be stamped when signed—Admission—Objection.*

An acknowledgment that a certain sum of money is due, should it signed by the party, be duly stamped under the provisions of the Indian Stamp Act. An unstamped acknowledgment once received in evidence cannot be rejected afterwards in view of the provisions of S 36 of the Stamp Act. (*Mookerjee and Beachcroft, JJ.*) SITARAM *v.* RAM PROSAD RAM. 18 C. W N. 697 22 I. C. 858 : 19 C. L. J. 87

STAMP ACT (II OF 1899), S. 36.

——S. 36 — *Document held admissible by single judge in High Court—Not open to question in Letters Patent appeal.*

Where a Judge of the High Court sitting singly differed from the court below and held a document was admissible in evidence and on that basis remanded the suit, he in effect admitted the document in evidence and his decision cannot be questioned further. A Letters Patent Appeal is a stage in the suit within meaning of S. 36 Stamp Act. (*Shadi Lal, C. J. and Martineau, J.*) BRIJ RAJ SARAN *v.* JOTI PRASHAD. **1923 Lah. 657.**

——S. 36—*Appellate Court—Powers.*

Where the trying Court treats an unstamped document as agreement and collects penalty and duty thereon erroneously, the Appellate Court cannot correct the error by virtue of S. 36. (*Oldfield and Hughes, JJ.*) VENKATRAMA AYYAR *v.* CHELLA PILLAI. **62 I. C. 607 ; 40 M. L. J. 479.**

——S. 36—*Pro-note with stamp not duly cancelled—Admissibility.*

A pro-note with a stamp not duly cancelled was admitted in evidence in an *ex parte* trial but the *ex parte* trial was set aside and the proceedings were commenced afresh. *Held*, that the admissibility of the pro-note in evidence could be attacked after the *ex parte* trial was set aside. S. 36 applies only where what is in evidence is sought to be expunged by a party objecting that the evidence is wrongly admitted. S. 36 really lays down a rule preventing only the exclusion of what already is in evidence in the proceedings. But where the document would not be regarded as being in evidence already, this section, it is deemed, has no application. (*Sundara Aiyar, J.*) SOLAMALAI MUDALIAR *v.* VADAMALAI MUTHIRAN **12 M. L. T. 122 : 16 I. C. 96 : 23 M. L. J. 273.**

——S. 36—*Document—Insufficiently stampea—Admission by trial Court—Not to be questioned in revision.*

Where a deed of release alleged to be insufficiently stamped has been admitted in the case by the trial Court, the High Court cannot question its admissibility in revision. (*Prideaux, A. J. C.*) KRISHNAJI *v.* SUKHDEO. **1923 Nag 284.**

——S. 36—*Admission in evidence—Subsequent rejection not proper.*

It is contrary to the express provisions of S. 36 of the Stamp Act to reject a document which has once been admitted in evidence on the ground that it ought to have been stamped. (*Ross, J.*) DASI CHAMAR *v.* RAM AUTAR SINGH. **1923 P. 404.**

——S. 36—*Admission—Meaning.*

The word 'admission' in S. 36 includes the giving of a decree. The term "acting upon", is wider than the word "admission" (*McColl, J. C.*) MI MI *v.* SOHAN SINGH. **33 I. C. 595 : 8 Bur. L. T. 290.**

——S. 36—*Admission by first Court—Appellate Court, interference by.*

An appellate Court should not dismiss a suit on the ground that a document which the first court has admitted in evidence was unstamped or insufficiently stamped ; all it could do would be to impound the document and send it to the Collector to levy duty and penalty. (*McColl, J. C.*) MI MI *v.* SOHAN SINGH. **33 I. C. 595 : 8 Bur. L. T. 290.**

STAMP ACT (II OF 1899), S. 62.

——S. 37—*Certificate by Collector.*

Endorsement on pro-note by a Sub Collector that the penalty has been levied, is not a certificate within S. 37 of the Stamp Act that the pro-note is duly stamped. 23 All. 233 : 19 Bom. L. R. 862 Cons. (*Phillips, J.*) KAMAKSHI AMMAL *v.* SUBBARAYA CHETTY. **52 I. C. 758.**

——S. 44 —*Scope of stamp duty and penalty—Joint executants—Contribution.*

S. 44 is only intended to give a right to an innocent party, to recover the duty and penalty he is obliged to pay, from the person or persons guilty of default. A co-executant cannot, therefore, claim contribution from his co-executants. (*Sadasiva Aiyar and Phillips, JJ.*) RAMAN CHETTY *v.* NAGAPPA CHETTY. **31 I. C. 285 : 2 L. W. 1024.**

——Ss. 56 and 57—*Document not in existence—Reference.*

Under S. 56 of the Stamp Act, 1899, the High Court can deal only with those instruments which are already in existence and which have been the subject of action by the Collector. (*Knox, Chamier and Piggott, JJ.*) STAMP REFERENCE, *In re.* **13 A. L. J. 47 : 27 I. C. 501 . 37 All. 125 (F.B.)**

——Ss. 57, 38 and 40—*Reference—Certificate by Collector after levy of deficit duty.*

A Collector acting under S. 40 (1) of the Stamp Act, levied the deficit together with the penalty provided by law and endorsed the fact on the document. The Board of Revenue then referred to the High Court under S. 57 of the Act the question as to the stamp duty if any, payable on the document. *Held*, that the High Court had no jurisdiction to decide the question. 25 Mad. 752, Foll. (*Knox, A. C. J Rafique and Piggott, JJ.*) KUB CHAND, *in the matter of.* **40 All. 128 : 47 I. C. 299 : 16 A. L. J. 49 (F. B.)**

——S. 57—*Pro-note by Court of Wards in acknowledgment of previous debt.*

When a Court of Wards, which has power to give an acknowledgment of an existing debt, authorises a promissory note to be executed, the note could in any event be used as an acknowledgment of the pre-existing debt. (*Fletcher and Richardson, JJ.*) RASHBEHARY LAL MANDAR *v.* ANAND RAM. **34 I. C. 205 : 43 Cal. 211.**

——S. 61—*Document not duly stamped—Admitted in evidence—If can be questioned later.*

Where an instrument has been admitted in evidence, such admission should not, except as provided in S. 61 of the Stamp Act, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. (*Prideaux, A. J. C.*) RAJE UDAJIRAM *v.* RAJESHWAR. **1923 Nag. 109.**

——S. 62—*Offence—Intention.*

For a conviction under S. 62 of the Stamp Act, proof of a dishonest intention to evade payment of stamp duty is essential. (*Piggott, J.*) KANHAIYALAL *v.* EMPEROR. **21 Cr. L. J. 54 : 54 I. C. 406 : 1 U. P. L. R. (H C.) 186.**

STAMP ACT (II OF 1899), S. 62.

——S. 62—*Conviction under—Unstamped receipt.*

A conviction under S. 62 of the Stamp Act for filing an unstamped receipt, when it was quite evident that the accused had no intention of evading the provisions of the Stamp Law, cannot be sustained. The Act itself provides for the levy of penalties in such cases, but not for a prosecution. (*Bucknill, J.*) NEMAI CHARAN SAHU *v.* EMPEROR. **1921 Pat. 173 : 22 Cr. L. J. 766 : 3 U.P.L.R. (P) 38 : .64 I. C. 286 : 2 P. L.T. 623**

——S. 62—*Granting of unstamped receipt—No criminal intent—No offence.*

Under S. 62 there can be no prosecution of a person who has granted an unstamped receipt in the absence of any criminal intention to evade the provision of the Stamp Law which itself provides for the payment of the stamp duty and penalty. (*Bucknill, J.*) NEMAI CHARAN SAHU *v.* KING-EMPEROR. **1921 Pat. 173 : 3 U. P. L. R (Pat.) 38 : 64 I. C. 286 : 22 Cr. L. J. 766 : 2 Pat. L. T. 623.**

——S. 62 (b), Sch. I, Art. 53—*Voucher by one servant to another—Money received on behalf of master—If receipt.*

Where a servant received money from a co-servant for paying it to his employee's creditor and gave a voucher therefor. *Held*, the amount was simply a memorandum not executed for consideration and not amounting to a receipt requiring stamp of one anna. (*Lindsay, J. C.*) SHADILAL *v.* EMPEROR. **18 Cr. L. J. 968 : 42 I. C. 328 : 4 O. L. J. 490.**

——S. 62 (b) and Sch I, Art. 35—*Amaldustak—No rent fixed—Conviction under S. 62 (b)—Schedule—Scope.*

The schedule to the Stamp Act must be treated as exhaustive. An agreement for a lease whereby no rent is reserved and no premium paid or money advanced is not included in the schedule and therefore does not require a stamp. The executant of such a ducument cannot be convicted under S. 62 (b) of the Stamp Act (*Roe and Jwala Prasad, JJ.*) SUNDER KUER *v.* EMPEROR. **17 Cr. L. J. 495 : 20 C. W. N. 923 : 3 Pat. L.W. 72 : 36 I. C. 175 : 1 Pat L. J. 366.**

——S. 62 (2)—*Unstamped award—Arbitrator signing is liable to prosecution.*

Not only persons who execute an instrument of partition but also those who sign it otherwise than as witnesses are liable to prosecution, if they append their signatures to an instrument which is not duly stamped. Where the arbitrators signed an instrument of partition otherwise than as witnesses, they are liable to prosecution because they put their signatures to a dutiable instrument which had not been duly stamped. (*Dalal, A. J. C.*) EMPEROR *v.* PUTTOO LAL. **24 Cr. L J. 592: 9 O. & A.L R. 378.**

——S. 62, Sch. I, Art. 8—*Petition to Court—Compromise of suit—Agreement—Court-fee label.*

A document informing the Court of an agreement into which the parties had orally entered out of Court to compromise a suit, and praying for a decree in terms of agreement, requires ordinary Court-fee label, and not a general stamp. (*Tudball and Piggott, JJ.*) RAM SARAN LAL *v.* EMPEROR. **40 All. 19; 19 Cr. L. J. 48: 42 I.C. 1008 : 15 A.L.J. 846.**

STAMP ACT (II OF 1899), Art. 1.

——S. 64—*Failure to stamp document—Fraudulent intent.*

Mere non-payment of a full stamp duty is not enough to make a person liable for prosecution under S. 64 of the Act. Prosecution must establish a fraudulent intention on the part of the petitioner. (*Chitty and Smither, JJ.*) BROJENDRA BAKSHI *v.* EMPEROR. **45 I. C. 275 : 19 Cr. L J. 515.**

——S. 64 (c)—"*Any other act,*" *Meaning—Document insufficiently stamped.*

The words "any other act" in Cl. (c) of S. 64, mean an act of the type specified in Cls. (a) and (b) ; the mere fact that a person puts a stamp on the document, which he knows is not of proper value cannot bring the case within Cl. (c) of the section. 23 Mad. 155 Ref. (*Sanderson, C. J. and Richardson, J.*) CHAGMAL CHOPRA *v.* KING-EMPEROR. **44 Cal. 321: 24 C. L. J. 441 : 17 Cr. L. J. 466 : 36 I. C. 146 : 21 C. W. N. 248.**

——S. 65—*Collector's sanction necessary under S. 65.*

Sanction of the Collector is essential before a Magistrate could try an accused under S. 65 of the Stamp Act. 9 Bom. 27, Foll. (*Shah Din, J.*) EMPEROR *v.* RAMJI LAL. **38 P. W. R. 1915 Cr.: 16 Cr. L. J. 787 : 31 I. C. 643 : 31 P. R. 1915 (Cr.)**

——Ss. 68 (c) and 62 (b)—*Essentials of offence.*

The main question in a case under S. 68 (c) of the Stamp Act is whether the act complained of is a device intended to defraud the Government of duty payable in respect of a document. Where in an application for a loan the person recommending wrote "I guarantee payment" and the Bank Manager approved of the application and recommended grant of the loan. *Held*, that the words 'I guarantee payment' do not amount to a completely executed security bond and the manager could not be deemed to have accepted such security bond and hence he is not liable under S. 62 (b) of the Stamp Act, and that the Secretary of the Bank who advanced the loan was not guilty under S. 68 (c) as his duties were purely ministerial. (*Teunon and Choudhury, JJ.*) RAJESWAR BAGCHI *v.* EMPEROR. **18 Cr. L J. 725 : 40 I. C. 725 : 21 C. W. N. 758.**

——Arts. 1 and 5—*Memorandum of agreement.*

A memorandum of agreement to pay interest appended to an acknowledgment of a debt over the debtor's signature is a stipulation to pay interest within the proviso to Art. 5. The question of the cancellation of adhesive stamp is to be considered with reference to the facts of each particular case. (*Piggott and Walsh, JJ.*) MANDEO KORI *v.* SHEORAJ RAM TELI. **17 A. L. J. 19 : 1 U. P. L. R. (H. C.) 29 : 52 I. C. 974 : 41 All. 169.**

STAMP ACT (II OF 1899), Art. 1.

——Art. 1—*Balance sheet—One anna stamp necessary.*

A balance sheet prepared and signed by a debtor showing the balance due from him is not valid unless stamped with one anna stamp, though it may be admissible in evidence. (*Jenkins, C. J. and Woodroffe, J.*) GULSTAUN *v.* HATICHISON. **16 C. W. N. 945 : 15 I. C. 279 : 39 Cal. 789**

——Art. 1—*Acknowledgment—Essential to be considered.*

In deciding whether a given acknowledgment is one falling within Sch. I Art. 1 of the Stamp Act, the question to be considered is whether it is given with the dominant intent to supply evidence of the deft. Where a document contains other entries from which it can be deduced that the intention is to arrive at a statement of accounts or to put on record payment on either side, the document although it contains a balancing item at the end, is not an acknowledgment under the Stamp Act. 4 Cal. 885; 9 Cal. 127; 15 Cal. 162 and 30 Cal 687 Foll. 31 M. L. J. 851 Not foll. (*Schwabe, C. J and Ramesam, J.*) SURJIMULL MURLIDHAR CHANDICK *v.* ANANTA LAL DAMANI. **46 Mad. 948 : 45 M. L. J. 399 : 18 L. W. 485 : (1923) M. W. N. 743 : 1924 M. 352.**

——Art. 2—*Construction of unconditional acknowledgment.*

Art. 2, Sch. I must be strictly construed. An unconditional acknowledgment does not imply a promise to pay a debt and if not duly stamped is inadmissible in evidence under S. 35 even to save limitation under S. 19. (*Batten, A. J. C.*) SITA RAM *v.* THAKUR DAS. **50 I. C. 781.**

——Art. 5—*Memorandum of agreement.*

A memorandum of agreement to pay interest appended to an acknowledgment of a debt over the debtor's signature is a stipulation to pay interest within proviso to Art. 5. (*Piggott and Walsh, JJ.*) MAHDEO *v.* SHEORAJ. **41 All 169: 1 U. P. L. R. (H. C.) 29 : 52 I. C. 974 : 17 A. L. J. 19.**

——Art. 5—*Agreement to pay grain on demand is within the article.*

An agreement to pay a certain quantity of grain on demand falls within Art. 5 of Schedule I of the Stamp Act. It is not a promissory note under S. 2 (22) but requires a stamp of 8 annas. (*Daniels, J. C*) THAKURAIN ABHAIRAJ KUAR *v.* DATA DIN. **9 O. & A. L. R. 163 : 1924 Oudh 106.**

——Art. 5—*Mortgage by deposit of title-deeds—Letter accompanying deposit.*

A letter stating the terms on which an equitable mortgage is effected and written to the mortgagee by mortgagor at the time of depositing the title-deeds of the mortgaged property, does not require registration, and if it does not "secure any amount", it need only be stamped as agreement under Art. 5 (*Abdur Rahim, Offg. C.J. and Seshagiri Aiyar, J.*) MUTHIA CHETTY *v.* KOTHANDARAMA SWAMI NAIDU. **(1916) 2 M. W. N. 221 : 4 L. W. 472 : 35 I. C. 864 : 31 M. L. J. 347.**

STAMP ACT (II OF 1899), Art. 13.

——Art. 5—*Agreement or memorandum of.*

A written proposal is not an agreement or a memorandum of agreement and does not become subject to stamp duty by reason of subsequent acceptance not in writing. (*White, C. J., Sankaran Nair and Tyabji, JJ.*) SECRETARY TO THE COMMISSIONER OF SALT *v.* SOUTH INDIA BANK. **38 Mad. 349 : (1913) M. W. N. 1012 : 20 I. C. 865 : 25 M. L. J. 119.**

——Art. 5 (i) (c) Exemption (a)—*Agreement which is not a bond stamp.*

An agreement, which is not a bond but only an instrument creating an obligation and which if broken would 'sound in damages', is one under Art. 5 (i) (c) of the Sch. relating to stamps and so no stamp is required. (*Fox, C. J. and Twomey, J.*) COLLECTOR OF RANGOON *v.* MAUNG AUNG BA. **8 B. L. R. 382 : 33 I. C. 920 : 9 Bur. L. T. 111.**

——Art. 5, Cl. (c)—*Agreement to hire machinery with option to purchase.*

An agreement to hire machinery with an option to purchase falls under the above Article and so requires stamp duty of eight annas. (*Sanderson, C. J.*) LINOTYPE MACHINERY CO. AND WINDSON PRESS, *In re.* **44 Cal. 72 : 24 C. L. J. 93 : 37. I. C. 175 : 20 C. W. N. 1252.**

——Art. 7—*Panchanama—Will giving power to panch to enquire into and remove shebaits and appoint successors.*

A will by the founder of an endowment providing for succession to the office of shebait and giving the panch the power to enquire into the misconduct of shebait and to remove him from the office and appoint a new shebait instead, falls within Art. 7 and requires a stamp of Rs. 15. (*N. R. Chatterjee and Sheepshanks, JJ.*) AMRIT LAL SHAH *v.* GOSSAIN GANPAT GIR. **51 I. C. 884 : 23 C. W. N. 401.**

——Art. 13—*Bill of Exchange on several pieces of stamp paper—Aggregate value.*

A document which was in fact a Bill of Exchange, though it was loosely described as a hundi, was properly stamped under R. 6 of the Rules of the Governor-General in Council when a portion of it appeared to have been written on each of three sheets of stamp paper of the aggregate value required by law. (*Chitty and Panton, JJ.*) BISWANATH NATH *v.* GOBINDA. **23 C. W. N. 534 : 51 I. C. 88 : 29 C. L. J. 305.**

——Art. 13—*Order on firm to pay specified sum—Bill of Exchange.*

An order on a firm to pay a specified sum of money to a certain person or bearer is a bill of exchange payable on demand and is chargeable with a duty of one anna. (*Thompson, F. C.*) M. A. RACHHURU & CO., *In re.* **47 I. C. 561 : 11 Bur. L. T. 87.**

——Arts. 13 and 35—*Agricultural lease—Hypothecation of immoveable property.*

An agricultural lease is exempt from stamp duty under exemption (a) to Art. 35 of the Stamp Act. But where the landlord is given the sole right over the whole crop until the rent is paid and the tenants agree not to alienate or otherwise

STAMP ACT (II OF 1899), Art. 15.

d away with the crops, it is an instrument evidencing a hypothecation of moveable property for a future debt and as such is liable to stamp duty. (*Parlett, J.*) MAUNG HTAT *v.* MAUNG SAN DUN. **44 I. C. 109.**

——Art. 15—*Security bond for stay of execution—Stamp.*

A security bond taken on an order for stay of execution is not a bond within Sch. II, Art. 6 of the Court-Fees Act, but must be stamped in accordance with Sch. I, Art. 15 of the Stamp Act. It cannot be written on plain paper bearing Court-fee of eight annas. (*Holmwood and Teunon, JJ.*) DWARKANATH DEY *v.* SAILAJA KANTA **43 I. C. 376 : 21 C. W. N. 1150.**

——Art. 30—*High Court—Does not include Court of Judicial Commissioner—Enrolment fee.*

The court of the Judicial Commissioner of Upper Burma is not a High Court within the meaning of Art. 30, Stamp Act. If an applicant wants to be enrolled in a High Court he must pay the fees mentioned therein. (*Robinson, C. J. Heald and May Oung, JJ.*) CERTAIN FIRST GRADE ADVOCATES, *In the matter of.* **1 Rang. 142 : 1924 Rang. 1.**

——Art 33—*Gift deed—Valuation not given—Power to ascertain—Value of property—Stamp duty payable.*

Where a gift deed contains no statement as to the value of the property gifted, the instrument as it stood does not require any stamp under the Stamp Act and the Collector has no authority to investigate the value of the property with a view to impound the instrument and cause it to be stamped with reference to the value so ascertained. (*Piggott Gokul Prosad and Lindsay, JJ.*) MAHOMMED MUZZAFAR ALI. *In the matter of.* **44 A. 339 : L. R. 3 A. 89 : 20 A. L. J. 161 : 1922 A. 82.**

——Art. 35—*Lease—Rent reserved—Liability of lessee to pay Government assessment.*

Under a lease of certain lands for a term of 5 years, the rent reserved was a moiety of the produce or Rs. 100 a year. The lessee also agreed to pay Rs 16-8-0 to the lessor for Government assessment. *Held*, that the value of the lease for stamp purposes was to be taken at Rs. 100 and not at Rs. 116-8-0. The only profit for the lands demised which the landlord could realise was half of the produce or Rs. 100. Rs. 16 8 0 was not a part of the profit but was a liability attaching to the thing itself in the hands of the lessor. A lease of this description falls within the exemption to Art. 35 as the rent reserved is only Rs. 100 (*Batchelor and Beaman, JJ.*) GANGARAM NARAYANDAS, *In re.* **39 Bom. 434 : 28 I. C. 584 : 17 Bom L. R. 320**

——Art. 35 Cl. (a) (i) and (iv)—*Lease—Agreement to pay rent daily.*

An agreement to pay shop rent at Rs. 60 per month at Rs. 2 per day creates a monthly tenancy and not a tenancy for an indefinite term under sub-clause (iv). (*Sanderson, C. J and Woodroffe, J.*) A. M. AMOLIA *v.* IBRAHIM. **46 Cal. 804 : 51 I. C. 231 : 23 C. W. N. 398.**

STAMP ACT (II OF 1899), Art. 47.

——Art. 35, Ex. A.—*Patta for one year—Stamp.*

A patta for one year and reserving a rent of less than one hundred rupees requires neither stamp nor registration. (*Gokul Prasad, J.*) HARDIAL *v.* ALAM. **L. R. 4 A. 233 Rev. : 1924 A. 459.**

——Art. 40—*Deed of trust.*

A trust deed executed by the debtor who had already executed a pro-note to secure advances to be made by a Bank, is a mortgage deed for purposes of the Stamp Act and not a letter of hypothecation within exemption (2) to Art. 40 of Sch I of the Act. (*White, C. J., Sankaran Nair and Oldfield, JJ.*) SECRETARY TO THE COMMISSIONER OF SALT *v.* MRS. E. W. ORR. **38 Mad 646 : 14 M L. T. 499 : 21 I. C. 876 : 25 M. L. J. 613.**

——Arts 45 and 62 (c)—*Instrument of partition—Transfer by trustee to beneficiary.*

Certain shares in a company belonged to a joint Hindu family consisting of three brothers. The brothers became divided in interest but the shares stood in the name of the eldest brother who received the dividends and paid two-thirds to his two brothers. Subsequently the eldest brother passed two deeds transferring some shares to each of the two brothers. *Held*, that the deeds were chargeable under Art. 45 of the Stamp Act. (*Shah, A. C. J. and Crump, J.*) THE SUPERINTENDENT OF STAMPS, BOMBAY *v.* CHIMANLAL. **47 Bom. 321 : 25 Bom. L. R. 112 : 1923 B. 237.**

——Art. 45—*Instrument of partition—Decree effecting partition in specie.*

A final decree effecting a partition of moveable or immoveable property *in specie* should be treated as an instrument of partition liable to stamp duty under Art. 45 of the Act. (*Lindsay and Kanhaiya Lal, A. J. Cs.*) SURAJIYA QUDR *v.* QUDSIA BEGAM. **24 I. C 643 : 1 O. L J 281.**

——Art. 47—*Policy of sea insurance—Protection note—Want of stamp—Admissible on payment of penalty.*

A document alleged to be a sea-policy was given by defendants to plaintiffs and it was in these terms :—" Given in writing by the undersigned persons. To wit : that we accepted the liability on goods shipped from the port of Muscat in the boat J. for Bombay. That liability is to exist up to the time the said goods have been discharged on the Bombay bunder having passed any intermediate ports. The insurance is accepted in accordance with the usage of English policies without damage. The amount is to be paid within six months from the date of the loss deducting therefrom discount at the rate of 20 per cent. through broker The signatures are to be duly affixed to the stamped pakka (i. e.) formal policy." The document was not stamped. The cargo was lost on account of an accident. In a suit for damages, *held*, that the document in question was a policy of sea-insurance within art. 47 of the Stamp Act. The document rendered the executants liable for a fixed sum for the insurance of the goods shipped by a particular boat and fixed a definite period. Therefore it is

STAMP ACT (II OF 1899), Art. 48.

open to the plaintiffs on payment of the necessary penalty, to tender the document in evidence. (*Shah, A C J and Crump. J.*) TRICAMJI DAMJI AND Co. *v.* VIRJI KANJI.
24 Bom. L. R. 820 : 1923 Bom. 142.

——Art. 48 —*Power of attorney.*

A power of attorney executed in favour of a person not a certified mukh ear or pleader should be stamped according to Art 48 of Sch. I. (*Richards, Griffin and Tudball, JJ.*) PERMANEND *v.* SAT PERSHAD. **33 All. 487 : 9 I. C. 617 : 8 A. L. J. 378**

——Art. 48—*Power of attorney—Person not a certified mukhtear or pleader—Stamp—Court-fees Act, Sch. II, Art.* 10.

Where a Power of Attorney is executed in favour of a person who is not a certified mukh tear or pleader under the Legal Practitioners Act the document should be stamped not with the stamp provided for by Art 48 ; but with a Court-fee stamp as provided for by Art. 10 of Sch. II of the Court Fess Act. (*Ried, C.J., Kensington and Chevis, JJ.*) GANPAT *v.* PREM SINGH.
108 P. W. R. 1912 : 15 I. C. 122 : 202 P. L R. 1912.

——Art. 53 —*Receipts for adjustments.*

Receipts granted for amounts transferred in books by adjustments are exempt from stamp duty. (*White. C. J., Munro and Sankaran Nair, JJ.*) SECRETARY TO THE COMMISSIONER OF SALT, MADRAS *In re.* **9 M. L. T. 355 : 9 I. C. 342 : (1911) 2 M. W. N. 293.**

——Arts. 55 and 45—*Release deed or partition deed.*

Where each of two persons claims, as full and exclusive donor certain property and where each of them afterwards agrees to release a portion in favour of the other, such agreements and release deeds and not partition deeds as the case is not of co-owners agreeing to divide the property. 9 Bom. 417, Foll. (*Knox, Rafique and Piggott, JJ.*) JIBAN KUAR *v.* GOVIND DAS. **38 All 56 : 31 I. C. 401 : 13 A. L. J. 1109.**

——Sch. I, Art. 1—*Account-book entries—Stamp.*

The account book entries are not liable to stamp duty and are admissible in evidence. 39 Cal. 789 ; 4 Cal. 885, Foll. (*Twoney and Ormond, JJ.*) RAMDAYAL *v.* KUMAR GANGADHARA BOGLA **29 I. C. 943 : 8 Bur. L. T. 238**

——Sch. I, Art. 5 and S. 35 —*Document—Stamped in accordance with practice.*

Documents which have been stamped in accordance with practice which has been recognised by the High Court for a long time, though not strictly legal. will be held to be duly stamped. (*Jenkins and Woodroffe, JJ.*) BAIJNATH *v.* AHMED MUSAJI SALEJI. **40 Cal. 219 : 18 I. C. 978 : 17 C. W. N. 395.**

STANDING COMMITTEE.
See CORPORATION.

STANDING CROPS OR TIMBER.
See (1) GENERAL CLAUSES ACT, S. 3 (25).
(2) REG ACT, S. 3.
(3) T. P. ACT, S. 3.

STRAITS SETTLEMENTS ORDINANCE (VI OF 1896), S. 10.

STARE DECISIS.
See PRACTICE—PRECEDENTS.

STATUTE—INTERPRETATION.
See INTERPRETATION OF STATUTES.

STATUTORY BODY.
See also (1) CORPORATION.
(2) JURISDICTION.

——*Discretion— Colorable exercise— Civil Courts—Power to interfere.*

Where a statutory body entrusted with the fixing of pensions of retired public servants passed an award on a maliciously low basis. *Held*, that the discretion was not to be arbitrarily exercised but reasonably fairly and justly ; that the award of the Board was unreal and unsubstantial, though made under the guise of exercising discretion and that the Court could decree the plff. his claim. (*Lord Macnaghten.*) LESLIE WILLIAMS *v.* HAINES THOMAS GIDDY.
10 M. L. T. 288: 15 C. W. N. 669 : 11 I. C. 509 : 21 M. L. J. 641 (P. C.).

——*Part—Non-feasance—Liability for.*

No action for damages lies against a public body unless it amounts to carelessness or negligence in the discharge of statutory duties. If, however. the acts done by a public body are only permissive the private rights of the parties must be respected and such body is liable to damages for injury caused to private individuals. 28 Mad. 72 ; 27 Bom. 344 ; (1902) A. C. 213, 226; 31 Mad. 117, Ref. (*Seshagiri Aiyar and Phillips, JJ.*) KRISHNAMURTHI AIYAR *v.* TALUK BOARD OF MAYAVARAM. **42 Mad. 331 : 9 L. W. 353 : 50 I. C. 809 : 36 M. L. J. 372.**

STAY OF EXECUTION.
See (1) C. P. CODE., S. 151 ; O. 21, R. 19 , O. 41 RR 5 AND 6 ; O. 45.

STAY OF PROCEEDINGS.
See (1) C. P. CODE. S. 151.
(2) C. P. CODE O. 41, R 5.

STAY OF SALE.
See C. P. CODE O. 41, RR. 5 AND 6.

STAY OF SUIT.
See C. P CODE. S. 10.

STEP-IN-AID.
See LIM. ACT, ART. 182.

STEP-MOTHER.
See (1) HINDU LAW—SUCCESSION.
(2) MAHOMEDAN LAW.

STIFLING PROSECUTION.
See CONTRACT ACT, S. 23.

STIPEND.
See (1) C. P. CODE, S. 60.
(2) PENSIONS ACT.

STRAIT SETTLEMENTS ORDINANCE (VI OF 1896).

——S. 10—"*Specific purpose,*" *meaning of.*

A "specific purpose" within the meaning of S. 10 of the Limitation) Ordinance No. 6 of 1896 of the Strait Settlement, corresponding with S. 10 of

STREET.

the Indian Limitation Act, must be a purpose that is either actually or specifically defined in the terms of the Will or Settlement, or a purpose which, from the specific terms can be certainly affirmed. The statement, in *Balwant Rao* v *Puran Mal* (1888) 6 All. 1 (P. C.) that the purpose of the following property in the hands of the trustees referred to at the end of the section must be the purpose of restoring it to the trust which is specified in the earlier part of the section provides a sound and critical test by which to consider whether or not any particular trust is within the provision of the section. (*Lord Buckmaster*). KHAW SIM TEK *v.* CHUAH HOOI GNOH NEOH.
(1922) 1 A. C. 120 : 26 C. W. N. 495 : 49 I. A. 37 : 30 M. L. T. 160 : 25 Bom. L. R. 121 : 1922 P. C. 212 (P.C.).

STREET.
See HIGHWAY.

STREET DRAINS.
See LOCAL ACTS.

STREET, PRIVATE.
See HIGHWAY.

STRIDHANAM.
See HINDU LAW - STRIDHANAM.

SUB-AGENT.
See CONTRACT ACT, Ss. 190—195.

SUBMISSION—Arbitration.
See (1) ARBITRATION.
(2) C. P. CODE, SCH. II.

————Jurisdiction.
See (1) C P. CODE, Ss. 13, 20.
(2) JURISDICTION.

SUBORDINATE COURTS.
See PRACTICE.

SUBROGATION.
See T. P. ACT, Ss. 76 AND 101.

SUBSEQUENT EVENTS.
See (1) C. P. C., O. 6, R. 17 and O. 41, R. 33.
(2) PRACTICE.

SUBSTITUTED SECURITY.
See (1) PARTITION—EQUITIES.
(2) T. P. ACT, Ss. 71, 73.

SUBSTITUTED SERVICE.
See C. P. CODE, O. 5, R. 20.

SUBSTITUTION OF SECURITIES.
See (1) HINDU LAW—PARTITION.
(2) PARTITION.
(3) T. P. ACT, Ss. 71, 73.

SUB-TENANT.
See (1) LANDLORD AND TENANT.
(2) T. P. ACT, S. 109.

SUCCESSION.
See (1) BUDDHIST LAW.
(2) HINDU LAW.
(3) MAHOMEDAN LAW.

SUCCESSION ACT (X OF 1865).

————S. 2—*Will—Present devise— Management after death.*

SUCCESSION ACT (X OF 1865), S. 50.

Where by a dedication the grantor appointed himself as the manager and provided that upon his death, his disciple was to become the manager held it is not a "will" as the disposition does not take effect after his death but becomes operative during his lifetime. (*Coutts and Das, JJ.*) MAHANTH SURKHDEO DAS *v.* KESHWAR SINGH.
1 Pat. L. T. 457.

————Ss 7, 9 and 10—*Domicile of origin—Domicile of choice—Burden of proof—Domicile of origin and domicile of choice explained.*

The law is very strongly inclined to retain the domicile of origin. If a person alleges that a man had acquired a domicile of choice, he must prove that that man had that intention. (*Beaman, J.*) SANTOS *v.* PINTO. **41 Bom. 687 : 36 I. C. 227 : 18 Bom. L. R. 715.**

————S. 7—*Procedure—Nature.*

To grant of a succession certificate no elaborate or lengthy enquiry is required a summary enquiry would do. (*Shadi Lal, J.*) RAMSARAN *v.* GAPPU RAM. **33 I. C 603 : 71 P. W. R. 1916.**

————S. 27—*Lineal descendant.*

The phrase "lineal descendants" in the Indian Succession Act means descendants born in lawful wedlock. (*Saunders, J. C.*) SOPHIA BLIN *v.* MARIA DAVID. **12 Bur. L. T. 48 : 10 L. B R. 77 : 51 I. C. 542 : (1919) 3 U. B. R. 128.**

————S. 50—*Will—Proof of execution.*

Where a Will is prepared under the direction of the testator with the intention of giving effect to it and the attestors attest it and the testator affixed his thumb mark in the presence of the attestors, the requirements under S. 50 of the Act must be held to have been complied with. (*Macleod, C. J. and Fawcett, J.*) THERESA *v.* MISQUITA. **45 Bom. 989 : 61 I. C. 587 : 23 Bom. L. R. 399.**

————S. 50—*Will—Attestation— Acknowledgment by testator.*

It is sufficient if the testator makes the attesting witnesses understand that the paper which they attest is his will though they do not see him sign it. (*Batchelor and Roe, JJ.*) BALMUKUND KESURDAS *v.* BHAGWANDAS KESURDAS.
19 I. C. 401 : 15 Bom. L. R. 209.

————S. 50—*Formalities—Execution and attestation of a will.*

S. 53 of the Succession Act merely lays down the formalities required by law to be observed in the execution and attestation of a will, and must not be confused with the question of the proof of the fact whether those formalities have been properly observed. (*Fletcher and N. R. Chatterjee, JJ.*) RAMMAL DAS KOCH *v.* KAKAL KOLI COCHINI. **43 I. C. 208 : 22 C. W. N. 315.**

————S. 50—*Will—Execution—Validity.*

Where a will is wholly in the handwriting of the deceased and bears his signature on the various pages thereof and alongside his signature on the top of the left-hand corner of the first page

SUCCESSION ACT (X OF 1865), S. 50.

are the signatures of four witnesses and on each of the other three pages, the signatures of two out of those four persons, the signature of the testator on the first page is the operative signature by which he intends to make the document effective. The witnesses put their signatures *animo attestandi* and the will was properly executed by the deceased. (*Fletcher and Richardson, JJ.*) SABITRI THAKURAIN *v.* F. A. SAIN.
29 I. C. 743 : 19 C. W. N. 1279.

——— S. 50—*Person signing for testator himself attestor.*

A will signed by a person for the testator and attested by himself and another is not duly attested and is inoperative. An unprivileged will is not duly executed under S. 50 where the testator who cannot sign his name simply touches the pen and hands it to some one to put his mark. He should affix the mark himself though he is allowed under S. 50 to get the will signed for him by a substitute. (*Wallis, C. J. and Phillips, J.*) RADHA KRISHNA MUDALIAR *v.* SUBBARAYA MUDALI. **40 Mad 550 : 34 I. C. 849 : 4 L. W. 255 : 31 M L. J. 357.**

———S. 50—*U. P. Court of Wards Act (IV of 1912), Ss. 17 and 18.*

S. 50 of the Succession Act requires the attesting witness only to have a clear view of the testator when he signs. (*Stuart and Kanhaiya Lal, A. J. Cs.*) KETKI *v.* MANAGER, NAN PARA ESTATE. **7 O. L. J. 589 : 58 I. C. 945 : 291 P. L. R. (J. C.) 178.**

———S. 50—*Will—Attestation—Validity.*

Under the section, it is sufficient if the attesting witnesses had a clear view of the testator at the time of signing. They may not see that his fingers moved at the time. Mere initials are proper signature if duly attested. Provisions in a will as to pious reflections and submission to creator do not invalidate will. (*Stuart and Kanhaiya Lal, A.J.Cs.*) SHER MUHAMMAD KHAN *v.* DEPUTY COMMISSIONER, BHARAICH.
58 I. C. 134 : 7 O. L. J. 406

———S. 50—*Will—Invalidity of—Want of attestation.*

A document which is put forward as a will but which is not attested at all, is not a duly executed will under S. 50 of the Succession Act. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) BURTON *v.* JACKOBSON. **30 I. C. 263 : 2 O. L. J. 193.**

———S. 50—*Will—Execution and attestation of.*

A will executed without attesting witnesses and deposited in the Registrar's office but taken out at the Registrar's office ten years afterwards in the presence of witnesses who signed the same in the proper places, sufficiently satisfies the provisions of S. 50 of the Act and must be taken as having been executed and registered on the same day. (*Piggott, J. C. and Lindsay, A. J. C.*) MIR SYED HASAN *v.* TAIYABA BEGAM.
26 I. C. 547 : 1 O. L. J. 591.

———S. 50—*Attestation—Endorsement of Sub-Registrar that execution was admitted—Effect.*

Where the writer of a will affixed only a mark by the pen of the scribe, and there was only one attesting witness on the day of execution, but the next day the Sub-Registrar signed an endorsementstating that the testatrix admitted execution before him. *Held* the Sub-Registrar also can be considered to be an attestor for the purposes of S. 50 of the Indian Succession Act. Case-law referred to. (*Das and Adami, JJ.*) SARADA PRASAD TEJ *v.* TRIGUNA CHARAN RAY. **1 P. 300 : 1 Pat. L. R. 263 : 1922 P. 402.**

———S 50 (3)—*Scope of—Direction—Attestation by witnesses.*

To constitute a direction it is not necessary that anything should be said. If a testator in making his mark is assisted by some other person and acquiesces and adopts it, it is just the same as if he had made it himself. 59 Eng. Rep. 1041, Ref. It is sufficient for purposes of S. 50 if each of the two or more witnesses to a will speaks either to the signature or to the affixing of the mark by another person or to the personal acknowledgment. The Indian Law unlike the English Law does not require that the witnesses to a will must be present at the same time. (*D. Chatterjee and Chapman, JJ.*) MUKTA NATH ROY *v.* JITENDRANATH ROY. **22 C. L. J. 262 : 27 I. C. 677 : 19 C. W. N. 1295.**

———S. 57—*Will—Codicil—Revocation—Conduct.*

S.157 of the Succession Act is exhaustive. 30 M. 359, Ref. That section read with S. 3 of the Hindu Wills Act means that a Hindu will cannot be revoked except in the manner mentioned in S. 57 subject to the proviso contained in S. 3 of the Hindu Wills Act. A codicil will not be impliedly revoked merely by the destruction or mutilation of the will, and the codicil notwithstanding remains ineffectual, unless it appears that in revoking the will, the testator intended to revoke the codicil as well. No doubt a codicil is *prima facie* dependent on the will and before the passing of the Wills Act it was recognised that a codicil fell to the ground with the will when the Will was revoked. Where the will and the codicil are so independent of each other that either could stand alone, a revocation of the one does not operate as a revocation of the other. The conduct of the sons could not be accepted as evidence of the intention of the testator in the matter of revocation of the will though no doubt his own declaration might under certain circumstances be admissible. 8 P. D. 169, Foll. (*Mookerjee and Cuming, JJ.*) SURENDRA NATH CHATTERJEE *v.* SHADAS MOOKERJEE. **35 C. L. J. 488 : 1922 Cal 182.**

———S. 57—*Writing the word "cancelled"—Effect—Destruction.*

The writing of the word "cancelled" on a will with the date and signature by the testator accompanied with a tearing of the will partially revokes the will completely under S. 57 of the Indian Succession Act. What acts of tearing, burning or cancelling are sufficient to constitute a total or partial revocation of will depends to a considerable extent upon the circumstances of each case. The slightest act of tearing with intent to revoke the whole thereby is sufficient to constitute valid revocation. The two elements that constitute revocation under S. 57 of the

SUCCESSION ACT (X OF 1865), S. 58.

Indian Succession Act are (1) intention ; (2) some outward act or symbol of intention. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention the *animo revocandi* sufficient unless some act of obliteration or destruction is done. (*Sanderson, C. J., Woodroffe and Mookerjee JJ.*) JOHUR LAL DEY *v.* DHIRENDRA NATH DEY.
20 C. W. N. 304 : 34 I. C. 707 : 23 C. L. J. 314.

——S. 58—*Alterations in will unattested—Probate.*

The execution of will long before the testator's death or the change in circumstances under which it was written are immaterial for a probate case. S 58 applies only to alterations made after the execution of the will. Where the alterations made are unattested and the intention of the will is clear even without them and is not affected by them, the will as it originally stood without the unattested alterations will be admitted to probate. (*Miller and Sadasiva Aiyar, JJ.*) MALHUSAMIER *v.* SREESRAE MEETHANITHI SAWAMIYER AVERGAL.
38 Mad. 356 : 13 M. L. T. 498 : (1913) M. W. N. 581 : 19 I. C. 694 : 25 M. L. J. 393

——S. 62—*Bequest to unnamed person—Secret instructions—Oral evidence.*

A legatee who undertakes to carry out the wishes of a testator, will be treated as a trustee and compelled to carry out the secret instructions of the testator. Parol evidence is admissible to prove the trust. Where a testator leaves instructions to carry out a bequest which he had kept secret reposing confidence in a particular man to carry out the instructions and the intended beneficiary files a suit praying that that person might be ordered to disclose the secret trust and that *Held*, that parol evidence was admissible to prove the bequest might be declared for his benefit the trust and that the secret trust should be declared in favour of the beneficiary, the power given to the trustee not being a general one but a special one. (*Macleod, J.*) BAYABAI SAKALKAR *v.* HARIDAS RANCHHORDAS. **40 Bom. 1 : 27 I. C. 946 : 17 Bom. L. R. 115.**

——S. 72—*Construction of will.*

No part of the will is to be rejected as of no meaning if it is capable of being reasonably construed. (*Fawcett, A. J. C.*) DINBAI *v.* NUSSERWANJI. **28 I. C. 481.**

——S. 80—"*Qualifying terms.*"

The words "qualifying terms" in S. 80 refer to the heirs and not to the bequest. (*Fawcett, A. J. C.*) DINBAI *v.* NUSSERANJI MEHTA.
28 I. C. 481.

——S. 82—*Grant to Hindu female—Nature of estate.*

Under Hindu Law a grant in favour of a female does not necessarily confer an absolute estate on her. S. 82 of the Succession Act does not apply to such a case. (*Kanhaiya Lal, A. J. C.*) CHAURAS KUNWAR *v.* JAGANNATH SINGH.
7 O. L. J. 147 : 56 I. C. 287 : 2 U. P. L. R. J. C.) 89.

SUCCESSION ACT (X OF 1865), S. 99.

——S. 82—*Applicability of—Hindu wills.*

By virtue of Hindu Wills Act, S. 82, applies to the will of a Hindu. In construing a will, the intention of the testator should be ascertained for which purpose the will should be read in the light of surrounding circumstances. (*White and Tyabji, JJ.*) DHANAPALA CHETTY *v* ANANTA CHETTY. **18 I.C. 973 : (1913) M W.N. 322 : 13 M.L T. 305 : 24 M.L.J. 418.**

——Ss. 82 and 111—*Will—Construction—Gift over—Death of the donee, during testator's life time—Effect.*

A will directed the distribution of the deceased landed property among his heirs and gave one part to his wife and provided that if her son *A*, outlived his mother, her share should descend to him : *Held*, that the interest of the wife was only a life interest and not an absolute one. It is only where the testator speaks of death which is certain as if it were a mere contingency by using such expression as "if any of them die" or "in case of his decease" that such death, to render the divesting clause operative, must be seemed to be death within the testator's life. (*Twomey, J.*) MAUNG PU *v.* NAPEAN. **15 I.C 355 : 5 Bur. L. T. 87.**

——S. 84—*Will—Devise to eldest son and the lawful male sons of such son.*

A devise to the eldest son and the lawful male sons of such son must be construed as conferring on the eldest son only a life estate. To a will of 1864 the provisions of the Succession Act are inapplicable and the rules of justice, equity and good conscience will govern the case (*Lord Shaw.*) RICHARD ROSS SKINNER *v.* MAUNILAL.
35 All. 211 : 19 I. C. 267 : 40 I A. 105 : (1913) M W. N. 500 : 13 M. L. T. 488 : 11 A.L.J. 494 : 17 C.L.J. 555 : 16 Bom L. R. 502 : 17 C. W. N. 853 . 25 M.L.J. 111 (P.C.

——S. 87—*Gift to mistress and her sons.*

In a gift by an unmarried person to his mistress and her sons, there must be an intimation that the illegitimate sons are meant. (*Coxe and Chatterjee, JJ.*) UDIT SINGH *v.* AMAR KUAR.
23 I. C. 348.

——S 91—*Estate vested not full or absolute.*

The estate vested is not full or absolute and until the executor's assent is given, the legatee's rights are only inchoate. A legacy, even if vested would be divested by the legatee's disclaimer. (*White, C.J. and Oldfield, J.*) LAKSHMAMMA *v.* RATNAMMA. **38 Mad. 474 : 21 I. C. 698. 25 M L.J. 556.**

——S. 99, (Excep.)—*Bequest to son's wife—Son not married at testator's death—Bequest, if valid—'Kindred.'*

Where a bequest was made to a son's wife and the son married only after the testator's death but the wife was in existence at the testator's death the bequest is covered by the exception to S. 99 of the Succession Act and is valid. The word 'kindred' in the exception to S. 99 of the Succession Act when imported in a Hindu wil should not be limited to blood relations and

SUCCESSION ACT (X OF 1865), S. 100.

therefore a wife stands equally well in the relation of a kindred to her husband. (*Mookerjee and Caspersz, JJ.*) DINESH CHANDRA ROY *v.* BIRAJ KAMANI DASI. 39 Cal. 87 : 11 I. C. 67 : 14 C.L.J. 20 : 15 C.W.N. 945.

——— Ss. 100, 101 and 102—*Applicability—Parsi will—Construction.*

The rules in Ss. 100, 101 and 102 constitute the law of British India applicable to succession to the property of everyone except Hindus, Mahomedans or Buddhists. They are, therefore, applicable to those subject to a variety of systems of jurisprudence, and must therefore be construed according to the generally current meaning of the words used and apart from such technical considerations as are only appropriate in the law of England. Where the will was that of a Parsi in Bombay. *Held* though the principle of joint family may not apply to a Parsi with the rigidity with which it applies, for example, in the case of a Hindu, still the conception of joint family right which is common in oriental countries ought not to be left wholly out of sight in interpreting the words of a Parsi, when the executors are enjoined to permit occupation to the daughter until death or marriage and to all the sons and also all their respective families, during as well as after the respective lifetimes of the sons, including the widows of the testator's lineal male descendants, the testator ought to be contemplated as having before his mind the family arrangements which would be natural in the case of his own sons, and in the case of the sons the title conferred on them to occupy extends to occupation along with their wives and families. The question is one purely of intention as shown by the particular words used in this will. Servants must be included on more general grounds. Even the daughter must be entitled if she resides to have a cook and the servants necessary for a household. But, while in her case it is not natural in the same way that she should bring with her a family of which she is not the head, in the cases of the sons they may have such families and be bound by religion as well as law to have these residents with them. Where there is a direction implying a postponement of the division of the residue for ten years, or until the death of the last surviving son, the direction is inoperative, the interest to which it attaches being absolute. (*Viscount Haldane.*) PUTLIBAI *v.* SORABJI NAOROJI GAAMDIA, 45 M.L.J 780 : 25 Bom. L.R. 1099 : 33 M.L.T. (P. C) 401 : (1923) M.W.N. 626 · 1923 P. C. 122 (P. C.)

——— Ss. 101 and 102—*Will—Construction—Dispositions to grandsons on attaining majority—Hindu Wills Act (XXI of 1870), Ss 2 and 3.*

A Hindu testator directed his executor to divide his residuary estate into five shares, he having had 5 sons, and to give away the same to his grandsons, in the case of sons with male issue. (if sons were without male issues, to the sons themselves) when the grandsons would attain their age *Held*, that the disposition was invalid having regard to Ss. 101 and 102 of the Succession Act. (*Lord Macnaghten*). SUBRAMANIA PILLAI *v.* MURUGESA PILLAI. 21 I. C. 282 : 17 C. W. N. 488 (P. C.).

SUCCESSION ACT (X OF 1865), S. 106.

——— S. 101—*Applicability—Hindu will.*

S. 101 of the Succession Act lays down a special rule which differs from the English Law on the subject and there is no reason why it should be invoked for the construction of Hindu Wills made before that section came into operation. (*Chaudhuri and Cuming, JJ.*) DAKSHAYANI DASI *v.* AMRITA LAL GHOSE. 53 I. C. 779 : 23 C. W. N. 826.

——— Ss. 101 and 105—*Charitable bequests.*

S. 101 of the Succession Act applies to all bequests, whether they are of a charitable nature or not. The question whether a bequest is invalid for remoteness, does not depend upon what did in fact happen but whether under the terms of the will the bequest might be delayed beyond the time specified in S. 101 of the Succession Act. The positive language of the Succession Act as contained in the provisions of S. 101 is sufficient to preclude the application of English Law. (*Sanderson. C. J. and Woodroffe, J.*) JOSEPH HENRY JONES *v.* THE ADMINISTRATOR GENERAL OF BENGAL. 47 I.C. 383 : 46 Cal. 485.

——— S. 101—*Direction in will for repairs of grave of testator and of his wife and child.*

A direction in a will that the trustee should look after and keep in repair the graves of himself, his wife and his child is not a charity but a perpetuity and therefore void. (*Chaudhuri. J.*) ADMINISTRATOR GENERAL OF BENGAL *v.* HUGHES. 21 I. C. 183 : 40 Cal. 192.

——— Ss. 103 and 250—*Probate—Proceedings—Caveator cannot contest will.*

A caveator has no *locus standi* to contest a will or agitate the matter of in probate proceedings. He may afterwards be able to establish his right to call in question the validity of some or all of the bequests made by the testator. (*Ayling and Odgers, JJ.*) RAJAMANIKAM *v.* FARRAR. 32 M. L. T. (H. C.) 20 : 1922 M. W. N 626 : 16 L. W. 456 : 1923 Mad. 131.

——— S. 105—*Will—Codicil.*

The re-publication of a will did not in the circumstances erase the old date and the will as modified upon the codicil is operative. (*Chaudhuri, J.*) ADMINISTRATOR GENERAL OF BENGAL *v.* HUGHES. 21 I. C. 183 : 40 Cal 192.

——— Ss. 106 and 107—*Parsi Will—Construction—Gift of life-interest—Reversionary trusts.*

Where a Parsi devised a house to his wife for life with remainder to trustees in trust for his son *J*, for life and if he dies, in trust for his widow and issue, and in default of issue, in trust for his son *K* and *J* died without leaving issue or widow during the lifetime of the testator's widow, *held*, that *K* because absolutely entitled to the house, subject to the life-interest of the testator's widow. (*Lord Phillimore.*) KAIKAHUSHRU BEZONJI CAPADIA *v.* SHIRUBAI BEZNAJI CAPADIA. 48 Bom. 88 : 21 Bom L. R. 130 : 23 C W. N 419 : 51 I. C. 481 : 9 L. W. 485 (P. C.)

——— Ss. 106 and 107—*Parsi will—Construction—Bequest to son—Son dying a minor—Gift, over—English rules of construction.*

Held on the construction of the will in the case the bequest in favour of the testator's son was

SUCCESSION ACT (X OF 1865), S. 106.

vested in interest at the date of the testator's death and it was not divested by the son's death before attaining majority. Per *Shah, A. C. J.* The exception to S. 107 of the Succcession Act would apply even where a part of the income is directed to be applied for the benefit of the legatee. Per *Pratt, J.*:—The exception to S. 107 of the Succession Act goes beyond the English Law and it is sufficient to bring the case within the exception if the direction is to apply so much as may be necessary of the income to maintenance (*Shah, A.C.J. and Pratt, J.*) RATANBAI RUSTAMJI, DADACHANJI *v.* CAWASJI EDALI.

24 Bom. L. R. 1124 : 1923 Bom. 96.

——S 106—" *Shall become vested.*"

Where a provision in a will confers life-estate on a widow and a vested interest in the sons after her death in equal shares, the interest of a son dying before the widow passes to his heirs, but where an agreement between the brothers provides that they would take the property in equal shares. After their step-mother's death, the interest of a brother dying before the mother, passes to his full brother by inheritance. (*Newbould, J.*) MATHURA NATH BISWAS *v.* KOHHIODH'M DASYA. **57 I. C. 747.**

——S. 107—*Illustrations—Contingent estate.*

An estate on a future contingency is within S. 107 of the Act. 9 M. I. A. 123, Ref. to. (*Mr. Ameer Ali.*) BHUPENDRA KRISHNA GHOSH. AMARENDRA NATH DEY. **43 Cal. 432 : 34 I C 892 : 43 I. A. 12 : 19 M. L. T. 97 : 20 C. W. N. 169 : 23 C. L. J. 169 : 14 A.L. J. 167 : 3 L. W. 252 : 30 M. L J. 110 (P. C.)**

[Affirming 41 Cal. 642 : 18 C. W. N. 360 : 24 I. C. 458.]

——S. 111—*Scope of—Strict construction.*

S. 111 of Succession Act enacts the rule in *Edwards* v. *Edwards*, 15 Beav. 361, which has not been fully accepted in England, and has to be applied only to cases coming strictly within its scope (*Mr. Ameer Ali*) BHUPEHDRA KRISHNA GHOSE *v.* AMARENDRA NATH DEY. **43 Cal. 432 : 43 I. A. 12 : 19 M. L. T. 97 : 23 C. W. N. 169 : 30 M. L. J. 110 : 23 C. L. J. 169 : 14 A. L. J. 167 : 3 L. W. 252 : (1916) 1 M. W. N. 73 : 18 Bom L R 347 : 34 I. C. 892 (P C) :**

[Affirming 24 I. C. 458 : 41 Cal. 642)

——S. 111—*Will—Uncertain event, estate to be made over on—Vesting at death of testator.*

A Parsi testator made a will in 1866 providing that his two sons "were to be proprietors half and half alike," of his whole estate, but the elder son P being of weak intellect the younger son was entrusted with the management of the estate. It was further provided that if the elder son who had only a daughter should get male issue, " half of the estate was to be made over to him on his attaining full age" and that his heirs should raise no objection to give him the share." P survived the testator and never had a son. *Held*, on the true construction of the will and having regard to S. 111 of the Succession Act, the will vested a moiety of the testator's estate in P absolutely on the testator's death. The gift over to a son of P who should take on attaining 21 years of age was

SUCCESSION ACT (X OF 1865), S. 111.

appropriate to the event of the death of P during the life-time of the testator and of his having a son under 21 at that time. (*Lord Shaw,*) JEHANGIR DADABHOY *v.* KAIKUSHRU CAVASHA.

39 Bom. 296 : 42 I. A. 71 : 28 M. L. J. 167 : 2 L. W. 208 : 13 A. L. J. 217 : 19 C. W. N. 426 : 21 C. L. J. 210 : 17 Bom. L. R. 197 : 17 M. L. T. 203 : 27 I C. 53 : 1915 M. W N. 633 (P. C.).

——S. 111—*Will—Construction — Uncertain event— Marriage of daughter — Provisions for maintenance, etc.*

A Hindu testator by his will made a gift for maintenance to each of his daughters of Rs. 600 a year coupled with a direction that "when they will be married", separate houses should be provided for them in the vicinity of the testator's house and that so long as the daughters lived in the separate houses so provided, " they would get the fixed allowances respectively but if the daughters do not live in the place they will get Rs. 10." The testator died in 1879 and the daughters married in 1888 and 1889 respectively and lived in separate houses. In suits by the daughters for their allowances, the defence was that the bequests to them were given in the " uncertain event" of their marriage and as that event did not happen until after the death of the testator, the bequests were void under S. 111 of the Succession Act. *Held*, that the payment of maintenance was not contingent on marriage or any other future event and therefore S. 111 of the Succession Act did not apply. (*Lord Mercy*). CHANDRA KISHORE ROY *v.* PRASANNA KUMARI DASI. **38 Cal. 327 : 38 I. A. 7 : 15 C. W. N. 121 : 9 M. L. T. 71 : (1911) 2 M. W. N. 30 : 13 C. L. J. 58 : 8 A. L. J. 96 : 13 Bom. L. R. 67 : 21 M. L. J. 116 : 9 I. C. 122 : 4 Bur. L. T. 65 (P. C.).**

——S. 111—*Rule of construction.*

S. 111 of the Act lays only rules of construction subject to be rebutted in its application by any provision in the will. Hence it cannot turn an estate into absolute one, where the intention of the testator in the will creates a gift followed by a contingent gift, which latter one is in substitution and not in remainder. The section applies only where the time of occurrence of the contingency is uncertain. A bequest by a Hindu in favour of his widow and on her death to his daughter for life and an alternative one in favour of the male issue of the daughter or to charity, fails as void in favour of the male issue but not in charity. A Hindu testator is competent enough to provide for the defeasance of an absolute of the happening of a conti gency in future. (*Pratt, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* VITHAL DAS MEGHJI. **58 I. C. 996 : 22 Bom. L. R. 1005.**

——S. 111—*Will —Restriction on inheritance—Time not mentioned for occurrence of uncertain event.*

A Parsi will provided (1) that the daughter of the testator when she attains majority and gets possession of her portion of the legacy was to be a sort of *ex officio* joint executor with the then existing executors, (2) that if the son of the testator comes and meets the testator there without

SUCCESSION ACT (X OF 1865), S. 111.

marrying, or if married, without any lineal heir, his share would revert equally to his surviving sisters or their heirs. *Held*, that the daughter on attaining majority is entitled to her legacy and to be co-executrix and was so entitled without waiting for possession of the whole of the legacy. S.111 of the Act applied and the restriction placed on the son's inheritance by the testator was nugatory and ought not to be given effect to. (*Davar, J.*) SARDAR NAWROJI *v.* PUTLIBAI, **37 Bom. 644 : 19 I. C. 832 : 15 Bom. L. R. 352.**

——S. 111—*Applicability of—Hindu will.*

The applicability of S. 111 of the Succession Act depends on a natural meaning as opposed to a forced tnterpretation of the words used in a will. (*Walmsley and Huda, JJ.*) SHRIMATI GUNAMANI DASI *v.* DEVI PBASANNA ROY. **54 I. C. 897 : 23 C. W. N. 1038**

——S. 111—*Applicability of—Will.*

Where a Hindu testator left a will providing "if my wife die before, my daughter shall get the said property," and died leaving him surviving the said persons, *held*, that the legacy to the daughter could not take effect under S. 111 of the Act, as the wife did not die in the lifetime of the testator. (*Chatterjee and Newbould, JJ.*) JAGAT BIJOY *v.* TOMIJUDDI HOWLADAR. **39 I. C. 228 : 44 Cal. 181.**

——S. 111—*Rule of construction—Absolute rule.*

If property is given to a person with a power to sell or give it away, he takes an absolute interest in the property. The rule laid down in S. 111 of the Succession Act is a statutory rule of construction which the Courts are bound to follow. Where the testator has given an absolute gift to a legatee and a gift over *simpliciter* on a contingency of death, is that he was referring to death before the period of distribution. (*Fletcher and Richardson, JJ.*) NISTARINI DEBYA *v.* BEHARILAL. **27 I. C. 239 : 19 C. W. N. 52.**

——S. 111—*Gift over in the event of minor legatee not attaining age.*

A gift over in the event of a minor legatee not attaining full age is valid. (*Fletcher and Richardson, JJ.*) DURGA PRASAD *v.* RAGHUNANDANLAL. **23 I. C. 597 : 19 C W. N. 439**

——S. 111—*No applicability to Punjab.*

Section 111, Succession Act, has been made applicable to cases governed by the Hindu Wills Act. This Act however, is not applicable to Punjab. Therefore, section 111 cannot apply to Punjab. (*Abdul Raoof and Lumsden, JJ.*) PREM SINGH *v.* HARDIT SINGH. **1923 Lah. 649.**

——S. 111—*Gift over on death of legatee with full ownership is void.*

A gift over of the remainder on the death of the legatee with full ownership is void and inoperative in law. (*Broadway and Abdul Raoof, JJ.*) MOHAN LAL *v.* NIRANJAN DAS. **60 I. C. 619 : 2 Lah. 175.**

——S. 116—*Failure of prior bequest not as contemplated—Validity of the gift over.*

SUCCESSION ACT (X OF 1865), S. 164.

A gift over shall take effect on the failure of a prior bequest although the failure may not have occurred in the manner contemplated by the testator. So, where a testator provided that if his son died, a minor and his widow survived him, she would acquire the property before the two daughters ; *Held* that if the widow predeceased the son still the two daughters would not be deprived of the legacy. (*Fletcher and Richardson, JJ.*) DURGA PRASAD *v.* RAGHAVANDAN LAL. **19 C. W. N. 439 : 23 I. C. 597.**

——S. 118—*Absolute estate—Gift to a third person on some condition.*

A bequest of absolute estate, with a provision that it should go to the third person if the legatee would die without male issue is valid under S. 118 and is not opposed to Hindu Law. (*Macleod, C. J. and Fawcett, J.*) BAI DHANLAXMI *v.* HARIPRASAD. **45 Bom. 1038 : 62 I. C. 37 : 23 Bom. L. R. 433.**

——S. 118 — *Will — Gift over to charity whether valid.*

An immediate gift to a charity for charitable purposes with a gift over, on an event which may occur beyond the limit of perpetuities, to another charity is not illegal. If the condition is neither impossible nor illegal the gift over would come into operation on the non-fulfilment of the conditions. (*Chaudhuri, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* HUGHES. **21 I. C. 183 : 40 Cal. 192.**

——S. 137—*Unprobater will—Defence.*

A will executed in Madras though not probated may be used by the deft. to contest the plff.'s suit. 14 Mad. 454; 33 Mad. 91, Foll.; 38 Mad. 474, Not foll. ; 18 C. W. N. 1136 ; 21 C. L. J. 96, Ref. (*Kumaraswami Sastri, J.*) SADAGOPA NAIDU *v.* THIRUMALAISWAMI NAIDU. **30 I. C. 272. 18 M. L. T. 129.**

——S. 159—*Will—Gift of income—If gift of corpus.*

A gift of income without more is a gift of the corpus though the gift is to the separate use or through the medium of trust. (*Chaudhuri, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* HUGHES **21 I. C. 183 : 40 Cal. 192.**

——S. 160—*Hindu Wills Act—Intention.*

S. 160 is made applicable to Hindus by the Hindu Wills Act. It only requires that a contrary intention should appear sufficiently from the language of the Will read as a whole, and not that the intention should be indicated by express words. (*Sanderson, C. J. and Richardson, J.*) NILADRINATH MUKERJI *v.* SAROJNATH MUKERJI. **62 I. C. 681.**

——S: 160—*Applicability.*

The principle in S. 160 does not apply when a contrary intention appears in the document. (*Chatterjee and Panton, JJ.*) RAJLAKHI DEBYA *v.* SAROLA SANDARI DEBYA. **56 I. C. 808.**

——S.164—*Effect of—Hindus.*

S 164 expressly abolishes the doctrine of satisfaction. Though the rule is not applicable to Hindus orMahomedans its principle is applicable. (*Beaman, J.*) HASSANALLI *v.* POPATLAL SARBHIS DAS. **37 Bom. 211 : 17 I. C. 17 : 14 Bom. L R. 782.**

SUCCESSION ACT (X OF 1865), S. 187.

——S 187—*Grant of probate before decree and after suit—Sufficiency of.*

So long as the compliance with S. 187 is prior to the decree, the fact that it was after the institution of the suit made no difference and the Court is fully competent to deal with the suit. (*Lord Mersey*). CHANDRA KISHORE ROY *v* PRASANNA KUMARI DASI. 38 Cal 327 : 38 I. A 7 : 15 C. W. N. 121 : 9 M. L. T. 71 : (1911) 2 M. W. N. 30 : 13 C. L. J. 58 : 8 A. L. J. 96 : 13 Bom. L. R. 67 : 9 I. C. 122 : 4 Bur. L. T. 65 : 21 M. L. J. 116 (P.C). [On appeal from 10 C. W. N. 864]

——S. 187—*Hindu Wills Act*, S. 2—*Compliance with after suit does not matter.*

S. 187 of the Succession Act is made applicable to Hindus by S. 2 of the Hindu Wills Act and so long as compliance with the section is prior to the decree, the fact that it was after the institution of the suit makes no difference. The court is entitled to proceed with the suit. (*Mookerjee and Cuming, JJ.*) CHARU CHANDRA PRAMANICK *v.* NAHUSH CHANDRA KUNDU. 50 Cal. 49 : 1923 Cal. 1.

——S. 187—*Admissibility in evidence of a will not proved in probate—Hindu Wills Act*, S. 2.

A will not proved in the Probate Court may be cited in evidence if it is for a purpose other than to establish a right as executor or legatee, not withstanding S. 187 of the Succession Act, incorporated in the Hindu Wills Act (*Mookerjee and Beachcroft JJ.*) ACHYUTANANDA DAS *v.* JAGANNATH DAS. 21 C. L. J. 96 : 27 I. C. 739 : 20 C. W. N. 122.

——S. 187—*Will—Probate not taken—Executor—Whether can pass possessory title.*

The rule stated under S. 187 of the Succession Act is that a person who has to prove a title and has to divorce it from a will whether that person is plff. or deft., cannot do so without producing probate. Though in order to complete the title of an executor under a will, it is necessary to take out a probate at a later date, the will cannot be treated as non-existence nor can the property pass by intestacy merely because a probate has not been granted. A will is perfectly valid independently of the probate and the executor can deal with the property and give a good title. S. 187 is no bar to a transferee from an executor who has not taken out probate but who was in possession, and who has given possessory title deed suing on that title deed to eject a trespasser and the lack of probate is insufficient to bar the ejectment of such a trespasser. (*Schwabe, C. J. and Wallace, J.*) S PARTHASARATHY AIYAR *v.* M. SUBBAROYA GRAMONY (1923) M W. N. 763 : 45 M. L. J. 175 : 1924 Mad. 67.

——S. 187—*Proof of execution title.*

A party claiming an interest under a will as well as his successors-in-title must prove the execution of the document and its terms by the particular procedure laid down by the Legislature.

SUCCESSION ACT (X OF 1865), S. 204.

38 Mad. 474, Foll.; 17 Cal. 347 (P.C.). Dist. (*Bakewell, J.*) ALAMELAMMAL *v* SURYAPRAKASAROYA. 38 Mad. 988 : 31 I. C. 491 : 29 M. L. J. 680.

——S. 187—*Person debarred from establishing legatee's right as* jus tertii.

S. 187 of the Succession Act affects not only the establishment of the legatee's right by himself but also debars a person from establishing legatee's right merely as a *jus tertii* for defence. (*White, C. J. and Oldfield, J.*) LAKSHMANA *v.* RATNAMA. 38 Mad. 474 : 21 I. C, 698 : 25 M. L. J. 556.

——S. 190—*One of several heirs of deceased sued against as legal representative—Letters of Administration.*

Where one of the heirs of a deceased Christian intestate was impleaded in a suit as his legal representative. *Held*, that unless Letters of Administration were granted by a competent Court no right to any part of the property of the deceased could be established. S. 190 of the Succession Act applies to the case. (*Batchelor, A. C. J. and Shah, J.*) TIMAJI KRISHNA PODDAR *v.* RAMA PIRAJI BHATKHANDE. 45 I. C. 862 : 20 Bom. L. R. 175.

——S 190—*Parsis—Decree debt—Daughter's liability.*

The amount under a decree against a family business, where the decree was passed after the father's death against the sons it does not affect the daughter's interest and S 190 has no application. (*Scott, C. J. and Russell, J.*) AHMEDABAD UNITED PRINTING CO. *v.* ARDESJUR KAVASJE 36 Bom. 5 5 : 16 I. C. 684 : 14 Bom. L. R. 644.

——Ss. 198, 183, 187 and 215—*Application for Letters of Administration by minor legatee's mother—Power of Court.*

A minor legatee cannot be granted Letters of Administration, and where there are other legatees also the mother of the minor cannot be granted the letters on behalf of the minor legatee. (*Fox and Hartnoll, JJ.*) MA SAW *v.* MA THIT. 5 Bur L. T. 235 : 18 I. C. 187 : 6 L. B. R. 118

——Ss. 201, 227, 228 and 246—*Letters of administration—Joint letters when granted—Co-heirs of equal degree—Rights of.*

Special circumstances should be made out before granting joint letters of administration and even where the claimants are equal in degree of kindred to the deceased, only one should be appointed according to the established practice. The Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased it is the rule to select one only, the selection being made according to certain recognised principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and other things being equal a person with business capacity and experience will be preferred to one who has none. Where two persons are equally entitled by consanguity preference with frequently be given to the one chosen by the majority of those entitled to the distribution of the assets although other

SUCCESSION ACT (X OF 1865), S. 239.

considerations may be sufficient to overrule the wishes of the majority of those interested. A son as a rule will be preferred to a daughter and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field. The court never forces a joint administration upon unwilling parties. Where the applicants are quarrelling between themselves and are antagonistic to each other the administration of the estate is likely to suffer. As they must act jointly one of them if obstinate, could defeat the proper administration of the estate. 5 C. L. R. 38 Ref. S. 204 of the Succession Act does no more than state that those who are in equal degree of kindred to the deceased are all, from that point of view alone, equally entitled to be appointed administrator, but the section does not say that they are all entitled to be appointed jointly Under S. 225 of the Act the Court is given very wide powers where it considers necessary or convenient to appoint some person to administer the estate other than the person who in ordinary circumstances would be entitled to the grant. There is nothing in the Act which makes it obligatory upon the Court to grant Letters of Administration to all persons who may be entitled thereto merely by reason of their equal nearness of kin to the deceased. Separate Letters of Administration can be granted under Ss. 227 and 228 of the Succession Act where the deceased leaves a will in respect of a person of his properties and the rest has to be administered by a person other than the executor of the will. (*Miller, C. J. and Foster, J.*) STONEY *v.* STONEY. **2 Pat. 508 : 4 Pat. L. T. 251 : 1923 Pat. 130 : 1923 P. 348 (2).**

——— **Ss. 239 and 264 B**—*Judge granting letters if can give directions as to property.*

After granting Letters of Administration the District Judge cannot give any directions with reference to the property. (*Shah and Crump, JJ.*) WINSOR *v.* WINSOR. **44 B. 682 : 57 I. C. 116 : 22 Bom. L. R. 396.**

——— **S. 332**—*Notification under—Retrospective effect—Decision, meaning.*

Notification dated 2nd May 1913, issued by the Government of India under S. 332 of the Succession Act at the appellate stage of a case did not apply where there had already been a decision of a competent Court regarding the rights of the parties. Decision includes a decision under appeal. (*Mullick, J.*) TUNI ORAON *v.* LEDA ORAON. **1 Pat. L. J. 225: 36 I. C. 206: 20 C. W. N. 1082.**

——— **S. 242**—*Jurisdiction of District Judge.*

S. 242 gives jurisdiction under certain limitation to a District Judge to grant probate having effect throughout British India. (*Kensington and Shah Din, JJ.*) NAGINDRA NATH BANERJEE *v.* P. N. BANERJEE. **21 P. R. 1913: 19 I. C. 692: 221 P. L. R. 1913.**

——— **Ss. 261 and 263**—*Appeal against order refusing grant of Letters of Administration—Court-fee.*

The Court fee payable in an appeal against an order refusing grant of Letters of Administration

SUCCESSION ACT (X OF 1865), S. 311.

is Rs. 10 under Art. 17 (*vi*) of Sch. II of the Court Fees Act, as the subject matter in dispute cannot be estimated at a money value. An order of a District Judge refusing to grant Letters of Administration with a copy of the will annexed is a decree and is appealable from the order. (*Tudball and Rafique, JJ.*) MISS EVA MOUNT-STEPHENS *v.* MR. HUNTER GARNETT ORME. **22 I. C. 98 : 35 All. 448.**

——— **Ss. 264, B and 239**—*Administrator—Direction to—Power to give.*

When Letters of Administration to the estate have been granted a District Court cannot give directions to the administrator as regards the property (*Shah and Crump, JJ.*) MINA WINSOR *v.* E. WINSOR. **22 Bom. L. R. 396: 57 I. C. 116: 44 B. 682.**

——— **Ss. 268 to 273**—*Decree against estate represented by administrator.*

A decree passed against an estate represented by an administrator acting on behalf of other administrator is perfectly valid and an auction sale held in execution of such a decree is binding until set aside though the administrator may be liable to the legatees for loss occasioned by gross negligence on his part. (*Sadasiva Aiyar and Napier, JJ.*) GRACE ROSAMUND RHODES *v.* PADMANABHA CHETTIAR. **1 L. W. 1033: 26 I. C. 369 : (1914) M. W N. 921 : 17 M. L. T. 18.**

——— **Ss. 269 and 293**—*Assent to legacy—Effect of—Power to dispose of property*

After an executor has given his assent to the legacy he is not competent to deal further with the property. An executor, although, he has power to dispose of the property on the deceased in such manner as he thinks fit under S. 269 of the Act must be able to prove necessity for doing so. (*Walmsley and Panton, JJ.*) MARIE PENHIERO *v.* JOTINDRA MOHAN SEN. **47 I. C. 289 : 28 C. L. J. 141.**

——— **S. 269**—*Executor—Power to mortgage assets—Renewal of mortgage.*

An executor who has obtained probate has absolute authority under S. 269 of the Succession Act to mortgage the testator's assets. The authority is in no away fettered by reason of his stipulation in the will that he is not to sell or mortgage the property. The executor would be acting within that authority if he renewed a mortgage effected by the testator to satisfy the debts created by that mortgage. (*Stuart, J. C.*) KUL HUSAIN *v.* AJODHYA BANK LTD. **54 I. C. 321 : 6 O. L. J. 526.**

——— **Ss. 291, 129 287, 288 and 290**—*Bequest of rent producing property on trust—Specific bequest.*

A bequest of rent producing property on trust (there being no rent charge) the trustees being directed to apply the rents and profits for benefit of a legatee is not a specific bequest within the meaning of S. 291 of the Succession Act. (*Beaman, J.*) BAI BHIKAJI *v.* BAI DIN BAI. **11 I. C. 350: 13 Bom L. R. 319.**

SUCCESSION ACT (X OF 1865), S. 311.

——S. 311—*Will—Payment of legacy—Applicability of section.*

S. 311 of the Act applies to a case where no time is fixed for payment but the amount is payable out of a particular fund. (*Chaudhury, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* A. D. CHRISTIANA. **34 I. C. 157 : 43 Cal. 201.**

——S. 311—*Construction of will.*

Held on the facts, the true construction of the will was that the legacies were intended to be given to the legatees as from the testatrix's death and to become due at once, but that it was recognised by the testatrix that they would not in fact be paid until the determination of the litigation as the funds would not be available for their payment, until then, there was no direction to be found that the legacies should not be paid until the determination of the litigation though, no doubt, it was recognised that they would not be, but as the funds were invested and bearing interest there was no reason for holding that the testatrix's intention as expressed in the will was that the legatees should not get interest but that the interest should accumulate for the sole benefit of the residuary legatee. (*Schwabe, C. J. Coutts Trotter and Kumaraswami Sastri, JJ.*) ZAMINDAR OF BHADRACHELLAM *v.* SRI RAJA VENKATADRI APPA RAO.
16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H. C.) : 46 M. 190 : 43 M. L. J. 486 : 1922 Mad. 457.

——S. 312—*Legacies—Interest on—Document silent.*

Interest on demonstrative legacies is payable from the time fixed for payment even at 4 per cent per annum, even though the document is silent about it. (*Chaudhuri, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* A. D. CHRISTIANA.
34 I. C. 157 : 43 Cal. 201.

——S. 331—*Hindu convert to Christianity—Law governing succession.*

Succession to the estate of a Hindu convert to Christianity who dies a christain and intestate, is governed by the Act. Since the passing of the Act, a person ceasing to be a Hindu cannot elect to continue to be governed by Hindu Law in matters of succession. *Abrahim* v. *Abrahim*, Dist. (*Lord Shaw.*) KAMAWAHTI *v.* DIGBIJAI SINGH.
43 All. 525 : 64 I. C. 559 : 48 I. A. 381 : 15 L. W. 1 (P.C.).

——S. 331—*Brahmos, if Hindus—Declaration under Act III of 1872—Effect of.*

A person by becoming a Brahmo does not necessarily cease to be a Hindu, that is to say, something further than mere becoming a Brahmo is necessary for a man to cut himself of from Hinduism. A declaration under Act III of 1872 can not be taken as an abjuration for all purposes of Hinduism but merely as a statement for the purposes of the Act itself. (*Greaves, J.*) JANANENDRA NATH ROY *In the goods of.*
26 C. W. N. 799 : 49 C. 1069 ; 1923 C. 265.

SUCCESSION CERTIFICATE ACT (VII OF 1889),

——Ss. 331 and 332—*Intestate professing Hindu religion though of mixed parentage—Grant of Letters of Administration.*

Where an intestate professed the Hindu religion though of a mixed parentage, the Probate and Administration Act applied and not the Succesion Act for the grant of Letters of Administration (*Hartnoll, Offg. C. J. and Young, J.*) MAUNG CHIT MAUNG *v.* MA YAIT.
7 Bur. L. T. 133 : 24 I. C. 638 : 7 L. B. R. 362.

——S. 331—*Applicability — Chinese-Buddhists.*

The Indian Succession Act does not apply to Chinese-Buddhist. 2 L. B R. 95 Foll. (*Twomey and Parlett, JJ.*) MA THIN SHEIN *v.* AH SHEIN.
8 L. B. R 222 : 24 I. C 367 : 7 Bur. L. T. 246.

SUCCESSION CERTIFICATE ACT (VII OF 1889).

——*Proceeding under—Not to be availed of for deciding conflicting claims.*

A proceeding under the Act cannot be availed of for the determination of conflicting claims or for the specification of the shares in a debt falling to different heirs or legal representatives. (*Piggott and Walsh, JJ.*) SUGHRA BEGUM *v.* MOHAMMED MIRKHAN.
43 All. 341 . 64 I. C. 6 : 19 A. L. J. 116.

——*Scope.*

An inquiry as to the validity of transfers made by a certificate holder is outside the scope and object of Act (Per *Sundara Aiyar, J.*) An assignee of a debt due to the estate of a deceased person can recover the debt without production of a certificate The act purports to facilitate the collection of debts to regulate the administration of succession as to protect persons who deal with alleged representatives of deceased persons against the contingency which so often occurs when disputes arise as to whether a claimant is or is not entitled as such personal representative. (*Walsh and Sunderlal, JJ.*) RAMAN LALJI MAHRAJ *v.* HARIDAS.
38 All. 474: 34 I. C. 364 : 14 A. L. J. 677.

——*Proceedings under, are summary—No bar to subsequent trial.*

The proceedings under the Act are of a summary nature and the Court has only to see that a *prima facie* right to collect the debts is made out and the Court's order does not bar the trial provided the question is the same and the parties are in same. (*Shadi Lal, C. J.*) RATTAN SINGH *v.* CHAUDHURI RAJ SINGH.
2 Lah. L. J. 578.

——*Mortgage—Suit—Buddhist heir of mortgagee.*

An heir of a Buddhist need not take out Letters of Administration in order to sue as representative of a deceased mortgagee. It is sufficient if a Succession Certificate has been obtained. (*Pratt and Duckworth, JJ.*) AH DOE *v.* MI AUNG TAH PRU AND ONE.
1 Bur. L. J. 110 : 1923 B. 74 (1).

SUCCESSION CERTIFICATE ACT (VII OF 1889). S. 1.

——S. 1 (iv)—*Scope of—Issue of certificate.*

Where a person died leaving a Will disposing thereby a portion of his property and gave a contingent interest to his widow and widowed daughters-in-law and a present interest to his daughter in some promissory notes and the natural heir who did not claim under the will applied for a Succession Certificate; *Held*, that there being no question of evading any fee or duty, S. 1 (iv) did not prevent before the contingency had arisen the issue of the certificate asked for, in respect of the promissory note in which a contingent interest was created in the Will, but that it did prevent the issue of a certificate in respect of the promissory note in which a present interest was granted by the will to the daughter. (*Richardson and Walmsley, JJ.*) ROMESH CHANDRA DAS *v.* KANNINISUDARY DASYA. **39 I. C. 525.**

——S. 1 (iv)—*"Such a will" meaning of.*

The words "such a will" have a reference to a will to which either the Hindu Wills Act or the Succession Act applies. Succession Certificate cannot be refused on the ground that a probate which would have been applied for has not been upheld. (*Shadi Lal, C. J.*) RATTAN SINGH *v.* CHAUDHURI RAJ SINGH. **2 Lah. L. J. 578.**

——S. 1 (iv)—*Jurisdiction of Court.*

An application for grant can be allowed in spite of S. 1 (iv) though the dispute between the parties could easily be settled in proceedings taken under the Probate and Administration Act (*Shadi Lal, J.*) RAMSARAN *v.* GAPPURAM. **33 I. C. 603 : 71 P. W. R. 1916.**

——Ss. 1 (4) 7, and 25—*Will — Application for certificate—Probate—Nature of proceedings under the Act—Decision on question of right.*

The words "such a will" in the concluding clause of S. 1, sub-S. (4) of the Succession Certificate Act refer to a will to which either the Succession Act or the Hindu Wills Act applies, 18 Bom. 608 and 2A.L.J. 126, Foll. S.1 (4) of the Succession Certificate Act does not preclude a person under a will to which neither the Succession Act nor the Hindu Wills Act applies. The mere fact that he might have applied for a probate is not an adequate ground for refusing to entertain his application for a succession certificate. 16 Bom. 712. Foll. A Subordinate Judge of the second class invested with the functions of a District Court under S. 26 of the Succession Certificate Act, is competent to entertain an application for a succession certificate in respect of debts exceeding Rs. 5,000. Proceedings under the Succession Certificate, Act are of a summary nature, and the only thing which the court is required to decide is whether the applicant has a *prima facie* right to collect the debts, and the decision of the Court under the Act, upon a question of right does not bar the trial of the same question in any other proceeding between the same parties. (*Shadi Lal, C. J.*) RATTAN SINGH *v.* CHANDHRI RAJ SINGH. **68 I. C. 302 : 2 Lah. L. J. 578.**

——S. 2—*Debt—Dower debt.*

Dower debt of a Mahomedan wife whether prompt or deferred is a debt within S 2 of Succession Certificate Act. 30 All. 315. Foll. (*Knox, Karamat Hussain and Griffin, JJ.*) GHAFOOR KHAN *v.* KALANDARI BEGAM. **8 A. L. J. 79 : 9 I. C. 127 . 33 All. 327.**

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Assignee from certificate holder.

——S. 3—*Insurance money.*

Under the Act money payable under a policy of life assurance after the death of an assured during an entirely undetermined sum during the life of the assured is not a debt due to the deceased. (*Holmwood and Imam, JJJ.*) CHAPUSILLA DASI *v.* JYOTISH CHANDRA SIRKAR. **33 I. C. 157**

——S. 4

Assignee from certificate holder.
Claim for part.
Debt, meaning of.
Divided Hindu family.
Joint Hindu family.
Legatee under will.
Minor as applicant.
Partnership.
Scope of.
Time for producing certificate and effect of non-production.
Miscellaneous.

Assignee from certificate holder.

——Ss. 4 and 16—*Assignment by heir of creditor—Suit by assignee—Succession Certificate*

Where the heir of a deceased creditor has not obtained a succession certificate in respect of the debt and assigns the debt before so obtaining to another, the assignee is entitled to obtain a succession certificate and cannot be granted a decree for such debt until he has done so. (*Tudball and Sulaiman, JJ.*) GULSHAN ALI *v.* ZAKIR ALI. **18 A. L J. 666 : 2 U. P. L.R (All.) 223 : 57 I. C. 55 : 42 A. 549.**

——S. 4—*Assignee from Certificate holder—Assignment of debt right of assignee to sue.*

Where a Succession Certificate was obtained in respect of a debt and subsequently the debt was assigned to a third person to whom the Succession Certificate was also handed over, the assignment of the debt is valid and the assignee is entitled to sue for the recovery of the debt. (*Ryves and Piggott, JJ.*) RANG LAL *v.* ANNU LAL. **11 A. L. J. 968 : 22 I. C. 349 : 36 All. 21.**

——Ss. 4 and 16—*Assignee from Certificate holder.*

An assignee of the holder of a Succession Certificate cannot sue for the recovery of the debt assigned to him. (*Griffin and Chamier, JJ.*) ALLAHADAD KHAN *v.* SANT RAM. **10 A. L. J. 506 : 17. I. C 486 : 35 All. 74.**

——Ss. 4 and 16—*Assignee from certificate holder—Succession Certificate holder assigning his rights—Right of assignee.*

An assignee from a person who has obtained a Succession Certificate is entitled to sue and obtain a decree for the recovery of a debt due to the estate of the deceased without producing a Succession Certificate in his own name. 35 All. 74. Diss. 36 All. 21 Foll. (*Phillips and Kumara swami Sastri, JJ.*) ARUNACHALA CHETTIAR MUTHU. **42 Mad. 130 : 48 I. C. 735 : 35 M.L.J. 666.**

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Claim for part.

Claim for Part.

——— S. 4—*Clain for part—Certificate in respect of a portion of—Whether can be granted.*

The Act does not contemplate the granting of a certificate for the collection of a part of the debt and a certificate ought not to be granted for a share only of a dower-debt which is a single debt. (*Piggott and Walsh, JJ.*) SUGRAH BEGUM *v.* MOHAMMAD MIR KHAN.

43 All 341 : 61 I. C. 6 : 19 A. L. J. 116.

——— S. 4—*Claim for part—Certificate for portion of debt—If may be granted.*

A succession Certificate for a portion of the debt due to the deceased may be granted. (33 All. 327 Dist. from) *Woodroffe and Carnduff, JJ.*) ANNAPURNA DASYA *v.* NALINI MOHAN DAS **42 Cal. 10 . 23 I. C. 556 : 18 C. W. N. 836**

——— S. 4—*Claim for part—Application by one of several heirs.*

Any one of the heirs of the deceased may apply for a Succession Certificate for a debt recoverable by him : he can even apply for a certificate for a part only of his share of the debt. (*Mookerji and Carnduff, JJ.*) MOHAMED ABDUL HASSAN *v.* MUSAMMAT SHARIFAN.

16 C. W. N. 231 : 12 I. C. 593 : 15 C. L. J. 384.

——— S. 4—*Claim for part—Certificate required for part of sum claimed.*

Even where a part of the sum claimed requires a Succession Certificate, S. 4 is applicable. (*Johnstone, J.*) BASSA *v.* AMIR BIBI.

175 P. L. R. 1914 : 24 I. C. 893 : 73 P. W. R. 1914.

Debt, Meaning of.

——— S. 4—*Debt, meaning of—Suit against a person who wrongfully collected debts.*

A certificate is not necessary where a Hindu widow brings a suit against a person who wrongly collects the debt due to the deceased's estate and withholds them. A certificate is necessary only where the debtor is sued as such. (*Tudball and Linsday, JJ.*) SAHEB RAM *v.* GOBINDI.

43 All. 440 : 60 I. C. 774 : 19 A. L. J. 268 : 3 U. P. L. R. (All.) 48.

——— S. 4—*'Debt' —Meaning of —Construction.*

The phrase 'his debt' in S. 4 is the whole of the debt due by the debtor to the deceased and cannot mean a portion of the debt because (1) such meaning is against the canons of interpretation, for the natural meaning of debt is not the share of some one in that debt. (2) it is opposed to the scheme of the Act which is intended for the protection of debtors (3) it will cause the splitting of an indivisible liability (4) it will lead to harassing of the debtor by multiplicity of suits on one and the same cause of action. (*Knox, Karamat Hussain and Griffin, JJ.*) GHAFFOOR KHAN *v.* KALANDARI BEGAM.

33 All 327 : 9 I. C. 127 : 8 A. L. J. 79.

——— S. 4—*Debt—Meaning of-Suit for arrears of rent due to deceased landlord—Succession Certificate.*

To recover arrears of rent in respect of homestead land by the heirs of legal representatives of a deceased landlord to whom the rent was due

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—"Debt", Meaning of.

a certificate is necessary. The words "land used for agricultural purposes", in S.4 govern the preceding words 'rent revenue or profits (*Fletcher and Newbould, JJ.*) SHEIKH SAHEBJAN KHANSAMA *v.* SHEIKH ABUL JALIL. **41 I. C. 84.**

——— S. 4—*Debt—Meaning of—Insurance policy.*

An insurance policy unless it is an ascertained debt in the lifetime of the assured, is not within the Act. Undetermined insurance money is not a debt due to the deceased. Succession Certificate empowers only to collect debts, existing in the deceased's lifetime and accruing before his death and gives no general power. It is unnecessary to realize insurance money. (*Holmwood and Imam, JJ.*) CHARUSILA DASI *v.* JYOTISH CHANDRA SARKAR **33. I. C. 157.**

——— S. 4, Cl. 2—*Debt—Meaning of—Decree for rent.*

The amount of a decree for rent deposited by the tenant judgment-debtor is rent even after the death of the decree holder and his heir is entitled io withdraw the money from Court without producing a Succession Certificate. (*Brett and Richardson, JJ.*) SURENDRA NATH MITRA *v.* UPENDRA NATH BHATTA. **18 I C 495.**

——— S. 4, (1) (a)—*Debt Meaning of—Insurance money—Succession Certificate whether necessary.*

An application under the Act by the widow of the insured for recovering the insurance amount is misconceived as the company is not the debtor of the deceased in respect of the sum and the applicant was not entitled to this sum as part of the assets of the deceased within the meaning of S 4 (1) (a) of the Act. (*Sadasiva Aiyar and Napier, JJ.*) SRINIVASA CHARIAR *v.* RANGANAYAKI AMMAL. **32 I. C. 991 : 3 L. W. 466.**

——— S. 4—*Debt—Meaning of—Insurance money.*

The insurance money falling due on the death of the insured is a part of the deceased's estate, and 'is a debt' due to him within the meaning of S. 4 (*Benson and Sundara Aiyar, JJ.*) ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LTD *v.* VANTEDU AMMIRAJU.

(1911) 1 M. W. N. 276 : 9 M. L. T. 451 : 10 I. C 263 : 35 Mad. 162

——— S. 4—*Debt—Meaning of—"Decree for debt"—Mortgage.*

A decree for enforcement of a mortgage rights, as against the mortgaged property is not a decree for debt within S. 4 of the Succession Certificate Act. Hence the heirs of mortgagee need not produce Succession Certificate. (*Tudball, A. J. C.*) HANUMAN BAKSH SINGH *v.* DIL RAJ.

50 I. C. 271.

——— S. 4—*Debt—Meaning of—Equity of redemption.*

An equity of redemption is not a security or debt within S. 4 of the Succession Certificate Act and the respondents could file a suit for redemption without such a certificate or letters of administration. (*Fox, C. J. and Hartnall,*) J. MA THEIN MAY *v.* MA THAN MYA. **15 I. C. 425 5 Bur. L. T. 102.**

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—"Debt", Meaning of.

——S. 4—*Debt—Meaning of—Paddy rent due from tenant.*

Where paddy rent remains due from a tenant of a deceased lessor it is not a debt within the meaning of S. 4 of the Succession Certificate Act and it is not necessary for the heir of the deceased lessor to take out a certificate for suing for recovery of the said rent. (*Heald, J.*) MA HLA KYA *v.* MAUNG NYUN. **2 Bur. L. J. 45 : 1924 R. 139.**

Divided Hindu family.

——S. 4—*Divided Hindu family—Certificate necessary.*

Section 4 of the Act imperatively requires the production of a Succession Certificate in the case of a divided Hindu family. (*Colvin, J. C.*) GHISH *v.* RAMBALLAKH. **13 I. C. 363.**

Joint Hindu Family.

——S. 4—*Joint Hindu family—Survivorship.*

A certificate is unnecessary where the succession is by survivorship. (*Piggott, J.*) MATHURA PRASAD *v.* DURGAWATI. **12 A L. J. 525 : 24 I C. 182 : 36 All. 380.**

——S. 4—*Joint Hindu family—Survivor—Joint family debt—Certificate.*

In a suit by the survivor of a joint family to recover joint family debts, no Succession Certificate is necessary. (*Banerji, J.*) RAMRATAN *v.* SUBHAN. **24 I. C. 93 : 12 A. L. J. 672.**

——S. 4—*Joint Hindu family—Suit by son for recovery of debts due to his deceased father—No certificate necessary.*

It is competent to a son in a Mitakshara family to sue for recovery of the debts due to his decesed undivided father without the production of a succession certificate. (*Suhrawardy and Cuming, JJ.*) SITAL PROSHAD PODDAR *v.* KAIFUT SHEIKH. **26 C. W. N. 488 : 1922 Cal. 149.**

——S. 4—*Joint Hindu family—Pro-note in favour of manager of Dayabhaga family—Suit by heirs.*

Where a promissory note executed in favour of *A* belonging to a Dhayabhaga Hindu family, was renewed after his death in favour of his brother *B* as *Karta* of the family and after *B*'s death *A*'s heirs and *B*'s heirs sued upon the note, *held*, that A's heirs were not required to take out a Succession Certificate as they were suing on their own behalf in respect of their share of the debt and not as the heirs of *A*. (*Richardson and Beachcroft, JJ.*) NILMONI DE *v.* SOORENDRA NATH MITRA. **46 I. C. 648**

——S. 4—*Joint Hindu family—Surviving widow—Maintenance fixed by bond in favour of two ladies—Certificate if necessary—Survivorship.*

Where a deed of maintenance was executed in favour of two ladies with rights of survivorship *interse* and one of them succeeded as survivor, on the death of the other, no Succession Certificate is necessary under S. 4 of the Act. (*Mookerjee and Carnduff, JJ.*) MATHURA PRASAD *v.* RUKMINI KOER. **13, I. C. 148 : 17 C.L.J. 87.**

——Ss. 4 and 6—*Joint Hindu family—Reversioner.*

A reversioner can get a certificate under Ss. 4 and 6 in respect of the estate of the deceased male owner, even if his widow had intervened. The estate comes to the reversioner as if no widow had intervened. (*Mookerjee and Caspersz, JJ.*) ABINASH CHANDRA PAL *v.* PROBADH CHANDRA PAL. **10 I.C. 357 : 15 C.W.N. 1018.**

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Joint Hindu family.

——S. 4—*Joint Hindu family—Survivorship.*

Where one member of a joint Hindu family dies, the other members succeed to him by the right of survivorship and no succession certificate is necessary for the realisation of debts due to the family. (*Johnstone, C.J.*) GURDITTA MAL *v.* DHARI MAL **31 I.C. 904.**

——S. 4—*Joint Hindu family—Pro-note executed by father—Son's rights to recover money under.*

The son must produce a succession certificate to enable him to recover a debt due under a promissory note in favour of his deceased father, the debt being the self-acquired property of the father. (*Wallis, C. J., Oldfield and Kumaraswami Sastri, JJ.*) VAIRAVAN CHETTIAR *v.* SRINIVASA CHARIAR. **44 Mad. 499 : 13 L. W. 475 : 29 M. L. T. 294 : (1921) M. W. N. 290 : 62 I. C. 944 : 40 M. L. J. 481.**

——S. 4—*Joint Hindu family—Adopted son—Ancestral property—Adoption subsequent to death of adoptive father—Succession certificate.*

Under the Hindu Law an adopted son takes the ancestral property of his adoptive father not as his heir but by survivorship. Therefore he is not bound to produce a succession certificate before he can obtain a decree for the recovery of the same. The fact that the son was adopted subsequent to the death of the adoptive father does not make any difference. (*Sankaran Nair and Oldfield, JJ.*) RAMANATHAM CHETTI *v.* SUBRAMANYAN CHETTI. **17 M. L. T. 266 : 28 I.C. 688 : 28 M. L. J. 372.**

——S. 4—*Joint Hindu family—Debt due to member of a joint family—Suit for recovery—Succession certificate.*

A succession certificate is not necessary to recover a debt due to a member of a joint family. The fact that the document sued on is a promissory note could not make any difference. It is not necessary that on the face of the document it could appear that the debt belongs to the joint family. In all cases the question will be whether the moneys sought to be recovered were advanced from joint funds or were the individual earnings of the person in whose favour the document was executed 14 Mad. 377; 17 Mad. 108. 20 Mad. 232; 22 Mad. 380 Ref.(*Seshagiri Aiyar, J.*) PICHAI KUTTIA PILLAI *v.* RANGANATHAM. **17 M. L. T. 264 : 28 I. C. 490 . 28 M. L J. 323.**

——S. 4—*Joint Hindu family—Adopted son—Succession certificate.*

An adopted son is entitled to get a decree in respect of a debt due to the deceased undivided adoptive father, without getting a succession certificate. But an adopted son cannot sue on a promissory note executed in favour of his deceased undivided adoptive father without production of a succession certificate. (1910) M. W. N. 211 Foll. (*Wallis, J.*) PERAYYA *v.* AHMAD ABDUL RAHIMAN SAIT. **1 L. W. 612 : 27 M. L. J. 236 : 25 I. C. 206 : (1914) M. W. N. 671.**

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Joint Hindu family.

——— S. 4—*Joint Hindu family.*

Illegitimate son of a sudra can recover debts due to his father without a succession Certificate. (*Prideaux, J.*) GAMLAL *v.* KASHIRAM. **68 I. C. 417.**

——— S 4—*Joint Hindu family—Sons—Mortgage in the name of manager—Suit by some of the members, other disclaiming interest.*

A suit on a mortgage standing on the name of a manager of a joint Hindu family consisting of his sons and nephews was instituted by the sons of the mortgagee after his death. The nephew disclaimed all interest in the mortgage. *Held*, that it was competent to the sons to sue without production of a succession certificate. (*Stuart and Kanhaiyalal, A. J. Cs.*) RAM SEWAK *v.* BALDEO BAKSH SINGH. **47 I. C. 649 : 5 O. L. J. 442.**

Legatee under will.

——— S. 4—*Legatee under will.*

A legatee claiming under the will of the deceased could obtain a succession certificate if he can show that it is self-acquired property of the testator. (*Abdur Rahim and Spencer, JJ.*) KOYYATHI HAJI *v.* KOYAMAN KUTTU HAJI. **31 I. C. 446.**

Minor as applicant.

——— Ss. 4 and 9—*Minor applying through natural guardian—Issue of certificate.*

A succession certificate can be granted to a minor on application by him through his natural guardian. S. 4 of the Succession Certificate Act lays down that a person suing for the effects of his deceased father must obtain Succession Certificate before instituting the suit. But Sec. 9 precludes a minor from applying for succession certificate as he cannot execute the bond required by that section. 28 Bom. 344; 25 Bom. 323 Cons. 5 C. L. R. 570; 20 All. 363 Foll. The provision of S. 9 of the Act however can be satisfied by the guardian depositing the necessary security on behalf of the minor. (*Abdur Rahim and Sundara Aiyar, JJ.*) SINGANAMALA KRISHNAMACHARLU *v.* SINGANAMALA VENKATAMMA. **(1912) M.W. N. 411 : 15 I. C. 408 : 36 Mad. 214**

Partnership.

——— S. 4—*Partnership—Succession certificate—Heirs of deceased partner.*

In a suit on a note executed in favour of a firm the full amount of the claim should be decreed even when one of the members of the firm dies during the pendency of suit. His legal representative who is added as plff. need not produce any succession certificate to the deceased partner. 17 C. L. J. 648 Foll. (*Richardson and Beachcroft, JJ.*) PULIN BEHARI ROY *v.* ABDUL MAJID **44 I. C. 911**

——— S. 4 (a)—*Partnership—Death of one partner—Claim by others—Succession certificate.*

Where one partner dies, the other partners claiming the effects of the deceased as due to them alone, should produce a succession certificate to substantiate their claim. (*Johnstone, C. J.*) GURDITTA MAL *v.* DHARI MAL. **31 I. C. 904.**

Scope of.

——— S. 4—*Scope of—Application for certificate—Nature of enquiry—Decree in respect of debt—Effect of.*

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Time for producing certificate and effect of non production.

Three executors appointed under the will of a Hindu testator had propounded the will and obtained probate. The testator's great grand-daughter applied for a succession certificate for collection of three specified debts two of which were due and payable to her father on bonds and the third due to him and the testator jointly, *Held* that she was entitled to a Succession Certificate in respect of the first two debts. The question whether the debtors on being sued could prove that the debts had been satisfied could not be considered in those proceedings. The third debt having merged in a decree no Succession Certificate could be granted in respect of it (*Piggott and Walsh, JJ.*) SAKAT MULL *v.* KATORI. **21 A. L. J. 122 : L. R. 4 A. 78 : 1923 A 265.**

——— S. 4 (1)—*Scope of.*

It is indicated by S. 4 (1) of the Act that the claim contemplated by this section is a claim made by a person in the capacity of and as a personal representative of a deceased person. (*Walsh and Sundar Lal, JJ.*) RAIMAN LALJI MAHARAJ *v.* HARIDAS. **14 A. L. J. 677 : 34 I. C. 364 : 38 All. 474.**

——— S. 4—*Scope of—Applicability of to suit for sale on mortgage.*

S. 4 of the Succession Certificate Act applies also to suits for sale under S. 88 of the Transfer of Property Act. 16 All. 259 Foll. (*Karamat Hussain and Tudball, JJ.*) RAM SARUP *v.* KALLA. **14 I. C. 570.**

——— S. 4—*Scope of—Position of Assignee from an undivided son—Time for production of certificate.*

Where an assignment is from an undivided son or where the assignee sues on the ground that he is a holder in due course and not that a debt did really exist, no succession certificate is necessary. In either case the applicability of S. 4 does not arise. A Court should not dismiss a suit for non-production of a succession certificate but must give time for its production. (*Spencer and Seshagiri Aiyar JJ.*) AMMASI KUTTI GOUNDAN *v.* APPALU. **29 I. C. 234.**

Time for producing Certificate and effect of non-production.

——— S. 4 (1)—*Time for producing certificate—Probate—Production before decree.*

A suit by an executor before obtaining probate is maintainable. The title of the executor is derived from the will of the testator and not from the probate. Production of probate before decree is sufficient compliance with S. 4. (*Lord Parker*). SOONA MAYNA KENA ROONA MEYAPPA CHETTY *v.* SOONA NAVENA S. M. P. RAMANIAN CHETTY. **20 C. W. N. 833 : (1916) 1 M. W. N. 455 : 18 Bom. L. R. 642 : 85 L. J. (P. C) 179 : (1916) 1 A. C. 603 : 114 L. T. 1002 : 35 I. C. 323 : 43 I. A. 113 (P. C.).**

——— S. 4—*Time for producing—Succession certificate—Production of, before decree.*

The production of a succession certificate before decree is a sufficient compliance with the

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Time for producing certificate and effect of non-production.

section though it was not produced at the time of the institution of the suit. (*Lord Mersey.*) CHANDRA KISHORE ROY *v.* PRASANNA KUMARI DASI. **38 Cal. 327 : 38 I. A. 7 : 15 C. W N. 121 : 9 M. L. T. 71 : (1911) 2 M. W. N. 30 : 13 C L. J. 58 : 8 A. L. J. 96 : 13 Bom L. R. 67 : 4 Bur. L T. 65 : 9 I C. 122 : 21 M. L. J. 116 : (P. C.)**

[On appeal from **10 C. W. N. 864.**]

——S. 4—*Time for producing certificate—Suit whether maintainable without Succession Certificate.*

A suit filed without the production of a succession certificate should not be dismissed by the Court without giving the plff. an opportunity of obtaining and filing it. Where on an objection being taken by the defendants that no succession certificate had been filed by plaintiff the Court forthwith dismissed the suit without giving opportunity to the plaintiff of obtaining and producing the necessary certificate. *Held*, in revision that the Court should have given such an opportunity and the dismissal was set aside. (*Tudball, J.*) JAWADALI SHAH *v.* KAMLAPATRA. **56 I. C. 641 : 18 A. L. J. 514.**

——S. 4—*Effect of non-production—Succession certificate—Dismissal of appeal for non-production—Remand.*

Where a party fails to produce the necessary succession certificate in the Court of first instance he should be given an opportunity to produce it by the Appellate Court on payment of costs. (*Woodroffe and Coxe, JJ.*) MURALIDHAR ROY CHOUDHURY *v* MOHINI MOHANKOR. **30 I. C. 510 : 19 C. W. N. 794. (Note).**

——S. 4—*Effect of non-production—Succession certificate—Non production of—Dismissal of suit—Appellate Court—Costs—Remand.*

When a suit failed by reason of the non-production of the succession certificate in the first Court the succession certificate may be obtained and filed in the Appellate Court on the appellant paying the costs of the previous proceeding. (*Holmwood and Mullick, JJ.*) GHULHAN SINGH *v.* MADHO SINGH. **28 I. C. 383 : 19 C. W. N. 794.**

——S. 4—*Time for producing—Succession Certificate—Necessity of.*

Where probate or Letters of Administration having been obtained with regard to the estate of the deceased a succession certificate is not necessary under S. 4 to entitle a person to sue. Where a succession certificate is necessary the suit should not be dismissed because the certificate had not been produced previously. It should be allowed to be produced before decree. (*Holmwood and Mullick, JJ.*) RAMANUGRAH NARAYAN SINGH *v.* CHUNNI LAL. **27 I. C. 822.**

——S. 4—*Effect of non-production—Dismissal of suit—Impropriety of.*

The dismissal of a suit for non-production of a succession certificate is improper. All that S. 4

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Miscellaneous.

of the Succession Certificate Act provides is that the Court shall not pass a decree without the production of a Succession Certificate, 68 P. R. 1891 ; 10 P. R. 1901 : 19 C. W. N. 794 ; 27 I. C. 822 Ref. (*Broadway, J.*) NANHA *v.* SUNDA. **1923 Lah 597.**

——S. 4—*Time for production—Pro-note in favour of deceased person—Suit by assignee of pro-note—Conditional decree—Proper order.*

In a suit on a pro-note executed in favour of a deceased person, a Court has no jurisdiction to pass a conditional decree directing the production of a succession certificate before execution of the decree even though the suit be by an assignee of the widow of the deceased promisee. 15 Bom. 105; 15 Mad. 419 Foll. The proper order is to direct its production before decree and in default to dismiss the suit. 17 Mad 419 Foll. (*Ayling. J.*) ARAVAMUDA AIYANGAR *v.* KALIA PERUMAL. **24 I. C. 143.**

——S. 4—*Effect of non-production—Suit by heirs of mortgagee for sale.*

A certificate under S. 4 is not essential before a decree can be passed directing the sale of mortgaged properties in a suit by the heirs of the mortgagee for the recovery of the mortgaged debt, especially when plffs. do not ask for a personal decree against deft. 29 Mad 77 ; 32 Cal. 418; 28 Bom. 630 Ref. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KAMBAI NAIDU *v.* SANKARAMMAL. **(1912) M. W. N. 1115 : 16 I. C. 224 : 12 M. L. T. 202.**

——S. 4—*Time for producing certificate—Decree postponed till the production of certificate—C. P. Code., S. 33.*

The Court passed a judgment in a suit to recover a debt due to the estate of the deceased but the decree was postponed till the production of the succession certificate. *Held*, that the procedure though undesirable, was not illegal. S. 33, C.P. Code. read with S. 4 of Succession Certificate Act precludes the passing of the decree till a certificate is produced. (*Mitra, A. J. C.*) RAJARAM *v.* MALAN. **57. I. C. 650 (Nag.)**

——S. 4—*Time for producing—Suit by heir against debtor—Maintainability of.*

S. 4 of the Act is no bar to the maintainability of a suit by the heir of a creditor against the debtor. That section only requires the production of a succession certificate before decree. (*Roe and Sir Ali Imam, JJ.*) ALICE THORP *v.* SHAMAT LAL. **44 I. C. 733 : 3 Pat L. J. 160.**

——S. 4—*Effect of non-production.*

A suit ought not to be dismissed for failure to produce a succession certificate or other authority mentioned in S. 4 of the Act. Where they are necessary, the Court should give the plaintiff an opportunity to produce them within a time fixed by it. (*Maung Kin, J.*) CHAING NA *v.* SHWE OK. **63 I. C. 807 : 13 Bur. L. T. 233.**

Miscellaneous.

——S. 4—*Suit by creditor against heirs of deceased debtor.*

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4.—Miscellaneous.

A creditor need not take out a succession certificate in order to sue the heirs of the deceased debtor, for the recovery of his debt. (*Walsh and Lindsay, JJ.*) SHADI JAN *v.* WARIS ALI. **19 A. L. J. 423 : 64 I. C 1 : 43 All. 493.**

——**Ss. 4 and 16**—*Assignment by heir of creditor—Suit by assignee—Succession certificate.*

Where the heir of a deceased creditor has not obtained a succession certificate in respect of the debt and assigns the debt before so obtaining to another, the assignee is entitled to obtain a succession certificate and cannot be granted a decree for such debt until he has done so (*Tudball and Sulaiman, JJ.*) GULSHAN ALI *v.* ZAKIR ALI. **2 U. P. L. R. (All.) 223 : 57 I. C. 55 : 18 A. L. J. 666.**

——**S. 4**—*Question of title of the deceased person.*

On a Government promissory note being assigned by registered deed the assignee applied for a succession certificate in respect of the note. The Court found that the applicant was the representative of his assignor but being of opinion that the assignor himself had not established a good and subsisting title to the note at the date of the assignment, the certificate was refused. *Held*, whether the assignor had a valid title or not, or whether the assignment conveyed any title to the applicant or whether the debt secured by the promissory note was recoverable or not, were not matters for determination on an application for a certificate. The only question to be decided was whether the applicant was the representative of the person who was to receive the debt. (*Piggott and Banerji, JJ.*) RADHIKA PRASAD BAPULI *v.* SECRETARY OF STATE. **14 A. L J. 650 : 35 I. C. 711 : 38 All. 438.**

——**S. 4**—*Succession Certificate—Execution proceedings—Legal representative.*

If a decree holder dies during execution proceedings his representatives need not take out succession certificate for being substituted in his place. (*Newbould, J.*) KSHETRA MOHAN *v.* AZIZULLAH MEA. **57 I. C. 902.**

——**S. 4**—*Applicability of—Substituted plff.*

In a suit for recovery of money due on a bond where the plff. dies and another plff. is substituted the Court should not pass a decree in favour of the plff. without the production of a succession certificate. *Quaere*:—Whether the same principle applies to execution proceedings. (*Mookerjee and Beachcroft, JJ.*) NEPASI BEWA *v.* NASIRUDDIN. **45 I. C. 730 : 27 C. L. J. 400.**

——**S. 4**—*Debtor—No obligation to pay debt to person without certificate or probate.*

A debtor is not under any legal obligation to pay the debt to any representative of the deceased creditor who does not produce a certificate, or probate or Letters of Administration or some authority to collect the debts due to the deceased. (*Broadway and Abdul Qadir, JJ.*) THAKAR DAS *v.* THE FIRM OF BASHI MAL KISHEN CHAND. **64 I. C. 385.**

——**S. 4**—*Pendency of regular suit—Ground for refusal of certificate.*

SUCCESSION CERTIFICATE ACT (VII OF 1889) S. 7.

That a regular suit involving the question of succession is pending is no ground for the refusal of succession certificate. (*Johnstone, J.*) BASSA *v.* AMIR BIBI. **175 P. L. R. 1914 : 24 I. C. 893 : 73 P. W. R. 1914.**

——**S. 5**—*Jurisdiction under.*

The Court has sufficient authority under S. 5 of the Act to dispose of proceedings where the deceased at his death had his ordinary place of residence within its jurisdiction and did his business there. (*Shadi Lal, J.*) RAM SARAN *v.* GAPPU RAM. **33 I. C. 603 : 71 P. W. R. 1916.**

——**Ss. 5 and 6**—*Jurisdiction to grant certificate—District Court—Residence.*

The jurisdiction to confer a succession certificate is given by S. 5 of the Succession Certificate Act and that jurisdiction is not enlarged by S. 6 (1) of the Act which relates merely to procedure. *Prima facie* a District Court has no jurisdiction to grant a succession certificate where the deceased has not ordinarily resided within the local limits of its jurisdiction. Where however the deceased at the time of his death had no fixed place of residence at all the certificate may be granted by the Court within whose jurisdiction any part of the deceased's property may be found. (*Robinson, C. J. and Macgregor, J.*) CHAN PYU *v.* CHAN CHOR KHINE. **2 Bur. L. J. 42 : 1923 Rang. 238.**

——**S. 6**—*Application for certificate—Question as to whether debt belongs to the deceased.*

In an application for a succession certificate the question as to whether the debts, in respect of which the certificate is applied for, belong to the deceased or not is irrelevant. 25 Cal. 320, Dist. from. (*Sankaran Nair and Ayling, JJ.*) SRINIVASACHARIAR *v.* GOPALAN. **(1914) M. W. N. 323 : 23 I. C. 424 : 26 M. L. J. 365.**

——**S. 6**—*Assignee of representative of deceased—If can apply.*

A succession certificate can be granted to the assignee of the representative of a deceased person. (*Chapman and Roe, JJ.*) RAM CHARITER SAHU *v.* RAM NARAIN SAHU. **40 I. C. 96 : 2 Pat. L. J. 350.**

——**S. 6**—*Minor—Application through next friend.*

A minor cannot apply for a certificate under Succession Certificate Act through a next friend. His legal guardian must apply for it, after the guardian is so appointed under the Guardian and Wards Act. (*Pratt, J. C.*) DAMBAI, *In the matter of.* **10 I. C. 981 : 4 S. L. R. 266.**

——**S. 6 (f)**—*Debt—Construction.*

"Debt" in S. 6 (f) means the whole of the debt due from the debtor to the deceased. A succession certificate for the collection of a portion of the debt cannot be granted. (*Knox, Karamat Hussain and Griffin, JJ.*) GHAFFOOR KHAN *v.* KALANDARI BEGAM. **8 A. L. J. 79 : 9 I.C. 127 : 33 All. 327.**

——**S. 7**—*Succession Certificate—Rejection of—Review—Appeal.*

An order rejecting an application for the grant of a Succession Certificate is appealable but an

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 7

order rejecting an application for review of an order granting such application is not appealable (*Piggott and Walsh, JJ.*) NARAIN DEI *v.* PARMESHARI. 40. I.C. 124.

——Ss. 7 and 9—*Grounds for refusing application.*

Though the conditions at the time of a previous grant of succession certificate were complied with a second application should not be refused (*Walsh and Sunderlal, JJ.*) PORNAKUER *v.* CHUNNILAL. 35. I C. 718 : 14 A.L.J. 654.

——S. 7—*Proceedings—Nature.*

Proceedings under the Succession Certificate Act are of a summary nature in which the Court merely decides the right of the applicant to the certificate and are in no way intended to determine the share of the applicant in the debt. (*Knox, Karamat Hussain and Griffin, JJ.*) GHAFFOOR KHAN *v.* KALANDARI BEGAM. 8 A.L.J. 79 : 9 I.C. 127 : 33 All. 327.

——S. 7—*Facts admitted by both sides—Injury.*

Barring exceptional cases the Court should hold some inquiry in succession certificate cases, even where many facts on both sides are admitted. (*Sadasiva Aiyar and Ayling, JJ.*) SARASVATHI AMMAL *v.* SUBBIER. 21 I.C. 867: (1914) M.W.N. 24.

——S. 7—*Scope of enquiry.*

It is not necessary that the Court must hold an enquiry before it can hold that the application for succession certificate raises a question too intricate and difficult for decision in a summary trial. The pleadings may be quite sufficient to show it. (*Benson and Sundara Aiyar, JJ.*) ANGAPPACHETTIAR *v.* MEENAKSHI AMMAL. (1913) M.W.N. 175 : 18. I.C. 733: 24 M.L.J. 198.

——S. 7—*Application for certificate—Scope of enquiry.*

The question of re-union is not an allegation which is suitable for enquiry in a summary proceeding under the Succession Certificate Act. (*Chapman and Roe, JJ.*) JAGGANNATH PRASAD SAHU *v.* MT. KUADARI SAHU. 43 I. C. 126 : 1917 Pat. 264.

——S. 7—*Procedure—Nature.*

To grant of a succession certificate no elaborate or lengthy enquiry is required ; a summary enquiry would do. (*Shadi Lal, J.*) RAMSARAN *v.* GAPPA RAM. 33 I. C. 603 : 71 P.W.R. 1916.

——Ss. 7 (3) and 9 (1)—*Duty of applicant to give sureties.*

In granting a succession certificate under S. 7 (3) a Court is bound to require the applicant to give a security bond with one or more sureties as a condition precedent to granting a certificate. The Court cannot grant a certificate unconditionally. (*Abdur Rahim and Sundara Aiyar, JJ.*) RAJAM CHETTY *v.* EDALAPALLI ATHAMMAL. (1912) M.W.N. 535 : 14 I.C. 303 : 11 M.L.T. 384.

——S 7 (3)—*Powers of Appellate Court—Interference by High Court in revision.*

An Appellate Court has the same discretion under S. 7, cl. (3), as the Court of first instance and if it considers that there is no intricate question to decide, the High Court will not, in revision, interfere with the exercise of such discretion. 17 Mad. 477 Dist. (*Sundara Aiyar, J.*) RAMAKRISHNA AIYAR *v.* NAGAMMAL. 10 M.L.T. 164 : (1911) 2 M W.N. 142 : 11 I. C. 835 : 21 M.L.J. 824.

——S. 7 (3)—*Order for security—Not appealable.*

An order to the effect that succession certificate would be granted on the applicant furnishing security is not an order either granting or refusing to grant a certificate and is therefore not appealable. (*Drake-Brockman, J. C.*) JASODA BAI *v.* SUJAN MAL. 63 I.C. 846 : 4 N.L.J. 144.

——S. 9—*Hindu widow—Security when to be demanded—Interest of reversioners.*

In the ordinary way a Hindu widow ought not to be called upon to give security at all. There may be reversioners who are interested but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest and to assume everything against the widow. The fact that the widow is engaged in handing over the estate either to her brother or to religious institutions is not a reason for creating an obstacle to her recovering debts before they become time-barred. The object of a Court is to grant certificates to the persons lawfully entitled to them and not to go out of its way to make it difficult for them to obtain them. (*Walsh and Ryves, JJ.*) MT. KAUSILLA KUER *v.* MT. SUKHDEI. 21 A.L J. 452 : L.R. 4 A. 246 : 1923 A. 579.

——S. 9—*Application by widow—Security.*

In the absence of special circumstances, security should not be ordered as a condition precedent to the grant to the widow of a succession certificate for debts due to her husband. (*Richards, C.J. and Banerjee, J.*) NARAIN DEI *v.* PARAMESHWARI. 40 All. 81 : 42 I.C. 941 : 15 A.L.J. 881.

——Ss. 9 and 6—*Certificate to realise interest*—Ultra vires.

An order granting succession certificate to a Hindu widow on condition of her realising interest only is *ultra vires*. The Court can under the section demand security for rendering an account of the debts and securities received by her or for indemnifying persons who may be entitled to the whole or any part of the debt. The certificate should include both principal and interest. (*Tudball and Rafique, JJ.*) JAI DEI *v.* BONWARI LAL. 11 A.L.J. 248 : 19 I C. 447 : 35 All, 249.

——S. 9—*Security—Hindu widow.*

The Court in granting succession certificate to a limited owner can at most only require the limited owner to give a bond with one or more sureties for the correct keeping of accounts and that, only when it is proved to the satisfaction of the Court that there is reasonable apprehension of waste or other danger on the part of the applicant. The Court has no power to order that the money may be deposited in a Bank and interest

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 9

thereon be paid to the applicant. (*Knox and Karamat Hussain, JJ.*) SHIB DEI *v.* AJUDHYA PERSHAD. 9 I. C. 571.

——S. 9—*Hindu widow—Opposition by—Husband's divided brother—Security.*

Under S. 9 the Court is not compelled to demand security whenever a Hindu widow applies for the grant of a certificate to her, especially in a case where the opponent is a divided brother of the deceased. 5 M. L. J. 36, Dist. (*Seshagiri Aiyar and Napier, JJ.*) CHINNASWAMI CHETTIAR *v.* PONNAMMAL 28 I. C. 638 : 2 L. W. 352.

——S. 9—*Object of the Act—Surety bond.*

The object of the Act is to appoint some one to give a legal discharge to debtor. Rights of the parties are to be decided *prima facie* and to ensure the safety of the debts received. A security bond may be taken under S. 9 of the Act. (*Prideaux, A. J. C.*) CHAMPALAL *v.* LACHERIBAI. 57 I. C. 641.

——S. 9 (1)—*Scope of—Order for security is not appealable.*

S. 9 (1) lays down that a certificate will not be granted unless security is furnished. Where no order actually granting or refusing a certificate has been made no appeal lies under sub-section 1 of section 9. (*Drake-Brockman, J. C.*) JASODA BAI *v.* SUJAN MAL. 63 I. C. 846 : 4 N. L. J. 144.

——Ss. 10, 19 and 26—*Extension of certificate—Order refusing—Appeal lies.*

The petitioner obtained a certificate of succession under Act VII of 1889 to collect certain debts of a deceased person. Subsequently, he applied for extension of the certificate under S. 10 of the Act to collect other debts. That application was refused by the Munsit who was empowered to deal with applications under this Act. An appeal against his order was preferred to the District Judge. *Held*, that an order refusing certificate as to some of the debts alleged to be due to the deceased came within the terms of S. 19 and that the order can be appealed. (*Newbould and Suhrawardy, JJ.*) RADHA RAMAN KUNDU *v.* GOPAL CHANDRA SINHA. 27 C. W. N. 947 (1) : 1924 Cal. 208.

——Ss. 10 and 3—*Scope of certificate.*

The grantee of a succession certificate does not thereby acquire a general power of administration of the estate of the deceased. It only empowers him to collect debts which were existing in the lifetime of the deceased and had accrued due to him prior to his death. (*Holmwood and Imam, JJ.*) CHARUSILA DASI *v.* JYOTISA CHANDRA SIRKAR. 33 I. C. 157.

——S. 10—*Minor — Application by next friend.*

A next friend can apply on behalf of a minor for a succession certificate. 25 Bom. 523 ; 28 Bom. 344, Dist. 20 All. 352, Appr. (*Benson, Offg C. J. and Napier, J.*) GODAVARTI PERAYYAH *v.* GODAVARTI LAXMIDEVI AMMAL. 16 I. C. 797.

——S. 14—*Fresh certificate, application by daughter—Court-fee—Death of widow—Court-Fees Act, Sch. I, Art.* 12.

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 16.

Whenever a fresh succession certificate is taken even though it is to collect debts for which a succession certificate was already been taken out by the applicant's deceased mother and the duty paid, the duty prescribed by the Court-fees Act must be paid, as it is an application for a certificate within the meaning of S. 14 of the Succession Certificate Act. One fiscal Act cannot be construed by another fiscal Act. (*Fletcher and Teunon, JJ.*) SARAJ BASHINI DEBI, *In re.* 36 I. C. 125 : 20 C. W. N. 1125.

——Ss. 16 and 18—*Succession certificate—Suit to set aside—Whether lies.*

No suit will lie to have a succession certificate and the decree based on it set aside, as the succession certificate is conclusive under S. 16 and can be revoked only under S. 18 and by the District Court alone. (*Tudball and Chamier, JJ.*) RUPAN BIBI *v.* BHAGELU LAL. 36 All. 423 : 20 I. C. 320 : 12 A. L. J. 524.

——S. 16—*Mortgage.*

The Act applies to a mortgage deed and a certificate obtained under S. 16 of the Act bars the representatives of the mortgagor from questioning the title of the plffs. to recover the mortgage debt. (*Karamat Hussain and Tudball, JJ.*) AJMAT ALI *v.* SITALA BUX PAL. 16 I. C 108 : 9 A. L. J. 766.

——S. 16—*Judgment-debtor.*

A judgment-debtor cannot go behind the terms of the succession certificate. (*Fletcher and Huda, JJ.*) GOLAM KHALIK *v.* TASADAK KHAN. 46 I. C. 890 : 28 C. L. J. 299.

——S. 16—*Grant of—Position of grantee.*

The grant of succession certificate does not make the grantee the heir of the deceased but only gives him an authority to collect the debts of the deceased and allows the debtors to make payment to him. (*Shadi Lal, J.*) RAM SARAN *v.* GAPPU RAM. 33 I. C. 603 : 71 P. W. R. 1916.

——S. 16—*Succession certificate—Grant of—Right to recover debts.*

The grant of a succession certificate gives the grantee a title to recover a debt due to the deceased and payment to the grantee is a good discharge of the debt. (*Wallis, C. J. and Kumaraswamy Sastri, J.*) MUTHIA CHETTIAR *v.* RAMANATHAM CHETTIAR. (1918) M. W. N. 242 : 43 I. C. 972 : 7 L. W. 330.

——S. 16—*Conclusive.*

Under S. 16 of the Succession Certificate Act, the certificate is a conclusive title to recover the Life Insurance money from an Insurance Company. (*Benson and Sundara Aiyar, JJ.*) ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LTD. *v.* VANTEDU AMMIRAJU. 35 Mad. 162 : (1911) 1 M. W. N. 276 : 10 I. C. 263 : 9 M. L. T. 451.

——S. 16—*Payment of debt to holder of certificate—Discharge.*

Payment of debt due to the deceased to the holder of the succession certificate is a valid and sufficient discharge of the debt under S. 16

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 18.

and the title of the holder of the certificate to collect debts due to the deceased is not open to question. (*Jwala Prasad and Imam, JJ.*) SARAFET HUSSAIN *v.* SHEIKH KHURSHED ALI. **49 I. C. 958.**

——— **Ss. 18 and 26**—*Revocation of certificate —Jurisdiction of Court.*

Ordinarily the revocation of a succession certificate which has become final by reason of no appeal having been filed against it in time, must be made by the Court which granted it. This must be so only when the Court granting the certificate is still exercising the jurisdiction in the District. The District Judge's jurisdiction in intestate cases is more administrative than judicial. He can act then only when there is no claimant He cannot ignore the claim of one who has obtained a certificate. (*D. Chatterjee and Mullick, JJ.*) SUKHIA BEWA *v.* SECRETARY OF STATE. **21 C. L. J. 154 : 27 I. C. 821 : 19 C. W. N. 551.**

——— **S. 18**—*Failure to plead will in certificate proceedings if a bar to revocation of—Certificate*—Res judicata.

Where no objection was taken to the grant of a succession certificate but subsequently a will made by the deceased was produced and admitted to probate and it is found that the executor was not aware of the existence of the will at the time of the certificate proceedings, *held*, that an application for revocation of the certificate is not barred by reason of any failure to plead the will before the grant of the same. The existence of a will is an impediment to the grant of a certificate under S. 1 (iv) of the Succession Certificate Act and the Court can of its own motion revoke a certificate if it appears that the application contained an untrue allegation of fact essential in law to justify a grant thereof. (*Pratt, J. C.*) ADIJA, *In the matter of.* **11 I. C. 261.**

——— **S. 18 (a), (d) and (e)**—*Revocation and grant of partial certificates to co-heirs.*

If after the grant of a certificate in respect of the entire debt the circumstances change so as to bring into operation S. 18 (*d*) or (*e*), it is open to the Court to partially revoke the certificate orginally granted or to modify the terms of the grant. (*Piggott and Walsh, JJ.*) SHARIFUNNISSA BIBI *v.* MASSOOM ALI. **42 All. 347 : 2 U. P. L. R. (All.) 57 : 56 I. C. 380 : 18 A. L. J. 314.**

——— **S. 19**—*Order granting certificate — Appeal.*

Under S. 18 an appeal lies from an order granting a certificate and the appellant is not bound to move the Court granting the certificate to revoke it. (*Piggott and Walmsley, JJ.*) RADHE LAL *v.* MUSSAMMAT BINDO. **56 I. C. 181 : 18 A. L. J. 609 : 2 U. P. L. R. (All.) 215.**

——— **S. 19**—*Appeal—Consent—Estoppel.*

A person who has consented to a succession certificate being given to himself and two others jointly cannot challenge its validity by way of appeal. (*Banerjee and Tudball, JJ.*) RAM RAJ *v.* BRIJ NATH. **35 All. 470 : 20 I. C 889 : 11 A. L. J. 717.**

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 35.

——— **Ss. 19 and 26**—*Appeal—Forum—Munsif specially empowered to act under S. 26.*

An appeal from an order passed by a Munsif specially empowered to act under S. 26 lies to the District Judge. The Court of Small Causes or any other Court subordinate to the District Court has no jurisdiction to hear such an appeal. (*Tudball, J.*) HUSAIN BIBI *v.* HINGHAN BIBI. **34 All. 148 : 12 I. C. 926 : 8 A. L. J. 1300.**

——— **S. 19**—*Order of District Judge declining to grant certificate—If final—Appeal.*

In an application under the Succession Certificate Act, the District Judge declined to grant certificate but ordered that if another application in a different form was made, he would consider it ; it was held the order was final and an appeal lay therefrom. (*Woodroffe and Carnduff, JJ.*) ANNAPURNA DASYA *v* NABINI MOHAN DAS. **42 Cal. 10 : 23 I. C. 556 : 18 C. W. N. 836.**

——— **Ss. 19 and 26**—*Application—Powers of Subordinate Courts to receive—Appeal.*

Where a Subordinate Judge is authorised to entertain applications under the Succession Certificate Act an appeal from an order of the Sub-Judge lies to the District Judge and not to the High Court. (*Lindsay J. C. and Sabonadiere, A.J.C.*) BASTI BEGAM *v.* SAULAT BAHADUR. **21 I. C. 388 : 16 O. C. 197.**

——— **Ss. 19 (1) and 26 (2)**—*Order of Sub-Judge —Appeal lies to Dt. Judge.*

An appeal from an order of a Subordinate Judge passed under the Succession Certificate Act lies to the District Judge and not to the High Court. (*Chevis, C. J.*) MAHABIR *v.* JAIRAMDAS. **2 Lah L. J. 312.**

——— **S. 26**—*Power of Sub-Judge, 2nd class, to entertain applications for certificate.*

The Sub-Judge of the second class invested with the powers of the District Court under S. 26 has powers to entertain an application for a succession certificate in respect of debts exceeding Rs. 5,000. (*Shadi Lal, C. J.*) RATTAN SINGH *v.* CHAUDHURI RAJ SINGH. **2 Lah. L. J. 578.**

——— **S. 26 (2)**—*Conditional order granting certificate—Appeal.*

An order granting a certificate to one of several claimants on condition of furnishing security is appealable. (*Scott, C. J. and Batchelor, J.*) BAI NAND KOER *v.* MAGANLAL. **36 Bom. 272 : 12 I. C. 921 : 13 Bom. L. R. 1208.**

——— **S. 26 (2)**—*Proviso—Order rejecting application for certificate—Appeal.*

Order of a senior Subordinate Judge rejecting an application for a succession certificate is appealable to the District Court and not to the High Court. (*Chevis, J.*) JAGRAM DAS *v* MANGAL DAS. **41 I. C. 640 : 121 P. W. R. 1917.**

——— **S. 35**—*Illegitimate children — English view.*

The English view that a man is not the father of his illegitimate children applies also under the Succession Act. (*Coxe and Chatterjee, JJ.*) UDIT SINGH *v.* AMAR KUAR. **23 I. C. 348.**

SUCCESSION (PROPERTY PROTECTION) ACT (XIX OF 1841).

———*Object of—Succession to large estates—Disputes as to—Breach of peace.*

The object of the Curator's Act (XIX of 1841) is to protect the property appertaining to large estates in case of a dispute as to succession. That Act in some respects stands in a similar position to S. 145, Cr. P. Code, with respect to certain specified properties whereas its scope is large inasmuch as it embraces all properties moveable and immoveable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in a proper Court. (*Jwala Prasad, J.*) BISO RAM *v.* EMPEROR.

23 Cr. L. J. 236 : 1922 P. 372.

———*Subordinate Judge—Jurisdiction.*

A Subordinate Judge has no jurisdiction to deal with an application under the Act unless there was any general assignment of cases under the Act to him by the Dt. Judge. (*Broadway, J.*) GANGA SAHAI *v.* BABU LAL.

72 P. R. 1918 : 31 P. L. R. 1918 : 46 I. C. 589 : 148 P W. R. 1918.

———*Lapse by survivorship—Applicability of Act.*

The Act does not apply to cases where property lapses by survivorship as in the case of property held by a karnavan of a Tarwad *Obiter*. The Act presupposes a case of surrender. If there are directions as to the disposal of the property the Judge should give effect to them in the summary proceeding without considering their validity. Before issuing notice under the Act the Judge must be satisfied that there are strong reasons for believing that the party in possession has no lawful title. (*Sankaran Nair, J.*) ABDULLA *v.* MIRTHUR.

12 M. L. T. 497 : (1912) M. W. N. 1164 : 17 I. C. 429 : 23 M. L. J. 537.

———**S. 3**—*Inquiry—Questions to be considered.*

Before action can be taken under Act XIX of 1841, the provisions of S. 3 must be strictly fulfilled. It is necessary to consider (1) whether the opposite party has no title, (2) whether the person claiming is really entitled to property and (3) whether the person making the application is likely to be materially prejudiced, if left to the ordinary remedy by a regular suit. 6 I. C. 630; 34 Cal. 929, Rel. Where action was taken under the Act XIX of 1851 without considering those requisites, the High Court set aside the order. (*Brett and Sharfuddin, JJ.*) TARAK CHANDRA GOSWAMI *v.* SATYA CHARAN PATNI.

15 I. C. 504.

———**Ss. 3 and 4**—*Non-compliance with provisions of—Revision.*

Ss. 3 and 4 are imperative and failure to comply with the provisions thereof is a material irregularity giving a good ground for revision, but still will not be interfered with, if there is another remedy open for the aggrieved party. 15 P. R. 1901, Foll. (*Broadway, J.*) GANGA SAHAI *v.* BABULAL.

72 P. R 1918 : 31 P. L. R. 1918 : 46 I. C. 589 : 148 P. W. R. 1918.

SUITS VALUATION ACT (VII OF 1887).

———**Ss. 3, 4 and 5**—*Protection of property—Deceased person—Procedure.*

The necessary conditions subject to which a curator is to be appointed under S. 5 of Act XIX of 1841, are :—(1) There must be an application and an examination as directed in S. 3 ; (2) the Judge must be in a position to say upon such application and examination that danger is to be apprehended of misappropriation or waste of the property before the summary suit can be determined ; and (3) the delay in obtaining security from the party in possession or its insufficiency is likely to expose the party out of possession to considerable risk. 12 Mad. 341, Foll. 15 I. C. 505 ; 7 P. R. 1904, Ref. (*Shah Din and Scott-Smith, JJ.*) MADAN GOPAL *v.* MUSSAMAT NARBADA

11 P. R. 1915 : 28 I. C. 248 : 17 P. L. R. 1916.

———**S. 3**—*Proceedings under—Revision.*

A statement on solemn affirmation by the agent of a Pardanashin lady is a sufficient declaration within S. 3. Ordinarily the Chief Court should not interfere on revision in cases under Act XIX of 1841, but where plainly an erroneous order which is likely to seriously prejudice a party and to cause serious embarrassment and difficulty in the future is passed : intervention is right and proper. The deft in a very high-handed manner forcibly took possession of a furniture shop and there was every likelihood of his proceeding to greater lengths unless sharply checked. *Held*, that the District Court can rightly take action under the Act. (*Johnstone, J.*) GHURUKU MAL *v.* DURGA DEVI.

65 P. L. R 1911 : 10 I. C. 820 : 223 P. W. R. 1911.

———**Ss. 3 and 5**—*Appointment of Curator—When justified.*

To apply the Act XIX of 1841 to any particular case it is a condition precedent that the Judge should find or be satisfied that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit and that the application was *bona fide*. Without that finding the Court has no jurisdiction to act under the Act and its order is revisable. 12 M. 341. Ref. (*Krishnan, J.*) KOTHANDARAMA REDDY *v.* JAGATHAMBAL AMMAL.

16 L. W. 924 : (1923) M. W. N. 74 : 1923 Mad. 229 (1).

———**S. 18**—*No appeal from decision of Dt. Judge.*

No appeal lies under the provisions of S. 18 of Act XIX of 1841 against the decision of a District Judge. (*Walsh and Stuart, JJ.*) GAJADHAR *v.* MEGHA.

44 All. 546 : 20 A. L J. 358 : L. R. 3 A 652 : 1922 A. 337.

SUITS VALUATION ACT (VII OF 1887).

———*Forum—Suit to set aside award.*

Suit to set aside an award must be brought in Court having pecuniary jurisdiction to the extent of liability which the plff. is trying to set aside. (*Venkatasubba Rao, J*). VENKATACHALAM PILLAY *v.* SRINIVASA AIYAR.

18 L. W. 399 : (1923) M. W N. 747 : 1924 Mad. 84.

———*Overvaluation—Procedure.*

Under the Act a suit which is overvalued and brought in the wrong court cannot be dismissed

SUITS VALUATION ACT (VII OF 1887), S. 3.

on that ground but it must be disposed of, as if it had been properly valued and brought in the proper Court. (*Chamier, C. J. and Sharfuddin, J.*) BADARI SINGH *v.* LOHI SINGH. **39 I. C. 551 : 1 Pat. L. W. 418.**

——— **Ss 3 and 4**—*Declaratory suit by—Occupancy tenant—Jurisdictional value.*

The jurisdictional value of a declaratory suit by an occupancy tenant against his landlord is 15 times the land revenue for the land. (*Johnstone and Shah Din, JJ.*) JAMAL *v.* QUADIR BAKHSH. **54 P. R. 1914 : 238 P. L. R. 1914 : 25 I. C. 437 : 153 P. W. R. 1914.**

——— **Ss. 3, 4, 8 and 9**—*Rules made under—Valuation.*

Where the value of the subject-matter has been determined by rules under S. 9 its value for purposes of jurisdiction and Court-fee shall be as determined by such rules but the value for purposes of jurisdiction can never exceed the value of the land as determined by rules framed under S. 3. (*Rattigan, Beadon and Agnew, JJ.*) BARRU *v.* LACHMAN. **111 P. R. 1913 : 228 P. W. R. 1913 : 22 I. C. 503 : 23 P. L. R. 1914.**

——— **S. 3 (1)**—*Pre-emption—Suit for valuation—Court Fees Act, S. 7 (v).*

The proper valuation of a suit to enforce a right of pre-emption is that fixed in S. 7 (v) of the Court Fees Act and the *forum* is determined accordingly. (*Oldfield and Sadasiva Aiyar, JJ.*) NARAYAN NAIR *v.* CHERIA KATHIRI KUTTY. **41 Mad. 721 : 45 I. C. 89: 34 M. L. J. 397.**

——— **S. 4**—*Proper valuation—Court's duty.*

A court cannot fix a valuation for the plff. even if plff.'s valuation is deliberately fictitious. It can compel plff. to put a reasonable valuation. (*Tudball and Walsh, JJ.*) ASHIG ALI *v.* IMTIAZ BEGAM. **39 All. 723 : 42 I. C. 891 : 15 A. L. J. 794.**

——— **S. 4**—*Valuation of suit—Jurisdiction.*

The proper valuation for jurisdiction of a suit for declaration that certain property is the absolute property of the plff. is 30 times the jama. 35 P. R. 1901 Foll. 22 I. C. 503 Dist. (*Le Rossignol and Wilberforce, JJ.*) SOHAN SINGH *v.* DEVI SINGH. **81 P. R. 1918 : 115 P. W. R. 1918 : 46 I. C. 490 : 119 P. L. R. 1918.**

——— **S. 4**—*Partition suit — Valuation for jurisdiction.*

In a suit for partition of joint family property the value of the suit for purposes of jurisdiction is the value of the share claimed and not of the whole estate. (*Kensington, C.J and Shadi Lal, J.*) KHILANDA RAM *v.* NANDA RAM. **108 P. L. R. 1915: 29 I. C. 766 : 68 P. W. R. 1915.**

——— **S. 4**—*Suit for declaration that mortgage is unaffected by attachment.*

In a suit for a declaration that plaintiff's mortgage is not affected by the attachment in execution of the defendant's decree, there being no dispute between plff. and the mortgagors as to the validity of the mortgage, the proper valuation where the value of the property is in excess of the amount claimed in execution of the decree, is not

SUITS VALUATION ACT (VII OF 1887), S. 8.

the value of the mortgaged property but the amount for which the decree may be executed. 30 Mad. 335 ; 38 All. 72 ; 38 Mad. 602, Doubted. (*Ayling and Krishnan, JJ.*) MADDUKURI ANKAMMA *v.* MUYYALA SUBBAYYA. **54 I. C. 543 : 37 M. L. J. 611.**

——— **S. 4**—*O. 21. R. 63, C. P. C.—Claim suit.*

A suit under O. 21. R. 63, C. P. C. to cancel the attachment of the judgment-debtor's property in execution of the decree is valued for purposes of jurisdiction according to the market value of the property and not according to decretal amount. (*Seshagiri Aiyar and Napier, JJ.*) NARAIN SINGH *v.* AIYASWAMI REDDI. **39 Mad. 602 : 31 I. C. 188 : 29 M. L. J. 728.**

——— **S. 4**—*Declaration prayed for—Valuation for jurisdiction.*

The value of a suit for a declaration is for the purpose of jurisdiction the value of the property for which the declaration is asked for. (*Coutts and Adami, JJ.*) MOHINI MOHAN *v.* GOUR CHANDRA PAI. **5 Pat. L. J. 397 : 1 Pat. L. T. 390 : 56 I. C. 762 : 2 U. P. L. R. (Pat) 123.**

——— **S. 8**—*Suit for declaration and consequential relief—Plaint—Valuation of—Appeal.*

In a suit for a declaratory decree and consequential relief, the amount at which the plff., values the relief sought for purposes of Court-fees determines the jurisdiction of the suit, including that on appeal. (*Sir John Edge.*) SUNDERBAI *v.* COLLECTOR OF BELGAUM. **43 Bom. 376 : (1919 M. W. N. 254 : 23 C. W. N. 753 : 21 Bom. L. R. 1148: 46 I A. 15 : 52 I. C. 897 (P.C.)**

[On appeal from 23 I. C. 221 : 38 Bom. 272.]

——— **S. 8**—*Jurisdiction—Valuation of suit—Court-fees--Declaratory decree without consequential relief—Court-fees Act, Sch. II, para. 17 (iii).*

Objections to jurisdiction on the ground of valuation should be taken at the earliest possible moment. Where a nominal value as distinct from the real value, is placed on property for the purposes of Sch. II of the Court Fees Act, the nominal value cannot displace the real value for purposes of jurisdiction. (*Sir Lawrence Jenkins.*) RACHAPPA *v.* SHIVAPPA.

43 Bom. 507: 17 A. L. J. 418: 25 M. L. T. 298: 29 C. L. J 452: 21 Bom. L. R. 489: 10 L. W. 274 : 50 I. C. 280 : 24 C. W N. 33 : 46 I. A. 24 : 36 M. L. J. 437 (P. C.).

[On appeal from 16 I. C. 1005 . 36 Bom. 628]

——— **S. 8**—*Mortgage—Redemption—Suit for—Valuation.*

The amount of the mortgage determines the amount of the court-fee to be paid and the valuation of a suit for redemption of a mortgage. It is an ancillary part of the claim that an account should be taken and any amount found due to or by one of the parties should be awarded to the party to whom it is due. The nature of the suit is not altered by it nor the value increased. 31 A. 44 Foll. (*Banerjee and Gokul Prasad, JJ.*) CAHIDDU SINGH *v.* JAHANJHAN RAI. **L. R. 3 A. 630.**

——— **S. 8**—*Valuation for purposes of jurisdiction.*

The value as placed by the plff. in the plaint must be looked at even though the plff. claims

SUITS VALUATION ACT (VII OF 1887), S. 8.

unnecessary relief. (*Stanley, C J. and Banerjee, J.*) PERTHI SINGH *v.* MARU SINGH. 9 I. C. 574 : 8 A. L. J. 266.

——S. 8—*Suit for declaration and injunction.*

The plaintiff has the right to put his own valuation on his claim for the purpose of court-fees in a suit for a declaration and for an injunction by way of consequential relief; and the same is the value for the purpose or jurisdiction. (*Shah and Hayward, JJ.*) BALAKRISHNA NARAYAN SAWANT *v.* JANKIBAI SITARAM. 44 Bom. 331: 56 I. C. 340: 22 Bom. L. R. 289

—— S. 8—*Suit for winding up partnership—Valuation for purposes of jurisdiction.*

In a suit for winding up of a partnership and for accounts the value determinable for the computation of court-fee is the value for the purposes of jurisdiction. (*Batchelor and Shah, JJ.*) BAI HIRAGAVRI *v.* GULABDAS JAMNADAS. 22 I. C. 71 : 15 Bom. L. R. 1123.

——S. 8—*Administration suit—Valuation.*

An administration suit by a creditor is in fact a suit for an account within S. 7 (iv) (f) of the Court Fees Act, and the plff. can place his own valuation on the relief claimed in such suit, which valuation for purposes of jurisdiction is the same as the valuation for purposes of court fees. (*Mookerjee and Cuming, JJ.*) SASI BHUSHAN *v.* MAHARAJA SRIMAN INDRA CHANDRA 24 C.L.J. 448: 21 C. W. N. 310: 38 I. C. 835: 44 Cal. 890.

——S. 8—*Suit for specific performance of lease—Jurisdiction—Valuation for.*

A suit for specific performance of a contract of lease should first be valued for Court-fees under S. 7 (x) (c) of the Court Fees Act and the value should be adopted under S. 8 of the Suits Valuation Act for jurisdiction. (*Mookerjee, J.*) SAILENDRANATH *v.* RAM CHARAN. 25 C. W N. 768 : 66 I. C. 268 : 34 C. L. J. 94.

——S. 8—*Suit for establishing occupancy right—Valuation.*

The value of a suit is the value of the interest claimed by the plff., so that the value of a suit for establishing a right as an occupancy raiyat in a garden and for possession thereof is that of the interest claimed and not that of the entire interest in the land, including that of the superior landlord. (*Mookerjee and Beachcroft, JJ.*) UPENDRA CHANDRA MITRA *v.* SAT KOURIDHAR. 23 I. C. 964.

——S. 8—*Suit for redemption—Jurisdiction.*

In a suit for redemption the value of the subject-matter for the purpose of jurisdiction is the aggregate value of the two heads of relief. In questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. (*Batten, A. J. C.*) CHIMNA *v.* MOTILAL.

55 I. C. 75.

——S. 8—*Value on reliefs—Duty of Court.*

The court can question the value of the reliefs in a suit coming under S. 7 (iv) (*c*) of the Court Fees Act where the valuation appears on the face of the plaint to be too small, as it is its duty to

SUITS VALUATION ACT (VII OF 1887), S. 8.

see that the reliefs claimed are properly valued. (*Carnduff, J.*) HARIHAR PRASAD SINGH *v.* SHYAMLAL SINGH. 21 I. C. 404 : 40 Cal. 615.

—— S. 8—*Suit for declaration of sole shebaitship.*

A suit for declaration that the plff. is the sole shebait and also for injunction restraining the deft. from intervening with his possession, falls within S. 8 and so the valuation for jurisdiction and Court-fees must be the same. (*Mookerjee and Beachcroft, JJ.*) RAJ KRISHNA DEY *v.* BEHARY DEY. 40 Cal. 245: 16 C. L. J. 194 : 17 I. C. 162 : 17 C. W. N. 591.

——S. 8—*Suit falling under S. 7 (iv) (c) of the Court Fees Act—Same valuation for Court fees and jurisdiction.*

Under S. 8 the valuation for purposes of court fees determines the valuation for purposes of jurisdiction also in a case falling under S. 7 (*iv*) (*c*) of the Court Fees Act. (*Scott-Smith, J.*) NANDAN MAL *v.* SALIG RAM. 1922 Lah. 236.

——S. 8—*Suit for declaration that house is not liable to attachment and sale in execution of decree.*

For the purpose of jurisdiction the value of a suit for a declaration that certain house is not liable to attachment and sale in execution of a decree against both the decree holder and the judgment-debtor, is the value of the property whether the judgment-debtor resists the claim or not. 41 P. R. 1913, Foll. Though the amount of decree is less than Rs. 5,000 the house in dispute having been found to be of the value of Rs. 10,000 or more, the case is beyond the jurisdiction of the Subordinate Judge, second class. (*Shadi Lal and Martineau, JJ.*) SHIV RAM *v.* KHURSHED AHMAD. 1 Lah. L. J. 87

——S. 8—*Suit for specific performance—Prayer for possession—Effect—Nature of suit not altered.*

Nature of suit is not altered where possession is prayed for in a suit for specific performance. (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJUM NAIDU *v.* SIVALINGAM PILLAI. 18 L. W. 333: 1924 M. 360

——S. 8—*Suit for redemption—What determines jurisdiction.*

In a redemption suit it is the amount of the principal debt that should be taken as determining the jurisdiction under the Act The High Court has power to fix a proper valuation even though the lower Court has properly valued. (*Ballis, C.J. and Hannay, J.*) MAHOMED JALALDEEN *v.* VIJAYASWAMI. 39 Mad. 447: (1915) M. W. N. 339: 28 I. C. 624: 29 M. L. J. 142.

——S. 8—*Court Fees Act* (1870), S. 7, *Cl.* (*xi*) (*cc*)— *Suit for recovery of immoveable property from tenant.*

In a suit for recovery of immoveable property from a tenant the valuation for court-fees is the same as that for jurisdiction. (*Ayling, J.*) VANNAVALLI SESHAGIRI ROW *v.* GOPISETTI NARAYANASAMI NAIDU. 38 Mad. 795: 24 I. C. 374: 26 M. L J. 573.

SUITS VALUATION ACT (VII OF 1887), S. 8.

——S. 8—*Court-Fees Act (VII of 1870), S. 7 (iv) (b) and (v)—Partition suit.*

In a suit for partition of lands of which the plff. is in joint possession he is entitled to value the suit at his own estimate for purposes of jurisdiction. 21 M. L. J. 21, 19 Mad. 6, 21 Mad. 234, 20 Mad. 289, Rel. on. 13 Mad. 56; 31 Mad. 89 Dist. (*Miller and Sundara Aiyar, JJ.*) CHALASAMY RAMIAH *v.* CHALASAMY RAMASWAMY.
11 M. L. T. 155: 13 I. C. 903: (1912) M. W. N. 199.

——S. 8—*Suit for foreclosure—Valuation.*

The valuation of a suit for foreclosure for purposes of jurisdiction depends not on the principal but on the total amount claimed. (*Mittra, Offg A. J. C.*) NANA *v.* MULCHAND.
21 I. C. 918 : 9 N. L. R. 161.

——S. 8—*Redemption—Valuation of suit.*

In redemption suits the valuation for the determination of jurisdiction is that of the mortgage amount and not of the property. The fact that incidentally other questions such as an adjudication of rival claims to redeem incidentally arise for determination, is immaterial. (*Kanhaiya Lal, J. C.*) MUNWAN SHANKAR BAKHSH SINGH *v.* RAM BAHADUR SINGH. **26 O. C. 297 : 1922 Oudh 45.**

——S. 8—*Suit for partition—Valuation of the subject-matter—Valuation of plaintiff's share of the whole of the subject-matter.*

The value for purposes of jurisdiction of a suit for partition pure and simple where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, is the value of the whole of the property sought to be partitioned. (*Das, J.*) RANJIT SAHI *v.* QASIM. **4 Pat. L. T. 257: 2 P. 432 : 1923 P. 342.**

——S. 9—*Rules under—Restitution of conjugal rights—Injunction—Valuation.*

Where plff. sues for restitution of conjugal rights and for an injunction restraining two persons from preventing the alleged wife from living with the plff. the relief for injunction is merely ancillary and the value of the suit was Rs. 1,000 only. (*Shadi Lal, J.*) NATHU *v.* MUSAMMAT CHURI. **52 I. C. 101 : 20 P. L. R. 1919.**

——S. 11—*Undervaluation—Appellant, duty of.*

In an appeal based on the ground that the first Court had no pecuniary jurisdiction to try the suit, the appellant must show the fact of incorrect valuation and also that the trial has been prejudicially affected thereby. (*Piggott and Walsh, JJ.*) NARSAT HUSAIN *v.* ADIA SARAN. **37 I. C. 851.**

——S. 11—*Undervaluation of suit—Parties not prejudicially affected—Powers and duty of Appellate Court.*

If the Appellate Court finds that a suit has been undervalued and therefore beyond the jurisdiction of the first Court it should first consider whether the undervaluation had prejudicially affected the disposal of the case. If the parties have not been prejudicially affected and the materials necessary for the disposal of the suit are on record, it is the duty of the Appellate Court to dispose of the appeal as if the Court of first instance had jurisdiction. (*Richards, C. J. and Tudball, J.*) DALIP SINGH *v.* KUNDAN SINGH. **36 All. 58 : 22 I. C. 614 : 12 A. L. J. 21.**

SUITS VALUATION ACT (VII OF 1887), S. 11.

——S. 11—*Undervaluation—Inferior Court—Prejudice.*

Where a suit is undervalued and tried by a Munsiff's Court, the defendant can reasonably say that he has been prejudiced by the case being tried by a Court which had no jurisdiction to try it. (*Walmsley and Panton, JJ.*) MAMRAJ AGARWALLA *v.* AHMAD ALI MUHAMMED. **47 I. C. 932.**

——S. 11—*Undervaluation—Objection in appeal.*

Where the Lower Appellate Court directed the first Court to return the plaint for insufficient valuation and stamp, the point being raised by the Court itself in appeal : *held*, that the order was bad as the objection as to valuation applied as well to the appeal as to the suit and that it could not therefore decide the appeal. 22 W. R. 433, Foll. (*Brett and Chapman, JJ.*) SHAJAN BIBI *v.* DARSINDEWAN. **16 I. C. 46.**

——S. 11—*Undervaluation—Value fixed by rules.*

S. 11 applies only where the valuation depends on the discretion of the parties or the Court and not when the valuation is fixed by rules having the force of law. Plaintiff sued for possession of a site and an injunction restraining defendants from building a house thereon. He valued his relief for possession at Rs. 50 and for injunction at Rs. 10. The Munsiff, second class, partly decreed the claim and both parties appealed to the senior Subordinate Judge, who modified the decree without any objection as to jurisdiction. Defendants preferred a second appeal to the High Court on the ground of undervaluation and of the want of jurisdiction in the Senior Subordinate Judge. *Held*, that S. 11 did not cure the defect as the valuation of the suit did not depend on the discretion of the defendants but was fixed by rules of the Court and the order of the lower Appellate Court was defective as being passed without jurisdiction. (*Scott-Smith, J.*) MAHOMAD SHAH *v.* ABDULLAH SHAH. **56 I. C. 918.**

——S. 11—*Rules—Jurisdiction — Valuation—Declaratory suit.*

The valuation of a suit for a declaration that the plaintiff is the owner of a certain land assessed with land revenue for purposes of jurisdiction is governed by rules framed under the Act. The plaintiff cannot fix an arbitrary valuation and make the suit cognizable by a Court of a particular grade. Neither waiver nor consent of parties can give a Court jurisdiction to entertain a suit which is beyond its pecuniary limits. Non-objection by defendant does not validate the proceedings. (*Shadi Lal, J.*) GHULAM AKBAR KHAN *v.* MUSAMMAT BAKHAT BIBI.
116 P. L. R. 1915 : 29 I. C. 796 : 229 P. W. R. 1915.

——S. 11—*Overvaluation—Undervaluation.*

Erroneous valuation caused by wrong application of the sections of the Court Fees Act is included in the terms overvaluation and undervaluation in S. 11. (*Sadasiva Aiyar and Spencer, JJ.*) AMMALU AMMAL *v.* KRISHNAN NAIR **62 I. C. 715.**

SUITS VALUATION ACT (VII OF 1887), S. 11.

——S. 11—*Object of—Overvaluation—Decision of Lower Court—Appellate Court not to interfere.*

In cases of overvaluation or undervaluation the appellate Court should not interfere with the decision of the lower Court unless the disposal of the suit has been prejudicially affected. The very object of S. 11 of the Suits Valuation Act is to prevent the operation of the general rule that neither consent nor waiver can confer jurisdiction on Courts which have under law only a limited pecuniary jurisdiction in cases where there has been no prejudice on the merits. (*Kumaraswami Sastri, J.*) A. VEDAJI BASKARA TIRUMAL RAO SAHIB *v* SUBRAMANIA GURUKKAL.

10 L. W. 221 : 52 I.C. 992 (2): (1919) M. W. N. 707.

——S. 11—*Objection to valuation when allowed in appeal.*

An Appellate Court should not allow an objection based on undervaluation to the jurisdiction of the trial Court unless for reasons to be recorded by it in writing, it is satisfied that the undervaluation has prejudicially affected the disposal of the suit on its merits, and the mere change of Court due to the undervaluation cannot by itself be treated as prejudicially affecting it. The proper course is not to dismiss the suit but to return the plaint to be presented to the proper Court. (*Sadasiva Aiyar and Spencer, JJ.*) NARAYANIAMMAL *v.* SECRETARY OF STATE. **41 I. C. 167.**

——S. 11—*Erroneous valuation—Mistake of law—Prejudice.*

S. 11 of the Suits Valuation Act covers also an erroneous valuation under a mistake of law. Where it is not clear that the objection to jurisdiction was taken before final decree in a foreclosure suit and the objection though taken was not argued before the lower appellate Court the defect of want of jurisdiction is cured by S. 11, Suits Valuation Act. The mere change of *forum* consequent on an undervaluation cannot prejudice the disposal of the suit on the merits. (*Mittra, A.J.C.*) NANA *v.* MULCHAND.

21 I. C. 918 : 9 N. L. R. 161.

——S. 11—*Wrong valuation put in plaint—Trial—Prejudice.*

S. 11 applies even if the plaintiff designedly exaggerates or undervalues his claim to choose his own *forum*. In the absence of anything to show that the disposal of the suit on the merits prejudiced the defendants, the trial is good, especially, as the Court later on acquired pecuniary jurisdiction for the actual value on the property in dispute. (*Piggott, J.C.*) MUHAMMAD SHARAFAT ULLAH *v.* HIRALAL. **21 I. C. 52 : 16 O. C. 257.**

——S. 11—*Redemption suit.*

The words "over-valuation" and "under-valuation" in S. 11 of the Act (1887), refer to cases in which the valuation is discretionary but not where plff. cannot at his discretion fix a value for the suit. The plff. mortgaged his house to deft. No 1 but himself remained in possession. Thereafter, an *ex parte* decree was obtained against him and in execution of that decree the house was sold and purchased by deft. No. 2 for Rs. 114 without the plff's. knowledge. Plff. sued for possession of the house. *Held*, that the suit should be valued at Rs. 114 as in suing for his right to redeem the plff. was also suing for cancellation of the sale. (*Johnstone, J.*) SANGA *v.* MALI.

8 I. C. 1043 : 214 P. L R. 1910.

——S. 11—*Objection to valuation—When can be taken—Court to decide.*

S. 11 of the Act is no bar to an objection being taken in second appeal though it was taken in both the Lower Courts. If the valuation of a suit put in the plaint for the purpose of jurisdiction is contested it is the duty of the Court to decide what the correct valuation is. 31 Bom. 73 Appr. In a suit for a declaration the value of the suit for the purposes of jurisdiction must be the value of the property in respect of which the declaration is sought. 12 Mad. 223. Foll. (*Coutts, Misser and Adami, JJ.*) MOHANI MOHAN *v.* GOUR CHANDRA RAI. **5 Pat. L. J. 397 : 1 Pat. L. T. 390 : 2 U. P. L. R (Pat.) 123 : 56 I. C. 762 : 1921 Pat. 390.**

——S. 11—*Pecuniary jurisdiction—Objection before High Court.*

An objection to the pecuniary jurisdiction of the Lower Court based on the valuation cannot be raised for the first time before the High Court. (*Mullick and Thornhill, JJ.*) BAUKAI SAHU *v.* MOSAHEB ALI. **46 I. C. 892 (Pat.)**

——S. 11—*Scope of.*

S. 11 of the Act applies to every case, where a Court has tried a suit which owing to over valuation or undervaluation it had no jurisdiction to try. It applies likewise to cases where the value of the subject-matter is not definitely set out in the plaint. 1 L. B. R. 85, Dist : 14 Mad. 183, Foll. ; U. B. R. (1887-1901) II, 443, Dist. (*Shaw, J. C.*) BAI JNATH SINGH *v* MI GAUK.

11 I. C. 742 : (1911) U. B. R 1, 82.

——S. 11 (a) and (b)—*Scope of—Valuation reduced by plaintiff without objection by defendant—Appeal—Decree not a nullity.*

The plaintiff reduced the valuation of the plaintiff from Rs. 5,300 to Rs. 2,300. The defendant raised no objection as to under-valuation. No issue was framed on the point, and in the appeal preferred to the District Judge no mention was made of undervaluation. On second appeal to the High Court, the Taxing Officer on the report of the Stamp Reporter held the correct valuation to be Rs 5, 300, which was accepted by both the parties The appellant thereupon contended that the decree passed by the District Judge was without jurisdiction and null and void. *Held*, that having regard to S. 11 of the Suits Valuation Act the decree of the District Judge could not be challenged as a nullity, there being no objection under clause (*a*) nor any prejudice under clause (*b*). (*Kulwant Sahai and Foster, JJ.*) MAHARAJA BAHADUR KESHO PD. SINGH *v.* LAKHU RAI. **4 Pat. L. T. 525 : 1923 Pat 258 : 1923 P. 581.**

SUITS VALUATION ACT (VII OF 1887) S. 11.

——— S. 11 (2)--*Undervaluation— Right of appeal affected—Prejudice*

S. 11 of the Suits Valuation Act, when referring to "prejudicially affecting the disposal of a suit or appeal on its merits", is not considering at all the different rules of procedure that there may be an appeal from one Court to another Court. Where a suit has been undervalued and tried by a Munsif instead of a Subordinate Judge, the District Court has jurisdiction to hear an appeal from the Munsif's decree and must do so unless it is satisfied as required by S. 11 of the Suits Valuation Act, first that the point was taken, and secondly, that the decision on the merits was prejudicially affected. 20 M. L. J. 726 ; 41 I. C. 167, Approved: 5 Pat. L. J. 397, Dissented from. (*Schwabe, C. J. Oldfield and Coutts-Trotter, JJ.*) NADUVIL EDOM KARNAVAN AND MANAGER KELU ACHAN *v* CHERIYA PARVATHI NETHIYAR.

(1923) M. W. N. 489 : 46 Mad. 631 : 18 L. W. 1 : 45 M. L. J. 135 : 1924 Mad. 6 (F.B.).

SUNNI LAW.

See MAHOMEDAN LAW.

SUMMARY PROCEDURE (CIVIL).

See C. P. CODE, O. 37.

SUMMARY SETTLEMENT ACT (BOMBAY ACT II OF 1863).

——— *Inam lands settled under, whether subject to Vatan Act of* 1874.

Settlements effected under Act II of 1863, prevent inam lands from being subject to the provisions of the Vatan Act of 1874 because holders of those settlements are no longer hereditary officers holding for service. (*Scott, C J. and Heaton, J.*) BRENDON *v.* SHRIMANT SUNDARA BAI. **38 B. 272 : 23 I. C. 221 : 16 Bom. L. R. 164.**

——— *Application of to villages of* Tatya Maharaj *is valid.*

The application of the summary settlement to the villages of *Tatya Maharaj* was valid and legal. (*Macleod, C. J., Pratt and Fawcett, JJ.*) VASUDEV HARIHAR PANDIT, *In re.* **45 Bom. 453 : 61 I. C. 146 : 23 Bom. L. R. 161.**

SUMMONS.

See C. P. CODE, O. 5.

SUPER-TAX ACT (XIX OF 1920).

——— S. 3—*Firm—What is— Husband and wife—Husband's option to take in fresh partners or determine her share—Partnership*

Where a husband and wife formed a partnership and the husband took some extra rights in himself and the parties were entitled to admit new partners after the death of the other, *held* that the partnership was valid. (*Sanderson, C.J., Mukerjee and Chatterjee, JJ.*) RAGHUMALL KHAN DELWAL *v.* OFFICIAL ASSIGNEE OF CALCUTTA.

25 Bom. L. R. 1225 : 1924 B. 182.

SURETY.

See CONTRACT ACT, Ss. 128—147.

SURRENDER.

See (1) HINDU LAW—WIDOW.
(2) LANDLORD AND TENANT.
(3) T. P. ACT, S. 111.

TALUQDAR.

SURVEY AND BOUNDARY MARKS ACT (IV OF 1897).

——— S. 17 (a)—*Resistance to Survey Officer—Good faith—Lawful authority—Colour of office—Meaning of.*

A Surveyor put up boundary marks *bona fide* on land not included in notification. Accused removed the marks. Accused was convicted under S. 434. The section does not make distinction between marks fixed correctly and those fixed incorrectly and there is no reference to the propriety of the exercise of authority. An offence under S 186 is established if surveyor *bona fide* believed he was discharging public functions though he was acting illegally. 'Under colour of office' in S 99 simply mean that the public servant must be acting in good faith, that is, with due care and caution (*Oldfield and Sadasiva Aiyar, JJ.*) PUBLIC PROSECUTOR *v.* MADHAVA BHONJO SANTS.

(1916) 2 M. W. N. 183 : 4 L. W. 377 : 17 Cr. L. J. 481 : 36 I. C. 61 : 31 M. L. J. 305.

——— S. 20, Cl. (3)—*"Tenant" does not include holder of rent-free inam in a* Zamindari.

The word 'tenant' in S. 20, Cl. (3) of the Act does not include the grantee of a rent free *inam* in a *Zamindari*. (*Ayling, O. C. J., Kumarasami Sastri and Odgers, JJ.*) RAJAH OF VENKATAGIRI *v.* TATTIKOLA SUBBIAH. **14 L. W 589 : (1921) M. W. N 783 : 45 M. 1 : 30 M. L. T. 532 : 41 M L. J. 530 : 1922 M. 137.**

SURVEY MAPS

See EVIDENCE ACT, Ss. 35, 74 AND 83

SURVEY RECORDS.

See (1) EVIDENCE.
(2) EVIDENCE ACT, Ss. 34 AND 114.

SURVIVORSHIP.

See HINDU LAW—JOINT FAMILY.

SYMBOLICAL POSSESSION.

See (1) ADVERSE POSSESSION
(2) C. P. CODE, O. 21, RR. 35 AND 96.
(3) LIMITATION ACT, ARTS. 142 AND 144.
(4) POSSESSION.

TACKING.

See T. P. ACT, S. 80.

TALAB-I-ISTIHAD.

See (1) MAHOMEDAN LAW.
(2) PRE-EMPTION.

TALAB-I-MOWAZIBAT

See (1) MAHOMEDAN LAW.
(2) PRE-EMPTION.

TALAK.

See MAHOMEDAN LAW—DIVORCE.

TALUQDAR.

——— *Property of — Presumption — Succession.*

Where it is not known as to how a property came into the hands of a *Taluqdar*, succession to such property is according to the personal law to which he was subject and it is more so if it was acquired after the British annexation. If it was ancestral property at the time of the second summary settlement and he treated it as *Taluqdari* property, it is *Taluqdari* property and the

TALUQDAR.

presumption is strengthened if the property happens to be the village where the *Taluqdar* himself resided. (*Lindsay and Daniels, A.J.Cs.*) IMTIAZI BEGAM *v.* HURMUZI KHANAM.
8 O. L. J. 67 : 61 I. C. 196 : 3 U. P. L. R. (J. C.) 12.

TAX.

———*Assessment—Principles applicable to—Salt works—Assessment of.*

In assessing any property, the assessing authority must consider what a tenant from year to year with a reasonable prospect of the continuation of the lease would give for the premises. The then occupier must be regard as a likely tenant and the assessment is to be fixed, on the highest rent that such a tenant might be reasonably expected to give.The premises must be valued as they exist at the date of the valuation. So long as the assessing Court applies one of the recognised modes of valuation and in doing so does not consider evidence which it should not consider and does not exclude evidence which it should not exclude it is left to that Court to select its particular formula. (*Batchelor, A C.J. and Kemp, J.*) ABDULLA BHAI *v.* THE EXECUTIVE COMMITTEE, ADEN. **42 Bom. 692 : 46 I. C. 721 : 20 Bom. L. R. 639.**

TAXATION OF COSTS.

See (1) COSTS.
(2) HIGH COURT RULES.
(3) PRACTICE.

TAYAZHI.

See MALABAR LAW.

TAZIAS.

See MAHOMEDAN LAW—WAQF.

TEJIMANDI TRANSACTION.

See (1) CONTRACT—TEJI MANDI.
(2) CONTRACT ACT, S. 30.

TEMPLE COMMITTEE.

See (1) HINDU LAW-RELIGIOUS ENDOWMENT.
(2) RELIGIOUS ENDOWMENTS ACT.

TEMPORARY INJUNCTION.

See C. P. CODE, O. 32.

TENANCY.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) LOCAL ACTS.
(4) T. P. ACT, SS. 105 TO 117.

TENANCY-AT-WILL.

See LANDLORD AND TENANT.

TENANCY FROM YEAR TO YEAR.

See T. P ACT, SS. 106 AND 107.

TENANCY IN COMMON.

See CO-SHARER.

TENANT.

See (1) LANDLORD AND TENANT.
(2) T. P. ACT, SS. 106 AND 107.

TENANT IN COMMON.

See CO-SHARER.

TORT.

TENDER.

See also (1) CONTRACT ACT, S. 38.
(2) T. P. ACT, S. 83.

———*Validity of—Tender o f portion of debt—Acceptance by creditor—Effect of.*

A creditor is not bound to accept less than his whole debt, and there can be no valid tender of part of an entire and indivisible debt. But there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account, provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole. A tender must be unconditional or, at all events free from any condition to which the creditor may righfully object. (*Mookerjee and Rankin, JJ*) BEHARI LAL BISWAS *v.* NASMUNNISSA BIBI. **37 C. L. J. 222 : 1923 Cal. 527.**

TENURE.

See LAND TENURE.

TESTAMENT.

See WILL.

TESTATOR.

See WILL.

THAKBUST MAP.

See EVIDENCE ACT, SS. 35, 36 AND 74.

THAK MAP.

See EVIDENCE ACT, SS. 35, 36 and 74.

THEKADAR.

See LANDLORD AND TENANT.

THIRD PARTY.

See (1) ASSIGNMENT.
(2) CONTRACT—STRANGER.

THUMB IMPRESSION.

See EVIDENCE ACT, S. 45.

TICCADAR.

See (1) LANDLORD AND TENANT.
(2) OUDH RENT ACT.

TIDAL NAVIGABLE RIVER.

See (1) FISHERY.
(2) JALKAR.
(3) RIPARIAN RIGHTS.

TIME.

See CONTRACT ACT, S. 55.

TITLE-DEEDS.

See (1) CONTRACT ACT, S 108.
(2) T. P. ACT, SS. 55 AND 59.

TODA GIRAS ALLOWANCE.

See C. P. CODE, S. 60.

TODA GIRAS ALLOWANCE ACT (LOCAL VII OF 1887).

TORT.

See also (1) LEGAL PRACTITIONER.
(2) LEGAL PRACTITIONERS ACT. S. 36.

Act of God.
Animals.
Breach of Contract.

Cause of action.
Conspiracy.
Conversion.
Defamation.
Easement.
False Imprisonment.
Joint tort-feasors.
Liability.
Malicious proceedings.
Negligence.
Nuisance.
Principal and Agent.
Public Officer.
Secretary of State.
Statutory body.
Trespass.
Wrongful dismissal.
Miscellaneous.

Act of God.

———*Act of God—Locusts—Right to drive away—Liability of owner of land.*

The principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, do not properly apply to the course of an insect pest which it is the interest of every one concerned to repel or destroy. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events rather than a normal incident like the rise of a river in a rainy season; and an owner of land is justified in driving away locusts from his own land without being liable to his neighbour for the consequences. Even as a formal incident of agricultural industry one will be entitled to drive the locusts away just as they are entitled to scare crows without regard to the direction they may take in leaving. (*Lord Robson*) SAMUEL JACOBUS *v.* DANIEL WILHELM.
15 C. W. N. 569 : 21 M. L. J. 674 : 10 I. C. 460 : 10 M. L. T. 311 (P. C.).

———*Act of God—Closing of culvert.*

Where in consequence of closing the culvert the water of the flood remained on the land for a long time, the plea of " Act of God" could not be pleaded by the defendant. (*Coxe and Chatterjee, JJ.*) BEHAR BUKHTIARPORE LIGHT RAILWAY COMPANY, LTD. *v.* JHANDOO MAHTON
21 I. C. 393.

———*Act of God—When a good defence.*

Before act of God can be pleaded, the party pleading it, must himself have done all that he was bound to do. The bursting of a tank after a heavy rain owing to failure to open the sluice is not an act of God. 6 Bom. L. R. 899 Rel. on. (*Prideaux, A.J.C.*) MURLIDHAR KURMI *v.* BHANGI KURMI.
50 I C. 615

———*Act of God—Rain water.*

A person who allows rain water to collect in the materials and the debris of his fallen house and thus to cause injury to an adjoining wall makes himself liable to compensate the owner of the wall for the damages sustained by him. The expression ' Act of God' is strictly confined to classes of inevitable accidents which are occasioned by the elementary forces of nature unconnected with the agency of man or other causes and does not cover damage which could have been prevented by reasonable foresight. (*Kanhaiya Lal, A. J. C.*) LALLU *v.* FAZLHAQ
21 O. C. 295 : 49 I. C. 43 : 1 U. P. L. R. 15.

Animals.

———*Animals—Damage, suit for.*

In removing an animal, so as to prevent it from causing damages, no more injury should be inflicted than is reasonably necessary and the infliction of excessive injuries will render the person inflicting them liable in an action for damages. (*Fletcher and Cuming, JJ.*) MALIRAM KALITA *v.* PURUANANDA ADHICHAR. **54 I. C. 761.**

———*Animal—Keeping animal known to be vicious—Injury—Damages.*

Where the defendant kept a horse knowing it to be a vicious animal and the horse injured the plaintiff, the defendant was held liable in damages though he was not guilty of negligence since negligence is not necessary to support a suit of this nature. (*Fletcher and Teunon, JJ.*) GANDA SINGH *v.* CHUNI LAL SHAHA. **29 I. C. 862 : 19 C. W. N. 916.**

———*Animal—Damage caused by.*

An elephant belongs to a class of dangerous animals and the owner who keeps such an animal must take all the risk of the damage it may do. The test for determining whether the animal is vicious by nature is whether the progeny of such animal is found harmless, from years ago to the present age. 35 Cal. 418 Dist. (*Sankaran Nair and Ayling, JJ.*) MANKADA KOVILAGAM *v.* MALAN KATILL KOPPAN. **35 Mad. 708 : 10 I. C. 108 : 21 M. L. J. 434 : 9 M. L. T. 496.**

———*Animal—Trespass—Damages.*

The owner of an animal is responsible for injury of damage committed by it by trespassing on the land of another ; whether the animal escapes by negligence of the owner or in spite of his diligent care is immaterial. Damages done by cattle passing along a highway to property near the highway is an exception to the general rule. In such cases the sufferer cannot recover damages unless negligence or want of skill is proved. (*Drake-Brockman, J. C.*) MADHO *v.* AKAJI.
17 I. C. 899 : 8 N. L. R. 190.

———*Animal—Pursuit—Escape.*

A complete capture and not a mere pursuit of an animal—*ferae naturae*—is necessary to make it one's property. If there is possibility of its escape from his possession, it is not considered a complete capture. So the overtaking by the person's dog of the animal does not amount to preclude the possibility of its escape. (*Piggott, J. C. and Lindsay, A. J. C.*) RAGHUNANDAN *v.* EMPEROR. **13 Cr. L. J. 556 : 15 I. C. 972 : 15 O. C. 183.**

———*Animals—Master and servant.*

Where M made over a buffalo to N, an independent contractor, to tend on payment of paddy and both M and N knew it to be vicious and while in the charge of N's son it gored to death

TORT—Animals.

the plff.'s buffalo, *held*, that N alone was liable and not M. The test is to see whether the relation of master and servant existed between them. (*Rigg, J.*) MAN YANING *v.* MAUNG SHWE THE.
10 Bur. L. T. 223 : 42 I. C. 52 : 9 L. B. R. 54.

——*Animals—Negligence—Damages for injury by.*

In order to determine defendant's negligence it is important to be proved by the plaintiff that the defendant owner know that his animal was vicious and through his negligence the damage was caused to the plaintiff. (*Twomey, J.*) MAUNG NGWE YA *v.* MAUNG SHWE YE.
4 Bur. L. T. 138 : 12 I. C. 910 : 8 L. B. R. 388.

Breach of Contract.

——*Breach of contract.*

If a person receives money which rightly belongs to a third person the third person has a right to sue him each time it occurs as it is not damages at all but money had and received and is in the nature of a breach of contract. (*Walsh, J.*) HARPAL *v.* RAM SARAP. **34 I. C. 173.**

——*Breach of contract.*

An action lies against any one who wilfully and with notice procures breach of contract. 13 C.P.L. R. 23 Foll. (*Hallifax. O. A. J. C.*) PANDURANG *v.* NAGIJI. **17 I. C. 138 : 8 N. L. R. 133.**

——*Breach of contract — Procuring of—Actionable wrong—Continuing cause of action.*

Where a third party procures a breach of contract of personal service by employing the servant himself with knowledge of the subsisting contract he commits an actionable wrong and the wrong continues so long as the breach continues. (*Robinson, C. J. and Heald, J.*) THE INDO BURMA OIL FIELDS *v.* BURMA OIL COMPANY, LTD.
64 I. C. 794 : 11 L. B. R. 26.

Cause of Action.

——*Cause of action — Right of property in earth washed away by rain.*

The owner of a field from which earth has been washed away by heavy rains and deposited in an adjoining field has got no right to dig and carry back the earth and a suit for a decree authorizing him so to dig or for damages cannot succeed. The fact that the neighbour lowered the level of his land will not give a cause of action. (*Rafique and Ryves, JJ.*) SAKAT MAL *v.* ABDUL.
19 A. L. J. 309.

——*Cause of action—Injury—Death of wife.*

Husband cannot sue the Railway Company for damages for the death of his wife during journey. In this case the husband is not the aggrieved party. (*Richards, C. J. and Bannerji, J.*) SHAM NARAIN TICKOO *v.* B. B. & C. I. RAILWAY.
41 All. 488 : 50 I. C. 130 : 17 A. L. J. 506.

——*Cause of action— Continuing injury—Nature of—Gives a fresh cause of action.*

An act which creates a source of continuing injury making the doer of it responsible for its continuance and in which no damage is necessary to an action as in trespass, arises a fresh cause

TORT—Conspiracy.

of action. (*Mookerjee and Beachcroft, JJ.*) BROJENDRA KISHORE ROY *v.* BHARAT CHANDRA ROY. **22 C. L. J. 283 : 31 I. C. 242 : 20 C. W. N. 481.**

——*Cause of action—Death of injured person—Right of legal representatives.*

Where a man dies by the tort of another, his heirs have a cause of action for damages and the principle embodied in the Fatal Accidents Act is applicable to cases arising in Berar as a rule of equity, justice and good conscience. (*Kotval and Macnair, A. J. Cs.*) RAKHMABAI *v.* DHANRAJ.
64 I. C. 311.

Conspiracy.

——*Conspiracy—Betrothal contract—Damages for breach of*

Per *Beaman, J.*—A person inducing a girl betrothed to another to break the engagements and marry him commits no tort as to give the aggrieved party a cause of action against him. The principle is the same when the father of the girl is induced by the father of the boy. The principle in *Lumley v. Gose* should be applied in India to contracts of every kind and the true principle governing cases of breach of promise of marriage is stated by *Coleridge, J.*, in the case in 22 L. J. Q. B. 463. Per *Heaton, J.*—The taking of an active and effective part in the negotiations or proceedings which induce a party to a contract of marriage to break it, is actionable. (Per *Beaman, J.*) The proceeding or enticement may be actionable when it is the result of a conspiracy. Before a conspiracy can be actionable it should be shown to be a conspiracy to do a lawful thing by unlawful means or to do an unlawful thing even by lawful means. (*Beaman and Heaton, JJ.*) JEKISANDAS HARKISANDAS *v.* RANCHODDAS BHAGWANDAS.
41 Bom. 137 : 38 I. C. 588 : 19 Bom. L. R. 18.

——*Conspiracy—Breach of contract of marriage—Damages.*

Where a man merely knowing of the existence of an unperformed agreement for marriage without malice or the use of unlawful means obtains the benefit of the agreement for himself, no action can lie against him for the breach of the agreement or promising such breach at the instance of the first promisee. The formula of all conspiracy action is the same, that A, B, and C, maliciously conspired together to do a rightful act by wrongful means or to do a wrongful act by rightful means or to do a wrongful act by wrongful means. In an action of conspiracy allegation and proof of malice is essential to the cause of action. The mere fact that a stranger whether he was or was not aware of a contract, induced the promisee not to perform his contract with the promisor does not by itself, in the absence of the other elements give rise to a cause of action against. (*Beaman, J.*) KHIMJI VASANJI *v.* NARASI DHANJI. **39 Bom. 682 : 28 I. C. 403 : 17 Bom. L. R. 825.**

——*Conspiracy—When gives rise to civil liability—What must be proved in suit for damages—Suit for damages—Forum.*

A criminal conspiracy gives rise to a civil liability if special damage has been suffered by

plff. In a suit for damages resulting from criminal conspiracy, it must be shown by the plff. that he suffered special damage being the result of the conspiracy. Pecuniary loss must be proved though not limited to the extent of the precise sum so proved. There is no rule in the Evidence Act, requiring the standard of proof of a conspiracy in a suit for damages in consequence of injury resulting from conspiracy, to be the same as if the defts. were on a trial on a criminal charge. A suit for damages resulting from a conspiracy is maintainable in British India (*Fletcher, J.*) PEARY MOHAN DAS *v.* WESTON.
13 I. C. 721 : 13 Cr. L. J. 65 16 C. W. N. 145 :

Conversion

——— *Conversion—Damages—Detention.*

When boats are hired for a specific period and are not returned, even after demand after that period, the proper remedy is a suit for damages for wrongful conversion of the boats at that date, and not for hire accruing after such date. (*Parlett, J.*) MAUNG BA GYAW *v.* HENG SEN AND CO.
36 I. C. 276 : 10 Bur. L. T. 187.

——— *Conversion—Damages—Measure of.*

In an action for damages for conversion of goods, the damages are not limited to their value at the date of breach but can cover them subsequent value also. (*Pratt, J. C. and Fawcett, A. J. C.*) LOUIS DREYFUS AND CO. *v.* FIRM OF GHANDAMAL AND CO. **52 I. C 878 : 13 S. L. R 128.**

Defamation.

——— **Defamation.**
Fair Comment.
Imputation of caste.
Justification.
Malice.
Privilege.
Publication.
Suit.
Miscellaneous.

Defamation—Fair Comment.

——— *Defamation — Fair comment—Journalist—Facts forming the basis of comment to be truly stated—Trivial mis-statements—Privilege.*

Whilst a journalist is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate instances in isolated passages, and the Judge must decide what impression would be produced on the mind of an unprejudiced reader, who knowing nothing of the matter beforehand read the articles straight through. Facts upon which the comment is founded must be truly stated though later they may not turn out to be true at all. A fact may be truly stated and may yet be utterly untrue. Comment to be fair need not take the form of an inevitable inference. Fair comment impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is

required is that inference from facts truly stated should be fair, that is, one possibly out of many equally or almost equally fair inferences. Cases discussed. (The nature of the defences available to a suit for libel as well as the distinction between privilege, fair comment, justification by truth, pointed out by *Beman, J.*) (*Batchelor, A. C. J. Beaman and Marten, JJ.*) SURAJMAL *v.* B. G. HORNIMAN. **47 I. C. 449 : 20 Bom. L. R 185.**

——— *Defamation—Fair comment—Public interest—Publication—Privilege.*

It is a libel to write that the plaintiff used to get permission to move or second propositions in public meetings by sending threatening letters to the conveners. Discussion of affairs concerning the Parsis in papers circulated among all classes of readers is not privileged even where the plaintiff made the matter of public interest. Any member of the public can comment fairly on facts truly stated on a matter of public interest but the allegation of fact imputing any act of misconduct, takes the libel out of the sphere of fair comment. The allegation must then be proved to be true. (*Scott, C. J. and Chandavarkar, J.*) NADIRSAW HORMUSJI *v.* PIROJSAW RATANJI RATNAGAR. **19 I. C. 98 : 15 Bom. L. R 130.**

——— *Defamation—Fair comment—Comment by Pleader in suit.*

In a suit for rent the defence pleader commenting on certain exhibits said "the plff. forged documents by fraud". In a previous rent suit by the plff.'s husband, the collection papers were held to have been manufactured. *Held*, that the pleader's comments were legitimate and without malice, that they were made in the professional discharge of his duty and in the interests of his client. (*Woodroffe and Cuming, JJ.*) SHIVA KUMARI *v.* BACHARAM. **66 I. C. 604 : 25 C. W. N. 835.**

——— *Defamation—Fair comment- Privilege—Malice—Right of each of several persons.*

Nothing is a libel which is a fair comment : It must be a comment and not a statement and the comment must be based on facts in order to be availed of as a defence When privilege is set up, he claims a protection by standing in a special relation whereas, if he sets up fair comment, he asserts only what everyone has a right to do. Malice may be inferred from a needlessly extensive publication in a violent language, of statements contrary to the facts and such statements are not entitled to the defence of privilege. Where a statement is defamatory of several persons, each of such persons is entitled to sue separately. (*Mookerjee, C. J. and Chaudhuri, J.*) IRWIN *v.* REID. **48 Cal. 304 : 63 I. C. 467 : 25 C. W. N. 150.**

——— *Defamation—Fair comment.*

It is a question for the jury to say whether an article complained of is a fair comment on matters of public interest and it is a question for the Judge to say whether on proof of certain facts, they would amount to justification. A Judge may stop the case only when the article is so fair that it cannot amount to libel on the admitted facts.

TORT—Defamation—Fair comment.

(*Sadasiva Aiyar and Spencer, JJ.*) NAGANATHA SASTRI *v* SUBRAMANIA IYER **21 M. L T, 324 : 5 L W. 598 : 40 I. C. 126 : 32 M. L. J 392.**

——*Defamation — Fair comment—Newspaper article—Imputation of motives justification.*

A statement of facts, may amount to no more than a comment. All the facts upon which the imputations are based need not set out to justify the imputation of motives to a person in a article published in a newspaper. In public discussions of matters of public interest proceeding in the Press from day to day where it will be too much to expect the writer in each article to set out all the facts which are within the knowledge of every one interested in the question, an accurate statement of the facts which form the subject of criticism or even a clear reference to them will be sufficient. Misstatement of facts and comment therein is not, however, fair comment. (*Wallis, C. J. and Phillips, J.*) THE MADRAS TIMES PRINTING AND PUBLISHING CO., LTD *v* C. J. ROGERS. **30 M. L. J. 294 : (1916) 1 M. W. N. 267 : 32 I. C. 408 : 3 L. W. 67.**

——*Defamation—Fair comment—Journalist—Privilege.*

A journalist is entitled to comment on matters of public interest and no suit will lie against him for defamation unless he has exceeded the bounds of fair comment or is actuated by malice. Fair comment on a matter of public interest is protected in the absence of malice. If statements are derogatory of a person they must be stated as matter of comment and not as matter of fact in which case they will have to be justified, that is they will have to be proved to be founded on truth. (*Wallis, J.*) RAMAKRISHNA PILLAI *v.* KARUNAKARAMENON, **21 I. C. 625 : 25 M. L. J. 476.**

Defamation—Imputation of caste.

——*Defamation—Imputation of caste—Privilege—Resolution by caste—Panchayat.*

The defendant the *chaudri* of a Hindu community of which plaintiff was a member in the performance of his duty as a *chaudri* published to the *chaudries* of other communities (of the same caste) a notice of resolution which had been passed by the Panchayat of his own community suspending social relations with the plaintiff for breach of caste rules. The plaintiff sued defendant for libel alleging that the notice was defamatory, imputing loss of caste to him. *Held*, that the occasion of the publication was privileged even if the resolution had been passed under circumstances which rendered it irregular and in the absence of proof of express malice, the suit failed. *Toogood* v. *Spyring*, 1 C. M. & R. 181. *London Association, etc.* v. *Greenlands*. (1916). 2 A. C. 15. *Adam* v. *Ward*, (1917) A. C. 309, Rel. (*Mr. Ameer Ali,*) GOVINDA DASS *v.* BISHAMBAR DAS. **39 All. 561 : 15 A. L. J. 629 : 33 M. L J 103 : 2 Pat. L. W. 125 : 21 C. W. N. 1113 : 19 Bom. L. R. 707 : 22 M. L T. 132 : 26 C. L. J 282 : 6 L. W. 494 : (1917) M W. N 817 : 40 I. C. 641 : 44 I. A. 192. (P. C.)**
[Affirming on appeal 23 I. C. 301 : 12 A. L. J. 552.]

TORT—Defamation—Malice.

——*Defamation— Imputation of caste—Panchayat—Whether amounts to.*

Where a *chaudri* of the community in fulfilment of his duties as such and without ill-will or malice convened a Panchayat and communicated to the plaintiff its resolution excluding him for social intercourse with the caste, the *Chaudhri* is not liable for libel or defamation. (*Tudball and Rafique, JJ.*) BISHAMBAR DAS *v.* GOVIND DAS. **23 I. C. 301 : 12 A. L. J. 552.**

[See on appeal 40 I. C. 641 : 39 All. 561 : (P. C.)]

——*Defamation—Imputation of caste.*

Where the deft. invited the plff. to a *Sradh* Ceremony and afterwards turned him out saying that as he had attended and taken meals at widow marriages, some Brahman refused to attend it was held, that the defandant had not standered the plaintiff. (*Sadasiva Aiyar and Hannay, JJ.*) VENGALA VENKAYYA *v.* THALLAM VENKATARAMAYYA, **17 M. L. T. 369 : 26 I. C. 460 : 2 L. W. 446 : 28 M. L. J. 58.**

——*Defamation— Imputation of caste—European called "native"—Journalistic communications "rubbish."*

To call an European or Anglo-Indian a "native" may be insulting but it is certainly not defamatory. To describe a journalist's communication as a rubbish is defamatory because the imputation conveyed by the word affects prejudicially his capacity as a journalist. (*Maung Kin, J.*) CHRISTENSEN *v* CASTOR. **41 I. C. 696**

Defamation—Justification.

——*Defamation—Justification— Absence of intention—Defame immaterial—Evidence of witnesses as to person referred—Opinion based on rumour—Admissibility.*

Absence of intention to defame is no defence in an action for libel. The question for decision in such cases is whether the article is libellous and whether it designates the complainant in such a way as to let those who know plff. understand that he is the person meant. Evidence giving the substance of rumours and suspicions is admissible. The existence of unproved rumours does not justify, slight damages. (*Hartnoll, O. C. J. and Twomey, J.*) PROVIDENCE *v.* CHRISTENSEN. **24 I. C. 749 : 7 Bur. L. T 155.**

——*Defamation — Justification — Truth of imputation—Special damage—Loss of caste—Malice means absence of just cause and excuse.*

Proof of truth of a slanderous imputation is a complete answer to the standered person's claim for damages. Losing the general good opinion of one's neighbours is not a special damage. There must be loss of some material advantage Loss of caste is a loss of material advantage and the cost of the ceremonies necessary for expiation is a fair measure of damages. (*Twomey, J.*) CHANGARAM *v.* RAYA. **23 I. C. 3 : 7 L. B. R 86.**

Defamation—Malice.

——*Defamation—Malice—Suit for damages—Custom of society—Exemplor.*

Defendant falsely writing that plaintiff instigated the breaking off, of marriage of a certain

TORT—Defamation—Malice.

girl, out of ill-will, is liable to pay damages If defendant proves that he honestly believed the statement to be true and that he published it in order that the matter should be investigated by the society concerned, he is protected. (*Richards, C. J. and Banerji, J.*) NARSINGH DAS *v.* SADA RAM. **41 All. 329 : 50 I. C. 398 : 17 A. L J. 278.**

——— *Defamation— Malice—Burden of proof —Privilege.*

The law applicable to a suit for damages for slander in India is the same as the English Law. If the occasion is privileged the burden is on the plff. to prove actual malice in the deft. and if the deft. makes the statement honestly he is not liable for the slander even though there is no reasonable ground for his belief. 3 Q. B. D. 237 ; 2 Q. B. 341 Ref. Refusal to apologies before suit may be evidence of malice but it may actually be consistent with the deft. honestly adhering to his opinion. The absence of any reasonable ground for the opinion would be evidence of malice. (*Ormand and Twomey, JJ*) ROBERTSON *v.* MURRAY. **30 I. C. 930 : 8 Bur L. T. 278.**

Defamation—Privilege.

——— *Defamation—Privilege—Press, not on a different footing from a subject.*

It is a fallacy to suppose that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is the same as that of an ordinary citizen. The journalist can go to the same lengths as any other subject and no further save when he is shielded by any special statutory provision. (*Lord Shaw.*) CHANNING ARNOLD *v.* EMPEROR. **41 Cal. 1023 : 41 I.A. 149 : 18 C.W.N. 785 : 15 Cr. L.J. 309 : 1 L.W. 461 : 7 Bur. L T. 167 : (1914) M.W.N 506: 16 M.L.T. 79 : 12 A.L.J. 1042 : 20 C L.J. 161 : 16 Bom. L.R. 544 : 8 L.B.R. 16 : 23 I.C. 661 : 26 M.L.J. 621(P.C).**

——— *Defamation—Privilege—Witness compelled to answer question put by Judge.*

Where the witness is compelled to answer the question put to him by the Judge under S. 132 of the Indian Evidence Act proceedings for defamation could not be taken against him. 16 All 88. Not foll. 40 All. 271 Ref. (*Walsh, J.*) GANGA SAHAI *v.* EMPEROR. **54 I. C. 890 : 18 A L.J 112.**

——— *Defamation—Privilege—Statements in complaint.*

A suit for damages for defamation for having made certain statements in a complaint is not maintainable. Defamatory words used in a complaint are absolutely privileged. The law relating to defamation as an actionable wrong is the same in India as in England based on justice, equity and good conscience. In civil action the plea of mere truth is good defence but in a criminal case it is not so. If it must be a good defence it must be an absolute truth and made for the public good. (*Knox, Bannerjee, Tudball, Rafique and Walsh, JJ.*) CHUNNILAL *v.* NARSING DAS. **16 A.L. J. 360 : 45 I.C. 540 : 40 All. 341 (F.B.)**

——— *Defamation —Privilege —Relevancy of statement.*

TORT—Defamation—Privilege.

Before deciding whether the statement by a witness amounts to a defamation it is necessary to find out if such statement was relevant to the enquiry. (*Knox and Rafique, JJ.*) BABU PARSHAD *v.* MUDA MAL. **18 I. C. 331 : 11 A. L. J. 193.**

——— *Defamation — Privilege — Qualified— Statement made to official superior.*

The privilege in respect of a slanderous statement made to the official superior of the slandered person which is not intended to be made in a Court of Justice or at any step or stage of a judicial proceedings is qualified and not absolute. *Watson* v. *M'Ewan*, (1905) A. C. 480 Dist. (*Batchelor and Rao, JJ.*) JUSAL THARIA *v.* MORRISON. **19 I. C. 480 : 15 Bom. L. R. 249.**

——— *Defamation—Privilege—Extent of.*

If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability in the absence of statutory rules applicable to the subject must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules in the Penal Code. (*Mookerji, C. J., Fletcher, Richardson, Walmsley and Buckland, JJ.*) SATIS CHANDRA CHAKRAVARTI *v.* RAM DAYAL DE. **24 C W. N. 982 : 32 C. L. J. 94 : 22 Cr. L. J. 31 : 59 I. C 143 : 48 C. 388. (S. B.).**

——— *Defamation — Privilege — Judicial proceedings.*

Per *Mukerjee, J* : — Neither party witness, counsel Jury nor Judge can be put to answer, civilly or criminally for words spoken in office, and no suit for damages is maintainable for such words. Per *Beachcroft, J* :—A defamatory statement in the pleadings in an action is not privileged and may form the foundation of a suit for damages for libel. (*Mookerjee and Beachcroft, JJ.*) C. H. CROWDY *v.* L. O'REILLY. **17 C. L. J.105 : 18 I. C. 737 : 17 C. W. N. 554.**

——— *Defamation —Privilege — Communication by deft. to his subordinate for enquiry—No malice—Liabilily—English Law.*

An imputation of a crime made in good faith by an employee against his employer communicated to a co-employee with a view to their making enquiries in the matter, is privileged being a communication made in the interest of the communicator and no action for slander would lie in respect thereof. 1 C. M. and R. 181, Foll. Special damage is not necessary to support an action for slander in India. Statements made to protect the interests of the speaker and to protect a common interest form the distinct heads of privilege. Whether the publisher of a libel exceeds the privilege by repeating it depends on the circumstances of each case. (*Wallis, C. J. and Sesha-*

TORT—Defamation—Privilege.

giri Aiyar, J.) J. B. LESLIE ROGERS *v.* A. R. HAJEE PAKIR MAHOMED SAIT.
42 Mad 132 :24 M. L. T. 461 : 9 L. W 104 : 49 I. C. 630 : (1918) M W N. 113: 35 M. L J 673.

——*Defamation — Privilege — Words published in course of official duties.*

Defamatory words published by the Governor-General in the course of official duties are not actionable unless they were used maliciously and without reasonable and probable cause (*Sadasiva Aiyar and Bakewell, JJ.*) ROSS *v.* SECRETARY OF STATE.
39 Mad. 781 : 31 I. C. 224 : 29 M. L. J 230.

——*Defamation—Privilege—Cochin.*

An enquiry was held under the authority of the Rajah of Cochin about an improper intimacy alledged to exist between the plff and a certain woman. As a result of this the plff was ordered to be ex-communicated This order was communicated by the Sarvadhikarigar or the general agent of the Rajah to the Superintendent of the Temple who communicated it to one deft. in his official capacity and the latter in his turn handed over a copy of the said letter to the Manager of the Temple. *Held*, that the act of the Rajah was absolutely privileged and that the defts. were not liable for the publication of the libel. (*Ayling and Tyabji, JJ.*) GOVINDAN NAIR *v.* ATCHUTHA MENON.
39 Mad. 433 : 28 M. L. J. 310 : 28 I. C. 394 : 2 L. W. 290.

——*Defamation—Privilege—Judicial act.*

A libellous statement made by Government in an order passed on appeal is absolutely privileged. The occasion is at least one of qualified privilege (*Wallis, J.*) A. M. ROSS *v.* SECRETARY OF STATE.
37 Mad. 55 : 19 I. C. 353 : (1913) M. W. N. 758 : 24 M. L. J. 429.

——*Defamation—Privilege—Accused—Statement made in reply.*

The deft. accused of rioting by the plff. s servant was being examined when questions were put to him implying that the charge was brought at the instigation of the plff. in reply to a notice given by the plff the deft. acknowledged the imputations *held*, that the deft. was not liable for imputations made in good faith in the questions put to the witness. The deft. had a right to reply to the notice sent to her and to state her reasons. The reply being privileged as it was confined to the matter in hand was relevant. (*Benson and Sankaran Nair, JJ.*) PATCHAPERUMAL CHETTY *v.* DASI THANGAM.
12 I. C. 954 : 10 M. L. T. 489.

——*Defamation—Privilege—Report by sub-committee.*

Defendants were members of the Water Works Committee of a municipality and were interested in the regulation of the water supply, and they submitted a report which was addressed to the Chairman of the Water Works Committee containing substantially one statement that the appellants used by threatening the municipal servants to get water at times other than those sanctioned by the municipality and this statement was found not to be true. *Held* that in the absence of proof of malice defendants were not liable in the damages (*Kotwal, A. J. C.*) SHRIRAM MOTI RAM *v.* SHAIKH AHMAD.
1923 Nag. 226.

——*Defamation—Privilege—Plea of—Essentials.*

An action lies for the malicious publication of statements which are false in fact and injurious to another, unless they are fairly made by a person in the discharge of some public or private duty or in the conduct of his own affairs In the latter class of cases the occasion prevents the inference of malice and a qualified privilege attaches to the statements made if fairly warranted by any reasonable occasion or exigency and honestly made or made in good faith. Three elements are necessary to make the defence of qualified privilege good, *i. e* the occasion must be fit, the matter must have reference to the occasion and it must be published from right motives. If a man comes to know of the commission of a crime, he owes a duty to society and the state to communicate it to the authorities and he cannot be liable if it turns out the person is not guilty. (*Kanhaiya Lal, J. C.*) KISHORI LAL *v.* MOOSA RAJA
9 O. & A. L. R. 302 : 1923 Oudh 247.

——*Defamation — Privilege — Pleading—Statements in.*

A suit brought about by a compromise does not render the plaintiff incapable to maintain an action for compensation for the defamatory statements which are not protected in a civil suit when made during the course of pleadings (*Lindsay, J.*) DALPAT SINGH *v.* RAJ AMARAPAL SINGH.
21 O. C. 321 : 49 I. C 58 : 6 O. L. J. 26.

——*Defamation—Privilege—Pleadings.*

Defamatory statements in pleadings are not absolutely privileged. (*Chatterjee and Suhrawardy, JJ.*) DHIRO KOOR *v.* GOBINDA DEV MISHRA
65 I. C. 204.

——*Defamation — Privilege—Suit for damages against vakil not maintainable—English and Indian law.*

Where a vakil in the course of his argument described plaintiff as a liar and swindler, *held* a suit for damages against him was not maintainable in law. The rule of English law, laid down in *Munster* v. *Lamb* (1883) 11 Q B. D. 588 as regards immunity of Counsel for words uttered in the course of the administration of the law, is also applicable to India as a principle of justice, equity and good conscience. 24 C. W. N. 982 and 10 Mad 28 followed. (*Das and Adami, JJ.*) JAGAT MOHAN NATH SAHI DEO *v.* KALIPADA GHOSH.
1 Pat. 371 : 3 Pat. L. T. 276 : 1922 Pat. 85 : 1922 P. 104.

——*Defamation — Privilege — Complaint to Police—Charges contained in.*

Where a person charges another by preferring a complaint to the Police or to the Court, he is protected from an action for defamation in respect of allegations contained in the charge If the complaint is dismissed, the accused can get sanction for the prosecution of the complainant for bringing a false charge and if he has suffered loss or injury he can sue for damages for false and

TORT—Defamation—Privilege.

malicious prosecution. (*Saunders, J. C.*) MAUNG MYO *v.* MAUNG KWET. E. 47 I. C. 674 : 3 U. B. R. (1918) 88.

——*Defamation—Privilege—Onus—Slander.*

Statements made to a Police Officer in the course of inquiries as to the names of bad characters are privileged But such statements are not absolutely privileged. In a suit for damages for slander, if the defendant proves that the occasion was privileged, the burden is upon the plff. to establish actual malice on the part of the defendant, and if he succeeds in doing so, it is open to the defendant to show that his statement was true or he believed it to be true. (*Parlett, J.*) LU GALE *v.* P. THEIN. 7 L B R. 64 : 22 I. C. 273

——*Defamation—Privilege—Statements to a Police Officer inquiries under the preventive sections of the Code of Criminal Procedure—Onus—Malice—Reasonable and probable cause.*

Statements made to a Police Officer by witnesses examined by him in the course of his inquiries under the preventive sections of the Code of Criminal Procedure must be held to have been made on the occasion of qualified privliege. It is for the plff. to prove malice on the part of the defendants and if he is able to do so it is still open to the defendants to show the truth of their statements or their good faith or that they had reasonable and probable cause for making those statements. (*Parlett, J.*) MAUNG LUE GALE *v.* MAUNG PO THEIN. 20 I. C. 290 : 6 Bur. L. T. 100.

Defamation—Publication.

——*Defamation— Publication— Communication.*

Publication in regard to libel and slander does not require communication to more persons than one. There need be nothing like "publication" in the common acceptance of term. *Pullaman v Hill & Co.*, (1891) 1 Q. B. 524 Foll. (*Ayling and Tyabji, JJ.*) GOVINDAN NAIR *v* ATCHUTA MENON. 39 Mad 433 : 28. I. C. 394 : 28 M. L. T. 310 : 2 L. W. 290.

——*Defamation—Publication—Defence.*

A letter from a client to his pleader regarding his fees ran thus. "The truth is that since you began conducting cases no rate has been fixed but at the time of filing the suit in question, you fixed the rate, wrote the receipt and filed it and how are you justified in asking for fees at the same rate for all cases" the letter was written by deft's clerk at the course of business. *Held* the letter contained accusations of professional misconduct and was defamatory but it was written on privileged occasion, that the burden of proving malice or falsehood was on plff. and the deft. is liable if it is untrue, that the writing by clerk amounted to publication and that plff. should get substantial but not exemplary damages. A libellous matter though privileged is not protected if untrue. (*Miller and Abdar Rahim, JJ.*) VAIDYA NATH SHASTRIAL *v.* KASIVASI SOMASUNDARA TAMBIRAN. 12 M. L. T. 377 : 16 I. C. 736 : 24 M. L. J. 8

——*Defamation—Publication—Repetition—Slander—Damages.*

The repetition of slander heard from others is actionable unless privileged. In a civil suit

TORT—Defamation—Suit.

for damages for slander, the principles applying to the Criminal Law of Defamation have no application. The suit must be decided according to justice, equity and good conscience. Proof of the truth of the slander is a complete defence in a civil suit for damages for slander or libel. (*McColl, A. J. C.*) MI NGWE HMON *v.* MI PWA SU. 27 I. C. 979 : 7 Bur. L. T. 253.

Defamation—Suit.

——*Defamation—Suit—Secretary of State.*

A suit cannot be brought against the Crown for libel (*i. e.*) for damages for defamation. (*Mookerjee and Beachcroft, JJ.*) RAMDAS HAZRA *v.* SECRETARY OF STATE FOR INDIA.

18 C. W. N. 106 : 16 I. C. 922 : 17 C. L. J. 75.

Defamation—Miscellaneous.

——*Defamation—"Most Insolvent Upstart"—If defamatory.*

Where a respectable Indian gentleman decree-holder was called a most insolvent upstart by the deft. as a process was being issued against him. *Held* (per *Chamier, J. and Karamat Hussain J. Contra*) that the words were not defamatory because they could not be intended to throw reflection on the birth or reputation or general character. (*Karamat Hussain and Chamier, JJ.*) BRIJ NATH SARAIN *v.* BYRNE.

13 I. C. 506 : 9 A. L. J. 253

——*Defamation—Newspaper article—Ambiguous—Interpretation.*

If a newspaper article is ambiguous and capable of double interpretation (1) defamatory and (2) innocent, it should be interpreted in favour of the accused and the more sinister interpretation should not be put on it. (*Sankaran Nair and Ayling, JJ.*) KARUNAKARA MENON *v.* T. M. NAIR. 24 I. C. 974: 15 Cr. L. J. 566 :

——*Defamation*—Innuendo — *Essentials—Malice*

Plaintiff advertised in a newspaper that a picture painted by Ravi Varma was for sale. A correspondent styling himself "Ante Humbug', in the same paper expressed a doubt about the genuineness of the picture. *Held*, that there was no imputation of bad faith or dishonesty to the plaintiff. Proof of malice is admissible only when there is plea of fair comment and the words published are *per se* libellous. (*White, C. J. and Sankaran Nair, J.*) NARASINGA RAO *v.* KASTURI RANGA IYENGAR. 9 M. L. T. 230 : 9 I. C. 279 : (1911) 1 M. W. N. 226.

——*Defamation—Slander — Words imputing unchastity to woman—No special damage to be proved—Common Law principle.*

A suit for damages for slanderous words imputing unchastity to a woman is maintainable without proof of special damage; the old Common Law rule not being consonant with equity, justice and good conscience and even that having been modified by the Slander of Women's Act, 1891, should not be followed in this Court. (*Saunders, A. J. C.*) NGA NYO *v.* MITE.

33 I. C. 673: (1915) 2 U. B R. 98.

——*Defamation—Entry in Surveillance Register does not amount to.*

The entry of a person's name in the Surveillance Register without justification does not give

TORT—Defamation—Suit.

rise to an action for defamation and there is no right to recover damages. (*Das and Adami, JJ.*) RAWLINS *v.* ANANTLAL SAHU. **2 Pat. L T. 176 : 59 I. C. 905: (1921) Pat. 40**

———*Defamation— Vulgar abuse—Calling a woman a prostitute.*

To impute unchastity to a woman is defamatory of her and of her husband if she is married. The words cannot be justified on the ground of being mere verbal abuse. (*Duckworth, J.*) MA WIN *v.* MA NGON. **1 Bur. L. J. 148 : 1923 Rang. 77.**

Easement.

———*Easement—Privacy—Interference with.*

In the United Provinces the custom of *Pardah* has for centuries been strictly observed by all Hindus and Mahomedans except the poorest. The intervention of a space between two houses cannot affect the right of privacy if as a matter of fact the right is involved by the new constructions complained of. (*Rafique, J.*) JAMILUDDIN *v.* ABDUL MAJID.

28 I. C. 674 : 13 A. L. J. 361.

———*Easement—Fishery—Obstruction —Liability.*

Where there is a right in one person and another deliberately infringes that right, the person injured can succeed without proof of special damage that is to say whether any damage has been proved to have accrued to him or not. Where the plaintiff and defendant were owners of adjoining fisheries and where owing to the obstruction of the free passage of fish to the plaintiff's waters caused by the defendant's the plaintiff's catch was materially lessened, *held* that the plaintiff was entitled to damages. (*Duckworth, J.*) MAUNG THIT SA *v.* MAUNG NAT.

1 Bur. L. J. 146 : 1923 Rang 76 (2)

———*Easement—Light and air—Obstruction —Damage.*

To constitute an actionable obstruction it must be shown that there has been such a diminution of light as to constitute a nuisance. It is not enough to show that the light is less than before. 42 Cal. 46. (P. C), Foll. (*Maung Kin, J.*) BALTHAZAR AND SONS *v.* M. A. PATAIL.

49 I. C. 458 : 11 Bur. L. T. 109.

False Imprisonment.

———*False Imprisonment—Measure of damages.*

For wrongful detention and insult of the plaintiff, and her servants by the Railway servants, vindictive damages cannot be awarded. However the sum awarded should be substantial. In the particular case a sum of Rs. 12,000 as against plaintiff's demand of Rs. 25,000, was awarded. (*Macleod, C. J. and Crump, J.*) KASTURIBAI *v.* G. I. P. RAILWAY COMPANY. **1923 Bom. 172.**

Feasor.

See (1) TORT.
(2) CONTRIBUTION.

Joint tort-feasors.

———*Joint tort-feasors—Contribution.*

TORT—Liability.

The doctrine that there is "no contribution between joint tort-feasors" enunciated in Merry weather is Nixon (*Z.* Sm. L. C. 569) cannot safely be extended to India (*Richards, C. J. and Rafique, J.*) NIHAL SINGH *v.* COLLECTOR OF BALANDSHAHAR. **38 All. 237 : 33 I. C. 165 : 14 A L. J. 275.**

———*Joint tort-feasors—Contribution.*

The general rule is that there is no contribution between joint tort-feasors but the right of contribution exists as an exception when parties become joint tort-feasors by inference of law only. (*Fletcher and Richardson, JJ.*) RASMAT ALI *v.* ASAB ALI. **38 I. C. 140.**

———*Joint tort-feasors—Liability.*

Joint wrong doers are jointly and severally liable for the whole damage caused by a tort committed by them whatever their relations *inter se* may be. (*Holmwood and Chapman, JJ.*) ABHOY KUMAR DAM *v.* UPENDRA NATH GHOSH. **18 I. C. 599.**

———*Joint tort-feasors—Liability.*

Two or more persons joining in the commission of a wrong are liable severally for the whole wrong, irrespective of the part taken by each of them in the commission of it. (*Stanyon, A. J. C.*) GOVARDHAN *v.* MARUTI. **31 I. C. 872 : 11 N. L. R. 183.**

———*Joint tort feasors—Death of one—Suit for contribution.*

The plaintiffs brought a suit in the Court of the Munsif, for damages against several defendants on the allegation that they had stopped the working of a water-mill belonging to the plaintiffs for a considerable period. One of the defendants entered in the plaint was dead before the plaint was filed. On this account the munsif dismissed the suit *in toto* and the order was upheld by the learned District Judge. *Held* that it was a trite proposition that the liability of a wrong-doer in tort is joint and several and that it was open to the Court to strike his name out and allow the suit to proceed against the others. (*Campbell, J.*) MT. PHILLO *v.* GOPI. **72 I. C. 670 (2).**

———*Joint tort-feasors—Liability, if joint and several.*

The liability of joint tort-feasors is, as a rule, joint and several. But the rule is not inflexible and where there is no combination in the deprivation of the plaintiffs by the defendants, which though wrongful has been caused in good faith in assertion of an imperfect title, the strict rule of joint and several liabilities cannot be enforced. (*Sultan Ahmed, J.*) RAM BILAS SINGH *v.* AMIR SINGH. **61 I. C. 425 : 1 P. L. T. 235.**

Liability.

———*Liability of wrong doer—Damages—Alternative courses open to injured party—Wrongful attachment—Payment under coercion.*

A person interfered with in the lawful enjoyment of his own property is entitled to rid himself of that unlawful interference by any lawful means, and to hold the wrong-doer liable for damages. It is not open to the wrong-doer to prescribe by which of two alternatives the injured man

TORT—Liability.

shall put a stop to the wrong under which he is suffering. A payment made to prevent a wrongful attachment of property is one made under coercion and can be recovered back. The owner in such a case need not prefer a claim against the attachment under. O. 21, R. 58, C. P. C. (*Lord Moulton.*) KANHAIYALAL *v.* NATIONAL BANK OF INDIA, LTD. 40 Cal. 598 : 17 C. W. N. 541 : (1913) M. W. N. 406 : 13 M. L. T. 406 : 11 A. L. J. 413 : 17 C. L. J. 478 : 15 Bom L. R. 472 : 184 P. L. R. 1913 : 40 I. A. 56 : 18 I. C. 949 : 25 M. L. J. 104 (P. C.).

——*—Liability of East India Company and Secretary of State.*

The liability to be sued of Secretary of State now and that of old East India Company before 1858, in respect of torts is the same. The liability of East India Company is no less than that of Crown in England on a petition of right which extends to breach of contract also. The company was not liable for their servants' torts, unless their acts were authorised or ratified. The officer doing the act was liable, though in cases of acts done by the servants, apart from the exercise of Sovereign powers, the Company was liable for the servants' negligence, like a private employer. (*Wallis, J.*) A. M. ROSS *v.* SECRETARY OF STATE. 37 Mad. 55 : (1913) M. W. N. 758 : 19 I. C. 353 : 24 M. L. J. 429.

Malicious Proceeding.

See also MALICIOUS PROSECUTION.

——*Malicious proceeding—Reasonable and probable cause—Burden of proof.*

In execution of a decree, the officer of the Court went to judgment-debtor's house and attached some articles. The judgment-debtor thereupon filed a complaint of theft against decree-holder, which was found to be groundless. In a suit for malicious prosecution by decree-holder against judgment debtor, *held* where on the face of it, the charge brought by defendant against plaintiff is groundless, the plaintiff cannot be asked to give further evidence directly going to show that there was no reasonable and probable cause. (*Rafique, J.*) BISHUN SARUP *v.* BINDRABAN. 1923 All. 531.

——*Malicious proceedings actions for—Elements to be proceeded.*

The judgment of the Court which acquitted a person is not sufficient by itself to sustain an action for malicious prosecution but such person has to prove first that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made. (*Lindsay and Stuart, JJ.*) GOBERDHAN SINGH *v.* RAM BADAN SINGH. 67 I. C. 65 : 20 A. L. J. 284.

——*Malicious proceeding—Illegal attachment—Damages.*

Where goods are attached illegally and kept in the custody of a receiver the creditor at whose instance the attachment is made is liable for any injury or depreciation to the goods locked up rising from climatic conditions. (*Knox, A. C. J.*

TORT—Malicious proceeding.

and Banerji, J.) ABDUL RAHIM *v.* SITAL PRASAD. 41 All. 658 : 17 A. L. J. 856 : 54 I. C. 792 : 1 U P. L. R. (H. C.) 115.

——*Malicious proceeding—Detinue—Damages.*

Compensation for wrongful seizure is no more than damages for tort in detinue or trespass. Actual possession of the property and its deprivation must be proved. (*Walsh and Sunder Lal, JJ.*) NAIDER SINGH *v* GANGA DEI. 38 All. 676 : 35 I. C. 86 : 14 A. L. J. 729.

——*Malicious proceeding—Wrongful attachment—Suit for damages.*

In a suit for damages for wrongful attachment the plaintiff can claim both the value of the property and compensation for wrongful attachment. The plaintiff had a complete cause of action on wrongful attachment and his right to relief was not impaired by subsequent occurrences for which he was not responsible. 3 Bom. 74, Foll. (*Stanley, C J. and Banerji, J.*) BISHAMBAR NATH *v* GADDAR. 33 All. 306 : 9 I C. 317 : 8 A. L. J. 92.

——*Malicious proceeding—Wrongful attachment.*

A suit for damages for wrongful attachment of moveables is maintainable against a decree-holder where he pointed out that property is that of the judgment-debtor. (*Mookerjee, A. C. J. and Fletcher, J.*) BHUSAN CHANDRA PAL *v.* NORENDRA NATH KOER. 60 I. C. 280 : 32 C. L. J. 236.

——*Malicious proceeding—Damages.*

No suit lies for damages against a person who institutes a civil action against another maliciously and without reasonable and probable cause. (*Asutosh Mookerjee, Fletcher, N. R. Chatterjea, Teunon and Chaudhury, JJ.*) NORENDRA NATH KOER *v.* BHUSAN CHANDRA PAL. 57 I. C. 375 : 31 C. L. J. 495. (F B.)

——*Malicious proceeding — Attachment—Malice—Proof of.*

To sustain a claim for damages for wrongful attachment of property plff. must establish not only want of reasonable and probable cause but also malice in fact on the part of the person attaching the property. 35 Mad. 598, Foll. (*Shadi Lal, J.*) HUKAM CHAND *v.* UMAR DIN. 54 I. C. 827.

——*Malicious proceeding—Illegal search—Person assisting.*

A person who assists in the conduct of a search by a Police Officer entitled to make a search under the Cr. P. C. is not liable in damages if the search proves to be illegal. (*Seshagiri Aiyar and Phillips, JJ.*) ASAN ALLAR *v.* MASILAMANI NADAR. 42 Mad. 446 : 20 Cr. L. J. 422 : 51 I. C 198 : (1919) M. W. N. 452 : 25 M L. T. 274 : 36 M. L. J. 252.

——*Malicious proceeding — Attachment — Notice issued on application.*

A mere application for attachment before judgment does not give rise to a cause of action for a suit for damages for malicious attachment. An improper procuring of the process of the Court by the application of such process in an improper

TORT—Malicious proceeding.

manner and for the improper purposes does not amount to an abuse of the process of the Court. 35 Mad. 598 ; 42 Cal. 550 Rel. (*Sadasiva Aiyar and Napier JJ.*) RAMA IYER *v.* GOVINDA PILLAI. **39 Mad. 952 : 32 I. C. 448 : 3 L. W. 82 : (1916) 1 M. W. N. 156 : 30 M. L. J. 180**

——*Malicious proceeding—Illegal distraint—Nature of suit.*

An action for damages for distraint illegally levied by a person on certain moveables belonging to the plff. is not in the nature of a suit for recovery of specific moveables appropriated by the deft. or their value. The maxim applies to an action for damages for illegal distraint of certain moveables by the plff. (*Benson, O. C. J. and Abdur Rahim J.*) SUMMALA NAGABHUSHANA *v.* SRI RAJAH VENKATADRI. **23 M. L. J. 255 : 17 I. C. 226 : (1912) M. W. N. 899 : 12 M. L. T. 383.**

——*Malicious proceeding—Wrongful attachment—Damages.*

In an action for damages for wrongful attachment of a person's property for revenue due from a stranger, no malice need be proved because the act itself is *prima facie* wrongful. (*Sundara Aiyar and Spencer, JJ.*) RAMASWAMI IYENGAR *v.* MUTHUSWAMI AIYAR. **13 I. C. 799 : (1912) M. W. N. 42.**

——*Malicious proceeding—Wrongful attachment—Costs of proceedings for releasing.*

Where in execution, a person objects to an attachment of property and has under an erroneous decision to pay the costs of the other side, he can recover the sum so paid as damages for having been compelled to pay costs. (*Stuart, J. C.*) MAIKU LAL *v.* NAZIR AHMAD. **55 I. C. 657 : 7 O. L. J. 310**

——*Malicious proceeding — Civil suit — Damages.*

In general, the malicious institution of civil proceedings without reasonable and probable cause is not an actionable wrong. The aggrieved party is sufficiently indemnified by costs. 4 Cal. 583, Foll. An agreement to make a false defence in a civil suit is not a actionable wrong. (*Mullick, J.*) DHARBANGI THAKUR *v.* MAHABIR PRASAD. **41 I. C. 522.**

——*Malicious proceeding.*

In the absence of proof of malice no suit will lie for damages for wrongfully obtaining the appointment of a Receiver (*Maung Kin, J.*) M. M.P.L.K. CHETTY *v.* SUPAYA MAISTRY. **56 I. C. 960 : 12 Bur. L. T. 239.**

——*Malicious proceeding — Execution — Claim petition.*

It is a tort to wrongfully obtain process of execution or an interlocutory process in a suit, but not to wrongfully intervene with a claim petition, in execution proceedings. 1 Bom. 467, Rel. on. (*Pratt, J. C. and Hayward, A. J. C.*) HASSOMAL HEMANDAS *v.* CHIMANLAL. **24 I. C. 261 : 7 S. L. R. 104.**

——**Maxims.**

See MAXIMS.

——**Negligence.**

——*Negligence — Railway — Derailment — Removal of rails—Onus of proof.*

TORT—Negligence.

The plaintiff a passenger in a railway was injured by reason of a train of the deft. Railway Company in which he was a passenger leaving the line and being wrecked. The immediate cause of the accident was the removal of a rail, which the Railway Co. pleaded had been effected maliciously by some unknown person who was not traceable. *Held*, that though the onus of proof that the plaintiff's injuries were not due to the negligence of the Ry. Co, was upon them that upon the evidence they had discharged that onus. Judgment of the High Court (*Sanderson, C J*, dissenting) reversed. (*Viscount Finlay.*) EAST INDIAN RAILWAY COMPANY *v.* KIRKWOOD. **48 Cal. 757 : 15 L. W. 248 : 1922 P. C. 195 (P. C.).**

——*Negligence — Contributory—Breach of warranty.*

Vendor sold goods wrongly labelled ; the purchaser's servant acted upon the label and the instructions thereon and damage was caused to the purchaser. The vendor's plea of contributory negligence would fail as it was his duty to put on right labels. (*Lord Sumner.*) BRITISH SOUTH AFRICA CO. *v.* LENNON LIM. **34 I. C. 273.**

——*Negligence—Railway Company—Measure of care—Contract to the contrary—Personal injuries.*

If a passenger has entered a train on a mere invitation or permission from a Railway Company without more, and he receives injury in an accident caused by the negligence of its servants, the Company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law and in the latter case as *informa tort*. But in either view, this general duty may, subject to such statutory restrictions as may be, be superseded by a specific contract, which may either enlarge, diminish or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of justice. The specific contract, with its incidents, either expressed or attached by law, becomes in such a case the only measure of the duties between the parties and a party cannot by any device of form get more than the contract allows him. If the contract deprives the passenger of the duty of care which he is *prima facie* entitled to expect that the Railway Company has accepted, the latter must prove that the passenger has assented to the special terms imposed. Thus he may be shown to have done either in person or through the agency of another (*Haldane, L. C.*) GRAND TRUNK RY. CO. OF CANADA *v.* ROBINSON. **19 C. W. N. 905 : 31 I. C. 684 : 84 L. J. (P. C.) 194. (P. C.)**

——*Negligence — Contributory — Riparian owner.*

An owner A of land through which a river flows is not bound to clear it up and if more water flows to B's land owing to the river being silted and the latter builds a dam the effect of which is to cause flood on A's land, B is liable to A and A is not guilty of contributory negligence.

TORT—Negligence.

(*Karamat Hussain and Chamier, JJ.*) BALDEO SINGH *v.* JUGAL KISHORE.
33 All. 619 : 10 I. C. 564 : 8 A. L. J 640.

——*Negligence—Dog—Ferocious animal—Injury due to dogbite—Invitation.*

Plaintiff had made bets on horse-races with the defendant on October 9, 1920. She went to the house of the latter at about 7-30 P. M. on October 11, to recover moneys she had won. She went up the steps of the house, and having crossed the verandah, looked into a window of the sitting room and was making for the door of the dining room with the object of entering it, when she was attacked by a dog which was chained to the door inside the room. The dog bit her on the left thigh and right knee. When she peeped into the window, the defendant noticed her and shouted out to prevent her from going towards the dining room door : but the shout was not heard by the plaintiff in time. The dog being not ferocious, but was habituated to bite when chained and on guard and in January 1920 it had attacked and bitten a customs peon. The plaintiff had, on a previous occasion been taken by the defendant's wife into the dining room ; and the sitting room was used as sort of club to play cards and billiards. In a suit for damages by the plff. against the defendant *Held*, that to put a dangerous dog behind the door in a room is just as much a trap to an innocent passer by as if there were a hole or man trap which might cause him injury and that the plaintiff who came on an implied invitation was entitled to damages. The liability of the occupier is only commensurate with the extent of the invitation. Where, therefore, the occupier of the premises has placed a notice warning persons of the existence of danger, and a person disregards the notice, or the circumstances show that the limits of the invitation have been otherwise exceeded the liability is limited in a corresponding degree and if the invitee wanders about in such a way as to be unable to see if there is danger or not, or if he knows the danger and undertakes the risk, the occupier of the premises is not liable. (*Fawcett, J.*) MARY LENNON *v.* PERCY FISHER.
25 Bom. L. R. 873 : 1924 Bom. 207.

——*Negligence—Injury to passenger travelling by Railway—Negligence of fellow passenger.*

The plaintiff was a second class passenger in the mail train of the defendant Railway. He made his journey in a compartment having seven berths, three of which were suspended from the roof and a ladder was kept to get into the upper birth. On the day the plaintiff travelled, he occupied the middle lower berth and stretched himself at full length and went to sleep. Some one among the passengers had folded the ladder and kept it in a rack near the roof of the compartment. While the train was running, the ladder fell on the plaintiff's head and caused him injuries In a suit by the plaintiff for damages caused by negligence against the defendant Railway. *Held* that there was no proof of negligence on the deft's part and the suit was not maintainable. (*Crump, J.*) VISHNU DIGAMBER *v.* B. B & C. I. RAILWAY.
25 Bom L. R. 881 : 1924 Bom. 278.

TORT—Negligence.

——*Negligence—Liability—Damages.*

In an action for damages for negligence the burden of proving that the injury was got by an act or omission of the defendant for which he was in law responsible lies on the plff. The maxim '*res ipsa-loquitor*' applies to those cases only when the facts already established are such that the proper and natural inference therefrom is that the injury was the result of the deft.'s negligence. (*Kajuji, J.*) CATES B. E. *v.* MONGAINI BROS. **42 I. C. 82 : 19 Bom L. R. 778.**

——*Negligence—Railway Company—Level crossing—Engineer passing along the line—Damages.*

Defts. were contractors working for a Railway Company, who had constructed two lines crossing a highway for which no gate or gateman was provided. The trucks and engines on the line were under the control of defts. whose duty was to safeguard the public by proper watching and lighting. The driver of the plff.'s motor car saw some trucks moving along the line crossing the road and in order to avoid collusion swerved and damaged the car by running into a heap of stones. Deft.'s agreement with the Railway Company to take proper precautions could not relieve the company of responsibility to the public, nor could it entitle persons using the highway to sue defts. for failure to perform the duty cast on the Company. Accordingly plff. had no cause of action against defts. so far as the omission to provide gates or lighting was concerned as there was no privity of contract between plaintiff and the defendants. But defendants were liable to the plaintiff for negligent act of their servants in the course of user of the Railway lines crossing the highway. (*Kemp, J*) ABDUL LATIFF SHAIK HUSSAIN *v.* PAULING & CO., LTD.
38 I. C. 773 : 19 Bom. L. R. 167.

——*Negligence—Municipality--Non-feasance.*

The exemption from liability of local bodies for non-feasance is confined to neglect of high ways and does not extend to drainage works which they are bound to repair so as not to be a nuisance to neighbouring owners. (*Scott, C. J. and Batchelor, J.*) DHOLKA TOWN MUNICIPALITY *v.* DESAI BHAI. **38 Bom. 116 : 21 I. C. 847 : 15 Bom. L. R. 1034.**

——*Negligence—Liability—Driving in motor—Skill, measure of.*

Driving of motor car being a skilled occupation the defendant was bound to act to the best of his skill which must be such as others of that occupation may reasonably be expected to possess. Where the defendant while driving a friend in his motor car went on an excessive speed and met with an accident which injured his friend. *Held*, he was grossly and culpably negligent so as to be liable in damages. (*Scott, C. J. and Batchelor, J.*) SORABJI HORMUSJI *v.* JAMSHEDJI MERWANJI. **38 Bom. 552 : 21 I. C. 705 : 15 Bom. L. R. 959.**

——*Negligence — Contributory — Damages. against a Railway Company.*

In order that a plea of contributory negligence may be successful, it must be shown either

that there was negligence on the part of the plff. which contributed to the accident or that deft. could not by using ordinary care have avoided the accident or that notwithstanding deft's negligence the plff. could by exercising ordinariy care have avoided accident. If the proximate cause of the injury is the negligence of the plff. as well as that of the deft. the plff. cannot recover anything. A passenger in a train with his arm projecting four inches out of the window came in contract with the open door of one of the stationary carriages of a train and fractured his arm. *Held*, that he cannot recover damages being guilty of contributory negligence. (*Dawar, J.*) JAHANGIR MUNCHIRJI LALI *v.* B. B. & C. I. RY. Co.

37 Bom. 575 : 19 I. C. 485 : 15 Bom. L. R. 252.

———*Negligence—Liability.*

The doctrine that negligent misrepresentation affords no cause of action applies when law lays down no duty to be careful. (*Scott, C. J. and Runnel, J.*) MERWANJI *v.* SECRETARY OF STATE. **16 I. C. 714 : 14 Bom. L. R. 654.**

———*Negligence — Contributory — Damages for injury got in attempt to board a tram car in motion*

A Tramway Company is not liable in damages for injuries sustained by a passenger in attempting to board a car in motion, the negligence being entirely on the part of the passenger. (*Dawar, J.*) TEMULJI JAMSETJI *v.* BOMBAY ELECTRIC SUPPLY AND TRAMWAY CO., LTD **35 Bom. 478 : 11 I. C. 362 : 13 Bom. L. R. 345.**

———*Negligence—Rule of the road*

The rule of the road is not an invariable or inflexible rule and a deviation may be not only justifiable but actually necessary. (*Russel and Batchelor, JJ.*) JAHANGIR D. DAVER, *In re.* **13 Bom. L. R. 126 : 9 I. C. 945 : 12 Cr L. J. 167.**

———*Negligence—What is—Proximate and remote cause of injury.*

Negligence is the effective cause of an injury when it has in fact brought about that injury as a direct and natural consequence. When negligence has been established, liability follows for all the consequences which are in fact the direct and natural outcome of it, whether the injury is a consequence that was foreseen or not. To determine responsibility the law will consider the proximate and not the remote cause of an injury. (*Mookerjee and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. *v* EASTERN ASSAM CO., LTD. **47 Cal. 1027. 61 I. C. 14 : 33 C. L. J. 72.**

———*Negligenoe—Railway Company—Level crossing gate left open.*

Where a gate at a level crossing is left open, it is an invitation to all comers to cross the line and an accident at that place points to negligence of the Railway Company. (*Jenkins, C. J. and Mookerji, J.*) BENGAL PROVINCIAL RAILWAY *v.* GOPI MOHAN SINGH. **23 I C 788 : 41 Cal. 308 : 18 C. W. N. 325.**

———*Negligence—Contributory.*

Contributory negligence is proved either where plff. was negligent and the deft. could not by ordinary care have avoided the accident or where notwithstanding deft.'s negligence, plff. could by ordinary care, avoid the accident. Where both parties are negligent plff. cannot recover anything. (*Shah Din and Scott Smith, JJ.*) FATEHCHAND *v.* MENGHIBHAY. **109 P. R. 1913 : 108 P.W.R. 1913 : 19 I.C. 481 : 181 P. L. R. 1913.**

———*Negligence—Municipal body—Damage—Liability of Committee.*

When the bursting of a water pipe is beyond the control of the Committee the latter will not be held to have been negligent in respect of the actual breaking of the pipe, but if damage results from the negligence of the servants of the Committee in failing to take proper action when the damage is brought to its notice, the Committee will be responsible. It is the duty of the Committee to employ servants who can be trusted to exercise due skill and care in cases when injury is caused to private property. (*Kensington and Beadon, JJ.*) MUNICIPAL COMMITTEE OF LAHORE *v.* NAND LAL. **18 I.C. 816 : 88 P.R. 1913 : 87 P.L.R. 1913 : 95 P.W R. 1913.**

———*Negligence—Railway accident—Trap—contributory negligence.*

The plaintiff a child of seven sustained injuries by being run over by an engine when crossing a Railway line at a point where to the knowledge of Railway authorities villagers crossed the line as licensees. The driver and fireman did not keep a proper look out on the occasion though they knew of the special danger. *Held* the plaintiff was entitled to damages. If a Railway Company allows children to spring over its lines it has to take all the precautions which though unnecessary in the case of adult are necessary to protect children against their own thoughtlessness. In their case ordinary negligence is sufficient to maintain an action, while in the case of adults a trap alone would render them liable. It is not contrioutory negligence on the part of the children walking over the railway lines unaccompanied by the parents though it may be negligence of the parents. (*Coutts Trotter, J.*) JAYAMMAL *v.* M.S.M. RY. COMPANY. **46 Mad. 929 : 45 M.L.J. 545 : (1923) M.W.N. 878 : 18 L W 933 : 1924 Mad. 312.**

———*Negligence—Railway Company—Unprotected and unlighted pit on the platform—Injuries—Liability.*

Where the plff. fell into an unprotected and unlighted pit on railway platform when he was waiting for a train and trying to get into a latrine, the company is liable in damages for not keeping the place lighted at the time. (*Coutts Trotter, J.*) MACK *v.* M. S. M. RY. COMPANY LTD. **45 M. L. J. 424 : 33 M. L. T. (H. C.) 66 : 1924 M. 154.**

———*Negligence—Measure of—Damages—Physical injuries.*

In awarding damages for physical injuries caused to plaintiff by the negligence of the defendant the amount of compensation must be fair and reasonable, an absolute compensation is not the true measure of damages. The Court should not give the value of an annuity for the same amount as the pla ntiff s average income for the rest of his life. In a suit for damages the

plaintiff can at any stage of the suit amend his plaint and enhance his claim for damages but the application for amendment should be before the commencement of the trial. An appellate Court can form its own opinions on the reason given by the lower Court for the award and measure of damages, but it cannot interfere with the amount unless it is considered to be excessive. (*Wallis, C J. and Sadasiva Aiyar, J.*) VINAYAGA MUDALIAR *v.* PARTHASARATHI AYYANGAR. **7 L.W. 415 : 45 I.C. 556 : 23 M.L.T. 312.**

——*Negligence—Municipal body—Statutory body—Liability—Contractor, employment of.*

Where statutory bodies are entrusted with the performance of public duties, their liability cannot be shifted to a contractor employed by them for a particular purpose. They may bargain with the contractor for performance of the duty but are not thereby themselves relieved from liability to persons injured by their failure to perform it. (*Seshagiri Aiyar and Napier, JJ.*) MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* WILLIAM FOSTER. **44 I.C. 308 : 41 Mad. 538.**

——*Negligence—Contributory—Damages.*

The principle of contributory negligence has no application to a case simply because the plff. did not at the earliest possible opportunity removed the obstruction caused by the deft. to a water course. (*Chapman and Mullick, JJ.*) RAGHUNATH SINGH *v.* ACHUTANAND. **43 I.C. 374 : 3 Pat. L. W. 283.**

Nuisance.

——*Nuisance—Trees— Branches over-hanging.*

A person has a right to remove the branches of a tree which overhung his house. 19 Bom 420, 31 Cal. 944, Foll. (*Rafique, J.*) DEO DUTT PANDEY *v.* KAULESHAR DUBE. **28 I. C. 843.**

——*Nuisance—Over-hanging trees—Injunction.*

A person has a right to cut off those portions of trees which overhang his land. He cannot sue to obtain an injunction to remove his growth even if he is unable to prove actual damage. (*Shah and Kemp, JJ.*) VISHNU *v.* VASUDEO. **47 I. C. 629 : 43 Bom 164: 20 Bom. L.R. 826.**

——*Nuisance—Test of—When actionable.*

In estimating a nuisance due regard should be paid to the station in life of the plaintiff and the locality and nature of the nuisance itself. The legal rights of the individuals cannot be allowed on penal considerations, to be encroached upon mere policy, or abstract public rights. In an action for nuisance it is no answer to say that the defenda t has done everything in his power to prevent its existence. (*Beaman, J.*) BAI BHICAIJI *v.* PERAJSHAW JIWANJI. **33 I.C. 192 : 40 Bom. 401 : 17 Bom. L. R. 1040.**

——*Nuisance—Overhanging branches and penetrating roots—Injunction.*

Every owner of land is under an obligation not to allow the roots and branches of his trees to exceed so as to penetrate his neighbour's land and in case of breach of such an obligation, it is

open to the Court to grant a mandatory injunction for the removal of the nuisance under S. 55 of the Specific Relief Act. (*Mookerjee and Panton, JJ.*) BHUDEB *v.* KALA CHAND. **66 I.C. 536 : 34 C.L.J 315.**

——*Nuisance—Public way—Obstruction—Right of suit—Special damage.*

The special damage which must be proved by a private person to give him a right to sue for obstruction of a public pathway must be one which is peculiar to that private person and different from that suffered in common with every one else who attempts to use the road. It does not mean serious damage but means damages of a special nature. (*Newbould and Panton, JJ.*) BATIRAM KOLITA *v.* SIBRAM DAS. **61 I.C. 405 : 25 C.W.N. 95.**

——*Nuisance—Public nuisance —Special. damage.*

Where one member of the public has suffered special damage by the obstruction of a public pathway so that he loses convenient access to his house, he can maintain a suit for declaration and injunction for the removal of the said obstruction. (*Mukerji, A. C. J. and Fletcher, J.*) KALI NATH *v.* NAIMUDDI. **60 I. C. 711.**

——*Nuisance—Ancient lights—Interference with—Remedy—Points for consideration.*

The remedy for interference with ancient lights is a suit for nuisance for which there should be sensible abridgment of the light so that occupation is rendered uncomfortable or to a sensible degree less fit for business purposes. The previous standard of affairs woule be a necessary standard for comparison, but light from other sources to which no right has been acquired by grant or prescription should not be taken into account. (*Jenkins and Woodroffe. JJ.*) P. C. PAUL *v.* WILLIAM RABSON. **12 I.C. 60 : 39 Cal. 59.**

——*Nuisance—Public thoroughfare of place set apart for a particular section of public—Distinction between.*

There is a distinction between a public thoroughfare and a place set apart for the use of a particular section of the public. (*Martineau, J.*) POKHAR DAS *v* RAGHU RAM. **62 I. C. 888 (1).**

——*Nuisance—Noise.*

Mere noise alone if produced by several persons might amount to a nuisance capable of being remedied by an injunction. (*Bevan Petman, J.*) JAWAND SINGH *v.* MUHAMADDIN. **51 I. C 728.**

——*Nuisance—Liability for—Act done in pursuance of statute—Effect—Permissive and obligatory duties—Madras District Municipalities Act, Ss.* 207, 263 (*a*) *and* 278—*Latrine.*

A private owner in pursuance of an order of a Municipal Council and with its approval erected a latrine which became a nuisance to the neighbouring owner. *Held*, that the provisions of S. 278 of the District Municipalities Act was no bar to an action against the private owner, for damages for nuisance and for an injunction and that no decree can be passed for demolishing the

TORT—Nuisance.

latrine but only for restraining the owner from using the building as a latrine. The permission given to the Municipality to supervise the erection by a private individual of a latrine is a permissive obligation which should be exercised without unnecessary detriment to private rights. (*Seshagiri Aiyar and Phillips, JJ.*) RAMA RAO v. MARTHA SEQUEIRA. **42 Mad. 796 : 26 M L T 122 : (1919) M.W N. 618 : 10 L.W. 147 : 52 I. C. 921 : 37 M.L.J. 224**

——— *Nuisance—Oil Mill—Noise—Cowdung and smell.*

It is an actionable nuisance to erect an oil mill close to a dwelling house emitting foulsmelling gas and water and producing unbearable noise. Where the nuisance cannot be abated it can be prohibited. The locality in question, the long standing nature of the nuisance, existence of similar trade in the locality are some of the important points which should be considered in deciding whether a particular business carried on in a locality is an actionable nuisance (*Wallis, C J. and Sadasiva Aiyar, J.*) SADASIVA CHETTY v. RANGAPPA RAJOO.

(1918) M.W.N. 293 : 24 M L.T. 17 : 45 I C. 428 : 7 L.W. 505.

——— *Nuisance—Elements of—Act offending susceptibilities of a person—If ipso facto a nuisance.*

To constitute nuisance in law there must exist expressly or impliedly (1) *injuria* and (2) *damnum. Damnum absque injuria* gives no right of action; where an act or omission causing the alleged nuisance is *per se* unlawful; damage is presumed; but when the act is lawful, the circumstances of the particular case are to be considered, to see if it is an actionable nuisance. An act offending the susceptibilities of a person or the sentiments of a particular class is not *ipso facto* an actionable nuisance, but the locality has an important bearing, in deciding the actionable nature of a nuisance. Any one of the persons in the neighbourhood affected by the establishment and maintenance of a slaughter-house may sue for an injunction. The motive underlying a complaint of nuisance is relevant in a case of injunction. (*Stanyon, A.J.C.*) MUNICIPAL COMMITTEE OF SAUGOR v. NILKANTH.

41 I.C. 62 : 11 N.L.R. 132

——— *Nuisance—Overhanging trees—Right to cut off.*

It is established law that in the absence of any express stipulation to the contrary the owner or occupier of the land over which the offending branches hang is entitled as of right to remove them or to have them removed. The fact that the party complaining has merely a leasehold and not a freehold would not appear in any manner to alter the case. (*Duckworth, J.*) MAUNG PO THAUNG v. MA GYI AND ANOTHER.

1 R. 281 : 2 Bur. L. J. 136 : 1923 R. 205.

——— *Nuisance—Tree overhanging—Right to cut off branches.*

A man may lawfully cut off the branches of a tree belonging to another overhanging his property without even giving notice to the owner. (*Maung Kin, J.*) MAUNG SHWE LA v. MA KIN.

42. I C. 92.

TORT—Secretary of state.

Principal and Agent.

——— *Principal and agent—Liability of master.*

A person who employs an independent contractor cannot be convicted for an obstruction caused by the contractor or his men and not authorized by him. (*Banerji, J.*) LALTA PRASAD v. EMPEROR. **22 Cr. L.J. 331 : 61 I.C. 59 : 19 A.L.J. 125.**

——— *Principal and agent*

Whenever any question as to the liability of a principal for the acts of his agent arises "the sole test is the scope of the agent's authority." (Per *Roe, J.*) (*Mookerji and Roe, JJ.*) SHER JAN KHAN v. ALI MUDDI. **43 Cal. 511 : 20 C. W. N. 268 : 34 I. C. 598 : 23 C. L. J. 225.**

——— *Principal and agent—Fraud.*

A principal is liable for the fraud of his agent acting within his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Acts of fraud by the agent committed in the course and scope of his employment are not exceptions to the rule by which the principal is liable for the acts of his agent though he did not in fact authorize the fraudulent act. (*Mookerjee and Roe, JJ.*) SHER JAN KHAN v. ALI MUDDI. **43 Cal. 511 : 20 C. W. N. 268 : 34 I. C. 598 : 23 C. L. J. 225.**

——— *Principal and agent—Suppression of accounts—Presumption.*

Where a trustee or agent by his tortious acts makes it impossible for the other party to discover the state of property, every presumption consistent with established facts ought to be made. (*Das and Ross, JJ.*) GOBIND DUBEY v. PARMESHWAR DUBEY. **62 I. C. 83 : 2 Pat. L. T. 365.**

Public Officer.

——— *Public officer.*

Neither the Secretary of State nor the Collector is responsible in tort for acts or defaults of the Collector done in official capacity. If the Collector incurs liability by negligence, that liability cannot be said to have been incurred on behalf of Government of India. In a suit against the Secretary of State the plaint as drawn must disclose the relation between the Collector and the Secretary of State. (*Scott, C. J. and Russel, J.*) MERVANJI v. SECRETARY OF STATE.

16 I. C. 714 : 14 Bom. L. R. 654.

——— *Public Officer—Liability—Exemption.*

An officer acting honestly in discharge of his duty is not liable, though acting on false report. (*Woodroffe, Coxe and Chatterji, JJ.*) D. WESTON v. PEARY MOHANDAS. **40 Cal. 898 : 62 I. C. 25 : 18 C. W. N. 185.**

Secretary of State.

——— *Secretary of State—Jewels produced in Criminal Court—Court wrongly giving over to third party—Suit for damages against Secretary of State.*

TORT—Secretary of State.

Where a jewel which had been pawned to the plaintiff was directed to be produced in a criminal court, but at the conclusion of the case was erroneously directed to be returned to its owner. *Held*, as the court was not a servant or agent of the Secretary of State, a suit for damages against him would not lie. (*Rafiq and Piggott, JJ.*) PANCHATI AKHARA MAHA NIRBANI *v.* THE SECY. OF STATE FOR INDIA IN COUNCIL.
20 A. L. J. 420 : L. R. 3 A. 315 : 44 All. 573 : 4 U. P. L. R. (A) 203 : 1922 All. 276

——*Secretary of State—Liability—Negligence of servants in keeping gravel on a military road—Maintenance of the road by P. W. Department—Injury to plaintiff—Government of India Act*, 1833, S. 4.

Plaintiff's carriage was capsised by one of its wheels running over a heap of gravels stacked on a military road maintained by the Public Works Department by a contractor. In a suit by the plaintiff for damages against the Secretary of State, *held*, that the provision and maintenance of roads especially military roads is one of the functions of the Government though in India it is now largely delegated by statutes to Municipalities and Local Boards, that the Act complained of cannot be said to have been done in the conduct by Government of undertakings which might have been carried on by private persons and no claim for damages lay. Tests laid for ascertaining liability of the Government in tort. Cases reviewed. (*Wallis and Seshagiri Aiyar, JJ.*) SECRETARY OF STATE *v.* A. COCKCROFT.
39 Mad. 351 : 27 I. C. 723 : (1915) M. W. N. 39.

Statutory body.

——*Statutory body—Non-feasance—Liability for.*

No action for damages lies against a public body unless it amounts to carelessness or negligence in the discharge of their statutory duties. If, however, the acts done by a public body are only permissive the piwak rights of parties must be respected and such body is liable in damages for injury caused to private individuals. 28 Mad. 72 ; 27 Bom. 344 ; (1902) A. C. 213, 226 ; 31 Mad. 117, Ref. (*Seahagiri Aiyar and Phillips, JJ.*) KRISHNA MURTHI IYER *v.* TALUK BOARD OF MAYAVARAM.
42 Mad. 331 : 9 L. W. 353 : 50 I. C. 809 : 36 M. L. J. 372.

Trade Mark.

See TRADE MARK.

Trespass.

——*Trespass—Suit by mortgagee to recover rents received by mortgagor—Nature of.*

Where a mortgagor having no shadow of right to take the rents of the mortgaged property realises such rents he is liable not only for a tort but also a breach of contract. (*Walsh, J.*) HARPAL *v.* RAMSARUP.
34 I. C. 173.

——*Trespass—By a person upon himself.*

It is a matter of grave doubt whether a man can be a trespasser on himself. (*Beaman, J.*) PEERBHOY *v.* EBRAHIM.
13 Bom. L. R. 717 : 12 I. C. 225 : 36 B. 214.

TORT—Trespass.

——*Trespass—Essentials of—Use of force—Justification.*

Unlawful entry is not an essential element to constitute trespass. The mere fact that there was a general notice forbidding trespass is not sufficient to dispense with a request to withdraw. Before force is used a trespasser must always be given an opportunity of withdrawing peacefully. (*Newbould and Panton, JJ.*) KUMUD KANTA CHAKRABURTHY *v.* BIGNOLD.
1923 Cal 306.

——*Trespass—Wall built on underground foundations—Remedy*

A person who superimposes a wall on footings or foundations belonging to another, commits trespass, and the proper remedy is a mandatory injunction to have the wall removed. (*Mookerjee and Fletcher, JJ.*) LEVY *v.* EZRA.
62 I. C 199 : 33 C. L. J. 26.

——*Trespass—Interference with exercise of proprietary rights—Liability.*

A person who interferes unlawfully with the exercise of the property of another commits trespass and is liable for damages in an action for trespass. (*Mookerjee, O. C. J., Fletcher, Chatterjee, Teunon and Chaudhuri, JJ.*) NORENDRA NATH KOER *v.* BHUSAN CHANDRA PAL.
57 I. C. 375 : 31 C. L. J. 495 (F. B.).

——*Trespass—Ejectment—Tenant in possession under lease.*

Per *Sanderson, C. J.* and *Mookerjee, J.*—If the land is in tenant's possession he should sue for trespass committed in respect of the land. The reversioner can sue only if the alleged trespass is injurious to the reversioner as in the case of nuisance or waste. Per *Sanderson, C. J.*—Though the trespass is accompanied by a claim as of right it need not always be injurious to the reversion. *Boxtor* v. *Taylor*, 4 B and Ad. 72, Ref. Case law discussed. (*Sanderson, C.J. Woodroffe and Mookerjee, JJ.*) RAMACHANDRA SIL *v.* RAMANMANI DASI.
36 I. C. 890 : 20 C. W. N. 773.

——*Trespass—Arrest of ship—Action in rem.*

An ordinary suit for trespass in the absence of proof of malice or its equivalent does not lie for the arrest of a ship. The arrest of a ship in view of a suit instituted in the High Court as a Colonial Court of Admiralty for the amount alleged to the due for maritime necessaries is a judicial act of the Court and an ordinary step in an action *in rem*. When the possession of the subject in suit is with the Court, the competing parties are simply preferring their claims in the ordinary course of law and any damages which the successful party may suffer from the continuance of the litigation are due to law's delay and not to any legal wrong done by the unsuccessful party. (*Jenkins, C. J. and Stephen, J.*) MADRAS STEAM NAVIGATION CO., *v.* SHALIMAR WORKS, LTD.
28 I. C. 463 : 42 Cal. 85.

——*Trespass—Damages—Measure of.*

The plaintiff's cutchey containing grain was threatened with *diluvion* and his men attempted to erect a new one on another side, which

TORT—Trespass.

defendant claimed as his and resisted the erection. The cutchey along with the grain was washed away. In a suit for damages for loss of goods ; *Held* that the defendant's resistance to erecting a new cutchey was only a remote cause of the damage especially since the defendant did not resist the removal of the grain by the plaintiff or his men. (*Jenkins, C. J. and Mookerjee, J.*) TRIBENI PROSAD SINGH *v.* SHEIKH BASIRAL MEAH. 21 I. C. 513 : 18 C. L. J. 327.

———*Trespass—Defence—Mistake.*

It is no defence to action for trespass that the act was done intentionally but by mistake, though the mistake is honest and inevitable. The liability is established even in absence of malice or reasonable or probable cause. (*Mookerjee and Carnduff, JJ.*) BHUT NATH PAL *v.* CHANDRA BENODE PAL. 16 I. C. 443 : 16 C. L. J. 34.

———*Trespass—Personal liability.*

Where a notice under S. 167 B. T. Act was served on one A for giving up possession as the property was purchased by the person giving notice, but the possession was not given up and A was sued for possession but on the death of A during the pendency of suit her sons were made defts. *held* the retention of possession was a tortious act by A and therefore A was personally liable. Her sons are liable for mesne profits before her death to the extent of her estate come to their hands and as to mesne profits after her death, they were personally liable. (*Brett and Sharfuddin, JJ.*) NAFAR CHANDRA PAL *v.* KAMINI KUMAR LAHIRI. 16 I. C. 205 (2) : 18 C. W. N. 542.

———*Trespass—Action for proper parties—Bengal Tenancy Act, (VII of* 1885) S. 188.

In an action for damages for trespass and cutting of trees, all the persons aggrieved are not necesssry parties and so any one who has been damnified may maintain an action singly. S.188 of the Bengal Tenancy Act does not apply to such a case though the plff. be a co sharer landlord and the deft. an *under raiyat.* 25 Cal 285 ; 6 C. L. J. 383: 2 C L J 496 Foll. (*Mookerjee and Teunon, JJ.*) FATIK CHANDRA RAI *v.* ATLAS BIBI. 14 I. C. 478 : 15 C. L. J. 225.

———*Trespass—Defence—Mistake.*

An honest or inevitable mistake cannot be pleaded as a defence by a person who has intentionally interfered with the person or property of another and therefore, if a litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity or any other reason and thus commits trespass he is liable in an action for trespass; it is not necessary to prove malice or want of reasonable or probable cause. *Painter* v. *Liverpool Gas Light Co.* 3 A and E 433. *Brooks* v. *Hoderkinson* 4 H and N. 712 Ref (*Mookerjee and Carnduff, JJ.*) BISHUN SINGH *v.* A.W.N. WYATT 16 C. W. N. 540 : 11 I.C. 729 : 14 C. L. J. 515.

———*Trespass—Ejectment.*

The plff. who is not bound by a sale can succeed in ejecting the deft as a trespasser. (*Abdul Raoof and Harrison, JJ.*) AMAR CHAND *v.* RAM RAKHA. 67 I. C, 941: 3 Lah. L. J. 402.

TORT—Miscellaenous.

———*Trespass—Immoveable property—Standing crops.*

Standing crop is immoveable property and an illegal attachment of the same is a trespass. (*White, C. J. Miller and Oldfield, JJ.*) KOTAGIRI VENKATARAMANUJAN *v.* PATIBANDA BASAVAYYA. 14 M.L.T 225 : 21 I.C. 213 : (1913) M. W N. 869 : 25 M. L. J 447.

———*Trespass—Damages.*

An owner of immoveable property not in possession of it can claim damages from any one trespassing on it. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) CHILLAMUTHU *v.* MUTHUDAYAR SERVAI. 17 I.C. 740.

———*Trespass—Erection of projecting cornice.*

Erection of *chhajas* cornice in a house so as to project over a neighbour's land constitutes a trespass on that land. (*Lindsay. J. C.*) KUNJ BEHARI PRASAD *v.* BASDEO PRASAD. 47 I. C 950 : 5 O. L. J. 464.

———*Trespass—Overflood of water from reservoir—Damages.*

Where by an ancient custom, defendant was entitled to accumulate water in reservoir and the water overflowed owing to the deposit of silt in the bed of the reservoir and due to no "non-natural" acts of the defendant and damaged the piff.'s crops *held* the plaintiff had no right of suit for damages for the damage caused to his land and crops. *Rylands* v. *Fletcher* (1868) 3 H L 330 Not foll : 22 W R 279 (PC) Fol. (*Mullick and Jwala Prasad JJ.*) SHAH YAD ALI *v.* SHYAM PARTAB DUBEY. 41 I C. 382 : 2 Pat. L. W. 8.

———*Trespass—Ingredients—Proof.*

Trespass is the doing of an illegal act forcibly and without legal authority against the property of another. The illegality and the wrongful nature of the act must be established before trespass can be declared. If the act is not illegal, no right is infringed. (*Mullick and Atkinson, JJ.*) DANAI DAS *v.* GOVINDA GEDI. 1 Pat. L. J. 533 : 38 I. C. 132 : 3 Pat. L W. 159.

Wrongful dismissal.

———*Wrongful dismissal of trustee--Damages.*

Where a Temple Committee dismisses a trustee in an irregular manner without convening a proper meeting but by circulation of papers the dismissed is wrongful and the individual members of the Committee are liable in damages to the dismissal trustee. In such a suit by sucha trustee for damages it is not open to the members to plead sufficiency of grounds for the dismissal. (*Wallis, C. J. and Kumaraswami Sastri, J.*) VENKATA NARAYANA PILLAI *v.* PONNUSAWMI NADAR. 41 Mad. 357 : 33 M L J. 660 : (1917) M. W. N.839 : 22 M. L. T. 454 : 43 I. C. 205 : 7 L. W: 85.

Miscellaneous

———*Damages—Not necessary in suit for declaration of public right—Sanction of court.*

Special damages need not be proved in suit for obstruction of public right of way (*Panton, J.*) HARISH CHANDRA SAHA *v.* PRAN NATH CHAKRABARTHY. 26 C. W. N. 587.

TORT—Miscellaneous.

———*Tort committed by several persons acting in concert is same as one committed by single individual.*

Per Chatterjee, J—Combination may be an element of aggravation in the assessment of damages but it is not sufficient to makeit a different tort, (*Woodroffce, Coxe and Chatterjee, JJ.*) WESTON *v.* PIYARE MOHAN DAS. **40 Cal. 898 : 23 I. C. 25 : 18 C. W. N. 185.**

———*Damages—Use of land—In ordinary manner—Damage—Lowering level of land to make land culturable—Tank water coming upon land and overflowing into neighbour's land.*

Where an owner of land, without wilfulness or negligence, uses his land in the ordinary manner, though mischief thereby accrues to his neighbour, he is not liable for damages; but if, with a view to use the land in an unusual manner he brings upon his land water which would not naturally have come upon it he will be liable for damages for the escape of the water into the land of his neighbour. 28 L T 886; 7 H.L.C. 349, Rel; L R 3 H L 330 Ref. Defts lowered the level of their land so as to render it culturable and the water from an adjoining tank passed to the lands of the defts and subsequently overflowed into the lands of the plff. *Held* that as the defts had not used their lands in any artificial or unusual manner they were amply within their rights in what they did. 7 C W N 515; 18 L J C.P. 172: 13 Bur 862 Rel. The plffs. were not entitled to an injunction against the defts. to compel the latter to raise an embankment for their protection. L R 10 Ex 4, Ref. (*Mookerjee and Carnduff, JJ.*) KENARAM AKHULI *v.* SRISTIDHAR CHATTERJEE. **15 I. C: 543 : 16 C. W. N. 875.**

———*Assault—Compensation for—Costs incurred in prosecuting.*

In a suit for damages for a criminal assault the plff. is not entitled to include in his claim costs incurred by him in successfully prosecuting the deft. for the hurt caused to the plff. by the deft. (*Chevis and Shadi Lal, JJ.*) JAGANNATH *v.* HAKIM. **17 P. R. 1916: 176 P. L. R. 1915 : 30 I. C. 485 : 117 P. W. R. 1915.**

———*Corporal punishment on pupil—Privilege.*

Infliction of corporal punishment for enforcement of discipline is justifiable provided it is moderate. (*Oldfield and Venkatasubba Rao, JJ.*) SANKUNNI *v* VENKATARAMANI. **42 M. L. J. 460 : 45 M. 548 : 15 L. W. 501 : 31 M. L. T. 26: (1922) M. W N. 246 : 1922 M. 200.**

———*Law of—Tort justified by* lex loci—*Liability of servant for tort of master.*

The Law of Torts not having been codified in India there being no determinate law which has to be administered in adjudicating upon a personal tort committed outside the local limits of a Court jurisdiction, the Court ought to be guided by the rule of justice, equity and good conscience. Consequently a person should not be held liable in tort for an act which would be justifiable by the *lex loci* of the law of the place where the act was done; nor should he be held liable unless the act is wrongful by the *lex loci* or the law of the country where the Court is situated. Where an act is

TRADE MARK—Assignment of.

wrongful *per se* plea that the act was done under the directions of a superior officer, not subject to the jurisdiction of the Court, is of no avail though the result of the action will give rise to a moral claim of indemnity as against such a superior officer. (*Ayling and Tyabji, JJ.*) GOVINDAN NAIR *v.* ATCHUTA MENON. **39 Mad. 433 : 28 I. C. 394 : 2 L. W. 290 : 28 M. L. J. 310.**

———*Tree falling on another's land—Removal—Rights of owners.*

Where a tree on one land falls down partly on another land the owner can require it to be removed and on its not being removed, do it himself. If after falling it strikes fresh root in both the owner's lands, the owners are entitled to the fruits thereof jointly. (*Bucknill and Kulwant Sahay, JJ*) MAHABALI DASIN *v.* MANU MANDAL. **1924 P. 416.**

———*Damages—'Wilful neglect'—Meaning of.*

A person is said to be guilty of wilful neglect, when he intentionally, and of set purpose, does something which ought either to be done in a different manner, or not at all, or omits to do something which ought to be done. A loss is said to be due to wilful neglect when such neglect is either the sole effective cause of the loss or is so connected with it as to be materially contributing to it. (*Pratt, J. C. and Crouch, A. J. C.*) FIRM OF DOULAT RAM *v.* THE SECRETARY OF STATE. **9 S. L. R. 177 : 32 I. C. 551.**

TORT-FEASOR.

See (1) CONTRIBUTION.
(2) TORT

TRADE MARK.

Acquisition.
Assignment of.
Good Will.
Infringement of.
Law applicable.
Trade name, distinction between.
What is.

Acquisition.

———*Acquisition—User for a long time.*

A trade-mark may be acquired and abandoned in the same way. No length of time is required for either. (*Imam, J.*) JAGANNATH & Co. *v.* GRESSWELL. **22 I. C. 372 : 40 Cal. 814.**

Assignment of.

———*Assignment of—Good-will.*

It is thus established that a trade-mark cannot be assigned in gross for it is a mode of representing the origin of goods to which it is attached or their trade association and the truth of the representation is essential. The representation of a trade-mark may perhaps be true only of its originator but usage has sanctioned a more liberal treatment based on the principle of identification by succession and therefore successors in business have been allowed to use their predecessor's trade-mark where the representation still continues to be substantially true. An originator of a trade-mark of a natural product who certifies to their good quality is entitled to it and has a right to alienate it. A trade-mark can be

TRADE MARK—Assignment of.

assigned together with the good-will of the business to which it relates (*Jenkins, C. J. and Stephen, J.*) G. S. HANNAH *v.* MESSRS JAGANNATH & CO. **27 I. C. 483 : 19 C. W. N. 1.**

———*Assignment of—Personal skill involved—Validity.*

A trade mark bearing the name of a person whose personal skill enters much into the value of the product, is impliedly a notice to the public that his personal supervision was employed in the manufacture and as such it would be unassignable. But on the other hand, the usage of trade may be such that no such inference would be drawn from the use of a trade mark which contains a person's name and what all the purchasers would reasonably suppose is that goods bearing a trade-mark belong to a certain standard or quality or are made in a certain manner or after a certain formula, by persons carrying on the same business, that formerly was conducted by the person whose name is in the trade-mark and in such cases the assignment of the trade-mark would not be invalid. (*Imam, J.*) JAGANNATH & CO. *v.* GRESSWELL. **22 I. C. 372 : 40 Cal. 814.**

Good Will.

———*Good-will—What is.*

Good-will is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. A transferee of good-will is entitled to use the name in which the business was carried on and to represent himself as carrying on that business. (*Jenkins, C. J. and Stephen, J.*) G. S. HANNAH *v.* MESSRS JAGANNATH & CO. **27 I. C. 483 : 19 C. W. N. 1.**

Infringement of.

———*Infringement of—Test—Limitation.*

When an injunction against limitation is asked for points of similarity and not the points of difference constitute the proper test. (*Mears, Kt. C. J and Banerji, J.*) CHETERPAL SHARMA *v.* JAGANNATHDAS. **20 A. L. J. 537 : 44 A. 608 : L.R 3 A. 344 : 4 U. P. L. R. (A.) 135 : 1922 A. 178.**

———*Infringement of—Cause af action—Jurisdiction.*

A trade mark can be infringed by an advertisement. The cause of action for such infringement arises partly where the advertisement is published and distributed. (*Chamier and Piggott, JJ.*) KHESHTRAPAL SARMA *v.* PANCHAM SINGH VARMA. **37 All. 446 : 29 I C. 987 : 13 A. L. J. 697.**

———*Infringement of—Limitation of Trade name—Injunction.*

The principle underlying the use of trade name is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. In other words a person shall not carry on his business in such a way as to represent that his business was the business of another person. The question to be determined in cases of this description is whether there is such a similarity between the two names

TRADE MARK—Infringement of.

as that the one is in the ordinary course of human affairs likely to be confounded with the other. It is not necessary to prove that the defts. in taking the name complained of by the plaintiffs had any fraudulent intent It is enough if the plaintiff prove that the act of the defendants in assuming the name complained of, does an injury to the plaintiffs' rights. There is no question in such cases of property or monpoly in the name. There is no property in the word but at the same time it is fraud on a person who has established a trade and carries it on under a given name that some other person assumes the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. (*Mulla, J.*) THE NATIONAL BANK OF INDIA *v.* THE NATIONAL BANK OF INDORE. **24 Bom. L. R. 1181. 1923 B. 119.**

———*Infringement of—What amounts to.*

When a combination of devices go to form a trade-mark of a particular article, the question as to what the dominant trade-mark is, is a question of evidence depending on, which device has caught the attention of the buyers and has come to be associated with the goods of the manufacturer. It is an infringement of a trade-mark to copy the number assigned by the manufacturer, to an article which is identified by that number in the market and it makes no difference that the infringer adopts a different drawing or picture along with the number. Where goods have acquired, by a fancy description, device, etc., a reputation in the market, it is immaterial that the customers do not know who the maker is. The questions for determination in a case of alleged infringement of a trade-mark are whether the defendant has adopted the dominant device of the plaintiff and whether the defendant's conduct is such as to deceive ultimate purchasers. Proof of actual deception is unnecessary. The Court may grant injunction and damages to the plff. in a suit on infringement. When an injunction is granted for infringement of a trade-mark it should be wide enough to cover all possible channels of approach to the ultimate buyers. When damages are awarded to the plaintiff in an action for infringement of a trade-mark, it should be on the result of an enquiry as to profits made by the deft. by the unlawful use of the trade-mark. (*Scott, C.J. and Heaton, J.*) MADHAVJI DHARAMSY MFG. CO., LTD *v.* CENTRAL INDIA SPINNING, WEAVING AND MFG. CO. LTD. **41 Bom. 49 : 34 I. C. 529 : 18 Bom. L. R. 206.**

———*Infringement of—Impostor's rights.*

An impostor who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark, is protected by the Court for the mark unless he has abandoned it. (*Scott, C. J.*) WEST END WATCH CO. *v.* BURMA WATCH CO. **35 Bom. 425 : 10 I. C. 805 : 13 Bom. L. R. 242.**

———*Infringement of—Right of action—Claim to exclusive user.*

Where the plaintiffs have the sole right to import and sell a certain kind of goods in India,

TRADE MARK—Infringement of.

that does not give them such a proprietary right as to enable them to maintain an action against the defendant who hold the same goods after obtaining it from elsewhere. In India provision is not made for registering exclusive rights to particular trade-mark. (*Sanderson, C. J. and Richardson, J.*) IMPERIAL TOBACCO COY. *v.* ALBERT BONNAN. **50 Cal. 762 : 1924 Cal 216.**

———*Infringement of—Similarity—Oriental Government Security Life Assurance Company—Oriental Assurance Company—Injunction.*

The deft. company—Oriental Assurance Company could not be called "Oriental" without regard to the other older companies, merely because it was dealing with the Orient. The name of the deft. company was so similar to the name of plaintiff company as to mislead people and there was real danger of the plaintiff suffering irreparable loss. A temporary injunction should therefore be issued. (*Fletcher, J.*) ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. *v.* ORIENTAL ASSURANCE CO., LTD. **21 I. C. 258 : 40 Cal. 570.**

———*Infringement of—Defendant using his own name in business—Injunction.*

None can use a name if it leads the public to believe that the business carried on by him is the business of some other person with whom the name has been associated. The Court should not restrain a man from carrying on business in his own name simply because other people are doing the same and they will be injured by what he is doing. It must appear that the person who is carriyng on the business in his own name is doing it in such a way as to pass off his goods as the goods of somebody else. A person carrying on business in his own name which also happened to be the name of the plaintiff could not be restrained from using his own name. (*Shadi Lal and Martineau, JJ.*) UBEROI LIMITED *v.* KIRPAL SINGH. **56 I. C. 709.**

———*Infringement of—What is—Damages*

In India a plff. can maintain a suit for infringement of a trade mark. Even if he has not proved registration of his trade-mark it is sufficient if it is proved that the deft. contemplates committing or has threatened to commit an infringement. In a suit for infringement of trade-mark, it is not necessary to prove that any one has been actually deceived. It is enough to prove that he is likely to be deceived. 34 Cal. 495; 24 Cal. 364, Rel ; 55 P. R. 1902, Dist. The Court has to see whether the device used by the dett. is such a colourable imitation of the plff'.s mark as would be calculated to deceive incautious, ignorant or unwary purchasers. 34 Cal. 495 : 7 Bom. 584, Foll. (*Shah Din and Scott-Smith, JJ.*) ABDUL SALAM *v.* HAMIDULLA. **97 P. R. 1913 5 P. L R. 1912 (Supp) : 15 I. C. 116 : 166 P. W R. 1912.**

———*Infringement of—Test.*

The proper test for an injunction to restrain colourable imitation of trade-marks is whether an ordinary purchaser is likely to be misled, *i.e.*, whether there is a reasonable probability of deception. (*Fox, C. J. and Twomey, J.*) BYRAMJEE COWASJEE *v.* VERA SOMABHAI MOTIBHAI. **10 Bur. L. T. 63 : 36 I C. 965 : 8 L. B. R. 561.**

TRADE NAME.

———*Infringement of — Proof of actual deception of any person—Misdescription of place.*

In cases of infringement of trade-marks, the plff. need not show that deft's colourable imitation of plff's mark did actually deceive any person or persons. Where it is clear that traders in rose-water used the words 'Ghazipore rose-water." as descriptive merely of a good kind of such water, *Held*, that people buying such goods do not set any particular value upon their coming from the particular place to which they are ascribed and such misdescriptions not being calculated to deceive any one, does not disentitle the plff. to the relief which he might otherwise have obtained. (*Fox, C. J. and Parlett, J.*) BALLADIN AND ALLADIN FIRM *v.* PURANMAL BALBEHARI LALL **30 I. C. 633 : 8 Bur L. T. 113.**

———*Infringement of—Onus.*

If the accused passes his own inferior goods as superior goods of another by affixing that other's trade-mark to his own goods, the latter must prove the reputation of his goods. But if the accused puts the name of the other on the goods of the accused, the other need not prove the reputation, Mere affixing of name to the goods can be a good trade-mark : a definite amount of time is not necessary to validate a trade-mark. (*Pratt, J. C. and Fawcett, A. J C.*) DUNBAR *v.* HOLLAND-BOMBAY TRADING CO. **12 S L. R. 129 : 50 I. C. 165 : 20 Cr. L. J. 277.**

Law Applicable.

———*Law applicable.*

In India, the law of trade-marks is not governed by statute. There is no statutory system of registration and the rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England. 38 Cal. 110 Ref. (*Jenkins, C. J and Stephen, J.*) G. S. HANNAH *v.* JAGANNATH & CO. **42 Cal. 262 : 27 I C. 483 : 19 C. W. N. 1.**

Trade name, distinction between.

———*Trade name—Distinction.*

A trade-mark must be some visible concrete device or design affixed to indicate the manufacturer whose property the trade mark is. Distinction between trade and trade name pointed out. (*Chitty and Richardson, JJ.*) ANATH NATH DEY *v.* EMPEROR. **40 Cal. 281 : 17 C. W. N. 227 : 18 I. C. 404 : 14 Cr. L. J. 68.**

What is.

———*What is—A numerical figure.*

A number may be a trade-mark as much as any other design. (*Scott, C. J. and Heaton, J.*) MADHAVSEE DHARAMSEY MFG. CO., LTD., *v.* CENTRAL INDA SPINNING AND WEAVING CO. LTD **41 Bom 49 : 34 I. C. 529 : 18 Bom. L R. 206.**

———*What is—Property—Nature of.*

In a trade-mark there can be no property in gross, apart from goods of which it has become the symbol. (*Scott, C. J.*) WEST END WATCH CO. *v.* BERAN WATCH CO. **35 Bom. 425 : 10 I. C. 805 : 13 Bom L. R. 242.**

TRADE NAME.

———*Passing off right as sole importer and seller—Misrepresentation.*

TRADE NAME.

Where an importer of cycles acquired a trade reputation by misrepresenting that they were manufactured by a particular company, (which was not at all in existence) he is not entitled to an injunction restraining others from passing off their cycles under the plff's. name. (*Sanderson, C. J. Woodroffe and Chaudhuri, J.*) SEN *v.* E. S. OAKES. **55 I. C. 560 : 24 C. W. N. 155.**

TRADE USAGE

See EVIDENCE ACT, S. 92.

TRAMWAYS ACT (XI of 1886).

———*Bye-laws—Break of journey -Fresh ticket.*

A bye-law provided that a tram-car ticket was available only for the car and the journey for which it was issued. The accused got down at an intermediate place and then got into another car going to the same destination. *Held*, that the contract of carriage was determined by his own act, and that he was rightly convicted of travelling without a ticket (*Parlett, J.*) NGA BA THIN *v.* RANGOON ELECTRIC TRAMWAY CO.
6 Bur. L. T. 193 : 14 Cr. L. J. 564 : 21 I C. 164 : 7 L B. R. 53.

TRANSFER OF PROPERTY.

TRANSFER OF CASE.
See C P. C., Ss. 22 TO 24.

TRANSFER OF PROPERTY.
See also T. P. ACT, S. 54.

———Razinamah *and* kabuliyat *do not always amount to.*

Execution of a *razinamah* and *kabuliyat* do not necessarily amount to a transfer of a property. Evidence of the conduct of parties may prove that it was not intended to be a transfer.(*Macleod, C. J. and Heaton, J.*) CHANDANMAL *v.* BHASKAR WAMAN. **59 I. C. 114 : 22 Bom. L. R. 1079.**

———*Restrictions imposed by Legislature and those by contract or decree—Distinction between.*

Restrictions are imposed by Legislature on the right of free alienation upon considerations of public interest but restrictions imposed by parties under a contract or by a decree affect none else but the parties themselves *Inter se* so that where a decree imposes a restriction upon alienation by one party it is a provision for the benefit of the other which he can waive by consenting to a transfer by the former. 2 O. C. 252, 11. I.C. 527; 6 O. C. 331. Rel. on. (*Evans, J. C. and Lindsay A. J. C.*) WAZIR MOHAMMAD *v.* HARPRASAD.
13 I. C. 613 : 15 O. C. 67.

TRANSFER OF PROPERTY ACT (IV OF 1882.)

STATUTE INDEX.

Acceptance of gift, S. 122
Acceptance, when to be made, S. 122
Accession, acquired in virtue of transferred ownership, S. 63
Accession, natural, S. 63
Accession, rights of mortgagor to, S. 63
Accession to mortgaged property, Ss. 63, 70
Accession, when separable, S. 63
Accumulation; direction for, S. 18
Acquirement of vested interest by unborn person, S. 20
"Actionable claim" defined, S. 3
Actionable claim, liability of transferee of, S. 132
Actionable claim, notice of transfer of, S. 131
Actionable claims, transfers of Ss. 130—137 (Ch. VIII)
Actionable claim, transfer of, S. 130
Acts, amended by the Act, S. 4
Agent, service or tender on or to, S. 102
Agricultural purposes, exemption for, S. 117
Alienation, condition making interest determinable on, S. 12
Alienation, condition restraining, S. 10
Anomalous mortgage, S. 58
Anomalous mortgages, Ss 98—99
Apportionment, Ss. 37—38
Apportionment, of benefit of obligation on severance, S. 37
Apportionment of periodical payments, S. 36
Apportionment of rent, S. 36
Assignment of rights under fire policy, S. 135
Assignment of rights under marine, S. 135
Assurance, mortgage when to be by, S. 59
Attachment of mortgaged property, S. 99
"Attached to the earth" defined, S. 3
Attempted alienation, condition making interest determinable on, S. 12
Benefit of public, transfer in perpetuity for, S. 17
Benefit of unborn person, transfer of, S. 13
Bona fide holders under defective title, S. 51
Bona fide paid rents, S. 50
Buddhist law, not affected by the Act, S. 2
Burden, of obligation annexed to ownership but not amounting to interest or easement, S. 40
Burden of obligation imposing restriction on use of land, S. 40
Burdensome gifts, S. 127
Buyer, rights, etc, of, S. 55
Cessation of interest, S. 84
Chance of heir-apparent may be transferred, S. 6
Charge by acts of parties, S. 100
Charge of one of several co-mortgagors who redeems, S. 95

Charge on proceeds of revenue-sale, S 73
Charges, Ss. 58—104 (Ch. IV.)
Charges by act of parties, S 100
Charges, extinction of, Ss. 100, 101
Charges of operation of law, S. 100
Circumstances, to transfer, S. 38
Claim, actionable, liability f t ansferee of, S, 132
Claim, actionable, notice of transfer of, S. 132
Claim, actionable, transfer of, S. 130
Claims, actionable, transfers of, Ss. 130—137 (Ch. VIII)
Common property, transfer of, by co-owner. S. 47
Co-mortgagors, redemption by; S. 95
Competent persons to transfer, S. 7
Conditional mortgage, S. 58
Conditional transfer, S, 25
Conditional transfer to one person coupled with transaction to another on failure of, prior disposition S. 27
Condition, invalid, S. 32
Condition, making interest determinable on insolvency etc. S. 12
Condition restraining alienation, S. 10
Conditions in restraint of alienation, S. 10
Conditions, in restraint of enjoyment, S, 11
Conditions precedent, fulfilment of, S. 26
Condition, subsequent fulfilment of, S. 29
Condition that transfer shall cease, S. 31
Consideration and transfer, S. 6
Consideration, joint transfer for, S. 45
Consideration, transfer by persons having distinct interest, S. 46
Contingent interest, S. 21
Contingent interest differs from, S. 21
Contingent interest, what is S, 21
Contract Act and Transfer of Property Act, S. 4
Contract Act, not affected by the Act, S. 3
Contract and transfer, difference between, S, 5
Contracts, enactments, relating to, S. 4
Contracts, implied, by mortgagor, S. 64
Contribution differs from marshalling. Ss. 81, 82
Contribution, how enforced, S. 82
Contribution and marshalling. S 81
Contribution to mortgage debt. S. 82
Contribution, when can be claimed. S. 82
Contribution, whether it creates a charge, S. 82
Contributory mortgage S. 58
Co-owner, right of, S. 44
Co-owner's share in common property, transfer of.
Co-owner, transfer by, S. 44
"Court" in S. 57 explained, S. 57 (expl).
Courts of justice, incapacity of. S. 136
Court to provide for incumbrances and sale free from, S 57
Debentures, saving of, S. 137
Debt. mortgaged, S 134
Debtor, warranty of solvency of, S. 133
Debt, transfer of, S. 8
Defective title, *bona fide* holders under, S. 51
Defective title, rents paid under, S, 50
Definitions, S. 3
Deposit in Court, Ss. 83—84
Deposit of money due on mortgage, S. 83
Determination of lease, S. 111
Direction for accumulation, S. 18
Discharge of incumbrances on sale, S. 57
Disposition ulterior, S 29
Disqualified person, gift to, S. 127
Distinct interests, S. 46
Donatio mortis causa and Mahommedan law, S. 129.
Donatio morits causa, not governed by the Act, S. 128
Donee, acceptance by, S. 128
Donee, universal S. 128
Duration of certain leases in absence of written contract. etc., S, 106
Duration of lease for a year, S. 110
Easement cannot be transferred, S. 6
Effect of holding over, S. 116
Effect of invalid direction. S. 18
Effect of surrender and forfeiture on under-lease, S. 115
Election, S. 35
Election. effect of, S. 35
Election in case of Hindu Wills, S. 35
Election in case of minor, S. 35
Election, period for, S. 35
Election, principle of, S. 35
Election, what is, S. 35
Election, when necessary, S. 35
Enactments relating to contracts, S. 4
Enactments, repealed, S. 2 & Sch. I
Endeavour, to transfer. S. 12
English mortgage, S. 58
Estoppel. in case of transfer by ostensible owner, S. 41
"Exchange" defined, S. 118
Exchange of money, S 121
Exchanges, Ss. 118—120 (Ch. VI)
Exchange, thing received in, S. 119
Exclusion of day on which term commences, S. 110
Exemption of leases for agricultural purposes, S. 117
Existing property, gift of. S. 124
Extent of the Act, S. 1
Extinction of charges, S. 101
Extinguishment of charges, S. 101
Failure of prior disposition, S. 27
Failure of prior transfer, transfer to take effect on, S. 16
Fetters on redemption, S. 60
Fire-policy of insurance, assignment, S. 135
Fire policy of insurance, transfer, of S. 130 (excep.)
Fore-closer and sale, Ss. 86 to 90
Fore-closer, right to, by mortgagee, S. 57
Foreclosure, suits for, Ss. 85—96
Forfeiture for non-payment of rent, S. 114
Forfeiture on under lease, S. 115
Forfeiture, waiver of, S. 112
Fraudulent transfer, S. 53
Fulfilment of conditions precedent, S. 26
Fulfilment of condition subsequent, S. 29
Future interest, Ss. 13, 14
Future property, gift of, S. 124
Gift, acceptance of, S. 122
Gift and failure of consideration, S. 126
"Gift" defined, S. 122
Gift of existing property, S. 124
Gift of future property, S. 124
Gift of immoveable property, S. 123
Gift of moveable property, S. 123
Gift, onerous, to disqualified person, S. 127
Gift, revocation of, S. 126
Gifts, Ss 122—129 (Ch. VII)
Gifts onerous, S. 127
Gift, suspension of, S 126

Gift to several of whom, one does not accept S. 125
Gift, transfer of, S. 123
Gift, when valid, S. 122
Gift, when void, S. 122
High Court, power to make rules, S. 104
Hindu law, not affected by the Act, S. 2
Holding over, S. 116
"Immoveable property," defined, S. 3
Immoveable property, gift, S. 123
Immoveable property, leases of, Ss. 105—117 (Ch. V)
Immoveable property, mortgages of, Ss. 58—104 (Ch. IV.)
Immoveable property, transfer of, Ss. 38—53
Implied contracts by mortgagor, S. 64
Imposing restriction, S. 40
Impossibility of performance, S. 26
Improvements made by *bona fide* holders under defective titles, S. 51
Incapacity of officers connected with courts of justice, S. 136
Incompetent person, notice to, S. 103
Incumbrances on sale, discharge of, S 56
Incumbrances, sale free from, S. 57
Insolvency, condition making interest determinable on, S. 12
"Instrument" defined, S. 3
Instruments, saving of, S. 137
"Insufficient security" in S. 66 explained, S. 66 (expl)
Insurance policy, transfer of, S. 130, (excep.)
Insurance policy of, assignment of, S. 135
Interest, cessation of, S. 84
Interest contingent, S 21
Interest in property, transfer of, S. 6
Interest vested, S 19
Invalid condition, S 32
Invalid direction, effect of, S. 18
Involuntary alienation, S. 12
Involuntary transfer, S. 10
Joint transfer for consideration, S. 45
"Lease" defined, S. 105
Lease, determination of, S. 111
Lease, duration of, S. 110
Lease, mortgaged renewal of, Ss. 64, 71
Lease, option to determine, S. 110
Leases duration of, S. 106
Leases for agricultural purposes, S. 117
Leases, how made, S. 107
Leases of immoveable property, Ss. 105—117 (Ch. V.)
"Lessee" defined, S. 105
Lessee, liabilities of, S 108 (B)
Lessee, rights of, S. 108 (B)
Lessee, rights, etc., of S. 108
"Lessor" defined, S 105
Lessor, rights, etc, of, Ss. 108, 108, (A)
Lessor's transferee, rights of, S. 109
Liabilities and rights of buyer and seller, S. 55, 108 (B)
Liabilites of lessee, S. 108
Liabilities of lessor, Ss. 108, 108 (A)
Liabilities of mortgagee, Ss 66—77
Liabilities of mortgagee in possession, S. 76
Liabilities of mortgagor, Ss 60—66
Liabilities of parties, S. 120
Liability of transferee of actionable claim, S. 132
Lis Pendens, S. 52
Lis Pendens, competent court on, S. 52
Lis Pendens, contentious suit, S. 52
Lis Pendens, effect of registration, S. 52
Lis Pendens, involuntary transfer, S. 52
Lis Pendens, principle, S. 52
Lis Pendens, rules as to, S. 52
Lis Pendens, subject matter, S. 52
Living persons, S. 5
Loss, occasioned by mortgagee's default, S. 77
Maintenance, right enforceable against, S. 39
Maintenance, right to, does not create charge, S. 39
Maintenance, transfer in defeasance of, right of, S. 39
Management of mortgaged property, S. 72
Marine, transfer of, S. 130, (excep.)
Marshalling and contribution, Ss. 81—82
Marshalling differs from contribution, Ss. 81, 82
Marshalling, principle, S 81
Marshalling securities, S. 81
Marshalling, rules as to, S. 81
Mercantile document of title to goods, S. 137
"Mercantile document of title to goods" in S. 137 explained, S. 137, (expl.)
Mere right to sue cannot be transferred, S. 6
Mesne mortgagee, rights of, against prior and subsequent mortgagee, S. 75
Minor and transfer, S. 7
Money deposited by mortgagor, S 83
Money deposited by mortgagor, right to, S. 83
Money due on mortgage, deposit of, S. 83
Money, exchange of, S. 121
Mortgage, anamalous, S. 58
Mortgage by conditional sale, S. 58
Mortgage contributory, S. 58
Mortgage debt, contribution to, S. 82
Mortgaged debt S, 134
"Mortgage debt" defined, S. 58
"Mortgagee" defined, S. 58
Mortgage, English, S, 58
Mortgagee, subsequent right to pay off, to prior mortgagee, S 74
"Mortgage money" defined, S. 58
Mortgage, what is, S. 58
"Mortgage" defined, S. 58
Mortgaged lease, renewal of, Ss. 64, 71
Mortgaged property, accession to, Ss. 63, 70
Mortgaged property, attachment of S 99
Mortgagee in possession, liabilities of, S. 76
Mortgagee in possession rights of, S 72
Mortgagee, prior postponement of, S. 78
Mortgagee, prior right against, S 75
Mortgagee, prior to be paid off by subsequent mortgagee, S. 74
Mortgagee, rights and liabilities of, Ss. 67-77
Mortgagee's default, loss occasioned by, S. 77
Mortgagee, subsequent rights against, S. 75
Mortgage, kinds of, S. 58
Mortgage, money due on, S. 83
Mortgage-money, right to sue for, S. 68
Mortgage not described in S 58, S. 98
Mortgages, anomalous, S. 98
Mortgage, simple, S. 58
Mortgages of immoveable property and charges, Ss 58-104 (Ch. IV.)
Mortgages, priority in, S. 77

Mortgage, sub mortgage, S. 58
Mortgage to secure uncertain amount, when maximum is expressed, S. 79
Mortgage, usufructuary, S. 58
Mortgage, when to be by assurance, S. 59
"Mortgagor", defined, S. 58
Mortgagor, right, deposited money, S. 83
Mortgagor's implied contracts, S. 64
Mortgagor's rights and liabilities, Ss. 60—66
Mortgagor, waste by, S. 66
Moveable property, gift of, S 123
Muhammadan law and *donatio mortis causa*, S. 129
Muhammadan law not affected by the Act, S. 2
Negotiable instruments, saving of, S. 137
Non-payment of rent, S. 114
Notice and tender, Ss 102, 104
Notice, etc., to or by person incompetent to contract, S. 103
"Notice of a fact" explained S 3
Notice of transfer of an actionable wrong, S. 131
Notice to be in writing, signed, S. 131
Notice to quit, S 113
Obligation on severance, apportionment of, S. 37
Officers connected with courts of justice, incapacity, S. 136
Onerous gift, law as to, S. 127
Onerous gifts, S. 127
Onerous gift to disqualified person, S. 127
Operation of Transfer, S. 8
Option to determine lease, S. 110
Oral Transfer, S. 9
Ostensible owner, transfer by, S. 41
Parties, rights, etc., of, S. 120
Party deprived of thing received in exchange, S. 119
Pensions, when not transferable, S. 6
Performance of act, time being specified, S. 34
Periodical payment, apportionment of, S. 36
Perpetuity, charities not affected by, S. 14
Perpetuity, covenant void for, S. 14
Perpetuity for benefit of public, transfer in, S. 17
Perpetuity, Hindu law as to, S. 14
Perpetuity, rule against, S. 14
Person, authorised, transfer by, S. 38
Persons as survive at some period not specified, transfer to, S. 24
Persons, competent to contract, S. 7
Persons, competent to transfer, S. 7
Persons having distinct interest, transfer by, S. 46
Person, incompetent to contract, notice, etc., to, S. 103
Persons, who subsequently acquire interest, transfer by, S. 43
Policy of insurance, assignment of, S. 135
Policy of insurance, transfer of, S. 130 (excep.)
Policy, transferee's right under, S. 49
Postponement of prior mortgagee, S. 78
Power of sale in mortgage, S. 69
Power of sale, when valid S. 69
Power to deposit in court money due on mortgage, S. 88
Power to make rules, S. 104
Precedent conditions, fulfilment of, S. 26
Preliminary, Ss. 1— 4(ch. I)
"Premium" defined, S. 105
Prior disposition, failure on, S. 27
Prior disposition, not affected by invalidity of ulterior disposition, S. 30
Priority, Ss. 78—80
Priority in mortgagees, S. 77
Priority of rights created by transfer, S. 48
Priority, rules as to, Ss. 77—80
Prior mortgagee, postponement of, S. 78
Prior mortgagee, rights against, S. 75
Prior mortgagee to be paid by subsequent mortgagee S. 74
Prior transfer, transfer to take effect on failure of, S. 16
Proceeds of revenue-sale, charge on S. 73
Properties, separately mortgaged, right to redeem, S. 61
Properties, subject to common charge, sale of, S. 56
"Property", S. 5.
Property pending suit thereto, transfer of, S. 52
Property, mortgaged, accession to, Ss. 63, 70
Property subject to prior mortgage sale of, Ss. 96 & 97.
Property, which can be transferred, S. 6
Property, which cannot be transferred, S. 6
Provision by Court for incumbrances and sale free from, S. 57
Public office cannot be transferred, S. 6
Recovery of possession by usufructuary mortgagor S. 62
Redemption, Ss. 60, 91—95.
Redemption, before date fixed, S. 60
Redemption by co-mortgagors, S. 95
Redemption by usufructury mortgagor, S. 62
Redemption, fetters on, S. 60
Redemption of portion of mortgaged property, S. 60
Redemption, reasonable time for, S. 60
Redemption, rights to, when extinguished, S. 60
Redemption, suit, S 60
Redemption, suit for, S. 91
Redemption, suits for, Ss. 85-96
Redemption, what is, S 60
Redemption, when, S. 60
Re-entry, right of, when transferable, S. 6
"Registered" defined, S. 3
Registration Act, affected by the Act, S. 1
Registration Act and Transfer of Property Act, S. 4
Registration is notice, S. 3
Relief against for forfeiture for non-payment of rent, S. 114
Renewal of mortgaged lease, Ss 64, 71
Rent, bona-fide paid to holder under defective title, S. 50
"Rent" defined, S. 105
Rent, non-payment of, S. 114
Repeal of enactments, S. 2 and Sch. I
Repeal of Sections 86 to 90 by C.P. Code, S. 86-90
Repeal of S. 92 to 94 by C.P. Code, Ss. 92—94
Restraint in a transfer, S. 11
Restraint in lease, S. 12
Restraint, involuntary alienation, S. 10
Restraint of alienation, conditions as to, S. 10
Restriction, on enjoyment of property, S. 11
Restrictions repugnant to interest created, S. 11
Restrictive conditions, Ss. 10, 11 and 12
Revenue-sale, charge on proceeds on, S. 73
Revocation of gift, S. 126
Right of mortgagor to redeem, S. 60
Right of party deprived of thing received in exchange, S. 119

Right of prior mortgagee, S. 74
Right of re-entry may be transferred, S. 6
Right of subsequent mortgagee to pay off prior mortgagee, S. 74
Right of transferee, policy under, S. 49
Right of usufructuary mortgagor to recover possession, S. 62
Rights and liabilities of buyer and seller, S. 55
Rights and liabilities of lessor, S. 108 (A)
Rights and liabilities of mortgagee. Ss. 67—77
Rights and liabilities of mortgagor, Ss. 60—66
Rights created by transfer, priority of. S. 48
Rights, etc., of lessor and lessee, S. 108
Rights of co-owner. S. 44
Rights of lessee, S. 108 (B)
Rights of lessor's transferee, S. 109
Rights of mesne mortgagee against prior and subsequent mortgagee, S. 75
Rights of mortgagee in possession, S. 72
Rights of parties, S. 120
Rights on redemption, S. 61
Rights under marine, assignment of S 135
Right to fore-closer or sale, S. 67
Right to money deposited by mortgagor S. 83
Right to redeem one of two properties separately mortgaged, S. 61
Right to sue for mortgage money, S. 68
Rule, against perpetuity, S. 14
Rules as to priority, Ss. 77—80
Sale and fore-closer, Ss. 86 to 90
"Sale", defined, S. 54
Sale, discharge of incumbrances on, S. 57
Sale free from incumbrances, S. 57
Sale how made, S. 54
Sale of one of two properties, subject to a common charge, S. 56
Sale of property subject to prior mortgage, Ss. 96 and 97
Sale, right to, by mortgagee, S. 67
Sales of immoveable Property, Ss. 54—57 (Ch. III)
Sale, suits for, Ss. 85—96
Saving of *donatio mortis causa*, S. 129
Saving of negotiable instruments, etc. S. 137
Securing uncertain amount when maximum is fixed, S. 79
Securities, marshalling, S. 80
Seller, rights etc., of, S. 55
Service on agent, S. 102
Service to agent, S. 102
Shares, saving of, S. 137
Simple mortgage, S. 58
Solvency debtor, warranty of, S. 133
Specified uncertain event, transfer contingent on happening of, S. 23
Stipends, cannot be transferred, S. 6
Stocks, saving of, S. 137
Sub mortgage, S. 58
Subsequent condition, fulfilment of, S. 29
Subsequent mortgagee, rights against, S. 75
Subsequent mortgagee to pay off prior mortgage, S. 74
Suit for redemption, S. 91
Suit, mere right of, S 6
Suits for foreclosure, Sale, etc. Ss 85—96
Surrender on under-lease, S. 115
Surviving, S. 24
Suspension of gift, S. 126
Tacking, abolished, S. 80
Tacking differs from consolidation, S. 80
Tacking, how far allowed, S. 80
Tacking, rules as to, S. 80
Tender and notice, Ss. 102—104
Tender on agent. S. 102
Tender to agent, S. 102
Thing received in exchange, S. 119
Title, defective, *bona-fide* holders under, S. 51
Title, defective, rents paid under, S. 50
Title of the Act, S 1
Transfer and consideration, S. 6
Transfer and unlawful object, S. 6
Transfer by co-owner of share in common property, S. 47
Transfer by ostensible owner, S. 41
Transfer by person authorised, S. 38
Transfer by person having authority to revoke former transfer, S. 42
Transfer by unauthorised persons, S. 43
Transfer, conditional, S. 25
Transfer conditional on performance of act, time being specified, S. 34
Transfer, conditional to one person, coupled with transfer to another on failure of prior disposition, S. 28
Transfer, contingent on happening of a specified uncertain event, S. 23
Transferee, lessor's, rights of, S. 109
Transferee of actionable claim, liability of, S. 132
Transferee's right under policy, S. 49
Transfer for consideration by persons having distinct interests, S. 46
Transfer for the benefit of woman, S. 10
Transfer, fraudulent, S. 53 (ch. III)
Transfer in perpetuity for benefit of public, S. 17
Transfer, joint, for consideration, S. 45
Transfer must be absolute, S. 12
Transfer of actionable claim S. 130
Transfer of actionable wrong, notice of, S. 131
Transfer of benefit of unborn person, S. 13
Transfer of debt, S 8
Transfer of fire-policy of insurance, S. 130 (excep.)
Transfer of gift, S. 123
Transfer of immoveable property. Ss. 38—53
Transfer of marine, S. 130 (excep.)
Transfer of one co-owner S. 44
Transfer of Property Act and Contract Act, S. 4
"Transfer of Property" defined, S. 5
Transfer of property, pending suit, relating thereto, S. 52
Transfer, of what, S. 6
Transfer, operation of, S. 8
Transfer, oral, S. 9
Transferred ownership, accession to, S. 63
Transfers of actionable claims, Ss. 130—137 (ch. VIII)
Transfer to class, some of whom come under Ss. 13, 14 and 15
Transfer to member of class, who attain a particular age, S. 22
Transfer to such of certain persons as survive at some period not specified S. 24
Transfer to take effect on failure of prior transfer, S. 16
Transfer, to unborn persons, S. 8
Transfer, to whom, S. 5
Transfer, ulterior, S. 28
Transfer, when third person is entitled to maintenance, S. 39
Transfer, who cannot, S. 7
Ulterior disposition, S. 29
Ulterior disposition, validity, S. 30

Ulterior transfer, S. 28
Unauthorised persons, transfer, S. 43
Unborn persons, transfer to, S. 8
Unborn person, transfer of benefit of, S. 13
Uncertain event, transfer, contingent on happening of, S. 23.
Under-lease, surrender &c on, S. 115
Universal donee, S. 128
Unlawful object and transfer, S. 6
Usufructuary mortgage S. 58
Usufructuary mortgagor's right to recover possession, S. 62
Valid gift, S. 122
Validity of ulterior disposition, S. 30
Vendor, rights, ect of, S. 55
Vested interest, S. 19
Vested interest differs from contingent, S. 20
Vested interest in possession, S. 20
Vested interest is transferable, S. 19
Vested interest on transfer, S. 20
Vested interest, what is, S 20
Vested interest, when defeated, S. 20
Void conditions in transfers, S. 25
Void gift, S. 122
Waiver of forfeiture, S. 112
Waiver of notice to quit, S. 113
Warranty of solvency debtor, S. 133
Waste by mortgagor in possession, S. 66
What may be transferred, S. 6
What may not be transferred, S. 6
When gift may be revoked, S. 126
When gift may be suspended, S. 126
When unborn person acquires vested interest, on benefit, S. 20
Who can transfer, S 7
Who may sue for redemption, S. 91
Writing expressly required, S. 9
Writing, when required on transferred, S. 9

TRANSFER OF PROPERTY ACT (IV OF 1882.)

———*Applicability—Sale before T. P. Act—Writing unnecessary—Oral sale valid.*

No writing was necessary to validate a sale before the Transfer of Property Act (*Lord Shaw*) MAHOMED MUSA *v.* AGHORE KUMAR **42 Cal. 801 : 42 I.A. 1 : 17 Bom. L. R. 420 : 21 C L.J. 231 : 28 M.L.J. 548 : 19 C.W.N. 250 : 13 A.L.J. 229 : 17 M.L.T. 143 : 2 L.W. 258 : 28 I.C. 930 : (1915) M.W.N. 621 (P.C.)**

———*Retrospective effect.*

Where a right to make an application for foreclosure under Regulation. (XVII of 1806) been extinguished by efflux of time, the T. P. Act does not revive it. (*Banerjee, J.*) SHYAM CHANDRA SINGH *v.* BALDEO. **17 I.C. 467 : 10 A L.J. 522.**

———*Applicability—Land with houses and fruit bearing trees.*

The fact that a portion of a holding used for residential purposes is planted with fruit bearing trees does not alter the character of the holding and the case is governed by the T. P. Act and not the Bengal Tenancy Act. (*Walmsley and Cuming, JJ.*) SRIMATI SASIBALA DEBI *v.* SRIMATI AMALA DEBI. **66 I.C. 61 : 25 C.W.N. 378.**

———*Applicability—Easements.*

The Act does not apply to easements. (*Chatterjee and Richardson, JJ.*) SITAL CHANDRA CHOUDHURY *v.* ALLEN J. DELANNEY. **34 I.C. 450 : 20 C. W. N. 1158.**

———*"Herein"—Construction.*

"Herein" means in that section " and not " in the Transfer of Property Act. (*Coxe, J.*) NABA KRISHNA PAL *v.* MOHIT KALI DEBI. **9 I. C. 840.**

———*Applicability to the Punjab as regards principles.*

The principles of the Transfer of Property Act certainly apply to the Punjab but in order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to the non-observances of prescribed formalities. (*Harrison and Zafar Ali, JJ*) JHUMAN *v.* DUBA **4 Lah. 439 : 1923 Lah. 646.**

TRANSFER OF PROPERTY ACT (IV OF 1882).

———*Applicability to the Punjab.*

Such sections of the Act as lay down principles of law consonant with the principles of equity, justice and good conscience should be followed by the Courts of the Punjab. S 114 embodies such a principle (*Fenton, F. C.*) AZIZ-UD-DIN *v.* BHAGWAN DAS. **17 I.C. 991 : 6 P.R 1912 Rev : 36 P.L R. 1913.**

———*Mortgage—Redemption—Mortgagee becoming a part owner—Form of decree.*

Although it is true that the appellants mortgagees have no right to retain possession after the tender and should be made accountable on that basis, having regard to practical convenience and the scheme of the Transfer of Property Act the proper course in a case where mortgagee has become an owner of some of the suit properties would be to determine the amount of the mortgage-debt for which the properties purchased by the appellants are liable and to finally settle the questions arising between the parties so as to obviate the necessity for a fresh suit. (*Krishnan and Venkatasubba Rao, JJ.*) TADEPALLE SUBBA RAO GARU *v.* SRI BALUSU BUCHI SARVARAYADU. **44 M.L.J. 534 : 18 L.W. 61 : (1923) M.W.N. 533 : 1923 M. 533.**

———*Applicability only to transfer inter vivos.*

Per *Kumaraswamy Sastry, J*:—The T. P. Act applies only to alienation *inter vivos* and has no application to disposal of property by will. (*Schwabe, C.J., Coutts Trotter and Kumaraswamy Sastri, JJ.*) RAJA OF BADRACHALAM *v* VENKATDRI APPA RAO **43 M.L.J. 486 : (1922) M.W N 532 : 16 L. W. 369 : 31 M.L.T 221 : 46 M. 190 : 1922 Mad. 457 (H.C.)**

———*Sale by mortgagor—Title of purchaser.*

A *bona fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of the encumbrance. (*Phillips and Kumaraswami Sastri, JJ.*) SREERAM *v.* VENKAT RAMIAH. **42 Mad. 59 : 35 M.L.J. 450 : 8 L.W. 517 : (1918) M.W.N. 718 : 47 I.C. 976 : 24 M. L T. 454.**

———*Not exhaustive—Transfer by award.*

The T. P. Act is not exhaustive of all modes of transfer and does not deal with transfer by an

award. If a transfer of property does not come within the special modes discussed in the Act, the conditions as to writing and registration prescribed therein have no application. (*Seshagiri Aiyar and Napier, JJ.*) AMIR BIBI *v.* AROKIAM.
45 I.C. 813 : 34 M L J. 184.

——*Applicability of, to Berar.*

Although the Transfer of Property Act did not apply to Berar in 1902 yet the principle embodied in that Act would be applicable as principles of equity, justice and good conscience. Consequently the Court could extend the time for payment under a mortgage in the exercise of its equitable jurisdiction. (*Kotwal, A. J C.*) KISHAN LAL *v.* ABDULLA. **1923 Nag. 88.**

——*Transfer by full owner—How effected.*

A full owner only can transfer either by sale or gift and such transfer can only be effected by a registered instrument. (*Mittra, A. J. C.*) UDEBHAN *v.* RANGA RAO. **59 I. C. 451.**

——*Applicability.*

Where foreclosure proceedings had been taken under Regn., (XVII of 1806), the Transfer of Property Act will not apply to such proceedings, though the year of grace expires only after the Transfer of Property Act comes into force. (*Batten, A. J. C.*) BAJIRAO *v.* GULAB SINGH.
17 I.C. 141 : 8 N.L.R. 136.

——*Extinction of—Mortgage—Merger.*

Where a prior mortgagee gets a pre emption decree against the subsequent mortgagee on the ground that the subsequent mortgage is really a sale, there is a merger, and he cannot sue for the balance. (*Kanhaiya Lal A. J. C.*) ARJUN PRASAD *v.* LAIQ SINGH. **35 I.C. 845 : 3 O.L.J. 276.**

——*Homestead land tenancy—Presumption as to transferability—Long-continued possession—Burden of proof.*

The presumption in case of tenancies of homestead lands originating prior to the Act is that they are non-transferable, the burden of proof being on the tenant. The exception is where there has been an erection of *pakka* buildings on a standing by on the part of the landlord when the tenant spent large sums of money. Mere long continued possession cannot give rise to a presumption of transferability. (*Mullick and Kingsford, JJ.*) AMBICA PRASAD SINGH *v.* BALDEO LAL. **36 I C. 126 : 20 C.W N 1113 : 1 Pat. L J. 253 : 2 Pat. L.W. 417.**

——S. 2—*Not retrospective.*

The provisions of the T. P. Act are not retrospective, but the principle of S. 111 (g) of the Act applies as a rule of justice, equity and good conscience to a lease transaction before the T. P. Act. (*Lord Phillimore*) MAHARAJA OF JEYPORE *v.* RUKHMINI PATTAMAHADEVI.
42 Mad. 589 : 7 A.L.J 552 : 29 C.L.J. 528: 50 I.C. 631: 21 Bom. L.R. 655 : (1919) M W.N. 271 : 23 C.W.N 889 : 26 M.L.T. 16: 10 L.W. 381 : 36 M.L.J. 543. (P.C.)

——Ss. 2 and 9—*Writing—Usufructuary mortgage—Before the T. P. Act.*

For a usufructuary mortgage in the mufassal executed before the T. P. Act, writing is not

essential. The delivery of possession is sufficient. (*Mr. Ameer Ali*) AHMED RAZA *v* ABID HUSSAIN.
38 All. 494 : 43 I. A 264 :18 Bom. L. R. 904: 14 A. L. J. 1099 : 20 M L T. 447 : 24 C. L. J. 504 : 21 C. W. N. 265 : 5 L. W. 153 : 1 Pat. L. W. 90 : 39 I. C. 11 : (1916) 2 M.W.N. 548 (P.C.).

——Ss. 2, 89 and 90—*Mortgage decree before the Act.*

The T. P. Act is not applicable to a mortgage decree passed before that Act began to operate but the instalments payable under which were due after it came into force. (*Heaton and Shah, JJ.*) DINU YESU *v.* SHRIPAD BAJI GARWARE.
43 Bom. 703 : 52 I. C 466 : 21 Bom. L. R. 720.

——Ss. 2 and 123—Rajinama *by* Khatidar—*Registration.*

A *rajinama* by a *Khatidar* of unalienated lands, subject to S. 74, Bombay Land Revenue Code abandoning his rights to another, subject to the payment of revenue need not be registered under S. 90, Registration Act. (*Scott, C. J. and Heaton, J.*) MOTIBHAI JIJIBHAI *v.* DESAIBHAI GOKALBHAI. **41 Bom. 170 : 38 I. C. 838 : 18 Bom. L. R. 976.**

——S. 2, Cl. (b)—*Rights of mortgagee.*

The T. P. Act is not a consolidating Act and the right of the mortgagee to a general account of the moneys due to him under the mortgage is saved by S. 2, Cl. (b). (*Bakewell J.*) VARADARAJULU CHETTY *v.* DHANALAKSHMI AMMAL.
26 I. C. 184 : 16 M L. T. 365.

——Ss. 2 (c) and 108 (j)—*Lease from year to year in existence from before 1882—Transferability—Custom.*

A lease of homestead land from year to year created before the passing of the T. P. Act is not governed by the Act and S. 108 (j) does not make it transferable absolutely or by sub-lease Such leases are transferable by custom. (*N. R. Chatterjee and Mullick, JJ.*) ANANDA MOHAN SAHA *v.* GOBINDA CHANDRA RAY CHOWDHURY.
33 I. C. 565 : 20 C. W. N. 322.

——S. 2 (c)—*Legal relation before the Act—Right arising out of.*

In order to be entitled to the benefit of S. 2 (c) it must be shown that the right, as it exists now arise out of a legal relation constituted before the Act. (*Mookerjee and Beachcroft, JJ.*) DURGI NIKARINI *v.* GOBERDHAN BOSE.
20 C. L. J. 448 : 24 I. C. 183 : 19 C. W. N. 525.

——S 2 (c) and 108 (j)—*Homestead land—non-transferable.*

Homestead which is non-transferable is not rendered transferable by the operation of S. 108 (j) of the T P. Act. (*Holmwood and Sharfuddin, JJ.*) UMAKANTA SAHA *v.* KASHIRAM BANIA.
23 I C. 246.

——Ss. 2, (c) and 111, (d)—*Patni and Mokarari interests—Mokarari created before T. P. Act—Merger*

Where two interests in a zemindari land Patni and Mokarari, are acquired by the same person piece-meal at different times and the interests

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 2.

both vest in him and are kept alive and separate there is a merger of the two under the terms of the Transfer of Property Act, S. 111, Cl. (d); there can, however, be no merger apart from the above provisions. (*Fletcher and Chatterjee, JJ.*) HIRENDRA NATH DUTT *v* HARI MOHAN GHOSE. **22 I. C. 966 : 18 C. W. N. 860.**

——S. 2 (c) –*Mortgage before* 1882—*Attestation.*

No attestation is required for a mortgage deed executed before the T. P. Act. (*D. Chatterjee and Teunon, JJ.*) JATTO KAR *v.* MUKUND DEB. **39 Cal. 227 : 14 C. L. J. 369 : 11 I. C. 884 : 16 C. W. N. 129.**

——Ss. 2 (c) and 67—*Suit after the Act.*

When a suit on a mortgage executed before the passing of the T. P. Act, is filed after the enactment of the T. P. Act, the remedy given by S. 67 of that Act could be availed of by the parties to the document and there is nothing in S 2, Cl. (c) to disentitle the parties from seeking the relief. 11 Cal. 582; 12 Cal. 583, 10 Mad. 129; 13 All. 432; 6 All. 262 ; 16 Cal. 693, Foll. The right to relief arising from a certain relation existing between parties is a matter of adjective law and consequently the parties are entitled, where a new remedy has been provided by a new Act at the time when the relation subsists to take advantage of that remedy in a Court of Law. 11 Cal. 582 and 12 Cal. 583, Foll. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) BIKKINA RAMAYYA *v.* ADABALA SESHAYYA **34 I. C 475 : 30 M. L. J 336.**

——S. 2 (e)—*Equitable mortgage effected before extension of the Act to Burma—Assignment of—Validity.*

An equitable mortgage made prior to 1st Jan. 1905 can be assigned by deposit in the district after that date. 4 I. C. 288, Foll. The parties could make the mortgage into one bearing compound interest, by an oral agreement subsequent to 1st Jan, 1905. (*Ormond and Parlett. JJ.*) KO KYO *v.* A. K. CURPEN CHETTY. **24 I C. 700 : 7 Bur. L. T. 140.**

——S. 3 –

Actionable Claim.
Immoveable property.
Notice.

Actionable Claim.

——S. 3— *Actionable claim — Insurance money.*

Assignment of moneys due under Life Insurance policy by way of charge must be in writing. (*Lord Moulton*). MULRAJ KHATAN *v.* VISHWANATH. **37 Bom. 198 : 40 I. A. 24 (1912) M. W N. 1247 : 12 M. L. T. 652 : 11 A. L. J 7 : 17 C. W. N. 209 : 15 Bom. L. R. 9 : 17 C. L. J. 162 : 17 I. C. 627 : 24 M L. J. 60. (P C.)**

——Ss. 3 and 133—*Actionable claim—Life Policy—Charge—Assignment—Effect.*

In an ordinary life insurance policy, the Insurance Company is a debtor in respect of the policy moneys which is a debt within the meaning of S. 3 though conditional and contingent. (*Scott, C. J. and Batchelor, J.*) VISHVANATH *v.* MULRAJ. **11 I. C. 964 : 13 Bom. L. R. 590.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S, 3—Immoveable Property.

——Ss. 3 and 130—*Actionable claim—Right to sue for damages for breach of contract.*

A right to sue for damages for breach of contract is not an actionable claim and cannot be transferred. (*Kensington, C. J. and Chevis, J.*) JANGLI MAL *v.* PIONEER FLOUR MILLS. **106 P. R. 1914 : 27 I. C. 115 : 242 P. L. R. 1915.**

——Ss. 3, and 130—*Actionable claim—Book debt is an—Delivery is necessary.*

A book debt is an actionable claim, and to render a gift thereof complete, delivery is not necessary. Where a deed purports to assign by way of gift a mortgage and book-debts and is unregistered it is inoperative as regards the mortgage but is effectual as to the book debts. (*Wallis, C. J and Hughes, J.*) PERUMAL AMMAL *v.* PERUMAL NAIKER. **44 Mad. 196 : 13 L. W. 69 : (1921) M. W. N. 5 : 61 I. C. 461 : 10 M. L. J. 25.**

——S. 3—*Actionable claim—Right to recover goods sent or to claim damages therefor does not amount to.*

S. 3 of T. P. Act does not warrant a claim to recover goods lent or damages for to breach of contract for failure to return them. It is a mere right to sue within S. 6 (e) of the Act and is not transferable. (*Batten, J. C.*) MT. NAKHOLA *v.* KOKAYA. **1923 N. 61.**

Immoveable property.

——S. 3—*Immoveable property—Fruit trees.*

Unless it is proved that the character of fruit trees is of growing timber, such trees are immoveable property. (*Rafique, J.*) KHATWAR CHAMAR *v.* RAM ADHIN UPADHIA. **17 I. C. 910 : 10 A. L. J. 516.**

——Ss. 3 and 59— *Immoveable property—Standing trees.*

Standing trees are not immoveable property and therefore S. 59 has no application to the hypothecation of trees. (*Karamat Husain, J.*) MANGAL SEN *v.* NAULI **9 I. C 478.**

——S. 3—*Immoveable property—Trees.*

Trees, other than fruit trees or other forest produce are standing timber and hence fall under moveable property ; so a contract to cut such trees is not a transfer of an interest in immoveable property (*Scott, C. J. and Rao, J.*) ALI SAHIB BABA DIWAKAR *v.* MOHIDIN SADIK PATIL. **12 I. C. 375 : 13 Bom. L. R. 874.**

——S. 3—*Immoveable property— Mortgage debt.*

A mortgage debt is immoveable property for purposes of the T P. Act and for a transfer of such a debt where the right, title or interest transferred by an instrument in writing exceeds Rs. 100, registration is necessary. (*Richardson and Beachcroft, JJ.*) SAKHIUDDIN SAHA *v.* SONAULLA SARKAR. **27 C. L. J. 453 : 45 I. C 986 : 22 C. W. N. 641.**

——S. 3—*Immoveable property--Non-proprietary resident of house—Materials of standing house—Not moveables—Limitation.*

A non-proprietary resident is the owner of the materials of his house and his rights in them are not temporary rights and the house is not moveable property, and the period of limitation for

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 3—Immoveable Property.

recovery is twelve years. (*Martineau, J.*) SHANCHI KHAN *v* KARAM CHAND.

1923 Lah. 150 (2).

——Ss. 3 and 54—*Immoveable property—Mortgage debt.*

A mortgage debt is not immoveable property and its transfer does not require registration. (*Wallis, J.*) DWARAKA DOSS *v.* DANAKOTI AMMAL.

23 I. C. 129: 15 M. L. T. 198.

——S. 3—*Immoveable property—Doors and windows.*

The doors and windows of a house are not moveable property. 11 Cal. 164 ; 13 Mad. 518 ; 14 Mad. 467. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) IBRAHIM SAHIB *v.* ARUMUGATHAYEE.

16 I. C. 877 : 38 Mad. 18.

——S. 3—*Immoveable property—Mortgage debt—Attachment.*

A simple mortgage has to be attached as a debt under O. 21, R. 46 and not as immoveable property under O. 21, R. 54, C. P. Code. 37 Mad. 51 ; 26 Bom. 305 , 20 Cal. 805 ; Rel (*Kanhaiya Lal and Daniels, A.J.Cs.*) SHAHA MOHAMMAD YUSUF *v.* LACHMI NARAIN.

6 O. L. J. 49 : 50 I. C. 157 : 21 O. C. 400.

——Ss. 3 and 58—*Immoveable property—Royalty—Commission— Interest in immoveable property—Mortgage—Attestation.*

Royalty is in reality the price paid for a portion of the soil, the payment whereof is distributed over a number of years. An interest in a royalty is not an interest in immoveable property and a mortgage of the interest does not require attestation. (*Das and Adami, JJ.*) KRISHNA KISHORE ADHIKARY *v.* THE KUSUNDA NYADI COLLIERIES, LTD.

1922 P. 36.

——S. 3—*Immoveable property —Fishery right.*

Exclusive fishery rights do not give occupancy right but where part of a holding is under water, occupancy right in the entire holding may be acquired. (*B. K. Mullick and Ross, JJ.*) MESSRS HENRY HILL & CO. *v.* SHEO RAJ RAY.

3 P. L. T. 53 : 1922 Pat 195 : 1922 P. 9.

——S. 3—*Immoveable property—Trees.*

A claim for possession of trees is a claim to an interest in immoveable property. (*Coutts and Macpherson, JJ.*) BENI PRASAD *v.* SURAJ SINGH

63 I. C. 264 : 2 Pat. L. T. 622.

Notice.

——Ss. 3 and 79—*Notice—Absence of enquiry.*

If a mortgagee taking a mortgage in a place where he knows that mortgages by deposit of title deeds are legal and usual does not ascertain whether the title deeds were already pledged, his failure so to ascertain is such abstention from an enquiry which he ought to have made or such negligence as to infer notice in terms of section 3. (*Lord Dunedin*) The IMPERIAL BANK OF INDIA *v.* U RAIBAYW THU & CO. LTD.

1 Rang. 637 : 21 A. L. J. 784 : 25 Bom. L. R. 1279 : 9 O. and A. L. R. 937 : 33 M. L. T. 395 : 2 Bur. L. J. 254 : 50 I. A. 283 : 45 M. L. J. 505 : (1923) M. W. N. 609 : 1923 P. C. 211 (P. C.).

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 3—Notice.

——S. 3—*Notice—Registration.*

A mortgagor effected certain alienations by registered instruments after a decree in 1898 but before a sale by him to another with the permission of the Court in 1905 : *held*, that the registration was sufficient notice against the purchaser of 1905. (*Richards, C. J. and Banerjee, J.*) ADAUKI TELI *v.* MOTIJAY.

16 I. C. 102 : 9 A. L. J. 759.

——S. 3—*Notice—Attestation is not notice of contents.*

An attesting witness need not as such be considered as being aware of the contents of the documents he attests. (*Macleod, C. J. and Crump, J.*) TALAK CHAND BHERAJI *v.* ATMARAM KESHAV VAIDYA.

25 Bom. L. R 818 : 1924 Bom. 58.

——S. 3—*Notice—Registration.*

Registration of a document is not invariably sufficient to fix a man with notice. If the property affected by the registration is referred to in the index register then a person affected by it may be said to have constructive notice of it. (*Macleod, C. J. and Heaton, J.*) GOVARDHANDAS *v.* MOHANLAL

22 Bom. L. R. 1158 : 59 I. C. 506 : 45 B. 170.

——S 3—*Notice— Registration —Search in registry.*

Registration by itself does not amount to notice in Bengal. The making of a search at the registry for a document does not raise an inferential presumption of notice in any case under S. 3 of the T. P. Act and it is open to a party making the search to show that in fact he had no notice. 16 I. C. 618 Expl. (*Holmwood and Imam, JJ*) NANDA LAL ROY *v.* ABDUL AZIZ.

34 I.C. 115 : 43 Cal. 1052.

——S. 3—*Notice—Constructive—Involuntary sale—Doctrine, if applicable.*

Where a purchaser should and could have ascertained before his purchase the true state of affairs as to the charge upon the property purchased by him, he is in the same position as if he had made such inquiry and the purchasers from him are in no higher position, if they could have, by enquiry, before they acquired title, ascertained the fact, but to a purchaser acquiring title under an involuntary alienation constructive notice cannot be imputed to the same extent as to a private purchaser. A purchaser without notice from a person who had notice is protected. A purchaser with notice may shelter himself under the title of the person from whom he purchased if the latter could successfully raise the defence of want of notice. (*Mookerjee and Beachcroft, JJ.*) AKSHOY KUMAR BANERJEE *v.* CORPORATION OF CALCUTTA.

42 Cal. 625 : 19 C. W. N. 37 : 27 I. C. 261 : 21 C. L. J. 177.

——S. 3—*Notice—Terms of lease.*

Notice of a lease is notice as to its terms. (*Fletcher and Chatterjee, JJ.*) BENGAL COAL CO., LTD *v.* RAJENDRA LAL MITRA.

21 I. C. 920 : 18 C. W. N. 420.

——S. 3—*Notice—Registration.*

Notice of a book amounts to notice of its contents. Search of a register amounts to a knowledge

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 3—Notice.

of all its contents, though the person making the search was unsuccessful in finding a particular document therein, if it was in the register. (*Chatterjee and Richardson, JJ.*) AKHOY KUMARI DEBI *v.* KANAI LAL KUNDU.
16 I. C. 618 : 17 C. W. N. 224.

——S. 3—*Notice—Possession.*

It may be conceded that whatever puts a party on inquiry amounts to notice in law. provided the inquiry becomes a duty and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding. If a person is in possession it may be sufficient to put one dealing with the property on enquiry as to the nature and extent of his interest. (*Mookerjee and Beachcroft, JJ.*) RADHA MADHAB PAIKARA *v.* KALPATARU ROY.
16 I. C. 811 : 17 C. L. J. 209.

——S. 3—*Notice—Registration is constructive notice.*

The registration of an instrument is constructive notice of its contents. (*Shadi Lal, C. J. and Harrison, J.*) MT. MALAN *v.* TARA SINGH.
4 L. L. J. 23 : 1922 Lah. 64.

——S. 3—*Notice, possession is.*

A subsequent purchaser alleging want of notice and basing his claim thereon must enquire into the title of a tenant in possession. (*Wilberforce and Abdul Quadir, JJ.*) ARURA *v.* GEHNA.
3 Lah L.J. 447.

——S. 3—*Notice—Possession.*

Pessession amounts to notice of such title as the person in possession may have and any other person who takes a mortgage on other charge upon or purchases immoveable property without ascertaining the nature of the claim of the person in possession does so at his own cost. 27 Bom. 452 ; 27 Bom 408 ; 35 Bom. 269 ; 56 P. R. 1900, Foll. (*Scott Smith, J.*) ABDULLA *v.* MOHOMED SHA.
2 Lah. L. J. 720.

——S. 3—*Notice—Registration, if constructive notice.*

In the circumstances of this case registration was held to be constructive notice and that but for the deft's wilful abstention from enquiry he must have known all the conditions regarding the prohibition to erect a balcony which were contained in the deed of sale to the plff. (*Leslie Jones, J.*) RAM SINGH *v.* RAM SINGH.
39 I. C. 778 : 48 P. W. R. 1917.

——S. 3—*Notice—Registration.*

The doctrine of constructive notice by registration does not arise in a case where a person sought to have had notice by it, is not obliged by law to make a search in the registry office (*Scott Smith, J.*) UMRAO SINGH *v.* LACHMI NARAYAN.
25 P. L R 1917 : 39 I. C. 762 : 19 P. W. R. 1917.

——S. 3—*Notice—Registration.*

Registration is notice to subsequent dealers with the property. 15 Mad. 268, Diss. (*Johnstone and Rattigan, JJ.*) ALLIANCE BANK *v.* KAHAN SINGH.
4 P. R. 1915 : 111 P. W. R. 1914 : 25 I. C. 856 : 216 P. L. R. 1914.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 3—Notice.

——S 3—*Notice—Registration.*

The residence of a person at the place where the deed was registered is insufficient to fix him with notice thereof (*Scott Smith and Shadi Lal JJ.*) HIRA LAL *v.* CHANAN KHAN.
98 P. W. R. 1914 : 25 I. C. 658 : 199 P. L. R. 1914.

——S. 3—*Notice—Constructive notice—Occupation of portion of the property—Effect of.*

A person who has acquired a property under a voidable title can himself give a good title to the property to a *bona fide* purchaser or mortgagee from him, who dealt with for value and has no notice of the defects in title. Under S. 3 of the T. P. Act constructive notice of all the rights of a person in possession of property sold or mortgaged is to be imputed to purchasers or mortgagees who made no enquiry of the persons in occupation. The rule is based on the principle that where another is in exclusive possession would *prima facie* be inconsistent with the full rights of ownership of the vendor or mortgagor and purchaser or mortgagor does not choose to ask what that possession is ; he must be taken to have got the information that he would have obtained if he had asked. But the unknown occupation of a part of the premises by a tenant or other person does not put the purchaser or mortgagee on enquiry as to the possible rights of the occupier of the portion over the remainder of the premises. *Hunt* v. *Luck* (1901) 1 Ch. 45 *Hunter* v. *Wallers* L. R. 7 Ch. 75: 35 B. 342 Ref (*Schwabe C. J. and Wallace, J.*) PARTHASARATHY IYER *v.* SUBBARAYA GRAMANY.
45 M. L J. 175 : 17 L. W. 763 : 1924 Mad. 67.

——S. 3—*Notice—Constructive.*

Constructive notice under S. 3 includes cases of gross negligence in making further enquiry about facts of which a person has actual notice and a wilful abstention from enquiry for the very purpose of avoiding notice. (*Sadasiva Aiyar and Moore, JJ.*) PUTHEN PURAYIL *v.* KANDIYAL.
(1916) 2 M. W. N. 31 : 34 I. C. 906 : 20 M. L. T. 127.

——S. 3—*Notice—Registration is not.*

Registration doses not operate as constructive notice and the purchaser from an ostensible owner whose title deeds are themselves complete is not bound to search the registration office to see if the original owner may not have given a title to somebody else. (*Batten, J.C.*) MT. KASTURI BIBI *v.* BALIRAM.
1923 Nag. 15.

——S. 3—*Notice—Constructive.*

Where a subsequent mortgagee had knowledge of the prior mortgage and also of the sale to the prior mortgagee, of the share belonging to the mortgagor's brother and terms of his own mortgage were such as to make that mortgage well nigh irredeemable, these circumstances could not be regarded as sufficient proof of notice that the subsequent mortgagee had notice of a contract of sale between the mortgagor and the prior mortgagee. (*Kanhaiya Lal, A. J. C.*) RAM BHAJAH *v.* SHEO DARSHAN SINGH.
34 I. C. 396 : 3 O. L. J. 162.

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 3—Notice.

——— S. 3—*Notice—Registration— Erroneous description of the property.*

In order to bind the subsequent transferees with a prior lien, the law of registration has been enacted so that the subsequent transferee may have an opportunity to ascertain whether the property transferred to them was subject to any prior encumbrance or not, and once that prior encumbrance is effected by means of a registered instrument, the subsequent transferees are presumed to have notice of the same and are in law bound by it. A mere misdescription of the property dealt with, will not take away the jurisdiction of the Registrar to register the same if he was otherwise empowered to do so under the Act. (*Jwala Prasad and Ross, JJ.*). MT WAJIHUNNISSA BEGAM *v.* VALMIKI SAHAY.
1 Pat. L. R. 80 : 1924 P. 359.

——— S. 3—*Notice—Registration*

Registration amounts to notice (*Maung Kin, J.*) AUNG KAING SAING *v.* MAUNG SAN
1 Bur. L. J. 204 : 1923 R. 41 (2).

——— S. 3—*Notice—Possession of third person.*

A person purchasing immoveable property in the possession of a person other than the vendor must be held to have constructive notice of the right of the possessor. (*Maung Kin, J.*) MAUNG KYI NYO *v.* MAUNG AUNG THA.
41 I. C. 628.

——— S. 3—*Notice—Possession of stranger.*

A purchaser of immoveable property in the possession of a third person is presumed to have notice of the title of such third person. (*Maung Kin, J.*) MAUNG BO *v.* MAUNG TUN BYU.
33 I. C. 121.

——— S. 4—*Registration Act Ss. 17, 49—Construction—Unregistered sale deed for less than Rs. 100—Inadmissible in evidence.*

Beaman, J.—Sec. 4 can properly be annexed to S. 17 Reg. Act the legal consequences become apparent, for then any unregistered deed of sale of immoveable property below the value of Rs 100 would not only not be effectual to transfer the property but would also fall within the comprehensive and stringent prohibition of S. 49. (*Macleod, and Beaman, JJ.*) DAWAL PIRAN SHAHA *v.* DHARMA RAJARAM. **19 Bom. L. R. 622 : 41 I. C. 273 : 41 B. 550.**

——— Ss. 4 and 137—*Contract Act.*

Section 137 is to be taken as part of the Contract Act, (1872) (*Scott, C. J. and Chandavarkar, J.*) AMARCHANDA & CO. RAMDASS PURBAR.
38 Bom. 255 : 21 I. C. 343 : 15 Bom. L. R. 890.

——— Ss. 4 and 107—*Registration Act, Ss. 17 and 49—Unregistered lease for less than a year —Admissibility.*

S. 107 of the T. P. Act cannot be taken to have been inserted in S. 17 of the Registration Act and an unregistered lease deed for less than one year is not a document required to be registered under S. 17 and S. 49 of the Act can have no application to it. (*Wallis, C. J. Ayling and Krishnan, JJ.*) RAMA SAHU *v.* GOWRO RATHO.
44 Mad. 55 : (1920) M. W. N. 711 : 12 L. W 649 : 39 M. L. J 639 : 59 I. C. 350 : 29 M. L. T. 10 (F. B.)

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 5.

——— Ss. 4 and 107—*Agreement to lease—Registration—Necessity for—Contract—Construction*

The only effect of the provision in section 4 of the Transfer of Property Act that section 107 shall be read as supplemental to the Registration Act (*i.e.*) to section 17 of the Registration Act is that the provision (that leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent shall be registered) contained in section 17 of the Registration Act shall be read as amplified by the proviso to section 107 of the Transfer of Property Act. It has not the effect of requiring the Court to construe the word "lease" in section 107 of the Transfer of Property Act in the wider sense in which it is defined in the Registration Act. The question whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document and where a contract operates as an actual demise it must be deemed to be a lease. (*Ashworth, J. C.*) MAHOMED ALI *v.* SYED HASAN JAFAR.
10 O. L. J. 109 : 1923 Oudh 237.

——— S. 5—"*Transfer of property"—Definition not applicable to Pres. Town. Ins Act.*

The definition of "transfer of property" in S. 5 of the Transfer of Property Act does not apply to transfers contemplated by the Presidency Towns Insolvency Act. (*Marten, J.*) MAHOMED HASHAM & CO. *In re.* **1923 Bom. 107.**

——— Ss. 5, 54 and 118—*Consideration—Exchange.*

A purchaser of property paying mortgage charges in respect of the property purchased cannot be said to have paid purchase money by such payment. When the sale was for a definite account in exchange of properties payment of a small amount of money by one for adjusting values does not make the transaction a sale. (*Rattigan, J.*) FUAZI *v.* SHARFA.
100 P. W. R. 1913 : 19 I. C. 301 : 199 P. L. R. 1913.

——— S. 5—*Mutual relinquishment admission of claim.*

Where a transaction can only be regarded as a mutual relinquishment and admission of claim by all the parties, it cannot come within any of the class of transfers defaulted with by the Transfer of Property Act. 33 A 356 referred to. (*Hallifax, A. J. C.*) JAINNABI *v.* GHULAM MOHIUDDIN.
1923 Nag 55 (2).

——— S. 5—*Transfer—Validity—Essentials.*

A person acquiring another's rights by transfer must acquire it by a valid transfer from the original owner of the right or by operation of law. (*Drake-Brockman, J. C.*) GANPATA *v.* TRIMBAK. **19 I. C. 759 : 9 N. L. R. 54.**

——— S. 5—*Transfer by sale to minor if valid.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6.

The definition of the expression "Transfer of property" contained in S 5 of the Transfer of Property Act does not import any disqualification on the part of a minor to acquire property by a transfer. (*Lindsay, J. C. and Kanhaiya Lal. A.J. C.*) RAGHUNATH BAKSH *v.* MUHAMMAD BAKSH.
2 O. L. J. 200 : 30 I. C. 200 : 18 O. C. 115.

——— ——S. 6—

Easement.
Mere Possibility.
Mere Rights to Sue.
Non-transferable Right.
Personal Right.
Public Officer.
Right of re entry.
Rights in future.
Scope of.
Unlawful object.

Easement.

——— ——S. 6 (c)—*Easement—"Easements in gross".*

S 6 of the T. P. Act merely expresses the rule that there cannot be an "easement in gross". (*Chatterjee and Richardson, JJ.*) SITAL CHANDRA CHAUDHURY *v.* ALLEN J DELANVEY.
34 I. C. 450 : 20 C. W. N. 1158.

——— ——S. 6 (c), (d)—*Easement—Natural rights—Waiver—Release.*

It is only a transfer to a stranger of natural rights which carry with them obligation to third parties that could not be assigned under the law, but a man is entitled to waive or release any rights in property belonging to himself. (*Sadasiva Iyer and Napier, JJ.*) THANGAVELU PILLAI *v.* DORAISWAMY PILLAI **26 I C. 211 : 16 M. L. T. 393 : 27 M L.J. 272.**

———S. 6 (c)—*Easement—Kumaki rights—Transfer of.*

Kumaki lands are waste lands adjoining *warg* lands, and a *kumaki* privilege is the right which the ryot, holding the *warg* land has to collect leaves for manure, and to pasture his cattle as an assistance to the cultivation of the *warg* land. 28 Mad. 257. Ref. These *kumaki* privileges are extinguishable by Government which may assign the land over which they are exercised to another person than the holder. 12 Mad. 422 ; 28 Mad. 527, Ref. The *kumaki* right is essentially in the nature of a right by way of easement as defined in S 4 of the Easements Act and is governed by the principle of S. 6 (c) of the T. P. Act. The *kumaki* rights are not rights "in gross" but only rights "appendant" and cannot be transferred except with land for which they exist. 16 Mad. 304, Expl. (*White, C. J. and Ayling, J.*) MATILDA FERMANDEZ BAI *v.* ALEX PINTO. **15 I. C. 278.**

Mere Possibility.

———Ss. 6 (a) and 43—*Mere possibility—Hindu reversioner—Joint in conveyance by limited owner.*

A Hindu reversioner's joining in a conveyance by a Hindu limited owner is wholly futile for he has a mere *spes successionis.* On the death of the limited owner the reversioner is not estopped

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Mere possibility.

from claiming properties as heir. (*Mr. Ameer Ali.*) GUAR NARAIN *v.* SHEO LAL SINGH.
46 Cal. 566 : 17 A L. J 66 : 9 L. W 335 : 28 C. W. N. 521 : 49 I. C. 1 : 1 U. P. L. R. (P. C.) 1 : 36 M. L. J. 68 (P. C.)

——— ——S. 6 (a)—*Mere pessibility—Hindu reversioner—Interest of.*

The interest of a Hindu reversioner during the lifetime of the limited owner is a mere *spes successionis* and it is not open to him or to his guardian, if he is a minor, to bargain with it or bind himself by an agreement in respect thereto. Such a dealing with the estate is void and not be binding on him when the succession opens. (*Mr. Ameer Ali.*) AMRIT NARAYAN SINGH *v.* GAYA SINGH. **45 Cal. 590 : 45 I. A. 35 : 23 M. L. T. 142 : 22 C. W. N. 409 : 27 C. L. J. 296 : 4 Pat. L. W. 221 : 16 A L. J. 265 : (1918) M. W. N. 306 : 7 L. W. 581 : 44 I. C. 408 : 20 Bom. L R. 546 : 34 M. L. J. 298 (P. C.).**

——— ——S. 6—*Mere possibility — Reversioner's rights.*

Hindu daughter cannot bargain among her son's right as a reversioner. (*Ryves and Gokul Prasad, JJ.*) NARAIN SINGH *v.* RAJ KUMAR SINGH.
20 A L. J. 251 : 44 A. 428 : L. R. 3 A. 229 : 1922 All. 217.

——— ——S. 6 (a)—*Mere possibility—Family settlement*—Spes successionis—*Dispute as to.*

S. 6 does not impose any statutory prohibition against the formation of contracts relating to specified subjects as though they were contrary to public policy and forbidden. S. 6 of the T. P. Act has no application to a *bona fide* settlement of a right to succeed to properties of a deceased person among the rival competitors. (*Piggott and Walsh, JJ.*) CHABLI *v.* PARMAL.
41 All. 611 : 1 U. P. L. R. (H. C.) 91 : 51 I. C. 919 : 17 A. L. J. 822.

——— S. 6 (a)—*Mere possibility—Adoption by widow — Agreement postponing son's estate during widow's life-time—Transfer by adopted son.*

Where under an agreement with a Hindu widow adopting a boy the latter's right to possession and enjoyment of the properties were postponed to the death of the widow, *Held*, that the interest of the adopted son was not a mere possibility of mere succession to the estate after the death of the widow but it was a vested right, the right of enjoyment and possession being only postponed, and that the sale was unaffected by the provisions of S. 6 (a) of the T. P. Act. (*Tudball and Abdul Raoof, JJ.*) BALWANT SINGH *v.* JOTI PRASAD. **40 All. 692 : 47 I. C. 599 : 16 A. L. J. 765.**

——— S. 6 (a)—*Mere possibility—Relinguishment—Settlement of disputed reversionary claim—Validity.*

A settlement of disputed claim to a reversionary estate by two claimants by virtue of which one gives up his right on receipt of a sum of money is not void under S 6. (*Banerji and Walsh, JJ.*) BARATILAL *v.* SALIGRAM. **38 All. 107 : 31 I. C. 919 : 13 A. L. J. 1141.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6 - Mere possibility.

——— S. 6 (a)—*Mere possibility—Contract regarding.*

If a person contracts for good consideration not to claim a share in a property in the event of his succeeding to it, on the death of a person then living, there is nothing illegal in it and it does not come within S. 6, T. P. Act. (*Richards, C. J. and Banerji, J.*) MOHAMMAD HASHMAT ALI *v.* KANIZ FATIMA. **27 I. C. 701 : 13 A. L. J. 110**

——— S. 6 (a)—*Mere possibility—Co-parcenary right.*

Agreement between certain Hindu brothers that on the death of any one of them without issue his share should go to the other brothers is not obnoxious to S 6. (*Stanley, C. J. and Banerji, J.*) KANTEE CHANDRA *v.* ALI NABI. **33 All. 414 : 9 I. C. 935 : 8 A. L. J. 199.**

——— S. 6 (a)—*Mere possibility.*

S. 6 does not prohibit an agreement by an heir expectant to divide property in a particular way on the happening of a contingency. 18 Cal. 138. Foll. (*Stanley, C. J. and Banerji, J.*) NASIRUL HAQ *v.* FYAZUL RAHMAN. **33 All. 457 : 9 I. C. 530 : 8 A. L. J. 275.**

——— S. 6 (a)—*Mere possibility—Hindu reversioner—Interest of—Not transferable.*

It is not competent to a Hindu reversioner to relinquish or transfer his interest to any one during the lifetime of the widow. If he purports to relinquish his interest in favour of the widow, her interest is not in any way enlarged. (*Macleod, C. J and Coyajee, J.*) DAYARAM PREMJI *v.* BECHARDAS. **24 Bom. L. R. 351 : 1922 Bom. 437.**

——— S. 6 (a)—*Mere possibility—Mother's estate—Right of sons to share in, cannot be transferred.*

Semble : The right of sons to get share in the mother's estate is only a *spes successionis* within the meaning of S. 6 (a) and as such cannot be relinquished. (*Rankin, J.*) SHASHI BUSAN SHAW *v.* HARI NARAIN SHAW **48 Cal 1059 : 66 I. C. 705 : 25 C. W. N. 990**

——— S. 6 (a)—*Mere possibility—Reversioner—Interest of*—Spes successionis—*Transferability.*

The interest of a Hindu reversioner is a mere *spes successionis* or a chance of succession and it is inalienable under S. 6(*a*) of the Act, neither is it devisable or transmissible by inheritance as it lacks the fundamental characteristic of the juristic concept of ownership as understood by Hindu Law (*Mookerjee, C. J and Fletcher, J.*) ANNADA MOHAN *v* GOUR MOHAN. **48 Cal. 536 : 25 C. W. N. 496 : 65 I. C. 27 : 33 C. L. J. 457.**

——— S. 6 (a)—*Mere possibility—Reversioner.*

A reversionary heir has under the Hindu Law a mere *spes successionis* which he cannot transfer validly. (*Richardson and Walmsley, JJ.*) SHYAMDAS ROY *v.* RADHIKAPROSAD. **22 C. W. N 486 : 47 I. C. 853 : 29 C L. J. 24.**

——— S. 6 (a)—*Mere possibility—Hindu temple—Offerings—Pujari's right*—Res extra commercium.

The chance that future worshippers will give offerings to a temple is a mere possibility within S. 6 (a) of the T. P. Act, and cannot be transferred. Such a transfer being prohibited by statute, the transferor is not estopped from questioning its validity. Per *Sharfuddin, J.*—The right of the Pujari of a Hindu temple to take a share of the offerings is a *res extra commercium.* 26 Mad. 31, Foll. (*Sharfuddin and Coxe, JJ.*) PUNCHA THAKUR *v.* BINDESHRI THAKUR **43 Cal. 28 : 28 I. C. 675 : 19 C. W. N. 580.**

——— S. 6 (a)—*Mere possibility— Reversioner, interest of—If can be transferred.*

The interest of a reversioner under the Punjab Customary Law is no more than a *spes successionis* and cannot form the subject-matter of a transfer. (*Shadi Lal, C. J. and Wilberforce, J.*) BUTA SINGH *v* JHANDU. **3 Lah. L. J. 211 : 61 I. C. 375 : 3 U. P. L. R. (Lah.) 49.**

——— Ss. 6 (a) and 43—*Mere possibility--Transfer of.*

An expectant heir who transfers a portion of the property included in the succession which he expects, does transfer only his chance of succession so far as that portion of the property is concerned. S. 6 of the Act does not prohibit the transfer of a *spes successionis.* It provides that such a transfer cannot be made for the reason that a *spes successionis* is not property and therefore the execution of a document purporting to transfer the *spes successionis* purports to transfer property which does not exist. If the transferor afterwards acquires an interest then the transferee would be entitled to the benefit thereof. (*Rossignol and Broadway, JJ.*) BHAGWATI *v.* CHAOLI. **55 I. C. 698 : 2 U P. L. R. (Lah.) 79.**

——— Ss 6 (a) and 54—*Mere possibility—Contract to sell by reversioner—Subsequent sale to third persons—Specific performance.*

A Hindu reversioner agreed to sell his reversionary estate, but subsequently sold it to another person. The disappointed vendee brought a suit for possession. *Held*, that the contract did not create any interest in the property. The only right which the contract gave to the plff. was a right to obtain a conveyance of the land when the reversioner got possession. The plff may be entitled to sue for specific performance on the death of reversioner but he had no cause of action to bring the present suit. 23 Bom. 181, Foll. 13 P. R. 1899, Dist. (*Shadi Lal and Martineau, JJ.*) ARUR SINGH *v.* TODAR MAL. **42 I C. 501: 22 P. W. R. 1919.**

——— S. 6 (a)—*Mere possibility—Reversionary right.*

The transfer of the reversionary interest by a reversioner is illegal. 67 P. R. 1909 ; 31 Cal. 433, Foll. (*Le Rossignol, J.*) DIWAN CHAND *v.* IMAM DIN. **74 P. W. R. 1917 : 41 I. C. 347: 135 P. L. R. 1917.**

——— S. 6 (a)—*Mere possibility—Reversionary rights, sale of.*

A sale of reversionary rights, though, invalid, can be enforced as an agreement to sell when succession opens out. 66 P. R 1897; 13 P. R. 1899, Rel. (*Beadon, J.*) ATTARCHAND *v* UMAR HAYAT. **150 P. W. R. 1913 : 20 I. C. 556: 296 P. L. R. 1913.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Mere possibility.

——S. 6 (a)—*Mere possibility— Reversioner —Agreement to divide.*

Where the reversioners to an estate in the possession of a Hindu widow agree to divide it in particular shares on her death the agreement is inoperative to confer any right to the property on any of the reversioners. (*Wallis, C J. and Spencer, J.*) SUBBARAYA GOUNDAN *v.* MUTHAYAMMAL. **49 I. C. 260: 35 M. L. J. 684.**

——S. 6 (a)—*Mere possibility—Succession—Right to—Mahomedan Law.*

Under the Mahomedan Law, the right of inheritance cannot be renounced or transferred before it vests in the heir. Till then it is a mere expectancy. (*Wallis, C. J., Bakewell and Kumaraswami Sastri, JJ*) ASHA BEEVI *v.* KARUPPAN CHETTY. **41 Mad 365 : 45 I. C. 35: 7 L. W. 215 : 34 M. L. J. 460.**

——S. 6 (a)—*Mere possibility under Mahomedan Law.*

Per *Sadasiva Aiyar, J, contra Spencer, J.*—A *spes successionis* not a right of property under Mahomedan Law and a release of such a right is invalid. 24 M L.J. 258 ; 31 Bom. 165, Foll. 13 A. L. J. 110 ; 19 Mad 176. Expl and Dist. This rule is unaffected by S.6. (*Sadasiva Aiyar and Spencer, JJ.*) ASA BEEVI *v.* KARUPPAN CHETTY. **41 I. C. 361.**

——S. 6 (a)—*Mere possibility— Partition—Agreement that on death of one member his share to pass to survivors—Legality.*

A provision in partition deed among brothers that on death of any one of them without male heirs his share must pass to the survivors who should divide it rateably among themselves is not illegal, it is not a transfer of a *spes successionis* nor is it a restraint upon alienation (*Wallis, C.J. and Seshagiri Aiyar, J.*) MUTHURAMAN CHETTIAR *v.* PONNUSWAMI UDAYAR. **(1915) M W. N. 405 : 2 L. W. 533 : 18 M. L. T. 124 : 29 I. C. 549: 29 M. L, J. 214**

——S. 6 (a)—*Mere possibility—Agreement to sell by reversioner of an estate when it falls to him.*

A contract by an expectant reversionary heir to an estate to sell the same if and when it devolves on him, is not specifically enforceable. It is void under S. 6 (a) of the T. P. Act as also under S. 23 of the Contract Act. Case-law considered. (*Wallis, C. J. and Tyabji, J.*) KAKARALAPUDI LAKSHMI NARAYANA *v.* KANDUKURI VEERA SARABHA. **39 Mad. 554 : 17 M L. T 419 : 28 M. L J. 650 : 29 I. C. 241. (1915) M. W. N. 626 :**

——S. 6 (a)—*Mere possibility— Hindu widow—Agreement with reversioner to convert expectant rights into vested rights.*

A Hindu widow cannot legally enter into an agreement with the expectant reversionary heirs whereby the latter's expectant rights become converted into vested rights. (*Sadasiva Aiyar and Spencer, JJ.*) PALLA KANAKAMMA *v.* CHELLA RAMASAMI. **23 I. C. 98 : 1 L W. 237.**

——S. 6 (a)—*Mere possibility—Relinquishment by Hindu female—Hindu Law—Vested life-interest.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Mere possibility.

A vested life-interest under the Hindu Law is a present interest and is alienable. Where two Hindu female heirs inheirt a life interest in properties under a contract that each of the female heirs gives up *in præsenti* her lifeinterest in the property falling to the share of the other female heir, such a complete relinquishment is valid and destroys the right of succession by survivorship. (*Sadasiva Aiyar and Spencer, JJ*) SUBBAMMAL *v.* KRISHNA AIYAR. **22 I. C. 399 : 26 M. L. J. 479.**

——S. 6 (a)—*Mere possibility—Reversionary right.*

The interest of a riversioner is a *spes successionis* and is not transferable. (*Batten and Stanyon, A. J. Cs.*) PARVATI *v.* GOVID PRASAD. **42 I. C. 737. 13 N. L. R. 187.**

——S. 6 (a)—*Mere possibility — Transfer of property subject to life-interest.*

The transfer by a donee of a property subject to a life-tinterest in favour of another is not forbidden by S. 6 (a) of the T. P. Act. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) LACHAMAN PRASAD *v.* BALDEO PRASAD. **5 O. L. J. 625 : 48 I.C. 396 : 21 O. C 312.**

——S. 6 (a)—*Mere possibility— Reversioner —Transfer of right—Void—Equity.*

A transfer made by a Hindu reversioner of his expectant interest in an estate prior to the passing of the Act is void under the Hindu Law. No principle of equity can be invoked to enforce a void agreement. (*Lindsay, J. C. and Stuart, A. J. C.*) HAR NATH KUAR *v.* INDRA BAHADUR SINGH. **47 I. C. 214 : 5 O. L. J. 277.**

——S. 6 (a)—and 43—*Mere possibility—Transfer of expectancy—Validity of.*

S. 6 (a) of the T. P. Act renders void a mortgage of a reversionary interest. This mortgage cannot be enforced even after the person who purported to effect the transfer has acquired an estate in possession. (*Lindsay, J. C.*) SHIAM SUNDAR *v.* DILGANJAN SINGH. **20 O. C. 155 : 39 I. C. 540 : 4 O. L. J. 380.**

——S. 6 (a)—*Mere possibility—Reversioner —Transfer by.*

An agreement by a reversioner to give a share in the property on the estate falling into possession is not void under S. 6, as it is not a transfer in possession but only an agreement to convey the property in future. (*Lindsay, A. J. C.*) GAJADHAR SINGH *v.* KANDHUYA BAKSH. **9 I. C. 243.**

——S. 6—*Mere possibility — Reversioner—Conveyance of interest—Invalid.*

A Hindu reversioner can under no circumstances convey or agree to convey or relinquish any future right or expectancy nor can his guardian, if he happens to be a minor, bargain with his possibility of succession or bind him by any contractual engagement in respect thereto (*Das and Bucknill, JJ.*) BHAGWATI KUAR *v.* JAGDAM SAHAY. **62 I. C. 933 : 2 Pat. L. T. 471.**

——S 6 (a)—*Mere possibility—Interest of co parcener.*

S. 6, cl. (a) of the Act does not apply to the case of a member of a joint Hindu family whose

TRANSFER OF PROPERTY ACT (IV OF 1882), S 6 Mere possibility.

interest is not in the nature of a mere *spes successionis* but a vested present interest which may be undefined, in the sense that it may vary from day to day but which is nevertheless something very different from the chance of an interest contemplated by the section. (*Atkinson and Manuk, JJ.*) PARMA DUBE *v.* MAHADEO SINGH. **49 I. C. 907.**

——S. 6 (a)—*Mere possibility—Reversionary right.*

A reversioner has no right to deal with his expectant interests 33 All 356 (P. C.); 36 I A 103; 21 All. 71 (P. C), 29 Cal. 355: 31 Bom. 165 41 I C 631 Dist (*Chamier, C.J. and Jwala Prasad, J.*) DILTOR DOEE *v.* HARKU SINGH.

(1917) Pat. 225 : 2 Pat. L. J. 578: 41 I.C. 631 : 1 Pat. L. W. 760.

——S. 6—*Mere possibility—Transfer of—Estopppel—Punjab and N. W. F. Province*

The principles of the Transfer of Property Act are binding upon the Courts of the Punjab but the Act itself with its technicalities has no force as such in the province. In the Punjab and North-West Frontier Province a transferor of reversionary right is bound by his act when succession opens to him even if S. 6 of the Transfer of Property Act makes the transfer itself inoperative when made and even if S. 6 of the Transfer of Property Act is to be regarded As making such a transfer illegal and therefore, a nullity from which no equity can arise the Act itself is not in force in the Punjab and North West Frontier Province and, therefore, constitutes no statutory bar to a contract which would otherwise be enforceable in equity. (*Pipon, J. C.*) KABAL SHAH *v.* MAHOMED BAGA. **73 I. C. 120.**

——S. 6 (a)—*Mere possibility—Buddhist Law—Burmese.*

The prohibition contained in S. 6 (a) of the T P. Act against the transfer of an heir apparent's chance of succeeding to the estate applied to estates governed by the Burmese-Buddhist Law. (*Young, J.*) W. DHAR *v.* HTOON MAY. **52 I.C. 927: 12 Bur. L T. 106.**

Mere rights to sue.

——S. 6 (e)—*Mere right to sue—Right to recover debt.*

The purchaser at an execution of a mere right to sue for recovery of a debt due is not entitled to sue for the debt. (*Walsh and Ryves, JJ.*) NADAR MAL *v* MUKHTAR SINGH.

17 A. L. J 837.

——S. 6 (e) and 58—*Mere right to sue--Right to funeral dues.*

The right of Maha Brahmin to receive dues at funerals of Hindus is an existing right and a mortgage of such a right is not null and void. No right of suit for compelling one to employ Maha Brahmins and no right of suit between Maha Brahmins *inter se* for fees received. *Obiter dictum* : There being no obligation on any person to employ any Maha Brahmins at funerals, no suit to compel any such employment is maintainable, nor can there be a suit between two Maha Brahmins for fees received, in the absence of an express agreement. (*Richard, C. J. and Banerjee, J.*) SUKHLAL *v.* BISHAMBAR.

39 All. 196 : 37 I. C. 661 : 15 A. L. J. 41.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Mere right to sue.

——S. 6 (e)—*Mere right to sue—Mortgage—Consideration, equity of redemption—Clog on.*

A, executed an usufructuary mortgage in *B's* favour Later on a fresh mortgage deed called the Mashrut-al-relm was executed on fresh advances by which it was agreed that the first mortgage would not be redeemed unless the other advances were repaid *Held*, that the 2nd mortgage was usufructuary mortgage and that there was no clog, the debts being consolidated by the parties. (*Griffin, J.*) HARGOBIND *v.* TULA RAM. **10 I. C. 222.**

——S. 6 (e)—*Mere right to sue—Right to sue for damages for breach of contract cannot be transferred.*

A right to sue for damages for breach of a contract for sale or purchase of goods cannot be transferred (*Macleod, C. J. and Crump, J.*) HIRA CHAND AMIRCHAND *v.* NEMCHAND.

47 Bom. 719 : 25 Bom. L. R. 445 : 1923 Bom. 403.

——S. 6 (e)—*Mere right to sue—Assignment of—Claim for unascertained damages is only a mere right to sue—English and Indian Law.*

A claim for unascertained damages for breach of contract is not assignable, as it is a mere right to sue. *Glegg v. Bromley* (1912) 3 K B. 474 Ref. Where under the terms of a contract, the defendants were to take delivery of certain goods from and as a result of their failure to do so the goods were after arbitration resold for a lower price brought a suit for the balance, pending the suit assigned it to the plaintiff. *Held*, that the suit was not maintainable as the assignment was not of property with an incidental right to sue, but of a mere right to sue within the meaning of S. 6 (e) of the T.P. Act. *Held*, also upon the facts, the resale was not justified under S. 107 of the Contract Act and the claim was one for unascertained damages. *Per Richardson, J.*—In England there is no definite statutory rule that a bare right of action cannot be assigned. There is a statutary provision making choses in action assignable which is subject to a limitation placed upon it by the courts that the assignment must not injure the law of maintenance. In India there is an imperative statutory rule that a mere right to sue cannot be transferred. Nevertheless the results may be in many respects similar. The Indian Legislature when it enacted S. 6 (e) of the Transfer of Property Act, no doubt had in mind the expressions used in the English cases "a bare right of action" or "a mere right to litigate." On the question of construction which arises in India the language of Parker, J., in *Clegg v. Bromley* (1912) 3 K. B. is at least a valuable guide. Even if it be assumed that the goods were properly resold and that the claim asserted in the plaint and transferred to the plaintiff is a claim to an ascertained sum, it would still be for consideration whether this claim is in the particular circumstances a mere right to sue or property with an incidental remedy for its recovery within the meaning of Parker, J in *Clegg's case* (1912) 3 K.B. 474 (*Sanderson C. J. and Richardson, J.*) JEWAN RAM *v.* RATAN CHAND KISSEN CHAND.

70 I. C. 498 : 26 C. W. N. 285.

——Ss. 6 (e) and 130—*Mere right to sue—Actionable claim.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Mere right to sue.

The right to recover moneys found due on taking accounts is not a mere right to sue but an actionable claim, and is transferable (*Fletcher and Newbould, JJ.*) CHURAMONI NANDAL *v.* RAJENDRA KUMAR SINGH. **42 I. C. 390.**

——S 6 (e)—*Mere right to sue—Decree for mesne profits.*

A right to mesne profits under a decree is assignable though the right to sue for damages is not (*Chatterjee and Walmsley, JJ.*) PRASANNA KUMAR PANIJA *v.* ASUTOSH ROY. **20 I. C. 685 : 18 C. W. N. 450.**

——Ss. 6 (e) and 130—*Mere right to sue—Breach of contract—Damages.*

A purchaser of the rights in an insolvent estate from the Receiver cannot enforce a claim for damages on an unfulfilled contract in favour of the insolvent ; a right to sue for damages for breach of contract is not an actionable claim and cannot be transferred. (*Kensington, C.J. and Chevis, J.*) JANGLI MAL *v.* PIONEER FLOUR MILLS. **106 P. R. 1914 : 27 I. C. 115 : 242 P. L. R. 1915.**

——S. 6 (e)—*Mere right to sue—Transfer of property—Mesne profits—Right to.*

A transfer of arrears of rents with immoveable property is valid and would give a right to maintain a suit under S. 6 of the T. P. Act. (*Krishnan, J.*) KOWTHA SURYANARAYANA GARU *v.* YARUDALA VENKAYYA. **16 L. W. 837 : 1922 M. W. N. 822 : 1923 Mad. 177.**

——S. 6 (e)—*Mere right to sue—Contribuation—Right to—Assignment.*

A right to contribution is not a mere right to sue for damages and is assignable. (*Kumaraswami Sastri, J.*) G. RAMASWAMI IYER *v.* DEIVASIGAMANI PILLAI. **43 M. L. J. 129 : (1922) M. W. N. 442 : 16 L. W. 282 : 31 M. L. T. 156 (H. C.) : 1922 Mad. 397.**

——S. 6—*Mere right to sue—Right to reconveyance.*

A right to reconveyance of land is property and not a mere right to sue and it can be attached and sold. (*Wallis, C. J. and Oldfield, J.*) NARASINGHERJI *v.* PANNUGANTI PARTHASARATHY. **(1921) M. W. N. 519.**

——S. 6—*Mere right to sue—Right to receive mesne profits is not.*

Where the Court declares the right of the plff. to receive mesne profits but leaves the amount unascertained, the right to receive measne profits can be transferred so that the transferee, can have the amount ascertained in the ordinary procedure in the same suit in the ordinary course. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) VENKATARAMA AIYAR *v.* RAMASAMI AIYAR. **44 Mad. 539 : 13 L. W. 199 : (1921) M. W. N. 137 : 29 M. L. T. 92 : 62 I. C. 305: 40 M. L. J. 204.**

——S. 6 (e)—*Mere right to sue—Landlord's right—Tenant holding over.*

The right accruing to the landlord to sue the tenant holding over after expiry of the term, is a mere right to sue and cannot be transferred. (*Sadasiva Aiyar and Moore, JJ.*) GOVINDASWAMI PILLAY *v.* RAMASWAMI AYYAR. **34 I. C. 6 : 3 L. W. 408 : (1916) 2 M. W.N 79: 30 M.L. J. 492.**

——S. 6 (e)—*Mere right to sue—Contract executary—Assignment of.*

The terms 'mere right to sue is only' applicable to cases where there has been complete breach entitling a party to damages and where the specific performance of the contract cannot be obtained. An executory contract for the conveyance of land is not a mere right to sue and is transferable. A right to sue is no doubt involved in it on breach of its stipulations but before breach there is also the right to conveyance. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) VENKATESWARA IYER *v.* RAMAN. **33 I. C. 696 : 19 M. L. T. 329 : 3 L. W. 435.**

——S. 6 (e)—*Mere right to sue—"Occupation rent.*

A person who becomes an owner of property by a sale-deed is entitled to sue for occupation rent that becomes due even before the sale-deed if the right to it is purported to be transferred. A right to claim occupation rent is not "a mere right to sue" and is capable of being transferred under S. 6 of the Transfer of Property Act (*Tyabji, J.*) GOVINDASWAMI PILLAI *v.* RAMASWAMI AIYAR. **31 I. C. 604 18 M. L. T. 483 : 2 L. W. 1186 :**

——S. 6 (e)—*Mere right to sue—Actionable claim—Rent due.*

Assignment of rent due which is a debt is an assignment of a chose in action and unlike mesne profits which is a claim in tort is not obnoxious to S. 6 of the Transfer of Property Act. 38 Mad. 308, Dist. (*Seshagiri Aiyar, J.*) CHIDAMBARAM PILLAI *v.* DORAISWAMI CHETTY. **31 I. C. 473.**

——S. 6 (e)—*Mere right to sue--Mesne profits*

A claim for mesne profits cannot be validly transferred. (*Benson and Sundara Aiyar, JJ.*) KOCHARLA SEETAMMA *v.* PILLALA VENKATARAMAYYA. **38 Mad. 308 : 14 M. L. T. 319 : 21 I. C. 387 : 25 M. L. J. 410 : (1913) M. W. N. 918.**

——S. 6 (e)—*Mere right to sue—Transfer of—Tort.*

The right of a vendee of a mukhasa inam with all the current dues and arrears and all the rights to sue the vendor's agent for damages for negligence, is a mere right to sue a transfer whereof is invalid under S. 6 (e) T. P. Act. If the claim is based on tort, the claim fails as such a claim is not assignable. (*White and Tyabji, JJ.*) PANSULARI VENKATASAWMI *v.* MENTANA RAMACHANDRA RAJU. **38 Mad. 138 : 13 M. L. T. 218: 18 I C. 520 : (1913) M. W. N. 285 : 24 M L. J. 298.**

——S. 6 (e)—*Mere right to sue—Actionable claim.*

When a deed of transfer conferred on the transferee the right to recover from the transferor's agents moneys not brought to account fraudulently in a settlement between the transferor and his

TRASNFER OF PROPERTY ACT (IV OF 1882), S. 6—Mere right to sue.

..gents, *held*, it was a valid transfer and actionable claim and not of a mere right to sue. A suit therefor by the transferee is not one for damages nor is it one for the re-opening of a settled account. (*Miller and Abdur Rahim, JJ.*) RAMIAH CHETTIAR *v.* RUKMANI AMMAL. **18 I.C. 138 : 13 M. L T. 257 : 24 M. L J. 313.**

——— S. 6 (e)—*Mere right to sue—Damages for breach of contract.*

A mere right to sue for damages for breach of contract is not assignable under the T. P. Act. S. 6 (e). 36 Cal. 345 Foll (*White, C. J. and Sankaran Nair, J.*) GOPALA AIYAR *v.* RAMASWAMY SASTRIGAL. **10 I. C. 320 : 10 M. L. T. 496 : 22 M. L. J. 207.**

——— S. 6 (e)—*Mere right to sue—Loan of articles—Right to recover them or in default damages—Nature of —If transferable.*

A right to recover goods is a personal claim and cannot be transferred. Where the document evidencing the loan provides for damages in case the goods are not returned, a claim for damages is not an "actionable claim" within the meaning of the T. P. Act but a mere right to sue within S. 6 (e) and as such cannot be transferred. (*Batten J. C.*) MT. NAKHOLA *v.* KOKAYA. **1923 Nag. 61.**

——— S. 6 (e)—*Mere right to sue—Suit for past mesne profits.*

A suit by an assignee of a village along with profits accrued due prior to the sale to recover such profits is not maintainable inasmuch as it is a mere right to sue within Cl. (e) of S. 6 of the T. P. Act. Future mesne profits may however be recovered. (*Batten, A. J. C.*) LAKHPAT SAHAI *v.* TIKARAM. **47 I. C. 158.**

——— S. 6 (e)—*Mere right to sue—Shade light—Transfer of—Custom.*

The customary right of the owner of land to compensation for the damage done to his crops by the shade of adjacent trees runs with the land and cannot be independently transferred. (*Skinner, A. J. C.*) APPAJI *v.* KHUSHAL. **10 I. C. 689 : 7 N. L. R 1.**

——— S. 6 (e)—*Mere right to sue—Title in dispute—Effect.*

Law does not prevent a man from transferring property of which he claims the ownership by reason of the fact his title to it may be in dispute S. 6 (e) T. P. Act, does not apply to such a case. (*Daniels, A. J. C.*) GULAB RAI *v.* MT. KHUDAIYA BIBI. **10 O. L. J. 295 : 9 O. & A. L. R. 141 : 1924 Oudh 62.**

——— S. 6— *Mere right to sue—Right to share of the profits.*

The right to recover a share of the profits of an estate claimed by the assignor to be due to him, is not a mere right to sue, but the assigment of such a right, is one of the arrears of the profits claimed to be due and therefore is not void under S. 6. (*Stuart and Kanhaiya Lal, A. J. Cs.*) GIRDARILAL *v.* AHMED MIRZA BEY. **60 I. C. 690 : 23 O. C. 384.**

——— S. 6 (e)—*Mere right to sue—Profits—Transfer of right to receive.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Non transferable right.

A transfer of a share of the profits of a village which have at the time actually accrued due is an assigment of a debt and not of a mere right to sue and not bad under S. 6 (e) of the Act although the transfer of a right to sue is a necessary incident of the transaction. (*Stuart and Muhammad Ali, A. J. Cs.*) BHARAT SINGH *v.* BINDHA CHARAN. **47 I. C 654 : 6 O L. J. 398.**

——— S 6 (d)—*Mere right to sue—Right to damages.*

A mere right to sue for damages cannot be transferred under S. 6 (e). (*Stuart and Kanhaiya Lal, A. J. Cs.*) SHAHRUKH RUQAIYA BEGAM *v.* SHEO PRASAD **41 I. C 435 : 4 O. L. J 425.**

——— S. 6 (e)—*Mere right to sue—Transfer of right to recover mesne profits.*

When plaintiffs have under a decree a right to mesne profits which have yet to be ascertained, they can make a valid transfer of their right to recover the mesne profits ; such a transfer is not a transfer of a mere right to sue as under S. 6 (e). (*Chamier, C.J. and Kingsford, J.*) HARIPRASAD *v.* KODO MARYA. **1 Pat. L. J 427 : 3 Pat. L. W. 392 : 37 I. C. 998.**

Non-transferable right.

——— S. 6 (i)—*Non transferable right—Transfer of, along with other property.*

The mere fact that a mortgagor mortgages in one deed his occupancy holding which he has no right to mortgage and his fixed rate tenancy which he can validly mortgage does not make the transfer of the fixed rate tenancy illegal. (*Richards, C. J. and Walsh, J.*) RAJENDRA PRASAD *v.* RAM RATAN RAI. **39 All. 539 : 39 I C. 785 : 15 A. L. J. 544.**

——— S. 6—*Non-transferable right—Religious office—Transfer of, to another member of the family—Validity of.*

The transfer of a share in the emoluments as well as the duties of a religious hereditary office by one member of a Hindu family to an outsider or to the original grantor of the office is invalid, but such a transfer to another member of the family is not open to objection (*Macleod, J.*) RAGHUNATH VITHAL BHAT *v* PURNA NAND SARSWATI SWAMI. **47 B. 529 : 25 Bom. L. R. 207 : 1923 B. 358.**

——— S. 6—*Non-transferable right—Desaigiri Hak, are alienable.*

Vatans of the kind of *Desaigiri Hak* in Gujerat are alienable. (*Macleod, C J. and Fawcett, J.*) KHUSALBHAI PARAGJI DEASI *v.* DULABHAI PARAGJI. **45 Bom. 948 : 61 I C. 411 : 23 Bom. L. R. 304.**

——— S. 6—*Non-transferable right — Lease from year to year—Transferable and heritable.*

A lease from year to year is transferable under S. 6 and also heritable unless there is anything to the contrary in the contract of lease (*D. Chatterjee and Newbould, JJ.*) BHANDU LALL MUNSHI *v.* LAGIN. **36 I. C. 1006.**

——— S. 6 (i)—*Non-transferable right—Home stead land—Yearly tenancy.*

The incident of non-transferability is common to tenancies from year to year of home-stead

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Non transferable right.

lands created before the passing of the T. P. Act, in the absence of the custom to the contrary 32 Cal 1023. Ref. (*Richardson, and Mullick, JJ.*) KALU RAM SRIMAL *v.* PURAN CHAND NAHAR.
27 I. C. 500

——— S. 6—*Non transferable right — Service inam—Swasthivachakam service in Hindu temple —Liability of inam to be attached and sold in execution.*

An inam granted to do Swasthivachakam service in a Hindu temple is of a public nature and is not liable to be attached and sold in execution. The private alienation of inam is invalid. (*Schwabe, C.J. Coutts-Trotter and Kumaraswami Sastri, JJ.*) NETI ANJANEYALU *v.* SRI VENUGOPAL RICE MILL.
42 M L. J. 477 : 15 L. W. 513 : 30 M L. T. 255 : (1922) M. W. N. 307 : 45 M 620 : 1922 M. 197.

——— S. 6 (i)—*Non-transferable right.*

The interests which are declared inalienable by S. 6 (i) are those created by statute to regulate the relationship of landlord and tenant and an interest conferred by a decree is not covered by S. 6 (i). (*Evans, J.C. and Lindsay, A.J.C.*) WAZIR MOHAMMAD *v.* HAR PRASAD.
15 O. C. 67 : 13 I. C. 613.

Personal Right.

——— S. 6—*Personal right—Malikana—Right to—Transfer of—Proprietary right.*

In a village there were two persons interested in the proprietary right in a village who were known as the Muafidars and Zemindars. The persons who corresponded to the proprietors in the ordinary sense, who collected the rent from the tenant, let out the land and paid the Government Revenue were the Muafidars. The settlement also had been done with them The only right which the zemindar had was a right to receive from the muafidars a cash payment of ten per cent. of the total rental and to hold sir land at a favourable rent which had been fixed by the Settlement officer. So long as they paid this rent they were not liable to ejectment. The interest of these Zemindars had been sold in execution of a mortgage decree. *Held*, that their right was of a proprietary nature and that it was transferable. (*Lindsay and Daniels, JJ.*) HANSRAJ *v.* BALDEO SINGH.
21 A.L.J. 289 : L. R. 4 A. 155 (Rev) : 1923 A. 304.

——— S. 6 (d)—*Personal right—Sale.*

The agreement by a vendee to pay revenue for land sold as well as for land reserved in the vendor's possession is void and being a personal contract, the next vendee of the reserved land is not entitled to sue for the breach of such a covenant. (*Richards, C. J. and Rafique, J.*) ALI HUSSAIN *v.* HAKIMULLAH.
38 All 230 : 33 I. C. 187 : 14 A. L. J. 266.

——— S. 6 (d)—*Personal right—Lands given to Hindu widow*

Hindu widow arrived at a compromise by which she was given a restricted life interest in lands under compromise This restriction on alienation prevented the widow from having disposing power over lands. Hence property not open to attachment in execution. (*Marten and Fawcett, JJ.*) BASAN GOWDA *v.* IRGOWDATI.
25 Bom. L. R. 293 ; 47 B. 597: 1923 B. 276.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Personal Right.

——— S. 6—*Personal right— Vritis—Alienation—Special custom.*

Vritis are as a general rule inalienable. They can only be alienated in special cases and under special conditions provided such alienations are supported by local usage or custom. (*Beaman and Heaton, JJ.*) MANJUNATH *v* SHANKAR.
39 Bom. 26 : 28 I. C. 139 : 16 Bom. L. R. 593.

——— Ss. 6 (d) and 3 —*Personal right—Pre-emption right.*

The right of pre-emption is a purely personal right which cannot be transferred to any one. (*Russell and Chandavarkar, JJ.*) JASUDIN *v.* SAKHARAM.
36 Bom 139 : 12 I. C. 693 : 13 Bom. L. R. 1042.

——— S. 6—*Personal right—Tankhas—Transferability of.*

Tankhas are assignable as they are heritable allowances in the nature of property. (*Richardson and Huda. JJ.*) LALA MUKHI PROKESHE NANDE *v.* SRIMATI ISWARI DEI DEBI.
57 I. C. 858 : 24 C. W. N. 938.

——— S. 6 (d)—*Personal right—Maintenance —Annuity charged on property—Assignment of right—Validity of.*

Where under an arrangement with the brothers of her husband, a widow gets an annuity for which the estate was charged and subsequently the widow assigned her right to the annuity to the plff. who sued for its realisation. *Held* that his was not a personal right of the Hindu widow, and that the assignment conveyed the right to plff. (*Fletcher and Cuming, JJ.*) RAJAT KAMINI DEBI *v.* RAJA SATYA NIRANJAN CHAKRABARTHY.
53 I. C. 587.

——— S. 6 (d)—*Personal right—Transferability of property allotted for.*

Though a right to maintenance cannot be transferred, specified property given in lieu of maintenance can be transferred. (*Sharfuddin and Coxe, JJ.*) RAMCHANDRA MARWARI *v.* GOPINATH CHOWDHURI.
29 I.C. 251.

——— S. 6 (d)—*Personal right—Broker—Right to exercise the calling of.*

The right to exercise the profession of a broker is not a personal right and is assignable in law (*Mookerjee and Beachcroft, JJ.*) LAKHAN JENA *v.* ARJUN NAIK.
18 C.W.N. 1194 : 24 I. C. 387 : 19 C. L. J. 313.

——— S. 6 (a), (d) and (h)—*Personal right—Maintenance—Malabar Tarwad—Assignment.*

The right of member of Malabar *Tarwad* or of an Aliyasanthana family to maintenance is property, and can be assigned. Per *Seshagiri Aiyar, J.*—Such an assignment is not invalid either under the Act or under the general Law. 34 Mad. 7, Ref. (*Oldfield and Seshagiri Aiyar, JJ.*) SESHAPPA HAGGADE *v.* CHANDAYYA HAGGADE.
53 I. C. 665 : 37 M.L.J. 402.

——— S. 6 — *Personal rights—Future maintenance.*

A right to receive future maintenance cannot be alienated in India though it may be otherwise under the law applied in Courts of equity in

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Personal Right.

England, 34 Mad 7 Dist. (*Sadasiva Aiyar and Moore, JJ.*) PALAKANDI MAMMAD *v.* CHINGOAN KALOTH VALIA APPA. **40 Mad. 302 : 34 I C 381 : 30 M.L. J. 361.**

——S 6—*Personal rights—Service inam—Alienation.*

Alienation of hereditary, fanning service (*in a temple*) Inam is invalid if it is not in favour of the person next in the line of succession. 15 M. L. J. 10, 14 M. L. J. 134; 15 Mad. 183, Foll. (*Ayling and Napier, JJ.*) VASU CHANDRA KANTHAM *v* VUSA SUBBARAYADU. **1 L. W. 827 : 16 M. L. T. 347 : 25 I. C. 685 : (1914) M. W. N. 745.**

——S. 6 (d)—*Personal right.*

S. 6 does not prevent the transfer of *moggu* right which is an allowance received by a *wargdar* from *walawargdars* who hold lands within the *warg* for which he holds the *patta.* It is the concession paid to the *wargdar* for his trouble in collecting the revenue and paying it over to the Government. (*Benson and Sundara Aiyar, JJ.*) GANPATHI *v* MANI ANANTHA. **10 I. C. 665 : (1911) 1 M. W. N. 233.**

——S. 6 (d)—*Personal right—Annuity.*

An annuity by way of maintenance is alienable, whether by voluntary or involuntary transfer. (*Drake-Brockman, J.C.*) MURLIDHAR *v.* MULCHAND. **52 I. C. 953.**

——S. 6 (d)—*Personal right—Contract of service.*

A contract of service is a personal contract and is not assignable before breach as the transfer would be of a mere right to sue. (*Mitra, A. J. C.*) KARANKHAN *v.* DANGUSTI. **47 I. C. 902**

——S. 6 (d)—*Personal right—Service inam.*

A rent free-grant made in lieu of service is not transferable and the purchaser of such grant from the grantee cannot acquire any valid title against the grantor. (*Campbell, J. M.*) GIRDHAR GOPAL *v.* GAIYA PRASAD. **34 I. C. 672 : 3 O. L. J. 235.**

——S. 6 (d)—*Personal right—Annuity — Right to.*

When a person in enjoyment of an annuity dies and the annuity ceases, his assets (when valued) cannot include any sum due on account of the annuity. (*Lindsay, J. C.*) ALI MUHAMMAD KHAN *v.* SAJJADI BEGAM. **33 I. C. 516.**

Public office.

——S. 6 (f) and (h)—*Public office—Mahomedan Law—Office of Mutawalli.*

A mortgage of the rights of Mutawalli is invalid and opposed to public policy. (*Fletcher and Huda, JJ.*) SHAHED BAKSH *v.* GULAM NABI KHONDOKAR. **47 I. C. 117 : 22 C. W. N. 996.**

——S. 6 (d) and (f)—*Public office—Right to receive gifts by worshippers—Transfer—Custom.*

The transfer of a right to receive gifts made by the worshippers at a temple to one of the officiating priests is usually void as being against public policy except according to custom or usage, when their validity will be judged according to the conditions of such custom or usage. (*Stuart, J. C.*) PARAGI *v.* GAURI SHANKAR. **51 I. C. 86 : 6 O. L. J. 157.**

——S. 6 (h)—*Public office—Right to offerings in Temple—If can be transferred.*

The right to offerings in a Hindu Temple cannot be transferred. (*Shafiuddin and Roe, JJ.*) PUNCHA *v.* BINDESWARI THAKUR. **37 I. C. 960**

Right of re-entry.

——S. 6 (b), 109 and 111 (g)—*Right of reentry—Breach of condition—Transfer by landlord subsequent to breach.*

A transfer of a reversion of a lease carries with it the right to enforce forfeiture of the lease for breach of a condition, even where the breach had accrued prior to the transfer. (*Beaman and Heaton, JJ.*) VISHVESHWAR *v.* MAHABLESHWAR. **43 Bom. 28 : 47 I. C. 198 : 20 Bom. L. R. 767.**

Rights in future.

——S. 6—*Rights in future—Contract to transfer expectancies—Validity.*

A contract for the future sale of future expectations cannot be enforced. (*Lord Sumner.*) ANNADA MOHAN ROY *v.* GOUR MOHAN MULLICK. **45 M. L. J. 617 : 21 A. L. J. 718 : 4 Pat. L. T 609 : 50 I. A 239 : 50 Cal. 929 : L. R. 4 P. C. 164 : (1923) M. W. N 803 : 25 Bom. L.R. 1269 : 33 M. L. T. 365 (P. C.) : 1923 P. C. 189 (P. C.).**

——S. 6—*Rights in future—Tankhas are heritable rights in property.*

Tankhas are more than a mere right to receive future maintenance. They are heritable allowances in the nature of property and are, therefore, assignable. (*Richardson and Huda, JJ.*) MUKTI PRAKASH NANDE *v.* ISWARI DEI DEBI. **57 I. C 858 : 24 C. W. N. 938.**

——S. 6 (d)—*Rights in future—Right to future maintenance—If alienable.*

The right under a contract to a fixed amount of maintenance is property within S. 6, T P. Act. Whether it is an interest in property restricted in its enjoyment personally must depend on the facts of each case, the question being whether the intention of the parties was that the right should be personal and inalienable. The language of the document and surrounding circumstances must be looked to in each case. The right to future maintenance properly so called is inalienable. (*Schwabe, C.J., Oldfield and Coutts Trotter, JJ.*) SUBRAYA SAMPIGETHAYA *v.* KRISHNA BAIPADITHAYA. **45 M. L J. 533 : 33 M. L. T. 57 (H. C.) : 46 Mad. 659 : 19 L. W. 6 : 1924 Mad. 22 (2) (F. B.).**

——S. 6—*Rights in future—Lease—Rent due under—Assignment—Renewal of lease—Right to rents.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6 — Rights in future.

An assignment of rent cannot operate in respect of future possible lease that may come into existence as the result of a renewal. (*Ramesam, J.*) RAMA PATTAR *v* RAMAN KUTTY ACHAN.
44 M. L. J. 236 : 32 M L. T. (H. C.) 136 : (1923) M. W. N. 250 : 1923 Mad. 316.

——— **Ss. 6 and 58** — *Rights in future—Assignment of—Creation of charge on fund.*

An assignment of future property is not invalid in India. S 6 of the Act does not contain a total prohibition against the assignment of all future property but must be constructed as an exception to the general rule in favour of transfers of property, present and future. The words "of a like nature" in Cl. (a), S. 6, indicate that the "possibility" referred to therein must belong to the same category as the chance of an heir apparent or the chance of a realisation obtaining a legacy. (*Ayling and Seshagiri Aiyar, JJ.*) PASHUPATI VENKATAPATHIRAJU *v.* VENKATASUBHADRAYAMMA. **47 I. C. 563 :**

——— **S. 6**—*Rights in future—Conveyance—Mahomedan Law.*

The conveyance of a remainder interest or interest *in futuro* is invalid according to the Sunni school of the Mahomedan Law. When life-estate is given with remainder to another person, and the latter is invalid, the donee of the life-estate takes the estate absolutely. (*Benson and Sundara Aiyar, JJ.*) MEERAGANI ROWTHAR *v.* KARUPATHI NAGUR MEERA.
(1913) M W.N. 371 : 24 M L. J. 258 : 18 I. C. 185 : 13 M. L. T. 91.

Scope of.

——— **S. 6 (e)**—*Scope of—Amount in court deposit pending suit.*

The income of an estate which is the subject matter of litigation held in a Bank to the credit of the successful litigant, is not property falling within S. 6 (e) of the T. P. Act. (*Schwabe, C. J Coutts Trotter and Kumarswamy Sastry, JJ.*) ZEMINDAR OF BHADRACHALAM *v.* VENKATADRI APPA RAO. **43 M L. J. 486 : 16 L.W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H.C.) : 46 M. 190 : 1922 Mad. 457.**

——— **S. 6**—*Scope of.*

The T. P. Act does not contain an exhaustive enumeration of what is assignable by the law of British India and an assignment is not invalid merely because it is not covered by the provisions of that Act. All contracts can be assigned which are capable of specific performance. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) VENKATESWARA AIYAR *v.* RAMAN NUMBUDRI.
19 M. L. T. 329 · 33 I. C. 696 : 3 L. W. 435.

Unlawful object.

——— **S. 6 (h)**—*Unlawful object — Future cohabitation.*

Where a deed of settlement was made with the object and in consideration of the donee cohabiting with the settlor and the immoral purpose of the donor was acheived by the donee in fact remaining in his keeping and living with him as contemplated by the settlement deed, the settlor

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 8.

cannot recover back the property transferred for an immoral consideration which has already been achieved. S. 6, Cl. (h) of the T P. Act does not modify the well-established rules of equity that when a transaction is entered into for unfawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of a *particeps criminis* to relieve him from the legal effect of the transaction; it only lays down that the Court will not enforce a transfer which would have the effect of carrying out his unlawful object. (*Abdur Rahim and Oldfield, JJ.*) DEIVANAYAGA PADAYACHI *v.* MUTHU REDDI.
12 L. W. 291 : 28 M. L. T. 255 : 44 M. 329 : 59 I. C. 1003 : (1920) M. W. N. 547 : 39 M. L. J. 525.

——— **S. 6 (h)**—*Unlawful object—Kabzadari without right of transfer—Mortgage of—Contract Act (IX of 1872), S. 23.*

A mortgage of lands granted *Kabzadari* without the right of transfer, is not a transfer "for an illegal purpose" within the meaning of S. 6 of the T. P. Act or for an unlawful object or consideration within the meaning of S. 23 of the Contract Act. (*Chamier, C. J.*) HIRDAY BIHARI *v* PRAG TIWARI. **11 I. C. 527 : 14 O C 144.**

——— **S. 7**—*Sale of property not one's own.*

A man has no right to deal with property which is not his own and unless he can show some right to deal with it, either as agent or guardian of the owner or trustee or the like, any transfer which he purports to make cannot bind the lawful owner. (*Daniels, J.*) CHITU *v.* CHARAN SINGH.
1923 A 563.

——— **S. 7**—*Infant's contracts—Mortgage in favour of infant.*

S. 7 does not in terms declare that a transfer by a person incapable of contracting is wholly void. Persons who are incapable of contracting are incapable of transferring. A mortgage in favour of a minor can be enforced by the minor. (*Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) RAGHAVA CHARIAR *v.* SRINIVASA RAGHAVA CHARIAR. **40 Mad. 308: 31 M. L. J. 575 : 20 M. L. T. 407 : 36 I. C. 921 : (1916) 2 M. W. N. 363 (F. B.).**

——— **Ss. 8 and 55 (2)**—*Conveyance by executor —What passes.*

A conveyance by an executor having beneficial interest in the property along with other beneficiaries purported to sell "all estate, right and title" of the vendor. *Held*, that the whole property passed to the purchaser and not merely beneficiary interest of the executor. (*Lord Moulton.*) BIJRAJ NOPANI *v.* SREEMETTY PURA SUNDARY DASEE. **42 Cal. 56 : 41 I. A. 189 : 1 L. W. 555 : 18 C. W. N. 1313 : 16 M. L. T. 338 : 24 I. C. 296 : 12 A. L. J. 1185 : 16 Bom. L. R. 796 : 20 C. L. J. 368 : (1914) M. W. N. 679 : 27 M. L. J. 93 (P. C.).**

——— **S. 8**—*Proprietary rights — Alienation along with rights to buildings.*

Where defendants conveyed to the plaintiff their proprietary rights in the lands and the buildings with the land on which they stood without expressly reserving a right of residence or of user

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 8.

in any of the buildings and there being no statutory qualification of the right, the defendants had no right to occupy the buildings or to treat them as appurtenances to their holding. (*Piggott and Walsh, JJ.*) UMRAJ SINGH *v.* CHEDA LAL.
35 I. C. 262.

——— S. 8—*Trees on plot within zemindari whether pass with the zemindari.*

Trees standing on a plot of land within a *zemindari* are appurtenant to the *zemindari* and, in the absence of evidence tothe contrary, the ownership thereof passes to the purchaser (*Tudball, J.*) ONKAR DAS *v.* CHOTELAL. 11 I. C. 192.

——— S. 8—*Conveyance by executor having personal interest in a share of the property—Scope of.*

Where a person has two estates, one larger and the other smaller and purports to convey the entire property without any words of limitation, he must always be taken to be conveying the highest interest in the estate he has, that is to say, if an executor having one-third personal beneficial interest in the estate purports to convey the whole of it without qualification or limitation, he must be taken to be conveying in his character as executor and not in that of one having a beneficial interest in a fraction of the whole estate purported to be conveyed. (1864) 2 Ch. 101, Foll. It does not make the least difference whether in such circumstances, the vendor is expressly designated as executor or administrator if, in fact, and to the knowledge of the purchaser, he be an executor or administrator and purports to convey without limitation the whole estate. (*Beaman J.*) GANGABAI *v.* SONABAI. 40 Bom 69 : 28 I C. 544 : 17 Bom. L. R. 303.

——— S. 8—*Mortgage—Fixtures—Right to.*

Where immoveable property is hypothecated the fixtures pass to the mortgagee. The rule as between landlord and tenant does not apply to the case of a mortgage. (*Fletcher and Huda, JJ.*) HARIPDA SHADHU KHAN *v.* ANATH NATH DEY.
44 I. C. 211 : 22 C. W. N. 758

——— S. 8—*Reservation of rights in transfer.*

A reservation of rights in a transfer cannot be inferred except from the terms of the document itself. But, if the document is ambiguous, an intention to reserve certain rights can be inferred from circumstances. (*Fletcher and Richardson, JJ.*) SURESH CHANDRA ROY *v.* SURENDRA CHANDRA ROY. 37 I. C. 870.

——— S. 8—*Mortgage—Security.*

As far as possible, a deed of grant ought to be construed strictly against the grantor. So a mortgage by a person of his rights in the mortgaged property would in the absence of express reservation include all interests of whatever kind possessed by him in the land. 19 C. W. N. 710. Foll. (*Mookerjee and Beachcroft, JJ.*) BHOJOHARI DAS ADHIKARI *v.* BHAGABATI DASI.
17 I. C. 494 : 18 C. L. J. 48.

——— S. 8—*English law of fixtures—Applicability in India—Crops on the land.*

The English law of fixtures cannot be applied in this country as based on equitable grounds. 37 Cal. 815, Foll. The purchaser at an auction sale is not entitled to sue for the crops standing on the lands at the date of sale and sown by a stranger before that date. 21 Cal 244, Ref. (*Mookerjee and Beachcroft, J.*) PRIYA NATH PAL *v.* RAJANI KANTA PAL. 15 I. C. 619 : 16 C. W. N. 1101.

——— S. 8—*Sale of house—Fixtures do not pass—English law if applicable.*

The English law as to fixtures does not apply to India and when a house is sold in court auction, the fixtures therein do not pass to the purchaser. The test to determine whether articles claimed or fixtures under S. 8, T. P. Act is whether they are provided for the permanent use of the house and whether they are necessary for the beneficial enjoyment of the same. "Fixture" does not include machinery brought into a home for carrying on a business. (*Kumaraswamy Sastry, J.*) NARAYANA SA *v.* BALAGURUSWAMI NADAR.
45 M. L. J. 385 : 18 L. W. 928 : 33 M.L.T. 227 (H. C.) : (1924) M. W. N. 43 : 1924 Mad. 187.

——— S. 8—*Transfer by person having full power to convey—Incorrect recitals as to extent of power—Effect of.*

A purchaser of property for consideration from a person having full power to convey the title to the property, is entitled to rely on all the powers vested in his vendor which would enable that vendor to convey the complete title professed to be conveyed notwithstanding that the vendor mentions in the sale deed that he derives his right to convey title by reason of facts whose truth can be successfully attacked. (*Sadasiva Aiyar and Spencer, JJ.*) SUBRAHMANIA PATTAR *v.* KRISHNA EMBRANDRI.
12 L. W 361 : 60 I. C. 77 : 39 M. L. J 590.

——— S. 8—*Profits accrued prior to transfer.*

A transferee cannot claim profits apart from the property prior to the transfer as the legal incidents of the transferor's interest under S. 8 of the Act include only rents and profits due after the transfer. (*Seshagiri Aiyar and Oldfield, JJ.*) MOTHU HENSU *v.* NETARVATHI NAIKSAVI.
58 I. C. 383 : 12 L. W. 44.

——— S. 8—*Scope of.*

S 8 of the T. P. Act is not a canon of construction but a rule concerning to the legal effect of a grant. (*Seshagiri Aiyar and Phillips, JJ.*) CHOKALINGA NAYAKAN *v.* ARUNACHALAM CHETTIAR.
26 M. L. T. 262 : 52 I. C. 239 : (1919) M. W. N. 353.

——— S. 8—*Negotiable instruments.*

S. 8 applies to negotiable instruments. (*Ayling and Seshagiri Aiyar, JJ.*) NATARAJA NAICKEN *v.* AYYASWAMI PILLAI. 5 L. W. 410 : 21 M. L. T. 405 : 38 I. C. 339 : (1917) M. W. N. 230 : 32 M. L. J. 354

——— Ss. 8 and 36—*Execution sale.*

The principles laid down in Ss. 8 and 36 of the T. P. Act have no application to transfer of right by execution sales. When the contract shows as here, that the whole rent accrues on a fixed date it is a contract to the contrary of what

TRANSFER OF PROPERTY ACT (IV OF 1882) S 8.

is enacted in S. 36 and the lessee is entitled to the year's crop. 21 Cal. 383, Foll. (*Sadasiva Aiyar and Napier, JJ.*) PENUMETA SUBBARAJU *v.* VEEGISENA SEETHARAMA RAJU.
39 Mad. 283 : 17 M. L. J. 57 : 28 I. C 232 :(1915) M. W. N. 174.

——S. 8—*Transfer by person holding property under limitations—What passes*

A person holding property under limitations cannot pass to a transferee a title free from those limitations. (*Ayling and Tyabji, JJ.*) MUTHU KRISHNA AIYANGAR *v* SANKARA NARAYANA AIYAR. **16 M. L. T. 196: 1 L. W. 699 : (1914) M. W. N. 708: 25 I. C. 573: 27 M. L. J 600.**

——S. 8—*Transfer of property—What passes.*

Where a grant in perpetuity is made in favour of one person who transfers it to another no subsequent sanad can legally be issued so as to make a fresh grant unless the transfer is avoided. (*Stanyon, A. J. C.*) DAMADJI *v.* MARTAND. **48 I. C. 901.**

——S. 8—*Profits accrued due on the date of transfer.*

Under S. 8 of the T P. Act only profits accruing after the transfer pass with the land. Profits already accrued are not beneficial interest in the land since the land cannot be transferred with retrospective effect. (*Batten, A. J. C.*) LAKHPAT SAHAI *v.* TIKARAM. **47 I. C. 158.**

——S. 8—*Applicability to mortgages.*

Though a mortgage in India is not a transfer of property but only of an interest in property S. 8 is applicable to mortgages. A mortgage of an undivided share includes the sir right and all other rights which the mortgagor is capable of transferring in the absence of words showing an intention to retain or exclude them. 30 Cal. 556, Foll. (*Stanyon and Hallifax, A. J. Cs.*) SHIOLAL *v.* NANHELAL. **17 I. C. 129 : 8 N. L. R 123.**

——S. 8—*Foreclosure of same property twice.*

A mortgagee is entitled to foreclose twice over, the same property. (*Stanyon and Hallifax, A. J. Cs.*) SHIOLAL *v.* NANELAL. **17 I. C. 129 : 8 N. L. R. 123.**

——S. 8—*Transfer of simple mortgage—Right to interest accrued.*

A purchaser of a simple mortgage can claim the interest due from the period antecedent to his purchase. 6 Cal. 213 (P. C.), Dist. (*Kanhaiya Lal and Daniels, A. J. Cs.*) SHAH MOHAMMAD YUSUF *v.* LACHHMINARAIN. **6 O. L. J. 49 : 50 I. C. 157 : 21 O. C. 400**

——S. 8—*Covenant running with the land—Renewal.*

A covenant for renewal being a covenant running with the land, where a grantee of land for a term of years transfers his interest the right of renewal goes with the transfer unless a contrary intention is expressed or implied in the document. (*Twomey, C. J. and Ormond, J.*) JOGENDRA LALL CHOWDHRY *v.* MIASHA. **12 Bur. L. T. 133: 51 I. C. 360: 9 L. B. R. 268.**

——S. 8—*Assignment of debt—Arrears of interest.*

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 10.

The arrears of interest of an assigned debt must be held to have been transferred with the debt. (*Twomey, C. J.*) MAUNG THA *v.* N. C. CHATERJEE. **27 I. C. 896 : 8 Bur. L. T. 121.**

——Ss. 9 and 54—*Sale before the Act—Writing unnecessary.*

No written conveyance was necessary to validate a transfer of property before the T. P. Act. (*Lord Shaw.*) MAHOMED MUSA *v.* AGHORE KUMAR. **42 Cal 801 : 42 I. A. 1 : 19 C. W. N. 250 : 13 A. L. J. 229 : 17 M. L. T. 143 : 17 Bom, L. R. 420 : 21 C. L. J. 231 : 2 L. W. 258· 28 I. C. 930. (1915) M. W. N. 621 : 28 M. L. J. 548 (P. C)**

——S. 9—*Surrender of lease—Writing and registration.*

A surrender of a lease need not be in writing nor need it be registered. (*Fletcher and Huda, JJ.*) BROJONATH SARMA *v.* MAHESWAR GAHANI. **46 I. C. 100 : 28 C L. J. 220.**

——S. 9—*Oral surrender—Consideration—Valid title—No registration.*

Receipt of consideration and actual surrender of lands by a *mokuraridar* to the *zemindar* are quite sufficient to give a title to the person to whom the surrender was made and no registration is necessary. 14 Cal. 109, Foll. (*Harrington and Carnduff, JJ.*) JANGLI RAI *v.* GHURARAI. **19 I. C. 124.**

——S. 9—*Right to enjoy usufruct—Oral transfer.*

A grant of immoveable property by way of *guzara* not being grant of the *corpus* but only of the right to enjoy the usufruct, does not require writing for its validity. (*Kanhaiya Lal, J C. and Daniels, A. J. C.*) GAJRAJ KUAR *v.* INDRA PAL KUAR. **21 O. C. 360 : 49 I C 406 : 6 O. L. J. 7.**

——S. 9—*Oral partition.*

An oral partition is valid. (*Fox and Hartnoll, JJ.*) CHOCKALINGAM CHETTY *v.* MAUNG YAUNG NI. **5 Bur. L. T. 296 : 18 I. C. 524 : 6 L. B. R 170.**

——S. 10—*Mahomedan gift—Condition restraining transfer is invalid.*

Where a gift is made subject to a condition restraining transfer the condition is invalid and the donee takes an absolute estate under the Mahomedan Law. (*Piggott and Walsh, JJ.*) BABULAL *v.* GHANASHAM DAS. **20 A. L. J. 466: 44 A 683 : 1922 A. 205**

——S. 10—*Restraint on alienation—Sale-deed.*

A sale with an agreement that the vendee must not sell to any one but the vendor or his heirs, and that at a fixed price, amounted to an absolute restraint an alienation and was unenforceable. (*Tudball and Lindsay, JJ.*) DOL SINGH *v.* KHUB CHAND. **64 I. C. 408: 19 A. L J 848.**

——S. 10—*Transfer with reservation of life estate.*

A father of joint Hindu family transferred to his sons his property obtained in a partition, reserving only a life-interest therein. *Held*, the creditors could attach the life-interest of the father and bring it to sale, as the transfer fell within the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 10.

purview of S. 10 of the T. P. Act. (*Walsh and Ryves, JJ.*) KUNDAN SINGH *v* JADON PRASAD.
17 A. L. J 913: 58 I. C. 552: 2 U. P. L. R. (A) 439.

——S. 10—*Gift—Restraint on alienation*

Where a gift is made with a condition restraining alienation, the gift itself is valid but the condition is not. But a condition directing the enjoyment of the *usufruct* of the gifted property by a third person for life is valid. 10 W. R. 25 (P. C.) Ref to. (*Chamier, J.*) MUHAMMAD SHAFI KHAN *v.* LALIJIN. **11 I. C 702.**

——S. 10—*Gift—Restrictions on alienation and enjoyment.*

Restrictions on alienation, enjoyment and disposal of the property by the legatees are void as being repugnant to the absolute gift. 5 Cal 438·21 Cal. 488 ; 24 Cal. 406; 16 Cal. 409 Full. (*Batchelor and Rao, JJ.*) JEHANGIR *v.* KAIKHUSRU.
9 I. C. 951: 13 Bom. L. R. 141.

——Ss. 10 and 12—*Lease—Covenant running with the land—Liability of transferee.*

The tenancy in suit was created on the 23rd March 1908, when a kabuliyat was executed by the second defendant in favour of the plaintiff The tenancy was described as an *ilmam*. Consequently on the authority of the decision in 47 C. 979 it may be assumed that the tenancy was a permanent, heritable and transferable tenure. The lease contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord, out of the purchase money in his hands, one-fourth as *nazar*, and would obtain registration of the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. *Held*, that the provisions of sections 10 and 12 of the Transfer of Property Act made it abundantly clear that restrictive covenant of this description was valid when inserted in a lease between a landlord and his tenant and that the covenant was one running with the land and binding on the transferee from the tenant. (*Mookerjee and Chotzner, JJ.*) SARADAKRIPA LALA *v.* BEPIN CHANDRA PAL. **37 C. L. J. 538: 1923 Cal. 679.**

——S. 10—*Lease darpatni—Restraint on alienation.*

A stipulation in a *darpatni* lease restraining the creation of subordinate rights by the *darpatnidhar* does not contravene S. 10 of the Act. (*Mookerjee and Beachcroft, JJ.*) MADHU SUDAN MAHATO *v.* MIDNAPORE ZEMINDARI CO.
45 Cal. 940: 46 I. C. 129: 27 C. L. J. 511.

——S. 10—*Restraint upon alienation—Scope and effect.*

Restraint upon alienation in mortgage bonds does not prevent alienation subject to mortgagee's rights. (*Chatterjee and Newbould, JJ.*) SYAM PEARY DASSYA *v.* EASTERN MORTGAGE AND AGENCY CO. **40 I. C. 865**

——Ss. 10 and 12—*Grant of property for maintenance—Restriction on alienation—Validity.*

A life-interest is just as much property as an absolute interest and any condition absolutely restraining the transferee of property for life in lieu of maintenance from disposing of that property is void. (*Sharfuddin and Coxe, JJ.*) RAM CHANDRA *v.* GOPINATH. **29 I. C. 251.**

——S. 10—*Restraint on alienation.*

A restraint on alienation even if validly imposed does not bar a compulsory sale at the instance of the creditors. (*Mookerjee and Beachcroft, JJ.*) PADMANAND SINGH *v.* RAMA PRASAD MALVI.
16 C. L. J. 354 : 17 I. C 284 : 17 C. W. N. 662.

——S. 10—*Gift with condition—Effect of.*

A gift with a condition precedent attached thereto fails when the condition is not fulfilled. (*Chitty and Chatterjee, JJ.*) SHYAMA CHARAN BHATTACHARYA *v.* NABACHANDRA CHAKRAVARTI.
11 I. C. 634.

——S. 10—*Lease—Covenant against alienation.*

A covenant in a lease against alienation is void unless coupled with the right of re entry under S. 10 of the T. P. Act as well as according to the law existing before (*Mookerjee and Coxe, JJ.*) AKRAM ALI *v.* DURGA PRASANNA ROY.
10 I. C. 489 : 14 C. L. J. 614.

——S. 10—*Lessor's benefit.*

A claim restricting a lessor's right, such as bringing to a sale the leasehold for the lessee's debts, is inoperative under S. 10 unless it is accompanied by a clause for re-entry. Unless there is the clause for re-entry it cannot be said that the restrictive clause is for the lessor's benefit. (*Mookerjee and Casperse, JJ.*) MAHANANDA ROY *v.* SARAT MONI DEBI **10 I. C 374 : 14 C. L. J. 585.**

——Ss. 10 and 11—*Agreement not to partition.*

Agreements not to divide property are enforceable although they would not preclude a party entering into such an agreement from alienating it 7 Bom. 538 ; 6 Cal. 106. Dist. (*Wallis, C J. and Seshagiri Aiyar, J.*) MUTHURAMAN CHETTIAR *v.* PONNUSWAMI UDAYAR **29 M. L. J. 214 : (1915) M W. N. 405 : 2 L. W 533 ; 29 I. C. 549 : 18 M. L T. 124.**

——S. 10—*Lease—Condition of inalienability—Whether valid.*

A condition in a lease that the lessee has no right to transfer his lease, is one intended for the benefit of the lessor and therefore does not invalidate it. Plaintiff's title as assignee is invalid. 17 Cal 826 ; 26 Mad. 157 Foll: 10 C. L. J. 49; 36 Cal. 745 ; 18 C. W. N. 1138 Dist. (*Sadasiva Aiyar and Napier, JJ.*) JACKI MINEZES *v.* VENCATARAMANA KAMATHI. **28 I. C. 904.**

——S. 10—*Hindu Law—Grants for maintenance—Restriction in alienation—Validity.*

There is no rule of Hindu Law that alienations may be prevented in the case of grants for maintenance and under S. 10 of the Act, a restraint on alienation in the case of such grants is void. (*Sadasiva Aiyar and Spencer, JJ.*) MUTHUKUMARA CHETTY *v.* ANTHONY UDAYAN.
38 Mad 867 : 15 M. L. T. 361 : 24 I. C. 120 : 29 M. L J. 617.

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 10.

——S. 10—*Condition of pre-emption*

A condition in a lease deed for pre-emption and pre-surrender is valid under S. 10 and can be enforced against transferees with notice. (*Wallis and Munro, JJ*) MANKOOTHIL CHITHUKUTTI *v.* KALYAMBATH KUNHANNI. **9 I. C. 171 : 9 M. L. T. 484.**

——Ss. 10 and 11—*Restraint on alienation —For uncertain time is invalid.*

The word 'absolutely' in S. 10 of the T. P. Act must be read with some qualification. A restraint on alienation absolute in its terms but limited to last for a period of uncertain duration is invalid under S. 10 of the T. P. Act. 14 C. L. J. 303. 43 C. 165. Relied on. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SHAI *v.* KUAR MATA PRASAD. **25 O. C. 189 ; 9 O. L. J. 235 : 1922 Oudh 236.**

——S. 10—*Transfer of full proprietary title —Lettering of—Effect.*

When a man having a right to make a transfer transfers full proprietary title the enjoyment of which is subject to the life of a certain person, and endeavours to fetter the succession to the estate, effect must be given to the transfer of full properietary title and the attempt to fetter the succession should be ignored. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) NARAIN SINGH *v.* DEPUTY COMMISSIONER OF PARTABGARH. **55 I. C. 896 : 7 O. L. J. 93.**

——S. 10—*Restraint of alienation.*

A condition in restraint of alienation of an absolute estate is null and void. 4 O. C 163 ; 106 Cal 136 Foll: 15 I. C. 244 Dist. (*Stuart and Kanhaiya Lal, A. J. Cs.*) LAL SRIPAT SINGH *v.* LAL BASANT SINGH. **25 I. C. 743 : 1 O. L. J. 421.**

——S. 10—*Alienation — Restrictions by—Settlement Court's decrees—Effect.*

Restrictions put by Settlement Court's decrees regarding certain lands do not render the lands absolutely incapable of transfers. They are imposed simply for the benefit of the superior proprietor who alone can challenge the alienation of such lands. (*Lindsay, J. C.*) RAMA SHANKAR *v* NANIK PRASAD. **1 O. L. J. 187 : 24 I. C. 32 : 17 O. C. 150.**

——S. 10—*Applicability.*

A sale-deed conveyed the entire share of the vendor with the exception of certain plots reserved for the vendor's maintenance without power of alienation and further provided " I have no interest and share of any kind left in the property sold except the *guzara* property mentioned above " *Held*, that S. 10 did not apply as there was no transfer of property with a condition restraining alienation. (*Evans, J. C.*) SHEO DARSHAN *v.* SHEO BHAJAN. **11 I. C. 685 : 14 O. C. 189.**

——S. 10—*Condition restraining alienation —When void.*

A condition against alienation is for the benefit of lessor. If there is a condition of re-entry, the benefit is obvious, but if the condition of re-entry is absent the benefit which the lessor seeks to derive is not apparent. If in the latter case the benefit can be made out otherwise the condition

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 11.

would not be void. Per *Chapman, J.*—A condition against sub-letting for the benefit of the lessor must provide for re-entry or forfeiture on its breach or there must be something in the wording of the lease to infer that the provision was for the direct benefit of the lessor otherwise the condition is void under S. 10. (*Chapman and Atkinson, JJ.*) SITAL PRASAD *v.* DILDAR ALI KHAN. **1 Pat. L. J. 1 : 33 I. C. 408 : 3 Pat. L. W. 80.**

——Ss. 11 and 54—*Sale in favour of minor—Validity*

A minor is not incapable of being a transferee and hence can sue for possession of a property under a sale-deed in his favour after the transaction is complete. 30 Cal. 539 (P. C.) ; 33 Mad. 312 Dist. (*Richards, C.J. and Rafique, J*) MUMI KOER *v.* MADAN GOPAL. **38 All 62 : 31 I. C. 792 : 13 A. L. J. 1084.**

——S. 11—*Absolute gift—Restraint on.*

Certain property was given by way of *Agrahar* gift to a *Brahmin* priest and his descendants. It was provided that the donee should not abandon the house, and go to another place. If the donee acted in contravention of the above his acts should be considered an act of irreligiousness and another person should be substituted in his place, *Held*, that the *Agrahar* gift was a private gift to the donee and an absolute gift according to law ; that the further provision as regards residence was not valid and enforceable. (*Shah and Hayward, JJ.*) RUKMANI BAI KRISHNA RAO *v.* LAKSHIMI BAI NARAIN. **22 Bom. L. R. 254 : 56 I. C. 361 : 44 Bom. 304.**

——S. 11—*Mahomedan Law—Gift with invalid condition attached.*

In Mahomedan Law a gift itself is valid though an invalid condition is attached to it. 2 C. W. N. 512. (*Fletcher and Huda, JJ.*) NUMAT-UN-NESSA BIBI *v.* GOLAM PANCHATON KAZI **22 C. W. N. 512 : 45 I. C. 601 : 27 C. L. J. 502.**

——S. 11—*Restraint of alienation.*

A condition by a testator in restraint of alienation is void in law. (*Shadi Lal, J.*) NEK MUHAMMAD *v.* MAYARAM. **32 I. C. 605 : 35 P. W. R. 1916.**

——S. 11—*Restraint—Absolute gift.*

A property delivered to a person absolutely with a right to enjoy from generation to generation is subject to no limitation whatever in the hands of alienee. (*Benson and Sundara Aiyar, JJ.*) NARASAMMA HAGADHTHI *v.* MILLA KESU. **31 I. C. 543 : 25 M. L. J. 637.**

——S. 11—*Partition—Clause for devolution of share on brother after death*

A clause in a partition deed that in event of the death of any one of them without male issue his share after deducting alienations by him should be divided among the survivors, is valid and does not contravene the provisions of Hindu Law or the T. P. Act. (*Wallis, C. J. and Seshagiri Aiyar, J.*) MUTHURAMAN CHETTIAR *v.* PONNUSWAMY UDAYAR **29 M. L. J. 214 : (1915) M. W. N. 405 : 2 L. W. 533 : 29 I. C. 549 : 18 M. L. T. 124.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 11.

——— S. 11—*Joint property— Partition—Covenant against invalid.*

A provision in a deed among the members of a joint family that they are only to enjoy the income of the family properties does not estop them from claiming a partition by metes and bounds as such an agreement is opposed to the ordinary incident of joint property. 25 Mad. 585 4 M. H. C R. 345, Foll. (*Wallis and Seshagiri, Aiyar, JJ.*) MUTHUSAMI NAICKER *v.* MUTHUSAMI NAICKER. **27 I. C. 3.**

———S. 11—*Transfer of property—Condition repugnant to interest created—Validity.*

Where property is transferred absolutely any condition which derogates from the immediate completeness of the transfer is void. But where the condition may be given effect to without interfering with the immediate completeness of the transfer, the condition is valid as also the gift. (*Stuart and Kanhaiya Lal, A. J. Cs.*) FAKHER JAHAN BEGAM *v.* MAHAMMAD ABDUL GHANI KHAN. **45 I. C. 307 : 5 O. L. J. 49.**

———S. 11—*Widow's estate created by will—Restriction on alienation.*

An absolute restriction on alienation by a widow with a limited estate is bad and the condition is void. (*Chapman, Atkinson and Imam, JJ.*) RAM BAHADUR *v.* JAGERNATH PRASAD. **(1918) Pat. 181 : 3 Pat L. J. 199 : 45 I. C. 749 : 4 Pat. L. W. 377 (F. B.).**

———S. 12—*Alienation—Restraint on—Construction of document.*

Where land is granted merely for use or occupation either free of rent or at a favourable rate of rent a condition restraining alienation would not be inconsistent with the rights conferred or necessarily void. Hereditary, rent-free, perpetual tenancies might exist without any power of alienation (*Kanhaiya Lal, A. J. C.*) KATESAR ESTATE *v.* MUHAMMAD AMIR. **46 I. C. 73 : 5 O. L. J. 149.**

——— Ss. 13 and 14—*Covenant for grant land at future uncertain date offends the rule.*

A covenant to grant land free of cost for building purposes at some future uncertain date is not a covenant running with the land and offends the rule against perpetuities and is not enforceable against the covenantor or his assignees. (*Lord Buckmaster.*) MAHARAJ BAHADUR SINGH *v.* BALCHAND CHOWDHURY. **48 I. A. 376 : (1921) M. W. N. 157 : 2 Pat L. T. 131 : 14 L. W. 254 : 6 Pat. L. J. 163 : 3 U. P. L R (P. C.) 29 : 61 I. C. 702 : 25 C. W. N. 770 (P. C.).**

———Ss. 13 and 14—*Rule against perpetuities —Violation—Test.*

To test whether a covenant violates the rule against perpetuities, one must look to all possible contingencies. (*Mookerjee, A. C. J. and Fletcher, J.*) NABIN CHANDAR *v.* RAJANI. **63 I C. 196 : 25 C. W. N. 901.**

———S. 13—*Actionable claim—Assignment to third party—Attachment—Effect*

When the amount deposited by a person as security for the due performance of the office is assigned to a third person, the attachment by a creditor of the assignor, after the assignment, is not valid as under S. 13. The assignee's right was complete against the assignor on the date of the assignment. Though S 13 does not apply, the principle therein applies. (*Benson and Sundara Aiyar, JJ.*) VENKATACHALA AIYAR *v.* SUBRAMANIA AIYAR. **11 M L. T. 245 : 14 I. C. 144 : (1912) M. W. N. 461.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 14.

——— Ss. 13 and 14—*Succession, rule of—Change.*

A person cannot change the rule of succession under the colour of fictitious endowment. (*Stuart and Kanhaiya Lal, A J Cs.*) SITARAMJI *v.* JADUNATH SINGH. **24 I. C. 72 : 1 O. L. J. 204.**

———Ss. 14 and 16—*Gift over— Indefinite failure of issue.*

A gift over on indefinite failure of male issue in the line of donor is void at its inception. (*Mr. Amer Ali.*) PURNA SASHI *v.* KALIDHAN RAI. **38 Cal. 603 : 15 C. W. N. 693 : 8 A. L. J 681 : 13 Bom. L. R. 451 ; 14 C. L J. 1 : (1911) 2 M. W. N. 403 : 10 M L. T. 361 : 11 I. C. 412 : 21 M. L. J. 1119 (P. C.).**

———Ss. 14 and 54—*Contract for the sale of land—Contract for pre-emption—Rule against perpetuities.*

Although contracts for the sale of land which can be specially enforced immediately or contract creating a right of pre-emption which cannot be specially enforced until the proper occasion arises in the future, do not according to the law in India create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinarily personal contracts and stand in a category by themselves. The principle which underlies the rule of perpetuities applies to this class of contracts. The law in England and in India is substantially the same with regard to the enforcement of contracts in respect of lands. The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly it is void and the principle is the same in India as in England. Under Hindu Law, neither equitable interests nor executory interests in immoveable property are recognised. Per *Kanga, J.*—A contract with regard to land which is calculated to defeat the rule against perpetuities which is one of public policy is void under S. 23 of the Contract Act. 41 B. 438; 38 M. 114 ; 24 M. 449; 25 C. W. N. 901 Ref. (*Macleod, C. J. and Kanga, J.*) DINKAR RAO GANPATRAO *v.* NARAYAN. **24 Bom. L. R. 449 : 1922 Bom. 84.**

———S. 14—*Permanent lease—Covenant for pre emption in case of sale by lessee is invalid.*

Where on the creation of a permanent lease the lessee covenants that if he or his representatives intend to transfer the whole or a portion of the leasehold interest, the transfer would be made in

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 14.

favour of the lessors for proper price or to third parties only with the permission of the lessor and that any transfer in contravention of this covenant would be invalid. *Held*, that the covenant is void as offending the rule against perpetuities and therefore not binding on the lessee. (*Woodroffe and Ghose, JJ.*) SWARNA KUMAR GHOSH *v.* PRAHLAD CHANDRA SARKHEL.
26 C. W. N. 874 : 1922 Cal. 474.

——S. 14—*Covenant for pre-emption—Unlimited in point of time is void.*

A covenant for pre-emption unlimited in point of time is void as offending the rule against perpetuities. Therefore an agreement among the members of a family that in case one of them had to sell his portion of the family property he would offer it for sale in the first instance to the other members cannot be specifically enforced. 25 C. W. N 901 ; 38 M. 114 : 5 C. W. N. 343 ref. (*N. R. Chatterjee and Cuming, JJ.*) RASH BEHARI GANGULY *v.* SHABHARANJAN SAMADDAR.
64 I. C. 1001.

——S. 14—*Redemption—Right to.*

A mortgagor's right of redemption is exempt from the operation of the rule against perpetuities. (*Jenkins, C. J. and Mookerjee, J.*) ABDUL GAFFUR *v.* SHEIKH JAMAL.
17 C. W. N. 1053 : 21 I. C. 90 : 18 C L. J. 228.

——S. 14—*Covenant for renewal—Renewal from time to time—Covenant running with the land.*

A covenant to renew a lease from time to time at the lessee's option, is one running with the land and is not subject to any rule against perpetuity. (*Abdur Rahim and Oldfield, JJ.*) TELLICHERY PICHU NAIDU *v.* JAFARSON.
44 Mad. 230 : 12 L.W. 670 : (1921) M. W. N. 31 : 60 I C. 591 : 41 M. L. J. 94.

——S. 14—*Gift to a joint Hindu family—Putravakasam property.*

Per *Sadasiva Aiyar, J.*—The rule against perpetuities cannot be applied so as to invalidate gifts made to all the persons who can naturally form a joint Hindu family, the gifted property to be held as joint family property, or to the whole of the group of persons following the natural law of *Marumakathayam* forming a natural *tavazhi* group. Per *Srinivasa Aiyangar, J.*—A gift is made to the entity which is called *Tarwad* or *Tavazhi* and the law governing the parties regulates the mode of succession, and enjoyment. (*Wallis, C. J., Sadasiva Aiyar and Srinivasa Aiyangar, JJ.*) CHAKKARA KANAM *v.* KUNHI POKKAR.
39 Mad. 317 : 18 M. L. T. 255 : (1915) M. W. N. 740 : 30 I. C. 755 : 29 M. L. J. 481 (F. B.).

——S. 14—*Rule against perpetuities—Contract to sell or reconvey—English and Indian Law.*

The rule against perpetuites is applicable only in reference to an attempt to create an interest in land. Under the Law of India an agreement to sell or reconvey land is an agreement merely personal, not creating an interest in land though

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 16.

it has reference to land. Such an agreement is not within the rule against perpetuities. 24 M.L. J. 84 Diss. (*Ayling and Tyabji, JJ.*) CHARAMUDI *v.* MARRIBOYINA RAGHAVALU **39 Mad 462 : 18 M. L. T. 76 : (1915) M. W N. 596 : 28 I. C. 871 : 28 M. L. J. 471.**

——S. 14—*Pre-emption — If enforceable against covenantor's heirs—Rule against perpetuities.*

When no time is fixed for the performance of an agreement to convey, a contract for pre-emption cannot be enforced against the heirs of the covenantor, as being obnoxious to the rule against perpetuities. (*Benson and Sundara Aiyar, JJ.*) KOLATHU AIYAR *v.* RANGAVADHYAR.
38 Mad. 114 : 13 M. L. T. 179 : (1913) M. W. N. 163 : 18 I. C. 203 : 24 M. L. J. 84.

——S. 14—*Perpetuities, rule against.*

A devolution of property in perpetuity is not recognised by the Hindu Law. 9 B. L. R. 37 (P. C), Ref (*Lindsay and Kanhaiya Lal, A. J. Cs.*) BHARATH SINGH *v.* BALBHADAR SINGH.
20 I. C. 429.

——S. 14—*Perpetuities.*

A covenant to grant land whenever it is required for the purpose of building a *mandir* or *dharmasala* and empowering the grantees to take the land if the grantor or his heirs should refuse to give it, is bad as offending the rule against perpetuities and as preventing the owner from alienating his estate before the happening of a condition which may never happen both under Hindu Law and under T. P. Act. (*Chamier, C. J. and Jwala Prasad, J.*) DAYA BHAI *v.* MAHARAJ BAHADUR SINGH.
1 Pat. L J. 238 : 34 I. C. 482 : 2 Pat. L. W. 333.

——S. 14—*Rule against perpetuities—Applicability to Mahomedans.*

The rule against perpetuities does not rest solely on the religious laws of Hindus or Muhammadans but on the general considerations of public policy. Consequently even under the Mahomedan Law one of the main features opposed to public policy is the attempt to restrict for all time the alienability of property by donees or legatees. (*Pipon, J. C.*) YUSAF KHAN *v.* MISAL KHAN.
73 I. C. 99.

——S. 15—*Applicability on Hindu transfers.*

S. 15 of the T. P Act which embodies the rule in *Leake* v. *Robinson* is applicable to Hindu transfers. (*Lord Macnaughten.*) BHAGBATI BARMAYYA *v.* KALU CHARAN SINGH.
38 Cal. 468 : 38 I. A. 54 : 15 C. W. N. 393 : 9 M. L. T. 411 : 13 C. L. J. 434 : 8 A. L. J. 433 : 13 Bom. L. R. 375 : (1911) 2 M. W. N 295 : 10 I. C. 641 : 21 M. L. J. 387 (P.C.).

——S. 16—*Charitable trusts—Applicability to.*

Though no statute governs charitable trusts in India the rule of conduct laid down in S. 15 of the Trusts Act applies also to a trustee of a charitable trust. (*Abdur Rahim and Phillips, JJ.*) SUBRAMANIA AIYAR *v.* PRAYAG DOSJI VARU.
33 I. C. 677.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 17.

——— S. 17—*Dedication—Religious purposes.*

A dedication for religious purposes will not be invalid merely by reason of its transgressing the rule against perpetuities. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SITARAMJI *v.* JADUNATH SINGH.
24 I. C. 72 : 1 O. L. J. 204.

——— S. 18—*Direction to accumulate—Gift of accumulation.*

R, in his will devised the residue of his property to B. his widow and executrix for life and thereafter to his five sons in equal shares He further directed certain payments to be made the surplus income during the lifetime of the widow to be accumulated for the benefit of the sons. *Held*, that the provisions for accumulation of the surplus income is not invalid, as a direction to accumulate with a gift of the accumulation is not bad in itself; it fails only if it offends some independent rule of Hindu Law. (*Greaves, J.*) RAM LAL SEN *v.* BIDHUMUKHI DASI. **56 I. C. 373 : 47 Cal. 76.**

——— S. 18—*Will—Accumulation from surplus income.*

Accumulations from bequests according to testator's directions, of surplus income from the *debutter* estate may create a religious and charitable trust. If a charitable gift is unconditional, a direction for accumulation is invalid and consequently such income is immediately distributable in charity excluding the heirs or next of kin. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) SAROJINI DASI *v.* GNANENDRA NATH DAS.
33 I. C. 102 : 23 C. L. J. 241.

——— S. 19—*Explanation—"Take by right of inheritance"—Gift to nephews.*

Where the nephews of testators are directed to take by right of inheritance after a life-estate they take a vested interest though possession and enjoyment is postponed after the death of the life-estate holders. (*Lord Macnaughten.*) BHAGBATI BARMANYA *v.* KALI CHARAN SINGH.
38 Cal. 468 : 38 I. A. 54 : 15 C. W. N. 393 : 9 M. L. T. 411 : 13 C. L. J. 484 : 8 A. L. J. 433 : 13 Bom. L. R. 375 : (1911) 2 M. W. N. 295 : 10 I. C. 641 : 21 M. L. J. 387 (P.C.)

——— S. 19—*Vested remainder.*

To enable a remainder to be vested there must be a direct gift. (*Macleod, C. J. and Heaton, J.*) NATAVAR LAL GIRDHAREAL *v.* RANCHHOD BHAGWANDAS. **55 I. C. 313 : 22 Bom. L. R. 71.**

——— Ss. 19, 28 and 31—*Vested interest—Divesting on condition subsequent—Validity.*

Under a partition deed between the sons of a Hindu it was provided that the mother should take a life-estate over certain properties, that the kist due on those properties should be paid by the two sons equally that after the mother's death the sons should take the properties and divide them equally, and if the sons defaulted in the payments of revenue the mother should take the properties absolutely. The sons defaulted in the payment of kist. *Held*, that the mother's life-estate was converted into an absolute estate, that the sons took a vested remainder under the partition deed subject to the same being divested

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 35.

by the happening of the conditions namely, default in the payment of kist, and that such divesting was not opposed to any principle of Hindu Law. 9 Cal. 952, 9. M. I. A. 123; 16 Cal. 383; 8 M. I. A 66, Foll. (*Oldfield and Seshagiri Aiyar, JJ.*) KRISHNASWAMI AIYAR *v.* APPAVIER.
12 L. W. 519 : (1920) M. W. N 691 : 28 M. L. T. 430 : 60 I. C. 802 : 39 M. L J. 498.

——— S. 19—*Interest on death of a person—Contingent or vested—Suit by reversioners—Compromise.*

Two persons claiming to be reversioners instituted a suit disputing the genuineness of a will where the properties of the last owner were bequeathed to his widow, mother, etc. A compromise was arrived at whereby some of the properties were to be taken by the plffs. on the death of the mother, the widow's rights having been already purchased by the mother in a compromise in a prior suit by her. *Held*, that the rights secured to two reversioners by the compromise was a vested interest and that it did not pass from one to the other by survivorship but was heritable and divisible between the two donees. 4 M. I A. 137 and 38 Cal. 468 Ref (*Ayling and Seshagiri Aiyar, JJ.*) KRISHNA AIYAR *v.* SWAMINATHA AIYAR. **24 M. L. T. 101 : 8 L. W. 140 : 47 I. C. 723 : (1918) M. W. N. 503.**

——— S. 19—*Gift — Enjoyment —Postponed after donor's death—Vested interest.*

Where a donor granted and conveyed to the donee property to hold the same as and from the date of the death of the donor, the vesting of the right in the donee takes place as soon as the gift was executed and registered. (*Spencer and Krishnan, JJ.*) RANGA RAO *v.* KITHORI AMMAL.
42 I. C. 265 : (1917) M. W. N. 634.

——— Ss. 21, 23 and 29—*Gift to daughters—Uncertain event—Marriage.*

A bequest to daughters of the testator "when they will be married" was held not to be contingent having regard to the other provisions in the will. (*Lord Mersey.*) CHANDRA KISHORE ROY *v.* PRASANNA KUMARI DASI. **38 Cal. 327 : 38 I. A 7 : 15 C. W. N. 121 : 9 M. L. T. 71 : (1911) 2 M. W. N. 30 : 13 C L. J. 78 : 8 A. L. J. 96 : 13 Bom. L R. 67 : 4 Bur. L. T. 65 : 9 I C. 122 : 21 M L. J 116 (P.C.).**

——— Ss. 25 and 29—*Charitable gifts—Illegal conditions.*

Per Imam, J :—If the trusts constitute a charitable gift and the conditions are illegal, the charity takes the gift without the conditions. (*Imam and Greaves, JJ.*) JITENDRA NATH PALIT *v.* LOKENDRA NATH PALIT. **34 I. C. 657 : 22 C L. J. 593.**

——— S 35—*Election—Full knowledge requisite—Effect of, on antecedent transactions.*

An election to be binding must be with a full knowledge of the rights of the person entitled to elect. Where a person elects after creating substantial rights in favour of strangers in property which he would lose by the election the strangers who had already acquired title would not be

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 35.

affected by the election. (*Lord Atkinson*). SADIK HUSSAIN KHAN *v* HASHIMI ALI KHAN.
38 All. 627 : 43 I. A. 212 : 14 A. L. J. 1248 : 19 O. C. 192 : 18 Bom. L. R. 1037 : 21 C. W. N. 130 : (1916) 2 M. W. N. 577 : 21 M. L. T. 40 : 1 Pat. L. W. 157 : 4 O. L. J. 22 : 25 C. L. J. 363 : 6 L. W. 378 : 10 Bur. L. T. 140 : 36 I. C. 104 : 31 M. L. J. 607 (P.C.)

——— S. 35—*Election—Hindu widow—Knowledge of facts necessary—Pardanashin lady.*

Plaintiff the widow of a Hindu testator was a legatee under his will in respect of one house and an annuity of Rs. 100. In addition she was entitled to suitable residential quarters in the family house. There was a litigation in respect of the administration of the estate and in that the widow claimed maintenance from the husband's estate. But this question was left open. Subsequently the widow brought a suit for arrears of maintenance. *Held* that she was *prima facie* entitled to maintenance and she had done nothing to waive that right To constitute a waiver or election by a Hindu widow it must be shown that she was fully aware of her right under the law and with that knowledge made an election. A pardanashin lady is entitled to special protection in this respect. (*Macleod, C. J., Harrington and Fletcher, JJ.*) TRIGUNA SUNDARI DASI *v.* RADHA RANI DASI. 37 C. L. J. 30 : 1923 Cal. 97.

——— S. 35—*Will reciting previous gift—Devisee if can contest gift.*

A person accepting a benefit under a will is not precluded from disputing a gift by the testatrix long before her death and which is not the subject of the Will at all though it is recited therein. (*Wallis and Oldfield, JJ.*) RAMIYAR *v.* MAHALASHMI. 14 L. W. 33 : 64 I. C. 481 : (1922) M. W. N. 484.

——— S 35—*Election—Doctrine of—Applicability to Hindus.*

The doctrine of election is based on the principle of compensation and not of forfeiture. The *quantum* of compensation is not what the Court considers. It only sees that a party deprived of a right vesting in him is recompensed by the gift of another property whatever may be its nature or duration of enjoyment. He who accepts a benefit under a deed or a will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. The rule enunciated in S. 35. T.P. Act, applies to Hindus. (*Seshagiri Aiyar and Napier, JJ.*) AMMALU ACHI *v.* PONNAMMAL ACHI. 9 L. W. 202 : 49 I. C. 527 : (1919) M. W. N. 144 : 36 M. L. J. 507.

——— S. 35—*Election of remedies—Mortgage—Rent due from mortgagor charged on property—Decree—Redemption.*

In a suit for redemption the mortgagee cannot claim any arrears of rent with interest thereon in respect of the mortgage land leased to the mortgagor as tenant under the terms of the mortgage deed, when the mortgagee has already sued for and obtained a decree in respect of such rent and interest and allowed the decree to become

TRANSFER OF PROPERTY ACT (IV OF 1882 S. 36.

barred by limitation. This is so even though the arrears of rent is made a charge on the property under the deed. (*Phillips and Krishnan, JJ.*) MANGESHWAR NARAINA RAO *v.* S. SHIVA RAO. 41 Mad. 1043 : 8 L. W. 405 : 24 M. L. T. 370 : 4 U. C. 123 : (1918) M. W. N. 917 : 35 M. L. J. 414.

——— S. 35—*Election—Decree for money by instalments—Mortgage*

Where a person takes a mortgage in consideration of consenting to a decree for payment by instalments in a suit on a pro-note, he can execute the decree and enforce the mortgage. The doctrine of election had no application to the case. (*White, C. J. and Phillips, J.*) KARUPPAN CHETTIAR *v.* PONNUSWAMI THEVAR. 11 I. C. 837 : 10 M. L. T. 187.

——— S 35—*Election—Different capacities.*

Where a person takes a benefit in one capacity and asserts his right in another no question of election arises though owing to circumstances the two capacities merge in him. A person benefiting indirectly under a transaction need not elect and a person taking in one capacity may dissent therefrom in another capacity. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) DEPUTY COMMISSIONER OF PARTABGARH *v.* RAM SARUP. 42 I. C. 18 : 20 O. C. 243.

——— S. 35—*Election—Remedies.*

If two remedies which are co-existent and inconsistent are equally available to a party and he pursues one remedy and fails therein, equity will step in and prevent him from pursuing the other remedy, because he chooses one remedy at his own peril and cannot turn round and say, when he fails therein that he will now pursue the other remedy open to him. (*Das, J.*) BABU JAGDEEP-SAHAY *v.* SONU LAL. 52 I. C. 363.

——— S. 36—*Mortgage--Deposit for redemption—Profits—Date from which claim begins.*

From the day of the deposit to redeem a mortgage the property is transferred to the mortgagor and under S. 36 of the T. P. Act mortgagor is entitled to the collections made therefor. (*Gokul Prasad, J.*) LALA GANGA RAM *v.* MEWA RAM SINGH. 1922 All. 275.

——— S. 36—*Contribution.*

When contribution is ordered between different funds each of them is to be placed in the same position as it would have had, if it had paid its due proportion at the proper time. (*Griffin and Chamier, JJ.*) SHAH MUHAMMAD ABBAS *v.* MAHOMED HAMID. 14 I. C. 179 : 9 A. L. J. 499.

——— S. 36—*Assignment of landlord's interest to tenant—Rent up to assignment is claimable by landlord.*

Where an assignee from a tenant of his interest subsequently gets an assignment of the interest of the landlord, the assignor of the landlord's interest is entitled to the rents accrued up to the date of the assignment on the principle of S. 36 of the T. P. Act from the assignee. (*N. R. Chatterjee and Panton, JJ.*) BIKRAM KUMAR BOSE *v.* MOHIT KRISHNA KUNDU. 64 I. C. 178.

TRANSFER OF PROPERTY ACT (IV OF 1882), S 36.

——S. 36—*Applicability—Execution sale.*

S 36 of the Act embodies a rule of justice, equity and good conscience which should be applied to execution sales. 26 Mad. 540 ; 38 Mad. 86, Foll. (*Wallis, C. J., Bakewell and Kumaraswami Sastri, JJ.*) VEMA RANGIAH CHETTY *v.* VAJRAVELU MUDALIAR. **41 Mad. 370 : 43 I. C. 78 : 33 M. L. J. 618.**

——S 36—*Lease—Aissignment—Apportionment of rent.*

An assignee from a lessee becomes the lessee from the date of assignment and he is liable only for the rent accruing after the assignment An assignee of a lease is entitled to claim as against the lessor an apportionment of the rent after the date of his assignment as the rent accrues from day to day as between him and the lessor. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) RANDIPURAYIL KUNHISOW *v.* ALUKANDIYIL PARKUM MULLOLI CHATHU. **38 Mad. 86 : 17 I. C. 933 : 12 M. L. T. 605 : 23 M. L. J. 695.**

——Ss. 37, 50 and 109—*Title of assignment when complete—Notice of assignment, whether necessary—Payment of rent by tenant in good faith.*

Under the sections the title of the assignee is completed upon execution and, when necessary, registration of the deed of assignment The completion of the title is not postponed till notice has been given either by the assignor or by the assignee to the tenant. As soon as the title of the assignee is complete he is entitled to claim rent. The tenant can escape liability if he can establish that he has paid rent to the assignor in good faith before notice of the assignment. A tenant cannot plead successfully that he has paid rent in good faith to the assignor if he has received notice of the assignment either from the assignor or from the assignee. (*Mookerji and Beachcroft, JJ.*) PEARYLAL DAW *v.* MADHOJI JIBAN. **19 I. C. 865 : 17 C. L. J 372.**

——S. 38—*Evidence Act,* S. 102—*Alienee from guardian—Onus.*

A purchaser deriving title to a minor's property by purchase from the minor's mother as guardian of the minor, must prove that the mother was authorised to effect the transfer. (*Scott, C. J. and Shah, J.*) RALAPPA DUNDAPPA *v.* CHAUNBASSAPPA. **33 I. C. 444 : 17 Bom. L. R. 1134.**

——S. 38—*Transfer by Karnavan.*

Where the vendor has absolute power to convey certain property, the vendee gets full title provided the vendor recites in the sale deed that he intends to pass full title though the recitals be false (*Sadasiva Aiyar and Spencer, JJ.*) SUBRAMANIYA PATTAR *v.* KRISHNA EMBRANDRI. **12 L. W. 361 : 60 I. C. 77 : 39 M. L. J. 590.**

——S. 38—'*Any person,' meaning of.*

A purchaser from a Muhammadan Zamindar who but for S. 28 of the Sind Encumbered Estates Act, would have been the absolute owner of the property need not inquire into the nature of the title of his transferor and therefore he gets a good title to the property purchased. (*Fawcett, C. J. and Crump, A. J. C.*) SHAHAB-UD-DIN *v.* VOHIDBUX. **56 I. C. 492 : 14 S. L. R. 12.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 40.

——S. 39—*Maintenance—Charge*—Bona fide *purchaser.*

The right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband, unless and until it is fixed and charged upon the estate by a decree or by agreement. If such estate has been alienated and is in the hands of a *bona fide* transferee the widow cannot follow the property even though the transferee had notice of the widow's claim for maintenance. 4 All. 296 ; 22 All. 326 ; 24 All. 160 Foll. (*Scott-Smith, J.*) DAULAT RAM *v.* CHAMPA **2 U. P. L. R. (Lah.) 50 : 55 I. C. 28 : 32 P. W. R. 1920.**

——Ss. 39 and 40—*Dasabandan Cess—Covenants running with land.*

The objection to collect and pay the *dasabandan* cess annexed to the ownership of the property may be enforced against the transferee with notice of the obligation under S. 39. (*Ayling and Tyabji, JJ.*) BANGARU MUTHU VENKATAPPA NAYANIVARU *v.* GOLLA CHINNABBA NAIDU. **31 I. C. 565.**

——S. 39—*Impartible estates—Maintenance—Junior members.*

Junior members in an impartible estate are not entitled to a charge for maintenance against a transferee of the estate in the absence of a special custom. (*Roe and Coutts, JJ.*) DEBENDRANATH SHAH DEO *v.* DEO NARAYAN SINGH. **48 I. C. 613 : 3 Pat. L. J. 648.**

——S. 40—*Judicial sales—Title—Vagueness in notice—Effect.*

Judicial sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the buyer's title. (*Lord Dunedin, J.*) NUR MAHOMED PERBHOY *v.* DINSHAW HORMASJI. **1922 P. C. 393.**

——S. 40—*Annuity—Payable by Zemindar—Charge.*

A charge for the maintenance of the junior member and his family in a *Zemindari,* created by the *Zimindar,* for the time being, binds his heirs and legatees. (*Lord Phillimore.*) RAJA RAJESWARA DORAI *v.* SUNDARA PANDIYASAMI TEVAR. **42 Mad. 581 : 17 A. L. J. 153 : 23 C. W. N. 549 : 29 C. L J. 551 : 25 M. L. T. 400 : 21 Bom. L. R. 885 : (1919) M W. N. 511 : 49 I C. 704 : 10 L. W. 322 : 36 M. L. J. 164 (P. C.).**

——S. 40—*Redemption—Right to—Purchase of equity of redemption by mortgagee.*

Where the equity of redemption has been held in execution of decree for mesne profits obtained by the usufructuary mortgagee for the period for which he was out of possession, the mortgagee's right of redemption is extinguished. (*Mr. Ameer Ali*) PRABHU DAYAL *v.* KALYAN DAS. **43 I. A 43 : 20 C. W. N. 425 : 19 M. L. T. 206 : (1916) 1 M. W. N. 234 : 3 L. W. 293 : 38 All 163: 23 C. L. J. 411 : 33 I. C. 505: 18 Bom. L. R. 382 (P. C.).**

——S. 40—*Vendor and purchaser—Covenant to pay a sum of money to vendor on alienation of structure by vendee.*

Deft. was allowed by the owner of certain lands to build on the lands on condition that if

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 40.

deft. sold any of the houses so built he should pay one-fourth of the purchase money to the owner. *Held*, that the heirs of the deft. and their alienees were severally liable in respect of the one-fourth of the purchase money payable to the owner *Per Walsh, J.*—A purchaser having notice of any restrictive covenant binding upon his vendor as a condition of the interest or the grant which he enjoys in the land is affected in equity with notice of such restriction and is liable after he becomes a purchaser for any act done in breach of such restriction. S. 40 of the T. P. Act was intended to codify this principle (*Piggott and Walsh, JJ.*) PRABHU NARAIN SINGH *v.* RAMZAN.
41 All. 417 : 49 I. C. 865 : 17 A. L. J. 469.

———S. 40—*Land Revenue—Covenant running with the land—Liability to pay Land Revenue.*

Where the owner of certain lands sold them, except a portion reserved by himself, stipulating that the transferee should pay land revenus on all the lands including the lands resumed, such an agreement cannot be enforced for all time against the person in possession. (*Chamier, J.*) RAM GOVIND *v.* SRI THAKURJI MAHARAJ.
19 I. C. 126: 11 A. L. J. 231.

———S. 40—*Covenant running with the land—Liability to pay revenue.*

An agreement that the transferor should retain a certain portion of the property transferred and that the transferee should pay the whole of the land revenue including that of the portion retained, is not a covenant running with the land, and the transferees of the vendee are not bound by it. (*Chamier, J.*) SRI THAKURJI MAHARAJ *v.* LACHMI NARAIN. **19 I. C. 67: 11 A. L. J. 212.**

———S. 40—*Covenant running with the land—Restricting user of property.*

A covenant agreeing to restrict the use of property by the owner is not binding on the purchaser unless he has notice as it does not run with the land. (*Macleod, C. J. and Heaton, J.*) GORDHANDAS *v.* MOHANLAL. **22 Bom. J. R. 1158 : 59 I. C. 506 : 45 B. 170.**

———Ss. 40 and 41—*Invalid Revenue Sale—Doctrine of purchaser for value without notice does not apply.*

A revenue sale held on the footing that the defendant was bound to pay assessment would be invalid if it is found that he was, in fact, entitled to hold the lands free of assessment. The purchaser in such a sale would not get a good title except by adverse possession. The doctrine of a purchaser for value without notice, does not apply to sale held by Revenue Courts. (*Macleod, C.J. and Heaton, J.*) MADHAV NARAYAN *v.* SADASHIV KESHAV. **45 Bom. 45 : 59 I. C. 118: 22 Bom. L. R. 1082.**

———S. 40—*Charge on land—Applicability to subsequent transfer.*

Where property in the hands of a person is burdened with a charge, a transferee getting it with notice of the said charge takes it subject to the obligation attaching to the property. (*Scott, C. J. and Heaton, J.*) TAVAKAL BHAI *v.* IMTIYAJUEGANN. **41 Bom. 372 : 39 I. C. 96: 19 Bom. L. R. 97.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 40.

———S. 40—*Covenant running with the land—Covenant to repurchase.*

The covenant to reconvey in a sale-deed only creates a personal liability and it does not run with the land. Even heirs of the vendor are not bound by it. (*Scott and Batchelor, JJ.*) GURU NATH BALAJI *v.* YAMCHANA NALAROO.
35 Bom. 258 : 10 I. C. 814: 13 Bom. L. R. 240.

———S. 40—*Covenant for preparation of jama papers.*

A contract between lessor and lessee for the preparation of a set of *Jama wasib vaki* and Jama Mufassil papers is a covenant running with the land. (*Fletcher and Newbould, JJ.*) BHAGWAN DAS *v.* SURENDRA NARAIN SINGH.
42 I. C. 521.

———S. 40—*Applicability—Creation of easement.*

The principle of S. 40 of the Act is not applicable to a case where a deed of sale in favour of the plaintiff creates an easement. S 40 does not deal with rights of that character. (*Leslie. Jones, J.*) RAM SINGH *v.* RAM SINGH,
39 I. C. 778 : 48 P. W. R. 1917.

———S. 40—*Covenant running with land—Condition.*

A condition that if the property was sold by the mortgagor three-fourths of the sale money should be paid to the mortgagee does not destroy the mortgagee's right over the property and he can follow the property if he is not paid the three-fourths of the sale money. 30 Mad 67, Dist. (*Johnstone and Rattigan, JJ.*) ALLIANCE BANK *v.* KAHAN SINGH. **4 P. R. 1915 : 111 P. W.R. 1914 : 25 I. C. 856: 216 P. L. R. 1914.**

———Ss. 40 and 100—*Charge—Purchaser without notice.*

Where there is a charge on immoveable property to secure payment of a sum of money supported by consideration, a purchaser of the immoveable property although without notice of the charge takes it only subject to the charge. (*Sadasiva Aiyar and Spencer, JJ.*) SRINIVASA RAGHAVA IYENGAR *v.* RANGANATHA AIYANGAR.
25 M. L. T. 347 : 51 I. C. 963: 36 M. L. J. 618.

———S. 40—*Contract of sale—Private sale pending attachment—Transferee—Meaning of—Execution of decree.*

A contract of sale creates an obligation annexed to the ownership of property within the meaning of the section. A private sale of property pending attachment under a contract entered into prior to attachment, confers good title on the vendee. The term 'transferee' in the section includes not merely a transferee under a private alienation but also to a purchaser in execution of a decree. The principle of the section applies also to the proceeding in execution. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) RIBALA VENKATA REDDI *v.* MANGADU YELLAPPA CHETTY.
38 I. C. 107 : 5 L. W. 234.

———S. 40—*Purchaser of encumbered estate with notice.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S 40.

A transferee who purchases property knowing that it is encumbered with a debt is liable under S. 40 of the said Act to discharge the debt. (*Stuart and Kanhaiya Lal, A J. Cs.*) MAHADEO BAKSH SINGH *v.* SANT BAKSH SINGH. **7 O L. J. 356 : 57 I. C. 513 : 23. O. C. 118.**

——— S. 40—*Covenant against alienation.*

A covenant between the mortgagor and mortgagee restraining the former from alienating the mortgaged property creates only a personal liability between the parties and does not invalidate a lease by the mortgagor. The lessee can claim to redeem the mortgage. 6 Cal. 317; 30 Bom. 250; 17 C L J. 384, Dist. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) SYED HUSAIN *v.* BANK OF UPPER INDIA, LTD. **30 I. C. 289 : 2 O. L.J. 291.**

——— S. 40—*Covenant running with land—Assignee.*

A covenant running with the land necessarily affects the nature, quality or value of the land independently of collateral circumstances affecting the mode of enjoyment. A covenant will bind the transferee though a portion of it does not relate to the thing demised. (*Das and Foster, JJ.*) THE LODNA COLLIERY CO., LTD *v.* BEPIN BEHARI BOSE. **55 I. C. 113 : 1 Pat. L. T. 84.**

——— S. 40—*Grant of land to build dharmasala—Not enforceable.*

A covenant to grant land to the grantee for building a *dharmasala* or mandir thereon whenever he or his successors wished it, creating as it does, only a secular estate in the grantee, is unenforceable against the heir and assignees of the grantee. (*Chamier and Jwala Prasad, JJ*) DAYA BHAI *v.* MAHARAJ BAHADUR SINGH.
1 Pat L. J. 238 : 34 I. C. 482: 2 Pat. L. W. 333.

——— S. 41.

Attestation.
Disqualified person.
Enquiry
Husband and wife.
Involuntary sale.
Notice.
Ostensible owner.
Reasonable care.
Rival transferees.
Scope of.
Miscellaneous.

Attestation.

——— S 41—*Attestation—Benamidar--Alienation by—Real owner, if can contest.*

A real owner who allows the *benamidar* to pose as the real owner and attests an alienation by hi is estopped from asserting the *benami* nature of the transaction against the *bona fide* transferee for value; and a person claiming through the real owner will have no superior rights. (*Rossignol and Wilberforce, JJ.*) SANT SINGH *v.* LACHMI. **46 I. C. 102 : 126 P. W. R 1918.**

——— S. 41—*Attestation—Conveyance by mortgagee as absolute owner.*

Where a person attests a registered mortgage document which expressly recited that the attestor has no objection to the mortgage and on the faith of such attestation a second mortgage is taken by third parties the attestator will be estopped from setting up rights to the property to the prejudice of the subsequent mortgagee. 20 Cal. 296, (P.C.) 18 W.R. 166 (P.C.); 22 Cal. 909, (P.C.) Ref. to. (*Agnew and Shadilal, JJ.*) BASSO *v.* MIR MUHAMMAD. **20 I. C 291. 278 P. L. R. 1913 :**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 41—Enquiry.

Disqualified Person.

——— S 41—*Disqualified person—Purdanashin lady—Representations by co-heir—Estoppel.*

In the absence of any proof or suggestion that *purdanashin* ladies of a family had misled by word or conduct any alienee from the male members the mere fact that the ladies left the management of the property in the hands of males is insufficient to show that the male members represented the females or that the latter are estopped. (*Lord Macnaghten.*) AZIMA BIBI *v.* SHAMALAVAND. **40 Cal. 378 : 17 I C. 758 : 17 C.W.N. 121 : 13 M.L.T. 159 : (1913) M. W. N. 125 : 11 A. L J. 169 : 17 C.L.J. 303:15 Bom. L.R. 423: 25 M.L.J. 55.(P.C.)**

——— S. 41—*Disqualified person—Minor—Purchase from an ostensible owner.*

Where a person purchased in good faith from another who was allowed by the father of the plaintiff (a minor) to hold himself out as the ostensible owner and who after the death of the father was allowed by the minor's mother to be in possession of the property collecting rents (for her) the rule of law contained in S. 41 of the Transfer of Property Act is no bar to the plaintiff's suit as no estoppel against an infant can be created by the acts of his guardian Unless the purchaser makes a detailed inquiry into the title of his vendor for a period of more than 12 years and insists on the production and if possible possession of title deeds of the vendor, he cannot claim the protection offered by S. 41 of the Transfer of Property Act. (*Mookerjee and Beachcroft, JJ.*) RAM CHARAN DAS *v.* JOY RAM MAJHI. **16 C.L.J. 185 : 16 I.C. 825 : 17 C.W.N. 10.**

Enquiry.

——— S 41—*Enquiry—Absence of, as to real title—Effect of.*

When it was proved that the plaintiff resided in the same locality and knew the family for a long time and advanced the money without making any enquiry as to the title of the reversioner, *held*, that he cannot claim as a *bona fide* transferee within S. 41 of the Transfer of Property Act (*Viscount Haldane*) NAGESHAR PRASAD PANDE *v.* RAJA NARAIN SINGH.
3 L.W. 454 : 34 I.C 673 : 20 C.W.N. 265 : (1916) 1 M.W.N. 142 (P.C.).

——— S. 41—*Enquiry—Transfer by ostensible owner—Title.*

A mortgagee from a sister's son of the last Hindu owner of the property ought to inquire if there are any collaterals of the last owner in existence, and if he does not so enquire, he is not entitled to the protection of S. 41 of the Act. (*Banerji and Gokul Prasad, JJ.*) BALLU MAL *v.* RAM KISHUN. **43 All. 263 : 64 I.C. 14: 19 A L J. 11.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S 41—Enquiry.

——S 41—*Enquiry.*

N, a mortgagee from *R*, did not make any inquiry as to *R's* title. He lived in the same locality as *R* and used to lend money to *R's* family. It was held in a suit by *P.* against *R.* and *N* that *R* had no title to the property. *N.* brought a suit for sale of the property It was held, that he could not take advantage of S. 41, T. P. Act, under the above circumstances. (*Johnstone, C. J. and Banerji, J.*) PATESHERI PARTAB NARAIN SINGH *v.* NAGESHAR PRASAD. **10 I.C. 961 : 8 A.L J. 358.**

——S 41—*Enquiry—Son acting for father—Transferee—Estoppel.*

Where a father purchased a site in the name of his son, built on it, was in possession and received its rents and the son transferred it. *Held*, that as the vendee from the son had various indications which should have led him to make inquiries into his vendor's title and had received moreover direct notice of the father's claim at the time when the deed was presented for registration, he could not urge that the father was estopped by his conduct from setting up a title as against him, 22 Cal. 909, Rel. (*Scott-Smith and Shadi Lal, JJ*) GULAM DASTGIR *v.* TEJA SINGH. **73 P R. 1918 : 47 I.C. 367 : 159 P.W.R. 1918.**

——S. 41—*Enquiry—Scope of.*

A purchaser is not bound to inquire whether the seller's wife is *enciente* and so the right of the son in the womb cannot prevail against the purchaser. (*Wallis, Offg. C. J. and Hanney, J.*) DATLA VENKATASUBBA RAJU GARU *v.* GATTEM VENKATARAYADU. **26 I.C. 61: 16 M.L T. 508: 27 M.L J. 580.**

——S. 41—*Enquiry—Protection.*

Pyatbaings not signed by the transferors are no documents of title after the passing of the T. P. Act. So to claim the protection of S. 41, a purchaser must prove that he enquired as to who was in actual possession of the land for 12 years before purchase, and should not assume that the vendor is the true owner merely on the strength of the *pyathaings.* (*Twomey, J.*) MG PO NYEIN *v.* MAUNG MY. **27 I.C. 777 : 8 Bur. L.T. 85.**

——S. 41—*Enquiry—Purchaser put on inquiry as to defect of title*

Where a purchaser from a son was aware of a mortgage which had been executed by him and his father held that the purchaser was put by the mortgage deed upon inquiry as to the interest of the father in the land and that he was therefore not a *bona fide* purchaser from an ostensible owner. (*Ormond and Parlett, JJ*) MOHAMED IBRAHIM SAIB KHATEH *v* MOUNG BA GYAN. **24 I.C. 482· 7 Bur. L.T. 69.**

——S. 41—*Enquiry.*

S. 41 does not apply in a case, where the mortgagees could have easily ascertained that the property belonged to the mortgagor as well as to his other brothers. (*Hartnoll, J.*) MAUNG PO THEN *v.* MA ON BWIN. **12 I.C. 858 : 4 Bur L.T. 143.**

——S. 41—*Enquiry— Absence of*—Bona fides.

S. 41 of the T. P. Act will not protect a transferee when the slightest enquiry would have sufficed to acquaint the mortgagee with the fact that the land stood in the real owner's name in the Revenue Maps and Registers. (*Twomey, J.*) MAUNG HMWE *v.* MA LUN AUNG. **11 I.C. 855: 4 Bur. L.T. 186.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 41—Notice.

Husband and Wife.

——S. 41—*Husband and wife—Purchase of property benami by husband in the name of his wife—Rights of decree-holder against the husband purchasing such property—Mortgagee from widow*—Bona fide *transferee for value.*

Where a husband purchased property in the name of his wife and held her out to be the true owner of the said property, a purchaser of the property in execution of a decree against the husband is estopped from denying the rights of a mortgagee from the wife who took the mortgage in good faith and without notice of the benami character of the wife's title. The purchaser in execution of the degree against the husband is his successor-in-interest and is affected by the same estoppel as would affect the husband under S. 41 of the T. P. Act. (*Chatterjee and Cuming, JJ.*) ANNODA MOHAN ROY CHOWDHURY *v.* NILPHAMARI LOAN OFFICE, LTD. **65 I.C. 245 : 26 C W.N. 436.**

——S. 41—*Husband and wife—Husband's property sold by wife—Husband's right to redeem and recover.*

Where during the husband's absence on pilgrimage, the wife sold a peice of land, which before the husband's departure was mortgaged by her, the purchaser who paid off the mortgage having satisfied himself that the wife was the owner : *Held*, that the husband could not recover the land nor could be redeem the mortgage. (*Chitty and Richardson, JJ*) NIRAS PURBE *v.* TETRI PASIN. **32 I C. 82 : 20 C.W.N. 103.**

Involuntary sale.

——S. 41—*Involuntary sales--Execution sale.*

Where title is obstensibly in a third person and the real owner acknowledges it as true, persons who seek to prove that the title is illusory will not be allowed to do so. This principle does not apply to execution creditors who are not estopped by consideration affecting the judgment-debtor. (*Abdur Rahim, O. C. J. and Seshagiri Aiyar, J.*) VEERAPPA CHETTY *v.* RAMASAMI CHETTY. **43 Mad. 135 : 53 I C. 579: 26 M.L.T 271 : 11 L.W. 232 : 37 M.L.J. 442.**

——S. 41—*Involuntary sales.*

S. 41 applies to the case of a Court auction purchase 16 I. C. 811, Foll. (*Moore and Sadasiva Aiyar, JJ.*) NARAPRATH KUMALI *v.* PARAMBOLI KANDI. **34 I.C. 494.**

Notice.

——S 41—*Notice—Transfer by ostensible owner—Hindu widow—Consent of.*

An assignee of an equity of redemption who also claims to be assignee of the mortgagee's rights but who has taken no re-transfer of the property from the mortgagee and whose assignor has also taken no retransfer of those rights, cannot set up a plea of *bona fide* purchase without notice. *Quaere:*—Whether the consent required

by S. 41 of the T. P. Act can be said to be furnished where the only consent given is that of a Hindu widow as tenant for life remainder-man being no party to such consent. (*Scott, C. J. and Batchelor, J.*) BAI JAYAGAVRI *v.* PURSHOTAMDAS. **44 I.C. 926 : 20 Bom. L.R. 77.**

——S. 41—*Notice—Possession with stranger.*

If a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession or else take the property subject to the rights of such person. (*Mookerji and Beachcroft, JJ.*) MAGU BRAHMA *v.* BHOLI DAS. **20 I.C. 195 : 19 C.L.J. 352 : 18 C.W.N. 657.**

——S. 41—*Notice—Real owner in possession*

Where the real owner has all along been in possession and enjoyment of the property, that circumstances is constructive notice of the *benami* nature of the transaction. A person invoking the plea of estoppel must show that he made *bona fide* enquiries (*Shadilal, J.*) RAM SARUP *v.* MAYA SHANKER. **46 P. R. 1918 : 43 I. C. 556 : 33 P W R 1918 : 45 P.L.R. 1918.**

——S. 41—*Notice — Burden of proof—Real owner holding out of another.*

Where a third person purchases an estate for value from the apparent owner the burden of proving that third person had actual or constructive notice of the real title is on the vendor and the burden is not shifted though the vendor was more than a mere *benamidar* and had a lien on the property for payments made by him. (*Abdur Rahim and Phillips, JJ.*) RAJA OF KARVETNAGAR *v.* SARAVANA PILLAI. **35 I. C. 893 : 4 L. W. 200.**

——S. 41 — *Notice*—Bona fide *mortgagee without notice.*

A *bona fide* mortgagee without notice of defect of title in his mortgagor may be awarded a decree under S. 41 even though the sale of the property to the mortgagor was collusive. (*Munro and Sankaran Nair, JJ.*) BOMMADEVARA VENKATA NARASIMHA *v.* GUNDU SASTRULU. **9 I. C 504 : 9 M. L. T. 365.**

——S. 41—*Notice—Possession of stranger.*

A purchaser of immoveable property in the possession of a third person is presumed to have the notice of the title of such third person. (*Maung Kin, J.*) MUNG BO *v.* MUNG TUN BYU. **33 I. C 121**

——S. 41—*Notice.*

A person who knows about the infirmity of title of his transferor cannot claim the benefit of S. 41 (*Robinson, J.*) SAW LAN *v.* MAUNG LUN. **22 I. C. 673.**

Ostensible owner.

——S. 41—*Ostensible owner—Property in the possession of—Execution sale—Rights of purchaser.*

The question whether, on the facts found, the principle of S. 41 of the T. P. Act applies, is one of law. 26 A. 490 ; 36 A. 303 Ref. The property in question originally belonged to a Mahomedan who died leaving a son and daughter. The son's name alone was entered in the revenue papers on the death of the lady in 1890 and he alone remained in physical possession of the property. In 1896 the son alone mortgaged the property and paid it off in due course subsequently. Again he mortgaged in 1908 and 1911. In a suit by the mortgagee the property was sold in execution and purchased by him. Subsequently in 1919 the daughter sued for a 1/3 share of the property. *Held* that the son having dealt with the property as his own with the consent of the daughter, the latter was estopped from claiming it as her own. (*Walsh and Ryves, JJ.*) MUL RAJ *v.* FAZL IMAM. **45 A. 520 : 21 A. L. J. 424 : L. R. 4 A 234 : 1923 A. 583.**

——S. 41—*Ostensible owner — Manager of property during owner's absence—Entry of manager in Municipal house tax register—Effect of—Dealings with property.*

The possession of a manager cannot be treated as sufficient evidence of ostensible ownership with the consent, express or implied, of the real proprietor within the meaning of S. 41 of the T.P. Act. The entry of the name of the manager in the municipal house-tax register on his own application was only made for the purpose of assessment and collection of house-tax and was not intended for registering title. Such an entry is not always enough to induce a person to think that the person whose name was entered was the proprietor and a right to sell the property which was entered in his name. 12 A. L. J. 411 ; 19 C. W.N. 1055; 23 A 442, Ref. (*Stuart and Kanhaiya Lal, JJ.*) MAHOMED SULAIMAN *v.* SAKINA BIBI. **20 A L. J. 654 : 44 All. 674 : L R. 3 A. 509 : 1922 All. 392.**

——S. 41—*Ostensible owner—Mahomedan lady.*

Where a Mah. Lady after the death of her husband represents herself to be the sole owner of the husband's property with the consent of the heirs, receives rent from tenants, and is entered as sole owner in public records, a transfer by her in good faith and for valuable consideration, is protected by S. 41. (*Bannerji and Ryves, JJ.*) MOHAMAD SHAKUR KHAN *v.* MUSSAMMAT SHAHAJAN BEGAM. **63 I. C. 125.**

——S. 41—*Ostensible owner.*

A manager of a property on behalf of another cannot be the ostensible owner under S. 41 of the Act. (*Richardson and Banerjea, JJ.*) JAMNADAS *v.* UMA SHANKER. **36 All. 308 : 25 I. C. 158 : 12 A. L. J. 411.**

——S. 41—*Ostensible owner—Transfer by—Silence—Estoppel—Judgment.*

Where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner the man who so allows the other to hold himself but shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title or that there existed circumstances which ought to have put him upon an enquiry

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 41—Ostensile owner.

that, if prosecuted would have led to discovery of it. The circumstances which would prompt enquiry might be infinitely varied but it might be said that they must be of such specific character that the court could place its finger on them and say that upon such facts some particular enquiry ought to have been made. It is not enough to assert generally that enquiries should be made or that a prudent man would make inquiries. Some specific circumstances should be pointed out as the starting point of an inquiry which might be expected to lead to some result. These principles apply to the case of sales as well as mortgages. 11 B. L. R. 46; 19 W. R. 292; 26 A. 490 Rel. One who culpably stands by and allows another to hold himself out to the world as the owner of property and thereby sell it to a *bona fide* purchaser cannot afterwards assert his title against the latter. It may be difficult on the concrete facts of a particular case to determine what standing by is culpable. It is the duty of a man who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay. 6 A. C. 82; (1904) A. C 806; (1893) 1 Ch. 736 Rel. (*Mookerjee and Cuming, JJ.*) BAIDYA NATH DUTT *v.* ALEFJAN BIBI. **36 C. L. J. 9 : 1923 Cal. 240.**

——— **S. 41**—*Ostensible owner—transfer by—Notice of defect in title—Effect of.*

In order to allow the real owner of property to recover from an alienee the property taken from a person allowed by the real owner to hold himself that as the owner, he must prove either direct or constructive notice of the title or the existence of circumstances which ought to have but the purchasers on an enquiry which if prosecuted would have led to a discovery of the real title. (*Prideaux, A. J. C.*) LAL SINGH *v.* PARAS RAM. **1922 Nag. 226.**

——— **S. 41**—*Ostensible owner*— Bona fides—*Purchase from an ostensible owner.*

Plaintiff cannot set up his real title when the defendant has purchased the property *bona fide* from the ostensible owner. (*Roe and Coutts, JJ.*) RAMSUNDAR SAHU *v.* RAMNARAYAN SAHU. **48 I. C. 936 : (1919) Pat. 404.**

Reasonable care.

——— **S. 41**—*Reasonable care—Ostensible owner—Vendee—Due care and inquiry.*

A vendee from an apparent owner must show that he had no actual or constructive notice of the real title and had not before him circumstances which would have put him on reasonable inquiry to find out the truth. *Quaere*:—Whether transfer of the *patta* makes the *pattadar* the ostensible owner? *Quaere*:—Whether S. 41 overrides S. 115 of the Evidence Act where immoveable property is claimed? (*Ayling and Coutts Trotter, JJ.*) VENKATARAMANA AIYAR *v.* E. VENKATARAMANA AIYAR. **9 L. W. 318 : 50 I. C. 969 : (1919) M. W. N. 180.**

——— **S. 41**—*Reasonable care—Purchase from ostensible owner.*

S. 41 of the T. P. Act is applicable when the transferor is the ostensible owner and the transfer ismade with the consent of the real owner The purchaser has to prove that he took reasonable care to ascertain that the vendor has no title to convey. (*White, C. J and Oldfield, J.*) KUPPAMMAL *v.* GATTIPALLI GOPAUL CHETTY. **27 I. C. 14 : 1 L. W. 649.**

——— **S. 41**—*Reasonable care—Collector's certificate.*

A man who acts on the Collector's certificate as evidence of title does so at his peril. Reasonable care and good faith are necessary to get the protection of S. 41 of the T. P. Act. (*White, C. J. and Oldfield, J.*) THANGAVELU CHETTY *v.* MANGATHAYE AMMAL. **21 I. C. 21 : (1913) M. W. N. 674.**

——— **S. 41**—*Reasonable care—Transferee from ostensible owner must prove title.*

The transferee from an ostensible owner has to plead and prove that he took reasonable care to ascertain that his vendor had power to make the transfer and that he took the sale deed in good faith and for consideration. (*Batten, J. C.*) MT. KASTUR BAI *v.* BALIRAM. **1923 Nag. 15.**

——— **S. 41**—*Reasonable care.*

S. 41 applies to a case where a transfer is made by a person whose name appears in the *khewat* and the real owner not only expressly consents to allow that person to become an ostensible owner of the property transferred but also takes an active part in settling the terms of the transfer as in such a case the transferee must be regarded as having taken reasonable care. (*Kendall, A. J. C.*) RAMA SAMAJH PANDE *v.* RAMJAS. **34 I. C. 773 : 3 O. L. J. 224.**

——— **S. 41**—*Reasonable care — What the transferee must show.*

Under the proviso to S. 41 the transferee must show that he acted in good faith and that he took reasonable care to ascertain that the transferor had power to make the transfer. The care required to be taken under this proviso is one that is expected of an ordinary prudent man of business, but a transferee is not protected by a refusal to enquire into the possession of title deeds and to rest content with the entry in the Record of Rights. (*Miller, C. J. and Mullick, J.*) KANHU LAL MARWARI *v.* PALU SAHU. **5 Pat. L. J. 521 : 1 Pat. L. T. 546 : 57 I. C. 353 : 1920 Pat. 305 : 2 U. P. L. R. (Pat.) 171.**

Rival Transferees.

——— **S. 41**—*Rival transferees — Subsequent,* bona fide *transferee—Negligence.*

If a prior transferee by his omission allows the transferor to sell it to some one else who buys it in good faith such a subsequent *bona fide* purchaser for value without notice of the property will have preference as against the first transferee the principle is that of two innocent transferees the one who renders it possible for the owner to deal with the property a second time, must suffer for his negligence. (*Seshagiri Aiyar and Phillips, JJ.*) PALANIAPPA GOUNDAN *v.* NACHIAPPA GOUNDAN. **53 I. C. 397.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 41—Rival transferees.

——S. 41—*Rival transferees—Transfer of preliminary and final decrees to different persons—Preference.*

The transferee of the preliminary decree is preferred to the transferee of the final decree when there is a conflict between the two for after a transfer of preliminary decree, the decree-holder has nothing left which he can transfer and the transferee cannot get more than the transferor's rights. (*Ormond and Twomey, JJ.*) MAHOMED *v.* MAO. **36 I. C. 426 : 9 Bur. L. T. 121.**

Scope of.

——S. 41—*Scope of.*

Where a person purchases property at an auction sale under circumstances which do not lead him to an enquiry. S. 41, T. P. Act, does not apply. (*Ryves and Daniels, JJ.*) MATHURA PRASAD *v.* ANANDI KUNWAR. **21 A. L. J. 498 : L. R. 4 A. 555 : 1924 All 63.**

——S. 41—*Scope of—Registration Act, S. 47.*

S. 41, T. P. Act must be read in such a way that it must not conflict with the Registration Act, S 47. (*Chamier, J.*) MATHURAKALWAR *v* AMBIKA DAT. **25 I. C. 725 : 12 A. L. J. 993.**

——S. 41—*Scope of—Intention to deceive—Acquiescence.*

In order to invoke S 41 it is not necessary to show that the real owners intended to decieve by their acquiescence much less that they intended to deceive any particular person. The object of the section is to protect *bona fide* transferee for consideration who had made inquiries though the real owner may be innocent. (*Lyle and Ashworth, A. J. Cs.*) AZIZ-UN-NISA *v* AHSAN ASHRAF. **53 I C. 970 : 22 O. C. 243.**

——S. 41—*Scope of—Estoppel—Silence—No duty to speak.*

S. 41 of the T. P. Act is based upon the doctrine of estoppel. The mere fact that the real owner kept silence and advanced no claim for a long time cannot be treated as evidence of an implied consent on his part to the continuance of a trespasser's possession during that time. The transferree from a trespasser cannot therefore avail himself of that plea. (*Lindsay, J C.*) SAIYED-UN-NISSA *v.* MAIKU LAL. **47 I. C. 687 : 5 O. L. J. 391.**

——S. 41—*Scope of.*

S. 41 is an exception to the rule that a person cannot convey a better title than he himself has and therefore the conditions set forth in that section must be strictly complied with. (*Miller and Mullick, JJ.*) KANHU LAL MARWARI *v.* PALUSAHU. **5 Pat. L. J. 521 : 1 Pat. L. T. 546 : 57 I. C. 353 : 2 U. P. L. R (Pat.) 171 : 1920 Pat. 305**

——S. 41—*Scope of—Property vested in shrine—If applies to.*

S. 41, T. P. Act, in protecting a transferee in good faith from an ostensible owner lays down the condition precedent that the persons interested in the property must have given their consent express or implied.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 43.

The section was intended primarily to apply to cases where an ostensible owner has acquired a title benami. Religious endowments are actually protected from its operation, as the idol is the shrine itself and no particular being can give consent, express or implied. (*Pipon, J. C.*) GHULAM HAIDAR *v.* MANAGER, COMMITTEE SAMADH BABA PHULA SINGH. **73 I C. 711.**

Miscellaneous.

——S. 41—*Mortgage*—Bona fide *purchaser—Rights of.*

It is not open to the parties to a mortgage to impeach the genuineness of that transaction to the detriment of a *bona fide* purchaser for value without notice from a purchaser in a Court sale. A *bona fide* transferee for value from an ostensible owner is allowed to protect himself against his real owner. (*Mookerjee and Richardson, JJ.*) RAM SUMNUN PROSAD *v.* GENDA LAL RAI. **29 I. C. 841 : 22 C. L. J. 574.**

——S. 41 — *Representation under mistake —Effect of.*

S. 44 of the T. P. Act, like S. 115 of the Evidence Act applies to a case where the person sought to be estopped has acted under a mistake of fact. 20 Cal 290 rel. (*Hallifax, A. J. C.*) RAM PRASAD *v.* IMARATBAI. **18 N. L. R. 27 : 1922 Nag. 79.**

——S 41—*Disclaimer by real owner—Effect on transferee from ostensible owner—Estoppel.*

A person disclaiming title cannot afterwards set it up to the prejudice of third parties purchasing from the ostensible owner in good faith and value. (*Stuart and Kanhaiya Lal, A J. Cs.*) FAKIR JHAN BEGUM *v.* MUHAMMAD ABDUL GHANI KHAN. **45 I. C. 307 : 5 O. L. J. 49.**

——S. 41—*Agreement to repurchase.*

Principle of S. 41 of T. P. Act is a stipulation for repurchase cannot be enforced against a *bona fide* transferee for consideration without notice. (*Twomey, J.*) MAUNG BYA *v.* MAUNG SAN THU. **10 I. C. 779 : 4 Bur. L T. 74.**

——S. 43 — *Limited owner—Conveyance by —Reversioner joining in transaction.*

Where a reversioner joins in a conveyance by a limited owner, but the purchaser is misled on the death of the limited owner, the reversioner succeeding to estate is not estopped from claiming properties and challenging the alienation as being without necessity. The doctrine of title feeding the estoppel is inapplicable. (*Mr. Ameer Ali.*) GUR NARAYAN *v.* SHEO LAL SINGH. **46 Cal. 566 : 17 A. L. J. 66 : 9 L. W. 335 : 28 C. W. N. 521 : 49 I. C. 1: 1 U.P.L.R. (P. C) 1: 36 M. L. J. 68 (P. C.).**

——S. 43—*Joint vendors—Subsequent acquisition of title—Vendor and purchaser—Liability of joint vendors.*

Where certain persons purport to sell property they are jointly liable to make good the property out of any property they had at the time of sale or which they had subsequently acquired. (*Richards, C. J. and Bannerji, JJ.*) RAUDHIRN SINGH *v.* BHAGWANDAS. **35 All. 541 : 21 I. C. 654 : 11 A. L. J. 746.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 43.

——S. 43—*Applicability.*

S. 43 applies to a case in which the contract of transfer subsists at the time when the property transferred without title is subsequently acquired by the transferor. (*Banerjee, J.*) JADU NANSUPADHIA *v.* SHEOJIT SINGH. **10 I. C. 443.**

——S. 43—*Mortgage by person having no right.*

Where a person mortgages property when he has no right to mortgage representing that he has such authority the mortgage becomes effective as against the property subsequently acquired by him. (*Stanley, C. J. and Banerjee, J.*) SARJA PRASAD *v.* BINDESHARI BAKSH PAL.
33 All. 382 : 9 I. C. 298 : 8 A. L. J. 184.

——S. 43—*Mortgage—Beneficial interest—Acquisition by mortgagor—Rights of mortgagee.*

Where mortgagors acquire the beneficial interest in the mortgaged property they must hold it for the benefit of the mortgagee. (*Scott, C. J. and Russel, J.*) AHMEDABAD UNITED PRINTING CO. *v.* ARDESHIR KAVASJI. **36 Bom. 515 : 16 I. C. 684 : 14 Bom. L. R. 644.**

——S. 43—*Sale by judgment-debtor—Collector's management.*

A judgment debtor selling the property while the Collector is exercising powers under S. 325 A, C P.C., must convey the property to the purchaser, after the Collector's management ceases and his incompetence to sell it, is removed, 34 Bom. 175, Dist. (*Scott, C. J. and Russell. J.*) MAGNIRAM *v.* BAKUBAI RAKHAMA LOHAR.
36 Bom. 510 : 16 I. C. 570 : 14 Bom. L. R. 598.

——S. 43—*Subsequent title to the property—Executory contract.*

The conveyance of a non-existent property though inoperative as a conveyance, is operative as an executory agreement which would attach to the property the moment it is acquired by the grantor and which in equity would transfer the beneficial interest to the vendee without any new act being done by the vendor to confirm the conveyance. Where there was consideration for the contract and the grantor having subsequently become possessed of the property not only referred to in the Hibanama but answering to the description of the property set out therein there cannot be any doubt that on those facts, a court of equity would compel the grantor to perform the contract and that the contract would in equity transfer the beneficial interest to the vendee at the moment of the subsequent acquisition of the property by the grantor. (*Ghose and Panton, JJ.*) RUSTAM ALI MIA *v.* ABDUL JABBAR. **1923 Cal. 535.**

——S. 43—*Applicability of—Person having no title executing sale—Estoppel.*

S 43 of the Transfer of Property Act has no application to persons who merely sign a sale deed whereby another person who has no title professes to transfer the property as his own. (*Walmsley and Ghose, JJ.*) JAGEDALI SHEIKH *v.* PRASANNA KUMAR NAG.
27 C. W. N. 433 : 1923 Cal. 423.

——S. 43—*There must be erroneous representation.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S 43.

Before advantage can be taken of S. 43 of the T. P Act it must be shown that there was an erroneous representation. Whether there was such representation or not is a question of fact (*Newbould and Fanton, JJ.*) SRIMATI SAHADAMOYI DASI *v.* ATUL CHANDRA ROY.
68 I. C. 208.

——S. 43—*Estoppel—Transfer of a* spes successionis.

The doctrine of estoppel enunciated under S 43, is inapplicable to a transfer of a *spes successionis* such as the interest of a reversioner. (*Mookerjee, C. J. and Fletcher, J.*) ANNANDA MOHAN *v.* GOUR MOHAN. **48 Cal. 536 : 25 C. W. N. 496 : 65 I. C. 27 : 33 C. L. J. 457.**

——S. 43—*Exchange—Defective title—Section will apply.*

For the purposes of S. 43, an exchange stands on the same footing as a sale. Though an assignment is of a defective title yet when the title of assignor becomes good afterwards, the Court will make that good title available to make the assignment effectual. (*Mookerjee, A. C. J and Fletcher, J.*) BHAIRAB CHANDRA MANDAL *v.* JIBAN KRISHNA. **60 I. C. 819 : 33 C. L. J 184.**

——S. 43—*Mortgage—Subsequent acquisition of title—Purchase by attesting witness.*

Where a mortgagor had lost title to a property at the time of the mortgage but had come back to the mortgagor subsequently, the mortgage is good as against an attesting witness, of the mortgage who subsequently purchases the equity of redemption. The attestor must be deemed to have had knowledge of the mortgage. (*Chatterjee and Richardson, JJ.*) NIBARAN CHANDRA SEN *v.* NAGENDRA CHANDRA SEN.
44 I. C. 984 : 22 C. W. N. 444.

——S. 43—*Non-transferable right—Estoppel feeding title.*

At the date of a mortgage the mortgagor had only a non-transferable interest in the property but subsequently acquired a transferable interest in it and conveyed a portion of the mortgaged property to a third party. *Held*, that the mortgage operated as a valid charge on the whole property (including the portion conveyed) enforceable immediately on the acquisition of transferable interest. The mortgagee has a charge not only for the original advance but also any money subsequently paid to save the property. 31 Cal. 667 : 10 All. 163: 29 All. 133, Rel. (*Mookerjee and Beachcroft, JJ.*) SURENDRA NATH DEY *v.* RAJENDRA CHANDRA. **43 I C. 740 : 27 C. L. J. 289.**

——S. 43—*Option—Exercise of—Mortgage of non-transferable right-subsequent acquisition of transferable rights.*

Non-repudiation of the mortgage when the misrepresentation of the original transaction came to be known is an exercise of the option under S. 43. A father, a defendant, mortgaged to the plaintiff a property in which he had only non-transferable right His sons afterwards transferred their rights in the same property to defendants 2 and 3 who had no notice of the mortgage. Subsequently the father acquired the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 43.

transferable rights. Under S. 43 of the T. P. Act the plaintiff was held to be entitled to sue on his mortgage subject however under the terms of the last clause of S 43 to the right of the defendants 2 and 3. (*Sanderson. C. J. and Mookerjee. J.*) BANI RAI *v.* NATABAR SIRKAR **33 I. C. 975**

——S. 43—*Applicability.*

The principle in 20 C. 708 (F. B.) is applicable only to cases where the lessor is in possession of land *as defacto* landlord in good faith and placed the lessee in possession of the land who also should have accepted it in good faith. (*Mookerjee and Beachcroft, JJ.*) KRISHNA NATH *v.* MOHAMMAD WAFIZ. **23 C. L. J. 563 : 31 I. C. 789 : 21 C. W. N. 93.**

——S. 43—*Scope of— Estoppel feeding the title.*

If the transferor himself has once become entitled to a valid estate in the land, the transferee's equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest by purchase for value without notice. The section applies only where the transferor made an erroneous representation as to his right to transfer. (*Asutosh Mookerjee and Beachcroft, JJ.*) CHOTA BAHIRA SAHEBA *v.* PURNACHUNDER CHAUDHURI. **21 C. L. J. 144 : 27 I. C. 982 : 19 C. W. N. 1272.**

——Ss. 43 and 115—*Landlord and tenant—Parmanent sub-lease--Original lease merely temporary, but renewed from time to time.*

Where lands held under Government under a temporary settlement were sub-leased to plaintiff permanently, who in turn sub-leased to defendant also permanently, and the settlement was renewed from time to time, the effect of the renewal was to keep alive the contractual obligations of the subordinate holders, arising out of their relationship as landlord and tenant. (*Mookerjee and Beachcroft JJ.*) MOHENDRA NATH *v* SHYAM LAL. **19 C. L. J. 308 : 23 I. C. 16 : 18 C W. N. 907.**

——S. 43—*Estoppel feeding title—Execution sale—Rent sale.*

If a grantor who has no title or a defective title, or an estate less than what he purports to grant, conveys with warranty or covenant of like import and subsequently acquires the title, or estate which he assumes to convey or perfects his title, such after acquired or perfected title will enure to the grantee or to his benefit by way of estoppel. In the case of a voluntary private alienation, the deed, either expressly or by necessary implication, signifies that the grantor intended to convey and that the grantee expected to become vested with an estate of a particular kind ; the deed may consequently create an estoppel although it contains no technical covenants. The case of an execution sale, however, is on a different footing. The judgment-debtor's title is not guaranteed by the decree-holder. (*Mookerjee and Beachcroft, JJ.*) PROSANNA KUMAR *v.* SRIKANTA. **40 Cal. 173 : 17 C. W. N. 137 : 16 I. C. 365 : 16 C. L. J. 202**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 43.

——S. 43—*Punjab Government Tenants Act, S. 8—Contract Act, Ss. 23 and 24 — Agreement by Government—Tenant to share whatever right may be acquired by him—If valid.*

An agreement by a Government tenant with a plaintiff to the effect that if the plaintiff helped the former in bringing the land under cultivation the former would give to the plaintiff one-half of whatever rights he may acquire in the land is not opposed to public policy. (*Abdul Raoof and Harrison. JJ.*) NATHU *v.* ALLAN DITTA. **64 I. C. 18 : 1922 L 287.**

——S. 43—*Erroneous representation—Necessary — Applicability of—Estoppel — Subsequent acquisition of title.*

To bring a transaction within S. 43 of the T. P. Act it is not necessary that the representation made by the transferor should be false; it is sufficient that the representation should be erroneous. When a person with a defective title (*i. e.*, a *spes successionis*) purports to mortgage property any interest subsequently acquired by him in that property is available in equity to make the mortgage effectual, even though the defect in the titles is apparent on the face of the document. (*Le Rossignol and Broadway, JJ.*) BHAGWATI *v.* CHAOLI. **55 I. C. 698 : 2 U. P. L. R. (Lah) 79.**

——S. 43—*Transferee must have been misled by erroneous representation.*

Section 43 of the Act does not apply to a transferee who is not proved to have been misled by erroneous representations of the transferor as to his power to transfer. 34 Mad. 159 : 28 M. L. J. 44 : 35 M. L. J 120, Ref. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNAMACHARIAR *v.* TIRUVENKATACHARIAR. **59 I. C. 275 : 12 L. W. 149.**

——S. 43—*Limited owner—Purchaser with knowledge.*

S. 43 of the Act does not apply to the case of a purchaser who knew, at the date of the sale, that the vendor had no right to convey to him the whole interest which the sale deed purported to convey. 34 Mad. 159, Foll. 40 Mad. 338, Ref. Where a Hindu widow sold certain properties belonging to her and her co widow and the purchaser knew of the co-widow's interest the purchase would not operate on the interest which the vendor subsequently acquired in her co-widow's share. (*Bakewell and Phillips, JJ.*) VENKATA LAKSHMI NARASAYYA *v.* MEENAKSHI AMMAL. **10 L. W 221 : 52 I. C. 992 : (1919) M W. N. 707.**

——S. 43—*Scope of — Law of estoppel—Erroneous representation essential.*

S. 43 of the Act is only a branch of the law of estoppel and is inapplicable where there is no proof of any erroneous representation by the mortgagor at the time of the mortgage or of the mortgagee having acted on any such representation to their prejudice. (*Oldfield and Sadasiva Aiyar, JJ.*) KEDI SANKARA BATTA *v.* MOIDIN. **35 M. L. J. 120 : 49 I. C. 147 : 8 L. W. 100.**

——S. 43—*Non-transferable right* — Spes successionis—*Transfer of.*

Where a person having merely a *spes successionis* in respect of a particular property

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 43.

purports to transfer it such transfer deed does not operate on the interest of the transferor if and where he actually succeeds to the property. 31 Mad. 255, Foll. (*Wallis, C.J. and Spencer. J.*) THE MIDNAPORE ZEMINDARI CO., LTD., v. MALAYANDI APPASWAMY NAYAKER. **41 Mad. 749 : 34 M. L. J. 563 : 24 M. L. T. 1 : 47 I. C. 733 : 8 L. W. 382.**

——S. 43—*Non-transferable right—Service Inam—Alienation—Subsequent enfranchisement.*

A mortgage of village service inam lands in a proprietary estate executed after the grant of a title deed of enfranchisement but before the notification under S. 17 of Madras Act II of 1894 is invalid and inoperative. Even subsequent notification by Government is not effective to confer title on the alienee. (*Wallis, C.J., Sadasiva Aiyar and Kumaraswami Sastri, JJ.*) VADDALI SANNAMMA *v.* KEDUGANTI RADHABHAYI. **41 Mad. 418 : 22 M. L. T. 532 : (1918) M. W. N. 23 : 43 I. C. 935 : 7 L. W. 234 : 34 M. L. J. 17 (F. B.)**

——S. 43 — *Applicability to grantees from Government.*

Section 43 does not apply to cases where land really belongs to Government. (*Sadasiva Aiyar and Spencer, JJ.*) SWAMINATHA MUDALI *v.* SARAVANA MUDALI. **40 I. C. 581 : 33 M. L. J. 370.**

——S. 43 — *Non-transferable right—Service inam—Alienation.*

An alienation of service inam is wholly void and the enfranchisement of the inam at a later date does not entitle the alienee to invoke the aid of the provisions of S. 43 of the T. P. Act. 30 Mad. 255 : (1913) M. W. N. 415 : (1913) M. W. N. 99, Foll. (*Spencer and Coutts Trotter, JJ.*) KARRI RAMAYYA *v.* VILLORI JAGANNADHAM. **39 Mad 930 : 18 M. L. T. 360 : 2 L. W. 874 : 30 I C. 889 : (1915) M W. N. 838.**

——S. 43—*Scope of—Transferor becoming entitled by inheritance.*

Where the transferor represents himself to be the absolute owner of the property transferred when he is really not so and on a subsequent date acquires that property by inheritance, the transfer is not void under S. 6 (*a*) as being a *spes successionis* but is one under S. 43 and is enforceable against the transferor. The principle of S. 43 applies equally both to the sales and to mortgages. 30 Mad. 255 · 20 Cal. 1; 2 C. L. J. 6 ; 34 Mad. 159, Dist. (*Ayling and Tyabji, JJ.*) ALAMANAYAKUNIGARI NABI SAB *v.* MURUKUTI PAPIAH. **29 I. C, 439 : 29 M. L J. 733.**

——S. 43—*Applicability—Privies— Landlord and tenant—Representation—Good faith—Estoppel.*

S. 43 applies also to the privies of the original transferor and the original transferee. Where land belonging to Government was included in a lease by the lessor to the lessee and the Government subsequently declared that the land was at its disposal and then granted it to the lessor again, the tenancy is determined by the declaration and the lessee cannot claim the benefit of S. 43, T. P. Act, in the absence of any allegation of proof that in taking the lease, the lessee believed, in good faith and after due enquiry, the erroneous representation regarding the title to lands leased by the lessor. (*Sadasiva Aiyar and Hannay, JJ.*) HATTIKUDUR NARAIN RAO *v.* ANDER SAIYAD ABBAS SAHIB. **27 I. C. 785 : 28 M. L. J. 44.**

——S. 43—*Non-transferable right — Service inam—Subsequent enfranchisement.*

The alienation of a service inam land is wholly void and S. 43 of the T.P. Act cannot be invoked in aid of such alienation, 3 M. L. T. 243 Dist. from · 24 M. L. J. 462 ; 30 Mad. 255, Foll. (*Sadasiva Aiyar and Spencer, JJ.*) BATCHU RAMAYYA *v.* DARA SATCHI. **14 M.L.T. 430 : (1913) M.W.N. 999 : 21 I.C. 600 : 25 M L.J. 635.**

——S. 43—*Alienation of service inam land—Alienation forbidden by law—Title.*

A purchaser of service inam land from the holder who is prohibited from alienating it cannot claim a valid title on the ground that the inam was subsequently enfranchised and a *patta* was granted to the alienor. The principle of S. 43 of the Transfer of Property Act has no operation when the alienation is forbidden by law on the ground of public policy. (*Benson and Sundara Aiyar, JJ.*) NARHARI SAHU *v.* KORITHAN NAIDU. **(1913) M.W.N. 415 : 19 I.C. 881 : 24 M.L.J. 462.**

——S. 43—*C.P C., Sch. III. Para. 2—Transfer by judgment debtor.*

S. 43 of the T.P. Act applies to the case of a judgment-debtor professing to transfer property without the permission of the Collector in contravention of Sch. III, Para. 2 of the Code. S. 43 does not embody any principle of equity but merely lays down a rule of estoppel by representation. (*Brockman, J. C., Stanyon and Mittra, A.J.Cs*). SALU BAI *v.* BAJAT KHAN. **42 I.C. 200 : 13 N.L.R. 130 (F.B.)**

——S. 43—*Mortgage by manager of Hindu joint family—Absence of necessity—Subsequent partition—Liability of share of manager.*

A mortgage of the whole or a share of the joint family property of a Mitakshara family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share. Where the mortgagor's interest has subsequently been separated from that of the other members of the family, it may become available as security for the mortgage debts. 5 Pat. L. J. 605 ; 2 Lah. L. J. 689, Foll. (*Simpson and Dalal, A. J. C s*) RAM RATAN *v.* GANGA BUKSH SINGH. **26 O C. 245 : 10 O.L.J. 193 : 9 O. & A L.R. 222 : 1923 Oudh 265.**

——S. 43—*Non-transferable right.*

S. 43 of the T. P. Act presupposes an attempt to transfer property which is transferable by law and does not extend to cases of transfers of property which cannot be transferred under S. 6 (*a*) of the Act. 30 Mad. 255: 31 Bom. 165 ; (1913) M. W.N 415. Rel. (*Lindsay. J. C.*) SHIAM SUNDAR *v.* DILGANJAM SINGH. **20 O.C. 155 : 39 I.C. 540 : 4 O. L. J. 380.**

——S. 43—*Applicability.*

It is not necessary for the application of the section that the transferee should have believed

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 43.

in and acted upon erroneous representation. It is also not necessary that the option under the section should be exercised immediately after the right to do so is attained. (*Stuart, J.C.*) JAG MOHAN SINGH *v.* SITA RAM SINGH.
39 I. C. 186 : 20 O.C. 72.

——— S. 43—*Mortgage of his interest an undivided co-parcener*—Bona fide *transferee without notice if affected.*

Where an undivided co-parcener mortgages his interest in the property and his share afterwards passed by mortgage and sale to others who took without notice of the prior mortgage, the prior mortgagee is not entitled to have it declared that the separated share is subject to his mortgage. (*Lindsay and Rafique, A J. Cs.*) BHAGANATH *v.* CHANDI SINGH, **13 I. C. 466 : 14 O. C. 295.**

——— S 43—*Mortgage without lawful right—Subsequent acquisition of title—Estoppel.*

Where a person mortgages property as having a right to do so but in fact without any title and subsequently acquires title as to a portion of the property he must make good his representation to the extent of the property which has come to his hands. (*Coutts and Ross, JJ.*) KAMLA PRASAD *v.* NATTUNI NARAYAN SINGH. **1922 Pat. 136 : 3 Pat. L.T. 401 : 1922 P. 347.**

——— S. 43—*Landlord—Grant of permanent lease—Property right.*

The *gaontia* of a village granted a permanent and heritable lease of *bhogra* land. The *gaontia* was subsequently declared to have proprietary rights in that village, *held*, that S. 43 of the T.P. Act creates in the lessee a permanent transferable interest and that the descendants of the lessor were not entitled to eject the lessees. (*Miller, C. J. and Mullick, J.*) ADITYA PRASAD *v.* PARAMANANDA PATEL.
53 I. C. 96 : 4 Pat. L. J. 505.

——— S. 43—*Subsequent acquisition of title.*

A person selling property to which he has no title must convey it to the vendee even if he gets a title to it subsequently by purchase. 23 C. L J. 501, Ref. (*Doss, J.*) KALI SAHU *v.* GIRDHARI MISTRI. **50 I.C. 778.**

——— S. 43—*Applicability of—Erroneous representation.*

Before S. 43 of the T. P. Act can be brought into operation there must in fact have been an inducement by erroneous representation. 26 Bom 379; 34 Bom. 175 and 34 Mad. 159 Ref. (*Roe and Imam, JJ.*) CHAKRAPANI MUNDI *v.* SRIMATI GAYAMONI DASSI. **1918 Pat 278 : 48 I. C. 228 : 5 Pat. L. W. 219.**

——— S. 44—*Co-parcener—Transfer by joint possession.*

A stranger purchaser of the share of an undivided Hindu co-parcener cannot claim to be put in joint possession of the family dwelling-house He can either ask for delivery of possession of what he acquired by purchase by partition in execution proceedings or bring a separate suit for partition. (*Mookerjee and Roe, JJ.*) GIRIJA KANTA CHAKRABARTHY *v.* MOHAN CHANDRA ACHARJEE.
20 C.W.N. 675 : 35 I.C. 294 : 23 C.L.J. 587.

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 48.

——— S. 44—*Transferee from co-sharer—Partition.*

Where one of several owners who are in possession of different parcels of land by mutual arrangement transfers his share in a parcel which is in the possession of his co-sharers the transferee can sue for partition of that parcel as against them. (*Mookerjee and Roe, JJ.*) SRIS CHANDRA *v.* MAHIMA CHANDRA. **33 I C. 17 : 23 C. L. J 231.**

——— S. 44—*The section does not overide Hindu Law.*

In cases coming under the Hindu Law S. 44 of the Transfer of Property Act does not override the Hindu Law. (*Abdur Rahim, O.C.J, Seshagiri Aiyar and Phillips, JJ.*) KOTA BALABHADRA *v.* KHETRA DASS. **4 L. W. 99 : (1917) M. W.N. 149: 37 I. C. 168 : 31 M. L. J. 275.**

——— Ss 44 and 73—*Substitution of properties.*

This substitution of properties and securities in favour of a person, who through no fault of his own is deprived of the original properties and securities is well known in law. The principle is recognised by the Indian legislature in S. 44 and 73 of the T.P. Act. 33 Mad. 429. Ref. Where a lessee *pendente lite* cuts and carries away the crops planted by him, the auction purchaser is entitled to the rent due from the lessee to the judgment-debtor. (*Sadasiva Aiyar and Napier, JJ.*) PENUMETASUBBARAJU *v.* VEEGISENA SEETHARAMA RAJU. **39 Mad. 283 : 17 M.L T. 57 : 28 I. C. 232 : (1915) M. W. N. 174.**

——— S. 44—*Scope of—Mortgagee from co-sharer.*

S. 44 of the Act provides for partition as a means of making the possessory right available to a transferee from a co-owner. Per *Napier J.*—(dissentient judgment) (*Oldfield and Napier, JJ.*) KOTA BALABHADRA PATRO *v.* KHETRA DOSS. **25 I.C. 401 : 26 M.L.T. 229.**

——— S. 48—*Priority—Purchaser of mortgaged property.*

The auction purchaser for mortgaged property is bound by mortgage whether he has notice or not. But a purchaser from such purchaser is not affected by the mortgage if he purchased without notice. (*Chamier, J.*) RAM LAL *v.* BACHHA SINGH. **16 I. C. 625 : 10 A. L.J. 114.**

——— S. 48—*Sale of property—Prior mortgage—Intention of parties—Rights of purchasers.*

A wrong description of property in a mortgage or sale certificate cannot be taken advantage of by the party if there is evidence to show the real intention of the parties as to what was intended to be conveyed. A subsequent purchaser cannot claim a better title than his vendor unless there is some special equity in his favour. (*Sundara Aiyar, J*) KANNAN NARAYANAPPA *v.* TANGATUR SUBBIAH. **14 I.C. 585.**

——— S. 48—*Right created in favour of different persons—Mode of exercise.*

On the principle recognized by S. 48 of the T. P. Act separate rights created in favour of different persons which can all be exercised without encroaching upon each other must be treated as

TRANSFER OF PROPERTY ACT IV OF 1882), S. 48.

relating to different entities. (*Kanhaiya Lal, A.J.C.*) MAHABIR PRASAD *v.* CHOTE SINGH. 49 I.C. 39 : 21 O.C. 317.

——— Ss 48 and 123—*Sale by donee from mortgagor—Is subject to mortgage.*

Where the vendee purchased the property from the donee of the mortgagor who had only a possessory title the property was held to be subject to the mortgage charge created by a registered deed. (*Maung Kin, J.*) AUNG KAING SAING AND ANOTHER *v.* MAUNG SAN AND OTHERS. 1 Bur. L. J 204 : 1923 R. 41 (2).

——— S. 49—*Mill insured against fire—Mortgagee of—Rights.*

A mortgagee as such has no right against the insurance company which insured the machinery of a mill against fire. (*Robinson, C. J. and Maung Kin, J.*) P V. CHETTY FIRM *v.* MOTOR UNION INSURANCE CO. 1 Bur. L.J. 28: 11 L B.R 294 : 1923 R. 6.

——— S. 50—*Mortgage—Redemption—Clog.*

A condition in a mortgage converting it into a sale if the money is not paid within a certain time is a clog in the equity of redemption. 38 Mad 167, Foll (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) PANDAYAN PILLAI *v* VELLAYAPPA ROWTHAR. 42 I. C. 438: 6 L. W. 588 : 33 M L. J. 316.

——— S. 50—*Payment of rent in advance to landlord—Assignment by landlord—Discharge of tenant.*

Where rent is paid to the landlord before it is due, it is merely an advance to him and is not in fulfilment of an obligation to pay rent. If, before the date the rent falls due, the landlord makes an assignment, his receipt of rent cannot be treated as a discharge by him. (*Coutts and Macpherson, JJ.*) RAM LAL MARWARI *v.* MAHADEO. 63 I. C. 587 : 1921 Pat. 352.

——— S. 50—*Receiver's claim for rent paid in advance to owner.*

Where the mortgagor of certain mortgaged premises let them to a tenant and received rent in advance as a condition precedent to letting, a receiver subsequently appointed in the mortgage suit cannot compel the lessee to pay rent over again. (*Fox, C J.*) TOON CHAN *v.* P. C. SEN. 7 Bur. L. T. 139 : 24 I. C. 693 : 7 L. B. R. 268

——— S. 50—*Mesne profits—Decree for possession not executed—Tenants, liability.*

Where the transferee of a decree for possession of land brought separate suits against the person who was in possession of the land and his tenants for mesne profits for three succeeding years, *held*, that the suits are maintainable though the decree for possession had not been executed and the tenants are also liable for the mesne profits as they also had notice of the claim of the transferee (*Twomey, J.*) SUBRAMANIAN CHETTY *v.* MAUNG PO THET. 14 I. C. 80 : 5 Bur. L T. 53.

——— S 51.

Alienee from limited owner.
Estoppel.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 51—Alienee from limited owner.

Good Faith.
Improvements by Mortgagee
Improvements by Stranger.
Improvements by Tenant
Improvements Pendente lite.
Invalid Transfer.
Knowledge of defective title.
Measure of Compensation.
Miscellaneous.

Alienee from limited Owner.

——— S. 51—*Alienee from limited owner—Absence of necessity—Alienee's right to improvements.*

An alienee from a Hindu widow has to make enquiries as to whether there was any necessity for the alienation and in the absence of same cannot be taken to have believed in good faith that he was absolutely entitled to the property in order to claim compensation for improvements under S. 51, T. P. Act. (*Lindsay and Kanhaiya Lal, JJ.*) HANS RAJ *v* MT. SOMNI. 44 A. 665 : L. R. 3 A. 402 : 20 A L. J. 524 : 4 U. P. L. R (A) 118 : 1922 A. 194.

——— S. 51—*Alienee from limited owner.*

A partition between two co-widows operated only during their lives and on the death of one the whole property passes to the other. Where one of the widows sold her share in her husband's house and on her death her co-widow brought a suit for possession the purchaser was not entitled to the money expended by him for improvements. (*Richards, C. J. and Banerjee, J.*) NANDI *v.* SARUP LAL. 39 All. 463 : 40 I. C, 71 : 15 A. L. J. 509.

——— S. 51—*Alienee from limited owner—Suit for possession by remainder-man—Transferee cannot claim compensation for improvements under S. 51.*

Where the remainder-man sues the transferee of a legacy which has been enlarged by the transferor legatee, the transferee cannot claim compensation for improvements under S. 51 of the T. P. Act. (*Tudball and Rafique, JJ.*) RAJ KISHORE DAS *v.* JAINT SINGH. 36 All. 387 : 23 I.C. 364 : 12 A L. J. 717.

——— S. 51—*Alienee from limited owner—Purchase from a widow—Improvements.*

The principle of S. 51 of the T. P Act applies to a purchase from a Hindu widow where the purchaser in good faith believing himself to have acquired a good title to the property effects improvements on it. In such a case the person seeking to set aside the sale as not binding on the estate can claim the market value of the property excluding that of improvements made by the purchaser (*Ayling and Seshagiri Aiyar JJ.*) AMERICAN BAPTIST FOREIGN MISSION SOCIETY *v.* AMMALANADHUNI PATTABHIRAMAYYA. 48 I. C. 859.

——— S. 51—*Alienee from limited owner—Improvements—Compensation, right to.*

When a donee from a limited owner *bona fide* effects improvements on the property, he is entitled to claim compensation and he should not be ejected until the value of such improvements is

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 51—Estoppel.

paid. (*Sadasiva Aiyar and Napier, JJ.*) KALAVAGUNTA SINGARA CHARLU *v.* SREEMAN GUDIMALLA. **29 I. C. 269.**

Es toppel.

——S. 51—*Estoppel — Acquiescence by real owner.*

A widow allowed an occupancy tenant to exchange one of the occupancy fields for a non-occupancy one. Plaintiff who was one of the collaterals of the last male holder and a *lambardar*, did not object to the exchange but affixed his seal to the *patwari's* report at the time of mutation Subsequently the occupancy tenant sank a well in the field obtained by him under the exchange but the plaintiff did not object. Six years after the exchange he sued for a declaration that the exchange would not effect his reversionary rights. *Held*, that the plaintiff having acquiesced in the exchange and having failed to object to the sinking of the well was estopped from objecting to the exchange. (*Abdul Raoof, J.*) ILLA-UD-DIN *v.* AMIR-UL-LAH. **56 I. C. 874 : 2 U. P. L. R (L.) 105.**

——S. 51—*Estoppel— Co-sharers—Sale of house—New house erected by vendee—Rights of minors on attaining majority—Delay*

Where certain co-sharers who were minors sued to set aside a sale of a house by the adult co-sharers and it was found that the vendee had spent considerable sums in improving the house. *Held*, that in view of their delay in asserting title the plaintiffs were not entitled to demand that the building should be pulled down or that they should be given a share in the newly built house without reasonable compensation to the vendee for the improvements (*Kensington, C.J.*) CHATTAR SINGH *v.* RALIA SINGH. **54 P. L. R. 1915 : 28 I. C. 350 : 247 P. W. R. 1915.**

Good Faith.

——S. 51—*"Good faith"—Meaning.*

"Good faith" means nothing more than an honest faith ; even negligent belief will amount to honest belief. If this is present, he is entitled to compensation. 36 Mad. 194, Foll. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) NARAYANA AIYAR *v.* SANKARANARAYANA AIYAR. **24 I. C. 940 : 1 L. W. 369.**

——S. 51—*Good faith—Meaning of.*

What constitutes " good faith" within S. 51 is a question of fact. A person may act in good faith even if he acts under a mistake of law or is negligent in investigating title. Where a purchaser of immoveable property under the honest belief that the vendor was the absolute owner thereof makes permanent improvements on the property, he is entitled to compensation for the improvements made by him, on the sale being annulled on the ground that the vendor had only a limited interest in the property and could not convey an absolute title. He must then account for mesne profits from the date his possession became wrongful, *i.e.*, the date of the vendor's death. (*Fawcett and Crump, A. J. Cs.*) SAHAH-UD-DIN *v.* VOHID BUX. **56 I. C. 492 : 14 S L. R. 12.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 51—Improvements by tenant.

Improvements by Mortgagee.

——Ss. 51, 63 and 72—*Improvements by mortgagee—Compensation.*

Where a mortgagee of a *katcha* one-storied house built a *pacca* room on the ground floor in place of a *katcha* room that had fallen down, and built also a second storey and put up a *pacca* staircase. *Held*, that the mortgagee was entitled to recover the cost of the new room on the ground floor as its construction was covered by S. 72 of the T. P. Act, but not the costs of the upper storey and staircase as they were constructed for his own convenience and without the mortgagor's consent. 16 I.C 635 : 21 W. R. 308, Dist. (*Chamier and Piggott, JJ.*) RUPAN SINGH *v.* CHAMPA LAL. **37 All. 81 : 26 I. C. 521 : 13 A. L. J. 14.**

——S. 51— *Improvements by mortgagee—* Bona fides.

A mortgagee who *bona fide* believes that under the terms of the bond, he has become absolute owner of the property, and effects improvements is entitled to the value of improvements under S. 51 of the Act. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) PANDYAPPAN PILLAI *v.* VELLAYAPPA ROWTHER. **33 M L. J. 316 : 42 I. C, 438 . 6 L. W. 588.**

Improvements by Stranger.

——S. 51—*Improvements by stranger—Removal of material.*

Deft. purchased the house from a person who had no title to transfer pulled it down and built a new one in its place, using the old materials : *Held*, deft. could not remove even the materials of the building. 6 B. H. C R. 80 ; 20 Bom 298, Dist. (*Chamier, J.*) FAKIR CHAND *v.* KEWAL RAM. **16 I C. 633 : 10 A. L J. 118.**

——S. 51—*Improvements by stranger--Knowledge that land belongs to another.*

If a stranger builds on another person's land knowing it to belong to the latter there is no principle in equity which would prevent the real owner from claiming the land with all benefits. (*Batchelor and Rao, JJ.*) RANCHHODLAL *v.* SECRETARY OF STATE. **35 Bom. 182 : 9 I. C. 765 : 13 Bom. L. R. 92.**

——S. 51—*Improvements by stranger—Trespasser.*

The section does not apply to improvements by a trespasser in law, though made in good faith especially where the owner did not know it. (*Fletcher and Newbould, JJ.*) BHUPENDRA KUMAR *v.* PYARI MOHAN ROY. **40 I. C. 464.**

Improvements by tenant.

—— S 51—*Improvements by tenant—Right to compensation.*

Where there is no express contract, a tenant cannot ask compensation for permanent structures erected on the land without the solid permission of the land lord. (*Wallis, C.J Oldfield and Seshagiri Aiyar, JJ.*) THAVASI AMMAL *v.* SALAI AMMAL. **22 M. L. T. 530 : (1918) M. W. N. 46 . 7 L. W. 178 : 43 I. C. 643 ; 35 M. L. J. 281.**

——S 51—*Improvements by tenant.*

A tenant who *bona fide* believed himself to be occupancy tenant is not entitled to compensation

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 51.—Improvements by tenant.

for improvements on ejectment by the landlord nor could the tenant ever believe in good faith that he was absolutely entitled to the land. 37 Mad. 1, Ref. (*Sadasiva Aiyar and Napier, JJ.*) NAINA PILLAI *v.* RAMANATHAN CHETTIAR. **41 I. C. 788 : 33 M. L. J. 84.**

——S. 51—*Improvements by tenant—Occupancy tenant.*

The right to claim compensation is given by the T. P. Act only to a person who makes improvements believing in good faith that he is "absolutely entitled" to the land on which he effects improvements and not to a person who merely believes that he has got a permanent right of occupancy over a building site. (*Sadasiva Aiyar and Napier, JJ.*) PERUMAL GRAMANI *v.* MAHAMAD KASIM SAHIB. **28 I. C. 840.**

——S. 51—*Improvements by tenant.*

A tenant is not entitled to compensation for improvements which he was bound to make under the terms of the lease. (*Wallis, O. C. J. and Seshagiri Aiyar, J.*) MANGALASAWMI THEVAR *v.* THE RAJAH OF RAMNAD. **27 I.C. 361: 1 L.W. 1074.**

——S 51—*Improvements by tenant.*

Under the common law of India, on the termination of a tenancy the option is with the lessor to take buildings erected by the tenant on payment of compensation or to allow the tenant to remove them before he quits the premises. Apart from contract orestoppel. the tenant has no right to demand compensation from the landlord for buildings though erected with his consent. (*White, C J. and Miller and Sankaran Nair, JJ.*) ANGAMMAL *v.* MALIE MAHOMED SYED ASLAMISAHITE. **38 Mad. 710 : 14 M. L. T. 418 : (1913) M. W. N. 974 : 21 I. C. 583 : 25 M. L. J. 625.**

——Ss. 51 and 108 (h)—*Improvements by tenant.*

At common law the general rule as to compensation for improvement is that the landlord is entitled to the possession of everything in the nature of real property on the determination of the term of the tenancy. But this rule is controlled by S. 108 (h) of the T. P. Act, by which the lessees may remove improvements during the continuance of the lease. A claim by the tenant for compensation for the structures erected by him on the land let out to him cannot come with in the scope of S. 51 of the T. P. Act, because a tenant cannot possibly believe in good faith that he is absolutely entitled to the land. 27 Cal. 470 Foll. (*Batten, A. J. C.*) BHUNESWAR *v.* LAL BAHADUR SINGH. **51 I. C. 380.**

——S. 51—*Improvements by tenant.*

A tenant is not entitled either under S. 51 of the T.P. Act or apart from it to compensation for any improvement made by him on the land during the tenancy. S. 51 of the T. P. Act, does not apply to tenants. (*Batten, O. J.-C.*) BANMALI *v.* NIHAL SINGH. **48 I. C. 354.**

Improvements Pendente lite.

——S 51—*Improvements* pendente lite—*Good faith.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 51.—Knowledge of defective title.

Where in a suit for possession it appeared that the property in dispute had been sold *Pendente lite* to the additional defendants who then believing in the soundness of their title effected certain improvements and then sold the property to another, the plaintiff cannot recover from that other or for that matter from the additional defendants without first paying compensation for the improvements. (*Shadilal and Le Rossignol, JJ.*) AMEERCHAND *v.* DURGA DAS. **70 P. L. R. 1916 : 34 I. C. 957 : 92 P. W. R. 1916.**

——S. 51—*Improvements* pendente lite.

There is no right to compensation for improvements made "*pendente lite*" with full knowledge of the risks in doing so. (*R. Benson and Sundara Aiyar JJ.*) VELUSWAMY NAYAKER *v.* BOMMACHI NAYAKER. **14 M. L. T. 229 : 25 M. L. J. 324 : (1913) M. W. N. 776 : 21 I. C. 219 : 5 L. W. 299.**

Invalid Transfer.

——S. 51—*Invalid transfer—Lessee under invalid lease—Compensation for improvements.*

A lessee holding under an invalid lease to claim compensation for improvements before eviction under S. 51 of the T. P. Act or under S. 2 of the Mesne Profits Improvements Act. (*Sadasiva Aiyar and Napier, JJ.*) VENKATAPPIER *v.* RAMASWAMI AIYAR. **10 L. W. 137 : 52 I. C. 517 : (1919) M. W. N. 548.**

——S. 51—*Invalid transfer—Buildings.*

The word "transferee" in S. 51 of the T. P. Act includes a transferee under an invalid transfer and the words "the person causing the eviction" include a transferer under an invalid transfer. 40 Mad. 1134, Foll. Per *Sadasiva Iyer J.*—Where B believing that he is the absolute owner, erects buildings on land purported to be transferred to him by A under an invalid instrument, B has only one of two rights, *viz.*, either to have the value of the improvements made by him estimated and paid by A the evictor or to require A to sell his interest in the property to him at the then market value irrespective of the building. The option however is with A, the person entitled to evict. (*Abdur Rahim, Sadasiva Aiyar and Napier JJ.*) RAMANATHAN CHETTY *v.* RANGANATHAN CHETTY. **40 Mad. 1134 : 33 M. L. J. 252 : 6 L. W. 300 : 22 M. L. T. 173 : 43 I. C. 138 : (1917) M. W. N. 757.**

Knowledge of defective title.

——S. 51—*Knowledge of defective title—Notice of prior contract.*

Defts who had purchased immoveable property with notice of a prior valid contract, of sale when decreed against in a suit for specific performance are not entitled to be re-imbursed for improvements made on the property. (*Mookerjee and Beachcroft, JJ.*) HARADHAN DEB NATH *v* BHAGABATI DASI. **41 Cal. 852 : 19 C. L. J. 420 : 23 I. C. 214 : 19 C. W. N. 89.**

——S. 51—*Knowledge of defective title—Dharkhast land—Improvements.*

A person who plants trees or clears the ground of trees planted on land before it was granted to

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 51.—Knowledge of defective title.

him on dharkhast, i.e., at a time when he could not be said to have believed in good faith that he was entitled to the land cannot claim the benefit of the section, when the grant is revoked. (*Ayling and Napier, JJ.*) DEORAMANI BHOGAPPA *v.* PEDDABHIMAKA GOWD. **28 I. C. 51 : (1915) M W. N. 148**

——— S. 51—*Knowledge of defective title*

Ordinarily a purchaser for value can have a right to compensation only if it is found that he was under a mistaken impression that he had a permanent interest in the property. But when he knows or is presumed to know that his vendor had only a limited interest the mere fact that he paid consideration, will not entitle him to compensation. Apart from S 54 of the T. P. Act, however, an equitable right may arise in favour of a purchaser from the owner of a limited interest who makes improvements on the property in his possession in the belief that he had a permanent interest. This right can exist only if it can be shown that the true owner stood aside and abstained from asserting his rights (*Lindsay, J. C.*) ETIZAD HUSAIN *v.* BEMI BAHADUR. **45 I. C 242 : 5 O. L. J. 1.**

——— S. 51—*Knowledge of defective title*—Bona fide.

A person is entitled to receive back moneys paid by him *bona fide* and in a mistaken belief of title, if the true owner seeks to recover the property. There is no such equity in favour of a person who spends money with knowledge of his defective title. (*Lindsay, J. C.*) SITLA BAKSH SINGH *v.* SAMI UDDIN HYDER. **42 I. C. 428:4 O L. J. 514 :**

——— S. 51—*Knowledge of defective title.*

If a person with full knowledge of his limited interest in land constructs permanent structure upon the same, he is not entitled to any compensation upon eviction. (*Sultan Ahmed, J.*) ONKAR MAL MARWARI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **56 I C. 813 : 2 U P. L. R. (Pat) 124.**

Measure of Compensation

——— S. 51—*Measure of compensation.*

In making allowance for improvements by a person in possession the real question is not the amount of expenditure made but the rise in the value of the property as a marketable subject. (*Lord Shaw.*) KIDAR NATH *v.* MATHU MAL. **40 Cal. 555 : 77 P. R 1913 : 127 P L R. 1913 : 25 M L J. 176 : (1913) M. W. N. 403 : 13 M. L. T 434 17 C. W. N 787 : 18 I. C. 946 : 15 Bom. L. R. 467. (P. C)**

——— S. 51—*Measure of compensation.*

In a suit by collaterals for possession of lands planted on defendants collaterals of the donees are not entitled to claim compensation for the land by the donees and the ordinary principle *quicquid plantatur solo credit* must prevail. (*Rattigan, C. J.*) HARNAMAN *v.* DASONDHI. **1 Lah. 210 : 56 I C. 733 : 112 P L. R. 1920.**

——— S. 51—*Measure of compensation—Evidence.*

The evidence required to prove a claim for the value of improvements must be more precise

TRANSFER OF PROPERTY ACT, (IV OF 1882), S. 51—Miscellaneous.

evidence than such general evidence as that the sale-proceeds of certain jewels were devoted to the improvements of the property, etc. (*White, C J. and Oldfield, J.*) MEENATCHI AMMAL *v.* MANICKA CHETTY. **24 I. C. 918 : 1 L W 360.**

——— S 51—*Measure of compensation—"Improvements"—What are not*

Spending of a small sum of money every year in the usual manuring and levelling of the lands, etc., does not entitle a person to recover the same as the value of improvements. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) SUDALA MUTHU MOOPAN *v.* SANKARANARAYANA AIYAR **24 I. C. 879 : 1 L. W. 371.**

Miscellaneous.

——— S. 51—*Improvements—Compensation for—by person not acting* bona fide.

A person is not entitled for compensation for improvements made by him when he does not *bona fide* believe that he is entitled to make it. (*Richards, C. J. and Banerjee, J.*) MAHOHARI *v.* MUHAMMAD ISMAIL. **33 All 752 : 11 I. C. 218 : 8 A. L. J. 896.**

——— S. 51—*Improvements — Compensation—When claimable.*

Where a party in good faith believes that litigation in respect of a certain property is at an end and spends money on it, he is equitably entitled to compensation in respect of the improvements effected by him. (*Shadi Lal and Le Rossignol, JJ.*) NIKKI *v.* GUJAR MAL. **94 P W. R. 1917 : 42 I. C 54 : 114 P. L. R. 1917.**

——— S. 51—*Improvements—Who can claim.*

No claim to the value of improvements can be upheld, unless the improvements have been effected by the transferee of immoveable property *Quaere* :- Whether an heir of a transferee can recover the value of the improvements, as against the party seeking to evict him. (*White, C J. and Oldfield, J.*) MEENATCHI AMMAL *v.* MANICKA CHETTY. **24 I C. 918 : 1 L. W. 360.**

——— S. 51—*Auction sale—Applicability of section.*

The purchaser making the improvements, must have acted under the bona fide belief of a good title to the property to validate his title. 33 Cal. 1119. Full. He is not affected by irregularities before the sale *Obiter dicta* :- S 51 is not applicable to a purchaser at a Court-sale. There is no covenant for title implied in a Court-sale, but this means that the auction-purchaser takes only the interest in the property sold which his judgment-debtor had at the sale. (*Sundara Aiyar and Ayling, JJ.*) MATHUNSA ROWTHAN *v.* APSA BIN. **36 Mad. 194 : 10 M. L T 373 : 12 I. C 444 : (1911) 2 M. W. N. 425 : 21 M. L. J. 969.**

——— S. 52.

Active prosecution.
Appeal
Contentious suit.
Effect of.
Immoveable property.
Involuntary transfer.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52 – Active Prosecution.

Lease Pendente Lite.
Nature and Scope of.
Partition Pendente Lite.
Pendency of Proceedings.
Pre-emption.
Miscellaneous.

Active Prosecution.

——S. 52—*Active prosecution—Question of fact.*

Whether a suit is contentious and actively prosecuted is a question of fact with which the High Court will not interfere in second appeal. (*Tudball and Rafique, JJ.*) RAM BHAROSE *v.* RAM PAL SINGH. **42 All. 319 : 18 A. L. J. 303 : 58 I. C. 484 : 2 U. P. L. R. (All.) 111.**

——S. 52—*Active prosecution—Scope of the doctrine.*

Per *Oldfield, J. contra Phillips, J.*— S. 52 of the T. P. Act though general and not restricted explicitly to the protection of those parties only who have been in active controversy with the transferor cannot be read as a general prohibition against the subsequent agitation of every question which arose in the litigation between whomsoever it was decided. That reading would refuse full effect to the words "the rights of any other party" for the right protected cannot be treated as existing like an obligation running with the property whoever may be party in whose favour it was decreed. (*Oldfield and Phillips, JJ.*) KRISHNAYYA *v.* VASUDEVA MALLYYA. **40 I. C. 826.**

——S. 52—*Active prosecution*—Lis pendens—*Applicability of.*

In the final decree of 1912 a piece of property was not included by mistake. The decree was amended in 1914. The property not included in the decree was sold before amendment in auction sale. The plff. relying on the doctrine of *Lis pendens* brought a suit for a declaration that the property was not liable to be attached and sold. *Held*, that the doctrine was inapplicable as no suit was actively prosecuted when the auction sale took place. (*Macnair, A. J. C.*) RAMCHANDRA *v.* BHAGWAN. **57 I. C. 652.**

——S. 52—*Active prosecution.*

Every Court is bound to decide cases in compliance to justice, equity and good conscience. So, as an equitable principle, a Court can adjudicate a case under a section even though it might not have been extended to a district. Where through oversight a wrong decree passed and afterwards amended after the subject of the decree is sold or disposed of, the sale may be set aside if the applicant is not guilty of laches. A person is held to be guilty of laches in not prosecuting his proceedings actively and without remission, when he could have applied for review or appealed against a decree as soon as it was passed. (*Parlett, J.*) NAGAPPA CHETTY *v.* MAUNG P. GWE. **12 I. C 849 : 4 Bur. L. T. 140**

Appeal.

——S. 52—*Appeal—Cross-appeal.*

Though cross-objection is in practical effect a cross-appeal it cannot be treated as an appeal for

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Contentious Suit.

the purpose of the doctrine of *Lis pendens*. (*Shadi Lal and Le Rossignol, JJ.*) NIKKI *v.* GUJAR MAL. **94 P. W. R. 1917 : 42 I. C. 54 : 114 P. L. R. 1917.**

——S. 52—*Appeal—Transfer* pendente lite—*Alienee brought on record in litigation—Compromise between alienee and opposite party—Right of alienee.*

Pending an appeal deft. alienated his interest in the suit property and the alienee was brought on record under O. 22, R 10 of the C. P. Code. After the addition of the alienee as party the original parties entered into a compromise of the suit claim. The alienee objected to the passing of a compromise decree. *Held*, that the compromise cannot effect the rights of the alienee *Pendente lite* who was on record as a party and that he was entitled to contest the appeal on the merits, and claim a judicial decision on the question in appeal. Per *Seshagiri Aiyar, J.*— Courts should exercise great caution in permitting a purchaser pending suit to become a party and they should not do so unless they are satisfied that the transferor is likely to act in violation of the rights of the transferee. Per *Kumaraswami Sastri, J.*—Except under special circumstances the Court ought not to refuse to join an alienee pending suit as a party under the provision of O. 22 R. 10. 10 M. I. A. 476, Foll. (*Oldfield, Seshagiri Aiyar and Kumarasuami Sastri, JJ.*) VEERARAGHAVA REDDI *v.* SUBBA REDDI. **43 Mad 37: 26 M. L. T 339 : (1919) M. W. N. 699 : 53 I. C. 428 : 10 L. W. 281 : 37 M. L. J. 449.**

——S. 52—*Appeal--Intermediate assignment of decree—Applicability.*

The doctrine of *lis pendens* applies to an intermediate assignment of the original decree. The fact that the assignment was made before the appeal was filed cannot make any difference in this respect nor the fact that the judgment-debtor had notice before the filing of the appeal of the assignment. (*Abaur Rahim and Sadasiva Aiyar, JJ.*) GOVINDAPPA *v.* HANUMANTHAPPA **38 Mad 36 : 17 I. C. 420 : (1912) M. W. N. 1152 : 23 M. L. J. 513.**

Contentious Suit.

——S. 52—*Contentious suit*—Ex parte *decree—Fraudulent or collusive.*

A suit in which an *ex parte* decree was passed, but which is not fraudulent or collusive, is a contentious suit from the date of its institution and there is no onus on the plaintiffs to prove against the transferee *pendente lite* any title independently of the *ex parte* decree. (*Tudball and Rafique, JJ.*) RAM BHAROSE *v.* RAMPAL SINGH. **42 All. 319 : 2 U. P L. R. (All.) 111 : 58 I. C. 484 : 18 A. L J. 303.**

——S. 52—*Contentious suit—Consent decree.*

To determine whether a suit is contentious within the meaning of S. 52 of the Act, the Court must consider whether it is contentious in its origin and nature. A consent decree falls within the scope of S. 52 of the Act. (*Mookerjee and Buckland, JJ.*) BHARAT RAMANUJA *v.* SARAT KAMINI. **25 C. W. N. 806 : 66 I. C. 273 : 34 C. L. J. 96 (2).**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Contentious Suit.

——S. 52—*Contentious suit—Consent decree.*

A purchaser *pendente lite* is bound by a consent decree in the absence of fraud or collusion. 29 Mad. 426. Rel. (*Chatterjea and Richardson, JJ.*) TINOODHAN CHATTERJEA *v.* TRILOKYA SARAN SANYAL. **18 I. C. 177 : 17 C. W. N. 413.**

——S. 52—*Contentious suit—Sale—Pendency of mortgage suit—Compromise—Effect.*

The doctrine of *lis pendens* governs a sale of property pending a mortgage suit relating to the same and will be only subject to the decree passed in it. The fact that the suit was finally compromised does not make it non-contentious. (*Krishnan and Coleridge, JJ.*) PARVATI AMMAL *v.* GOVINDA RAJA. **45 M. L. J. 682 : (1923) M. W. N. 766 : 1924 Mad. 359.**

——S. 52—*Contentious suit or proceedings—Application for attachment.*

A mere application for attachment and sale of judgment-debtor's interest in the property is not the commencement of a contentious proceeding within S. 52. (*Wallis, C. J. and Seshagiri Aiyar, J.*) CHAMIYAPPA THARAKAN *v.* RAMA AIYAR. **44 Mad. 232 : 62 I. C. 121 : (1921) M. W. N. 53 : 40 M. L. J. 65.**

——S. 52—*Contentious suit—Parties ranged on the same side—If affected.*

The doctrine of *lis pendens* does not apply to a case where the parties are ranged on the same side and between whom there is no issue for adjudication. The words "any other party" in S. 52 of the Act mean any other party between whom and the party alienating, there is an issue for adjudication which might be prejudiced by the alienation. The doctrine of *lis pendens* is an expansion of the doctrine of *res judicata.* (*Wallis, C. J., Kumaraswami Sastri and Bakewell, JJ.*) MANJESHWARA KRISHNAYYA *v.* VASUDEVA MALLAYA. **41 Mad. 458 : 23 M. L. T. 70 : 44 I. C. 471 : 7 L. W. 104; 34 M. L. J. 263.**

——S. 52—*Contentious suit.*

"Contentious suit" in S. 52 of the Act are used as distinguished from a friendly suit brought by agreement of parties. Every suit other than a friendly suit, by origin and nature is a "contentious suit." (*Sadasiva Aiyar and Tyabji, JJ.*) PULLAKAL KATHUR *v.* CHENNAJADAM. **38 Mad. 450 : (1913) M. W. N. 672 : 20 I. C. 976 : 14 M. L. T. 185.**

——S. 52—*Contentious suit—Partition proceedings under C. P. Land Revenue Act of—Lease by* lambardar.

The mere institution of partition proceedings under C. P. Land Revenue Act (1881) does not in itself put an end to the authority of the *lambardar* to give lease. A partition proceeding under the C. P. Land Revenue Act (1881) is not in its origin and nature necessarily a contentious proceeding. It is only when an objection on a question of title is raised and the Deputy Commissioner elects to exercise his powers as a Civil Court under S. 36 (*g*) of the C. P. Land Revenue Act that the proceedings become contentious within S. 52 of the T. P. Act. (*Mittra, A. J. C.*) FAKIRGIR *v.* MULCHAND. **43 I. C. 934 : 14 N. L. R. 18.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Immoveable Property.

——S. 52—*Contentious suit—Collusive and fraudulent proceeding.*

The doctrine of *lis pendens* does not apply to a collusive or fraudulent proceeding and cannot affect prejudicially an auction-purchaser nor does it prejudice the rights of third persons who purchased at a sale held by the Court under its own decree. (*Piggott, J. C. and Kanhaiya Lal, A. J. C.*) NAWAB NUZHAT UD-DAULA ABBAS HUSSAIN KHAN *v.* NAWAB DILBAND BEGAM. **21 I. C. 570 : 16 O. C. 225.**

——S. 52—*Contentious suit — Compromise decree.*

The doctrine of *lis pendens* applies to transfers during the pendency of a suit even when that suit is terminated by a compromise decree. But in such cases the Court should be satisfied that the compromise is not a collusive arrangement entered into with the object of defeating a purchaser. (*Miller, C. J. and Mullick, J.*) HUKUM CHAND *v.* RAJA RAM BAHADUR SINGH. **4 Pat. L. J. 580 : 53 I. C. 833 : 1919 Pat. 305.**

Effect of.

——S. 52 — *Effect of—Mortgage executed during pendency of a mortgage suit—Dismissal of suit on mortgagee*—Res judicata.

A mortgage executed during the pendency of a mortgage suit in which the mortgagor's title is in question is subject to the result of the suit and if it goes against the mortgagor a subsequent suit by the mortgagee would be barred by *res judicata.* (*Banerji, J.*) KOLPATI KUAR *v.* RAJADHARI LAL. **13 I. C. 641.**

——S. 52—*Effect of.*

A suit for specific performance of alienation of property would not affect the title of the holder of the decree in suit. (*Teunon and Suhrawardy, JJ.*) DULLA SINGH *v.* DY. INSPECTOR GENERAL OF POLICE, C.I.D. **34 C. L. J. 79 : 49 C. 495 : 1922 C. 412.**

——S. 52—*Effect of.*

S. 52, T. P. Act, does not invalidate a sale *pendente lite* but only makes the property in the purchaser's hands, subject to the decree passed in the pending proceedings. (*Oldfield and Seshagiri Aiyar, JJ.*) VEYINDRA MUTHU PILLAI *v.* MAYA NADAN. **43 Mad. 696 : (1920) M. W. N. 299 : 58 I. C. 501 : 28 M. L. T. 312 : 39 M. L. J. 456.**

——S. 52—*Effect of—Transferee* pendente lite—*Bound by decision.*

A Court can bind a transferee *pendente lite* by the result of litigation, even though his name be not on the record if the fact of the transfer is admitted before the Court during the course of the trial. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) SYED HUSSAIN *v.* BANK OF UPPER INDIA, LTD. **30 I. C. 289 : 2 O. L. J. 291.**

Immoveable Property.

——S. 52—*Immoveable property — Mortgage-debt.*

A transfer of mortgage-debt during a partition suit is a transfer of immoveable property within

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Immoveable Property.

the meaning of S. 52, T. P. Act. (*Knox and Rafique, JJ.*) TARA CHAND *v.* BACHANUM SINGH. 18 I. C. 492.

———S. 52—*Immoveable property.*

The doctrine of *lis pendens* does not apply to moveable property. (*Scott, C. J. and Batchelor, J.*) GOVIND *v.* JIJIBAI SAHEB. 36 Bom. 189 : 13 I. C. 849 : 14 Bom. L. R. 9.

———S. 52—*Immoveable property—Hut.*

A hut is immoveable property. (*Caspersz, J.*) ARJUN RAM PAL *v.* SADANANDA SARMA. 9 I. C. 1

———S. 52—*Immoveable property—Applicability to moveables.*

The principle of S. 52, T. P. Act, may be applied to cases where the alienee of moveables *pendente lite* has notice of the 'lis'. 36 Bom 189 ; 15 All. 108, Dist. (*Sadasiva Aiyar and Tyabji, JJ.*) TALARI KAVOLI NAGADU *v.* VISWANATHAM PEDDA GOVINDAPPA. 1 L. W. 587 : 25 I. C. 133 : 16 M L. T. 158.

———S. 52—*Immoveable property—Applicability to moveable property.*

It is more than doubtful whether the principle of *lis pendens* applies to moveable property, such as in the particular case, money. (*Jwala Prasad, A. C. J. and Ross, J.*) MAHARAJA BAHADUR SINGH *v.* ABDUL RAHIM. 62 I. C. 900.

Involuntary Transfer.

———S. 52—*Involuntary transfer—Execution sale.*

The doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others, pending the litigation, right over the property in dispute,so as to prejudice the opposite party. The doctrine applies to sales in *invitum* also. 15 Cal. 755; 25 Cal. 179; 28 Cal. 28, Appl. (*Chatterjee and Walmsley, JJ.*) MAHARAJA BAHADUR SINGH *v.* SARDAR NARAYAN SINGH. 28 I. C. 898 : 19 C. W. N. 152.

———S. 52—*Involuntary transfer—Suit on simple mortgage.*

S. 52 applies to a purchase pending a suit upon a simple mortgage as it involves a question of right to immoveable property. It also applies to a purchase at an execution sale. (*Chatterjee and Richardson, JJ.*) TINOODHAN CHATTERJEE *v.* TRILOKYA SARAN SANYAL. 18 I. C. 177: 17 C. W. N. 413

———S. 52—*Involuntary transfer—Mortgage-decree—Sale in execution—Purchase by mortgagee—Previous purchase in execution of money-decree.*

A mortgagee purchasing the mortgaged property in execution of his mortgage-decree has priority over a prior purchaser in execution of a money-decree against the judgment-debtor obtained during the pendency of the mortgage suit ; the doctrine of *lis pendens* is applicable to *ex parte* mortgage suits and to purchases in execution. (*Holmwood and N. Chatterjea, JJ.*) RAM DOYAL *v.* RAM TANU. 11 I. C. 464: 15 C. L. J. 137.

———S. 52—*Involuntary transfers and suits for specific performance are within the section.*

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 52—Involuntary transfer.

The doctrine of *lis pendens* applies to suits for the specific performance of agreements to sell immoveable properties. Court sales and private sales equally come under the doctrine of *lis pendens.* (*Krishnan and Odgers, JJ.*) VEDACHARI *v.* NARASIMHA MUDALI. 45 M L. J. 825: 19 L. W. 28: (1924) M. W. N. 14 (1). 1924 Mad. 307.

———Ss. 52 and 91—*Involuntary transfer—Mortgage suit—Attaching decree-holder in execution of prior money decree—Omission to implead—Right to redeem.*

Appellant was the purchaser at a Court-sale held in execution of a money decree. After his attachment but before the sale a suit was instituted on a mortgage of the properties attached to which the attaching creditor was not made a party. Later on a mortgage-decree for sale was passed and the respondent bought the properties. On his claiming delivery he found the appellants already in possession. *Held,* that S. 91 of the T. P. Act and O 34, R. 1 do not confer on the attaching creditor any interest in the mortgaged property. The doctrine of *lis pendens* applied to him. (*Oldfield and Seshagiri Aiyar, JJ.*) VEYINDRA MUTHU PILLAI *v.* MAYA NADAN 43 Mad 696: 58 I. C. 501 : (1920) M. W. N. 289. 28 M. L. T. 312 : 39 M. L. J. 456.

———S 52—*Involuntary-transfer — Doctrine of, is applicable.*

The doctrine of *lis pendens* applies to involuntary transfers also. 25 C. 179, 266, 966 ; 15 C. 94; 15 C. 756, Rel. (*Hallifax, Kotval and Dhobley, A. J. Cs.*) JOGESHWAR *v.* MOTI. 66 I. C. 631.

———S. 52—*Involuntary transfer—If doctrine applies.*

The principle in S. 52, T.P. Act applies to involuntary sales in execution proceedings during the pendency of a suit relating to the property sold. 15 Cal. 756 (P. C.), 25 Cal. 179 (P. C.), Foll. 14 Cal. 18 (P. C.) ; 10 All. 166 (P. C.) ; 29 Bom. 435 ; 21 I. C. 570, Expl. and Dist. (*Kanhaiya Lal, A. J. C.*) SATGUR DAYAL *v.* NAND KUMAR. 40 I. C. 146: 4 O. L. J. 135.

———S. 52—*Involuntary sales—Execution sale—Attachment—Sale of property in execution during pendency of suit.*

The doctrine of *lis pendens* applies to execution sales also. An attachment of property does not confer title on any one. It only prevents alienation of the property during the continuation of execution proceedings. Execution proceedings taken against a property during the pendency of a suit in respect of the same property and resulting in a sale of that property sometimes after the suit is decreed are proceedings *pendente lite* and do not affect the rights of the decree-holder though the property may have been under attachment from before the institution of the suit. (*Lindsay, J. C.*) KUNJ BEHARI LAL *v.* RAM SAHAI. 30 I. C. 213 : 2 O. L. J. 327.

———S. 52—*Involuntary transfer—Applicability to execution sales.*

The doctrine of *lis pendens* applies to execution sales also and an auction purchaser *pendente lite* is bound by the decision in the pending liti

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Involuntary transfer.

gation. 15 Cal. 756 (P. C.), Ref. (*Piggott, J. C. and Kanhaiya Lal, A. J. C.*) SOHAN LAL *v.* JOT SINGH. **20 I. C. 458: 16 O. C. 148.**

——— S. 52—*Involuntary transfer—Execution sale and Revenue sale.*

The strong weight of authority, though not the express language of the section, is in favour of the view that the doctrine of *lis pendens* applies to execution sales as well as sales for non-payment of Government revenue. 26 Cal. 966, Foll. (*Das and Adami, JJ.*) MATHURA PRASAD SAHU *v.* DASAI SAHU. **3 Pat. L. T. 296: 1 Pat. 287: 1922 P. 542.**

——— S. 52—*Involuntary transfer—Sale under money-decree during pendency of mortgage suit.*

A purchaser of property sold in Court auction under a money-decree during the pendency of a mortgage suit gets only the equity of redemption thereby. (*Moore, J.*) ABDUL MAJID *v.* ABDUL MAJID. **9 I. C. 772: 4 Bur. L. T. 44.**

Lease pendente lite.

——— S. 52—*Lease* pendente lite—*Settlement by* ijardar *with tenant during pendency of suit for ejectment if binding on landlord.*

An *ijardar* made a settlement of the lands on the expiry of the *ijara* pending a suit by the proprietors for his ejectment. *Held*, that the raiyats with whom the *ijardar* had settled were liable to be ejected by the proprietors as the *ijardar* did not act in good faith in making the settlement (*Walmsley and Panton, JJ.*) FELU SARKAR *v.* HEMANTA KUMARI DEBYA. **47 I. C. 365.**

——— S. 52—*Lease* pendente lite—*Mortgage suit—Mortgagor's leasing out his property—*Lis pendens—*Applicability.*

The grant of a lease by a mortgagor during the pendency of a suit on the mortgage is invalid as offending the provisions of S. 52 of T. P. Act as a lease is a transfer of an interest in immoveable property. Though the mortgagor has not anything like a general authority to deal with the property mortgaged, he may make a lease in the ordinary course of management such as granting a yearly lease in case of agricultural lands or a lease by the month in the case of house property, etc. The doctrine of *Lis Pendens* is not affected by the fact that the lessee has been let into the land under *bona fide* settlement. (*Mookerjee and Beachcroft, JJ.*) MADAN MOHAN SINGH *v.* RAJKISHORI KUNWARI. **39 I. C. 182: 21 C. W. N. 88.**

——— S. 52—*Lease* pendente lite—*Lease during pendency of mortgage proceedings.*

A person who is settled on the land as permanent tenant by a mortgagor during the pendency of a mortgage suit is affected by *lis pendens* and may be ejected by the purchaser in execution of the decree. If the lease is one in the ordinary course of the management, *i.e.* from year to year or month to month it will bind the mortgagee. (*Beachcroft and Mookerjee, JJ.*) MADAN MOHAN SINGH *v.* RAJ KESHORI KUMARI. **17 I. C 1: 17 C. L. J. 384.**

——— S. 52—*Lease* pendente lite—*Lease by mortgagor.*

A lease by the mortgagor during sale proceeding is covered by S. 52 and the sale is free from

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Nature and Scope of

the lease subsequently created by the mortgagor. (*Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Bakewell, JJ.*) RAMASAMI AIYANGAR *v* GOVINDA AIYAR. **20 M. L. T. 512: 5 L. W. 443: 38 I. C. 1: 31 M. L. J. 839.**

——— S. 52—*Lease* pendente lite—*Yearly leases—Effect.*

A lease for a year given by the judgment-debtor who was in possession pending the execution sale of his property, was the ordinary and reasonable incident of an *interim* beneficial enjoyment and was not affected by the doctrine of *lis pendens* and the lessee was entitled to the crops raised by him for the year. (*Sadasiva Aiyar and Napier, JJ.*) PENUMETA SUBBARAJU *v.* VERGISENA SEETHARAMA RAJU. **39 Mad. 283: 17 M. L. T. 57: 28 I. C. 232: (1915) M W. N. 174.**

——— S. 52—*Lease* pendente lite—*Agricultural lease—Not affected.*

A lease whether for agricultural or for other purposes is a transfer within the meaning of S 52 of the Act and the burden lies on the party relying on the lease to show that it did not affect the rights of the other parties to the litigation. (*Batten, A. J. C.*) GANESH MAHARAJ SADHU *v.* PANDURANG. **46 I. C. 762: 14 N. L R 133.**

——— S. 52—*Lease* pendente lite—*Validity.*

An agricultural lease granted during the pendency of a contentious partition proceeding is void even though summons had not been served upon the opposite party at the time when the lease was granted (*Hallifax, A. J C.*) CHANDAN SINGH *v.* FAKIRGIR. **27 I. C. 940: 11 N. L. R. 21**

Nature and Scope of.

——— Ss. 52 (b) and 65 (a)—*Nature and scope of—Mortgage before the Act—Covenant for title—Knowledge.*

In a suit to redeem a usufructuary mortgage of 1880 and a further charge tacked on to it of the year 1882, the mortgagee claimed damages or compensation for the failure of mortgagor's title in respect of a portion of the mortgaged property. It was found that the mortgagee was aware of the defect in title. *Held*, that S 65 (*a*) of the T. P. Act had no application where the mortgage was executed before the date of the T. P. Act and that the mortgagee's claim was unsustainable. (*Lord Macnaughten.*) ABDULLAKHAN *v.* BASHARAT HUSSAIN. **35 All. 48: 40 I. A. 31: 17 C. W N. 233: 13 M. L. T. 182: (1913) M W. N. 131: 17 C. L. J. 312: 15 Bom. L R. 432: 17 I. C. 737: 25 M. L J. 91 (P. C.).**

——— S. 52—*Nature and scope of—Document executed before and registered after suit—If affected.*

A second mortgage executed before but registered after the institution of a suit on the first mortgage is not affected by the doctrine of *lis pendens* (*Sadasiva Aiyar and Spencer, JJ.*) PINGALI VENKATARAMANA REDDI *v.* KOTIGARI RANGIAH CHETTI. **(1922) M W N. 15: 41 M. L. J. 399: 1922 M. 249.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Nature and Scope of.

——S 52—*Nature and scope af*—Lis pendens.

Two things are necessary in a case before the doctrine of *lis pendens* can be applied: (1) there must be a decree order of a Court and (2) it should have been made when the alienee was not a party. *Lis pendens* is an exception to the rule that a decree or order binds only the parties to the suit. Per *Wallis, C. J. contra Srinivasa Aiyangar, J.*—A decree embodying a compromise entered into after an alienation *pendente lite* binds the alienee though he has been made a party to the suit before the passing of the decree. (*Wallis, C. J. and Srinivasa Aiyangar, J*) CHERLO SUBBA REDDI *v.* AMPARAYANI VENKATASESHIAH. **43 I. C. 502.**

——S. 52—*Nature and scope of.*

"*Lis pendens*" is not confined to cases where the doctrine of *Res judicata* would apply to a transferor, and it operates only in favour of a plaintiff and cannot be invoked by a defendant. (*Oldfield and Phillips, JJ.*) MUNJESHWARA BISHNAYYA *v.* VASUDEVA MALLYA. **40 I. C. 826.**

——S. 52—*Nature and scope of.*

"*Lis pendens*" applies only to alienations inconsistent with the right which may be established by the decree in the suit. (*Wallis, C. J. and Napier, J.*) PETHU AIYAR *v.* SANKARA NARAYANA PILLAI. **40 Mad. 955 : (1917) M. W. N. 284 : 5 L. W. 519 : 21 M. L. T. 377 : 38 I. C. 778 : 32 M. L. J. 374**

——S. 52—*Nature and scope of—Transferee pendete lite—Right to impeach decree on ground of fraud.*

S. 52 of the Transfer of Property Act does not debar a transferee from one party to a suit during the pendency of the suit from impeaching the decree on the ground of fraud subsequent to the transfer. (*Ashworth, A. J. C.*) RAGHUBAR DAYAL *v.* BINDA PRASAD. **22 O. C. 171 : 6 O. L. J. 646 : 53 I. C. 572 : 1 U. P. L. R. (J. C.) 77.**

——S. 52—*Nature and scope of.*

The doctrine of "*Lis pendens*" is not applicable where the rights of the transferor alone are affected and not of the other parties to the suit. (*Stuart, A.J.C.*) ABDUL WAHAB *v.* BASANT LAL. **41 I. C. 413 : 4 O. L. J 386.**

——S. 52—*Nature and scope of—Subrogation.*

The essence of S. 52 of the T. P. Act is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit and not a party to the transaction during subrogation. (*Sharfuddin and Roe, JJ.*) RAI BENODE BEHARI BOSE *v.* BABU HIRA SINGH. **44 I. C. 726 : 1918 Pat. 76.**

——S 52—*Nature and scope of—Transfer under compromise out of Court.*

S. 52 of the T. P. Act only protects rights acquired under a decree or order of Court. The doctrine of *lis pendens* cannot be applied so as to protect a transfer of land made during the pendency of a suit when such transaction is not embodied in the final order or decree. A purchaser from a litigant *pendente lite* cannot go behind the final order in the suit in order to show that the order would not have been so but for the fact that the land in dispute had been transferred to him by another party to the suit in pursuance of compromise made out of Court. (*Twomey, C. J. and Ormond, J.*) SUBRAMANIAN CHETTY *v.* MAHABIR ALI.

10 L. B. R. 43 : 52 I. C. 624 : 12 Bur. L. T. 117.

——S. 52—*Scope—Mortgage pending suit or specific performance of contract of sale.*

A mortgagee has no lien on the sale price due to the vendor under decree where the mortgage is during the pendency of the suit for specific performance. (*Fawcett, A. J. C.*) BHAGWANJI *v.* GANGA. **36 I. C. 968 : 10 S. L. R. 72.**

Partition Pendente lite.

——S. 52—*Partition* pendente lite—*Partition among mortgagees*—Pendente lite—*Void as against plaintiff*

A partition of joint Hindu family in the course of a suit for redemption falls within the mischief of S. 52 and could not be allowed to affect the plaintiff's right either under the redemption decree or in execution. No party during the conduct of a suit has any power by dealing with the property to change the person of incidence or inherence to the detriment of the other. (*Beaman and Rao, JJ.*) ISHIVAR LANGO DESAI *v.* DATTU GOPAL DESAI. **37 Bom. 427 : 19 I. C. 885 : 15 Bom. L. R. 366.**

Pendency of Proceedings.

——S. 52—*Pendency of proceedings--Amendment of plaint—No relation back.*

For purposes of S. 52. T. P. Act, the amendment of a plaint by including property not originally included in specific terms does not relate back to the date of institution of suit. (*Rafique and Lindsay, JJ.*) WALI BANDI BIBI *v.* TABEYA BIBI. **50 I. C. 919 : 17 A. L. J. 569.**

——S. 52—*Pendency of proceedings— Purchase between preliminary and final decree.*

The purchaser of property in execution of a simple money decree between the date of a preliminary decree under O. 34, R. 4 and a final decree under R. 5 is a purchaser *pendente lite* and his purchase cannot in any way affect the rights of the decree-holder under the preliminary decree. (*Chamier and Piggott, JJ.*) MAN SINGH *v.* AMANTAKA PRASAD. **26 I. C. 879.**

——S. 52—*Pendency of proceedings—Transfer after maintenance decree and before execution.*

A decree awarding maintenance and creating a charge for it upon a particular property is final and an alienation after the decree and before its execution is not affected by the doctrine of *Lis pendens.* (*Batchelor and Shaw, JJ.*) BHOJE MAHADEV PARAB *v.* GANGABAI VITHAL NAIK. **37 Bom. 621 : 21 I. C. 54 : 15 Bom. L. R. 809.**

——S. 52—*Pendency of proceedings—Suit for specific performance of contract — Intermediate conveyance.*

Where a suit for specific performance of a transfer of property is decreed, title to the property relates back to the date of the agreement and no intermediate conveyance will affect the

TRANSFER OF PROPERTY ACT, (IV OF 1882), S. 52—Pendency of proceedings.

title of the decree-holder. (*Mukerjee and Buckland, JJ.*) JOHAR MULL *v.* BHUPENDRA NATH BASU. **34 C. L. J. 79 : 49 Cal. 495 : 1922 Cal. 412.**

——— S. 52—*Pendency of proceedings—Mortgage suit.*

A misdescription of property involved in a mortgage suit is sufficient to render the doctrine of *lis pendens* applicable to it in the case of a person having knowledge of the real facts. In a mortgage suit, *lis pendens* does not end until the security has been realized for the satisfaction of the judgment-debt. (*Mookerjee and Buckland, JJ.*) BEPIN KRISHNA *v* JOGESHWAR **34 C. L. J. 256 : 26 C. W. N. 36.**

——— S. 52—*Pendency of proceedings—Plaint returned to make up stamp duty—Transfer in the interval—Doctrine not applicable.*

A transfer effected during the period when an insufficiently stamped plaint is returned for the stamp duty to be made up, and the date of its re-presentation is not affected by the doctrine of *lis pendens* as there was no suit pending on the date of transfer. (*Walmsley and Buckland, JJ.*) MOHENDRA NATH MAITI *v.* PARMESWAR SAMANTA. **60 I. C. 439.**

——— S. 52—*Pendency of proceedings—Dismissal for default—Restoration.*

The subsequent restoration of a suit dismissed for default relates back to the date of application for restoration. The *lis* is pending during the period. (*Teunon and Greaves, JJ.*) ASHUTOSH ROY *v.* ANANT RAM. **50 I. C. 727.**

——— S 52—*Pendency of proceedings—Transfer after mortgage decree but before execution.*

Purchase in execution of a money-decree, after the passing of a mortgage-decree, but before the sale of the property in execution thereof, is subject to the subsequent sale of the property in execution of the mortgage-decree. (*Mookerjee and Beachcroft, JJ.*) CHANDI CHARAN BANDOPADHYAYA *v.* KAZI JAWADAL. **42 I. C. 624.**

——— S. 52—*Pendency of proceedings.*

A purchase of mortgaged property after mortgage decree and before the sale in execution is a purchase *pendente lite*. 26 Cal 965, Foll. (*Coxe, J.*) NABA KRISHNA PAL *v.* MOHIT KALI DEBI. **9 I. C. 840**

——— S. 52—*Pendency of proceedings—Execution sale before suit but confirmation after suit for maintenance—Validity of.*

An auction-purchaser's title even as regards strangers arises on and becomes complete from the date of the confirmation of sale and a suit by a female for maintenance subsequent to the sale certificate does not make the sale void by the doctrine of *Lis pendens* and the purchaser takes the properties free from every charge of maintenance. Case-law discussed. 15 Cal. 546; 2 C W. N. 589 ; 17 Bom 375 ; 24 All. 475 ; (1902) A. W. N. 145 ; 33 All. 63, Dist ; 6 Bom. 139 ; 10 Bom. 453 ; 11 Bom. 588 ; 21 W R. 651 ; 17 Bom. 375, Foll. (*Oldfield and Tyabji, JJ.*) LANKA GOPALAM *v*, LANKA RATNAMMA. **(1915) M W. N. 15 : 26 I. C. 353 : 28 M. L. J. 666.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Pre-emption.

——— S. 52—*Pendency of proceedings—Claim suit—Transferee after order and before suit.*

A transferee after the date of the order allowing a claim and before the suit under O. 21, R. 63 is affected by *Lis pendens*. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNAPPA CHETTY *v.* ABDUL KHADER SAHEB. **38 Mad. 535 : 25 I. C. 11 : 26 M. L. J. 449.**

——— S. 52—*Pendency of proceedings—Transfer pending execution of decree for specific performance.*

The doctrine of *Lis pendens* applies to the transfer by the judgment-debtor of the property after the passing but before execution of a decree for specific performance of an agreement of lease. Action taken by the Court under O. 21, R. 34 in execution is a proceeding in the suit itself. (*Drake-Brockman, J. C.*) PANDU *v.* SITAL PRASAD. **48 I. C. 188 : 14 N. L. R. 176.**

——— S. 52—*Pendency of proceedings—Mortgage decree—Execution sale of property under money-decree—Effect of.*

Where after a mortgage decree had been passed and before its execution, the mortgaged property was sold in execution of a money-decree and purchased by the decree-holder and subsequently the holder of the mortgage-decree executed it and purchased the property, *held* that the sale in execution of the mortgage-decree would prevail over the sale in execution of the money-decree. The purchaser of the property under the money-decree having purchased it while the mortgage-decree was in existence must be taken to have purchased it subject to the mortgage charge. (*Miller, C. J. and Adami, J.*) CHAMAN LAL *v.* KAMARUDDIN MIAN. **3 Pat. L. T. 757 : 1922 P. 655.**

Pre-emption.

——— S. 52—*Pre-emption—Re-sale to vendor after suit—Effect.*

A suit for pre-emption is not affected by a re-sale of the property in question to the vendor after the institution of the suit. (*Richards, C. J. and Tudball, J.*) KEDAR NATH *v.* BANKEY BEHARI LAL. **11 I. C. 645.**

——— S. 52—*Pre-emption—Declaratory decree affecting sale—Effect on pre-emption suit.*

During the pendency of a pre-emption suit, a reversioner filed a suit and obtained a consent decree recognising his rights to the property after the death of the vendor. *Held*, as a litigating party is exempted by the rule of *lis pendens* from taking notice of a title acquired during his litigation, the pre-emption suit is not in any way affected by the declaratory decree. (*Scott-Smith, J.*) HAZARA SINGH *v.* BUBE KHAN. **3 Lah. 264: 1922 Lah. 403 (2).**

——— S. 52—*Pre-emption—Exchange pending suit.*

The doctrine of *Lis pendens* applies to an exchange effected during the pendency of a suit in favour of a person who has a superior right of pre-emption, but whose superior rights have been extinguished on the date by lapse of time. (*Johnstone and Chevis, J.*) KARAM ALI *v.* SULTAN. **10 I.C. 1007 : 30 P.R. 1911 : 187 P.L.R. 1911.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Pre-emption.

——S. 52—*Pre-emption—Person with equal or superior rights buying property during pendency of suit—Doctrine of* Lis pendens, *not applicable.*

The doctrine of *Lis pendens* does not apply to a case where a person having an equal or superior right to a plff. pre-emptor, asserts that right out of Court while the plff.'s claim is pending in Court and the vendee deft. resells the property to the former by a private sale in recognition of that right. (*Shah Din and Chevis, JJ.*) SUNDER SINGH *v.* SAJJAN SINGH. **53 P. R. 1911 : 10 I. C. 367: 164 P.L.R. 1911 : 166 P.W.R. 1911.**

——S. 52—*Pre-emption—Agreement to sell during a pre-emption suit.*

An agreement by a purchaser of property to sell the property to a superior pre-emptor during the pendency of a pre-emption suit by an inferior pre-emptor cannot be enforced. (*Kanhaiya Lal, A.J.C.*) KUBRA BIBI *v.* KHUDAJA BIBI. **38 I C. 582 : 20 O.C. 13**

——S. 52—*Pre-emption—Suit for—Applicability.*

The doctrine of *Lis pendens* applies to pre-emption suits also. 30 All. 467; 36 All. 60 ; 10 I. C. 1007, Foll. (*Lindsay, J. C.*) RAMSHANKAR *v.* NANIK PRASAD. **1 O.L.J. 187 : 24 I.C 32 : 17 O. C. 150.**

Miscellaneous.

——S. 52—*Mortgage suit—Leases by mortgagor—Mortgagee bound.*

A purchase of property against which a money decree for sale had been passed in 1898 and who purchases the property from the mortgagor, the mortgagor having obtained the Court's permission under S. 309, C P C. in 1905, takes the property subject to the *bona fide* alienations effected by the mortgagor in the course of management, after the decree but before the purchase. (*Richards, C. J and Banerjee, J.*) ADMATTI TELI *v.* MOHICHAND. **16 I. C. 102 : 9 A L.J. 759.**

——S. 52—*Mortgage suit--Creation of puisne mortgage.*

The plff. in a suit on a mortgage has a right to bring a property to sale as it stood at the date of suit and it is not open to the mortgagor to affect the right by creating a puisne encumbrance during the pendency of the plff.'s suit on his mortgage. (*Scott, C. J. and Shah, J.*) MORU NARSU GUJAR *v.* HASAN FATTEKHAN JUMMAL. **43 Bom. 240 : 48 I.C. 135 : 20 Bom. L.R. 929.**

——S. 52 (2) (d)—*Party to suit—Whether affected by mortgage with sanction of another Court.*

A second mortgagee who was party to a suit by the first mortgagee is not affected by any subsequent mortgage even though sanctioned by another Court in which the liquidation proceedings of the mortgagor company were going on. The mortgage by the liquidators though sanctioned by the Liquidating Court is not a transfer in execution of an order of a Court within S. 2 (*d*) of the T. P. Act as the sanction is not an order capable of execution. (*Scott, C. J. and Heaton, J.*) MOTILAL SHEO LAL *v.* POONA COTTON AND SILK MANUFACTURING CO., LTD. **42 Bom. 215 : 41 I C. 246 : 19 Bom. L.R. 602.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 52—Miscellaneous.

——S. 52—Lis Pendens—*Plea of.*

The plea of *Lis pendens* cannot be raised by a party who is himself guilty of laches. (*Shadi Lal and Le Rossignol, JJ.*) NIKKI *v.* GUJAR MAL **94 P.W.R. 1917 : 42 I C. 54 : 114 P.L.R. 1917.**

——S. 52—Lis pendens—*Sale by vendee to person having equal right with pre-emptor after institution of suit by latter.*

Where during the continuance of a suit for pre-emption, the vendee sells the property to a person who possesses equal rights of pre-emption, the doctrine of *Lis pendens* does not apply, if the right of the subsequent vendee subsists at the date of sale and is not time-barred for no new right is created by the sale. (*Johnstone, J.*) KARAM ILAHI *v.* HIRA. **175 P.W.R. 1911 : 10 I. C. 842 : 74 P. L. R. 1911.**

——Ss. 52 and 69—*Suit for redemption—Sale under power reserved in the mortgage.*

The doctrine embodied in S. 52 of the T. P. Act has no application whatever to a mortgagor who has given under that mortgage an express power of sale and he cannot by starting a suit for redemption derogate from that which he in express terms conferred on the mortgagee by the mortgage, *viz.*, the power of sale (*Coutts Trotter and Ramesam, JJ.*) RAMAKRISHNA MUDALI *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **45 Mad 774 : 16 L.W. 133 : (1922) M,W.N. 447 : 43 M.L.J 566 : 1922 Mad. 390 (2).**

——Ss 52 and 91 (*f*)—*Purchaser at Court auction.*

A *pendente lite* purchase is not sustainable and can be nullified. A purchaser at a Court sale in execution of a money-decree is liable to be ousted by another buying the same in execution of sale in a mortgage-decree passed in a mortgage suit instituted after the attachment but before the sale in execution of the money-decree. (*Oldfield and Seshagiri Aiyar, JJ.*) VEYINDARAMUTHU PILLAI *v.* MAYA NADAN. **43 Mad. 696 : (1920) M.W.N. 299 : 58 I.C. 501 :28 M.L.T. 312 : 39 M.L.J. 456.**

——S. 52—*Onus probandi—Institution of suit before execution of deed of transfer—Beginning of—Dealing with property.*

A party relying on S. 52, T. P. Act, must establish that his suit was instituted before the execution of deed of transfer he is impeaching. The filing of a plaint is not a judicial proceeding considered as taking place at the earliest period of the day on which it is done. The admission of execution before a Sub-Registrar is not a dealing with property within the meaning of S. 52, T. P. Act. (*Mitra, A. J. C.*) RAFIUDDIN *v.* BRIJMOHAN. **21 I.C. 602: 9 N.L.R. 155.**

——S. 52—*Mortgage of share.*

In 1880 one C mortgaged certain share to R and S with possession. Three deeds of further charges were also executed.One B became entitled to a one-fourth of the interest of the mortgage executed by C. In 1896 B sub-mortgaged that one-fourth share to the appellant undertaking that if the money were not paid off in one year, he would put the sub-mortgagee in possession. In 1905 the

TRANSFER OF PROPERTY ACT (IV OF 1882), S 52 Miscellaneous.

appellant sued for possession and summons was served upon C on 22nd January, 1905. On February 16, 1905, C mortgaged his share to the respondents who subsequently redeemed the four mortgages of C. The appellant got a decree for possession on 17th August 1905. In a suit by the respondents for possession of the said share against appellant, *held*, that the respondent could not take a valid mortgage and that he could get possession only by paying one fourth of the total mortgage share to appellant (*Chamier, J. C. and Evans, A. J. C.*) DEBI DIN *v.* MANNU SINGH. **10 I. C. 16.**

——S. 52—*Notice—Necessity.*

Notice is necessary to apply the doctrine of *Lis pendens.* (*Jwala Prasad, A. C. J. and Ross, J.*) MAHARAJA BAHADUR SINGH *v.* ABDUL RAHIM. **62 I. C 900.**

——S 52—*Mortgage decree—Mortgagee purchaser—Prior sale of mortgaged property for arrears of revenue.*

In execution of a mortgage-decree, plff mortgagee himself purchased the mortgaged property and obtained formal possession but the defts. had purchased the property subject to the plff.'s mortgage at a sale for arrears of revenue even before the suit by the mortgagee. Plff. sued for possession. *Held*, that the plff. was not entitled to a decree for possession but the mortgaged property should be put up for sale if the defts. failed to redeem. (*Chamier, C. J. and Jwala Prasad, J.*) BALLI SINGH *v.* BINDESWARI TEWARI.
2 Pat. L.W. 432 : 35 I.C. 532 : 1 Pat. L.J. 133.

——S. 52—*Second mortgage subsequent to decree on first mortgage—Rights of second mortgagee.*

Where a second mortgage was executed after the decree for sale on the first mortgage, the second mortgagee has no rights other than those of his mortgagor and as the latter's right of redemption of the first mortgagee was determined by the decree for sale the second mortgagee has no remedy against the land but is only entitled to a personal decree against the mortgagor. What was sold at the sale in execution of the decree on the first mortgage was the right, title and interest of the mortgagor at the time of the first mortgage (*Pratt, J. C. and Crouch, A. J. C.*) KANAYA RAM *v* LIRITHSING. **31 I. C. 37 : 9 S. L. R. 86.**

——S. 53.

Embarrassed circumstances of transferor.
Frame of suit.
Fraud carried out.
Fraud not carried out.
Future creditors.
Inadequate consideration.
Intention to defraud.
Partial consideration.
Plea in defence.
Preference
Sham Transaction.
Subsequent Transferee.
Miscellaneous.

Embarrassed Circumstances of Transferor.

——S. 53—*Embarrassed circumstances of transferor—Decree —Assignment*—Bona fides—*Validity.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Embarrassed circumstance of transferor.

A deed of assignment executed by a debtor is void against his creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. Even the existence of good consideration does not render such a deed valid unless it be *bona fide* also. *Quaere*—Whether any of the parties could establish rights based, not on the transactions, but on other grounds, such as the actual payment of debts. (*Lord Moulton.*) CHIDAMBARAM CHETTIAR *v.* SRINIVASA SASTRIAL. **37 Mad. 227 : 18 C W. N. 841 : 16 M. L. T. 286 : 20 C. L. J. 571 : 16 Bom. L. R. 783 : (L. W 963 : 23 I. C. 714 : (1914) M. W. N. 754 26 M. L. J. 473 : (P C.).**

——S. 53 (2)—*Embarrassed circumstances of transferor Likelihood of decrees against transferor—Presumption.*

Held, that the lower Courts in coming to a conclusion on the question whether the transfer was fraudulent ought to have considered the fact that the transfer was executed at a time when the executant was well aware of the probability of a decree for a substantial sum being passed against him and should have applied the presumption laid down by S. 53 (2) of the T. P. Act. (*Walmsley and Panton, JJ.*) MAMRAJ AGARWALLA *v.* AHAMAD ALI MAHAMAD. **47 I. C. 932.**

——S. 53—*Embarrassed circumstances of transferor—Burden of proof—Consideration—Love and affection.*

The provisions of S. 53 of the Act being in accordance with the principles of justice, equity and good conscience is applicable also to the Punjab. The fact that a transaction is not void under S. 25 of the Contract Act as being in consideration of mutual love and affection does not make it a non-gratuitous transaction for the purposes of S. 53 of the T. P. Act. Where it is found that the transferor was indebted, and that the transfer was gratuitous, the transferee must show that the transferor had undisposed of assets at the time of transfer sufficient to discharge his debts and if he fails to prove it the Court will assume that the transfer was with a view to defraud creditors and the fact that he had, subsequent to the transfer, paid some creditors would not be sufficient. 16 Bom. 1 ; 2 I. C. 813, Foll. (*Robertson and Rattigan, JJ.*) CHAMPO *v.* SHANKAR DAS
74 P. R. 1912 : 148 P. W. R 1912 : 14 I. C. 232 : 165 P. L. R. 1912.

——S. 53 (1)—*Embarrassed circumstances of transferor—Fraud of creditors—Settlement on mother* bona fide—*Rights of mother.*

Where a son made two purchases in his mother's name, one at a time when he was in a prosperous condition and the other when he was highly involved in debts, *held*, that the first transaction was a sound one as the son was not, at the time, seriously embarrassed. But that the second purchase was in fraud of creditors, having been made at a time, when the son was much involved in debts. (*Kensington and Rattigan, JJ.*) CHEMBELI *v.* NATIONAL BANK OF INDIA, LTD.
10 I. C. 647 : 62 P. L. R. 1911.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Embarrassed circumstances of transferor.

——S. 53—*Embarrassed circumstances of transferor.*

Where a person transfers all his properties in favour of his children by his first wife at the time he is about to marry a second wife and in consideration of his being permitted to do so by the relations of his first wife, is not a transfer in fraud of creditors and is not voidable under S. 53 of the T. P. Act, even though the transfer was heavily indebted at the time. (*Ayling and Napier, JJ.*) KAPINI GOUNDAN *v.* SARANGAPANI.
3 L. W. 287 : 34 I. C. 744 : (1916) 1 M. W. N. 288.

——S. 53—*Embarrassed circumstances of transferor—Presumption.*

Where a person, in exercise of the power given to him by the grantor of land to transfer it with the consent of the grantor obtains that consent and transfers it to another without consideration at a time when he is in an embarrassed condition, the presumption under S. 53, Transfer of Property Act, is that the transfer is void as against the creditor of the transferor. (*Ormond, J.*) MAUNG MAUNG *v.* S. G. FIRM.
8 L. B. R. 233 : 35 I. C. 448 : 10 Bur. L. T. 67.

Frame of Suit.

——S. 53—*Frame of suit—Judgment-creditor and ordinary creditor—Distinction.*

The only distinction between a judgment-creditor and an ordinary creditor who seeks to set aside an alienation as fraudulent under S. 53, appears to be that, while the former is not bound to bring a representative suit on behalf of all the creditors of the debtor, the latter should bring an action on behalf of the general body of the creditors. (*Shadi Lal, C. J. and Fforde, J.*) CHINA MAL *v.* GUL AHMAD. **1923 Lah. 478.**

——S. 53—*Frame of suit.*

A suit to avoid a fraudulent transfer must be a representative suit on behalf of all the creditors and so one of them alone cannot maintain a suit for declaring the property liable to attachment especially after the judgment-debtor has instituted proceedings to be declared an insolvent. Where a suit to avoid a fraudulent transfer is brought by one of the creditors alone without objection to the frame of the suit and the judgment-debtor is adjudicated insolvent the proper decree to be passed is to declare the rights of creditors, to treat the transferred property as that of the transferor and the Receiver can then realise and distribute it rateably among the creditors. (*Robertson and Rattigan, JJ.*) CHAMPO *v.* SHANKAR DAS.
74 P. R. 1912 : 148 P. W. R. 1912 : 14 I. C. 232 : 165 P. L. R. 1912 :

——S. 53—*Frame of suit—Fraudulent transfer—Suit to set aside by attaching decree-holder—O. 21, R. 63, C. P. Code—C. P. Code, App. D., Form 13.*

An attaching decree-holder whose attachment has been set aside on a claim petition by a transferee from the judgment-debtor can without suing in a representative character maintain a suit for a

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Frame of suit.

declaration that the transfer is in fraud of creditors and void under S. 53 of the T. P. Act. *Obiter* :—Even in suits by creditors who have not obtained decrees or attached property, the suit ought not to be dismissed because it is no brought on behalf of all creditors but on objection on that score being taken, leave should be given to amend the plaint. The decree however will enure to the advantage of all the creditors. In any case an objection that the suit is defective in form must not be allowed to be taken in appeal for the first time. 41 Mad. 612, Dist.; 34 Cal. 994, Diss. (*Ayling and Krishnan, JJ.*) KOTTARATHIL PUTHIYAPURAYIL POKKER *v.* CHANDRANKANDI KUNHAMMAD. **42 Mad. 143 : 25 M. L. T. 47 : 9 L. W. 138 : 51 I. C. 714 : (1919) M. W. N. 39 : 36 M. L. J. 231.**

——S. 53—*Frame of suit—Transfer of a decree in fraud of creditors.*

One creditor has no right to sue for the cancellation of the assignment of a decree on the ground of his being in fraud of all creditors. 27 Bom. 146 : 31 Mad. 206, Foll. (*Oldfield and Bakewell, JJ.*) ARUMUGA MUDALIAR *v.* KRISHNASWAMI NAYAKEN. **42 I. C. 498.**

——S. 53—*Frame of suit—Need not be representative—C. P. Code, S. 11, expl. 6.*

A suit under S. 53 though brought by only one creditor who has been defrauded will enure to the benefit of all such creditors as have been defrauded like himself in view of S. 11, Expl. 6, C.P.C. A suit to set aside sale as voidable under S. 53 of the T. P. Act need not be a representative one by all the creditors in a body. Any person defrauded, defeated or delayed may sue to impeach the transaction provided he alleges in his plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not confer any personal rights on the litigating plaintiff but would enure for the benefit of all creditors like himself. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) PALANIANDI CHETTIAR *v.* APPAVU CHETTIAR. **34 I. C. 778 : 19 M. L. T. 390 : 30 M. L. J. 565.**

——S. 53—*Frame of suit—Fraudulent transfer.*

A suit under S. 53, T.P Act to avoid a transfer made with intent to defraud the creditors of the transferor need not necessarily be brought by a creditor in a representative capacity. (*Drake Brockman, J.C.*) DHANSUKHDAS *v.* ZANGOO.
54 I.C. 798 : 16 N.L.R. 3.

——S. 53—*Frame of suit—Representative suit—Transfer by judgment-debtor subsequent to Court auction-sale—Suit to set aside.*

The object of an auction under S. 53 is to make the assets of the transferor available to the general body of creditors. The test to apply in such a case is to see whether, if the plff. succeeded in the action, the property claimed would be available to the general body of creditors. A suit under S. 53 must be brought on behalf of all the creditors. A suit by a mortgagee decree-holder for a declaration that an alienation by the judg-

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Frame of suit.

ment-debtor subsequent to the Court sale is invalid, is not one under S. 53 of the Act inas much as the property is not available for the general body of creditors, and as such need not be brought on behalf of all the creditors. (*Das and Adami, JJ.*) THAKURJI *v.* NARSINGH NARAIN.
1921 Pat. 47 : 63 I. C. 788 : 2 Pat. L. T. 217 : 6 Pat. L.J. 48.

——S. 53—*Frame of suit.*

It is open to a defeated creditor to bring a suit under O. 21, R. 63, C.P. Code on his own behalf without impleading all the other creditors of the transferor. 42 M. 143 relied upon. (*Pipon, J. C.*) LOKANATH *v.* THAKARDAS. **71 I.C. 20.**

——S. 53—*Frame of suit—Objections as to—Raised in appeal.*

A suit under S. 53 of the T. P. Act must be framed on behalf of all creditors generally and an objection on this ground must be taken in the first Court, but if not so taken, cannot avail in the Appellate Court. (*Robinson, J.*) U. R. M.V. A. CHETTY FIRM *v.* MAUNG PO SIN. **23 I.C. 341 : 7 Bur. L T. 257.**

Fraud carried out.

——S 53—*Fraud carried out—Fraudulent admission by one creditor to defeat other creditors—Effect of.*

In case of a fraudulent admission by one creditor taking part in a fraudulent conspiracy to defeat the rights of other creditors, the creditor making the fraudulent admission cannot bring any action at law for the amount to which such admission relates. (*Ryves and Stuart, JJ.*) MUHAMMAD SHAFI *v.* NANHE. **63 I.C. 921 : 19 A.L.J. 454.**

——S. 53—*Fraud carried out—Equity will not help participator.*

Wherever two or more persons are engaged in a fraudulent purpose to injure another, neither law nor equity will interfere to relieve either of those persons as against the other from the consequence of their own misconduct. (*Mukerjee and Chotzner, JJ.*) RAGHUPATI CHATTERJEE *v.* NRISHINGHA HORI DAS.
36 C.L.J. 491 : 1923 Cal. 90.

——S. 53—*Fraud carried out*—Bona fide *purchaser—Onus on purchaser.*

The burden is on the auction-purchaser to prove that he is a *bona fide* purchaser for value without notice of the fraud in obtaining the decree. (*Mookerjee and Beachcroft, JJ.*) RADHA MADHAB PAIKARA *v.* KALPATARU ROY.
16 I.C. 811 : 17 C.L.J. 209

——S. 53—*Fraud carried out—Sale not to be set aside.*

Where a debtor with a view to defraud his creditors transfers his property to a third person and as a result thereof succeeds in compounding the claim of his creditors for much smaller amounts than they were entitled to be is thereafter precluded from putting forward his own title to the property by taking advantage of his own fraud. 35 C 551 referred to. (*Gokul Prasad, J.*) LACHMAN DAS *v.* MULCHAND.
1923 A. 411.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Fraud carried out.

——S. 53—*Fraud carried out—Whether plff. can succeed.*

A plff. cannot allege his own fraud in the presence of partial carrying out of it. (*Broadway and Wilberforce, JJ.*) DINA NATH *v.* DUNI CHAND.
2 Lah. L.J. 439.

——S. 53—*Fraud carried out—Suit not maintainable*—In pari delicto potior est conditio possidentis.

Plff. sued to declare that a deed of release executed by him was a colourable transaction entered into to defraud creditors and for enforcing the rights which he possessed prior to the execution of the deed. *Held*, that he could do so only if the fraud had not been accomplished. 35 Cal. 551 Foll. When the object of fraud had been carried into effect no relief could be granted to the plff. 38 P.R. 1892, 25 P.R. 1905 Foll (*Shadi Lal, J.*) RAM LAL *v.* THE FIRM OF ARUR CHAND
115 P.W.R. 1915 : 30 I.C. 482 : 175 P.L.R. 1915.

——S. 53—*Fraud carried out—Suit for possession—If maintainable.*

A person who has conveyed property *benami* to another for the purpose of defrauding his creditor cannot, where the fraud has been effected, set up the *benami* character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. The principle "let the estate lie where it is" will be applied to the case. In case like this that party fails who first has to allege the fraud in which he participated. (*Wallis, C.J, and Coutts Trotter, J.*) KAMAYYA *v.* MAMAYA. **43 I.C. 352 : 32 M.L.J. 484.**

——S. 53 (1)—*Fraud carried out—Effect.*

Where a fraudulent transfer has been made and the fraud has been carried out, the parties to the transfer cannot either as plffs. or defts. plead fraud to vitiate the transaction and escape from its consequences. (*Lindsay, J. C.*) SARUP NARAIN *v.* MADHO SINGH. **18 O.C. 131 : 30 I.C. 253 : 2 O.L.J. 399.**

——S. 53—*Fraud carried out—Avoidance of document—Proof.*

A transfer in fraud of creditors is voidable at their option. Where a creditor attaches in execution the property so transferred, that is a sufficient exercise of the option to avoid the transaction. (*Coutts and Das, JJ.*) NAURATAN LAL *v.* MRS. MARGARET ANNE STEPHEN.
3 Pat. L. T. 613 : 1923 Pat. 572.

——S. 53—*Fraud carried out—Adverse possession.*

Where the owner of property executed a fraudulent transfer with some ulterior motive but continued in possession of the property for more than twelve years, he is entitled not only to confirmation of possession but to recover possession

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Fraud carried out.

if he subsequently loses it even though the fraud intended to be effected was effected. 35 Cal. 551; 27 Cal. 231; 33 Cal. 967; 13 C.L.J 625. Ref. (*Jwala Prasad and Foster, JJ.*) BADRI CHAUDHURI *v.* HARBANS JAH. **53 I.C. 114.**

——S. 53— *Fraud carried out* — Benami *transaction—Effect of.*

Where a *benami* transaction is effected in order to defeat a creditor and the purpose having been achieved, the real owner cannot subsequently attack the *benami* transaction. (*Das, J.*) SHIVA NARAIN RAM *v.* MUSSAMMAT PHULJHARIA. **52 I.C. 402.**

——S. 53—*Fraud carried out—Right to recover the property.*

Where a fraudulent transfer has been effected and the fraud has been carried out, the Court will not assist the party to a fraud to obtain possession of the property nor would they assist him to succeed by preventing the other party to the fraud from showing the true nature of the transaction. 18 Bom. 372; 5 Bur. L.T. 156; 35 Cal. 551; 31 Bom. 405 ; 38 Bom. 10 ref. (*Robinson, C.J. and Heald, J.*) MAUNG TIN *v.* MA MAI MYINT. **65 I C. 459: 11 L.B.R. 83.**

——S. 53—*Fraud carried out—Position of parties.*

The law as to the rights and the duty of the Court to interfere between parties guilty of a fraud is clear. If a sale has been executed with the object of defeating creditors and that fraud has been carried into effect to any material extent the Courts will not aid either party to take advantage of his fraud but will let the estate lie where it falls. But where the fraud has not been carried out, when nothing has been done under it, the Courts will aid the vendor to retain possession of the property and will not allow the vendee to take it, that is to effectuate the fraud to which he is a party. (*Robinson, C.J. and Duckworth, J.* MAUNG PO ZU *v* MAUNG PO KWA. **65 I.C. 322 : 11 L. B. R. 89.**

——S. 53—*Fraud carried out*—Benami *transaction—Suit by real owner—Burden of proof.*

Where the plaintiffs sued to recover lands transferred *benami* to defeat creditors, it lies on the plaintiffs to prove that no part of the intended fraud had in fact been carried out and in default of such proof the suit must fail. (*Parlett, J.*) SWEYDAL *v.* ESNATI. **23 I. C. 370 : 7 Bur. L. T. 12**

Fraud not carried out.

——S. 53—*Fraud not carried out—Avoidance of transfer.*

It is only where the attempted fraud has been wholly or partially successful and has been carried into effect the Court will give effect to the fraudulent transaction as between the transferor and the transferee. On the facts it was found the fraud was not carried into effect. 23 B 406; 28 C. 370. followed. (*Stuart, J.*) MT. MUSTAFAI BIBI *v.* SHEIKH MD. SHABBIR. **1923 A. 164.**

——S. 53—*Fraud not carried out —Suit by a mortgagee.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Fraud not carried out.

Where the fraud on the execution creditor was not actually effected, the mortgagor could plead that the mortgagee, was without consideration and hence void, if the mortgagee went to Court on his mortgage. 13 M. I. A. 551 ; 15 W. R 14 (P. C.) Foll. (*Scott, C. J. and Beaman, J.*) GIRDHARILAL PRAYAGDAT VAJPE *v.* MANIKAMMA NARAYANSAMI. **38 Bom. 10 : 21 I. C. 50 : 15 Bom L. R. 805.**

——S. 53—*Fraud not carried out.*

Where a party admits that he has made a fictitious transfer of his property to another with a view to effect a fraud but asks to have his act undone, the Court would refuse relief and would leave the parties to the consequences of their misconduct, dismissing the claim when the suit was brought by the real owner to get back possession of his property and refusing to listen to the defence when he set it up in opposition to the person whom he had invested with the legal title. Upon this rule has been engrafted the distinction that although where the intended fraud has been carried into effect, the Court will not assist the true owner, yet if he has not defrauded any one, and the purpose for which the assignment was made has not been carried into execution, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. 35 C. 551 : 33 C. 967 : 18 C. L. J. 616 : 22 C. L. J. 197 Rel. (*Mookerjee and Cholzner, JJ.*) DAKENDRA KUMAR BOSE *v.* CHANDRA KANTA ROY. **36 C. L. J. 82 : 1923 C. 154.**

——S. 53—*Fraud not carried out—Effect.*

Although where the intended fraud has been carried into effect the Court will not allow the true owner to resume the individuality which he has once cast off in order to defraud others yet if he has not defrauded any one the court will not punish his intention by giving his estate away to another whose retention of it, is an act of gross fraud. (*Mukerjee and Cholzner, JJ.*) RAGHUPATI CHATTERJEE *v.* NRISHINGA HORIDAS. **36 C. L. J. 491 : 1923 C. 90.**

——S. 53—*Fraud not effected—Right to relief.*

Where the contemplated fraud has not been effected a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. 35 Cal. 551 : 18 C. L. J. 616, Foll. The principle is applicable to a case where a party suffers a decree to be passed against him in a fictitious collusive suit as part of a fraudulent scheme (*N. Chetterjee and Mullick, J.*) RAJAB ALI *v.* HEDAYATH ALI. **19 C. W. N. 1151 : 29 I. C. 699 : 22 C. L. J. 197.**

——S. 53—*Fraud not carried out—Fraudulent transfer—Right of transferor to claim properties.*

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected. Else the fraudulent grantor or giver does not lose his right to claim the aid of law to recover

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Fraud not carried out.

the property he has parted with. (*Mookerjee and Beachcroft, JJ.*) AKHIL PRODHAN *v.* MANMOTHANATH KAR. **27 I. C. 230 : 18 C. W. N. 1331. Also 22 I. C. 86 : 18 C. L. J. 616.**

——— S. 53—*Fraud not carried out—Transferee, if can be protected by Court.*

When a property is transferred to effect a fraud of which the transferee was aware the fraud should have been effected to debar the transferor from recovering the property. (*Mookerjee and Beachcroft, JJ.*) AKHAL MADHAN *v.* MANMATHA NATH KAR. **22 I. C. 86 : 18 C. L. J. 616.**

——— S. 53—*Fraud not carried out—Fraudulent* benami *transfer—Right of real owner.*

Where a mortgage is taken by plaintiff *benami* in the name of another for a fraudulent purpose but the fraud is not effected the plaintiff could enforce the mortgage. (*Wallis, C. J. and Oldfield J.*) RAJAGOPALACHAR *v.* SUNDARAM CHETTY. **45 I. C. 333 : 33 M. L. J. 696.**

——— S. 53—*Fraud not carried out—Fraudulent transfer—Right to recover.*

Where a transfer of property is made fraudulently but the object of the fraud is not wholly or partially accomplished, the person in whose hands the property is found is bound to return it to transferor. Where it is accomplished even partially plff. cannot succeed, even though the defrauded party has got his dues. (*Abdur Rahim and Ayling, JJ.*) SULUGU SURYANARAYANA NAYAKARAM *v.* GUNDABOLU BUTCHAIAH. **3 L. W. 111 : 32 I. C. 810 : (1916) 1 M. W. N. 107.**

——— S. 53—*Fraud not carried out — No estoppel.*

In order to shield his property from his creditors a person executed a mortgage *benami* and set up the mortgagee to prefer claim petitions based on such mortgage. Those petitions were dismissed by the Court. *Held*, that he was not precluded from afterwards setting up the fraudulent nature of the mortgage and questioning it on the ground of want of consideration. 20 Mad. 333 ; 31 Mad 485, Ref. (*Ayling and Tyabji, JJ.*) APPAVADHANALU *v.* VENKIAH **2 L. W. 361 : 28 I. C. 702 : (1915) M. W. N. 273.**

——— S. 53—*Fraud not carried out—Whether transferor estopped from setting up title.*

Property transferred *benami* to defraud creditors is still the transferor's, when no creditor is defrauded thereby and he is not estopped from proving that the transferee has no title. (*Sadasiva Aiyar and Spencer, JJ.*) SOKKAPPA REDDI *v.* SINGANA REDDI. **23 I. C. 620 : 1 L. W 169**

——— S. 53—*Fraud not carried out—Assignment of decree—Part consideration intended to benefit creditors.*

When the difference between the real value of the decree and the consideration for its assignment is by a secret agreement between the assignor and assignee intended to benefit the assignor and defeat his creditors, the assignment is invalid as against the creditors but neither the assignor nor the judgment-debtor can object to it

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Inadequate consideration.

on that ground. 30 Mad. 6 ; 24 Cal. 825, Ref. The assignee is entitled however to previous valid attachments. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) ARUMUGHA MUDALIAR *v.* YAGAMBA BAI AMMANI. **17 I. C 323 : 13 M. L. T. 227.**

——— S. 53—*Fraud not carried out— Real-owner can recover property.*

A transfer which is merely colourable and made with the intention of defrauding creditors can always be set aside by the transferor at any time before the fraud has actually taken place. But if the fraudulent intention has succeeded, the Court will not assist either party claiming under such a transaction. 20 Mad. 326, Rel.: 33 Cal. 967 Ref. (*Miller, C. J. and Foster, J.*) SHEIKH AHMED HUSSAIN *v.* GHULAM ASHGAR. **52 I. C. 866.**

——— S. 53—*Fraud not carried out—Effect.*

A *benami* purchaser brought a suit for possession against the vendor who had sold the property to defraud creditors. *Held*, whether the object of fraud was or was not carried out, the purchaser could not recover possession. *Obiter* :- It is the grantor or vendor whose right to recover is lost if the object of fraud is carried out. (*Twomey, J.*) MANDAYA *v.* MA E. **17 I. C. 918 : 5 Bur. L. T. 166.**

Future creditors.

——— S. 53—*Future creditors— Intention — Onus.*

Where a donor had no debts on date of the gift there is no presumption of intent to defraud future creditors and it is for the latter to prove such an intent. (*Sundar Lal, J.*) CHANDAR BHAN *v.* HAR GOPAL. **25 I. C. 183 : 12 A. L. J. 1098.**

——— S. 53—*Future creditors—Settlement on behalf of minor in fraud of creditors—Whether creditor's transferee can set it aside.*

Where a settlement was effected on behalf of a minor of properties in fraud of creditors, the transferee of the latter cannot set the settlement aside against the minor, *Holmes* v. *Penny*, 3 K. and J. 90, Dist. But it is doubtful whether a future creditor can avoid a voidable but real transfer under this section. (*Wallis and Sadasiva Aiyar, JJ.*) VAIKUNTARAMA PILLAI *v.* ATHIMOOLAM CHETTIAR. **38 Mad. 1071 : 23 I. C. 799 : 26 M. L. J. 612**

Inadequate consideration

——— S. 53—*Inadequate consideration—Transfer of whole property for inadequate consideration —Transaction not* bona fide—*Void* in toto.

Where both the transferor and the transferee had the intention of defeating the creditors of the transferor, the document must at the option of the person defeated or delayed be treated as void *in toto* and not merely as void in so far as there was no consideration. (*Scott, C. J. and Hayward, J.*) BHIKHABHAI *v.* PANACHAND. **43 Bom. 707 . 52 I. C 682 : 21 Bom. L. R. 770**

——— S. 53—*Inadequate consideration—Good faith.*

If property is sold at an undervalue on the understanding that the seller shall be entitled to

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Inadequate consideration.

occupy it at a low rent that is strong evidence but nothing more of bad faith. (*Coxe, J.*) JAGAT CHANDRA *v.* RADHA NATH.
9 I. C. 623 : 21 C. L. J. 302.

——S. 53—*Inadequate consideration.*

S. 53 does not apply to a case when the mortgagee is a transferee in good faith and the mortgage is for consideration though inadequate. (*Shah Din, J.*) ISSHAR KUAR *v.* RAM SINGH.
114 P. L. R. 1911 : 9 I. C. 1018 : 172 P. W. R. 1911.

——S. 53—*Inadequate consideration—Fraudulent transfer.*

Where the consideration for a sale is not so inadequate as to raise a presumption against good faith, the transaction cannot be brought under S. 53, T. P. Act. (*White and Oldfield, JJ.*) KURUCHA GANGU NAIDU *v.* KOVVURI BASAVA REDDY.
13 M. L. T. 145 : 18 I. C. 691 : (1913) M. W. N. 821.

——S. 53—*Inadequate consideration.*

The circumstance that a judgment-debtor soon after the decree was passed, sold her land for an inadequate price to the employee of her advocate's father who lent the money, is sufficient to infer fraud under S. 53. (*Moore, J.*) MG. LU. GAIRE *v.* VENCATACHELLAM CHETTY.
10 I. C. 922 : 4 Bur. L. T. 118.

Intention to defraud.

——S. 53—*Intention to defraud—Onus of proof*

Where a transfer is attacked on the ground that it was collusive, fraudulent, and without consideration, and entered into to defeat or delay creditors the onus, which lies on the plff. to prove the facts, is not discharged by producing witnesses to prove signatures to certain documents necessary for deducing title and to topographical position of the property. (*Lord Phillimore.*) MANIKLAL MUNSUKHBHAI *v.* BEJOY SINGH.
(1921) M. W. N. 80 : 62 I. C. 356 : 25 C. W. N. 409 (P. C.).

——S. 53—*Intent to defraud—Fraudulent transfer—Tests of—Facts to be weighed as a whole—Mere regularity of entries in books of account not of much value.*

To find out whether a particular transaction is a fraud upon creditors the facts should be considered in relation to each other and weighed as a whole. It is erroneous to consider separately each fact which militates against the *bona fides* of the transaction and which by itself may be susceptible of explanation. The secrecy and haste with which the document was executed, the subsequent negotitaions for a composition with the creditors on a payment by them to get the mortgage effected by the document revoked, the non-production of material books, the unsatisfactory nature of the evidence as to the settlement of the accounts on which the mortgage was based, the relationship of the parties and the reservation of the entire usufruct of the immoveable properties for the wife and children of the debtor, led to the conclusion that the mortgage was in fraud of creditors. Mere formal regularity of entries in books

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Intention to defraud.

of account is in such cases of little value. (*Mr. Ameer Ali.*) GHANSHAM DAS *v* UMA PERSHAD.
23 C. W. N. 817 : (1919) M. W. 518 : 10 L. W. 511 : 21 Bom. L. R. 472 : 17 A. L. J. 410 : 15 N.L. R. 68 : 50 I. C. 264 : 36 M. L. J. 483 (P. C.).

——S. 53—*Intention to defraud—Proof.*

Where a person creates a permanent lease at a low rent with the object of defrauding the creditors the lease is voidable even though the lessee did not equally share the intention to defraud: (*Lindsay and Kanhaiya Lal, JJ.*) AMINA BIBI *v.* SAIYID YUSUF.
20 A. L. J. 731. 4 U. P. L. R. (A.) 209 : 44 A. 748 : 1922 All. 449.

——S. 53—*Intention to defraud—Transfer in favour of sons—No proof as to the non-existence of other properties.*

A *Lambardar* against whom certain Revenue decrees were passed, transferred some properties in favour of his sons and grandsons The decree-holders sued to set aside the transfers. There was no proof that there were no other properties to the *Lambardar* to satisfy the Revenue decrees. *Held*, the suit must fail in absence of such proof. (*Rafique and Ryves, JJ.*) JWALA SINGH *v.* FATTA.
60 I. C. 825 : 19 A. L. J. 37.

——S. 53—*Intent to defraud—Payment of consideration—Effect of.*

The mere fact that a transfer of property which has the effect of defrauding or delaying the vendor's creditors was for good consideration is not enough. It must also be shown that the purchaser acted in good faith. But the mere fact of the indebtedness of the vendor or knowledge on the part of the purchaser that the sale may defeat or delay the creditors is not sufficient to negative the *bona fides* of the purchaser. If there was good consideration and intention to part with the whole interest is proved and it is not shown that the transfer was a mere cloak for retaining a benefit to the vendor it is valid against the creditors. But if the object of the transferor is to defeat or delay his creditors and that object is known to the transferee and he aids and assists in its execution then the transfer is not in good faith. (*Richardson and Huda, JJ.*) KAMINI KUMAR ROY *v.* HIRA LAL PAL CHOWDHURY.
51 I. C. 736 : 23 C. W. N. 769.

——S. 53—*Intent to defraud — Transferee knowing fraudulent intention—Effect.*

A transfer in fraud of creditors is void if the transferee takes it with knowledge of the fraudulent intention of the transferor, even though the transferee has paid full consideration for the transfer and even if a portion of the consideration goes to a creditor of the transferor. (*Chatterjee and Richardson, JJ.*) AFTAB-UD-DIN *v.* BASANTA KUMAR MUKOPADHYA. **45 I. C. 441 : 22 C. W. N. 427.**

——S. 53—*Intent to defraud—Absence of.*

Where there is nothing to show that a transferor intended a sale of his immoveable property as a cloak or device for his own protection and where the *bona fides* of the transfer cannot be doubted the transfer cannot be impeached as

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Intention to defraud.

fraudulent. (*Mookerjee and Beachcroft, JJ.*) KANCHAND MANDAR *v* KAMALA PROSAD. **29 I. C. 734 : 21 C.L. J. 441.**

——S 53—*Intention to defraud—Fraudulent decree—Execution sale—Estoppel*

When as a result of A's design to keep the property from the reach of the creditors an alienation is made *benami* for A by B to C who mortgages it to D and when D gets a decree for sale on the basis of the mortgage without contest the purchaser in the Court auction E can invoke the principle against A " Where one of two innocent parties must suffer from the fraud of a third the loss should fall on him who enabled such third party to commit the fraud." If no such estoppel arises the purchaser acquires no title by purchase as the judgment-debtor's title whose right, interest and title he acquires is fictitious 31 All. 479 (P. C.), Appl. (*Mookerjee and Beachcroft, JJ.*) RADHA MADHAB PAIKARA *v* KALPATARU ROY. **16 I. C. 811 : 17 C. L. J. 209.**

——S. 53—*Intent to defraud—Debtor retaining some interest.*

The mere fact that a debtor retains some interest in the property sold by him would not in all cases make the transaction fraudulent as matter of law. 34 Cal 999 Ref. (*Coxe, J.*) GANGA CHANDRA *v.* RADHA NATH. **9 I. C. 623 : 21 C. L. J. 302.**

——S. 53—*Intention to defraud - Fraudulent transfer of a substantial portion—Effect.*

Where a substantial portion of the transfer is fraudulent the whole transfer must be treated as fraudulent. (*Broadway and Harrison, JJ.*) MULA RAM *v.* JAWINDA RAM. **4 Lah 211 : 5 Lah. L. J. 200 : 1923 Lah. 423**

——S. 53—*Intent to defraud—Knowledge of vendee.*

A sale with intent to defraud a creditor is void, if the vendee is aware of the intent to defraud. (*Chevis and Shadi Lal, JJ.*) BHAGWAN DAS *v* KANSAI RANU. **253 P L. R 1914 : 25 I. C. 180 : 145 P. W. R. 1914.**

——S. 53— *Intent to defraud—Burden of proof—Claim suit.*

Where in execution of a decree obtained by *A* against *B*. *C* preferred a claim on the basis of mortgage decree on an award in her favour and the claim was allowed in summary proceedings, and *A* brought a suit for a declaration that *B*'s properties were liable to attachment and sale. *Held*, (1) that the burden was in the plff. to establish the fraudulent nature of the mortgage decree having regard to the decision against him in the summary proceedings ; (2) that neither the mere fact that *B* owed money to their people nor the fact that he consented to a decree for a time-barred debt will make the decree fraudulent; and (3) that neither the absence of contest between *B* and *C* in the arbitration proceedings nor the hurried way in which the award was drawn up and the decree obtained was sufficient proof of fraud. (*Johnstone and Chevis, JJ.*) MEHYANGI BAI *v.* FATEH CHAND. **246 P. L. R. 19 3 : 20 I. C. 355 : 197 P. W. R. 1913.**

——S. 53—*Intent to defraud—Proof.*

An intention to defeat or delay the creditor cannot be inferred from the fact that the mortgagor and the mortgagee are related to each other specially when the creditor obtained his decree a year before the second mortgage took place. (*Shah Din, J.*) ISHAR KUAR *v.* RAM SINGH **114 P. L. R. 1911 : 9 I. C. 1018 : 172 P. W. R. 1911.**

——S. 53—*Intention to defraud—Bona fide transferee for value without notice from—Who is—Such transferee if protected by proviso.*

The proviso to S. 53 of the Transfer of Property Act protects a *bona fide* purchaser for valuable consideration, whether he purchases from the fraudulent grantor himself or from a fraudulent transferee from him. A transferee who fails to make any inquiry of the person who could have given the best information as to the defects in the title is not a transferee in good faith with notice within the meaning of the proviso to S. 53 of the Transfer of Property Act. (*Oldfield and Ramesam, JJ.*) KUNHU POTHU NAIR *v.* KARU NAIR. **46 Mad. 478 : 44 M L. J. 527 : 17 L. W. 547 : 32 M. L. T. (H. C) 372 : 1923 Mad. 558.**

——S. 53—*Intent to defraud — Sale-deed—Presumption— Whether nominal or sham—Burden of proof—When recitals to be challenged.*

If the consideration for sale consists of certain mortgage deeds which contained false recitals, the Court may presume its sham nature and enquire whether the fictitious documents were intended to give colour to the transaction which was never intended to be acted on. If there was substantial consideration for the sale but all items of the consideration cannot all be proved, this does not lead to the presumption that the deed was nominal. The burden of proof lies on the person alleging it to be sham. After proof of execution and registration by a competent person the presumption is that parties intend to give legal effect to the deed. To rebut this it must be shown that both the parties meant it to be sham and a purpose other than the ostensible one must be shown. Recitals in the deed should be challenged at the execution and lapse of time weakens this challenge. (*Abdur Rahim and Spencer, JJ.*) VYRICHERLA VEERABHADRARAJU *v.* DASIRAJU VENKATACHALAPATHI. **57 I.C. 689.**

——S. 53— *Intent to defraud — Transfer before attachment.*

A judgment-creditor cannot avoid a transfer by the judgment-debtor prior in date to his attachment without showing that it was voidable under S. 53 of the T. P. Act. (*Spencer and Krishnan, JJ.*) MUTHUKUMARA CHETTIAR *v.* ALAGAPPA CHETTIAR. **42 I. C. 554 : 6 L. W 518.**

——S. 53—*Intent to defraud— Burden of proof.*

Where the plaintiff had been for some time (5 years) in possession under a sale-deed and having lost possession the trespass of the vendor's son tries to recover back the possession of the property, he must show that the sale was a real one and that it was for antecedent debts when the trespasser sets up that the sale executed by his father was nominal and intended to defraud creditors. Per *Phillips, J.* dissenting. (*Wallis, C. J. and Phillips, J.*) RAGHUNATHA CHARI *v.* ARAVAMUTHAIYANGAR. **34 I. C. 617.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Intention to defraud.

——S. 53—*Intention to defraud— Presumed from a gratuitous transfer—Intention presumed from—Effect.*

Where a transfer is made gratuitously and the effect of the transfer is to defeat or delay any creditor, the intention on the part of the transferor so to defeat or delay may be presumed. If the available assets left after the conveyance were not enough to pay the debts of the transferor, then the law would infer an intention to defeat and delay. The mere fact that the creditor had not at that time obtained a decree is immaterial. 27 Bom 146 Foll. (*Baker, J. C*) MULLA FAIZ ALI *v.* MT HARKUAR. **1923 Nag. 334.**

——S. 53—*Intention to defraud— Test—Evidence.*

Even where consideration has been paid and possession delivered the transfer will not affect the rights of the creditor if the intention was to defeat or delay him ; but so far as the transferee is concerned it must be found that he participated in the intention to defeat or delay the creditor. 34 C. 999 referred to. In dealing with a question of this sort the court has to consider the facts and relation to each other and weigh as a whole. If the transferee has no notice of and did not share in the fraudulent intention the transfers will not be set aside. 43 B. 707 referred to. (*Kotwal, A.J.C.*) PANDURANG BAPUJI *v.* BAPUJI **1923 Nag. 103 (1).**

——S. 53—*Intention to defraud—Mortgage—Defeating of creditors.*

Where the consideration of a mortgage by successor is practically all money due by the deceased, there is nothing to prevent the successor from satisfying the claims of certain of deceased's creditors to the exclusion of others. The auction sale in execution of a money decree in case of unrecovered debt really takes place subject to the mortgage. The fact of the mortgage having been executed does not itself imply that its execution was made to defeat creditors. (*Prideaux, A. J. C.*) SUBHANALI *v.* BODULAL. **1923 Nag. 17.**

——S. 53—*Intention to defraud—Creditor taking a transfer.*

Where the transferee is himself the creditor of the transferor there is nothing contrary to good faith in his securing an advantage over other creditors by getting a mortgage security for the debt due to him under S.53 (*Batten and Prideaux A. J. Cs.*) GHANASAMDAS. *v.* BHAIRAOBAX. **4 N. L. J. 149.**

——S. 53—*Intent to defraud— Transfer to defeat an anticipated execution.*

A transfer made to defeat an anticipated execution is not one made with intent to defraud, delay or defeat creditors within S. 53. (*Wazir Hassan, A. J C.*) KIAZAT HUSSAIN *v.* ALI BANDI. **60 I. C. 725 : 7 O. L. J 699.**

——S. 53—*Intent to defraud—Consideration of natural affection.*

Transfers for consideration of natural affection being voluntary transfers are not protected as being in good faith if they mediate or have the effect of defrauding a third party. (*Kanhaiya Lal and Lyle, A. J. Cs.*) SUKHPAL KUAR *v.* DASU. **7 O. L. J. 429 : 58 I. C. 165: 2 U. P. L. R. (J. C.) 129.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Intention to defraud.

——S. 53—*Intent to defraud—Good faith proof.*

In a case under S. 53 the plff. must prove that the transferee is a party to the fraud. Want of good faith cannot be presumed but it must be proved. (*Lindsay, J. C.*) KALU SINGH *v.* RANDHIR SINGH. **21 O. C. 97 ; 46 I. C. 330 : 5 O. L. J. 208.**

——S. 53—*Intent to defraud—Proof—Anticipated attachment*—Bona fide *transferee.*

The fact that a transfer was made to defeat an anticipated attachment does not by itself evidence an intent to defeat or delay creditors of the vendor. 25 Bom. 202 Rel. Where a plff. sues for a declaration that a particular transfer in his favour is a good and a valid one it is incumbent upon him to make out in the first instance the validity of the sale in his favour. 5 C. W. N. 403 Rel. (*Rafique, A. J. C.*) BAKHT BALI SINGH *v.* LEKHRANI KUNWAR. **15 I. C. 509.**

——S. 53—*Intent to defraud—Alienee innocent—Effect.*

The deed of alienation cannot be set aside as fraudulent where there is a fraudulent intention of the alienor but not of the alienee. (*Evans, A. J. C.*) HASSAN ABBAS ALI KHAN *v.* RAZIA BEGAM. **12 I. C. 401.**

——S. 53—*Intention to defraud—Mortgage to pay off creditors—Effect.*

Where under a mortgage which is impeached as a fraud on creditors, the creditors of the mortgagor have been paid off out of the mortgage money, the mortgage is binding on the parties and enforceable. (*Miller C. J. and Foster, J.*) BHAGWAN LAL *v.* RAJENDRA PRASAD SAHAI. **4 Pat. L. T. 409: 1923 P. 564.**

——S. 53—*Intent to defraud—Absence of—Transfer* pendente lite.

There is nothing in S. 53 of the T. P. Act or in any other law to prevent a deft. in a suit from transferring either, for consideration or voluntarily, his property to another, unless the effect is shown to be that his creditors are defeated or delayed. The fact that the transfer was made during the pendency of a suit concerning another property, is not a fraudulent transaction if the transferor had other property to pay off creditors. (*Miller, C. J. and Foster, J.*) SHEIK MAHOMED KABIR *v.* SHAHDEO SUKUL. **52 I C. 873.**

——S. 53—*Intent to defraud—Burden of proof—Discharge of—Consideration.*

The onus of proof on the transferee is satisfied if the transferee shows the passing of consideration. He need not go further and show absence of fraudulent intent. If there is no consideration or if it is inadequate, it would raise a presumption or fraudulent intent. (*Miller, C. J. and Coutts, J.*) JNANENDRA NATH *v.* GADADHUR PRASAD. **50 I. C. 463 : 1919 Pat. 226.**

——S. 53—*Intent to defraud—Transfer to defraud single creditor—Not valid.*

Section 53 is applicable even though a single creditor may have been defrauded and hindered in realising his debt. But a transfer to a *bona fide* purchaser for consideration is not affected. (*Chapman and Atkinson, JJ.*) FAKIRA SINGH *v.* MAGHO SINGH. **40 I. C. 685 : 2 Pat. L. J. 546.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S 53—Intention o defraud.

——— S 53—*Intention to defraud—Evidence of—Intention to defeat particular creditor.*

The position with regard to transfers made by a judgment debtor which have the effect of defeating a decree-holder is this; the transaction may defeat or delay. The transferor may intend that it should; the transferee may know that it will; the consideration may be inadequate; and yet unless the transferee himself has been wanting in good faith the presumption in S 53 Para (4) of the T. P. Act does not arise. The question really is one of fact and it is the intention of the parties. But the intention which the Court must consider is not so much the intention to defeat the decree-holder but the intention to create a valid transfer at all. The second clause of the T P. Act relates to a question of evidence. A certain presumption arises when the effect of the transfer is to defeat the creditor and where the transfer is gratuitous or without adequate consideration, But it is a presumption which can be rebutted. The question at issue really is whether the transfer ever actually occurred. The failure or absence of consideration and the omission to transfer possession are evidence of fraud. (*Pipon, J. C.*) LOKANATH *v.* THAKURDAS. **71 I. C. 20**

———**S. 53**—*Intent to defraud—Object to defeat one creditor.*

A transfer for consideration is not voidable though it is made to defeat one creditor. (*Ormond and Twomey, JJ.*) MAUNG TUN *v.* MAUNG PO THAUNG **36 I. C. 395: 10 Bur. L. T. 111.**

——— **S. 53 (2)**—*Intent to defraud—When necessary—Burden of proof.*

All that is necessary to prove is that the transfer had the effect of defeating or delaying the transferor's creditors. An intention of actual fraud need not be proved, and when this is proved, the burden of displacing the presumption that the transfer was fraudulent falls on the transferee. (*Maung Kin, J.*) MA NYUN *v.* MAUNG BATHA. **33 I. C. 945 : 9 Bur. L. T. 107.**

———**S. 53**—*Intent to defraud—Proof—Presumption—Intention to defeat generally.*

Relationship between a transferor in fraud of creditors and the transferee is not alone sufficient to establish that the latter aided in the fraudulent intent, but it is a circumstance raising suspicion. In order that a transfer of immoveable property by a debtor may be set aside under S. 53, it must be proved that his intent was to defeat or delay his creditors generally and not any one particular creditor in which case, the transfer cannot be avoided provided there has been good consideration and the transaction is not a mere sham. A transfer with intent to defraud creditors generally made in favour of a creditor as security for the debt due to him cannot be set aside, even if he was aware of the vendor's intention to defeat other creditors, all that he is required to prove being valuable consideration, but not so in the case of a present purchaser who must prove not only valuable consideration but also that he was not aware of the vendor's fraudulent intent and that he did not aid such intent. (*Robinson, J.*) V. R. M. V. A. CHETTY FIRM *v* MAUNG KO SEN **23 I. C 341 : 7 Bur. L. T. 257**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Partial consideration.

——— **S. 53**—*Intent to defraud*—Bona fides—*Adequate consideration.*

The burden of proving fraud lies on the person alleging the fraud and where fraud could be presumed, *e. g.*, as per the relationship of parties, it lies on the person presumed to be defrauding to prove the *bona fides* and adequacy of consideration for the transaction, (*Twomey, J.*) MA KYIN *v.* RAM PERSHAD. **21 I. C. 333. 6 Bur. L. T. 185 :**

———**S. 53**—*Intent to defraud—Burden of proof—Sale before attachment.*

An owner may sell and any one may purchase property before it is attached, provided that the transaction is *bona fide* and for good consideration. The creditor who impeaches the sale, must prove fraud. (*Twomey, J.*) SUBRAMANIAM CHETTY *v.* MAUNG SHWE THE. **11 I. C 781 : 4 Bur. L. T. 163.**

Partial Consideration.

———**S. 53**—*Partial consideration—Mortgage in fraud of creditors—Legality—Part consideration paid—Lien.*

S. 53 does not render a transaction void but it is only voidable at the option of any person defrauded, defeated or delayed thereby. Fraudulent intention alone is not enough. There must be also evidence to show that there were other creditors at the time of the transaction who were intended to be defrauded or defeated. A mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor and the mortgagee has a lien on that property to that extent (*Mookerjee and Roe, JJ.*) KRISHNA KUMAR NANDI *v.* JOY KRISHNA NANDI. **29 I. C. 680 : 21 C. W. N. 401.**

——— **S. 53**—*Partial consideration—Transfer in fraud of creditors—Prior mortgage—Subrogation.*

The fact that an assignment is set aside as being in fraud of creditors under S. 53 does not prevent the Court from declaring a charge on the property assigned to the extent of the payment made by the assignee towards the redemption of the previous mortgage. 33 Mad. 334, Foll. In the absence of any conflicting equities, the mere fact that the consideration for the previous mortgage has not been paid in full does not prevent the assignee from claiming the right. (*Mookerjee and Roe, JJ.*) HARINATH *v.* HARA DAS ACHARYA. **29 I. C. 580 : 43 Cal. 269 : 20 C. W. N. 188 : 23 C. L. J. 163.**

——— **S. 53**—*Partial consideration—Fraud of creditors—Absence of benefit to transferor.*

A transfer of immoveable property which is not *bona fide* and is effected so as to defraud creditors is void though the transferor is without any benefit. Where the transfer is fraudulent and is effected with a *mala fide* intent, the mere fact that a portion of the consideration is actually paid will not clothe the transaction with reality and take it out of the operation of S. 53, 24 M L.J. 266. Foll. 30 Mad. 6; 25 Bom. 202, Dist. (*Spencer and Seshagiri Aiyar, JJ.*) SUBBAROYA GOUNDAN *v.* PERUMAL CHETTIAR. **43 I.C. 956.**

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 53 – Partial consideration.

——— S. 53—*Partial consideration—Previous real mortgage.*

An assignment in fraud of creditors can be the basis for a charge on the property to the extent of the amount spent for redemption of a prior real mortgage. (*Oldfield and Tyabji, JJ.*) UMMACHAKUTTI *v.* UMMERKUTTI HAJI. **29 I. C. 583.**

———S. 53—*Partial consideration—Fraud on creditors—Voidable as a whole.*

Where the consideration for a mortgage was partly real and partly fictitious inserted to defend creditors of the mortgagor, is voidable as a whole by the creditors of the mortgagor, as the two parts of such a single transaction are not separable and ought not to be separated to favour a creditor guilty of fraud against his fellow creditor. (*Miller and Sadasiva Aiyar, JJ.*) SAMA ROW *v.* DORASAWMY CHETTIAR. **18 I. C. 768 : 13 M. L. T. 206 : 24 M. L. J. 266.**

———S. 53—*Partial consideration—Fraudulent transfer.*

A mortgage for the purpose of discharging a real debt, due by the mortgagor, does not, to the extent of the consideration applied therefor, come within S. 53 of the T. P. Act, and is therefore not a fraudulent transfer. 24 Cal. 825, Foll.; 30 Mad. 6 Dist. (*Sundara Aiyar, J.*) JALADANKI CHINNA PITCHIA, *In re.* **36 Mad. 29 : 11 I.C. 868 : 10 M. L. T. 183 : (1911) 2 M. W. N 152**

Plea in defence.

———S. 53—*Plea in defence—Attachment under decree—Objection on the ground that property is not of the judgment-debtor—Transfer by judgment-debtor fraudulent.*

Per *Stuart, J.* :—Where a third party objects to the attachment on the ground that the property has been transferred by the judgment-debtor but the Court decides the deed of transfer to be fraudulent, the decree-holder may plead, in a suit by that third person for a declaration that the deed is valid, that it is fraudulent. The decree-holder need not sue again for that purpose. If a man fraudulently transfers property to avoid existing obligations, it can be impeached by creditors of later date. (*Rafique and Stuart, JJ.*) RAM CHAND *v.* MATHURA CHAND. **60 I. C. 896 : 19 A. L. J. 299.**

———S. 53—*Plea in defence.*

A deft. can as a defendant avoid a transfer voidable only under S 53 of the T. P. Act. (*D. Chatterjee and N. Chatterjee, JJ.*) ABDUL KADER *v.* ALI MEAH. **14 I. C. 715 : 15 C. L. J. 649 : 16 C. W. N 717.**

———S. 53—*Plea in defence—Suit under O. 21, R. 63, C.P.C.*

An attaching decree-holder can plead as defence to a suit by the alienee whose claim has been disallowed that the transfer was fraudulent and intended to defeat or delay the transferor's creditors. 41 Mad. 612 ; 30 M L.J. 565, Overruled. (*Wallis, C. J., Oldfield, Sadasiva Aiyar, Spencer and Seshagiri Aiyar, JJ.*) RAMASWAMI CHETTIAR *v.* MALLAPPA REDDIAR. **43 Mad. 760 : 28 M L. T. 170 : 59 I. C. 947 : 12 L W 475 : (1920) M. W. N. 572 : 39 M. L J. 360 (F.B.)**

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 53—Preference.

———S. 53—*Plea in defence—Fraudulent transfer—Avoidance of suit—C P. Code, O. 21, R. 63.*

A plea of fraudulent transfer under S. 53 of the T. P. Act cannot be pleaded as a defence. A suit has to be instituted by the creditor whose rights are affected by the transaction to have it set aside 41 Mad. 612, Foll. Per *Seshagiri Aiyar, J.*—All transactions sham or colourable, the effect of which is to defraud or defeat creditors are within the purview of S. 53 of the T. P. Act (*Abdur Rahim and Seshagiri Aiyar, JJ.*) CHERUTHAZHATH ABDULLA HAJI *v.* CHERIYANDI IBRAYAN KUTTI. **50 I C 959.**

This is no longer law. *See* **43 Mad. 760 (F.B.).**

——— S. 53—*Plea in defence—Fraudulent transfer—Suit by creditor.*

The plea that a transfer is in fraud of creditors cannot be raised as a defence to a suit by the transferee to establish his title, if the creditor or creditors have not already sued for the cancellation of the transfer on that ground It is open to a single creditor to institute a suit for cancellation of a transfer on the ground that it is intended to defraud him and other creditors similarly placed. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) PALANIANDI CHETTY *v.* APPAVU CHETTIAR **45 I. C. 52 : 22 M. L. T. 474.**

[Overruled by 43 Mad. 760 (F. B.).]

———S. 53—*Plea in defence—Remedy of creditors.*

The plea of a fraudulent transfer is not available as a defence to a suit under O 21, R. 63, C. P. C. by an unsuccessful claimant. (*Ayling, Seshagiri Aiyar and Bakewell, JJ.*) SUBRAMANIA AIYAR *v.* MUTHIA CHETTIAR. **41 Mad. 612 : 6 L. W. 750 ; 43 I. C. 651 : 33 M L. J. 705.**

[Overruled by 43 Mad. 760 (F.B.).]

——— S. 53—*Plea in defence—Fradulent transfer—Suit under O. 21, R. 63, C.P.C.—Payment of portion of consideration—Effect.*

A defendant may impeach a transaction voidable as against him such as a fraudulent transfer when it is sought to be enforced whether by a declaration or otherwise. 41 Mad. 612, Diss. from. The mere existence of a part of the consideration for a transfer does not prevent the transfer being a fraudulent transfer voidable at the instance of the person defrauded. (*Mitra, A J. C*) HAJI ABOO *v.* SOBHAGCHAND. **55 I. C. 752.**

——— S. 53—*Plea in defence.*

The fraudulent character of the transfer can be pleaded as a defence to a suit under O 21, R. 63, C.P.C., 41 Mad. 612, Diss.: 42 Mad. 14[illegible], Rel. (*Drake-Brockman, J.C.*) DHANSUKHAS *v.* ZANGOO. **54 I. C. 798 : 16 N. L. R. 3.**

Preference.

——— S. 53—*Preference.*

A debtor may pay his debts in any order he pleases and prefer any creditor he chooses and even though a debtor has preferred a creditor of set purpose and others might suffer thereby it

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Preference.

would not stamp the transaction as fraudulent. (*Sir Lawrence Jenkins.*) MINA KUMARI BIBI *v.* BIJOY SINGH. **44 Cal. 662 : 44 I. A. 172 : 1 P. L. W 425 : 5 L. W. 711 : 40 I. C. 242 : 21 C. W. N. 585 : 21 M. L. T. 344 : 15 A.L.J. 382 : 25 C. L. J. 508 : 19 Bom. L. R. 424 : (1917) M. W. N. 473 : 32 M. L. J. 425 (P. C.).**

——S. 53—*Preference—Test of—Preference of single creditor—Transfer, if voidable by others.*

Where there is no question of bankruptcy law, there is nothing to prevent a debtor from paying one creditor in full although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. *Moroney, In re.* L.R. 21 Irish 27, and *Middleton* v. *Pollock*, (1876) 2 Ch. D. 104, Ref. to. A transfer of property by a debtor is not within the mischief of S. 53 of the T. P. Act, because its object or effect is to prefer one creditor to another even though it is made with the intention to defeat an anticipated execution by a creditor other than the transferee. What the section hits at is a transfer which removes the whole or a part of the debtor's property from the creditors as a body to the benefit of the debtor. (*Lord Wrenbury.*) MUSABAR SAHU *v* HAKIM LAL. **43 Cal. 521 : 32 I. C 343 : 43 I.A. 104 : 3 L.W. 207 : 20 C.W.N. 393 : 14 A.L J. 198 : (1916) 1 M.W.N. 198 : 19 M.L.T. 203 : 23 C. L. J. 406 : 18 Bom. L R 378 : 30 M. L. J. 116 (P. C.).**

——S. 53—*Preference—Insolvency proceedings.*

The question of unduly preferring one creditor to another can only be raised in insolvency proceedings, and not under S. 53 of the T. P. Act, (*Johnstone and Chevis, JJ.*) MEHUGI BAI *v.* FATEHCHAND. **246 P. L. R. 1913: 20 I. C. 355 : 197 P. W. R. 1913**

——S. 53—*Preference—Prov. Ins. Act, S. 37.*

In a case under S. 53 of the T. P. Act, actual fraud must be proved but in a case under S. 37 of the Insolvency Act, it is enough to show that there was a preference by the debtor of one creditor over another. (*Robertson, J.*) BALMUKUND *v.* AYA SINGH. **18 P. W. R. 1912: 13 I C. 68. 26 P. L. R. 1912.**

——S. 53—*Preference.*

A transfer for valuable consideration to one creditor is not void merely because it would inevitably defeat or delay the claim of a less vigilant creditor. 81 P. R. 1908 ; 34 Cal. 999, Foll. (*Reid, C. J. and Kensington, J.*) MUKAND KUAR *v.* BULAKI MAL.
83 P. W. R. 1911 : 9 I. C. 1037 : 124 P. L. R. 1911.

——S. 53—*Preference.*

Where a debtor mortgaged his properties for payment of debts mostly due to relations including the mortgagee, *held*, that the bond though it preferred some creditors to others was not one removing propertyfrom the creditors for the benefit of the debtor especially when the debts were found to be actually due, and hence was not void

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Sham transaction.

under S. 53 of the Act. (*Oldfield and Ramesam, JJ.*) MUTHIAH CHETTIAR *v.* PALANIAPPA CHETTY. **41 M. L. J. 594: (1921) M. W N. 764: 15 L. W 190: 45 M. 90 : 1922 M. 447.**

——S. 53—*Preference—No ground for avoidance.*

A sale of land for consideration, even with a view to exclude one particular creditor in favour of the other creditors, is not bad as it does not defraud creditors generally (*Sadasiva Aiyar and Moore, JJ.*) PELLER MASTEN REDDI *v.* KUNAM REDDI MALAKONDA REDDI. **33 I C. 695.**

——S. 53—*Preference.*

Preference to some creditors does not itself bring the transaction under S. 53 of the T. P Act 43 Cal. 521, Foll. (*Mitra, A. J. C.*) RAMSA HARANASA *v.* RATNASA. **48 I. C. 783.**

——S. 53—*Preference—Validity.*

It is essential for the operation of S. 53 of the Act, that there should be proof that the transaction was intended to defeat all the creditors, a transaction made merely for preferring one creditor, over another is not void, neither is a fact that one has made an extremely good bargain a reason to conclude that the transaction is tainted with dishonesty. (*Lindsay, J. C.*) KALU SINGH *v.* RANDHIR SINGH. **21 O. C 97: 46 I C. 330: 5 O L. J. 208.**

——S 53—*Preference—Intention.*

A preference given to one creditor is not voidable if the transferee is innocent of the fraud intended by the debtor. 34 Cal 909, 30 Mad. 6; 17 M. L J. 11. (*Kanhaiya Lal, A. J. C.*) AHMADI BEGAM *v.* RAJA UDIT NARAIN SINGH.
25 I. C. 164 : 17 O. C. 173.

——S. 53—*Preference—Transfer for good consideration.*

A transfer for good consideration is not fraudulent within S. 53, though it amounts to preferring one creditor to another. (*Coutts and Macpherson, JJ.*) MUSAMMAT BIBI SAIRA *v.* BIBI SALIMAN **63 I. C. 111 : 2 Pat. L T. 577.**

——S. 53—*Preference.*

In the absence of other circumstances, an intent to prefer a particular creditor in the case of a *bona fide* sale for value does not *per se* as a matter of law, render the conveyance fraudulent, (*Fox, C J and Hartnoll, J.*) MAUNG TUN THAN *v.* LEONG CHY. **20 I. C. 349: 6 Bur. L. T. 121.**

Sham transaction.

——S. 53—*Sham transaction—Setting aside sale at the instance of creditors—Not necessary*

S. 53 of the T. P Act has no application to a sham sale deed not intended to pass title though intended to defeat creditors Such a deed does not require to be set aside 50 I. C. 959 Not. Foll. (*Sadasiva Aiyar and Spencer, JJ.*) SWAMINATHA AIYAR *v.* RUKMANI AMMAL. **55 I. C 766 : 11 L. W 106.**

——S. 53—*Sham transaction.*

A suit under S. 53 is not necessary where the transfer is void or has been found to be a sham transaction. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) PALANIANDI CHETTIAR *v.* APPAVU CHETTIAR.
30 M L. J 565: 34 I. C. 778: 19 M. L. T. 390.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Sham transaction.

——S. 53—*Sham transaction—Fraudulent intention—Colourable transaction—Surrounding circumstances.*

The mere fact of payment of consideration is not enough to maintain the contention that a sale is not voidable under Section 53. Nor is it any the less voidable because money was paid to the creditors, mentioned in the sale-deed, if really what was paid to them, was not the consideration for the sale-deed and if the alienation by the vendor was part of a scheme of fraudulent alienations. A colourable transaction is inoperative between the parties to it and it is different from an alienation voidable on the ground of fraud. (*Benson and Sundara Aiyar, JJ.*) MUTHU K. R. V. ALAGAPPA CHETTY *v.* DASAPPA CHETTIAR.

(1913) M. W. N. 141: 13 M. L. T. 201: 18 I. C 332: 24 M. L. J. 293.

——S. 53—*Sham transaction — Applicability of Section to.*

S. 53 of the Act contemplates a transfer binding between the parties but voidable only at the option of the persons specified. The mere facts that the transaction was one which was carried out with intent to defeat or delay or defraud creditors does not of itself bring it within S. 53 when the deed itself is in fact void, and colourable and was never meant to be acted upon. (*Miller, C. J. and Foster, J.*) BIBI SIRAH *v.* MUSST. GOLAB KUER.

53 I. C. 892 : 1919 Pat. 409.

Subsequent Transferee.

——S. 53—*"Subsequent transferee," who is—Fraudulent transfer—Auction-purchaser whether subsequent transferee.*

A person who steps in by operation of law (*e. g.*) by purchase in execution sale and not by any act of the owner is not a subsequent transferee within the meaning of S. 53. He is not a person having an interest in the property within the meaning of the section which refers to interest which exists at the time of the transfer objected to. (*Heaton and Shah, JJ.*) VASUDEV RAGHUNATH OKA *v.* JANARDHAN SADASHIV APTE.

39 Bom. 507: 29 I. C. 497: 17 Bom. L. R. 522.

——S. 53—*"Subsequent transferee"—Auction-purchaser in execution of decree—Right to impeach previous transfer.*

An auction-purchaser at a sale in execution of a decree is not a "subsequent transferee" entitled to impeach a previous transfer under S. 53 of the T. P. Act. (*Drake-Brockman, J. C.*) AWADHUT *v.* PUNJAJI. **53 I. C. 205**

Miscellaneous.

——S. 53—*C. P. C. O. 39, R. 1.*

Unless facts are established of the same kind as are necessary for a case under S. 53 of the T. P. Act, R. 1 (b) of O. 39, C. P. C. does not apply (*Piggott and Walsh, JJ.*) ZARIHUSAIN KHAN *v.* KANIZ FATIMA BIBI. **39 I. C. 922.**

——S. 53—*Father's transfer to son.*

The father transferred certain property to his son by a sale-deed, he himself acting for his son as the son was a minor. *Held*, that the transfer was *prima facie* a fraudulent and colourable transaction within the meaning of S. 53 of the Act.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Miscellaneous.

(*Knox and Piggott, JJ.*) MAHOMED ABBAID ULLAH KHAN *v.* MAHOMED IBRAHIM ALI KHAN.

10 I. C. 906.

——S. 53—*Practice—Fraud—Plaintiff and defendants parties to it—Rule applicable.*

Where both the plaintiff and the defendant are parties to fraud upon innocent third parties the rule applicable is "let the estate lie where it falls." The old rule which was laid down more than a century ago. (*Beaman and Hayward, JJ.*) TANJI DAGDE *v.* SHANKAR SAKHARAM.

36 Bom. 116 : 12 I. C. 564 : 13 Bom. L. R. 1002.

——S. 53—*Fraudulent mortgage—Tests of—Prior simple debts.*

Where a debtor executed a mortgage to one of his creditors for a genuine debt, and the security is reasonable, just and sufficient, neither the fact of the relationship of the parties nor the fact of the mortgagee was aware of the pressure on the part of the other creditors will bring the transaction within S. 53 of T. P. Act. 44 Cal. 662 and 43 Cal. 521, Foll. (*Teunon and Richardson, JJ.*) RASH MOHAN SAHA *v.* KRISTODAS ROY.

47 I. C. 412 : 22 C. W. N. 982.

——S. 53—*Vendor's duty to discharge encumbrances.*

The vendor, however, is bound to discharge all encumbrances existing at the date of the sale. The vendor is therefore bound to discharge the mortgage and give a good title to the purchaser. (*Stephen, J.*) NABIN CHANDRA SAHA *v.* KRISHNA BAKONI DASEE.

38 Cal. 458 : 9 I. C. 525 : 15 C. W. N. 420.

——S. 53—*Fraudulent transfers—Setting aside of—Creditors need not be judgment-creditors.*

Section 53 of the Transfer of Property Act does not require that the persons complaining of a transfer coming within the purview of that section should obtain decrees proving their debts before they are entitled to set aside the conveyance. There is no warrant for the proposition that a creditor cannot maintain a suit to set aside a deed obnoxious to the provisions of the section until he establishes his debt by obtaining a decree from a Court of Law. As soon as the person who complains, proves his debt either by producing a decree in his favour or by any other evidence oral or documentary, he is entitled to sue and it is not necessary that he must be a judgment-creditor or should have obtained a lien or charging order on the property transferred by his debtor. 7 Equity Cases 347; 27 Bom. 146 Foll. (*Shadi Lal, C. J. and Fforde, J.*) CHINAMAL *v.* GUL AHMAD. **1923 L. 478.**

——S. 53—*Transfer of property—Partition among member of a family is a.*

A partition among the members of a joint Hindu family is a transfer to which the provision of S. 53 of the Transfer of Property Act would be applicable. *Per Spencer, J.* in *Indoso Jithiajai* v. *Kothopalli Ramacharlu* 10 L. W. 498, 507 not followed. (*Oldfield and Venkatasubba Rao, JJ.*) RASA GOUNDAN *v.* ARUNACHALA GOUNDAN.

44 M. L. J. 513 : 17 L. W. 613 : (1923) M. W. N. 320 : 32 M. L. T. (H. C.) 344 : 1923 Mad. 577.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 53—Miscellaneous.

——S. 53—*Avoidance of fraudulent transfer—Unequivocal declaration—Conduct.*

An unequivocal declaration of an intention to avoid a fraudulent transfer, expressed by a creditor is sufficient to enable him to treat it as void and such declaration can be made by open unequivocal conduct. Where a creditor got a subsequent fraudulent transfer by the debtor, a sale of the same properties and dispossessed the plaintiff *held*, that the prior sale was properly avoided and that the plaintiff had no title to the property. (*Sadasiva Aiyer and Napier, JJ.*) AYYA PERUMAL ASARI *v.* ADINAM ASHAGIYA PILLAI.
12 L. W. 718 : 61 I. C. 580 : (1921) M. W. N. 497.

——S. 53—*Meaning of transfer—Release by member of joint family for consideration—Partition.*

Per *Abdur Rahim, J.*—A partition among the members of a family under which a co-parcener is allotted a share which he relinquishes for a disproportionately less consideration in favour of others, operates as a severance of status and is voidable if in fraud of creditors. Per *Spencer, J*—The document was one of relinquishment of the executant's right to have a partition, and as such did not fall within S. 53 of the T. P. Act, and it was a *bona fide* family settlement not intended to defeat or to delay creditors. Partitions of co-parcenary property under the Hindu Law are not 'transfers' within S. 53. (*Abdur Rahim and Spencer, JJ.*) INDOJI JITHAJI *v.* KOTHAPALLI RAMA CHARLU.
54 I. C. 146 : 10 L. W. 498.

——S. 53—*Foreign judgment—Title obtained under.*

Per *Coutts Trotter, J., Seshagiri Aiyar, J. Contra.*—The mere obtaining of judgment (in India) creates no title but creates only an inchoate title in the judgment-creditor and he must therefore follow up his judgment by attaching the properties in order to enable him to utilise S. 53 of the T. P. Act in answer to a claim of a third party founded on a deed of transfer which is impeached as being in fraud of creditors. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) PALANIANDI CHETTY *v.* APPAVU CHETTIAR.
30 M. L. J. 565 : 34 I. C. 778 : 19 M. L. T. 390.

——S. 53—*Creditor—Simple mortgagee—Right to sue.*

A simple mortgagee who has obtained a decree for sale whose right to a personal decree is not barred, is a "creditor" within S. 53 T. P. Act and can bring a suit to set aside an alienation in fraud of creditors. Such a suit is governed by Art. 120 and not by Art. 91 or 95 of the Limitation Act (1908). 10 Mad. 213 : 30 Mad. 402. Foll. (*Sadasiva Aiyar and Napier, JJ.*) AUTHIKESAVALOO NAICKER *v.* SHAH ABDULLA HUSSAIN SAHIA.
2 L. W. 479 : 29 I. C. 62 : (1916) M. W. N. 337.

——S. 53—*Applicability of—Remission of debt to defeat creditors—Effect of.*

Under S. 53 gifts to third parties are as much voidable as other transfers and it is not necessary that transferor should reserve a benefit to himself. The principle of the section will apply in case of voluntary remissions of debts made with a view to defeat the creditors. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) NAMAGIRI LAKSHMI AMMAL *v.* SRINIVASA AIYANGAR.
27 I. C. 269.

——S. 53—*Transfer of part of property to pay off genuine debt.*

A mortgage by a debtor for a genuine debt of a part only of his property is not voidable under S. 53 of the T. P. Act. 23 Mad. 227 (P. C.) Foll. (*Wallis, Offg. C. J. and Seshagiri Aiyar, J.*) PALANIAPPA CHETTI *v.* RAMANATHAN CHETTI.
26 I. C. 834 : 2 L. W. 64.

——S. 53—*Fraudulent transfer—Acquisition.*

There is no distinction between fraudulent alienation and fraudulent acquisition as each consists of a dishonest dealing with property. 13 Mad. 394 S. D. of 1858 ; 34 All. 579 (P. C.) Foll. (*Sadasiva Aiyar and Tyabji, JJ.*) RAMASUBBA IYER *v.* AVUDAI AMMAL.
26 I. C. 123 : (1914) M. W. N. 595.

——S. 53—*Fraud of creditors—Assignment of debt—Right to impeach.*

Although as between a transferor and his transferee, an assignment may be complete, the creditors of the assignor are not bound by it, if it be in fraud of creditors, and they are entitled to attach and sell the property assigned as being still the property of the assignor, so far as the debts are concerned. The purchaser also at auction of the debt is entitled to show that the assignment was in fraud of creditors. (*Sundara Aiyar, J.*) SUBRAMANIA PILLAI *v.* DAKSHINA MURTHI.
11 M. L. T. 262 : 15 I. C. 193 : (1912) M. W. N. 363.

——S. 53—*Fraudulent transfer is only voidable and not void—Gift—When voidable by creditors—Delivery of possession.*

Even a gratuitous transfer made for the sole purpose of defeating the creditors of the transferor is not void ; it is only voidable and that only at the instance of a creditor who has been actually defeated or delayed by it. Where the transferee offers the debt due to the creditor, he cannot complain that he is defeated or delayed by the transfer and so cannot avoid it. A question as regards delivery of possession to validate a gift under Hindu Law can arise only between the donor and the donee and cannot be raised by the third party. 1 C. P. L. R. 11 referred to. (*Hallifax, A. J. C.*) MT. KRISHNA BAI *v.* DEBI SINGH.
1923 Nag. 195.

——S. 53—*Prov. Insol. Act, S. 36.*

Considerations affecting S. 53 do not apply to S. 36, Provincial Insolvency Act. (*Mullick and Atkinson, JJ.*) HEMRAJ CHAMPALAL *v.* RAMKISHEN RAM.
2 Pat. L. J. 101 : 1 Pat. L. W. 752 : 38 I. C. 369 : (1917) Pat. 303.

——S. 53—*Sale of hired animals.*

B made over his buffaloes to *S* in settlement of a debt and then hired them from him. Later he sold or rather made them over in settlement of a

TRANSFER OF PROPERTY ACT (IV OF 1882), S 54

debt due to *K. Held* that *S* was entitled to recover his buffaloes. (*Duckworth, J.*) SHAUNG NYAN *v.* KO MAUNG. **1 Bur L. J. 164 : 1923 R. 98 (1).**

——S. 54.

Admissibility of unregistered deed.
Applicability.
Consideration.
Contract to sell.
Easement.
Immoveable property.
Non payment of price.
Priority.
Registration.
Sale of equity of redemption.
Sale of reversion.
Sale when complete.
Title by delivery.
Title by estoppel.
Transfer for dower.
Vendee in possession.
Miscellaneous.

Admissibility of unregistered deed.

——S. 54— *Admissibility of unregistered deed—Sale of immoveable property of less than Rs. 100 in value.*

Where an immoveable property of less than Rs. 100 in value is sold by delivery of possession and an instrument of sale is also executed but not registered, the instrument is admissible as evidence under Sec. 91 of the Evidence Act to show the nature and terms of the transaction though it confers no title to the property. (*Richardson and Walmsley, JJ.*) JUMAN *v.* MAHOMED NADINEOAZ. **41 I. C. 779 : 21 C. W. N. 1149.**

——S. 54—*Admissibility of unregistered deed—Specific performance.*

It is not necessary to register a document which is only an agreement to sell but when the document is a sale-deed registration is essential, and the vendee can place no reliance on an unregistered sale-deed even in a suit for specific performance. (*Chevis and Abdul Raoof, JJ.*) MUSSAMMAT PARMESHRI DEVI *v.* AUTAR SINGH. **4 U. P. L. R. (L) 59.**

——S. 54—*Admissibility of unregistered deed—Contract of sale.*

An unregistered sale-deed of immoveable property, for less than Rs. 100, though inoperative under S. 54 where delivery of possession has not been made to the vendee, is admissible to prove the contract of sale. (*Bakewell and Phillips, JJ.*) POOMALAI *v.* KARUPPA. **34 I. C 921 : (1916) 2 M. W. N. 136.**

——S. 54— *Admissibility of unregistered deed—Oral sale with possession—Effect.*

A transferee under an unregistered deed of sale of immoveable property of the value of less than Rs. 100 could rely on an oral sale followed by possession and the unregistered sale deed could be used as evidence of a contract to sell. 7 M.L.T 372: 25 I.C. 772: 27 M L J. 497, Ref. (*Sadasiva Aiyar and Napier, JJ.*) KATHARI NARASIMHA RAJU *v.* BHUPATI RAJU. **18 M. L. T. 371 : 2 L. W. 964 : (1915) M. W. N. 819 : 31 I. C. 52 : 29 M. L. J. 721.**

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 54—Applicability.

——S. 54—*Admissibility of unregistered deed—Agreement to sell—Intention—Want of registration.*

In construing whether a document operates by way of a present conveyance of property or only as an agreement to create a future right, the intention of the parties as expressed in the instrument is the test. Even if a present right is created, the instrument, though unregistered, is admissible in evidence in a suit for specific performance. 14 Mad. 55 ; 15 C.W.N. 375. Foll. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MANGAMMA *v.* RAMAMMA. **37 Mad. 480 : 12 M. L. T. 262 : 16 I. C. 587 : (1912) M. W. N. 917.**

——S. 54—*Admissibility of unregistered deed—Sale for less than Rs. 20—Nature of possession.*

A sale-deed of immoveable property worth Rs. 20 does not require registration but it gives no title to the site under S. 54 of the Transfer of Property Act. It is admissible in evidence of an agreement to purchase the property. (*Mittra, A. J.C.*) HARSALSA *v.* BAPU. **56 I. C. 382.**

——S. 54— *Admissibility of unregistered deed—No sale deed—Remedy.*

A transfer by *pyatpaing* cannot be proved to be a mortgage or sale where there is unregistered instrument evidencing it. Where the plaintiff wanted the property back by redemption and the defendants claimed the transaction to be a sale with the option of repurchase within three years and as that period was long since past they asked that the plaintiff may be ordered to give them a registered conveyance as agreed upon. *Held* that as the sale by the *pyatpaing* did not transfer any interest in the property to the defendants the point as to what amount if any was due from plaintiff to the defendant did not arise in this case and that plaintiff was entitled to recover the property without paying any amount. (*Maung Kin, J.*) MG. PO KIN *v.* MG OH. **1 Bur. L. J. 4 : 1923 R. 230.**

Applicability.

——Ss. 54 and 55—*Applicability—Contract entered into with father of minor—Effect—No obligation on minor's part.*

The T. P. Act does not prevent a minor from purchasing property When a contract is entered into with the father and guardian of the minor no contractual obligations are undertaken by the minor. Any personal obligations arising as between the vendor and vendee, would have to be discharged by the party contracting with the vendor. Though consideration for sale is not paid, till to the property passes to the buyer but Courts will pass a decree in his favour conditional on his paying the purchaser money. (*Banerjee and Walsh, JJ.*) NARAIN DAS *v.* MUSSAMMAT DHANIA. **38 All. 154 : 35 I. C. 23 : 14 A. L. J. 65.**

——S. 54—*Applicability—Mahomedans.*

Mahomedans can no more transfer immoveable property without complying with the provisions of the T. P. Act than any other community. To allow them to do so would in effect, be to repeal

TRANSFER OF PROPERTY ACT (IV OF 1882), S 54—Applicability.

the provisions of the T. P. Act, so far as the Mahomedan community is concerned. (*Richards, C. J. and Banerji, J.*) GHAFUR-UD-DIN *v.* HAMID HUSSAIN. **16 I. C 679 : 10 A. L. J. 154.**

——— S. 54—*Applicability.*

The section is not exhaustive on the law of relations by contract for sale of immoveable property. (*Scott, C. J., Batchelor and Heaton JJ.*) BAPU APPAJI POTDAR *v* KASHI-NATH SADOBA GULMIRE. **41 Bom. 438 : 39 I. C 103 : 19 Bom. L. R 100 (F. B.)**

——— S. 54—*Applicability—Receiver of insolvent estate—Conveyance.*

Conveyance in writing and registered is necessary to pass title from the Receiver of an insolvent's estate to a purchaser from him. (*Fletcher and Cuming, JJ.*) ABDUL HASHIM *v* AMAR KRISHNA. **53 I. C. 121 : 46 Cal 887.**

——— S. 54 — *Applicability — Unregistered agreement—Defence—Suit for ejectment.*

A suit for ejectment by a person having a legal title can be met by one in possession under an agreement not formally executed and registered though a suit for its specific performance is barred. 24 Mad 377; 39 Bom. 472 ; 44 Cal. 542; 40 Mad. 1134 : 20 C. W. N. 149. Ref Per *Richardson, J.*—The T. P. Act does not contain the whole law on the subject of transfer of property. (*Teunon and Richardson, JJ.*) MUHAMMAD SHAFIKUL HUQ CHOUDHURY *v.* KRISHNA GOVINDA DUTTA, **23 C W. N. 284 : 47 I. C. 428 : 28 C. L. J. 77.**

— Ss. 54 and 58—*Applicability—Punjab.*

The definition of mortgagee as given in S. 58 of the Transfer of Property Act, should be adopted and recognised as good law, for the Punjab just as the definition of 'sale' in S 54 of the Act has been adopted in the Punjab. (*Johnstone, C. J., Chevis, Smith, Rossignol and Shadi Lal, JJ.*) ATTAH ALLAH DITTA *v.* NAZAR DIN. **53 P. R 1916 : 33 I. C 474 : 51 P. W. R 1916 (F.B.)**

——— Ss. 54 and 55—*Applicability—Transfer of mortgage—Implied covenant of title.*

A transfer of a mortgage by a deed is a sale of immoveable property and where it turns out that the mortgage itself was invalid for want of consideration, the transferor will be liable in damages for the breach of the implied covenant as to the existence of the mortgage debt. (*Phillips and Odgers, JJ.*) BALAGURUMURTHY CHETTY *v.* V. R. NAGULU CHETTY. **14 L. W 191 : (1921) M. W. N. 602 : 69 I. C. 473 : 41 M L. J. 267.**

——— S. 54—*Applicability—Mortgage debt—Transfer of.*

A mortgage debt, can be validly transferred only in accordance with S. 54 of the Act. (*Sadasiva Aiyar and Napier, JJ.*) OFFICIAL RECEIVER *v.* LAKSHMAN AIYAR. **68 I. C. 752 : 41 M. L J. 453.**

——— S. 54—*Applicability— Sale—Agreement to sell—Want of formalities—Part performance.*

It is immaterial whether a transaction is described as sale by a parol or an agreement for sale

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Consideration

If the sale cannot take effect as a sale for want of formality, it would have the effect of an agreement for sale with its consequences in equity. Where the question is whether as a result of the agreement for sale of the entire plot in consideration of an advance made, followed by possession the defendant obtained a good title in equity to the land in suit. *Held* that the equitable doctrine of part performance clearly applied to the case. To constitute part performance the act must be an act, unequivocally referring to, and resulting from the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement The principle of the cases is, that the act must be of such a nature, that, if stated it would of itself infer the existence of some agreement ; and then parol evidence is admitted, to show what the agreement is. (*Ross, J.*) RAM KISHUN MAHTO *v.* HARIHAR MAHTON. **1924 P. 433.**

——— S. 54—*Applicability—Sale of property over Rs. 100—Registration Burma.*

S. 54 of the T. P. Act, requires that a sale of property worth Rs 100 or more should be by a registered instrument. (*Twomey, J.*) MANYSEN *v.* KADIRESAN CHETTY. **28 I. C. 264.**

——— S. 54— *Applicability — Extension to Burma—Sale contravening Act—Validity.*

An unregistered sale transaction in respect of immoveable property worth more than Rs. 100 is invalid if it is executed after the extension of the Transfer of Property Act, to Burma: (*Ormond, J.*) MAUNG PO MAUNG *v.* MAUNG KAING. **7 Bur L T. 86 : 24 I. C. 57 : 7 L. B. R. 262.**

——— S 54—*Applicability—Burma.*

The Transfer of Property Act was first extended to the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon from the 1st January 1893. A verbal sale for Rs. 350 of immoveable property at Rangoon in 1890 after the T. P. Act was applied to Bengal from the 1st July 1882, though prior to the extension of the Act to Rangoon, is invalid, as it would have been invalid if it had taken place in Calcutta in that year. (*Fox, C. J. and Hartnoll, J.*) M. G. SAN U. *v.* MA HMYIM. **5 Bur. L. T. 169 : 17 I. C. 954 : 6 L. B R. 98.**

Consideration.

——— S 54—*Consideration—Conditional payment—Validity.*

There is nothing contrary to the public policy in providing in a deed that the payment of consideration for a sale should be postponed in certain events and that it should not be paid at all in the event of the property being lost. It is not a gambling transaction. *Richards, C. J. and Piggott, J.*) KAULESHER PRASAD MISRA *v.* ABDI BIBI. **30 I. C. 512 : 37 All. 631.**

——— Ss. 54 and 55—*Consideration—Suit for possession by vendee—Conditional decree—Deposit of price.*

In a suit for possession though the vendee's allegations that he has paid full consideration may be found to be false and that only a part of it

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Consideration.

was really paid, the Court may pass a conditional decree for possession to take effect on his depositing in Court whatever is due under the purchase with interest, costs, etc. (*Chitty and Walmsley. JJ.*) JOGENDRA NARAYAN ROY. *v.* MANMATHA NATH. **34 I. C. 106.**

—— S. 54—*Consideration — Adequacy—If third parties can question.*

If a purchaser of a share in the joint property institutes a suit for possession the vendor's co-sharers cannot successfully contest the *bona fides* or validity of the sale of want, or inadequacy of the consideration does not affect the purchaser's right so long as the vendor himself is satisfied. (*Shah Din and Scott-Smith, JJ.*) HUKAM KAUR *v.* BIHARI LAL, **110 P. L. R. 1912 : 15 I. C. 192 : 73 P W. R. 1912.**

——S. 54—*Consideration—If can be questioned by third party.*

Where the vendor does not question the consideration for the sale it is not open to a third party to do so. (*Sadasiva Aiyar and Tyabji, JJ.*) ARTHO RAMA *v.* ARTHO PADHI. **14 M. L. T. 177 : (1913) M. W. N. 687 : 20 I. C 952 ; 25 M. L. J. 248.**

——S. 54—*Consideration—Failure of—Vendor's power to cancel sale*

When a sale-deed is registered and possession given to the vendee, the title of the property passes to the vendee under S. 54 and in the absence of fraud coercion under influence or misrepresentation, the vendor is not entitled to have the deed of sale set aside. If there is failure of consideration he can sue for it. (*White, C. J and Munro, J.*) SUBBAIYER *v* MANIAM SUBRAMANI IYER. **36 Mad. 8 : 10 M. L. T 51 : (1911) 2 M. W. N 6 : 10 I. C. 546 : 21 M L. J. 800.**

—— S. 54—*Consideration—Provision for payment on the success of litigation.*

Where the object in executing a sale deed is to confer upon the vendee the power of contesting a suit and the payment of consideration is made conditional on the success of the suit, the transaction cannot be called a nominal transaction (*Mitra, A. J, C.*) MANGLA GOURI *v.* SAMSON SHALOM. **51 I. C. 24**

——S 54—*Consideration—Connotation of.*

Where the consideration for a sale is the amount of money to be spent later for purposes of a litigation, the fact that the latter amount is not ascertained and definite, does not vitiate the transaction, for it was certainly capable of being ascertained. Dr Gour's notes on "Price" referred to. (*Daniels and Lyle, A. J. Cs.*) BISHESHAR DUYAL *v.* MT. HAR RAJ KUAR. **66 I. C. 622.**

——S. 54—*Consideration— Inadequacy — Effect.*

A sale cannot be said to be a fictitious transaction, if any consideration has passed though inadequate. (*Lindsay, J. C.*) KALA SINGH *v.* RANDHIR SINGH. **21 O C. 97 : 46 I. C. 330 : 5 O. L. J. 208.**

——S. 54—*Consideration—Failure of—Sale if can be treated as gift.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Contract to sell.

The failure of a sale-deed for want of consideration will not make the transfer good as a gift, in the absence of intrinsic evidence in the document itself. The meaning of the document must be found within its four corners. (*Mullick and Atkinson, JJ.*) GHULBAI *v.* BALA BUKSH SETT. **3 Pat. L. W. 206 : 45 I. C. 330 : (1917) Pat. 369.**

Contract to sell.

—— S. 54—*Contract to sell— Right of parties —Right to interest and profits— English and Indian Law.*

Under the English law a contract for sale of real property makes the purchaser the owner in equity of the estate, and where the rights as to payment of interest on the purchase money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the rents and profits of the property as from the time he could have safely taken possession : and interest on the purchase money runs in favour of the vendor from that time. The above rule would not have application to India since S. 54 of the T. P. Act provides that such a contract creates no charge on the land. (*Lord Buckmaster.*) MAUNG SHWE GOH *v.* MAUNG INN. **44 Cal. 542 : 44 I. A. 15 : 21 M. L. T. 18 : 15 A. L. J. 82 : (1917) M. W. N. 117 : 25 C. L. J. 106 : 19 Bom. L. R. 179 : 21 C. W. N. 500 : 5 L. W. 532 : 10 Bur. L. T. 69 : 38 I. C. 938 : 32 M. L. J. 6 (P. C.).**

——Ss. 54 and 14—*Contract to sell—Rule against perpetuities—Contract when repugnant to—Contract Act, S. 37.*

A contract of sale creates no interest in immoveable property and consequently such a contract cannot be vitiated by the rule against perpetuities. *Quaere*— Whether S. 37 of the Contract Act enables an owner of immoveable property to enter into an agreement imposing a restrictive covenant for an indefinite period on the disposition of the said property so as to bind his heirs and representatives ? 39 M. 463 diss. (*Rafique and Piggott, JJ.*) GOPI RAM *v.* JEOT RAM. **45 A. 478 : 21 A. L. J. 480 : L. R. 5 A. 17 : 1923 A. 514.**

—— S. 54—*Contract to sell—Law before the T. P. Act.*

Prior to the T. P. Act, 1882, a contract for the sale of immoveable property created an equitable interest in the land and made the purchaser the owner in equity. Consequently a contract or covenant for pre-emption in such a sale was void as infringing the rule against perpetuities. *Obiter* : The result would be the same under the T. P. Act though a contract for sale does not create an interest in immoveable property. (*Macleod, C.J. and Kanga, J.*) DINKARRAO GANPATRAO *v.* NARAYAN. **24 Bom. L. R. 449 : 1922 Bom. 84.**

—— S. 54—*Contract to sell—Vendee in possession of property—No registered sale deed—Payment of purchase money—Suit by vendor for possession—Defence.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Contract to sell.

Where a person agrees to sell his property to another who is already in possession and who paid the purchase money but there is no registered deed of sale, the vendee can successfully resist a suit by the vendor to recover possession of the property, although the time has passed within which the vendee could have sued to get a sale-deed. (*Macleod, C. J. and Shah, J.*) VENKATESH DAMODAR MOKASH *v.* MALLAPPA BHIMAPPA CHIKKALKI. **46 Bom. 722 : 24 Bom. L. R. 242 : 1922 Bom. 9.**

——S. 54—*Contract to sell—Vendor's widow receiving purchase-money—Rights of adopted son.*

A vendor died after a contract to sell was executed but before the sale was complete. His minor widow received purchase money and delivered possession to the vendee. The widow then adopted the plff. who then sued to eject the purchaser, *held*, the suit is not maintainable. (*Macleod, C. J. and Fawcett, J.*) LAKSHMAN MADHAO *v.* BHAGWAN SINGH. **45 Bom. 434: 60 I.C. 581: 23 Bom. L. R. 55.**

——S. 54—*Contract to sell—Vendee in possession.*

A vendee in possession under a contract of sale capable of being enforced is not liable to be evicted on the ground of there being no registered document in his favour ; he cannot be deemed a trespasser (*Scott, C. J. Batchelor, Heaton, Shah and Marten, JJ.*) BAPU APAJI PATDAR *v.* KASHINATH SADOBA GULMISA. **41 Bom 438 : 39 I. C. 103 : 19 Bom. L. R. 100 (F B.).**

——Ss. 54 and 55—*Contract to sell—Promisee under contract to sell in possession, if can resist suit for possession by vendor*

Quaere :—Whether a promisee under a contract to sell land who is in possession of the property and who has paid a portion of the purchase money, can resist a suit for possession by the vendor? 28 Bom. 466 ; 29 Mad. 336, (F. B.) Doubted. (*Scott, C. J. and Heaton, J.*) GANGARAM GANPATI *v.* LAXMAN GANOBA. **40 Bom. 498 : 37 I. C. 360 : 18 Bom. L. R 455.**

——S. 54—*Contract to sell— Delivery of possession—If defence to suit for possession by vendee.*

S. 54 of the T. P Act did not permit an agreement to convey to be pleaded in bar of plff's. present right to recover possession of a house owned by him, though possession has been delivered. 29 Mad. 336. Ref. (*Batchelor, J.*) IMMANGOWDA *v.* BENEPGOWDA. **39 Bom. 472 : 28 I. C. 946 : 17 Bom. L. R. 335.**

——S. 54—*Contract to sell—Delivery of possession—Effect of.*

When in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, subject to the proviso that specific performance can be obtained between parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. 21 Ch. D. 9, (1892) 2 Q. B. 255: 31 C. L. J. 75 Rel.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Contract to sell.

on. (*Mookerjee and Cuming, JJ.*) GAJENDRA NATH DEY *v* MOULVI ASHRAF HOSSAIN. **36 C. L. J. 48 : 27 C. W. N. 159 : 1923 C. 130.**

——S. 54—*Contract to sell—Conveyance not executed—Transferee in possession—Specific performance.*

When in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents had not been executed the legal position is as if the document is executed provided specific performance can be obtained between the parties to the agreement in the same Court and at the time when the question has to be determined. (*Mookerjee and Panton, JJ.*) SYAM KISHORE DE *v.* DINESH CHANDRA BHATTACHARYA. **31 C. L. J. 75 : 55 I. C. 154 : 24 C. W. N. 463.**

——S. 54—*Contract to sell—Saleable interest.*

A vendee who has paid the consideration and is in possession under a contract of sale has, until the conveyance is registered a saleable interest which is transferable by sale. (*Chatterjee and Newbould, JJ.*) JNAN CHANDRA DAS *v.* RAJANI KANTA PAL. **41 I. C. 850 : 22 C. W. N. 522.**

——S. 54—*Contract to sell—Delivery of possession—Sale deed not executed and registered—Ejectment by vendor.*

Where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been executed the position is the same as if the documents had been executed provided that specific performance can be obtained in the same Court and at the same time as the subsequent legal question falls to be determined. 29 Mad. 336, Diss: 2 C. L. J. 343 ; 13 C. L. J. 271 ; 13 C L. J. 300 ; 16 C L. J. 317 ; 17 C. L. J. 167 Ref. (*Mukerji and Roe, JJ.*) AKBAR FAKIR *v.* INTAIL SAYAL. **29 I. C 707.**

——S. 54—*Contract to sell — Possession under—Purchase with notice of prior contract of sale.*

Where a purchase of land was made by the plff. with notice of a prior contract for sale by the pld's. vendor in favour of the defendant. *held*, that the plff's title cannot prevail as against the rights of the defendant. (*Jenkins, C.J. and Mookerjee, J.*) PUCHHA LAL *v.* KUNJ BEHARY LAL. **18 C. W. N. 445 : 20 I. C. 803 : 19 C. L. J. 213.**

——S. 54—*Contract to sell—Possession, if any right passes.*

A person in whose favour there is only an agreement to sell by the *patnidar*, cannot be regarded as the purchaser of the tenure and is not liable for rent. Mere possession will not render a man liable for rent if the lease has not been assigned to him. 29 Bom. 324, Foll. (*Coxe and Ray, JJ.*) ANANDA CHANDRA ROY *v.* SYED ABDULLA HUSSAIN CHOUDHURY. **20 I. C. 679 : 41 Cal. 148.**

——S. 54—*Contract to sell—Conveyance and contract—Distinction between—Absence of registered deed but possession given—Suit for possession—Defences open—Part performance.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Contract to sell.

What S. 54, T. P. Act enacts is that a conveyance or a document of title to land can only acquire validity and be provable if it is registered. So far from forbidding unregistered contracts for sale, it expressly recognises their existence, denying to them only the creation of an interest in or charge on the land. The section prohibits only unregistered conveyances and not contracts. Where in pursuance of a contract of sale, possession has been given but no registered sale deed executed and thereafter a suit is brought for the recovery of the lands on the ground that there was no registered document, *Held*, a plea in defence that the defendants had a valid contract capable of specific performance is quite good. The defendant can retain possession as part performance of the contract. 29 Mad. 336 and 40 Mad. 1134 overruled. (*Schwabe, C J. Coutts-Trotter and Krishnan, JJ.*). VIZAGAPATAM SUGAR DEVELOPMENT COY *v.* MUTHURAMAREDDY.
33 M. L. T. 53 (H. C.) : 18 L. W. 953 : 46 Mad. 919 : (1924) M. W. N. 1 4(2) : 45 M. L. J. 528 : 1924 Mad. 271 (F. B.)

——— **Ss. 54 and 55**—*Contract to sell—Decree for possession not to be given till title is completed by specific performance—Amendment.*

In case of a contract for sale or exchange of land, decree for possession cannot be given if the title is not completed by specific performance of the contract. A prayer for specific performance of the contract by execution of a conveyance by the defendant can be added in a plaint in a suit for possession. (*Abdur Rahim and Oldfield, JJ.*) SUBRAMANIA IYER *v.* KALYANASUNDARAM IYER.
53 I. C. 283.

——— **S. 54**—*Contract to sell—Attachment of property after the contract—Effect.*

The section does not affect any equitable rights which may arise under a contract of sale. The person in whose favour the contract is made becomes the equitable owner and an attachment can only be subject to such obligation, if subsequent to the contract of sale. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) REBALA VENKATA REDDI *v.* MANGADU YELAPPA CHETTY.
38 I. C. 107 : 5 L. W. 234.

——— **S. 54**—*Contract to sell—Creates obligation to get a conveyance executed—Enforcible against.*

A contract for sale of immoveable property though it does not create a charge or interest in immoveable property, gives the obligee the benefit of an obligation to execute a conveyance under para. 2 of S. 40 which may be enforced against a transferee with notice of that obligation.(*Sadasiva Aiyar and Moore, JJ.*) PUTHENPURAYIL *v.* KANDIYAL. **(1916) 2 M. W. N.31 : 34 I. C. 906 : 20 M. L T. 127.**

——— **Ss. 54 and 55**—*Contract to sell—Breach—Contractee entitled to compensation—Mesne profits.*

Where there has been an agreement to convey properties and a breach of it takes place the contractee is not entitled to mesne profits but is only entitled to compensation for breach of the contract to convey, in addition to suing for specific performance for execution of the conveyance. And the compensation will be the value of the mesne profits which could have been obtained between the date when the breach took place and the date when conveyance was actually executed. (*Sadasiva Aiyar and Moore, JJ.*) SUBBARAYAR *v.* KOTTAYA GOUNDAN.
34 I. C. 737 : (1916) 1 M W. N. 284.

——— **S. 54**—*Contract to sell—Sale of immoveable property—Not binding upon a purchaser—Contract — Joint undivided Hindu family.*

Under S 54 of the T. P. Act a contract for sale of immoveable property does not by itself create any interest in the property. It does not run with the land and is not binding upon a purchaser without notice. Such a contract is outside the scope of Sec. 14, T.P. Act but can be enforceable against the surviving members of a joint undivided Hindu family. (*Sankaran Nair and Oldfield, JJ.*) VARDACHAIAR *v.* VELAYUDA REDDI.
29 I. C. 435 : 18 M. L. T. 83.

——— **S. 54**—*Contract to sell—Delivery of possession—Ejectment suit by vendor—Rights of vendee.*

A contract of sale followed by delivery of possession canot be pleaded in defence to an action in ejectment if the sale-deed is not registered, but the defendant can avoid the difficulty by suing for specific performance and getting the action in ejctment postponed pending the result of the suit. (*Spencer and Coutts Trotter, JJ.*) MANIYAM KUPPANNA *v.* KUPPANA GOUNDEN. **29 I. C. 195 : (1915) M. W. N. 319.**

——— **S. 54**—*Contract to sell—Rule against perpetuities.*

The rule against perpetuities is applicable only in reference to an attempt to create an interest in land. Under the law of India an agreement to sell or reconvey land is an agreement merely personal not creating an interest in land though it has, reference to land. Such an agreement is not within the rule against perpetuities. The English and Indian law on the point distinguished. 24 M. L. J. 84 Diss. (*Ayling and Tyabji, JJ.*) AVULA CHARAMUDI *v.* MARRIBOYIANA RAGHAVALU.
39 Mad. 462 : 28 M. L. J. 471 : 18 M. L. T. 76 : (1915) M. W. N. 596 : 28 I. C. 871. Also [18 M. L. T. 83 : 29 I. C 435.]

——— **Ss.54 and 55**—*Contract to sell -Purchaser if entitled to possession before campensation of conveyance.*

Per *Tyabji. J* —Under Ss. 54 and 55 of the T.P. Act, taken together along with the Registration Act, a person agreeing to purchase a property is not entitled to possession until the completion of the conveyane but he may be so entitled where there is an express agreement to transfer possession independently of the registered conveyance. (*Sankaran Nair and Tyabji, JJ.*) KRISHNAMMAL *v.* M. SUNDERARAJA IYER. **38 Mad. 698 : 15 M. L. T. 103 : 1914 M W N. 200 : 22 I. C. 912 : 1 L. W. 147.**

——— **S. 54**—*Contract to sell—Possession given Rights of vendee.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54 Contract to sell.

Where a person agrees to sell his property to another and receives the purchase money and puts him in possession of the property but there is no registered deed of sale, the vendee can successfully resist a suit by the vendor to recover possession of the property whether or not the time for filing a suit for specific performance has expired. 46 B. 722 ; 3 N. L. R. 72 ; 17 C. P. L. R. 19 Rel. on (*Pridcaux, A. J. C.*) SAMPAT *v.* MOTILAL.
1923 Nag. 177.

——— S. 54—*Contract to sell—Land less than Rs. 100—Delivery of possession.*

Where on a contract for sale of land, worth less than Rs. 100 possession is given in pursuance of an agreement to sell but not after the transfer, the title rests with the vendor. (*Mittra A. J. C.*) BATANAND *v.* MADHO RAO **42 I. C. 288.**

——— S. 54—*Contract to sell—Not effective to pass title.*

Under S. 54 of the T. P. Act a contract of sale of immoveable property of the value of Rs. 100 and upwards unless followed by the registraton of the deed cannot completely transfer property. Admission of execution before a Regisrar not followed by actual registration of the document could pass no title. (*Jwala Prasad, J.*) SHEIK WAZIR ALI *v.* MUSSAMMAT MAHIMUNNISSA.
43 I. C. 777 : 4 Pat. L. W. 72.

——— S. 54—*Contract to sell—If creates interest.*

Obiter:—Under S. 54 a contract for the sale of property does not of itself create any interest or charge on the property. (*Mullick and Jwala Prasad, JJ.*) NAND LAL PAL *v.* NARESH CHANDRA DEB. **41 I. C. 468 : 2 Pat. L. W. 108.**

——— S. 54—*Contract to sell.*

It would seem from the the terms of S. 54 of the T. P. Act that a contract to give immoveable property does not of itself give any interest in the property. The fact that a person takes possession of the land in pursuance of a contrat which could be specifically enforced does not on the principle of decision in *Walsh v. Lonsaale*, (21 Ch. D. 9) give him the same rights as if the land had actually been conveyed to him. (*Chamier, C. J. and Jwala Prasad, J.*) DAYA BHAI *v.* MAHARAJ BAHADUR SINGH. **1 Pat. L. J. 238 : 34 I. C. 482 : 2 Pat. L. W. 333.**

——— S. 54—*Contract to sell—Delivery of possession to vendee—Conveyance not executed—Rights of vendee.*

A purchaser who has actually taken possession under an agreement to sell can retain such possession as against the sellor even though the agreement to sell has not been converted in the actual sale. But this principle is one of equity only It does not amount to the conversion of the agreement of sale, into an actual sale and the enforcement of this equity depends entirely upon the fact of the purchaser having taken actual possession. It is in fact a principle which prevents a fraudulent seller who has actually delivered possession of the thing which he had agreed to sell from taking advantage of the incompleteness of the sale and ousting a person who has obtained a *bona fide* possession. But the principle has no application as against a subsequent purchaser of the property without notice of the agreement. (*Pipon, J. C.*) SAID KHAN *v.* ZARIFKHAN. **71 I. C. 781.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Easement.

——— Ss. 54 and 55—*Contract to sell—Transfer of possession—Effect of.*

Where a person enters into possession of immoveable property belonging to another under an agreement that he was to appropriate the rent, and profits of the property in lieu of interest on money advanced by him, such an agreement does not create any interest in immoveable property in favour of the person so entering into possession and he could not resist a claim for possession by the owner or his transferee. 29 M. 336 ; 8 I. C. 10; 8 L. B. R. 553 foll. (*Robinson, C. J. and Macgregor, J.*) MAUNG PO NGWE *v.* YACOOB ALLY.
11 L. B. R. 319 : 1 Bur. L. J. 33 : 1922 L. B. 25.

——— S. 54—*Contract to sell—Delivery of possession—Ejectment—Defence.*

A person in possession of property under a contract of sale but without a registered sale deed can resist a suit in ejectment by the owner or any person claiming under him under subsequent title. (*Robinson, C. J. and Duckworth, J.*) SANTHAYI AMMAL *v.* M. K. MAHOMED.
65 I. C. 405 : 11 L. B. R. 94.

——— Ss. 54, and 55 (6) (b)—*Contract to sell—If passess interest.*

Contract of sale followed by delivery possession without a registered sale-deed does not create any interest in property in favour of the vendee. Such delivery of possession does not like part-payment create a charge or interest on the land. (*Maung Kin, J.*) MAUNG BO *v.* MAUNG TUN BYU.
33 I. C. 121.

——— S. 54—*Contract to sell—Unregisterd sale deed.*

A sale of land over Rs. 100 without Registration is a mere contract to sell and creates no interest in the land sold. (*Charles Fox, C. J.*) SHAWE ON *v.* MAUNG KYWET. **32 I. C. 536 : 9 Bur. L. T. 45.**

Easement.

——— Ss. 54 and 123—*Easement—Right of way—Creation of.*

The creation or imposition of a right of way whether as a gift or for consideration need not be in writing under Ss. 54 and 123 of the Act. Ss. 54 and 123 were not intended to change the pre-existing law so as to require a writing for their creation or imposition as no writing was previously necessary under English Law, a right of way is said to be in deed and not in livery. (*Chatterji ana Richardson, JJ.*) SITAL CHANDRA CHAUDHURY *v.* ALLEN J. DELANNY.
34 I. C. 450 : 20 C. W. N. 1158.

——— S. 54—*Easement—Transfer of.*

The creation by grant of a right of way over the grantor's land is not a transfer of ownership requiring writing and registration under S. 54, as instead of an existing right of easement being transferred a new easement is imposed on the property. (*Maung Kin, J.*) GUN SONE *v.* CASSIN DALLA. **9 Bur L. T. 222 : 34 I. C. 95 : 9 L. B. R. 24.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Immoveable property.

Immoveable Property.

——S. 54—*Immoveable property—Transfer of right to cut and appropriate plants—Registration.*

The right of cutting and appropriating " plants now standing or that may here after form " on certain land being an interest in immoveable property can only be transferred bya regis'ered instrument. 20 Mad. 58, (F. B , Foll. 35 Mad 95, Dist. (*Wallis and Sankaran Nair, JJ.*) KUTTUVA LATCHUMANA BAGVATHAR *v.* THOPPAI VENKATARAMIER. **15 I. C. 234.**

——S. 54—*Immoveable property—"Tangible immoveable property"—Registration.*

An nndivided share in immoveable property is " tangible immovable property " within S. 54, therefore a sale of such property, if worth less than Rs 100 is not compulsorily registrable.2 O. C. 9 Dist ; 18 Mad. 454, Ref. (*Evans, J. C.*) PEARE LAL *v.* LALA. **11 I. C. 673 : 14 O. C. 161.**

Non-payment of Price.

——S. 54—*Non-payment of price—Effect—Intention.*

The mere fact of non payment of part or whole of the consideration will not make a sale fictitious, if the real intention is that property should pass, but it may often be very strong evidence that the deed was not intended to operate. (*Richards, C. J. and Banerji, J.*) ALAMDAR HUSSAIN *v.* MOTI RAM. **46 I. C. 382 : 16 A. L. J 454.**

——S. 54—*Non-payment of price—Title if passess—Intention of parties.*

The failure to pay the consideration for a conveyance does not defeat the conveyance unless there is an agreement that itshould take effect only if the consideration is first paid. 13 C. W. N. 692. Ref. When the sale has passed to the purchasers the vendor or his representatives may sue for the recovery of the purchase money. (*Mookerjee and Beachcroft, JJ.*) NITAI CHANDRA NASKAR *v.* SRIMATI CHAMPAKLATA DEBI. **51 I.C. 104 : 29 C. L. J. 250.**

——S. 54—*Non payment of price—Effect of.*

The mere non-payment of the consideration for a sale may be an important item to take into consideration to determine whether the conveyance is or is not a real transaction but it does not prevent the passing of title except where the conveyance is drawn in such a form that the transfer is conditional only upon the payment of the consideration money. (*Fletcher and Richardson, JJ.*) KUMUD KAMINI DASI *v.* KHUDUMANI DASI. **47 I. C 202**

——S. 54—*Non-payment of price—Right to possession of property by vendor—When exists.*

The non-payment of consideration, in whole or in part will not affect the vendor's right to possession unless the parties had intended that ownership should not pass till the consideration was paid in full. (*Chitty and Walmsley, JJ.*) JOGENDRA NARAIN ROY *v.* MANMATHA NATH. **34 I. C. 106**

——Ss. 54 and 55—*Non-payment of price—Vesting af title in vendee.*

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 54—Non-payment of price.

In the absence of any intention on the part of the parties to a conveyance that the operation thereof shall be postponed till the consideration had been actually paid, the title vests in the vendee as soon as the conveyance is executed and registered. The right of the vendee to possession under S. 55 (1) (*f*) of the Act, and the right of the vendor to the unpaid purchase money under S. 55 (4) (*b*) can be recognised and enforced in one action The provision of S. 55 do not exclude the application of the principles of equity to such cases. The court might compel the vendee to pay the unpaid money before giving decree possession to the vendee. 11 All. 244, 2 B. 547, 30 All. 125, 27 Mad 28 : Approved. 34 Mad 543 : Not foll. (*Mookerjee and Beachcroft, JJ.*) NIL MADHAB PARHI *v.* HAREN PRASAD PARHI. **17 C. W. N. 1161 : 20 I. C. 325 : 19 C L. J. 146.**

——S. 54—*Non-payment of price—If title passes.*

A sale deed intended to be operative upon registration dose not become inoperative by non-payment of purchase money. But if the intention was that no title shall pass till consideration money has been paid, the law would give effect to such intention. Mere registration of a deed of transfer is not sufficient in itself to convey title but the court has to see what was the intention of the vendor if no consideration passed. The intention may be presumed from circumstances. (*N. Chatterjee and Walmsley, JJ.*) SERAMOT ALI *v.* SAMAD ALI. **19 I. C. 562.**

——S. 54—*Non-payment of price—If invalidates sale.*

Mere non-payment of consideration does not invalidate a sale unless it was agreed that title should not pass until consideration was paid. The intention is to be gathered not only by what the parties say or do at the time of sale but also from their subsequent conduct. (*Chevis,J.*) TARACHAND *v.* NIRMAL DAS. **40 I. C. 489 : 46 P.W. R. 1917.**

——S. 54—*Non-payment of price—Sale—When complete.*

When there is no contract to the contrary title by " Sale " passes to the vendee at the time the contract is made irrespective as to whether or when the price is actully paid. (*Johnstone, C. J. Chevis, Smith, Shadilal and Le Rosssignol, JJ.*) ALLAH DITTA *v* NAZAR DIN. **53 P R. 1916 : 33 I. C. 474 : 51 P. W. R. 1916 (F B.)**

——S. 54—*Non-payment of consideration—Passing of title.*

The title in the property sold passes from the vendor to the vendee upon the due execution and registration of a sale deed unless it is proved that both the parties intended that the payment of price should be a condition precedent to the transfer of ownership. (*Shadi Lal and Leslie, Jones, JJ.*) ABDUL AZIZ KHAN *v.* KALA SHAH. **32 I. C 961 : 50 P. W. R. 1916.**

——S. 54—*Non-payment of price—Receipt for money containing incorrect entry of amount of Mortgage—Intention af parties.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Non-payment of price.

In the case of a sale of land the receipt for the earnest money mentioned an out-and out sale as having been effected, and a sale-deed-which would be drawn up, *held* that the contract was not incomplete. Nor was an incorrect entry of the amount of a mortgage on that property an indication of the completeness of the sale. The fact that such a receipt is not followed by registration of a formal sale-deed is not sufficient to show that the intention of the parties was that title should not pass until the consideration money has been paid in full. (*Shah Din and Chevis, JJ.*) HARDIT SINGH *v.* BEHARI LAL. **104 P W. R. 1915 : 29 I. C. 305 : 9 P.L. R. 1916.**

——— S. 54.—*Non-payment of price.*

Where the intention of the parties is that ownership should pass only on payment of the consideration money, the mere execution of the sale deed will not *ipso facto* convey the property to vendee 27 P. L. R. 1911, Foll. (*Shah Din, J.*) SALAMAT RAI *v.* RAMKRISHEN. **260 P. L. R. 1911: 12 I. C 534 : 249 P. W. R. 1911.**

———S. 54—*Non-payment of price—Passing of property.*

To make a sale complete it is not necessary that the price should be paid, in the absence of proof of an intention in both parties that ownership should not pass till payment of consideration 62 P. R. 1879 ; 132 P. R 1879 ; 40 P. R. 1906 and 15 P. R. 1882 Com. (*Johnstone and Chevis, JJ.*) BHAGAN *v.* ALLAH DITTA. **27 P. L. R. 1911 : 41 P. W. R 1911 : 9 I. C. 547 : 55 P. R. 1911.**

———Ss. 54 and 55—*Non-payment of price—Suit by vendee for possession.*

Deft. sold immoveable property to plff. under a registered deed. The plff. did not pay the purchase money but sued for recovery of possession on the property from the vendor. The Court below passed a decree for possession conditional on plff's paying the purchase money ; on appeal by plff., *held* that the plff. was entitled to an unconditional decree for possession. (*Ayling and Coutts-Trotter, JJ.*) YALKA KRISHNAMMA *v.* KOTTIPALLI MALI. **43 Mad. 712 : 11 L. W. 563 : (1920) M. W. N. 380 : 56 I. C. 530 : 28 M. L. T. 88 : 38 M. L. J. 467.**

——— S. 54—*Non-payment of price—Want of consideration.*

(Per *Kumarasami Sastri, J.*)—In cases of sales and assignment mere non-payment of purchase money would not vitiate the transaction and in such cases so long as the deed stands a person who is not a party to the transaction cannot call in question, the non-payment of consideration ; but where the transaction is impeached on the ground of its being a colourable one or of its being otherwise invalid in law, differant considerations arise 22. I. C. 645 Ref (*Spencer and Kumarasami Sastri, JJ.*) KUMARAPPAN CHETTIAR *v.* NARAYAN CHETTIAR. **35 I. C. 455.**

———S. 54—*Non-payment of price.*

Failure to pay the consideration for a conveyance would not defeat the conveyance unless there is an agreement that it should take effect only if the consideration is first paid. 17 M. 146,

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Non-payment of price.

Foll. (*Benson and Sundara Aiyar, JJ.*) BUSI REDDI PEDDA CHINNAKKA *v.* BUSIREDDI CHINNA CHUMREKKA. **14 I. C. 120.**

——— Ss. 54 and 55—*Non-payment of price—Condition that title should pass only on payment of price—Effect of.*

Where a sale-deed contains express stipulation that if the vendee omits to pay the balance of the purchase money within a particular time, the deed would be treated as null and void, the vendor can avoid the deed if the vendee fails to make the payment agreed upon. By the mere execution of sale deed after the parties had agreed about the price ownership does not pass necessarly in the property sold. It is open to the parties to contract that ownership shall not pass until certain conditions are fulfilled (*Lindsay, J. C.*) BAKHTAWAR RAM *v.* NAUSHAD ALI. **55 I. C. 659 : 7 O. L. J. 240.**

——— Ss. 54 and 55 (4)—*Non-payment of price—Sale—Title passes.*

In a sale of immoveable property title to the property passess to the purchaser when the sale deed is executed although the seller is entitled to a charge on the property for the amount of the purchase money or any portion thereof unpaid to him with interest thereon. Unless there is a contract between the parties title to the property will not pass to the purchaser until the whole amount is paid. But such a contract must be alleged and proved by the party setting it up. (*Das, J.*) JAGDEEP SAHAY *v.* SONU LAL. **52 I. C. 363.**

———S. 54—*Non-payment of price—Burden of proof.*

Where the execution of sale deed is admitted, it is for the vendor to prove that consideration did not pass in spite of the recital that it passed. But where the vendee, does not get possession under the deed, for a long time the burden of proving that consideration passed is shifted to him. (*Maung Kin. J.*) ACHAYA *v.* MAUNG PO SAING. **13 Bur. L T. 112 : 61 I C. 634 : 10 L. B. R. 264.**

———Ss. 54 and 55 (4) (b)—*Non payment of price—Right of vendor.*

The mere fact of non-payment of the purchase money does not prevent the passing of the ownership to the purchaser, who can notwithstanding non-payment, maintain a suit for possession, the only remedy of the unpaid vendor in such case being to sue for the unpaid purchase money. (*Maung Kin, J.*) SOMASUNDARAM CHETTY *v.* SHWE BWA **13 Bur. L. T. 26 : 57 I. C. 948 : 10 L. B. R. 133.**

———S. 54—*Non-payment of price—Title of vendee—Remedy of seller.*

Non-payment of the purchase money does not prevent title passing to the vendee and the only remedy of the vendor is a suit for recovery of the purchase money. (*Maung Kin, J.*) VENKATACHALLUM *v.* MG. TUN E. **45 I. C. 860 : 12 Bur. L. T. 98.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Priority.

Priority.

——S. 54—*Priority—Oral sale—Immoveable property of Rs. 100 in value—Transfer of possession subsequent registered sale.*

The plff. purchased a piece of land worth more than Rs 100 under an oral sale, paid the price and took possession. Subsequently the owner sold the same property under a registered sale-deed to the deft. who had the notice of the first sale before the deed was registered In a suit by plff. *Held*, that the plff. was entitled to get a registered sale deed from the owner on the basis of the oral sale, and that the sale to the deft. was void (*Macleod, C. J. and Heaton, JJ.*) DESAI BHAI JORABAI *v.* ISHWAR JESHING.

22 Bom. L. R. 764 : 57 I. C. 447 : 44 Bom. 586.

——S. 54—*Priority—Effect of possession.*

When the usufructuary mortgagee of certain property purchased by an unregistered deed of sale, the equity of redemption, and subsequently another person purchased the same by a registered sale deed the latter could claim no priority over the former if he was aware of the possession of the former, and did not make enquiries as to the nature of his possession. (*Holmwood and Chapman, JJ.*) UMESH CHANDRA *v.* UMESH CHANDRA. **18 I. C. 46.**

——S. 54—*Priority — Unregistered sale—Vendee under—Position of.*

A vendee claiming title under a deed of sale, which for want of registration cannot be received in evidence, is in the position of a trespasser and is liable to ejectment by a vendee under a subsequent deed of sale duly registered 34 Mad. 64 Ref. (*Shah Din, J.*) UTTAM CHAND *v.* JANJI RAM. **110 P. R. 1918 : 48 I. C. 390 : 24 P. L. R. 1919.**

——S. 54—*Priority—Equity of redemption—Oral sale—Subsequent purchaser under registered document.*

The second purchaser who was aware of the fact of the oral sale of the same property can not claim the title to the same though he claims it through a registered deed. (*Shah Din and Chevis, JJ.*) HARDIT SINGH *v.* BEHARI LAL. **104 P. W. R. 1915 : 29 I. C. 305 : 9 P. L. R. 1916**

——S. 54—*Priority—Notice—Person other than vendor in possession.*

The circumstance that a person other than the vendor is in possession is sufficient to put a purchaser on enquiry as to the nature and extent of his interest and if that enquiry is not pursued the purchaser will be affected with notice of the title if any under which the possession is enjoyed, or of any contract the person in possession might have entered into, for the purchase of the property. (*Sadasiva Aiyar and Moore, JJ.*) PUTHENPURAYIL *v.* KAUDIAL. **(1916) 2 M. W. N. 31 : 34 I. C. 906 : 20 M. L. T. 127.**

——S. 54—*Priority — Unregistered sale—Delivery of possession.*

To pass title to the vendee under a sale by an unregistered instrument, mere delivery of possession in pursuance of the sale is enough provided that such delivery of possession was effected with the consent, express or implied, of the vendor, and in connection with and to give effect to the contract of sale But such a sale has no priority over a vendee claiming under a registered instrument, if the latter, at the time of the sale to him, had no notice of the prior sale and the prior delivery of possession. (*Oldfield and Tyabji, JJ.*) AMMANI *v.* JAGANNATHA.

(1915) M. W. N. 442 : 30 I. C. 7 : 18 M. L. T. 103.

——S. 54—*Priority—Registration Act, S. 50—Prior unregistered sale deed followed by delivery of possession—Subsequent registered sale deed.*

In case of a conflict between a prior unregistered sale deed for less than Rs. 100 accompanied by delivery of possession and a subsequent registered deed of sale, under T. P. Act S. 54 and Registration Act S. 50, the latter registered instrument prevails over the prior unregistered one notwithstanding delivery of possession under the former. S. 54 of the T. P. Act, virtually abolished optional registration of sales in which a document was actually executed. (*White, C. J. and Oldfield, J.*) MOHAMED KASIM ALI *v.* MIR GULAM ALI. **22 I. C. 285 : 15 Cr. L. J. 29 : (1914) M. W. N. 55.**

——S. 54—*Priority—Unregistered purchaser—Subsequent registered purchaser.*

An registered purchaser of land, where part of the consideration was paid in discharge of a mortgage, does not step into the shoes of the mortgagee as against a subsequent registered purchaser unless there was an intention on his part to keep the mortgage alive (*Maung Kin, J.*) MA KYAN *v.* MYANG SHIN.

34 I. C. 47 : 9 Bur. L. T. 234.

Registration.

——S. 54—*Registration—Sale-deed registered—Agreement to reconvey not registered, if evidence.*

Where a registered sale-deed is executed and almost the same day an agreement to reconvey is executed but not registered, *held*, that the agreement along with the sale-deed should be treated as a part of the same transaction and therefore can not be admitted in evidence without registration, if the value is not less than Rs. 100 (*Macleod, C. J. and Shah, J.*) BALA KHANDAPPA *v.* SADASHIV. **64 I. C. 294 : 23 Bom. L. R. 1066.**

——S. 54—*Registration—Transfer of—Mortgage debt.*

A mortgage debt is immoveable property for purposes of S. 54 of the T. P. Act and where such a debt is transferred by an instrument in writing and the value of the interest transferred is one hundred rupees or more, registration is necessary under the Registration Act (*Richardson and Beachcroft, JJ.*) SAKHIUDDIN SAHA *v.* SONAULLA SARKAR. **27 C. L. J. 453 : 45 I. C. 986 : 22 C. W. N. 641.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Registration

——S. 54—*Registration—Effect of.*

When the deed has been executed and registered, the non payment of consideration does not affect the passing of property. (*Chitty and Walmsley, JJ.*) JOGENDRA NARAIN ROY *v.* MANMATH NATH. **34 I. C. 106.**

——Ss. 54, 118 and 123—*Registration—Transfer of immoveable property worth more than Rs. 100—Future maintenance—Provision for—Writing and registration.*

A transfer of land worth more than Rs 100 by a husband to his wife to be enjoyed by the wife during her lifetime in lieu of her claim for future maintenance can be made without writing. The expression "price" in S. 54 of the T. P. Act means money. Such money need not necessarily be handed over in current coin at the time but includes money which might be already due or might be payable in future. (*Schwabe, C. J. Coutts Trotter and Kumaraswami Sastri, JJ.*) MADAM PILLAI *v.* BADRAKALI AMMAL

45 Mad. 612 : 42 M. L. J. 410 : 15 L. W. 464 : 30 M. L. T. 274 : (1922) M. W. N. 345 : 1922 Mad. 311.

——S. 54—*Registration.*

A transfer by a Hindu widow of her life-interest to the reversioners for a price exceeding Rs. 100 requires an instrument in writing and registered. 37 Mad. 423, Foll. (*Sadasiva Aiyar and Moore, JJ.*) BETI REDDI SOMI REDDI *v.* BETI REDDI TATAYYA. **34 I. C. 748.**

——S. 54—*Registration—Sale by guardian not registered—Minor's suit 3 years after majority—Not barred.*

Where a guardian of a minor sold property on behalf of the minor without registering the sale-deed, the minor sued to recover possession more than 3 years after attaining majority. *Held*, that no title passed under the sale, that the defendant was a mere trespasser and that the plaintiff can bring an action against the trespasser and his suit was not barred. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) SANI KOMMU VELIGONDAREDDI *v.* ANDRA NARAYYA. **33 I. C. 436.**

——S. 54—*Registration — Transfer of—Mortgage debt.*

A transfer of a mortgage is a transfer of the mortgage debt with all attendant securities and not a sale of immoveable property and therefore no registration is required under the Act therefor. (24 M. 449, Dist.) (*Wallis, J.*) DWARKA DAS *v.* DANAKOTI AMMAL.

23 I. C. 129 : 15 M. L. T. 198

——Ss. 54 and 129—*Registration—Transfer of property in lieu of dower.*

A transfer of immoveable property in lieu of dower amounts to a sale and can only be effected by a registered document under S. 54, T. P. Act. When it is not so effected, the transaction conveys no title to the transferee. (*Kotwal, A. J. C.*) FAHMID-UN-NISSA *v.* HIRALAL.

64 I. C. 126 : 17 N. L. R. 103.

——S. 54—*Registration — Sale-deed — Time of operation—Time of execution or registration—Registration Act, S. 47.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Sale of equity of redemption.

Though under S. 47 of the Registration Act a document when registered becomes operative as from the date of its execution, a transfer of ownership under S. 54 of the T. P. Act can be effected only by a registered conveyance and a suit in respect of the property after execution but before registration of the sale-deed will not be affected thereby. (*Coutts and Sultan Ahmed, JJ.*) TILAKDHARI SINGH *v.* GOUR NARAIN.

5 Pat. L. J. 715 : 2 Pat. L. T. 95 : 59 I C. 290 : 1921 Pat. 122.

Sale of equity of redemption.

——S. 54—*Sale of equity of redemption—Assignment of mortgagor's right—Registration.*

The interest of a simple mortgagee, is plainly an intangible thing within S. 54 of the T. P. Act and the transfer of such interest must be made by a registered instrument. 18 M. 454 ; 24 M. 449, Ref. (*Chamier, J.*) MUTSADDI LAL *v.* MUHAMMAD HANIF. **15 I. C. 853 : 10 A. L. J. 167.**

——S. 54—*Sale of equity of redemption—Unregistered document—Actings of the parties—Doctrine of part performance.*

In 1906 plaintiffs conveyed certain property to the defendants under a registered sale for Rs. 1,200 subject to condition that if the plaintiffs repaid a sum of Rs. 125 per annum for 10 years the defendants were to reconvey the property to the plaintiffs. The plaintiffs were to lose all right to the property in case of default in payment. Subsequently in 1908 the parties arrived at an arrangement under which the defendants agreed to take possession of a portion of the property absolutely free from liability to redemption and the plaintiffs were to take possession of the remainder free from the mortgage debt. The arrangement was embodied in a document which was not registered. Defendants took possession of the property allotted to them under the arrangement and the plaintiffs continued in possession of the remainder as before. In 1919 the plaintiff sued to redeem the property in the possession of the defendants who set up the unregistered agreement as their defence. *Held* that the transaction of 1908 though embodied in an unregistered agreement had still been acted upon by the parties and under the equitable doctrine of part performance the plaintiffs were estopped from going behind the agreement and claiming redemption.

Per Marten, J. To establish the application of the principle of part performance it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. A mere payment of the purchase money, for instance, is insufficient. 42 I. A. 1 ; 23 Bom. L. R. 506 : 40 A. 187 foll. 29 M. 336 : 40 M. 1134 not foll. (*Marten and Fawcett, JJ.*) SANDU VALJI *v.* BHIK CHAND. **47 Bom. 621 : 25 Bom. L. R. 381 : 1923 Bom. 473.**

——S. 54—*Sale of equity of redemption—Registration.*

The transfer of an equity of redemption could be effected only by a registered instrument. (*Scott, C. J. and Shah, J.*) SAKHARAM KESHEO *v.* RAMCHANDRA GANESH.

38 I. C. 819 : 18 Bom. L. R. 980. (note.)

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Sale of equity of redemption.

——— S. 54—*Sale of equity of redemption—Razinama and complementary* kabuliat—*Effect.*

Where a mortgagor executed a *razinama* relinquishing occupancy rights in the mortgaged land in favour of his mortgagee who executed a complementary *kabuliat*, the transaction amounts to a transfer of the equity of redemption by the mortgagor to the mortgagee. (*Beaman and Hayward, JJ.*) VENKAJI NARAYAN KULKARNI *v.* GOPAL RAMCHANDRA DESHPANDE.
39 B. 55 : 27 I. C. 613 : 16 Bom. L. R 718.

———S. 54—*Sale of equity of redemption—Compromise.*

A *razinama* by a mortgagor in favour of mortgagee relinquishing occupancy rights in the mortgaged land and a corresponding *kabuliyat* given by the mortgagee operate to transfer the equity of redemption from the mortgagor to the mortgagee. (*Scott, C. J. and Batchelor, J.*) DAGON *v.* SAKHARAM. **27 I. C. 594 : 16 Bom. L. R. 719 (Note.)**

———S. 54— *Sale of equity of redemption by unregistered sale— Discharge of mortgage —Registration Act,* S. 49.

Per *Chitty, J.*—The property sold being in the possession of the mortgagee the sale was of the equity of redemption and being a sale of an intangible thing could under S. 54 of the T. P. Act only be effected by a registered document. The conveyance was therefore inadmissible to prove the sale or to show when and how the mortgage was satisfied. *Per Walmsley, J.*—The sale was nevertheless ineffective for want of delivery of possession. 24 Mad 449 Rel. (*Chitty and Walmsley, JJ.*) SHEIKH HUSTAMA *v.* SHEIKH JAMIR. **52 I. C. 558 : 23 C. W. N. 513.**

———S. 54—*Sale of equity of redemption—Registration.*

A purchase of the right of redemption of a possessory mortgage cannot be effected except by a registered sale deed. (*Walmsley and Panton, JJ.*) RAMNARAYAN GOPE *v.* KULA CHANDRA CHAKRABURTY. **49 I. C. 426.**

———S. 54—*Sale of equity of redemption—Land worth less than Rs.* 100—*Mortgage over Rs.* 200—*Registration.*

A deed recited that Rs. 200 was due on a previous mortgage and that the mortgagor had now received Rs. 55 more and had sold his rights, *held* that it was a sale deed of the equity of redemption for less than Rs 100 and hence registration was optional. (*Chevis, J.*) FEROZEUD-DIN *v.* MUSSAMAT MEHRAN. **194 P. W. R. 1913 : 21 I. C. 563 : 332 P. L. R. 1913.**

———S. 54 (2)—*Sale of equity of redemption.*

The right to redeem a mortgage comes within the expression "other intangible thing" in cl. (2) of the section and as such cannot be transferred without registration. (*Richards, C.J. and Tudball, J.*) FATEHALI *v.* MAHOMED. **68 P.W.R. 1913 : 18 I. C. 818 : 197 P. L. R. 1913.**

———Ss. 54 and 118—*Sale of equity of redemption—Sale or exchange — Mortgagee — Adverse possession.*

If two persons mutually exchange two things and fix the values of the exchanged things in current coin they must be held to have effected sales and paid prices and not merely to have effected an exchange or barter. A convevance of land in consideration of moneys already due to the vendee by the vendor is either a "sale" or an "exchange" 13 M L. J. 500, not appr. 34 B. 139 Ref. A purchase made orally by a mortgagee of the equity of redemption in a land other than that mortgaged to him, as consideration for forgoing a portion of the mortgage money, the transaction amounts to a sale and it is invalid for want of Registration. The mortgagee continues to remain in possession only as mortgagee after the said oral sale and that the mortgagor is entitled to redeem the property within the statutory period. The mortgagee could not assert a title by adverse possession as from the date of the oral sale. (*Miller and Sadasiva Aiyar, JJ.*) TRIYA PUTHIRA PADAYACHI *v.* MUTHU KUMARASWAMI PADAYACHI. **37 Mad. 423 : 12 M.L.T. 425 : 15 I. C. 343 : (1912) M. W. N 854 : 23 M. L J. 339.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Sale when complete.

———S. 54—*Sale of equity of redemption —Unregistered deed.*

A mere right of redemption, being intangible property, cannot pass by an unregistered deed. (*Lindsay, J. C.*) MAHENDRA *v.* CHANDRAPAL.
63 I. C. 284 : 24 O. C. 155.

Sale of reversion.

———S. 54— *Sale of reversion—Meaning of—Registration.*

Reversion is the undisposed interest in land which reverts to the grantor after a certain time. Where the property transferred is in the possession of tenants, the deed of transfer requires registration though the consideration be less than Rs. 100 as the interest conveyed is merely a reversion. (*Batchelor and Hayward, JJ.*) BHASKAR GOPAL *v.* PADMAN HIRA. **40 Bom. 313 : 33 I.C. 267 : 18 Bom. L.R. 8.**

Sale when complete.

———S. 54—*Sale when complete* — Rajinama *and* kabuliyat *if constitutes transfer.*

A *rajinama* and *kabuliyat* do not by any means completely take the place of a sale deed. Before they really do evidence a transfer of ownership there must be either evidence or indications furnished by lapse of time and possession and so forth and that there was in fact an intention to transfer ownership. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of facts proved. (*Macleod, C. J. and Heaton, J.*) CHANDANIMAL HAMBIRMAL *v.* BHASKAR WAMAN.
59 I. C. 114 : 22 Bom. L. R 1079.

———S. 54—*Sale when complete— Razinama by mortgagor.*

A razinama by a mortgagor and a complementary *kabuliat* by a mortgagee transfers the equity of redemption from the one to the other. (*Beaman and Hayward, JJ.*) VENKAJI NARAYAN KULKARNI *v.* GOPAL RAMCHANDRA. **39 Bom. 55 : 27 I. C. 613 : 16 Bom. L. R. 718.**

———S. 54—*Sale when complete—Admission and release and whether title passes by—District Board governed by the Bengal Local Self Govt. Act.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Sale when complete.

A sale certificate (not registered) was issued to the purchaser of land for a certain sum but the property not having been specifically described therein, the District Board Chairman executed in favour of the purchaser a registered release deed which did not purport to be a conveyance and was stamped as a release *Held* (1) the documents conferred no valid title to the purchaser since the unregistered sale certificate is not a valid conveyance and the registered release deed could not transfer title because title to land could not pass orally when the statute requires a deed; (2) Even construing the release deed as a conveyance, the sale was invalid inasmuch as these two documents though sealed and signed by the Chairman, did not fulfil the conditions laid down in S. 138 (*d*) of the Bengal Local Self-Govt. Act; (3) that these two documents did not constitute even a valid contract for sale as it was not sanctioned at a meeting of the Board or exempted in accordance with the provisions of Rule 103 of the Act; (4) that the purchaser, who came to Court as plaintiff for a declaration of title to and for recovery of possession of land must succeed on proof of a valid title thereto but is not entitled to ask for a postponement of the case to enable him to complete his title by bearing a valid and properly executed instrument of title from the District Board. (*Mookerjee and Chatterjee, JJ.*) MATHURA MOHAN SAHA *v.* RAMKUMAR SAHA.
43 Cal 790 : 23 C. L. J. 26 : 35 I. C. 305 : 20 C. W. N. 370.

——**S. 54**—*Sale when complete—Sale less than Rs 100 does not pass title in the absence of either registration or delivery of possession.*

An auction purchaser of a property worth less than hundred rupees, admitted the claim of the plff to the property purchased by him and by an unregistered deed agreed to hold it as a tenant for five years after which the entire rights were to vest in the plff In a suit to recover possession, *Held*, that as the property was worth less than Rs. 100 either the delivery of possession or registration of the deed was necessary and the document amounted to neither and therefore the plff had no title to the property. (*Stephen and Richardson, JJ.*) KONNORMAL OSWAL *v.* NABIN CHANDRA DAS. **12 I. C. 228.**

——**S 54**—*Sale when complete—Option to purchase land—Subject to sanction—Effect.*

Where under a lease the lessee has the option of purchasing the proprietary rights of certain Govt. land on payment of the purchase money subject to sanction being obtained from the Commissioner the sale is not complete till the purchase money is paid, the Commissioner's sanction amounting only to a sanction to purchase (*Shah Din and Chevis, JJ.*) KISHAN CHAND *v.* GURDIT SINGH. **112 P. L. R. 1911 9 I. C. 833. 235 P. W. R. 1911**

——**S 54**—*Sale when complete—Sale—Possession not delivered — Consideration not paid—Registration alone does not pass title.*

If neither the sale deed nor the property sold is delivered to the purchaser and no consideration has passed, mere registration of the deed of sale does not pass the title to the purchaser (*Jwala Prasad, J.*) RAJU MAHTON *v.* HOSSAINI MIAN. **59 I. C. 171.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54 - Title by delivery.

——**S. 54**—*Sale when complete—Registration—Effect of.*

Where there has been a registered deed of sale, in the absence of fraud, the deed passes the title to the interest conveyed. (*Maung Kin, J.*) K. Y K. M. CHETTY FIRM *v.* S. N. V. R. CHETTY FIRM. **34 I. C. 125 : 9 Bur. L. T. 199.**

——**S. 54**—*Sale when complete.*

Where the vendee has done his part by paying off the purchase money the vendor must do everything in his power to complete the title of vendee but under S. 54 of the Transfer of Property Act nothing but a registered deed will give a complete title. (*Maung Kin, J.*) MYA BWIN *v.* MAUNG KYA ZAN. **33 I. C. 761.**

Title by delivery.

——**S. 54**—*Title by delivery—Sale of property worth less than Rs. 100—Delivery.*

Under S. 54 of the Act, in case of a sale of property under the value of Rs. 100, in the absence of a registered instrument there must be real delivery of the property. (*Viscount Finlay.*) BISWANATH PRASAD *v.* CHANDRA NARAYAN.
48 Cal. 509 : 63 I. C. 770. 48 I. A. 127. (P. C.)

——**S. 54**—*Title by delivery—Mode of delivery—Actual delivery necessary — Constructive not sufficient.*

Where immoveable property worth less than Rs. 100 is sold by unregistered instrument, real delivery is necessary. Constructive delivery resulting from the delivery of the instrument is not enough. (*Viscount Finlay.*) MATHURA PRASAD *v.* CHANDRA NARAYAN.
18 A. L. J. 385 : 33 C. L. J. 440 : 23 Bom. L. R. 629 : (1921) M. W. N 370 : 60 I. C. 833 : 14 L. W 1 : 2 Pat. L. T. 397 : 25 C. W N 985 : 29 M. L T 413 : 40 M L. J. 489. (P.C.)

——**S. 54**—*Title by delivery— Land worth more than Rs. 100—Subsequent registered sale to another—Effect.*

Under an oral sale of land for Rs. 150, the consideration being paid the possession was passed and mutation of names in the revenue record effected Ten years later the vendor sold the same under a registered document to the plaintiff who sued for possession *Held*, even though specific performance of the first agreement was barred, the possession obtained thereunder was a complete answer to plaintiff's claim. (*Shah, A. C. J and Covajee, J.*) LAXMAN MANKAR KASAR *v.* RAVJI DHANSINGH PATIL. **25 Bom L R 1027 : 1924 Bom. 150.**

——**S. 54**—*Title by delivery—Sale less than Rs. 100 in value*

Section 54 still leaves it open to the parties desirous of doing so to make a valid sale of immoveable property of less than Rs 100 by oral contract and delivery of possession. (*Beaman and Macleod, JJ.*) DAWAL PIRANSHAHA *v.* DHARMA RAJARAM. **19 Bom. L. R. 622 : 41 I. C. 273 : 41 B. 550.**

TRANSFER OF PROPERTY ACT (IV OF 1882).
S. 54—Title by delivery.

——S. 54—*Title by delivery—Registration.*

The mere registration of a sale deed is not sufficient to prove a transfer of property to the vendee, especially if it be not accompanied by delivery thereof. (*Chitty and Walmsley, JJ.*) JOGENDRA NARAYAN ROY *v.* MANMATHA NATH. **34 I. C. 106.**

——S. 54—*Title by delivery—Land worth less than Rs.* 100.

Under S. 54 the sale of immoveable property of less than Rs. 100 in value may be made either by a registered instrument or by delivery of the property. (*Sharfuddin and Coxe, JJ.*) UDIT NARAIN CHOWDHURY *v.* MATHURA PRASAD. **29 I. C. 413.**

——S. 54—*Title by delivery—Land worth less than Rs.* 100—*Unregistered deed—Delivery of possession.*

Where a transfer of immoveable property worth less than Rs. 100 is effected by an unregistered instrument and possession of the property is given to the vendee, the sale is valid. 22 Cal. 179 ; 20 O. C. 33, Foll. (*Stuart, J. C.*) GULAB *v.* LALTU SINGH. **51 I. C. 561 : 22 O. C. 58.**

——S. 54—*Title by delivery—Property worth less than Rs.* 100.

Where a sale of immoveable property of less than Rs. 100 is effected by an unregistered instrument, delivery of possession affords a good title. (*Kanhaiya Lal, A. J. C.*) HRIDAY BIHARI *v.* RAM RANI KUNWAR. **37 I. C. 20 : 8 O. L. J. 460.**

——Ss. 54, 55 and 100—*Title by delivery—Property worth more than Rs.* 100.

A purchaser of immoveable property worth more than Rs. 100 without a registered deed but in possession after payment of purchase money acquires no interest in the property except a charge over it. (*Young, J.*) MAUNG PE GYI *v.* VELLIAN CHETTY. **33 I. C. 610 : 8 Bur. L. T. 268.**

——Ss. 54 and 55 (6) (b) and 59—*Title by delivery—Property worth more than Rs.* 100—*Mortgage or sale.*

Plffs. put defts. in possession of two plots five or six years before suit on payment of Rs. 100 in respect of each plot. There was no registered instrument of sale or mortgage. The plffs. contended it to be an abortive mortgage ; the defts. contended it to be an abortive sale. *Held*, in either case, the plffs. were entitled to possession on payment of Rs. 200 as an oral transfer could effect neither a sale nor a mortgage. The defts. were entitled only to a charge on the land under S. 55 (6) (*b*) for the money paid by them. (*Ormond J.*) MAUNG YEIK *v.* MAUNG PE TO. **29 I. C. 886 : 8 Bur. L. T. 70.**

——S. 54—*Title by delivery— Unregistered sale deed—Effect.*

Non-registration of a sale deed does not render the sale ineffectual if the vendee has paid the price and obtained possession ; for, thereby the vendee obtains an equitable right that the vendor should complete the title by a formal registered conveyance. (*Twomey, J.*) MAUNG PYA *v.* MAUNG O ZA. **9 I. C. 770 : 4 Bur. L. T. 40.**

TRANSFER OF PROPERTY ACT (IV OF 1882),
S. 54—Title by estoppel.

Title by estoppel.

——S. 54—*Title by estoppel—Actings of parties.*

Even in the absence of a registered conveyance or mortgage the acts of the parties and the change of position resulting therefrom might estop the true owner from asserting title to the properties. (*Lord Dunedin.*) JAGANNATH PRASAD SINGH *v.* ABDULLAH. **45 Cal. 909 : 16 A. L. J. 576 : 5 Pat. L W 83 : (1918) M W. N.406 : 22 C. W. N. 891 : 8 L. W. 163 : 24 M. L. T. 62 : 28 C. L J. 192 : 45 I. C 770 : 20 Bom. L. R. 851 : 45 I. A 97 : 35 M. L. J. 46 (P. C.)**

——S. 54—*Title by estoppel — Estoppel by conduct—Sale — Unregistered — Informality of transaction—Part performance of contract not embodied in statutory form—Defects cured by equity—Acting of the parties—No* locus penitentiae.

It is true that there is a *locus penitentiae* or a power of resiling from an incomplete agreement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not been adhibited in an authentic shape. But this is the situation when the parties stand on an engagement not final or complete. But where the acts and conduct of the parties are founded on, *rai interventus* raises a personal exception which excludes the plea of *locus penitentiae*. In certain proceedings in 1873, the parties, the mortgagor and mortgagee, entered into a compromise, whereby a part of the equity of the redemption was to be released in the mortgagee's favour who were to keep the property entirely and the remainder to be retained by mortgagor free from incumbrance. No conveyances were executed but the parties acted upon the agreement and enjoyed the properties separately. In a suit about 1908 for redemption of the mortgages of 1848 and 1871, *Held*, that because of the conduct of the parties, who had acted upon the compromise, the mortgages cannot be re-opened, though the mortgages being executed before the T. P. Act came into force, no writing was necessary for their execution. (*Lord Shaw.*) MOHAMED MUSYA *v.* AGHORE KUMAR. **42 Cal. 801 : 42 I. A. 1 : 17 Bom. L R. 420 : 21 C. L. J. 231 : 2 L. W. 258 : 28 I. C. 930 : 19 C. W. N 250 : 13 A. L. J. 229 : 17 M. L. T. 143 : (1915) M W N. 621 : 28 M. L. J. 548 (P. C.).**

——S. 54—*Title by estoppel—Acting of the parties—Defect cured.*

An agreement for the sale of the equity of redemption was unregistered but effect was given to it by the parties and the mortgagees had dealt with the property as owners. *Held*, that under the circumstances the right of redemption had been actually extinguished by the agreement which, though unregistered, had been acted upon by the parties. (*Richards, C.J. and Bannerjee, J.*) LALMAN PANDE *v.* SHEO NARAIN PANDE. **1 U.P.L.R. (H.C.) 124 : 51 I.C. 865 : 17 A L.J. 737.**

——Ss. 54 and 118—*Title by estoppel—Actings of parties—Exchange of property—Unregistered.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Title by estoppel.

Where a contract of exchange is unregistered but the parties have been for long acting upon its terms, the transaction becomes binding upon them in spite of non-compliance with the provisions of Ss. 54 and 118 of the T. P. Act. (*Piggott and Walsh, JJ.*) SALAMAT-UR-ZAMIN *v.* A. MASHA ALLAH KHAN.

40 All. 187 : 43 I. C. 645: 16 A. L J. 98.

——— **Ss. 54 and 123**—*Title by estoppel.*

Where the widow of a person jointly entitled with another to the possession of certain immoveable property, agreed to the other's name alone being entered in the *khewat* though she made a statement to the effect that that she was the heir of her husband, *held*, that a suit by her for possession of her husband's share was maintainable as the statement in the mutation proceedings could not be said to have complied with Ss. 54 and 123 of the T. P. Act. (*Richards, C. J. and Bannerjee, J.*) RAM PRASAD *v.* BEDO

13 I. C. 436.

——— **S. 54**—*Title by estoppel—Part performance, doctrine of—Transferee put in possession—Title deeds not executed—Effect of.*

A transferee, put in possession of the land, even if the title-deed is not executed, and registered, stands in the same position as if the document has been executed provided specific performance can be obtained by the parties. (*Mookerjee, C.J. and Fletcher, J.*) HARIPADA GHOSE *v* KRISHNA NIROD GHOSE, **61 I. C 687: 33 C. L. J. 437.**

——— **S. 54**—*Title by estoppel—Admission of ownership.*

Where a sale can be effected only by a registered instrument mere admission of ownership cannot give any title. 29 Bom. 323, Foll. (*Coxe and Ray, JJ.*) ANANDA CHANDRA ROY *v.* SYED ABDULLA HOOSAIN, **20 I.C. 679: 41 Cal. 148.**

——— **Ss. 54 and 118**—*Title by estoppel—Unregistered exchange—Actings of parties—Part performance.*

Plff. and deft. exchanged adjacent plots of land worth more than Rs. 100 each by an unregistered deed both *bona fide* believing they had effected a valid transfer. Possession was taken by each party and deft. had built considerable structures on the property exchanged. Plff. was aware of the progress of the building and even took an additional sum of money for the excess area found to have been given in exchange. In a suit by plff. to eject the deft., *held*, by a majority that the plff was not estopped from recovering his plot owing to the absence of a registered deed as required by Ss. 54 and 118 of the T. P. Act. But the plff. must pay compensation under S. 51 of the T. P. Act before recovery. 29 Mad. 336, Foll. 42 Cal. 801; 39 Mad. 509, Dist. *Per Abdur Rahim, J.*—Plff. was estopped by his conduct from recovering his plot in spite of the want of a registered deed of exchange. (*Abdur Rahim, Sadasiva Aiyar and Napier, JJ.*) RAMANATHAN CHETTY *v.* RAGUNATHAN CHETTY.

40 Mad. 1134: 6 L.W. 300: 22 M L T. 173: (1917) M. W. N. 757 : 43 I. C. 138 : 33 M. L. J. 252.

——— **Ss. 54 and 118**—*Title by estoppel—Unregistered deed.*

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 54—Vendee in possession.

There is no estoppel contrary to Ss. 54 and 118, (*Wallis, C. J. and Seshagiri Aiyar, J.*) RAMANATHAN CHETTY *v.* RAMASWAMI CHETTY.

(1915) M. W. N. 1043: 19 M. L. T. 114: 32 I. C. 5 : 30 M. L. J. 1.

——— **S. 54**—*Title by estoppel—Registration—Transfer of rights.*

In the absence of a registered instrument, no waiver or transfer of rights can be recognised in case of immoveable property after the passing of the T.P. Act. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KANDASWAMI *v* RANGASWAMI.

36 Mad. 564: 12 M.L.T. 211: (1912) M.W.N. 882: 16 I.C. 30: 23 M.L J. 301.

Transfer for dower.

——— **S. 54**—*Transfer for dower—Sale or gift—Gift in lieu of dower.*

According to Mahomedan Law a gift by a husband of landed property to his wife in lieu of her dower is a sale. A deed of gift in lieu of dower below Rs. 100 does not require registration, although the real value of the property transferred may be more than Rs. 100. (*Kensington, C.J. and Shah Din, J.*) NUR MUHAMMAD *v.* ALLAH WASAI.

5 P.W.R. 1915 : 27 I.C 562: 35 P.L.R. 1915.

——— **S. 54**—*Transfer for dower—Dower—Registration.*

A transfer of immoveable property of the value of over Rs. 100 in lieu of dower is a sale and requires to be made by a registered instrument. (*Evans, J.C.*) ASALAT FATIMA *v.* SHAMBHU DAYAL

11 I C. 928: 14 O.C. 214.

Vendee in possession.

——— **S. 54**—*Vendee in possession—Land valued at less than Rs. 100—Registered document.*

The sale of land valued at less than Rs. 100 to a usufructuary mortgagee already in possession thereof without a registered instrument, is invalid. (*Richardson and Walmsley, JJ.*) TILAK BRITTIAL *v.* RUNDESWAR **41 I. C. 8.**

——— **S. 54**—*Vendee in possession—Delivery of property—Sale of immoveable property below Rs. 100 in value.*

Where a sale of immoveable property of value less than Rs. 100 is made to a mortgagee in possession, the fact that the boundaries were pointed out, the mortgage document was handed to the mortgagee with the endorsement "I have not been able to pay you the debt, I make over the patta to you, You have your name registered". . . . . amount to sufficient delivery for the purpose of S. 54 of the T. P. Act, 3 O. C. 207, Ref. (*Jenkins, C. J. and Woodroffe, J.*) SONAI CHUTIA *v.* SONARAM CHUTIA. **34 I. C. 692 : 20 C.W.N. 195.**

——— **S. 54**—*Vendee in possession—Delivery of possession—Oral sale to mortgagee.*

An oral sale of property below Rs. 100 in value to a person already in possession of the property is valid without actual delivery of possession. 34 Cal. 207, not Foll. The effect of Ss. 4 and 54,

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 54—Vendee in possession.

T. P. Act, is only to make all sale deeds of immoveable property compulsorily registrable, irrespective of the value of the property. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) MUTHUKARUPPAN SAMBAN *v.* MUTHU SAMBAN.
38 Mad. 1158: 1 L.W. 754: 16 M.L.T. 344: (1914) M.W.N. 768 : 25 I.C. 772 : 27 M.L.J. 497.

——S. 54—*Vendee in possession—Delivery of possession.*

Under S 54 a vendor can make an effectual delivery of the property sold to the purchaser though the latter may already have its physical possession in some other capacity. 12 N.L.R. 3. Foll. (*Stanyon, A.J.C.*) DINANATH *v.* MANBODHI.
36 I.C. 547: 12 N.L.R. 139

——S. 54—*Vendee in possession—Delivery of possession.*

Even where the vendee is already in possession as lessee there may be delivery of property to him within the meaning of the section if the vendor, by appropriate declaration and acts, converts the position of the tenant into one as purchaser. (*Batten, A. J. C.*) THAKUR DAS *v.* SOBHAGCHAND.
32 I.C. 233: 12 N.L.R. 3.

——S. 54—*Vendee in possession—Suit for ejectment—Contract to sell, if a defence.*

A purchaser in possession of a land, can plead, a contract to sell, in defence to a suit for ejectment, if he can prove the contract, and is ready to do his part of the contract. (*Twomey, C.J., Young and Rigg, JJ.*) KARAMATH KHAN *v.* LACHMI ACHI. **61 I.C. 675: 13 Bur. L.T. 119: 10 L.B.R. 241 (F.B.)**

Miscellaneous.

——S. 54—*Entry in—Revenue Papers—No title.*

The mere fact that a man succeeds in getting his name recorded in the revenue papers confers no title on him. (*Richards, C. J. and Bannerjee. J.*) KUNWAR SEN *v.* DARBARI LAL.
34 I.C. 171: 38 All. 411.

——S. 54—*Contract by guardian of minor—Voidable—Deposit—Suit for refund.*

Where a guardian enters into a contract for the purchase of immoveable property, it is not void but only voidable. If such a contract falls through the default of the purchaser, the vendor need not return the earnest money, if he is willing to perform his part. In a suit for refund, the questions of mutuality and enforceability by specific performance do not arise. (*Drake Brockman, J.C.*) MANGULAL *v.* MT. NAHI.
67 I.C. 806: 19 N.L.R. 131.

——S. 54—*Conveyance—Agreement.*

One *L* was entitled to succeed to property which was in the hands of remote reversioners. *A* entered into an agreement with *L* that he should supply funds for litigation and that *L* should give half of the property to *A*. Pending the suit *L* died. *Held*, that *A* could not proceed with the suit as the agreement was neither a sale nor a conveyance. (*Piggott, A.J.C.*) INDAR SINGH *v.* KESHRI SINGH. **10 I. C. 179 : 14 O. C. 139.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Contract to the contrary.

——S. 55.
Caveat Emptor.
Contract to the contrary.
Covenant for title.
Disclosure of defect.
Execution of conveyance.
Production of title deeds.
Purchase money left with vendee.
Relief against forfeiture.
Right to possession.
Sale subject to incumbrances.
Vendee's charge.
Vendor's lien.
Miscellaneous.

Caveat Emptor.

——S. 55 (2)—*Caveat emptor—Applicability in the Punjab.*

Though the T. P. Act does not extend to the Punjab, the provisions thereof are generally applied to decisions there. The rule of *caveat emptor* has became obsolete and where the sale has failed on account of defect in title, the sale price must be returned even in the absence of a covenant guaranteeing title. (*Martineau and Zafar Ali, JJ.*) KANSHI RAM v. JAIMAL SINGH.
1923 Lah. 590.

——S. 55 (1) (a) and (2)—*Caveat emptor—Contract to the contrary—Auction sale—Notification of conditions of sale.*

Where the conditions of an auction sale were duly printed and published and the would-be purchasers were distinctly told to satisfy themselves as to the nature of the property sold there is a "Contract to the contrary" and the principles of S. 55 of the T. P. Act regarding the existence of an implied covenant do not apply. If after the purchase it turns out that the property was subject to incumbrances, the doctrine of *caveat emptor* applies to the case. (*Broadway and Abdul Quadir, JJ.*) MT. JUGLO *v.* ABDUL SALAM.
65 I. C. 734.

——S. 55 (2)—*Caveat emptor—Doctrine of—Applicability of, to India.*

The rule of *caveat emptor* has no application in India to sales by private contract. (*Piggott, J. C. and Lindsay, A. J. C.*) BRIJ MOHAN LAL *v.* MUNNI BIBI. **13 I. C. 803 : 14 O. C. 343.**

Contract to the contrary.

——S. 55, cl, (4) (*b*)—*Contract to the contrary—Vendor's lien—Unregistered mortgage—Effect of.*

The vendor of certain property took a mortgage for the balance of the purchase money but the mortgage deed was not registered. *Held*, there was only a simple money bond, that there was no contract to the contrary within S. 55 (4) of the T. P. Act and that the vendor's lien had not been lost. (*Phillips and Krishnan. JJ.*) RANGANAYAKI AMMAL *v.* PARTHASARATHY AIYANGAR. **54 I. C. 503 : 10 L. W. 550.**

——S. 55 (2)—*Contract to the contrary—Scope of.*

Buyer having notice of facts indicating that the seller had no power to transfer the interest professed to be conveyed, does not imply a contract

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Contract to the contrary.

to the contrary. (*Abdur Rahim, Sadasiva Aiyar and Napier, JJ.*) ADIKESAVAN NAIDU *v.* GURUNATHA CHETTI. **40 Mad. 338 : (1917) M.W. N. 171 : 5 L. W. 425 : 22 M. L. T. 300 : 39 I. C. 358 : 32 M. L. J. 180. (F. B.)**

——— S. 55 (4) (b)—*Contract to the contrary—Vendor's lien—Lien for unpaid purchase money.*

The recital by the vendor in the sale deed that he has received full consideration does not necessarily amount to evidence of a contract inconsistent with the existence of the statutory lien for unpaid purchase money. 25 I, C 208, Ref. (*Lindsay, J. C.*) MUKTA PERSHAD *v.* ABDUL RAZAQ. **33 I. C. 527.**

Covenant for title.

Applicability.
Compromise of dispute as to title.
Continuing breach.
Cost of litigation.
Covenant for quiet enjoyment.
Deficiency in extent.
Eviction by paramount title-holder.
Notice of defect.
" Professes to transfer."
Refund of purchase money.
Registered conveyance.
Miscellaneous.

Covenant for title—Applicability.

——— S. 55 (2)—*Covenant for title—Applicability—Sale by guardian—Minor if bound by covenant in sale—Liability in damages.*

A guardian of a minor cannot personally bind the minor by covenants entered into on his behalf. The 2nd deft. as guardian sold properties alleged to belong to the minor, 1st deft. The vendee was subsequently dispossessed as the 1st deft. had no right to the property. In a suit by the vendee for damages *held*, that the minor was not liable but that the guardian must be deemed to have entered into the covenant personally and hence liable, 19 C. 507, Foll. (*Seshagiri Aiyar and Moore, JJ.*) SRINIVASA THATHACHARLU *v.* NOOLAMMA. **11 L. W. 246 : 55 I. C. 436 : (1920) M. W. N. 340.**

——— S. 55 (2)—*Covenant for title—Applicability—Contract of sale.*

S. 55 (2) applies not only to cases of completed sales but also to agreements to sell. (*Abdur Rahim, Sadasiva Aiyar and Napier, JJ.*) ADIKESAVAN NAIDU *v.* GURUNATHA CHETTY. **40 Mad. 338 : (1917) M. W. N. 171 : 5 L. W. 425 : 22 M. L. T. 300 : 39 I. C. 358 : 32 M.L.J. 180. (F. B.).**

——— S. 55 (2)—*Covenant for title—Applicability—Transfer of mortgage debt.*

There is no implied covenant for title on a transfer of a mortgage debt as it cannot be regarded as a transfer of immoveable property and no suit for damage for breach thereof will lie. (*Srinivasa Aiyangar, J.*) SAMU PATHAN *v.* CHIDAMBARA ODAYAN. **2 L. W. 918 : (1916) M. W. N. 7 : 31 I. C. 179 : 29 M. L. J. 454.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Covenant for title—Covenant for quiet enjoyment.

Covenant for title—Compromise of dispute as to title.

——— S. 55, Cl. (2)—*Covenant for title—Compromise of dispute as to title—Suit for damages.*

Where *A*, the vendor undertook to indemnify *B*, the vendee against any loss and on a claim by a third person B, gave notice to *A* who paid no attention to it and *B* subsequently compromised the suit with the claimant by payment of a certain amount and sued *A* for damages, *held*, that *B* was competent to settle the dispute and to sue *A* for damages. (*Henry Richards and Bannerjee, JJ.*) DURGA KUR *v.* KALI CHARAN. **35 All. 168 : 18 I. C. 521 : 11 A. L. J. 184.**

Covenant for title—Continuing breach.

——— S. 55 (2)—*Covenant for title—Continuing breach—Cause of action.*

In the case of a continuing covenant for title, the cause of action for damages for breach of the covenant arises when the title is finally declared to be in some person other than the vendor. (*Ayling and Seshagiri Aiyar, JJ.*) VENKATA RAMAYA *v.* LANKA RAMABRAHMAN. **24 M. L. T. 104 : 8 L. W. 142 : 47 I. C. 924 : 35 M. L. J. 124.**

——— S. 55 (2)—*Covenant for title—Continuing breach—Damages—Limitation.*

The implied covenant for title under S. 55 (2) is broken on the date of the sale and does not admit of a continuing breach. 31 M. 542 ; 11 A. 27 : 25 B. 593 Rel. But a vendee who is subsequently dispossessed can sue as on a failure of consideration. (*Miller and Bakewell, JJ.*) RAMANATHA AIYAR *v.* OZHALOOR PATHIRISERRI RAMAN. **14 M. L. T. 524 : (1913) M. W. N. 1029 : 21 I. C. 740 : 1 L. W. 110.**

Covenant for title—Costs of litigation.

——— S. 55 (2)—*Covenant for title—Costs of litigation.*

Where a vendor of land covenants to indemnify the purchaser against all losses that the latter might be put to in defending his title or enjoyment of the lands from adverse claims, the vendor is bound to pay the purchaser not merely taxed costs as between party and party of a suit in which he had to defend his title but the actual costs incurred by the purchaser in maintaining legal title provided they are not unreasonable. (*Wallis, C. J. and Seshagiri Aiyar, J.*) VENKATARANGIAH APPA RAO *v.* VARAPRASADA RAO. **43 Mad. 898 : 28 M. L. T. 188 : 60 I. C. 164 : 39 M. L. J. 316.**

Covenant for title—Covenant for quiet enjoyment.

——— S. 55 (2)—*Covenant for title—Covenant for quiet enjoyment—Contract to the contrary to be clear and express—Formal recitals—Sale by widow.*

The covenant for title implied under S. 55, Cl. (2) of the T. P. Act is not got rid of except by the use of clear and unambiguous expressions showing that the vendor did not mean to guarantee that he had a good title to the property conveyed. 1 L. W. 8 ; 15 C. W. N. 655, Rel. The recital in a sale-deed of the previous transactions forming the links in the vendor's chain of title

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Covenant for title—Covenant for quiet enjoyment.

disclosing a defect in title to the property conveyed has not the effect of a contract displacing the ordinary covenant for title and does not defeat the vendee's right on the basis of the covenants implied by law. (1914) M.W. N. 376: 2 L.W. 458: 29 I. C. 747, Ref. A deed of sale recited " you the (vendee) shall henceforward be enjoying the same hereditarily and with right of alienation by gift, sale or otherwise as you please removing the hindrances to this arising from my agnates or kings or neighbour. I shall see that the sale is given effect to in your favour without any obstruction". The usual covenant for title in the Telugu country was " free of obstruction arising from agnates, kings, or others," *Held*, that there was an express covenant for title in the deed, and that there was also a covenant for quiet enjoyment. (*Abdur Rahim and Phillips, JJ.*) MAHOMED ALI SHERIFF SAHIB *v.* VENKATAPATHI RAJU.

11 L. W 537 : 39 M. L. J. 449 : 60 I. C. 235 : 27 M. L. T. 304.

——S. 55—*Covenant for title—Covenant for quiet enjoyment—Dispossession—Suit for damages.*

Where a vendee is dispossessed, limitation runs from the date of failure in a suit for damages. **(1921) M. W. N. 634.**

——S. 55—*Covenant for title—Covenant for quiet enjoyment.*

On a sale of land a covenant for quiet enjoyment and freedom from encumbrance should, in the absence of any express covenant on the point and independently of the T. P. Act, be held to be implied under English law it is always so. (*Kotval, A. J. C.*) KESHRIMAL *v.* KADHA.

55 I. C. 152.

Covenant for title—Deficiency in extent.

——S. 55 (2)—*Covenant for title—Deficiency in extent.*

No action can be maintained either at law or equity for damages on account of the quantity or quality of the subject-matter of the sale unless such error amounts to a breach of some contract or warranty or unless some fraud or deceit has been practised on the purchaser. It amounts to a clear case of a breach of contract of warranty if a vendor professes to sell under his sale deed land burdened only by a yearly tenancy, whereas it is burdened by a permanent tenancy. (*Scott, C.J. and Beaman, J.*) VISHVANATH *v.* BALA KALKU KAPADI. **34 I. C. 147 : 18 Bom. L. R. 292.**

——S. 55 (2)—*Covenant for title—Deficiency in extent.*

Where in the case of a sale of house, there was a description of its boundary as well of the quantity of land conveyed ; the area of the house was found short and the buyer wanted to resile from the contract : *held*, the vendor plainly guaranteed everything set forth about the house and the guarantee was expressed in emphatic terms a defect of shortness is substantial and the plaintiff is justified in withdrawing from contract. (*Campbell, J.*) NARAIN DASS *v.* JAWAHIR SINGH.

69 I. C. 827 : 50 P. L. R. 1922.

——S. 55 (2)—*Covenant for title—Deficiency in extent—Rights of purchaser.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Covenant for title—Notice of defect.

A covenant for title is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed but a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. A suit to recover compensation money for deficiency in the extent of the land conveyed is not a suit for damages for breach of a covenant for title but one for partial failure of consideration. A suit lies at the instance of the purchaser under S. 14 of the Specific Relief Act for specific performance of so much of the contract as can be performed with compensation in money for the deficiency. The passing of a regular conveyance does not bar this right of the purchaser. (*Sadasiva Aiyar and Napier, JJ.*) JANGA VENKATAREDDI *v.* JAMAL AHMED SAHEB.

18 M. L. T. 364 : 29 I. C. 394 : (1915) M. W. N. 422 : 29 M. L. J. 122.

Covenant for title—Eviction by paramount title holder.

——S. 55 (2)—*Covenant for title—Eviction by paramount title holder—Contract Act (IX of 1872), S. 73.*

A vendee evicted from a portion by a third person with a superior title can claim damages from a vendor of a specified area of land sold at a certain rate with reference to the area. The measure of damages is the price of the land at the date of the eviction. (*Shadi Lal and Martineau, JJ.*) JAI KISHAN DAS *v.* ARYA PRITI NIDHI SABHA.

58 I. C. 757 : I Lah. 380.

Covenant for title—Notice of defect.

——S. 55 — *Covenant for title— Notice of defect—Right of vendee.*

A sale deed cannot operate against a prior contract to sell by the vendor where the vendee has taken the sale with notice of the prior contract. The vendee can only stand in the shoes of the vendor and where the latter has received part of the purchase money the former will be entitled to receive only the balance on payment of which he will be bound to convey the property to the promisee under the contract. (*Scott, C. J. and Heaton, J.*) GANGARAM GANPATI *v.* LAXAMAN GANOBA.

40 Bom. 498 : 37 I. C. 360 : 18 Bom. L. R. 455.

——S. 55—*Covenant for title—Notice of defect—Duties of purchaser—Inquiry of vendor's title.*

Vendee should not rely upon the paper-title disclosed by the sale deed in favour of the vendor but also should make inquiries of the person in actual possession of the property sold. If he does not make any inquiry of the person in possession he would be bound by such title as the said person possesses. (*N. G. Chandavarkar Kt. and Heaton, JJ.*) VENKAPPACHARYA SRINIVASACHARIA *v.* YAMNASANI RADHA.

35 Bom. L. R. 269 : 10 I. C. 817 : 13 Bom 256.

——S. 55—*Covenant for title—Notice of defect—Duty of vendor.*

The purchaser is entitled to recover damages in spite of his knowledge as to the defects in the title of the vendor, and the manager of a joint Hindu

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Covenant for title--Notice of defect.

family who has agreed to sell immoveable property belonging to himself and the minor members of the family, is personally liable for failure to perform the contract when it is found that it is not binding on the minors. The vendee has a right to get a refund of the earnest money paid by him. (*Broadway and Abdul Qadir, JJ.*) LACHHMAN DAS *v.* JOWAHIR SINGH.
44 P. L. R. 1922.

———S. 55—*Covenant for title—Notice of defect--Vendee knowing the defective title--Effect.*

Mere knowledge on the part of the vendee of the defective title of the vendor would not defeat the vendee's right, which can only be defeated if the vendor indicates by clear words that he does not guarantee his title to the property. The recital in a deed of previous transactions forming the links of the chain of the vendor's title does not amount to a warning to the vendee that his vendor's title is defective. (*Abdur Rahim, O. C. J. and Phillips, J.*) MAHAMMAD ALI SHERIFF *v.* BUHDHARAJU VENKATAPATHI RAJU.
11 L. W. 537 : 27 M. L. T. 304 : 60 I. C. 235 : 39 M. L. J. 449.

———S. 55 (2)—*Covenant for title—Notice of defect—Damages.*

A vendee's knowledge that the vendor's title was defective will not preclude him from suing for recovery of his purchase money if he is deprived of the property sold. (23 I. C. 570 ; 27 I.C. 989, F.) (*Ayling and Tyabji, JJ.*) VELLAYAPPA ROWTHEN *v.* BAVA ROWTHEN. **29 I. C 747.**

———S. 55 (2)—*Covenant for title—Notice of defect.*

The rule that in spite of his knowledge of a defect in the title of the vendor, a vendee is in case of dispossession is entitled to sue his vendor onthe implied covenant for title under S 55 (2) of T.P. Act, applies only to cases of conveyance of absolute or full title. If, howevre what is conveyed is not full title (as for example a sale of *Karamkari* tenure which by its nature is inalienable) and the vendee is ejected by a person with a superior title, the vendor cannot be made liable on any implied covenant of title. (*Ayling, J.*) VATAKKA CHATHILINGATH TAVAZHI *v.* RAMASWAMI PATTER.
27 I. C. 889 : 2 L. W. 155.

———S. 55 (4)—*Covenant for title—Notice of defect.*

The vendee can rely upon the covenant contained in the deed, and is not bound to exercise due diligence in discovering the facts. Mere knowledge or suspicion regarding the defect in title does not prevent an express or implied contract from operating in the absence of a contract to the contrary. (*Mittra, A.J.C.*) SHALIGRAM *v.* NARAYAN. **4 N. L. J. 221.**

———S. 55 (2)—*Covenant for title—Notice of defect—Remedy of vendee.*

Where a vendor sells land as belonging to him and his title turns out to be defective, he is liable in damages for breach of covenant for title, whether the vendee knows about the defect in title or not. It is only when there is a contract

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55--Covenant for title--Refund of purchase-money.

to the contrary that the implied covenant does not apply 40 M. 338 Ref. (*Mittra, A. J. C.*) SHALIGRAM SADASHEO PANDE *v.* NARAIN.
45 I. C. 669.

Covenant for title—"Professes to transfer."

———S. 55 (2)—*Covenant for title "Professes to transfer".*

When the interest which a seller "professed" to transfer was not larger than what he actually possessed, he is not liable for any breach of covenant for title. (*Sadasiva Aiyar and Moore JJ.*) VATAKA CHATHILINGATH *v.* RAMASWAMI PATTER. **32 I.C. 984.**

——— S. 55 (2)—*Covenant for title—"Professes to transfer".*

Where a person transfers immoveable property or makes a sale of goods, he thereby, though he may be a minor, represents to the purchaser that he has authority to transfer or sell ; the vendor is deemed to positively assert his power to transfer in the former case under S. 55 of the T. P. Act. (*Crouch and Hayward, A. J. Cs.*) SOBHANNA POHUMAL *v.* BACHAL.
34 I. C. 890 : 9 S. L. R. 214.

Covenant for title—Refund of purchase-money.

———Ss. 55 (1) (g) (2)—*Covenant for title—Refund of purchase money—Sale of property free from incumbrances—Moneys paid to discharge mortgages or to avoid execution sale—Right to be repaid.*

Where properties are sold free from incumbrances and the purchaser pays off mortgages on the property or pays off decrees obtained on those mortgages, he is entitled to a refund from the purchaser of those moneys spent by him to clear his title. (*Lord Buckmaster.*) NATHU KHAN *v.* THAKUR BURTONATH SINGH. **42 M. L. J. 444 : 23 C.W. N. 514: L. R. 3 P. C. 82 : 20 A. L. J. 301 : 24 Bom. L. R. 571 : 15 L. W. 635 : (1922) M. W. N. 323 : 35 C. L. J. 417 : 1922 P. C. 176.**

——— ———S. 55 (1) (g)—*Covenant for title—Refund of purchase money—Vendee paying off encumbrances—Effect.*

Where the vendor intended to sell and the vendee intended to buy a thing different from what, as a matter of fact, was sold and bought under S. 55 (1) (g), it is the duty of the vendor to pay off all encumbrances unless the vendee had agreed to do so. If, as a matter of fact, an encumbrance which ought to have been paid off by the vendor under S. 55 of the Transfer of Property Act was paid off by the vendee, under the provisions of S. 69 of the Contract Act, the vendor would be liable to repay. (1922) P. C. 176: 6 Bom. L. R. 832 : 30 All. 172 followed. (*Walsh and Ryves, JJ.*) RAM GOPAL *v.* THAKUR BAKHTAWAR SINGH. **1922 All. 508.**

———S 55—*Covenant for title—Refund of purchase money—Suit for return of earnest money—Charge.*

Where defendant having failed to perform his part of a contract to sell, the plaintiff is entitled for getting back his purchase money and to a

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Covenant for title—Refund of purchase-money.

charge on the property for the amount. (*Shah, A. C. J. and Crump, J.*) KARSANDAS PURUSHOTTAMDAS *v.* GOPALDAS. **25 Bom. L. R. 1144 : 1924 B. 282.**

——S. 55 (2)—*Covenant for title—Refund of purchase money— Condition for return of earnest money on non-approval of title by purchaser's solicitor.*

Where an agreement for purchase and sale contained a condition for the return of the earnest money on the vendor's title not being approved by the vendee'solicitor *held*, that the vendee was entitled to get back the earnest money and his solicitor's costs if the solicitor on reasonable grounds disapproved of the title. (*Choudhuri, J.*) W. P. ABRO *v.* PRAMOTHONATH. **24 I. C. 452 : 18 C. W. N. 568.**

——S. 55 (2)—*Covenant for title—Refund of purchase money— Attachment of property by third party—Claim by purchaser—Dismissal—Suit for purchase money.*

A vendor agreed to refund the purchase-money with interest in case the vendee was dispossessed. A third party attached the property in execution of a money-decree obtained against the vendor. The purchaser laid a claim which was dismissed. Without suing to establish his title he sued the vendor to recover the purchase-money. *Held*, that the condition provided for in the deed did not arise and the suit should be dismissed. (*Stephen and Richardson, JJ.*) TASSADUK HOSSAIN KHAN *v.* ABTAB HOSSAIN KHAN. **15 I. C. 334.**

——S. 55—*Covenant for title— Refund of earnest money—No interest can be claimed on.*

If a contract of sale cannot be carried out for want of defect in title of the vendor, the earnest money can be recovered but no interest can be allowed. The knowledge of the purchaser of such defect makes no difference. (*Broadway and Abdul Qadir, JJ.*) LACHHMAN DAS *v.* JOWAHIR SINGH. **70 I. C. 250 : 44 P. L. R. 1922.**

——S. 55 (2)—*Covenant for title—Refund of purchase money—Failure of consideration—Interest.*

On failure of consideration, return of the purchase-money can be claimed with interest. If the plff. pays off an adverse claimant and retains the property even then he can sue for return of the purchase-money. (*Wallis, C. J. and Ayling, J.*) ARVANULACHARIAR *v.* ARAMANAI KRISHNA AIYAR. **50 I. C. 815.**

——S. 55 (1) and (2)—*Covenant for title—Refund of purchase money—Suit for.*

If in a suit brought by a third party against a vendor and vendee of immoveable property the former admitted the claimant's title and the suit was decreed, he cannot in a subsequent suit for the recovery of the purchase money paid to him by the vendee, plead that the former suit was wrongly decided. In such a case there is a failure of consideration for the contract of sale without any fault on the part of the purchaser and the vendor is liable to refund. Per *Imam, J.* :—

TRANSFER OF PROPERTY ACT (IV OF 1882), S 55—Covenant for title—Miscellaneous.

The expression of " pak saf " means a flawless title ; 15 C. W. N. 655 Ref. (*Roe and Imam, JJ.*) BHATTU RAM *v.* GANGA PRASAD GOPE. **47 I. C. 37 : 3 Pat. L. J. 358.**

Covenant for title—Registered Conveyance.

——S. 55 (2)—*Covenant for title—Registered conveyance.*

Under S. 55 (2), T. P. Act, there is an implied covenant for title and possession in all registered conveyances, on a breach of which damages can be claimed under Art. 116, Lim. Act. (*Chowdhury, J.*) KANOK DASI *v.* SRIBARI GOSWAMI. **52 I. C. 269.**

——S. 55 (2)—*Covenant for title—Registered conveyance.*

In all registered conveyances after the passing of the T. P. Act a covenant for title under S. 55 (2) is implied. (*Sadasiva Aiyar and Napier, JJ.*) ARUNACHALA AIYAR *v.* RAMASWAMI AIYAR. **38 Mad. 1171 : 1 L. W. 849 : 27 M. L. J. 517 : 25 I. C. 618 : 16 M. L. T. 397.**

——S. 55 (2)—*Covenant for title—Registered conveyance.*

When there is no express covenant to the contrary the statutory guarantee for good title is always implied in every sale under S. 55 of the Act and discovery of defects in title does not extinguish the purchaser's right to be indemnified. (*Seshagiri Aiyar, J.*) SUBBARAYA REDDIAR *v.* RAJAGOPALA REDDIAR. **38 Mad. 887 : 15 M. L. T. 240 : 23 I. C. 570 : (1914) M. W. N. 376.**

——S. 55 (2)—*Covenant for title—Registered conveyance.*

S. 55 (2) imports a covenant for title in every case of a transfer. (*Sadasiva Aiyar, J.*) RAGAVA AIYANGAR *v.* SAMACHARIAR. **(1914) M. W. N. 57 : 22 I. C. 42 : 1 L. W. 8.**

Covenant for title—Miscellaneous.

——S. 55 -*Covenant for title—Contract of sale—Want of marketable title— Breach—Damages.*

In an ordinary contract for the purchase and sale of land where the vendor contracts to make out a marketable title the Court may find an implied agreement that, without any fault on the part of the vendor, if he was not able to make out a marketable title, the bargain will be off and that the vendor would have only to pay the purchaser's cost of the agreement and the inspection of the title-deeds. However if the vendor is found to be guilty of default of a deliberate nature in breaking the contract the damages will be calculated on a higher scale the measure of which will be the difference between the contract price and the market price on the date of the breach. (*Macleod, C.J. and Shah, J.*) VALLABHDAS *v.* NAGARDAS. **23 Bom. L. R. 1213.**

——S. 55—*Covenant for title—Implication.*

Even where there is no express covenant for title in a contract of sale, S. 55 (2), T. P. Act, implies one and can be based thereon a suit for damages. (*Sanderson, C. J. and Richardson, J.*) INJAD ALI *v.* MOHINI CHANDRA ADHIKARI. **27 C. W. N. 1025 : 1924 Cal. 148.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Covenant for title—Miscellaneous

——— S. 55—*Covenant for title—Vendee's title if affected by belief of vendor.*

The title of the vendee cannot in any way be affected by the belief of his vendor as to the source of his title. The vendee's title is good if that of his vendor is good whatever be the source from which his title had been derived. (*Mookerjee and Beachcroft, JJ.*) BEPIN BEHARI *v.* PANCHANAN BHATTACHARYA. **24 I. C. 262.**

——— S 55 (1) (b)—*Covenant for title—Breach—Damages.*

Where the 1st deft. purchased certain specific land from a co-parcener of a joint Hindu family and pending a suit by the other co-parceners for a partition, sold the same to the plff. and the plff. sued the deft. for the recovery of the property allotted to the latter's vendor in lieu of the land sold by him, or, in the alternative, for damages. *Held*, that though the 1st deft. may be entitled to whatever was substituted by the decree for partition of the land the plff. could not claim any such equity against the 1st deft but was only entitled for breach of warranty of title to damages assessed at the enhanced value of the land. (*Abdur Rahim and Oldfield, JJ.*) DHADA SAHIB *v.* MAHOMED SULTAN SAHIB. **(1920) M. W. N. 710 : 12 L. W. 603 : 59 I. C. 311 : 44 M. 167: 39 M. L. J. 706.**

——— S. 55 (4) (b)—*Covenant for title—Vendor without title at the time of completing the agreement.*

If the vendor of any particular property has no title to convey the land, on the date when the purchaser has agreed to pay the balance of the purchase money, the purchaser is not bound to tender the balance and he is also entitled to treat the contract as at an end. (*Twomey, J.*) COHEN *v.* MG BA CHIT. **14 I. C. 811 : 5 Bur. L. T. 45.**

——— S. 55—*Covenant for title—Title to property—Doubts of vendee.*

In the case of a purchaser while he is not on the one hand at liberty to raise doubts which are not rational, he cannot be compelled on the other hand to take a title which will expose him to litigation or hazard. The question whether the doubt is reasonable must be determined on the facts of each case. (*Madgavkar, A. J. C.*) KHEMCHAND RATANCHAND *v.* DHALOMAL. **15 S. L. R. 180 : 1922 Sind 33.**

Disclosure of Defect.

——— S. 55 (1) (a)—*Disclosure of defect—Failure—Effect.*

If a seller does not disclose to his buyer any material of which he is aware but of which the buyer is not aware, it amounts to fraud. But if he had no knowledge of it himself, the position is different. (*Sanderson, C. J. and Richardson, J.*) NURSING DASS KOTHARI *v.* CHITOO LALL MISSER. **50 Cal. 615 : 1923 Cal. 641.**

——— S. 55 (1) (b)—*Disclosure of defect—Proof of title—Abstract.*

Where the conditions of sale mentioned an abstract of documents of title, and commenced with an indemnity bond and did not disclose a permanent lease, *held* that the document of title with which the abstract commenced must be one which

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Execution of conveyance.

is a proper root of title, that the indemnity bond was in no sense a root of the title that the permanent lease ought to have been expressed in the abstract and that the purchaser was not bound to accept such a title. (*Fletcher, J.*) JOGEMAYA DASEE *v.* AKHOY COOMAR DAS. **18 I. C. 954 : 40 Cal. 140.**

——— S. 55 (1)—*Disclosure of defect—Knowledge of purchaser—If can be imputed.*

Under Indian Statute Law, the question of knowledge of the purchaser does not affect his rights to be indemnified ; in the case of a conveyance, *prima facie*, unimpeachable, a knowledge of defects in title cannot be imputed to the purchaser because, he was aware of a release deed which, when legally construed, would throw a cloud on the vendor's title. (*Seshagiri Aiyar, J.*) SUBBARAYA REDDIAR *v.* RAJAGOPALA REDDIAR. **38 Mad. 887 : 15 M. L. T. 240 : 23 I. C. 570 : (1914) M. W. N. 376.**

——— S. 55 (1) (a)—*Disclosure of defect—Damages for failure to disclose defect.*

The defect in the title is a material defect under S. 55 (1), and where such defect not apparent and very difficult to be discovered with ordinary care is not disclosed by the seller, he commits fraud and is liable to pay damages to the buyer, in the form of return of purchase money. (*Jwala Prasad, J.*) SHEO RAM MAHOTON *v.* THAKUR MAHTO. **58 I. C. 529.**

——— S. 55 (a), (5) and (6)—*Disclosure of defect—Effect of existence of defect—Remedy of purchaser.*

A purchaser is not entitled, in case of existence of undisclosed encumbrances, to avoid the contract, but can retain purchase money. (*Foxe, C. J. and Twomey, J.*) MAUNG PO TE *v.* MAUNG SHWE KO. **35 I. C. 373 : 10 Bur. L. T, 35.**

Execution of Conveyance.

——— S. 55 (1) (d)—*Execution of conveyance—Duty of purchaser to tender conveyance before obtaining the title-deeds.*

It is the duty of the purchaser to tender a conveyance to the vendor for execution as required by S. 55 (1) (*d*) of the T. P. Act, and until such tender is made or waived the purchaser has no right to obtain the title-deeds. (*Viscount Haldane.*) MA HNIT *v.* MAUNG PO PU. **31 C.L.J. 87 : 11 L. W. 253 : (1920) M. W. N. 176 : 27 M. L. T. 139 : 55 I. C. 791. 2 U. P. L. R. 43 (P. C.)**

——— S. 55—*Execution of conveyance—Agreement to sell—Co-sharer—Right to get a conveyance.*

Where a co-sharer in certain property has agreed to sell certain property it is open to the vendee to insist on his executing a conveyance of such interest as he has in the property at least in cases where it is not proved that the co-sharer has no sort of a title to the property. (*Stuart, J.*) SAKTOO MAL *v.* GOPAL CHAND. **4 U. P. L. R. (A) 5 : 1922 All. 439.**

——— S. 55—*Execution of conveyance—Suit for—Alternative prayer for possession—Subsequent vendee necessary party.*

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 55—Execution of conveyance.

Plff. sued for possession on declaration of title with an alternative prayer for specific performance of a contract of sale. He impleaded the original owners of the property as well as a subsequent vendee of the same. *Held*, that the plff. could not compel registration of the sale deed without following the procedure prescribed by S. 77 of the Regn. Act. The execution of the conveyance not followed by registration could not be regarded as fulfilment of the contract. The plff. was therefore entitled to proceed against his vendors to compel them to fulfil the contract. The subsequent vendee from the owners of the property was also a proper and necessary party. (*Mookerjee and Beachcroft, JJ*.) NASIRUDDIN MIDDA *v.* SIDHOO MIA. **44 I. C. 361 : 27 C. L. J. 538.**

——— S. 55 (1) (d)—*Execution of conveyance—Non-registration owing to default of vendee—Right to demand subsequent conveyance.*

Where a sale-deed is executed and delivered to the vendee but is not registered owing to his default in the payment of the purchase-money. *Held*. the vendee having failed to take advantage of the provisions of Ss. 32 and 36 of the Registration Act to enforce compulsory registration, it was not open to him to read into the sale an enforceable agreement to sell which was superseded by the conveyance itself. 16 Mad. 341 Foll.; 12 C. L. J. 464 not Foll. (*Oldfield and Seshagiri Aiyar, JJ*.) THAYARAMMAL *v.* LAKSHMI AMMAL. **39 M. L. J. 181 : 59 I. C. 417 : 12 L. W. 161 : (1920) M. W. N. 457 : 43 M. 822.**

——— S. 55 (1) (d)—*Execution of conveyance—Registration.*

A vendor is under no obligation to register the document he has given. (*Spencer and Coutts Trotter, JJ*.) MANIYAM KUPPANNA *v.* KUPPANNA GOUNDEN. **29 I. C. 195 : (1915) M. W. N. 319.**

——— S. 55 (1) (d)—*Execution of conveyance—Default—Vendor and purchaser—Evidence of.*

Failure on the part of the vendee to tender the expenses of sale and Registration having undertaken to do so is clear evidence of default. (*Sadasiva Aiyar and Napier, JJ*.) MULPURI VEERAYYA *v.* SANAGAVARAPU SIVAYYA. **26 I. C. 121 : 27 M. L. J. 482.**

——— S. 55 (1) (d)—*Execution of conveyance—Transfer of mortgage—Registration—Pronote in consideration of unregistered transferred mortgage.*

A transfer of a mortgage to be effectual should be registered at the instance of the transferor, so that a pronote in consideration of the transfer of a mortgage not so registered, is without consideration. (*Benson and Abdur Rahim, JJ*.) MUTHIA CHETTY *v.* KASIVARI SOMASUNDARA. **10 M. L. T. 79 : 12 I. C. 78 : (1911) 2 M. W. N. 47.**

——— S 55 (1), cl. (d)—*Execution of conveyance—Delivery of ineffectual conveyance—Effect of.*

On a sale of land it is the duty of the seller to execute and deliver a valid conveyance to the property and if for any reason, he executes an ineffective or invalid conveyance he has no answer to a suit for specific performance for the agreement to sell and for the execution of a legal and

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 55—Production of title-deeds.

binding sale-deed. 6 Mad. 641 Diss, 20 Mad. 19. 20 Mad, 250 ; 12 C L, J. 454 Ref, (*Robinson, C. J. and Duckworth, J*.) SANTHAYI AMMAL *v.* M. K. MAHOMED. **65 I. C. 405 : 11 L. B. R. 94.**

——— S. 55—*Execution of conveyance—Duty of vendor—Sale of immoveable property—"Complete title"—Registered conveyance.*

Once there is an agreement to sell immoveable property to which S. 54 applies and the vendee has done his part of paying the purchase-money, the vendor is bound to do everything necessary to complete the title of the vendee including a registered deed of conveyance. (*Maung Kin, J*.) MYA BEVIN *v.* MAUNG KYA ZAN. **33 I. C. 761.**

——— S. 55—*Execution of conveyance—Vendor's duty.*

The vendor must do all things necessary to complete the vendee's title and registration if it is compulsory (*Maung Kin, J*.) MAUNG NE DUN *v.* MALE. **32 I. C. 573 : 9 Bur. L. T. 86.**

Production of title-deeds.

——— S. 55 (1) (b), (2) and (3)—*Production of title-deeds—Marketable title free from defects—Recitals in deeds—Discharge of mortgage—Refund of deposit.*

Where a vendor agreed to deduce "a marketable title free from all reasonable doubts" it was found that the property was hypothecated more than 20 years before the contract by a registered deed in favour of two persons. The vendor produced a registered release executed by one only of the joint mortgagees but reciting that the other mortgagee was dead and that the executant was his heir and that the mortgage had been redeemed. The vendor did not produce one of the title-deeds deposited with the mortgagees. *Held*, that the agreement as to title had not been complied with and the purchaser was entitled to a refund of the deposit with interest thereon. The recitals in the release deed were not evidence against the joint mortgagee or his heir. The existence of a custom of conveyancers to provide in contracts of sale and purchase that recital in deeds of a certain age (the period in England being 20 years before the contract) shall be sufficient to satisfy a purchaser of the truth of the fact recited is material whenever a purchaser is bound to accept a marketable title; for, the insertion of a usual conditional clause in a contract of resale would not be depreciatory. The recitals in the release deed in question being only 10 years old, such a condition would be depreciatory. (*Lord Parker*.) SHRINIVASDAS BAUNI *v.* MEHESHAI. **41 Bom, 300 : 21 M, L. T. 236 : 32 M. L. J. 175 : 19 Bom. L. R. 151 : (1917) M. W. N. 258 : 21 C. W. N. 558 : 25 C. L, J. 311 : 39 I. C, 627 : 44 I. A. 36, (P. C.).**

——— S. 55 (1) (b)—*Production of title deeds—'On his request.'*

The words 'on his request' in S. 55 (1) (b) make it, the duty of the seller to produce his documents of title for examination by the buyer only when the latter ask for them ; if the buyer does not ask for them within the time fixed for the completion of the contract, he is not excused from

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Purchase-money left with vendee.

the consequences of his failure, though the plff. does not offer to show the title-deeds. (*Fox C. J. and Twomey, J.*) MAUNG PO TE *v.* MAUNG SWE KO. **35 I. C. 373 : 10 Bur. L. T. 35**

Purchase-money left with vendee.

——S. 55—*Purchase-money left with vendee —Prior mortgage—Pre-emption—Charge against vendee and pre-emptor.*

Where the vendor left a part of the consideration with the vendee to pay off a prior mortgage but the mortgage was not paid off and a third person pre-empted the property without paying the prior mortgage, the vendor can sue to recover the money to be paid by sale of the property. As the vendee and pre-emptor had notice of the mortgage, they got the property subject to the mortgagee's lien. (*Walsh and Ryves, JJ.*) RAMANAND BHARATI *v.* SHEO DAS. **43 All. 314: 60 I. C. 933 : 19 A. L. J. 58.**

——S. 55 (1) (j) and (4)—*Purchase-money left with vendee — Payment of debt—Remission—Vendor's right.*

Where a portion of the purchase money for a sale is left with the vendee for payment to a creditor who, at the time of payment, remitted a portion of the debt, the vendor could recover it from the vendee. 31 A. 583 (P. C.) Dist. (*Knox and Rafique, JJ.*) RAM RATAN LAL *v.* ABDUL WAHID KHAN. **18 I. C. 503.**

——S 55 (5) (b)—*Purchase-money left with vendee—Payment to a prior mortgagee—Redemption.*

Where the consideration for sale is left in the hands of a purchaser for payment to a prior mortgagee, the purchaser is not bound to redeem the mortgage if the amount due under it is in excess of that deposited with him. 21 A. 233 Foll. (*Chamier and Rafique, JJ.*) BADRI DAS *v.* JIWANLAL. **15 I. C. 854 : 10 A. L. J. 480.**

——S. 55 (5) (b)—*Purchase-money left with vendee—Vendee directed to pay a mortgagee of vendor—Suit and decree against vendor by mortgagee—Suit against vendee before payment of decretal amount.*

Where on a sale of property the vendee was directed to pay a mortgagee of the vendor on some other properties and the latter, on default of the vendee to pay, had a decree passed against him on the mortgage, *held*, that the vendor could maintain a suit against the vendee for breach of covenant even before paying the decretal amount to the mortgagee. 23 M. 441; (1901) A. W N. 14 Rel. on. (*Karamat Husain and Tudball, JJ.*) RAGHUBAR RAI *v.* JAJI RAI. **14 I. C. 244 : 34 All. 429: 9 A. L. J. 534.**

——S. 55 (4) (b)—*Purchase-money left with vendee—Right of vendor to sue for.*

Where a vendor merely directed the purchaser to pay the sale consideration to his creditors but there was no completed agreement between the purchaser and the vendor's creditor for substitution of the liability, the vendor does not lose his right to enforce the lien against the purchaser. (*Spencer and Kumaraswami Sastri, JJ.*) THYAGARAJA MUDALIAR *v.* SESHAPPIER. **10 L. W. 518 : 54 I. C. 458 : 27 M. L. T. 94.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Right to possession.

——S. 55 (5) (b)—*Purchase-money left with vendee—Payment debts of vendor—Default—Damages.*

Where on a sale of land a portion of the purchase-money is left with the vendee on the understanding that he was to pay certain debts of the vendor and the vendee also agreed to compensate the vendor in case of his default in paying the amounts, the vendor is entitled to sue the vendee on a breach of the covenant without proof of actual loss sustained by him (vendor) by such breach. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) KOMU KUTTI *v.* KUMAR MENON. **24 M. L. T. 260 : 49 I. C. 313 : 35 M. L. J. 692.**

——S. 55 (5) (g)—*Purchase-money left with vendee—Redemption of mortgage—Damages.*

Where the vendor promised to pay off the mortgage on the property but failed and long afterwards the mortgagee recovered from the vendee a sum in excess of the promised amount *held* in a suit by the vendee for reimbursement, that he was entitled only to the money which might have been due in excess at the time of the sale, 21 A. 223 P. C.; 15 I. C. 854 Dist. (*Lindsay, J.C.*) MAZHAR ALI KHAN *v.* ALI ASHGAR. **40 I.C. 361 : 4 O. L. J. 321.**

——Ss. 55 and 100—*Purchase-money left with vendee.*

Money left in the hands of a vendee to pay off an incumbrance on the property does not become a charge on the property. (*Lindsay, J.C.*) MUKTA PERSHAD *v.* ABDUL RAZAQ. **33 I. C. 527.**

Relief against forfeiture.

——S. 55—*Relief against forfeiture—Vendor and purchaser—Agreement to sell—Payment to seller—Payment by instalment—Forfeiture on default—Penalty—Specific performance, suit for, maintainability of.*

An agreement to sell provided that payment be made by instalments and on default the contract be forfeited and determined at the option of the vendor, time being agreed to be the essence of the contract. On default being made, the vendor by notice cancelled the contract. The purchaser sued thereupon for specific performance and relief from forfeiture *held* that specific performance cannot be decreed but that the stipulation for forfeiture, being a penalty, should be relieved against. (*Viscount Haldane.*) STEEDMAN *v.* DRINKLE. **33 I. C. 323 : 85 L. J. P. C. 79 (P. C.)**

Right to possession.

——S. 55 (1) (f)—*Right to possession—Joint sale—Consideration paid by one—Right of other vendee.*

Where immoveable property is purchased by two persons jointly but one of them alone pays the consideration and takes possession of the property and the vendee sues for possession, it was held that the suit for possession ought to be decreed on the consideration of the plff. paying his share of the consideration money as the ownership in the property vested in both the vendees as soon as the sale was completed. 30 A. 125; 11 A. 244 Foll. (*Banerji, J.*) PARAG *v.* JAGANNATH. **15 I. C. 173.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Right to possession.

——S. 55 (1) (f)—*Right to possession—Stipulation as to non-liability of vendor for failure to secure possession.*

Where in a speculative purchase there is a stipulation that the vendor shall not be liable if the purchaser was dispossessed by third persons, and the purchaser is not able to get possession the stipulation holds good and the purchaser cannot get a refund of the purchase-money. (*Walmsley and Panton, JJ.*) INDRA NARAYAN DAS *v.* BADAN CHANDRA DAS. **47 I. C. 340.**

——S. 55 (1) (f)—*Right to possession.*

As right to possession of property sold passes to the vendee even though a part of the consideration has not been paid, a vendor who sets up that the intention of the parties was that ownership should not pass till the entire consideration was paid, has himself to prove it. (*Chitty and Walmsley, JJ.*) JOGENDRA NARAIN ROY *v.* MANMATHA NATH. **34 I. C. 106.**

——S. 55 (1) (f)—*Right to possession—Vendor, if can transfer better title than he has.*

A vendor cannot transfer a better title to the vendee than he himself has, and when the vendor is out of possession at the time of the sale the vendee must bring his suit for possession within the same period as would be allowed to his vendor, 3 W. R. 176 Rel. on. (*Mookerji and Beachcroft, JJ.*) ABBAS DHALI *v.* MASABDI KARIKAR. **24 I. C. 216.**

——S. 55—*Right to possession.*

Per *Venkatasubba Rao, J.*—In every contract of sale unless the contrary appears, it is implied that the vendor agrees to give possession of the property to the purchaser, in addition to executing a conveyance in his favour. (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAI. **45 M.L. J. 431. 18 L. W. 333 : 47 Mad. 150 : 1924 Mad. 360.**

——S. 55 (1) (f)—*Right to possession—Duty of vendor.*

Spencer, J.—It is the duty of the seller to secure his purchaser in quiet and peaceful enjoyment of the property sold, the mere signing of the sale deed does not discharge this obligation which continues till the purchaser gets an indefeasible title to the property. (*Spencer and Trotter, JJ.*) MANIYAM KUPPANNA *v.* KUPPANNA GOUNDAN. **29 I.C. 195 : (1915) M. W. N. 319.**

——Ss. 55 (1) (f) and 5 (b)—*Right to possession—Suit for possession by vendee—Conditional decree.*

In a suit by a vendee for possession of property purchased, it is competent to the Court to pass a decree conditional on his paying the balance of purchase-money. (*Oldfield and Tyabji, JJ.*) ABRAHAM SERVAI *v.* RAPTIAL MUTHIRIAN. **39 Mad. 288 : 27 I. C. 337 : 16 M. L. T 569 : 27 M. L. J. 746.**

——S. 55 (1) (f)—*Right to possession—Failure to give possession to vendee.*

On the vendor's failure to give possession he is bound to return to the vendee the purchase-money paid. (*Sadasiva Aiyar, J.*) RAGAVA AYYANGAR *v.* SAMA CHARIAR. **(1914) M. W. N. 57 : 22 I. C. 42. 1 L. W. 8.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Vendee's charge.

——S. 55—*Right to possession.*

A purchaser suing for damages for failing to give possession of a part of the land sold to him, has to prove that he was not put in possession of such portion of the land, but he need not prove who was in possession of it. (*Benson and Sundara Aiyar, JJ.*) TAVALA NAGESWARA ROW *v.* SARIPALLI SAMBASIVA ROW. **11 I C. 337 : (1911) 1. M. W. N. 361.**

——S. 55 (1) (f)—*Right to possession.*

It is the duty of the vendor, holding himself out as such to ascertain that the subject-matter exists. He must give physical possession to the buyer especially when the identification of the property is difficult. (*Chapman and Atkinson, JJ.*) DARPAN KOER *v.* KEDAR NATH. **1 Pat. L. J. 140: 35 I. C. 539 (2): 2 Pat. L. W. 389.**

Sale subject to Incumbrances.

——S. 55 (5) (d)—*Sale subject to incumbrance—Vendee's right to contest.*

A vendee of mortgaged property subject to the mortgage can contest its legality when sued against upon the mortgage bond. (*Mookerjee and Beachcroft, JJ.*) ACHYUTANUNDA BHATTACHARYA *v.* RAM NATH BHATTACHARYA. **21 I. C. 79 : 18 C. L. J. 354.**

——S. 55 (5) (d)—*Sale subject to encumbrance—Notice to encumbrancer.*

The law does not insist—that the purchaser of property which is subject to a mortgage to give notice of his purchase to the mortgagee. (*Lindsay, J. C.*) SHEO PERSHAD *v.* BISISHAN NATH. **19 O. C. 12 : 34 I. C. 266 : 3 O. L. J. 129.**

——S. 55—*Sale subject to encumbrance.*

When the property sold is encumbered the purchaser must satisfy the encumbrance although the property is sold subject to no encumbrance. (*Stuart, A. J. C.*) GURCHARAN PRASAD *v.* BACHNI. **30 I. C. 238 : 2 O. L. J. 225.**

Vendee's Charge.

——S. 55 (6) (b)—*Vendee's charge when commences.*

The purchaser's lien comes into existence as soon as the purchase-money or a part of it is paid. (1864) 10 H. L. 672 : 23 B. 56 Rel. (*Mittra, Offg. A. J. C.*) KESAR *v.* MUNNA. **39 I. C. 50 : 13 N. L. R. 19.**

——S. 55 (6) (b)—*Vendee's charge—Money paid by promisee under contract of sale—Subsequent registered conveyance to third party.*

A purchaser of immoveable property in the possession of a third person is presumed to have notice of the title of such third person. If the possession to such third persons was given on condition that the vendors were to give them a registered deed of sale for money paid on their account before giving possession, the persons in possession would have charge under S. 55 (6) (*b*) on the amount paid and also on the interest there on at 6 per cent. 28 B. 466 Foll. (*Maung Kin, J.*) MAUNG BO *v.* MAUNG TUN BYU. **33 I. C. 121.**

——S. 55 (5) (b)—*Vendee's charge—Sale invalid.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S 55—Vendor's lien

Though a sale may be invalid for want of registration a vendee who has paid the purchase money and is in possessiou under the contract of sale has a charge on the property for the amount advanced by him as purchase money and for interest thereon. (*Ormond, J.*) MAUNG PO MAUNG *v.* MAUNG KAING. **7 Bur. L T. 86 : 24 I. C. 57 : 7 L. B. R. 262.**

Vendor's lien.

——**S. 55 (4) (b)**—*Vendor's lien—Interest on unpaid purchase-money.*

In the absence ot an express or implied contract to the contrary, the date when one enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand the new owner has possession, use and fruits , on the other, the former owner, parting with these has interest on the price 12 Ves, 25; 3 H. L. C. 565, 595. (*Lord Shaw.*) RATANLAL CHONILAL PANALAL MUNICIPAL COMMISSIONER, BOMBAY.
43 Bom. 181 : 17 A. L. J. 1 . 29 C. L. J. 138 : 9 L. W 171 : 25 M. L. T. 103 : 21 Bom. L. R. 114 : 23 C. W· N 441 : 1 U. P. L. R. (P. C) 31 : (1919) M. W. N. 321: 48 I. C. 404 : 36 M. L. J. 1. (P. C.)

——**S. 55 (4) (b)**—*Vendor's lien—Assignment if valid.*

An assignment of the vendor's lien is valid. 32 M. L. J. 347. (*Sir Lawereace Jenkins.*) DEONAND PRASAD *v.* JANKI SINGH. **44 Cal. 573 : 15 A. L. J. 154 : 21 C. W. N, 473 : (1917) M. W. N. 254 : 25 C. L. J. 259 : 21 M L. T. 240 : 5 L. W. 526 : 19 Bom. L. R. 410 : 1 Pat. L. W. 294 : 44 I. A. 30 : 39 I. C. 346 : 32 M. L, J. 206 (P. C.)**

——**S. 55 (4) (b)**—*Vendor's lien—Agreement to pay balance of purchase-money by instalments—Vendor's charge, if abandoned.*

An agreement to pay the balance of purchase-money under a sale, in instalments, is by itself no evidence of abandonment of the vendor's charge granted by S. 55 (4) (b) of the Act. (*Tudball and Rafique, JJ.*) BASHIR AHMED *v.* NAZIR AHMED. **43 All. 544 : 19 A. L. J. 491 : 63 I. C. 495 : 3 U, P. L. R. (All) 106.**

——**S. 55 (4) (b)**—*Vendor's lien—Enforcement against transferee.*

The vendor's charge mentioned in S. 55 (4) cannot be enforced against subsequent transferees for value without notice, (*Richards, C, J. and Rafique, J.*) GUR DAYAL SINGH *v.* KARAM SINGH. **38 All, 254 : 35 I, C. 289 : 14 A. L, J. 304.**

——**S. 55 (4) (b)**—*Vendor's lien—Enforceability against pre-emptor.*

A lien under S. 55, Cl. (4) of the Act is not enforceable against a pre-emptor of the land sold by the vendee. If in such a suit brought by the vendor, the pre-emptor is a party and does not appear and a decree is passed against the property, the pre-emptor is bound by it. (*Richards, C. J. and Tudball, J.*) MAHADEO SAHU *v,* MAHIPAL RAI. **25 I. C. 939 : 12 A. L. J, 921,**

——**S. 55 (4) (b)**—*Vendor's lien—Whether enforceable against vendee's transferees.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Vendor's lien.

A vendor is entitled to recover unpaid purchase money either by enforcement against the vendee personally or by enforcement of the charge on the property sold. The latter remedy will be available though the former is barred by limitation. A charge is enforceable against the transferees or heirs of the vendee but not a personal remedy. (30 A. 172; 7 I. C. 639 : 31 C. 57 : 7 A. 502 Foll. (*Sunder Lal, J.*) MEGH RAJ VAISH *v.* ABDULLA KHAN. **25 I C. 208 : 12 A. L J. 1034.**

——**S. 55**—*Vendor's lien—Unpaid purchase money—Delay in completing the sale—Interest—Liability for.*

Delay caused merely by the defect of the vendor's title not known to him at the date of the contract especially where immediate steps are taken by the vendor for remedying the defect does not exempt the purchaser from paying interest. (*Mulla, J.*) SUBHADRABAI *v.* MAHOMED BHAI. **25 Bom. L. R. 931 : 1924 Bom. 187.**

——**S. 55 (4) (a) and (5) (b)**—*Vendor's lien—Unpaid purchase-money—Interest — Purchaser taking possession of property sold—Liability to pay interest.*

It is a principle of equity, quite independent of the provisions of the Transfer of Property Act, 1882, that where one party to a contract of sale enters into possessfon of the property before the whole price has been paid, he is ordinarily liable to pay interest on the unpaid purchase-money from the date when he enters into possession. (*Macleod, C. J, and Shah, J,*) PANDURANG BALAJI APTE *v.* MAHADEO GOPAL JOG. **64 I, C. 492 : 23 Bom L. R. 1000.**

——**S. 55 (1) (b)**— *Vendor's lien—Vendor's remedy when part of price is not paid.*

The vendor's right for non-payment of any part of the consideration for a conveyance is to recover the unpaid balance of the purchase-money as such non-payment will not by itself invalidate the sale. (*Mookerjee and Beachcroft, JJ.*) SECRETARY OF STATE *v.* BANSI RAM. **35 I. C, 284 : 20 C. W. N. 638.**

——**S. 55 (4) (b)**—*Vendor's lien—Assignability of.*

The charge mentioned in S. 55 (4) (b) is not a personal right of the seller himself and therefore can be transferred to an assignee. The debt itself cannot be transferred and also the security for it. (*Coxe and Richardson, JJ.*) SHEO NANDAN LAL *v.* JAINUL ABDIN. **42 Cal. 849 : 29 I. C. 869: 19 C. W. N. 899.**

——**S. 55 (4) (b)**—*Vendor's lien—Interest—Charge.*

Though no interest is provided for in an agreement by a vendee of property to pay the purchase-money to the vendor, the latter is entitled to a charge upon the property in the hands of the former for the unpaid purchase-money and for interest thereon. (*Rattigan, J.*) ARJAN DAS *v.* HAKIM RAI, **39 P. R. 1913 : 20 I. C. 299 : 263 P. L, R. 1913.**

——**S. 55**—*Vendor's lien—Unpaid purchase money—Vendor failing to perform his part of the contract no interest can be claimed.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S, 55—Vendor's lien.

Where the vendor fails to perform his part of the contract and the circumstances are such as to require the purchaser to keep the money idle and unproductive the vendor will not be allowed to claim. (*Wallis, C. J, and Oldfield, J.*) NARASINGERJI *v.* PANUGANTI PARTHASARATHI.

(1921) M. W. N. 519.

——S. 55 (4) (b)—*Vendor's lien—Intention.*

Where a pro-note is executed by a vendee of immoveable property for part of the sale consideration, the question whether the vendor thereby intended to abandon his lien for unpaid purchase-money is a question of fact and depends on the facts of the case. The lien created by S. 55 (4) is different from the English equitable lien. (*Ayling and Phillips, JJ.*) KRISHNASWAMI *v.* SUBRAMANIA. **23 M. L. T 85 : 7 L. W. 210 : (1918) M. W. N. 231 : 44 I. C. 523 : 35 M. L. J. 304.**

——S. 55 (4) (b)—*Vendor's lien—Vendor when entitled to interest.*

In the absence of an express contract to the contrary the purchaser is considered as in possession from the date of the completion and from that date he takes the rents and profits and pays interest. If the delay in payment of the purchase-money is due to the default of the vendor in showing a good title, he cannot claim interest. (*Sadasiva Iyer and Spencer, JJ.*) PULIYADI NAVANNA ELLARAYAN *v.* NAGENDRA IYER.

42 I. C. 509 : 6 L. W. 233.

——S. 55 (4) (b)—*Vendor's lien—Alienation piecemeal.*

Where the several vendees of a mortgaged property sold piecemeal, are directed to pay specific sums towards discharge on the encumbrance the vendor's lien under S. 55 (4) (b) for unpaid purchase money resides in him alone and does not in the absence of a specific conveyance of that lien pass to the purchaser of the other mortgaged properties. (*Seshagiri Iyer and Napier, JJ.*) KUNCHITHAPATHAM *v.* PALAMALAI.

(1917) M. W N. 166 : 39 I. C, 405: 32 M. L. J. 347.

——S. 55 (4) (b)—*Vendor's lien—Paying purchase money to a third person.*

A direction to pay the consideration money to the third person not being a "Contract to the contrary" under the above section, the vendor by giving such a direction does not lose his charge for the purchase money. 31 C. 57 Diss. Per *Seshagiri Iyer, J.*—A direction communicated to the third party may disable the vendor from claiming the money; but when the vendor has to pay the third person himself, and the third person is not shown to look to the vendee for payment, the lien attaches to the property. Instead of the three classes of charges under English Law, a simple rule of law is enacted in S. 55 of T. P. Act. 33 M. 446 and 21 M, L. J. 359 overruled. (*Abdur Rahim, C. J., Seshagiri Aiyar and Phillips, JJ.*) SIVASUBRAMANIA AIYAR *v.* SUBRAMANIA AIYAR.

39 Mad. 997: 31 M. L. J. 530 : (1916) 2 M. W. N. 306: 20 M. L. T. 375: 37 I. C. 429 : 4 L W. 415 (F. B.): [Overruling 21 M. L. J. 359 : 10 M. L. T. 71: 10 I, C. 98 and 33 Mad. 446: 7 M. L. T. 376 : 5 I. C. 87.]

See ALSO **10 L. W. 518 : 54 I. C, 458 : 27 M. L. T. 94**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Vendor's lien.

——S. 55—*Vendor's lien—Intention to transfer.*

In a suit for cancellation of a sale deed for consideration which was found really not to have passed, if the intention of the executant was to transfer the property, the failure of consideration will not make the deed void or voidable but will only give the right to its payment with lien on property till it is paid. 25 B. 10 at p. 18, Foll. (*Ayling and Tyabji, JJ.*) GOVINDSWAMY RAJA *v.* KUPPAMMAL.

31 I. C. 77.

——Ss. 55 (4) (b), 81, 82, and 101—*Vendor's lien—Sale by member of joint Hindu family—Mortgage to third party of property sold—Privity of vendor.*

It is competent to a Hindu co-parcener to sell his share of the family properties to another co-parcener and the vendor has a lien on the property for unpaid consideration and the vendee has all the rights of a stranger purchaser. Where the vendee reserved a part of the purchase-money as consideration for a mortgage to be executed by the vendee to the vendor later on, and before its execution, the property was mortgaged to a third person, *held* that such mortgage has no priority over the mortgage subsequently executed for the unpaid purchase-money, of which the mortgagee must be deemed to have had notice. S. 101, T P. Act does not apply as the lien did not merge in the mortgage taken by the vendor. S. 81, T. P. Act does not apply as the 1st mortgagee had notice of the lien. (*Miller and Abdur Rahim, JJ.*) LAKSHMANA AIYAR *v.* SANKARANA MOORTHY PILLAYAN.

25 M. L. J. 245: 18 I. C. 199: 13 M. L. T, 364.

——S 55 (4) (b)—*Vendor's lien—Taking of a pronote for price due—Effect.*

A vendor has a charge on the land sold under S. 55 (4) (*b*), T.P. Act, for the amount due though a promissory note is executed for the unpaid purchase money. (*Miller and Abdur Rahim, JJ.*) VELLAYAPPA *v.* NARAYANAN. **18 I C 81: (1913) M. W. N. 826.**

——S. 55 (4) (b)—*Vendor's lien—Liability of vendee to pay interest on consideration money.*

Where a contract of sale provided for payment of the purchase-money on a particular day and for execution of the conveyance on that day and also for interest in case of default of payment, the vendee's obligation to pay interest and the vendor's obligation to execute the conveyance are mutually dependent and interest is payable only from the date on which the vendor could give a clear title. (*Sundara Iyer and Sadasiva Iyer, JJ.*) ADUSUMILLAI SINGARAYADU *v.* SAYAMI NARAYANASAMI. **17 I. C. 273 : (1912) M. W. N. 915.**

——S. 55 (4) (b)—*Vendor's lien—If applicable to exchange—No charge on property exchanged for money due.*

The principle of S. 55 (4) (*b*) does not apply regarding an exchange and there can, therefore, be no charge on the property exchanged, for the balance of any money due under such exchange. (*Miller and Sankaran Nair, JJ.*) KRISHNA NAIR *v.* KUNDU NAIR. **16 I. C. 109: (1912) M. W. N. 535.**

——S. 55 (4) (b)—*Vendor's lien—Acceptance of pronote from purchaser or stranger for part consideration—Lien if destroyed.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 55—Vendor's lien.

A vendor's lien for unpaid purchase-money as against property in the hands of the purchaser is not in the absence of an intention to the contrary lost by his acceptance of a pronote either from the purchaser himself or from a stranger on his behalf, for part of the consideration. 33 M. 496 dist. (*Abdur Rahim and Sundara Iyer, JJ.*) KAMPIAH *v.* HARI ROW. **21 M. L. J. 849: 11 I. C. 890: 10 M. L. T. 189.**

——S. 55 (4) (b)—*Vendor's lien—Interest on purchase money.*

S. 55 (4) (*b*) gives the vendor an absolute right to interest on the purchase-money subject to the equities of the case. The clause only gives the vendor a lien on the property for unpaid purchase money which will also enure for the interest, if any, payable. It is certainly unjust that either party to the contract should at one and the same time have possession both of land and purchase-money. (*Benson and Sundara Aiyar, JJ.*) MUTHIA CHETTY *v.* CHINNA VEMIAM CHETTY. **35 M. 625: (1911) 1 M. W. N. 228: 9 M. L. T. 378: 10 I. C. 662: 21 M. L. J. 236.**

——S. 55 (4) (b)—*Vendor's lien—Contract to the contrary—Mortgage.*

The statutory charge in favour of the vendor is excluded by an express mortgage taken in respect of the amount of the unpaid purchase-money. (*Drake Brockman, J. C.*) MOOLCHAND *v.* BISNOO. **51 I. C. 721: 15 N. L. R. 109.**

——S. 55 (4) (b)—*Vendor's lien—Interest on unpaid price.*

Under S. 55 of the T. P. Act, a vendor can claim interest on unpaid purchase money unless he has disentitled himself to it by his own conduct. (*Kanhaiya Lal and Daniels, A.J.Cs.*) ADITYA PRASAD *v.* MOHAMMAD MUBARAK ALI SHAH. **48 I. C. 257: 263 P. L. R. 1913: 20 I. C. 299: 21 O. C. 234**

——S. 55 (4) (b)—*Vendor's lien—Purchase-money in hand of vendee.*

Where part of the consideration money is left in the hands of the vendee of immoveable property, to pay off an incumbrance subsisting on the property, such money is not 'purchase-money and the vendor has no lien in respect of it. (*Lindsay, J. C.*) MUKTA PERSHAD *v.* ABDUL RAZAQ **33 I. C. 527 (Oudh).**

——S. 55—*Vendor's lien is non-possessory.*

When the vendor does not get the full consideration money he has a lien for his unpaid purchase-money but that lien does not entitle him to retain possession of the property and he is therefore liable for mesne profits. (*Coutts and Das, JJ.*) HARI PRASAD CHOUDHURY *v.* HARIHAR PRASAD CHOWDHURY. **(1923) Pat. 20: 1923 P. 205.**

Miscellaneous.

——S. 55 (4) (b)—*Vendor—Passing of ownership—Burden of proof.*

The intention of the parties that the ownership should not pass till the full consideration is paid should be proved by the vendor. (*Chitty and Walmsley, JJ.*) JOGENDRA NARAIN *v.* MANMATH NATH. **34 I. C. 106.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 56.

——S. 55 (5) (b)—*Purchases-money—Vendor's agreements.*

A purchaser is not bound to pay the balance of the purchase-money till the vendor has put the property in the condition in which it was to be conveyed to him. (*Mookerjee and Caspersz, JJ.*) ADHAR CHANDRA *v.* RAM CHARAN. **10 I. C. 526.**

——S. 55 (1) (b)—*Property sold to different vendees by halves—Vendor entitled only to half—Suits for possession.*

When *A* sold half of a certain shop to *B* alleging that the whole belonged to him and afterwards sold the other half to *C* who sued *B* for possession of that half and got a decree, and subsequently *B* sued for possession of his half and it was then found that *A* was only entitled to one half of the shop, *held* *B* was entitled to get a decree for the half claimed by him, and that the decreee obtained by *C* against *B* was no bar to it as *C* had in that suit admitted that *B* was the owner of the other half and he only claimed the half purchased by him from *A*. (*Reid, C. J.*) MANGHA RAM *v.* DITTA. **19 P. L. R. 1913: 18 I. C. 834: 77 P. W. R. 1913.**

——S. 55 (d)—*Sale—Interest on purchase-money—Vendee's duty to prepare draft.*

When a purchaser is in actual possession or receipt of the rents and profits he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for completion of the transaction. It is the purchaser's business to propose a proper draft of the sale deed and submit it to the vendor. (*Prideaux, A. J. C.*) DINKAR RAO *v.* AYUB. **1923 Nag. 37.**

——Ss. 56 and 82—*Applicability—Contribution—Several villages mortgaged.*

Sarju mortgaged his shares in eight villages to *R*. Four of these were already under three mortgages and they were discharged by the sale of 2 villages *K* and *B*, and a fourth share in *D*. Out of the mortgaged villages, the villages *P*, *S*, and one-eighth of *D* were purchased by deft. under a simple money decree, Sarju died and his son sued for contribution alleging that his village *L* had paid more than was due under the mortgage in favour of *R*, *held*, he was entitled to contribution and that S. 56 did not apply to the present case. (*Mears, C. J. and Banerji, J.*) RAMA SHANKAR PROSAD *v.* GHULAM HOSSAIN. **19 A. L. J. 584: 3 U. P. L. R. (All.) 88: 63 I. C. 209: 43 A. 589.**

——S. 56, 82—*Applicability — Purchasers of different properties subject to same mortgage.*

The rule of equity embodied in S. 56, T. P. Act is limited to a case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor and has no application as between purchasers of several properties subject to the same mortgage. As between such purchasers the several properties are liable to contribute to the mortgage debt in proportion to their values. 31 Cal. 95 Foll. (*Tudball and Rafique, JJ.*) DIN DAYAL *v.* GURSARAN LAL. **42 All. 336: 59 I. C. 67: 18 A. L. J. 287.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 56.

——Ss. 56, 81 and 88—*Marshalling of securities—Scope of S. 58.*

In 1896, deft. No 1 mortgaged ten lands to *V.* for Rs. 400 of which Rs. 200 was paid in cash and the rest was to be paid to *N*, a prior mortgagee. *V* having failed to pay *N*, 1st deft sold to 5th deft. items 6 to 10 of the lands mortgaged and other property and redeemed *N*'s mortgage by paying Rs. 200 to 1st deft. Shortly afterwards the 1st deft. mortgaged 4 items to deft. No. 4 for Rs. 500. The deft. No. 4 sued on his mortgage and obtained a decree against 1st deft. In execution of the decree the 4 items were sold and purchased by deft. No. 4. V then sued on his mortgage treating it as one for Rs. 400. to recover the amount by sale of all the 10 numbers. *Held*, that V could not treat his mortgage as one for Rs.400, that as he failed to pay Rs.200 to *N* either at once or within a reasonable time, there was partial failure of consideration for the mortgage, that the subsequent payment of Rs. 200 to deft. No. 1 could not undo the effect of that failure, so as to prejudice the rights of deft. No. 5 and that the Court could under S. 88 pass in such a suit a decree for sale, ordering that, in default of 1st deft. in paying the mortgaged property or a sufficient part thereof be sold. *Per Curiem* :—S. 56 applies only as between a seller and his buyer. not as between a mortgagee of the seller and the buyer. (*Chandavarkar and Heaton, JJ.*) SUBRAYA VKNKATESH *v.* GANPA. **35 Bom. 395 : 11 I. C. 989 : 13 Bom. L. R. 678.**

——Ss. 56 and 81—*Mortgage—Purchaser of equity of redemption.*

A mortgagee without notice of a previous mortgage or of the decree thereon has a right as against the mortgagor to have the first mortgage satisfied out of properties other than those mortgaged to him. (*Richardson and Newbould, JJ.*) TARA PRASANNA BOSE *v.* NILAMONI KHAN. **25 I. C. 118 : 41 Cal. 418.**

——S. 56—*Transfer of property subsequent to mortgage—Mortgage decree satisfied by mortgagor—Contribution.*

Where a mortgagor makes a transfer subsequent to the mortgage, *e. g.*, a lessee. the presumption is that the subsequent transferees are not burdened with a liability to discharge the original mortgage in whole or in part. If the mortgagor satisfies the original mortgage he cannot claim contribution from the subsequent transferees in respect of the money paid by him towards the satisfaction. If the mortgagor claims contribution a covenant to that effect must be proved. 38 All. 237: 12 M. L. J. 13 and 39 M. 795. Dist. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) GAJRAJ KUAR *v.* INDRAPAL KUAR. **21 O. C. 360 : 49 I. C. 406 : 6 O. L. J. 7.**

——S. 56—*Scope of—Prior mortgagee accquiring portion of equity of redemption—Puisne mortgagee's right.*

S. 56 of the T. P. Act applies only to cases where the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. Where a prior mortgagee has acquired the equity of redemption in proceedings to which the puisne mortgagee is not a party, the puisne mortgagee is not thereby necessarily deprived of his ordinary right of bringing the mortgaged property to sale subject to the first mortgage. (*Fawcett, J.C. and Crump, A, J. C.*) HIROMAL *v.* THAILIOMAL. **28 I. C. 49 : 8 S. L. R. 257.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

——S. 58

See also MORTGAGE.

S. 58 (a) MORTGAGE, MEANING OF.
S. 58 (b) SIMPLE MORTGAGE.
S. 58 (c) MORTGAGE BY CONDITIONAL SALE.
S. 58 (d) USUFRUCTUARY MORTGAGES.
S. 58 (e) ENGLISH MORTGAGE.

S. 58 (a)—[Mortgage, meaning of.]

——S. 58 (a)—*Mortgage—Payment of prior mortgagee by partner does not create a mortgage.*

Where a partner of a firm on entering into the partnership redeemed a mortgage and kept with him the title-deeds, but there was no entry in the account books as to the creation of a mortgage from that date, the transaction must be treated as merely an advance by one partner to another and not a mortgage. (*Viscount Haldane,*) HENG MOH AND Co. *v.* LIM SAW YEAN. **45 M. L.J. 776 : 18 L. W. 92 : (1923) M. W. N. 614 : 33 M. L. T. 430 : 1 Rang 545 : 1923 P. C. 87. (P. C.)**

——S. 58 (a)—*Mortgagee—If can insist that manager be appointed—Manager. agent of mortgagor—Liability for waste and mismanagement.*

Before lending money, a mortgagee has a perfect right to insist upon the mortgagor appointing a manager of the estate mortgaged in whom the mortgagee has confidence and where such a manager is appointed is an agent of the mortgagor and the mortgagee is not liable for waste or mismanagement of the manager. The mere fact that very wide powers are given to the manager would not, in the absence of any thing suggest that the mortgagor was misled or was under undue influence, or pressure, render the mortgage unenforceable. (*Sir John Edge.*) MOTI LAL DAS *v.* THE EASTERN MORTGAGE AND AGENCY Co. **(1920) M. W. N. 631 : 28 M. L. T. 351 : 47 I. A. 265 : 2 U. P. L. R. (P. C.) 166: 61 I C. 486 : 25 C. W. N. 265 (P.C.).**

——Ss. 58 (*a*) and 100—*Security bond—Mortgage or charge—No personal liability.*

Where an Appellate Court directed a decree holder to furnish security for mesne profits on his taking possession of the properties decreed to him and two persons offered security in the following terms : "We, the declarants, furnish security for one lakh of rupees hypothecating the undermentioned properties therefor. and declare that the hypothecated properties shall serve as security and be liable to the extent of one lakh of rupees for carrying out the aforesaid purpose."

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

Held, that there was no personal liability on the part of the sureties and that the document merely created a charge. (*Lord Phillimore.*) RAJ RAGHUBAR SINGH *v.* JAI INDRA BAHADUR SINGH. **42 All. 158 : 22 O.C. 212 : 6 O.L. J. 682 : 38 M. L J. 302 : 18 A. L. J. 263 : 22 Bom.L. R. 521 : 55 I. C. 550 : 13 L. W. 82 (P.C.).**

———Ss. 58 (a) and 100—*Equitable charge—Creation of—Writing.*

Writing is essential to the creation of an equitable charge over moneys due under an Insurance Policy. The English decisions are inapplicable. (*Lord Moulton.*) MULRAJ KHATAU *v.* VISHWANATH. **37 Bom. 198 : 40 I. A. 24 : (1912) M. W. N. 1247 : 12 M. L. T. 652 : 11 A. L. J. 7 : 24 M. L. J. 60 : 17 C. W. N. 209 : 15 Bom. L. R. 9 : 17 I. C. 627 : 17 C. L. J. 162 (P. C.)**

———S. 58 (a) and (b)—*Simple mortgage—Provision for entering into possession on default of payment of interest—Effect of.*

Under a simple mortgage, the mortgage money including interest was to be paid in two instalments failing the payment of any one instalment the mortgagee was entitled to take possession of the property and pay himself the principal and interest out of the usufruct. The mortgagee did take possession under that clause. *Held* that the relationship between the parties continued to be that of a mortgagor and mortgagee under a simple mortgage. The mortgagor did not lose his right of redemption by the fact that the mortgagee was given an additional security for his money by taking possession of the land, 21 M.L. J. 1147 (P. C.) Rel. (*Batten. J. C.*) PUNA *v.* LAXMAN PRASAD. **1923 A 232.**

———Ss. 58 (a) and 57—*Consideration—Partial—Suit for foreclosure by mortgagee i maintainable.*

A decree for foreclosure may be passed in a suit by a mortgagee by conditional sale even if full consideration had not been paid by him. 59 P. R. 1907 Disappr. (*Karamat Husain and Chamier. JJ.*) RASHIKLAL *v.* RAMNARAIN. **34 All. 273 ; 13 I. C. 573 : 9 A. L. J. 198.**

———S. 58 (a)—*Consideration—Failure of consideration—Mortgage if enforceable.*

A mortgage is unenforceable where there is a failure of consideration for the same ; where the consideration for a mortgage is an intended assignment by the mortgagee and such an assignment is not made, there is failure of consideration and the mortgage is unenforceable. (*Karamat Husain and Chamier, JJ.*) PARBHUN NARAIN SINGH *v.* DEO RAJ SINGH. **11 I. C. 4.**

———Ss 58 (a) and 100—*Mortgage—Charge—Construction.*

Where in a certain document the plaintiff's property which was made security for a debt was

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

described as 'hypothecated", the document creates a mortgage and not merely a charge. (*Stanley. C. J. and Banerjee, J.*) MOHOMAD HUSSAIN *v.* VINAYAK RAO. **9 I. C. 828.**

———S. 58 (a)—*Mortgage —Consideration—Partial payment—Effect of.*

The validity of a bond is not effected by the fact that the consideration recited was not paid in full; the bond is operative to the extent of the sum actually advanced. 10 C. W. N. 932 Ref. (*Mookerjee and Buckland, JJ.*) KRISHNA *v.* NAGENDRABALA. **25 C. W. N. 942 : 66 I C. 694 : 34 C. L. J. 333.**

———S. 58 (a)—*Consideration—Proof of.*

If the evidence shows that the payment of consideration in the mortgage bond is false, the mortgagee must prove it by some other cogent evidence. (*Teunon and Greaves, JJ.*) BHUT NATH *v.* KALI PRASAD. **50 I. C. 71.**

———S. 58 (a)—*Consideration—Enforcement.*

At the time of the execution of a mortgage for Rs. 3,000 only Rs. 1,000 were advanced and the balance kept in deposit with the mortgagee. It was subsequently paid over to the mortgagor, on a registered receipt after the expiry of the due date of repayment stipulated in the mortgage bond. *Held*, for the balance of Rs. 2,000 subsequently advanced, the mortgagee could recover the whole amount of Rs. 3,000 by a suit on the mortgage security. (*Fletcher and Huda, JJ.*) KASINATH MITRA *v.* DHIKAN CHARAN MAITY. **45 I. C. 778.**

———S. 58 (a)—*Mortgage debt—Moveable.*

Under Hindu as under English law, mortgage is treated as personal or moveable property, the land being merely security for the money lent. (*Richardson and Fletcher, JJ.*) SURESSUR *v.* MOHASH RANI. **31 I. C. 983 : 20 C. W. N. 142.**

———Ss. 58 (a) and 67—*Intangible property—Mortgagee's remedies.*

A *pala* or turn of worship is intangible property and a mortgagee thereof is entitled to foreclose the mortgage like a pledgee or mortgagee of chattels or lands, (*Mookerjee and Beachcroft. JJ.*) MAHAMAYADEBI *v.* HARIDAS HOLDAR. **42 Cal. 455 : 20 C. L. J. 183 : 27 I. C. 400 : 19 C. W. N. 208.**

———Ss. 58 (a) and 100—*Mortgage and charge—Distinction between—Remedies.*

A mortgage is a transfer of an interest in specific immoveable property. A charge only secures payment of money out of that property. The distinction is important in the determination of the question whether the property can be followed in the hands of a *bona fide* purchaser for value without notice. A charge cannot be enforced

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

against the property in the hands of a *bona fide* purchaser for value without notice. (*Mookerjee and Beachcroft, JJ.*) AKSHOY KUMAR BANERJEE *v.* CORPORATION OF CALCUTTA.
42 Cal. 625 : 19 C. W. N. 37 : 21 C. L. J. 177 : 27 I. C. 261 : 44 I. C. 734.

See also

——Ss. 58 (a) and 59—*Immoveable property—Turn of worship if.*

A turn of worship in a temple is not an interest in immoveable property and S. 59 of the T. P. Act does not apply to it. 4 C. 683 Rel. (*D. Chatterjee and Teunon, JJ.*) JATO KAR *v.* MUKUND DEB. **39 Cal. 227 : 14 C. L. J. 369 : 11 I. C. 884 : 16 C. W. N. 129.**

——S. 58 (a)—*Consideration — Failure—Effect.*

As a mortgage is a mere security for a loan, if there is no consideration for the loan, the mortgage also fails. (*Le Rossignol, J.*) ARJAN SINGH *v.* BAKHTAWAR SINGH. **1924 L. 381.**

——S. 58 (a)—*Vendee from mortgagor—Position of.*

A purchaser from a mortgagor is as much bound as the latter, as regards the liability of the property mortgaged, for the debt due to the mortgagee. (*Shadi Lal, C. J. and Harrison, J.*) MALAN *v.* TARA SINGH. **63 I. C. 744.**

——S. 58 (a)—*Mortgage—Period for redemption fixed—Interest.*

Where a shop was mortgaged three times to the same mortgagee and the third mortgage provided that the mortgagor will continue to pay interest, that he will redeem this mortgage as well as the previous mortgages in one year and that otherwise, after the expiration of the prescribed period the shop was to be considered as sold to the mortgagee, *held*, that the intention of the parties was that the relationship of mortgagor and mortgagee should cease after the expiry of the period fixed for payment and that therefore interest ceased to run after the expiry of the stipulated period. (*Broadway and Abdul Raoof, JJ.*) MUNSHI LAL *v.* TEJ RAM. **63 I. C. 533.**

——S. 58 (a)—*Specific immoveable property—Future crops—Transferee without notice—Liability of.*

A hypothecation of future crop becomes complete when the crop is grown and the produce realised and is enforceable against a transferee of such produce with notice of the obligee's equitable interest but not against a transferee without notice. 10 A. 133 Foll. (*Martineau, J.*) SAWAY RAM *v.* FATTU RAM. **56 I. C. 489.**

——S. 58 (a)—*Consideration—Non-payment of consideration— Possession of mortgaged property.*

A puisne mortgagee's failure to prove the payment of part of the consideration for the mortgage does not debar him from recovering possession on redemption of a prior mortgage. (*Shadi Lal, J.*) BUDHA *v.* MULRAJ.
48 I. C. 916 : 8 P. W. R. 1919.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

——S. 58 (a)—*Mortgage—If can be created by Court.*

A mortgage can be created by a decree and it stands practically on the same footing as one created by contract *inter partes.* (*Shah Din and Scott Smith, JJ.*) DEBI SAHAI *v.* RAMJI LAL.
56 P. R. 1918: 46 I. C. 460 : 127 P.W.R. 1918.

See also **14 I. C. 213.**

——S. 58 (a)—*Transfer of interest—When complete.*

In the absence of a contract to the contrary a mortgage is complete (*i.e.*) the transfer of interest is effected when the mortgage contract is entered into and not when the consideration therefor is paid or made good. (*Johnstone, C.J., Chevis, Smith, Shadi Lal and Le Rossignol, JJ.*) ALLAH DITTA *v.* NAZAR DIN. **51 P. W. B. 1916 : 33 I. C. 474 : 53 P. R. 1916 (F. B.).**

——S. 58 (a)—*Consideration—Suit by mortgagee—Mortgagor admitting payment prior to mortgage.*

The Full Bench Ruling in 59 P. R. 1907 (F.B.) does not apply to a case where the mortgagor states that he has actually been paid prior to the mortgage whereas in fact such payment has not been made. (17 I. C. 235 Foll.) (*Rattigan and Beadon, JJ.*) MUNI LAL *v.* CHATTAR SINGH.
67 P. R. 1914 : 25 I. C. 595 : 232 P. L. R. 1914.

——S. 58 (a)—*Consideration not actually paid—Plea of part failure whether can be raised—Estoppel.*

Where a mortgage-deed recites payment of full consideration, the mortgagor is estopped from pleading failure of part consideration so as to render the mortgage unenforceable ; the rule that a mortgage is unenforceable when there is a partial failure of consideration does not apply to a case where the consideration relates to a payment made in the past. (*Kensington and Rattigan, JJ.*) KARAM CHAND *v.* BASANT KUAR.
192 P. L. R. 1911 : 31 P. R. 1911 : 11 I. C. 321 : 236 P. W. R. 1911.

——Ss. 58 (a), 59 and 100—*Mortgage or—charge—Security for a debt without transfer of interest.*

If a document purports to treat an immoveable property as a security for a debt but no interest in the property is transferred the whole thing amounts to a charge and not to a mortgage. (*John Wallis, C. J. and Oldfield, J.*) RAMASWAMI IYENGAR *v.* M. V. KUPPUSAMI AIYAR.
14 L. W. 99 : 56 I. C. 554 (2) : (1921) M. W. N. 472.

——S. 58 (a)—'*Mortgage money' includes interest.*

Per *Wallis, C.J.*—'Mortgage money' in S. 58 (*a*) includes interest and if it is in arrears, the mortgagee can realise the same by sale of sufficient portion of the security though the principle money has not become payable. Per *Sadasiva Aiyar, J* :—Mere failure to keep down the interest by punctual payments, would not put an end to the term provided for in the mortgage-deed for the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

re-payment of the principal amount. (*Wallis, C. J. and Sadasiva Aiyar, J.*) ARUNACHALA CHETTIAR *v.* RAJAH OF KALAHASTI.
13 L. W. 312 : 29 M. L. T. 176 : 32 I. C. 505 : (1921) M. W. N. 172.

——S. 58 (a) and 100—*Mortgage—Charge—Future debt—Property specified—Deed, when becomes operative.*

Where a document of indemnity before a specific date, contained a covenant to pay and also specified the property to be sold in case the debt was not paid, the deed creates a mortgage and not merely a charge. 23 M.L.J. 131, 29 I. C. 605 Foll. A mortgage takes effect on the date of its execution unless the parties contemplated the bringing into existence the mortgage on a future date even though the debt secured is a future date. The mortgagee will have a priority over any intermediate mortgage subsequently created though at the time when the future debt had not come into existence. (*Spencer and Seshagiri Aiyar, JJ.*) NARAYANASWAMI RAO *v.* RAMASAWMI.
60 I.C. 611 : 12 L. W. 674.

——S. 58 (a) and (c)—*Mortgage—Construction—Simple and usufructuary mortgage—Combination.*

A mortgage-deed provided for repayment of the principal and interest at a certain rate within a fixed time until when the mortgagee was to be in possession and pay revenue. On default to pay on due date the mortgagee was to treat the land as sold to him for the amount due and the mortgagor was not then to exercise his right of redemption. *Held* (1) that the mortgage was combination of simple and usufructuary mortgages (2) that it is not necessary to state in a usufructuary mortgage deed that the mortgagee is to appropriate the profits in lieu of interest. If it is not stated that he is not to appropriate profits in satisfaction of the principal the inference from the deed is that they are to be applied towards advance; (3) that an appropriation in part-payment of interest alone can make the mortgage transaction a combination of simple and usufructuary mortgage; (4) that in ascertaining the nature of the mortgage deed if the essentials of any one of the four kinds of mortgages are present other recitals should be ignored but if they are not present the parties should be dealt with according to the terms of their contract. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) KANDULAL VENKAIAH *v.* DONGA PILLAI. **43 Mad. 589 : (1920) M.W.N. 349 : 57 I. C. 724 : 28 M.L.J. 56 : 13 L. W. 123**

——S. 58 (a) and 100—*Charge—Mortgage—Distinction—Covenant to pay.*

Per *Sadasiva Aiyar, J.*—Even if there is no personal covenant to pay, a document creating a charge on specific immoveable property is a mortgage and not a mere charge liable to be defeated by a plea of *bona fide* purchase for value without notice. Distinction between charge and mortgage considered. 33 Cal. 985 Not Foll. (*Sadasiva Aiyar and Spencer, JJ.*) SRINIVASA RAGHAVA IYENGAR *v.* RANGANATHA.
25 M.L.T. 347 : 51 I.C. 963 : 36 M.L.J. 618.

TRANSFER OF PROPERTY ACT (IV OF 1882), S: 58 (a)—Mortgage, meaning of.

——S. 58 (a)—*Consideration— Non-payment of.*

When a contract of mortgage becomes an executed conveyance the deed could not be cancelled for mere non-payment of consideration. Consequently where a registered mortgage is made, it is not void or voidable because of non-payment of consideration. (*Phillips and Kumaraswami Sastri, JJ.*) ABDUL HASHIM *v.* KADER BATCHA. **42 Mad. 20 : 8 L.W. 543 . 35 M.L.J. 740 : 48 I. C. 370 : (1918) M W.N. 769 : 24 M.L.T. 478.**

——S. 58 (a)—*Consideration—Partially paid up*—Pro tanto *charge.*

A mere default on the part of the lender to pay the full amount of the charge would not deprive him of his lien in respect of the money actually advanced. A property can be specific so long as it is identifiable, though it may not be in existence on the date of the transfer. A transfer, therefore, if otherwise valid, is not rendered inefficacious by reason of the subject-matter not having been in existence on the date of the agreement. Where a loan is charged on a fund to come into existence in the future the charge attaches to the property on its coming into existence. Where moneys advanced for financing a litigation are charged on the properties to come into existence in a particular manner but a compromise is effected in a totally different manner the lien will not attach itself to the substituted property. (*Ayling and Seshagiri Aiyar, JJ.*) FUSAPATHI VENKATAPATHI RAJU *v.* VENKATA SUBHADRAYAMMA.
47 I. C. 563.

——S. 58 (a)—*Consideration—Partial failure of.*

It is open to a mortgagor to show that there has been actual failure of consideration in respect of part of the debt. The mortgage is good for the balance. 2 M. 212, 36 M. 117 Ref. (*Sadasiva Aiyar and Phillips, JJ.*) ZAMINDAR OF KARVETINAGAR *v.* SUBBARAYA PILLAI.
(1918) M.W.N. 146 : 43 I.C. 871 : 7 L. W. 36.

——S. 58 (a), (b), (c), (d) and (e)—*Scope and effect.*

The definitions of the various classes of mortgages in S. 58 should not be read as amplifying the *quantum* of interest conferred on the mortgagee. Cls. (*b*), (*c*) and (*d*) prescribe only forms in which the mortgages are to be expressed ; and the legal effect is indicated in Cl. (*a*). When property is situated in the muffasil and one of the parties is a Hindu, a mortgage though styled English mortgage does not transfer an absolute interest to the mortgagee 7 C. 394 Dist. (*Wallis, C. J. and Seshagiri Aiyar, J.*) ANSUR SUBBA *v.* SECRETARY OF STATE. **41 I.C. 770 : (1917) M. W. N. 794.**

——S. 58 (a)—*Consideration —Failure of—Right of mortgagor to prove.*

Where the mortgagee stands in a fiduciary relation to the mortgagor, the latter can prove failure of consideration by proving circumstances which would entitle him to go behind the settled account comprised in the mortgage and showing that the whole or part of the amount was not

really due. 35 Mad. 114; 2 Mad. 212 Foll. An attaching creditor can question the correctness of the whole account on which a mortgage of the attached property is founded. 35 Cal. 1051 Foll. (*Sadasiva Aiyar and Napier, JJ.*) RAJA KUMARA VENKATA PERUMAL RAJU *v.* UDDAGIRI PAPA NAIDU. **41 I.C. 208 : 21 M.L.T. 351.**

——— ——Ss. 58 (a) and 100—*Mortgage or charge—Implied covenant to pay.*

Under the contract between the stake-holders and subscribers to a *chit* there was the usual provision that the prize-winner should execute a security bond before he receives the prize-money. *Held*, the document so executed amounted to a mortgage and not merely charge, though there was no express covenant to pay. (*Oldfield and Sadasiva Aiyar, JJ.*) VENKATA RAMA CHETTY *v.* PANCHANATHA AIYAR. **38 I. C. 813 : (1916) 2 M. W. N. 263.**

———S. 58 (a)—*Immoveable property—Specific performance—Right to.*

A mere right to specific performance cannot be the subject of a mortgage. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) NOCHAT KIZAKI MADATHI VENKATESHWARA *v* KALUR ILLATH RAMAN. **3 L. W. 435 . 33 I. C. 696 : 19 M. L. T. 329.**

———S. 58 (a) *and* 100 — *Security bond—Transfer of interest—Charge or mortgage.*

A security bond, after reciting an order of the Court, stated that "we have for a sum not exceeding Rs. 300 made over properties mentioned below as security." *Held*, that the document did not transfer any interest in the property nor was there any existing or future debt or an agreement which might give rise to a pecuniary liability .It merely created a charge. (*Sankaran Nair and Bakewell, JJ.*) RAMACHARIAR *v.* DORASAMI. **29 I. C. 605.**

———S. 58 (a)—*Transfer of interest— If essential.*

A formal transfer of interest or the express mention of a power of bringing the property to sale is not essential for a mortgage. 21 M. L. J. 562 ; 23 M. L. J. 131 ; 27 M. L. J. 58 Foll. A document styling itself *Adamanakadan pathiram* and giving sufficiently accurate description of the property and reciting the amount due thereunder is a mortgage within S. 31 of the Limitation Act even though words expressing a transfer of interest and giving a power of sale are absent. (*Sankaran Nair and Spencer, JJ.*) PONNURANGA *v.* THANDAVARAYA. **1 L. W. 1025 : 26 I. C. 274 : (1915) M. W. N. 21.**

———S. 58 (a)—*Transfer of interest—Implied—Mortgage.*

Where a document recited among other things, the existence of another document executed by the father of the present executant, the loan of Rs. 55 to carry interest from the date of execution, and also the delivery of possession of land to be enjoyed in lieu of principal and interest for 13 years and also the rights to collect from the tenants and containing a clause for redelivery of possession at the end of the term, and styled as *Diggu Bogam* it was held that the document was a mortgage as there was a transfer of an interest in specific immoveable property and not merely an assignment of the income for a period. (*Ayling and Hannay, JJ.*) ANANTHA *v.* RAMASAMI. **16 M. L. T. 444 : 26 I.C. 71 : (1914) M. W. N. 891.**

———S. 58 (a)—*Consideration—Failure of.*

A mortgage without consideration is a nullity; it creates no charge on property and is unenforceable against a subsequent purchaser. 21 Mad. 56 Dist. (*Tyabji and Spencer, JJ.*) RAMASWAMY *v.* SUNDARA. **23 I. C. 805.**

———S. 58 (a)—*'Specific property'—Scope of and construction of—' Tanakha'.*

The terms 'Tanakha' used in Ganjam District means a mortgage and is used there in no other sense, so that where the word is used twice in the operative portion of a document a mortgage is created. For purposes of S. 58 the expression " my *jiroyati* and *inam* lands which I own at the village of my residence Bramma Tarla of Tarla Taluk" is sufficiently 'specific' to interpret as meaning a mortgage. (*Ayling and Oldfield, JJ.*) DAKKATA THOTAPALLI *v.* SASANAPURI DALI SETHI. **1 L. W. 96 : 22 I. C. 524 : (1914) M. W. N. 270.**

———S. 58 (a)—*Essentials of mortgage.*

Formal transfer of interest and an express power of sale are not essential elements of a mortgage. A covenant to pay is an essential element of a simple mortgage. A charge which is created by act of parties on specific immoveable property, for a debt and containing a covenant to pay is a mortgage. It further entitles the mortgagee to such possession as the case admits of. (*Wallis and Ayling, JJ.*) RAMA BRAHMAN *v.* VENKATANARASU PANTULU. **23 M.L.J. 131: 16 I. C. 209 : (1912) M. W. N. 1124.**

———S. 58 (a)—*Consideration—Sale.*

The suit on the mortgage is maintainable where through the vendee's default the sale-deed was not registered, though he was put into possession and the vendor has taken a mortgage for the sale price. (*Ayling and Spencer, JJ.*) RAMA AIYAR *v.* VENKATARAMA AIYAR. **12 I. C. 310 : (1911) 2 M. W. N. 241.**

———S. 58 (a)—*Consideration —Instalment decree.*

A consent decree for payment of money due in instalment is good consideration for a mortgage executed simultaneously by the deft. for decree amount. In such a case the enforcement of the decree does not bar the plff.'s rights under the mortgage, (*White, C. J. and Phillips, J.*) KARUPPAN *v.* PONNUSWAMI. **11 I. C. 837 : 10 M. L. T. 187.**

———S. 58 (a)—*Consideration—Partial—Full consideration not paid up.*

A mortgage bond, the whole consideration of which has not been paid up is valid to the extent of the paid up consideration unless the mortgagor has expressly put an end to it. (*Abdur Rahim and Ayling, JJ.*) SUBBARAYA *v.* MANICKA. **9 M. L. T. 479 : 10 I. C. 258 : (1911) 1 M. W. N 265.**

[See also 2 O. L. J. 488 : 8 O. C. 280 : 32 I. C. 341: and 29 I.C. 690 : 21 C. W. N. 401.]

TRANSFER OF PROPERTY ACT (IV OF 1882), S 58 (a)—Mortgage, meaning of.

——S. 58 (a)—*Consideration—Partial failure—Usufructuary mortgage.*

Where part of the consideration is or becomes void, the mortgagees could not prescribe for a larger interest than that which actually passed and time did not run in their favour for the acquisition of a larger interest by the mere assertion of it to the knowledge of the mortgagor. (*Krishnaswami Aiyar and Ayling, JJ.*) TIRUMAL *v.* PANDLA MUTHIAL. **35 Mad. 114 : 9 M. L. T. 286 : 21 M. L. J. 169 : 9 I. C. 289 : (1917) 1 M. W. N. 113.**

——S. 58 (a)—*Mortgage—Implied covenant to pay.*

There is an implied personal covenant to pay in the case of most mortgages, except where there is a right of sale under the mortgage itself 44 C. 388 Ref. (*Hallifax and Dhobley, A. J. C.*) JIWANDAS *v.* JANKI. **5 N. L. J. 49 : 18 N. L. R. 145 : 1922 Nag. 98.**

——S. 58 (a) and 67—*Immoveable property—Malikhana rights—Rights of mortgagee.*

Where in lieu of a money-debt a superior proprietor gives possession of malikhana rights of a village and covenants not to claim the property till satisfaction of the debt, the agreement amounts to a hypothecation of the property The mortgagee is entitled to a decree for sale of his proprietary rights. (*Mittra, O. A. J. C.*) RAM GHULAM *v.* BALA PRASAD. **27 I. C. 498 : 10 N. L. R. 185.**

——S. 58 (a)—*Mortgage charge—Distinction between.*

The distinction between the two kinds of deeds is that a mortgage imports while the charge does not import an agreement express or implied governing the disposal of property in some way on default being made. In other words in the case of a simple mortgage the right to sell the security on default of payment is created when the mortgage is effected where as in a charge the statutory right to have the security sold arises only when default is made and not till then. (*Stanyon, A. J. C.*) KHEM CHAND *v.* MALLO. **26 I. C. 601 : 10 N. L. R. 81.**

——S. 58 (a)—*Mortgage—Consideration—Portion of, with mortgagee to pay off—Prior mortgage—Failurs to pay—Effect of.*

Where a portion of the consideration, for a mortgage is left with the mortgagee to pay off a prior mortgage and he fails so to pay, he is responsible for any additional sum payable to the prior mortgagee. (*Wazir Hasan, A.J.C.*) RAGHUBAR SINGH *v.* SANWAL SINGH. **8 O. L. J. 23 : 61 I. C. 125 : 3 U. P. L. R. (J. C.) 9.**

——S. 58 (a)—*Consideration— Partial payment—Usufructuary mortgage.*

A mortgagor has no right to elect between delivery of possession or redemption when part of consideration was paid and part is being offered. The mortgagor must give up possession on receipt of the balance. Though part of consideration was paid and part is to be paid to creditors of the mortgagor, the mortgage is good if the unpaid part is paid. (*Lyle, A. J. C.*) GAJADHAR CHAUBEY *v.* SANT BAKSH SINGH. **58 I. C. 161 : 7 O. L. J. 425.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

——S. 58 (a)—*Consideration—Failure of.*

The consideration for a mortgage may be money paid or promised to be paid afterwards. In the latter case, there is no failure of consideration unless the mortgagee expresses his unwillingness to keep his promise or has by his conduct disqualified himself from carrying out his part of the contract. (*Kanhaiya Lal, J. C.*) NAROTAM PRASAD *v.* SHANKAR SINGH. **52 I. C. 91 : 22 O. C. 112.**

——S. 58 (a) — *Consideration — Partial failure—Effect of.*

Though only a part of the consideration for a mortgage is proved, the mortgagee is entitled to possession of or a lien on the mortgaged property to the extent of the money advanced. (*Kanhaiya Lal, Offg. A.J.C. and Daniels, A. J.C.*) SANKATA DIN *v.* HAR BAKSH SINGH. **50 I. C. 952.**

——S. 58 (a)—*Consideration— Mortgagor and mortgagee — Accounts — Overstatement of consideration—Mistake.*

Though a mortgagee is put in possession of the mortgaged property on condition of his appropriating the income of the properties towards interest still it is open to the mortgagor to show the mistake in the consideration stated in the mortgage. The mortgagor is entitled to interest on the amount by which the consideration stated exceeded the real amount paid. (*Lindsay, J. C.*) PARTAB SINGH *v.* BALWANT SINGH. **48 I. C. 550 : 5 O. L. J. 670.**

——S. 58 (a)—*Consideration—Deposit of the loans with mortgagee—Suit for the recovery of the deposit—Not a suit to enforce a contract—Small Cause Court*

Where a mortgagor allows the whole or part of his loan to remain with the mortgagee on the understanding that it is to be taken by him from time to time, the transaction is to be regarded as a deposit of money with an agent or banker repayable on demand without interest. It is not a contract of loan, and so a suit lies for its recovery in the Small Cause Court. (*Lindsay, J. C.*) MUSSAMMAT RANJITA *v.* MUSSAMMAT RUKMIN. **34 I. C. 387.**

——S. 58 (a)—*Mortgage—Validity of unregistered deed of gifts—Rights under—Mortgage in consideration of.*

The common ancestor of the defts. executed in 1891 a mortgage-deed in favour of one K. in consideration of a debt-due to the latter's deceased husband from the former. In 1897 the widow executed a deed of gift in favour of the plff., conveying all her rights under the mortgage-deed to him, but she died before the deed of gift could be registered. Subsequently the plff. obtained from the legal representative of the widow in 1899 under a Registered deed, all rights possessed by the legal representative under the deed of 1891. In consideration of the sum due under the deed of 1891, the defts. executed in 1898 a mortgage in favour of the plff. In a foreclosure suit by the plffs., the defts. pleaded that the deed of 1898 was obtained by fraud as the plff. had represented that all the rights under the deed of 1891 were

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a.—Mortgage, meaning of.

lawfully transferred to him while in fact the transfer in his favour was void in law.—*Held*, that, (1) Under the circumstances the defts. could not plead undue influence and fraud. (2) The deed of 1897 could be admitted in evidence both as an evidence of circumstances under which the mortgage-deed of 1898 was executed and as regards the question of fraud and consideration. (3) The mortgage was one by conditional sale and the consideration for it was the discharge of the defts. from the liability under the deed of 1891 from which liability the plff. after obtaining the deed of 1899, could free the defts. and that was a good consideration. (*Piggott, C. J. and Lindsay, A. J. C.*) LALA ATAL BEHARI LAL *v.* NARPET SINGH. **20 I. C. 47 (2).**

——— **Ss. 58 (a) and 100**—*Mortgage or charge —Distinction.*

Every document must be interpreted on its own terms and not in the light of other cases. A mere agreement that no redemption of an earlier mortgage will be allowed before the amount borrowed later is paid, does not effect a charge on the property. (*Lindsay, A. J. C.*) GANESH PRASAD *v.* BISRAM SINGH. **18 I. C. 461.**

——— **Ss. 58 (a) and 105**—*Mortgage or lease—Zuripeshgi—Redemption—Existence of debt.*

The test to find out whether a zuripeshgi is a mortgage or lease is to find out whether there is a secured debt and a right of redemption. In a zuripeshgi lease properly so called there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may thereupon re-enter. The transaction is really one in which rent is paid in a lump sum in advance instead of by instalments during the term. Where however the interest created in the lease after the expiration of the term until the advance which is essentially loan not an advance of rent, is repaid, the transaction has the essential characteristics of a mortgage. (*Miller, C. J. and Mullick, J.*) MAHARAJAH KESHO PRASAD SINGH *v.* CHANDRIKA PRASAD SINGH. **2 P. 217 : 3 P. L. T. 797 : 1923 P. 122.**

——— **Ss. 58 (a) and 100**—*Mortgage or charge—Distinction—Lease—Security of property for rent.*

Where a lease deed in addition to making the lessee personally liable for rent made certain property the security for the same and restrained the lessee from alienating such property so long as the rent remained unpaid. *Held*, the transaction did not amount to a mortgage. The broad distinction between a mortgage and a charge is that whereas the latter only gives a right to payment out of a particular fund or property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immoveable property. The line of division is clear in England, but is not so well marked in

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

India. (*Das and Adami, JJ.*) SHIVA PRASAD SINGH *v.* BENI MADHAB CHOWDHURY. **1 P. 387 : 4 P. L. T. 6 : 1922 P. 528.**

——— **S. 58 (a)**—*Mortgage—Consideration — Agreement not to prosecute—Validity of mortgage.*

A decree-holder in attempting to execute his decree was resisted by a third party. The Court granted the decree-holder sanction to prosecute the obstructor. An agreement was arrived at to the effect, that on a mortgage bond being executed by the judgment-debtor and the obstructor, for the amount of the decree the latter would not be prosecuted. In a suit to enforce the mortgage, illegality of consideration was pleaded in defence. *Held*, the bond was enforceable against all the defendants. The distinction between the motive for coming to an agreement and the actual consideration for the same must always be kept in view. (*Das and Adami, JJ.*) ADHIKANDA SAHU *v.* JOGI SAHU. **1 P. 164 : 1922 P. 502.**

——— **Ss. 58 (a) and 59**—*Mortgage—Operation of—Non-payment of consideration—Execution of sale deed—Priority.*

In the absence of a provision in a mortgage that it is not to become effective until payment of the consideration money the mortgage becomes operative from the date of its execution. Consequently, where after the execution and registration of a mortgage the mortgagor executes a sale deed of the property the vendee does not get priority over the mortgagee even though the consideration for the mortgage was paid after the execution of the sale. (*Das and Adami, JJ.*) RAGHUNATH BHAGAT *v.* AMIR BAKHSH. **1 Pat. 281 : 3 Pat. L. T 307 : 1922 P. 299.**

——— **S. 58 (a)**—*Mortgage—Test of—Interest—Provision for.*

A very important test to apply, wherever the question is raised whether a transaction amounts to a mortgage or not, is to see whether any interest is to run upon the sum of money that may be due by one party to another in consideration of which the transaction is entered into. If no interest is payable by the debtor to the creditor and if document expressly states that the transaction is entered into for the purpose of paying off the sum due by the debtor to the creditor it is difficult to understand how the transaction can be regarded as a mortgage. (*Das and Adami, JJ.*) KRISHNA KISHORE ADHIKARY *v.* THE KUSUNDA NYADI COLLIERIES, LTD. **1922 P 36.**

——— **S. 58 (a)**—*Mortgage—Unregistered — Mortgagee cannot resist redemption—"Once a mortgage always a mortgage".*

A mortgagee in possession, under a mortgage requiring registration but not registered, cannot resist a redemption suit on the ground that the deed is unregistered and that he holds adversely, on the principle, of the maxim 'once a mortgage always a mortgage.' (*Jwala Prasad, C. J. and Adami, J.*) RAJPATI RAI *v.* SUKWAROKUER. **63 I. C. 400.**

——— **S. 58 (a)**—*Zuripeshgi lease—Construction.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (a)—Mortgage, meaning of.

A security bond contained the following stipulation : Whereas I, the executant, have taken (in settlement) the entire 16 As. of mouza. A forming the *milkiat* property of X for a period of 7 years at an invariable annual rent of Rupees 407 with Road, Public Works, and Dak cesses, therefore, I, executant, on executing this bond stand as security for the sum of Rs. 407 fixed as above. As security for the aforesaid stipulated amount, I pledge and mortgage upto the term of the Thicca to the said *malik* the entire 16 As. of my *mouza* B." It was contended that the rental of only one year was secured held that inasmuch as the executant had taken a lease of the property for a period of seven years, and given security for the payment of the rent, it was only reasonable to suppose that he intended to give security for the due payment of the rent during the period of the lease and not merely to secure the payment of rent for one year only. (*Chapman and Atkinson, JJ.*) GADADHAR PRASAD *v.* UMESH CHANDRA CHAKRAVARTHY. **2 Pat. L. J. 195.**

——**S. 58** (*a*)—*Mortgage money—Interest—Right to.*

Unless the interest is expressly secured by the mortgage, it is not included in the mortgage money. (*Das and Adami, JJ.*) PAWAN KUMAR CHAND *v.* DULARI KUAR. **58 I. C. 216 : 1 Pat L. T. 544.**

——**S. 58** (a)—*Shares in a company—Mortgage—Effect of such mortgage—Scope of the T. P. Act.*

Shares in indigo concerns in Bihar are a definite and specific kind of property and are a valid subject of a mortgage or transfer in any way. There are many mortgages known to English Law which it would be difficult or impossible to bring within the terms of the T. P. Act and yet they would be enforeceable in India, *e.g.*, mortgage of a share or shares in a partnership. *Cavendeer* v. *Bullock* (1873) 9 Ch. 79 Ref. If a share is mortgaged, parties must intend that when foreclosure or sale takes place, the share shall pass to the mortgagee as it stands at date of sale or foreclosure. This would include not only accessions but also changes in good will and the like. 5 Cal. 198 (P. C.) Ref. (*Chapman and Roe, JJ.*) BHUPENDRA NATH *v.* WAJIHUNNISSA BEGAM. **2 Pat. L. J. 293 : 39 I. C. 564 : 3 Pat. L.W. 20.**

——**S. 58** (a)—*Consideration—Payment of—Registration.*

Per *Jwala Prasad, J.*—A mortgage is not invalid merely by non-payment of part of consideration. Per *Mullick, J.*—Registration alone does not validate a mortgage if there is a condition that the mortgage should not operate till the whole consideration money is paid. The person setting up such condition must prove it. (*Mullick and Jwala Prasad, JJ.*) RAKHAULAL *v.* HANUMAN BAKSH. **1 Pat. L. W. 250 : 38 I. C. 877 : 2 Pat. L. J. 168.**

——**S. 58** (*a*)—*Consideration — Partially proved.*

In a suit for possession by a mortgagee, the defts. raised a plea of want of legal necessity but a fair portion of such necessity was proved.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (b)—Simple mortgage.

Held, that details of transaction thirty years old could not be expected to be proved by the plff. and the land can be a security, at any rate for the amount shown to be for necessity. (*Mullick, J.*) KESHO PRASAD SINHA BAHADUR *v.* LALJI RAY. **35 I. C. 535 : 1 Pat. L. J. 138.**

——**S. 58** (a)—*Delivery of possession of land as security for money in absence of writing or registration is not mortgage.*

Where a person delivers possession of land to secure the payment of a debt but there is no writing or registration in evidence on the transaction, it is not a mortgage. In a suit the proper decree to be passed would be one for recovery of possession on repayment of the debt. (*Pratt, J.*) MAUNG AUNG *v.* MAUNG SHWE LIN. **1923 Rang. 51.**

——**Ss. 58 (a) and 69**—*Mortgage money—Interest—Mortgage with power of sale—Default of payment of interest.*

When the mortgagee is given a power of sale at any time on default of payment of principal or interest and the sale proceeds are to be applied towards the payment of the principal and interest the document as a whole is subject to S. 69 of the T. P. Act and the right of redemption should be taken as dependent on punctual payment of the monthly interest as it falls due in the mean time. The power of sale can be exercised under S. 69 of the T. P. Act even if there is no default in respect of payment of the principal money. The term "mortgage money" includes interest along with the principal. (*Twomey, C. J. and Parlett, J.*) THE FIRM OF A. C. KUNDU *v.* ROOKOCHAND. **11 Bur. L. T. 147 : 43 I. C. 921 : 9 L. B. R. 106.**

——**S. 58 (a) and (c)**—*Mortgage by conditional sale—Test—Relationship of debtor and creditor.*

The *true test* for determining whether a transaction amounts to a mortgage is whether a relation of debtor and creditor exists between the parties; a sale with right of re-purchase does not amount to a mortgage by conditional sale, if such a relation does not exist between the parties. (*Twomey, J.*) MA HUIN *v.* OSMAN GANI. **15 I. C. 423 : 5 Bur. L. T. 99.**

S. 58 (b)—[Simple Mortgage].

——**Ss. 58 (b), 59 and 68 (b) and (c)**—*Mortgage—Unenforceable for want of attestation—Personal covenant to pay—Dispossession—Lender if may sue on.*

A loan *prima facie* involves a personal liability to pay ; and such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest ; but the nature and the terms of such security may negative any personal liability on the part of the borrower. Even if the mortgagor be in the first instance under no personal liability, such liability may arise under S. 68 (b) or (c) of the T. P. Act. The right of a mortgage to sue the mortgagor personally for the mortgage money arising out of any of the circumstances specified in S 8 of the T. P. Act is unaffected by the fact that the mortgage being unattested is unenforceable as a mortgage

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (b)—Simple mortgage.

(*Lord Parker.*) RAM NARAYAN SINGH *v.* AUHINDRA NATH. **44 Cal. 388 : 21 M. L. T. 12 : 15 A. L. J. 107 : (1917) M. W. N. 94 : 25 C. L. J. 121 : 21 C. W. N 383 : 19 Bom. L. R. 194 : 44 I. A. 87 : 38 I. C. 932 : 32 M. L. J. 39 (P. C.)**

——**Ss. 58 (b) and 98**—*Simple mortgage—Condition that mortgagee shall take possession—Default of payment of interest by the mortgagor—Decree for sale.*

In a suit brought by the mortgagee against the mortgagor who had failed to pay the principal and interest, to enforce his mortgage, the single instrument styled a simple mortgage, provided : "If the whole or portion of the interest remains unpaid by the due date, the mortgagee shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgage" *Held*, that the mortgagee retained the position of simple mortgagee, and the mortgagor had not fulfilled his obligations and the decree for sale of the mortgaged property is right. (*Lord Macnaughten.*) LINGAM KRISHNA *v.* MANYA SULTAN. **15 C. W. N. 441 : 9 M. L. T. 445 : 8 A. L. J. 594 : 13 C. L. J. 584 : 13 Bom. L. R. 447 : (1911) 1 M. W. N. 429 : 10 I. C. 272 : 21 M. L. J. 1147 (P. C.).**

——**S. 58 (b)**—*Right of mortgagee to enforce whole claim against a portion of the property.*

Where portions of mortgaged property go, subsequent to the mortgage, into different hands, the mortgagee is entitled unless he is himself a party to the disintegration, to sue to enforce the whole of his claim against any portion of the property. (*Gokul Prasad and Stuart, JJ.*) SURAJ MAL *v.* THAN SINGH. **64 I. C. 451 : 19 A. L. J. 917**

——**S. 58 (b)**—*Enforcement of security—Cause of action.*

A leased certain property to *B* who mortgaged two items to *A* as security for due payment of rent. The rent fell due and *A* obtained a decree against *B* for the arrears. *B* subsequently sold one of the items to *C*. *A* then sued to enforce the lien against both the items, without impleading *C* and got a decree and the properties were sold in execution. *A* then sold to *D* all the rights he had acquired in the properties who sued *C* for a proportionate share of the arrears. *Held*, that *D* was entitled to recover the proportionate amount from *C*. (*Tudball and Rafique, JJ.*) MAHADEO RAI *v.* BALDEO RAI. **19 A. L. J. 478 : 63 I. C. 504 : 3 U. P. L. R (All.) 96.**

——**S. 58 (b)**—*Rights of mortgagee—Law before T. P. Act—Sale of unhypothecated property—Validity.*

Under the law which existed prior to the passing of the T. P. Act (1882), the mortgagee could proceed against either the hypothecated property or any other property of the mortgagor. In the present case, he proceeded against the latter, and all the properties were put to sale. *Held* it was impossible to hold that this sale was a nullity. 2 C. 213 : 28 A. 295 Rel. (*Tudball and Rafique, JJ.*) O. DUNDIYA *v.* GIYANI RAM. **39 I. C. 119.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (b)—Simple mortgage.

——**S. 58 (b)**—*Simple mortgage—Covenant against alienation—Effect of.*

Where a document provided "I have borrowed Rs. 1,000 from so and so and one-third of the entire 20 Biswa Zemindary property belonging to me. I therefore covenant and give it in writing that I shall repay the aforesaid amount with interest, etc. Until payment, I shall not transfer the aforesaid property. If I do so, then such transfer shall be invalid. I have therefore executed these presents by way of land (Tamassuk)." *Held*, that the document did not constitute a simple mortgage as there was no transfer of a specific interest in immoveable property nor any power of sale conferred on him. A covenant against alienation is merely an assurance to the person advancing the money that there will be property available for the realisation of a money-decree in the event of his being driven to obtain one. Something more than this is required to create a mortgage. (*Tudball, Rafique and Piggott, JJ.*) MOHAN LAL *v.* INDOMATI. **39 All. 244 : 39 I. C. 18 : 15 A. L. J. 174 (F. B.).**

——**S. 58 (b)**—*Mortgage or charge.*

Where the executant of a deed of transfer hypothecates the properties and covenants to pay interest and not to transfer the property so-long as the debt remain unpaid, the deed constitutes a simple mortgage and not a charge. (*Richards, C.J. and Banerji, J.*) KALYAN SINGH *v.* DAMMAR SINGH. **26 I. C. 752**

——**S. 58 (b)**—*Simple mortgage-deed—Construction of—Word "hypothecation" not mentioned in deed—Mortgage, if results.*

A document intended to secure repayment of amounts borrowed, but which does not mention any fact of hypothecation of immoveable property nor refers to a right to bring any immoveable property to sale or non-payment of the amounts due, cannot merely because it refers to specific immoveable property which the executant agrees not to transfer until repayment of the loan, be construed as amounting to a simple mortgage. Per *Banerjee, J.*—In construing a document one should consider the intention of the parties, and if that intention can be gathered from the document itself it should be given effect to. The mere omission of the word 'mortgage' or of a clause giving the mortgagee a right to sell the property secured for the debt does not remove the document out of the category of an hypothecation. (*Richards, C.J. and Banerji, J.*) JWAHIR MAL *v.* RANI INDOMATI. **36 All. 201 : 22 I. C. 973 : 12 A. L. J. 290.**

——**S 58 (b)**—*Essentials of a simple mortgage—"Makful" and 'Mustagharak'—Meaning of.*

Right of redemption is the essential condition of a mortgage. The words, '*Makful*' and '*Mustagharak*' ordinarily imply a power of sale, except where the parties intended otherwise The deed was not a simple mortgage. Property secured for maintenance allowance is not a mortgage. (*Ryves and Lyle, JJ.*) MUSUMA KHATUM *v.* TAHIRA KHATUM. **19 I. C. 661 : 11 A. L. J. 580.**

——**S. 58 (b)**—*Simple mortgage—Sale.*

In a simple mortgage, the deed should indicate when read as a whole that the intention was that

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (b)—Simple mortgage.

property was to be sold on default. (*Ryves and Lyle, JJ.*) MOTI BEGAM *v.* HAR PRASAD.
19 I. C. 658 : 11 A. L. J. 570.

——S. 58 (b)—*Simple mortgage*—'Muakhiza".

To constitute a simple mortgage, there must be a transfer of an interest in specific immoveable property, (b) a personal undertaking by the mortgagor to pay the mortgage-money, and (c) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold. The word "*muakhiza*" is not commonly employed to denote a simple mortgage. The root meaning of *muakhiza* is taking and the word is generally used in the sense of taking satisfaction or calling to account. (*Karamat Husain and Chamier, JJ.*) DALIP SINGH *v.* BAHADUR RAM. **34 All. 446 : 15 I. C. 435 : 9 A. L. J. 550.**

——S. 58 (b)—*Simple mortgage—Right of mortgagee.*

A simple mortgagee's right under the T. P. Act is only to hold the property as security for his loan while the mortgagor continues to possess the property, and so when a simple mortgagee sues for sale, such suit is not one for possession of an interest in immoveable property. 30 M. 426 Foll. (*Sanderson, C.J. and Mookerjee, J.*) PRIYA SAKHI DEVI *v.* BIRESHWAR SAMANTA.
44 Cal. 425 : 21 C. W. N. 177 : 37 I. C. 277 : 27 C.L. J. 212.

——S. 58 (b)—Lekha Mukhi—*Essential features of.*

A *lekha mukhi* mortgage is a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability and the mortgagee not having the right to sue for the debt. (*Bevan Petman, J.*) KHANDULAL *v.* FAZEL.
51 I. C. 956 : 1 Lah. 21.

——S. 58 (*b*) and (*d*)—*Mortgage—Simple or usufructuary—Tests of—Interest—Charge on property.*

Under a mortgage-deed the mortgagee was to be in possession of the mortgaged properties and to set off the rents and profits towards interest and if any portion of the interest was unpaid the mortgagee might recover the interest month after month from the mortgagor. The mortgagors were to redeem the property on payment of the principal money. *Held* that the mortgage was neither a simple nor usufructuary mortgage and that the interest was not a charge on the mortgaged property. 2 A. 537, 33 A 107 Ref. (*Schwabe, C.J. and Wallace, J.*) NAMMALWAR CHETTY *v.* KRISHNASWAMI CHETTY. **16 L. W. 743 : 1923 Mad. 71.**

——S. 58 (b)—*Personal covenant—Mortgage.*

A mortgage-deed containing a stipulation to redeem in any *Chittirai* month at the end of ten years does not imply a personal covenant to pay at once at expiry of the period. (*Phillips and Krishnan, JJ.*) RANGA PILLAI *v.* NARASIMHA AYYANGAR. **47 I. C. 852 : (1918) M. W. N. 672.**

——Ss. 58 (b) and 100—*Simple mortgage—Charge — Transfer of interest—Covenant to pay.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (b)—Simple mortgage.

A formal transfer of interest is an element of a mortgage document. A stipulation for repayment of a certain amount within a specified time involves a personal covenant to pay and the document is a simple mortgage and not a charge. 10 M. 509 ; 29 I.C. 605 Dist. (*Sadasiva Aiyar and Spencer, JJ.*) SAMANDAN KARAKAT ETATHIL *v.* MAINKOTT VELLUA VETTIL. **6 L.W. 296 : 42 I. C. 349 : 33 M. L. J. 679.**

——S. 58 (b)—*Rights of mortgagor—Default on payment.*

Mortgage is a security for repayment of debt. In a simple mortgage the mortgagor is and continues to be owner of the property before and after default of payment. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) SURAPUDI MUNIAPPA *v.* NOOKALA SESHAYYA. **32 I. C. 901 : 3 L. W. 341.**

——S. 58 (b) and (d)—*Simple and usufructuary mortgages—Construction of deed.*

Where long after a simple mortgage the mortgagor gave a lease to the mortgagee, by which the rent was to be applied towards interest on the mortgage. *Held*, the two transactions must be deemed to be independent of each other and the simple mortgage was not converted into a usufructuary mortgage on the execution of the lease. 14 C.W.N. 1001, Dist. (*Seshagiri Aiyar, J.*) CHIDAMBARAM PILLAI *v.* M. S. M. DORAISWAMI CHETTY. **31 I. C. 473.**

——S. 58 (b)—*Mortgage*—Adamanam—*Simple mortgage.*

A document styling itself *Adamanakaanpathiram* and giving sufficiently accurate description of the property and reciting the amount due thereunder is a mortgage within S. 31 of the Lim. Act, even though words expressing a transfer of interest and giving a power of sale are absent (*Sankaran Nair and Spencer, JJ.*) PONNURANGA MUDALIAR *v.* THANDAVARAYA MUDALIAR.
1 L. W. 1025 : 26 I. C. 274 : (1915) M. W. N. 21.

——S. 58 (b)—*Simple mortgage—Covenant to pay, essential.*

A covenant to pay is essential in a simple mortgage. Where the mortgage recited "Whenever we pay the same to you, you shall receive it and give back the deed". Held, *per Sadasiva Aiyar, J.* (*Seshagiri Aiyar, J.* contra.) that there was no covenant to pay and the document only created a charge. 15 M. 304 Cons. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) RAGAPPA *v.* THAMAYYAPPA. **24 I. C. 372 : 26 M. L. J. 514.**

——Ss. 58 (b), 67 and 98—*Kanom mortgage—Right to bring property to sale—Provision as to re-payment—Whether 'Covenant to pay" within S. 67.*

Though a Malabar kanom is an anomalous mortgage within S. 98 of the Act the provision as to re-paymont is not a "Covenant to pay" within the meaning of S. 67 of the Act. (*Wallis and Sadasiva Aiyar, JJ.*) CHUNDAM VEETTIL PAZHAYATTAYIL *v.* C. P. M, MUHAMMAD.
24 I. C. 127 : (1914) M.W.N. 618.

——S. 58 (b)—'*Mortgage*'—*Whether includes instruments creating no transfer of interest or conferring power of sale.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (b)—Simple mortgage.

The term 'mortgage' includes instruments which create no actual transfer of interest or confer express power of sale. Such an instrument may be a simple mortgage. 16 I C. 209, Foll. 10 Mad. 509; 9 Mad. 218; 21 Mad 326, Dist. (*Miller and Sadasiva Aiyar, JJ.*) VENKATARAM AIYAR *v.* SUPPA NADAN. (1914) M.W.N. 501 : 24 I. C. 24 : 27 M. L. J. 58.

——— Ss. 58 (b) and 100—*Mortgage-charge —Simple bond*—Thanaka.

A simple bond under which the obligee bound himself and his heirs "with all my property moveable and immoveable *as thanaka*" is not a mortgage or charge. No charge can be created by act of parties without an intention to do so. (*Benson and Sundara Aiyar, JJ.*) KAMAYYA *v.* YERAKOLA.
13 M. L. T 327 : (1913) M W. N. 335 : 19 I. C. 221 : 24 M. L. J. 479.

——— S. 58 (b)—*Personal covenant—Suit on mortgage—Withdrawal of prayer for sale—If mortgagee entitled to a personal remedy.*

Where in a suit upon a mortgage in which the mortgagee was given remedies from other propertiesand person of the mortgagor, the mortgagee withdrew his prayer for sale of the hypotheca, it was held that he is not entitled to the personal remedy. 35 Bom. 327 Dist. (*Benson and Sundara Aiyar, JJ.*) CHERIYONNI *v.* NHERA POYILE.
(1911) 2 M W. N. 527 : 10 M. L. T. 528 : 13 I. C. 174 . 22 M L. J. 47.

——— S. 58 (b)—*Mortgage or charge—Simple mortgage, essentials of.*

A deed recited:—"In default I shall on the security of the house site belonging to me pay and make good the principal and interest. *Held*, that the instrument created a simple mortgage. A covenant to pay is essential for a simple mortgage. There need not be a formal transfer of any interest in property. To constitute a simple mortgage the instrument need not state that the mortgagee shall recover his money by sale. (*White, C. J. and Krishnaswami Aiyar, J.*) BALASUBRAMANIA NADAR *v.* SIVA GURU ASARI.
11 I. C. 629 : 21 M L. J. 562.

——— S. 58 (b)—*Power of sale—Hypothecation bond before T.P. Act.*

Hypothecation bondexecuted prior to the passing of T.P. Act though not expressly containing a power of sale is a simple mortgagewithin S. 58. (*Wallis and Munro, JJ.*) PAMLING *v.* ARUKKANI.
9 I. C. 163 : 9 M. L.T. 309

——— S. 58 (b) and (c)—*Personal covenant—Mortgage by conditional sale.*

A mortgagee is not entitled to sue for simple money decree on a mortgage when there is no personal covenant to pay. (*Mittra, A. J. C.*) JETHAMAL *v.* SAROO. 58 I. C. 30.

——— S. 58 (b)—*Personal covenant—Simple mortgage.*

The chief feature of a simple mortgage as that defined in S. 58 T.P. Act is that the mortgagor binds himself personally to repay the mortgage money. (*Drake Brockman, J.C.*) GOVIND *v.* JAGANNATH. 33 I. C. 753 : 12 N. L. R. 19.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale.

——— S. 58 (b)—*Simple mortgage—"Mustagharaq".*

A power of sale in a simple mortgage may be given either expressly or impliedly by using words such as :'Mustagharaq,' 'rehen' Arh' which commonly import such power. (*Lindsay, J. C.*) GAUHAR KHAN *v.* AJUDHIA SINGH. 20 I. C. 870.

——— S. 58 (b)—*Simple mortgage—Personal covenant.*

In the case of a simple mortgage a personal covenant is always implied and a decree for sale could be granted. (*Kanhaiya Lal, A J.C*) LALTA PRASAD *v.* HORI LAL. 19 I. C. 748; 16 O. C. 90.

——— Ss. 58 (b) and 100—*Simple mortgage—Essentials—Mortgage or charge.*

Where as a security for payment of money certain property was mortgaged and hypothecated with a covenant that, until repayment, the mortgagor would not alienate the property in any way. *Held*, that the document was simple mortgage. 34 A. 446, 35 Cal. 837. Appr. (*Atkinson and Kingsford, JJ*) ANAND RAM MARWARI *v.* DHANPAT SINGH.
1 Pat. L. J: 563 : 38 I. C. 37 : 2 Pat. L. W. 341.

——— S. 58 (b) and (d) —*Mortgage — Upper Burmah—Usual form—Onus.*

In Upper Burmah, the usual form of mortgage is not simple but usufructuary and if an exception be set up to it, should be proved. (*Mc Coll, A. J. C.*) MI SAW MYIN *v.* MI SHWE THIN.
15 I. C. 919 : (1912) I. U. R. R. 125.

Mortgage by conditional sale.

——— S. 58 (c)—*Mortgage by conditional sale —Sale — Agreement to reconvey — Intention—Provision for deposit of purchase money in Court —Effect of.*

A deed of absolute sale of immoveable property and a subsequent agreement for re-sale to the vendor on payment of the price, do not constitute a mortgage by conditional sale unless it appears from the documents themselves viewed in the light of surrounding circumstances that the parties so intended. Where a suit for redemption is instituted long after the date fixed for the re-purchase (in this case forty-four years) cogent evidence of such intention is necessary. If the deed of sale is earlier than the contract to reconvey, then the intention to treat it as a mortgage must be shown to have existed before the sale was executed. A provision in the agreement to reconvey and for deposit in Court of the repurchase price, similar to the provisions of Beng. Reg I of 1798 and XVII of 1806, does not necessarily show an intention to mortgage. 12 A. 387 Ref. 22 All. 149 Dist. (*Lord Atkinson.*) JHANDA SINGH *v.* WAHID-UD-DIN.
38 All. 570 : 21 C. W. N. 66 : 20 M. L. T. 529 : 14 A. L. J. 1189 : (1916) 2 M W. N. 570 : 19 Bom. L. R. 1 : 5 L. W. 189 : 25 C.L.J. 524 : 10 Bur. L. T. 131 : 36 I. C. 38 : 43 I. A. 284 : 31 M. L. J. 750. (P. C.)
[On appeal from 6. I. C. 183 : 7 A. L. J. 484]

——— S. 58 (c)—*Mortgage by conditional sale —Sale in lieu of prior debt with condition for reconveyance.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale.

Where in lieu of a portion of the amount due under a mortgage the mortgagor (co-sharer) purported to transfer his share in the village out and out in favour of the mortgagee and the deed also contained a covenant for reconveyance of the property by the vendee in case the money was repaid. *Held*, that the transaction was one of mortgage by conditional sale. (*Kanhaiya Lal and Sulaiman, JJ.*) MOHINDRA MAN SINGH *v.* MAHARAJ SINGH.

45 A. 72 : 20 A. L. J. 810 : 1923 A. 48.

——S. 58 (c)—*Mortgage by conditional sale —Sale and agreement to reconvey—Accounting for profits.*

Two deeds were executed on the same day one an absolute sale, and the other an agreement by the vendees, reciting that the property had been purchased by them on the condition that whenever within five years the vendors should pay to them the amount of the consideration money together with interest deducting the actual profits realized by the vendees from the property, the vendors would be entitled to have the property reconveyed by the vendees, *Held*, that the provisions as to accounting at the time of the demand for reconveyance, showed clearly that the relation of creditor and debtor existed between the parties and that the transaction was a *bai bil wafa* or mortgage by conditional sale. 12 All. 287 (P.C.); 38 All. 337 (P. C.) Dist. (*Mears, C. J. and Rafique, J.*) MUHAMMAD HAMID-UD DIN *v.* LALA FAKIR CHAND.

42 All. 437 : 18 A. L. J. 478 : 58 I. C. 717 : 2 U. P. L. R. (All) 341.

——S. 58 (c)—*Sale or mortgage—Stipulation for repurchase—Intention of security.*

A mere stipulation for re-purchase does not convert a sale into a mortgage and if only a sale made with a contemporaneous agreement by the purchaser to restore the property back on a refund of the price appears to be made, the transaction must mean a sale. An intention to create a security for the payment of a debt is essential to a mortgage. (*Lindsay, J. C.*) KISHEN DAYAL PANDE *v.* CHANDER DEO PANDE.

36 I. C. 991.

——S. 58 (c) — *Sale or mortgage — Surrounding circumstances.*

Though the conditions on which a mortgage can be redeemed are onerous. Court is not justified in coming to the conclusion that the transaction which purports to be a mortgage is a sale. A Court has to look to the surrounding circumstances as well. (*Bannerjee and Piggott, JJ.*) MUHAMMAD KASIM *v.* SHEO LING SWAMI JANGAM

32 I. C. 192.

——S. 58 (c)—*Conditional mortgage—Subsequent bond—Stipulation to pay money due under—Effect of.*

A mortgage by conditional sale was made in 1869. The mortgagor executed another bond which provided that the money due on it would be paid on the last day of Baishak. If payment was not made, the obligee might recover the money from the obligor personally and from his moveable and immoveable property. After a

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 58 (c)—Mortgage by conditional sale.

reference to the earlier deed, the obligor contained " when we mean to pay the amount due on the deed of conditional sale, we will first pay the amount of the present deed with interest and then pay the amount of the deed of conditional sale. Therefore, we have written this bond in order that it may be of use." *Held*, that the later bond did not constitute a mortgage. 31 All. 482 : 6 I. C. 165, Dist. (*Chamier, J.*) BALDEO RAI *v.* MURLI RAI.

16 I. C. 638 : 10 A. L. J. 120.

——S. 58 (c)—*Mortgage by conditional sale —Sale to be void on payment.*

A sale deed providing that if within 6 years, the amount secured was paid back the sale would become void, creates a mortgage by conditional sale. (*Richards, C. J. and Bannerjee, J.*) BALBHADAR RAI *v.* BIRIYRAJ RAI.

10 I. C. 630.

——S. 58 (c)—*Sale or mortgage by conditional sale—Distinction—Test.*

When the sale deed and the agreement to reconvey are executed on the same date, an almost irresistible presumption arises that the transaction is a mortgage by conditional sale. But when the agreement to reconvey is executed some time afer this and when at the time of execution of the sale deed the parties had no intention of entering into the agreement ; the deeds read together would notmake the transaction a conditional mortgage. 22 All. 149 Dist. (*Richards, Griffin and Tudball, JJ.*) JHANDA SINGH *v.* WAHIB-UD-DIN.

33 All. 585 : 9 I. C. 1013 : 8 A. L. J. 389.

——S. 58 (c)—*Mortgage by conditional sale —Essentials.*

A stipulation for repurchase will not by itself convert a sale into one of mortgage. There must be the right to repurchase. Whether it is a mortgage by conditional sale or sale with clause to reconvey, depends on the intention of the parties. 31 Bom. 528 Con. A sale-deed executed contemporaneously with an agreement to reconvey contained the clause " the sale has become absolute. The parties have no right to cancel the sale and to demand the consideration money. The vendor has no right to any share of the property sold." *Held*, the transaction was an out and out sale. (12 All. 387 Foll.) (*Stanley and Tudball, JJ.*) GHULAM NABI KHAN *v.* NIAZ-UN-NISSA.

33 All. 337 : 9 I. C. 140 : 8 A. L. J. 119.

——Ss. 58 (c) 67 and 68—*Usufructuary mortgage—Possession not taken by mortgagee—Interest, if can be recovered.*

If, in a usufructuary mortgage, the property is secured only for the amount borrowed and not for interest and if the mortgagee does not take steps to get possession, he loses his right to interest. (*Macleod, C. J. and Fawcett, JJ.*) MANIK CHAND *v.* MAGANI CHAND RANGAPPA KONDAPPA.

45 Bom. 523 : 59 I. C. 765 : 22 Bom. L. R. 1435.

——S. 58 (c)—*Mortgage by conditional Sale—Essentials—Sale or mortgage.*

A deed of transfer of lands under a sale in lieu of principal and interest due upon a pre-existing

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale.

mortgage, reserving to the vendor the right to repurchase the same on payment of the sale consideration within twenty years even when read with a lease of the same lands by the vendee to the vendor at an annual rent which was liable to reduction in proportion to any fractional payment of the sale price amounts to a sale and not a mortgage. S. 58 of the T. P. Act defines what a mortgage is and cl. (c) of the section describes one method of effecting a mortgage, *i. e.*, by conditional sale. But cl. (c) is not to be read in an isolated manner but in reference to the first paragraph of the section and when it is so read it is manifest that cl. (c) comes into play only when there is a mortgage as that term has been defined. (*Batcholor and Shah, JJ.*) NARAYAN *v.* VIGNESAWAR. **40 Bom. 378 : 34 I. C. 414 : 18 Bom. L. R. 250.**

——S. 58 (c)—*Mortgage by conditional sale—Provision for accounts—Rent.*

Where a debtor transferred his property to the creditor for a debt of Rs. 2,500 with a stipulation for a reconveyance by the creditor of the sum due as well as all moneys spent in improvements by him, and there was also a rent note from the debtor to the creditor providing for payment to the deft. annually of a rental of a certain sum, it was treated as a mortgage by conditional sale and not an out and out sale. (*Batchelor and Hayward, JJ.*) KASTURCHAND LAKHMAJI *v.* PADIA PATIL. **40 Bom. 74 : 31 I. C. 388 : 17 Bom. L. R. 928.**

——S. 58 (c) *Sale or mortgage—Agreement to resell—Rent—Interest.*

Where a vendor sold his house to the vendee and on the same day executed a lease deed to the vendee and the vendee contemporaneously agreed to reconvey the house on payment of the sale price and rent from month to month ; *held*, that these documents constituted a mortgage with the right of redemption within a period and an agreement to pay rent in lieu of interest. (*Scott, C. J. and Hayward, J.*) NAGINDAS JEKINSON DAS *v.* NANABHAI DULABHRAM. **26 I. C. 753 : 16 Bom. L. R. 774.**

——S. 58 (c)—*Sale of mortgage by conditional sale—Intention of parties.*

Where the deft. sold his property to the plff. and the plff. on the same day agreed to resell the property and remained in possession paying a rent of Rs. 18 and it was found that the properties were worth from Rs. 750 to Rs. 1,500 and Rs, 75 was a fair rent, *held* that the real intention of the parties was to effect a mortgage by conditional sale. (*Beaman and Hayward, JJ.*) MADHAV RAO *v.* SAHEBAO. **26 I. C. 751 : 39 Bom. 119 : 16 Bom. L. R. 769.**

——S. 58 (c)—*Covenant to repurchase—Mortgage or sale.*

If the document of sale with a condition of repurchase shows no relationship of a creditor and a debtor, the transaction is a sale with a covenant of repurchase and not a mortgage. (*Scott, C. J. and Batchelor, J.*) GURUNATH BALAJI *v.* YAMANEYA NALARAO. **35 Bom. 258 : 10 I. C. 814 : 13 Bom. L. R. 240.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale.

——S. 58 (c)—*Mortgage by conditional sale—Sale with intention to reconvey--Distinction—Surrounding circumstances.*

The question whether a transaction is a mortgage by conditional sale or sale with an agreement to reconvey must be determined with reference to the intention of the parties as gathered from the document and surrounding circumstances 12 A. 387 ; 38 A 570 ; 22 A. 149 Rel. One of the tests is to see whether the relation of debtor and creditor subsists between the parties. (*N. R. Chatterjee and Panton, JJ.*) CHANDI CHARAN CHOWDHURY *v.* NABIN CHANDRA DE. **67 I C. 113.**

——S. 58 (c)—*Sale and agreement to reconvey—Mortgage.*

Two distinct but simultaneously documents, one of sale and the other of agreement to retransfer, jointly make the transaction a mortgage by conditional sale where among other circumstances vendor continues in possession under a Kabuliat executed by him. (*Greaves and Panton, JJ.*) ARJAD ALI *v.* HABIB. **50 I. C. 12.**

——S. 58 (c)—*Mortgage by conditional sale—Option to re-purchase.*

Where words indicating a mortgage by conditional sale are used and all the terms of the document are consistent with a mortgage, it cannot be contended that the intention of the parties was to make an out and out sale subject to a condition of re-purchase. (*Fletcher and Panton, JJ.*) CHANDRA MOYI CHOWDHURANI *v.* GREGSON. **48 I. C. 465.**

——S. 58 (c)—*Sale or mortgage—Reg. XVII of 1806—Lender.*

Whether a transaction is a sale or mortgage depends upon the intention of the parties to be gathered from the surrounding circumstances. Time is the essence of the mortgage, by conditional sale both under Reg. XVII of 1806 and under S. 58 (c). The words 'on a certain date' in S. 58 (*c*) do not imply that a mortgagor cannot make a tender before that date. (*Holmwood and Chapman, JJ.*) MAHOMED MOZAFFER ALI *v.* ASRAF ALI. **25 I. C. 93.**

——S. 58 (c)—*Sale or mortgage—Deed of sale with power to repurchase.*

The recitals in the deed were all pointing to a sale. No mention was made of any interest. The amount was described not as principal but as consideration. There was a clause for releasing the property on payment in one year. *Held*, that the document was an out and out sale with a condition of repurchase. (*Sharfuddin and Richardson, JJ.*) AZIZAR RAHMAN *v.* RABATANNESSA. **21 I. C. 19.**

——S. 58 (c)—*Sale and agreement to reconvey, if amounts to mortgage—Parties different.*

A document which purports to be a deed of sale cannot, on the mere ground that it is accompanied by an agreement to reconvey the property to the vendor, be construed as a mortgage ; this is especially so when the parties to the sale-deed and the agreement are different. (*Coxe, J.*) RAMA KANTA SARMA *v.* KOLIJOY SARMA. **11 I. C. 124.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale.

——Ss. 58 (c) and 60—*Stipulation for conditional sale and possession—Suit for possession—Consideration — Registered deed duly acted upon.*

Where apart from the stipulation for a conditional sale a mortgage is with possession and the former remedy is barred by legislation the mortgagee can sue for possession as mortgagee (*Kensington and Beadon, JJ*) PUNNU MAL *v.* MAHOMED BAKSH. 189 P. L. R. 1918 : 18 I. C. 914 : 73 P. W. R. 1913.

——S. 58 (c)—*Mortgage by conditional sale—Sale or mortgage—What has to be proved.*

In order to prove that a mortgage is in reality a sale, it has to be shown that there was an agreement between the mortgagor and the mortgagee that redemption would not be demanded and secondly that the terms are such that redemption is an impossibility. But mere onerous conditions in a mortgage would not make it a sale. A mortgage was effected of a building site in a flourishing town and it was proved that the market value was almost the same as mortgage money, that the term was for fifteen years, that no interest was chargeable and that the mortgagee could build upon it at will charging the expenditure with interest, *held*, that these were insufficient to prove that the transaction was a sale and not a mortgage. 100 P. R. 895 : 78 P. R. 1901, 19 P.R 1905 Rel. 145 P. R. 1906, 20 P. R. 1899 Dist. (*Johnstone and Rattigan, JJ.*) MAGHARAM *v.* MAKHANLAL. 126 P. L. R. 1912 : 67 P. R. 1912 : 13 I. C. 667 : 255 P. W. R. 1912.

——S. 58 (c)—*Sale with condition to reconvey—No presumption of mortgage by conditional sale.*

S 58 (*c*) does not raise a presumption that a sale with an agreement to reconvey is a mortgage by conditional sale. (*Wallis, C.J. and Oldfield, J.*) NARASINGERGI *v.* PANUGANTI PARTHASARATHY. (1921) M W. N. 519.

——S. 58 (c)—*Mortgage by conditional sale—Sale and agreement to reconvey.*

Where in one and the same transaction land is sold absolutely, with a right of re-purchase to be exercised within a certain date, the transaction is not necessarily a mortgage by conditional sale, under S. 53 T. P. Act without reference to the intention of the parties. All the cases reviewed. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) MUTHUVELU MUDALIAR *v.* VYTHILINGA MUDALIAR. 42 Mad. 407 : 9 L. W. 365 : 25 M. L. T. 332 : (1919) M W. N 393 : 50 I. C 205 : 36 M. L. J. 385.

——Ss. 58 (c) (a) and 59—*Mortgage by conditional sale—Registered sale—Unregistered agreement to reconvey.*

An unregistered agreement is not admissible as extrinsic evidence to show that the parties intended the sale-deed to be only a mortgage. 45 Cal. 320 (P. C.) Foll. A mortgage by conditional sale cannot be effected by a registered sale deed and an unregistered agreement to reconvey as the document relied on to derogate from the absolute conveyance must be of the same high character as the conveyance itself. 25 Mad, 7 and

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale

27 Mad. 848 Foll. (*Wallis, C. J. and Seshagiri Aiyar, J.*) PUTTI SESHA AIYAR *v.* KUPU ACHAR. 26 M. L. T. 291 : (1919) M. W. N. 87 : 49 I. C. 699 : 10 L. W. 1.

——S 58 (c)—*Mortgage by conditional sale—Sale with agreement to reconvey—Distinction.*

P sold his lands for their full market value to *Q* part of the consideration being the full discharge of a pre-existing mortgage debt due from *P* to *Q*. By another instrument of even date *Q* agreed to reconvey the lands to *P* or his heirs, on payment of the price "at the beginning of the cultivation season of any years within four years from this date." In 1912 *P*. sued to *Q* for redemption. *Held*, that the transaction was not a mortgage by conditional sale within S. 58 (*c*) and the relationship of debtor and creditor did not seem to exist between the parties nor did the lands seem to be security for a debt. (*Bakewell and Napier, JJ.*) MARUTHAI GOUNDAN *v.* DASAPPA. 31 M. L. J. 375 : 36 I. C. 393 : 5 L. W. 141.

——S. 58 (c)—*Mortgage by conditional sale.*

Where a mortgage-deed executed in 1879 did not purport to sell the property but contained a provision that in default of payment of the mortgage-money in the prescribed manner the property should be relinquished by the mortgagor as if sold to the mortgagee ; it should be construed with reference to the law as stood before the T. P. Act and so construed it was a mortgage by conditional sale. 38 Mad. 667 : 29 M. L J. 525 : 13 M I. A. 560 : 2 I. A. 241 Foll. The mortgagee could however avail himself of the remedies under the T. P. Act. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) BIKKINA RAMAYYA *v.* ADABALA SESHAYA. 34 I. C. 475 : 30 M. L. J. 338.

——S. 58 (c)—*Sale or mortgage—Test.*

The question whether a document in a mortgage by way of conditional sale or a sale with a provision for re-purchase depends ultimately on the intention of the parties to be gathered from the instrument and the surrounding circumstances. There are two tests to determine this, *viz.*, (1) whether there was a debt subsisting at the time of the transaction (2) Whether value of land conveyed is so disproportionate to the amount mentioned in the document as the alleged consideration for the sale as to raise a reasonable presumption that the parties intended only a security. (*Coutts-Trotter and Kumaraswami Sastri, JJ*) KALAPPA KAMTHI *v.* KACHUR SAKHARAMA RAO. 29 I. C. 898.

——S. 58 (c)—*Sale and agreement to reconvey—Contemporaneous—Intention.*

Where the parties execute two documents within an interval of a few days, one purporting to be a sale and another an agreement to reconvey, the intention is rather to create a mortgage than a sale. Case law considered (1914) M. W. N. 222 : 12 A. 387 : 14 M. 170 Dist. (1914) M. W. N. 735 Foll. (*Ayling and Hannay, JJ.*) MUTHUKARUPPA PILLAI *v.* MARUDHACHALAM CHETTI. 27 I. C. 436.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale.

——S. 58 (c)—*Sale or mortgage—Sale-deed and agreement to reconvey—Effect of.*

A mortgagor executed a deed of absolute sale in favour of his mortgagee who was about to sue on his mortgage. Some days later the mortgagee executed an agreement to reconvey the property within eighteen months if the mortgagor paid the money, *held*, that in the circumstances of the case the transaction amounted only to a sale with an agreement to reconvey and not to a mortgage by a conditional sale. (*Wallis, O. C. J. and Seshagiri Aiyar, J.*) SWAMINATHA AIYAR *v.* APPASAMI AIYAR. **27 M. L. J. 686 : 27 I. C. 305 : (1914) M. W. N, 906**

——S. 58 (c)—*Sale or mortgage.*

The intention of the parties is the test to determine whether a transaction is a sale or mortgage. (*Wallis, O. C. J. and Hannay, J.*) SINGARAM CHETTIAR *v.* KALYANASUNDARAM PILLAI. **1 L. W. 687 : 26 I. C. 1 : (1914) M. W N, 735**

——S. 58 (c)—*Hindu mortgages.*

Hindu forms of mortgages by conditional sale are not affected by the Act. (*Sadasiva Aiyar and Spencer, JJ.*) SRINIVASA AIYANGAR *v.* RADHAKRISHNA PILLAI. **38 Mad. 667 : 26 M L.J. 47 : 14 M. L. T. 547 : 22 I. C. 54 : (1914) M. W. N. 81.**

——S. 58 (c)—*Mortgage by conditional sale—Absolute sale and counter-part to reconvey.*

Where there is an absolute sale followed by the execution within 2 days by the vendee of a deed called the counter-part of a sale-deed by which he undertakes to reconvey the properties sold to him, both the instruments constitute a mortgage by conditional sale, the mortgagor having the right to redeem within the statutory period. (*Sadasiva Aiyar and Spencer, JJ.*) PALANIAPPAN *v.* SUBBARAYA GOUNDEN. **14 M, L. T. 579 : (1914) M. W. N. 222 : 22 I. C. 4 : 1 L. W. 80.**

——S, 58 (c)—*Mortgage by conditional sale—Personal covenant to pay.*

There is no personal covenant to pay in the case of a pure mortgage by conditional sale. (*Batten, A. J. C.*) ANANDRAO *v.* TUKARAM. **46 I. C. 326.**

——S, 58 (c) and 67—*Mortgage by conditional sale—Title of mortgagor when and how lost.*

In every mortgage by conditional sale, on default of payment on the due date, ownership will not vest in the mortgagee until after a decree absolute for foreclosure has been passed by the Court, (*Mittra, A. J. C.*) RAGHUNATH *v.* SHEOLAL. **39 I. C. 849 : 13 N. L. R. 69.**

——S. 58 (c)—*Mortgage by conditional sale or out and out sale.*

Where a sale deed provides that if the vendor pays back the consideration, the properties will be returned and the sale cancelled, the transaction is not a sale but a mortgage by conditional sale. This right to enforce payment is not a necessary corollary to a mortgage by conditional sale. 12 A. 387 P. C.; 22 A. 149 P. C., Ref, to 11 I. C. 124 : 33 A. 337 ; 21 B. 528. Dist. (*Kanhaiya Lal, A. J. C.*) BALDEO PRASAD *v.* CHET RAM, **26 I. C. 706 : 1 O. L. J. 703.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S 58 (c)—Mortgage by conditional sale.

——S. 58 (c)—*Mortgage by conditional sale—Mortgage—Redemption—Rights of mortgagor.*

The mere insertion of the following clause in a mortgage deed : "When five months have elapsed, if the principal and interest be not paid and the property redeemed, let the creditor go with the mortgage-bond to the Town Lots Office and effect a mutation of names and take the property as his absolutely " does not of itself convert the mortgage into a sale on failure of the mortgagor to pay the principal and interest within five months and the right to redeem continues in spite of such failure. (*McColl, J. C.*) NGA PO YIN *v.* MI YIN. **(1916) 2 U. B. R, 141 : 39 I. C. 377 : 11 Bur. L, T. 36.**

——S. 58 (c)—*Mortgage and sale—Test applied to distinguish.*

The relation of debtor and creditor between the parties after executing a document determines whether it is a mortgage or a sale. (*Ormond and Twomey, JJ.*) MA SHWE *v.* MAUNG PO LU. **37 I. C, 91 : 9 Bur. L. T. 177.**

——S. 58 (c)—*Sale or mortgage—Agreement to repurchase.*

When a sale of property followed by an agreement to re-purchase within specified time, the transaction may be regarded a type of mortgage but the burden of proving that the transaction does amount to a mortgage is on the party asserting. 12 All 387 (P.C.) Ref. (*Parlett, J.*) MAUUG KYA HNIN *v.* MAUNG PO KYAW, **35 I. C. 336 : 10 Bur. L. T. 4.**

——Ss. 58 (c) and 60—*Mortgage by conditional sale—Redemption—Loss of right to, after specific period.*

Where a mortgage-deed provided that it should be redeemed in two years and, if not, the mortgagee would be entitled to treat it as a sale and if the mortgagee did not wish to treat it as a sale, he might sue the mortgagor on the mortgage but if the mortgagor was unable to redeem, the right of redemption should be extended indefinitely, *Held*, that assoon as the two years had elapsed without the mortgagor redeeming it, the mortgage became a sale with effect from its inception, thus closing the transaction between the parties as if it were a mortgage by conditional sale. 1 M. 1 (P. C.) Rel (*Parlett, J.*) MA NGWE *v.* MA THA HLAY. **27 I. C. 868 : 8 Bur. L. T, 125.**

——S. 58 (c)—*Mortgage or sale—Redemption—Onus.*

Where the transaction between the parties admittedly began by a simple mortgage and there was subsequently a transfer of possession to the mortgagee the onus is on the mortgagee to prove his right to resist redemption 1 L. B. R. 215 ; 3 L. B.R. 5 Foll. (*Twomey, J.*) MA SHWE HPE *v.* MAUNG SEIN **20 I. C. 666 : 6 Bur. L T. 131.**

——S. 58 (c)—*Mortgage by conditional sale—Sale with condition of re-purchase.*

A document purporting to be one of sale, though accompanied by a contract reserving to the vendor a right of re-purchase, is not on that account to be construed as if it were a mortgage. The test to apply is whether the relation of debtor and creditor subsists between the parties. If the relation does not exist then the transation does

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (c)—Mortgage by conditional sale.

not fall within the general definition of a mortgage in S. 58 (a) of the T. P. Act and therefore, cannot be regarded as a mortgage by conditional sale within S. 58 (c), 12 All. 387. 17 I.A. 98. Foll. 2 L. B. R. 338 Foll. (*Twomey, J.*) MAHNINU v OSMAN GANI. **15 I. C. 423 : 5 Bur. L. T 99.**

——S. 58 (c)—*Mortgage by way of conditional sale—Time essence of contract.*

In Sind in the case of a mortgage by conditional sale, time is the essence of the contract and on the expiry of the time fixed for redemption the mortgage becomes a sale. (*Pratt, J. C. and Hayward J. C.*) FRAMJI BAIRAMJI *v.* SULLMANJI IBRAHIMJI. **19 I. C 428: 6 S. L. R. 178.**

58 (d)—[Usufructuary Mortgage.]

——S. 58 (d)—*Usufructuary mortgage—Incidents.*

In every contract of usufructuary mortgage there is an implied covenant for quiet possession which implies a contract to pay the Government revenue. (*Ryves and Gokul Prasad, JJ.*) RAM SEWAK RAI *v.* SHEO NAIK RAI. **45 A. 388 : L. R. 4 A 389 : 21 A. L. J. 294 : 1923 A. 433 (2)**

——S. 58 (d)—*Usufructuary mortgage—Further loan on same security-No specific transfer of interest—Covenant for redemption on payment of whole amount—Effect.*

Where subsequent to a usufructuary mortgage by A to B, A took a further loan from B on a document stating that the loan would be paid along with the loan on the previous mortgage and that the mortgaged property was not to be redeemed without repayment of the loans due on both the documents, *held*, that the later document was a mortgage within S. 58 of the Act and that the mortgagee was entitled to remain in possession until both the loans were discharged. Per *Stuart. J.*—The absence of an explicit transfer of an interest in immoveable property will not show that the deed is not a mortgage for there may be an implied transfer of an interest (*Bannerjee, Stuart and Wallace. JJ.*) HAR PERSHAD *v.* RAM CHANDER. **19 A. L. J. 807 : 63 I. C. 750 : 3 U. P. L. R. (All.) 139.**

——S. 58 (d)—*Mortgage—Enjoyment of usufruct—Deficiency.*

A mortgagor executed a document stipulating the conditions that the mortgagee of the part of his property enjoying the mortgaged property in lieu of interest, will be paid deficiency in the interest every year ; on failure of which in any year he was entitled to recover the same from the rest of his moveable and immoveable property. *Held*, the document amounted to a mortgage for the deficiency of interest on the mortgage money. (*Richards, C. J. and Bannerjee, J.*) BHOLA DAS *v.* BISHNATH LAL. **16 I. C. 982 : 10 A. L. J. 162.**

——Ss. 58 (d) and 105—*Zuripeshgi Lease or mortgage—No provision for interest—Premium—Inference.*

The term "Zuripeshgi" is an ambiguous one and the facts that no interest was provided for may give rise to an inference that there was a lease with a premium and not a usufructuary mortgage. (*Holmwood and Mullick, JJ.*) CHULHAN SINGH *v* MADHO SINGH. **28 I. C. 383 . 19 C. W. N. 794.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (d)—Usufructuary Mortgage.

——S. 58 (d)—*Covenant to put mortgagee in possession—Compensation in case of breach—Liability of mortgagor.*

Where a mortgagor stipulated that the mortgagee would take the produce of the property in lieu of interest and recover compensation for improvements and then failed to deliver possession, held in a suit for redemption, that the terms of the mortgage showed that the mortgagee was entitled to possession as soon as the transaction was entered into and that the mortgagor was liable to compensate the mortgagee (*Shadi Lal and Broadway, JJ.*) AKBAR HUSSAIN *v.* RAGUNANDAN DASS **57 I. C. 348 ; 2 U. P. L. R. (L.) 130.**

——S. 58 (d)—*Usufructuary mortgage—Refusal to deliver possession—Effect.*

The refusal by a mortgagor to deliver possession gave the mortgagee the right to sue for the mortgage money and interest. (16 A. 318 Con.) (15 P. R. 1870, 57 P. R. 1873) (127 P. R. 1881, Dist.) (*Reid. C. J.*) SHER MUHAMMAD *v.* NIKKA MAL. **17 I. C. 362 : 21 P. L. R. 1913.**

——Ss. 58 (d) and 98—*Usufructuary mortgage—Anomalous or English mortgage—Construction.*

Where a mortgage with possession provides that it is irredeemable before 5 years and should be treated as a sale if not redeemed within 20 years, *held*, it is neither an anomalous nor an English mortgage but is only a usufructuary mortgage with a clog on the equity of redemption. A usufructuary mortgage does not cease to be usufructuary merely because of a provision for irredeemability within 5 years. (*Oldfield and Ramesam, JJ.*) NARAYANA MURTI *v* APPALANARASIMHULU. **14 L. W. 536 : 68 I. C. 717 ; 41 M. L. J. 563.**

——Ss. 58 (d) 67 and 68—*Usufructuary mortgage—Failure of mortgagor to give possession—Mortgagee's right to sue for sale.*

A usufructuary mortgagee is entitled to sue for the sale of the property mortgaged to him when the mortgagor fails to deliver possession of the said property to him and he has consequently to sue for the mortgage money. 21 M 476; 22 M.L.J. 39 Rel. (*Wallis, C. J., Ayling and Kumaraswami Sastri. JJ.*) MARTURU SUBBRAMMA *v.* GADDE NARAYYA. **41 Mad 259 : 33 M. L. J. 623 : 22 M. L. T. 429 : (1917) M.W.N. 828 : 43. I. C. 4 : 6 L. W. 738 (F. B.)**

——S. 58 (d)—*Usufructuary mortgage—Possession essential.*

In usufructuary mortgages possession is an essential part of the security and what is kept alive is not the security only but the rights of the mortgagee on the property under the deed. (*Abdur Rahim, O. C J. and Krishnan, J.*) SREE MOHANT PRAYAG DOSS JEE VARU *v.* RAYU CHENGAMMA NAIDU. **20 M. L. T. 295 : (1916) 2 M. W. N. 288 : 37 I. C. 456: 4 L. W. 477.**

——S. 58 (d)—*Usufructuary mortgage—Lease—Document not giving right to sell property—Mortgage.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (d)—Usufructuary mortgage.

A document securing repayment of a debt out of the rent of the service inam lands taken with a deed of lease does not create an usufructuary mortgage, as no authority was given to bring the property to sale for recovery of the money advanced. The documents constitute a lease deed and a simple money bond. (*Sadasiva Aiyar and Spencer, JJ.*) KAMESRA PEDA SUBBAYYA *v.* KAKERLA CHENNAPPA. **28 I. C. 842 : 28 M.L.J. 303.**

———Ss. 58 (d) and 98—*Mortgage—Construction—Anomalous mortgage.*

A mortgage described in the deed as usufructuary provided that if the mortgage amount was not paid on the stipulated date the mortgage was to be changed into a sale for the principal amount of the mortgage and that the mortgagor should pay the costs of the construction of earthwork etc., effected on the land along with the mortgage money. The mortgagee was given possession. *Held*, (*Per Sadasiva Aiyar, J.*) that it was a combination of a simple and usufructuary mortgage with a covenant clogging the equity of redemption and not a conditional sale. Per *Spencer, J.*—That it was usufructuary mortgage with a covenant clogging the equity of redemption, Per *Curiam.*—The transaction is not an anomalous mortgage under S. 98 of T.P. Act and is redeemable under S. 60. (*Sadasiva Aiyar and Spencer, JJ.*) SRINIVASA AIYANGAR *v.* RADHAKRISHNA PILLAI. **38 Mad. 667 : 26 M. L. J. 47 : 14 M. L. T.547: 22 I. C. 54 : (1914) M. W. N. 81.**

———S. 58 (d)—*Usufructuary mortgage—Elements.*

For a usufructuary mortgage, a condition for the rendition of any accounts or an express or implied provision for redemption is not necessary. A mortgage can be so made that nothing remains to be paid at the end of the term. (*Dhobley, A. J. C.*) RAMPRASHAD *v.* CHANDULAL. **4 N. L. J. 262: 1922 Nag. 156.**

———S. 58 (d)—*Usufructuary mortgagee retaining money to pay prior mortgages—Default—Money paid by mortgagor—Mortgagee whether can sue for possession.*

Where a usufructuary mortgagee with whom money is left for redemption of prior mortgages to enable him to obtain possession fails to do so and the mortgagor subsequently pays the amount and obtains possession, the usufructuary mortgagee cannot sue for possession. (*Kanhaiya Lal, A. J C.*) HUSAINI *v.* RAMCHARAN. **18 O. C. 280 : 32 I. C. 341 : 2 O. L. J. 488.**

———S. 58 (d)—*Usufructuary mortgage—Period which it can be redeemed.*

Even though the mortgage deed fixes a date within which it can be redeemed the deed may nevertheless be a usufructuary mortgage. (12 All. 233, 21 Mad. 1, 26 B. 252: 27 All. 313 Ref. 'Delever' in S. 58 means 'Deliver immediately' Therefore even though possession is to be delivered subsequent to date of mortgage it is nevertheless a usufructuary mortgage. 21 All. 521 Foll. (*Stuart, A. J. C.*) BISHESHAR BAKHSH SINGH *v.* DEBI BAKHSH SINGH. **17 I. C. 329 : 16 O. C. 56.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 58 (e)—English mortgage.

———S. 58 (d)—*Mortgage—Suit for possession by the mortgagee.*

A mortgaged his property to B with possession and gave him the possession. A. subsequently mortgaged the same property to C. with possession. Then A. assigned his interest to G. who redeemed B's mortgage and took possession. There upon C brought a suit for possession which was resisted by G. on the ground that A was not in possession when C's mortgage was effected. *Held*, that C got possession on his paying to G. the amount he had paid to B. (*Chamier, A.J.C.*) KANCHAN SINGH *v.* JAFRE BEGUM. **10 I. C. 190.**

———S. 58 (d)—*Usufructuary mortgage—Right of sale.*

Where a due date has been fixed for payment of the mortgage-money, the mortgage is not a pure usufructuary motgage and the mortgagee is entitled to sell immediately after the due date has passed even though he still remained in possession of the property, 6 C.L.J. 143: 34 Bom. 462 foll. (*Coutts and Ross, JJ.*) JAG SAHU *v.* MUST RAM SAKHI KUER. **1 Pat. 350 : 1922 Pat. 58 : 3 Pat. L. T. 332 : 1922 P. 167.**

———S. 58 (d)—Zarpeshgi ijara—*Annual rent payable to executant—Mortgage or lease.*

It is impossible to lay down any general rule as to effect of a *Zarpeshgi* transaction. Every case must depend upon its own facts. *Held*, that the transaction created the relationship of mortgagor and mortgagee and this was not a case in which the amount advanced to the owner of the land ought to be viewed as an advance of the rent fixed upon the land. 25 All, 115 ; 24 Cal. 272; 2 C. W.N. 758, Ref. The question to be decided in each case is whether the main object of the instrument was to create the relationship of mortgagor and mortgagee or of simple landlord and tenant. (*Miller, C. J, and Mullick, J.*) SHEK MUHAMMAD HANIF *v.* MOORAT MAHTON. **44 I. C. 153: 4 Pat. L. W. 146.**

———S. 58 (d)—*Usufructuary mortgage—Construction.*

Where the mortgagee agreed by a deed to pay a fixed annual sum to the mortgagor as the balance after deducting the interest from the income of the property of the mortgagor of which he takes possession under the deed and allows the mortgagor by the same deed to redeem, in a particular year, the deed is a usufructuary mortgage. (*Chapman and Atkinson, JJ.*) BARHAMDEO NARAIN SINGH *v.* RAMANAND PRASAD SINGH. **1 Pat. L. W. 795 : 40 I. C. 594: 1918 Pat. 24.**

S. 58 (e) [English Mortgage.]

———S. 58 (e)—*English mortgage—Elements of—Principle of.*

In an English mortgaget he mortgagee is the owner of the property subject to the ownership being divested by repayment on the appointed day. The mortgagee can enter into possession

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 58 (e)—English mortgage.

immediately after the mortgage. The morgtagor hasfonly the right to redeem. The ownership of the property passes to the first mortgagee in an English mortgage and not to the puisne mortgage. (*Chaudhry, J.*) BANK OF UPPER INDIA *v.* ADMINISTRATOR-GENERAL OF BENGAL. **45 Cal. 653 : 47 I. C. 529: 22 C. W. N. 793.**

———S. 58 (e)—*English mortgages.*

The T. P. Act, is not exhaustive. There are many mortgages known to English Law, which it is difficult or impossible to bring within the terms of the Act (*Chapman and Roe, JJ.*) BHUPENDRA NATH BASU *v.* WAJIUNNISSA BEGAM. **2 Pat L. J. 293 : 39 I. C. 564: 3 Pat. L. W. 20**

———S. 59.

See also (1) ATTESTATION.
(2) EVIDENCE ACT, Ss, 68 AND 115,
(3) T. P. ACT, S. 123.

Delivery of possession
Equitable mortgage.
Invalid attestation.
Marksman as attestor.
Meaning of Attestation.
Modification of mortgage.
Mortgage before T. P. Act.
Oral mortgage.
Proof of attestation.
Proof of execution.
Registration.
Scribe as attestor.
Who can be attestor.

Delivery of possession.

———S. 59—*Delivery of possession—Mortgage less than Rs.* 100—*Unregistered document.*

As a mortgage below Rs. 100, is created by mere delivery of possession, the fact that an unstamped document is put forward to evidence the mortgage does not affect its validity. (*Tudball, J.*) HABIBUL RAHMAN *v.* RASUL BANDI. **62 I. C. 859 : 19 A. L. J. 376.**

———S 59—*Delivery of possession—Non-registration of the bond.*

Where the plaintiff was put in possession of a plot of land under a bond containing a separate stipulation for interest in case the defendants failed to get the document registered. *Held*, that as the principal money secured was less than Rs. 100 a valid mortgage was created under S. 59 of the Transfer of Property Act and no registration was necessary. (*Lyle, A. J. C.*) JHAM SINGH *v.* GAURI SHUNDAR. **1922 Oudh 125.**

———S. 59—*Delivery of possession.*

The delivery of possession under S. 59 is to be contemporaneous with the execution of the deed (*Lindsay, J.*) SURAJ BARAN SINGH *v.* PRATAB BALI SINGH. **41 I. C. 455: 4 O. L. J. 446.**

———S. 59—*Delivery of possession—Mortgage for less than* 100 *Rs.—Terms of mortgage—Unregistered instrument—Secondary.*

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 59—Equitable mortgage.

Delivery of possession of the property mortgaged would effectively create a mortgage for less than Rs. 100 Where there is a document unregistered evidencing the mortgage,its termscan only be proved by the document or by secondary evidence of its contents in case the original is not forthcoming. (*Saunders, J. C.*) MAUNG PO DIN *v.* MAUNG PO NYEIN. **66 I C. 360 : (1921) 4 U. B.R. 80.**

Equitable Mortgage.

———S. 59—*Mortgage—Equitable mortgage—Application of priority sections of the T. P. Act.*

Equitable mortgage effected by deposit of title-deeds is a mortgage in the sense of the Act and consequently the priority sections do apply, for unless the deposit of title-deeds effects the transfer of an interest in a specific immoveable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all. Further the concluding words of S. 59 actually use the word mortgage to denote the security effected by delivery of documents of title. (*Lord Dunedin,*) THE IMPERIAL BANK OF INDIA *v.* U. RAIGYAW THU & CO. LTD. **1 Rang. 637 : 21 A. L J. 784 : 25 Bom L. R. 1279: 9 0 & A. L. R. 937 : 33 M. L. T. 395 : 2 Bur. L. J. 254 : 50 I. A. 283 : 45 M. L. J. 505 : 51 Cal. 86 : 28 C. W. N. 470 : 39 C. L. J. 186 : (1923) M. W. N. 609 : 1923 P. C. 211 (P. C.)**

———S. 59—*Equitable mortgage—Extent of the security.*

Where documents of title to immoveable property are handed over to the creditor with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. Where, however, titles are handed over accompanied by a bargain, that bargain must rule. If there is a written memorandum that part only of the property is to be security for the debt, the memorandum is conclusive evidence that the charge in favour of the creditor extends to that part of the property. (*Lord Shaw.*) PRANJIVANDAS JAGJIVANDAS MEHTA *v.* CHANMAH PHEE. **43 Cal. 895 : 43 I. A. 122 :(1916) 1 M. W. N. 443 : 4 L. W. 69 : 14 A.L. J. 638 : 20 C. W. N. 925 : 18 Bom. L. R. 664 : 20 M. L T. 242; 9 Bur. L. T. 125 : 24 C. L. J. 314 : 35 I. C. 190 : 8 L. B. R. 458 : 31 M. L. J. 155.**

———S. 59—*Equitable mortgage—Deposit of title deeds—Loan—Contract in writing—Registration, necessity for.*

Defendant borrowed money from plff. in Bombay and deposited the title-deeds of his house, the transaction was recorded in a writing which ran as follows : "We have taken Rs. 1,000 from you. In security of that we have given our house in Godhra.....in mortgage for the above amount.And we have also given to you the copy of the record. We shall execute a *pacca* document in respect of the same whenever you may ask us,

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Equitable Mortgage.

Its interest is settled at eight annas. It is agreed that you should return to us the copy of the record on paying the above amount." The above writing was not registered nor was the *pacca* document demanded or taken. In a suit to recover the advance by sale of the mortgaged property, the defendant admitted the advance.

Held, that the writing in question contained everything that was necessary for the purpose of proving an agreement creating a mortgage and that it required registration. Being unregistered it was inadmissible in evidence and plff. could not have a decree for the money by sale of the property sought to be mortgaged. The defendant having admitted the advance plff. was entitled to a decree personally against him. In the absence of a document accompanying the title deed, it would have been open to the plff. to prove orally what was the intention with which the document was deposited and whether it was meant to be considered as a security. But as the deft. executed a document in writing the Court must refer to it in order to ascertain what the contract was. The fact that the defendant agreed to execute another document in formal terms, if he was asked for one, does not affect the value of the document signed, provided it is evidence of a complete transaction which can be spelt out of its wording. The whole point is whether the document created a charge upon the property referred to therein, and once there is a writing with reference to the deposit of title deeds, then it is quite clear that the Court must refer to that writing, and can only refer to it, in order to determine what were the conditions, on which the title deeds were deposited. (*Macleod, C. J. and Coyajee, J.*) CHUNILAL SOMESHVAR BHATT *v.* VITHALDAS KARSANDAS. **24 Bom. L. R. 502 : 1922 Bom. 440**

——S. 59—*Equitable mortgage—Formalities of—Proof of intention—Contemporaneous or subsequent loan—Property outside Presidency Town.*

The mere fact of a contemporaneous or subsequent loan, apart from other evidence, is not sufficient in law to warrant a presumption that the contemporaneous or antecedent deposit of title deeds was necessarily made as a security for the loan. No writing is necessary to create an equitable mortgage, the very essence of such mortgage being that it comes into being by mere conjunction of three sets of facts (1) a debt, (2) a deposit of title deeds, and (3) an intention that the latter should be security for the former. Per *Macleod, J.* (*Beaman, J.*, dubitante.) Where title deeds are deposited in the towns mentioned in S.59 of the T.P. Act, a valid equitable mortgage is effected wherever the property may be situate (*Beaman and Macleod, JJ.*) BEHRAM RASHID IRANI *v.* SORABJI. **38 Bom 372 : 16 Bom. L. R. 35 : 23 I. C. 140 : 11 I. C. 721 : 4 Bur. L. T. 169 : 6 L. B. R. 23.**

[*See also*

——S. 59—*Equitable mortgage—Essentials.*

Simple possession of title deeds coupled with debts at the same time does not create equitable mortgage. There must be intention to make the title deeds security for the debt. A time-barred debt is good consideration for an equitable mortgage created by deposit of title deeds. (*Beaman, J.*) JETHIBAI *v.* PUTLIBAI. **17 I. C. 722 : 14 Bom. L. R. 1020.**

——S 59—*Equitable mortgage—Deposit of title deeds.*

Deposit of the title deeds by unregistered letter followed by advance of money does not create a valid equitable mortgage. (*Chatterjee and Panton, JJ.*) BHAIRAB CHANDRA BOSE *v.* ANATH NATH DE. **57 I. C. 686 : 24 C. W. N 599 : 31 C L. J. 375.**

——S. 59—*Equitable mortgage—Mortgage by deposit of title deeds—Registration if and when necessary.*

A memorandum creating a mortgage requires registration but when the deposit of title deeds is independent of it, the deposit creates the mortgage and the memorandum need not be registered. (*Chaudhuri and Walmsley, JJ.*) E. I. E. MORDECAI *v.* MORTHU MULL. **37 I. C. 117 : 25 C L. J. 160.**

——S. 59—*Equitable mortgage—Letters Patent, Cl. 12—Mortgage by deposit of title deeds by persons some of whom had no interest.*

Where a suit was brought on a mortgage by deposit of title deeds by the persons, some of whom had no properties in the Presidency Town. *Held*, that that fact would not affect the jurisdiction of the High Court as all the mortgagors had concurred in creating a liability. (*Harrington, J.*) MATI GARA COAL CO., LTD. *v.* SHRAGERS, LTD. **13 I. C. 429 : 38 Cal. 824.**

——S. 59—*Equitable mortgage—Suit on—Parties—Record of deposit of title deed need not be registered.*

A mortgagee by deposit of title deeds can proceed against properties mortgaged to the mortgagor though the original mortgagor is not impleaded. 27 All. 511, diss ; 29 All. 385 (F. B.) foll. A letter written by the mortgagor containing the deposit of the title deeds and execution of a pro-note for the amount due need not be registered since the letter was not the evidence of the contract, but only a writing which was the evidence of the fact from which the contract is to be inferred. 13 Cal 322; 33 Cal. 410; 7 B.L.R. 55; 23 I C. 129, dist. An equitable mortgage by deposit of title deeds is enforceable by law in Punjab. Where a pro-note was executed by the defendant in favour of the plaintiff and also possession of title-deeds some relating to their property and some relating to property mortgaged by them to the former was given to the latter and also delivered a letter opening with the following words " we render this writing deposit with you as security 12 deeds relating to the property of the value of Rs. 8,537 mentioned in the list in lieu of a pro-note for Rs. 8,000 in respect of which a separate pro-note has been executed to-day." In a suit on the pro-note. *Held*, that the equitable mortgage by the deposit of title-deeds was perfectly valid and enforceable in Punjab, and that there was no necessity of making the original mortgagors parties to the suit, and that the letter was not required to be registered inasmuch as it was written after the mortgage was effected and simply being used as an evidence of fact necessary to infer the contract and there-

fore was not covered by the provisions of S. 17 of the Registration Act. (*Jones and Broadway, JJ.*) MOTI RAM MOHANLAL *v.* BHARAT NATIONAL BANK LTD., DELHI. **67 I. C. 421 : 3 L. L. J. 373.**

——— S. 59—*Equitable mortgage—Record of deposit of title deeds is not a mortgage.*

A memorandum recording deposit of title deed as an equitable mortgage and the purpose thereof does not create any interest in immoveable property and is not mortgage. 38 Bom. 372, dist. (*Wilberforce, J.*) UMRAO SINGH *v.* THE PUNJAB NATIONAL BANK, LTD. **3 L. L. J. 44 : 59 I. C. 578 : 3 U. P. L. R. (Lah.) 6.**

——— S. 59—*Equitable mortgage Mortgage by deposit of title deed—Copies.*

A mortgage can be created by a deposit of copies of title deeds where the originals are not available. (*Ratligan and Le Rossignol, JJ.*) JESSIE MOGLE STEWART *v.* BANK OF UPPER INDIA, LTD. **31 P. R. 1916 : 34 I. C. 937 : 215 P. W. R. 1915.**

——— S. 59—*Equitable mortgage—No necessity for registration.*

A memorandum merely evidencing a deposit of title deeds by way of equitable mortgage does not require registration. In any event the mortgage can be proved by other evidence. 4 L. W. 472 ; 16 L. W. 615 P. C. Ref., 24 Bom. L. R. 502 Diss. (*Spencer and Devadoss, JJ.*) VADAMALAI PILLAI *v.* SUBRAMANIA CHETTIAR. **16 L. W. 936 : (1923) M. W. N. 57 (2) : 1923 Mad. 262.**

——— Ss. 59 and 58—*Equitable mortgage—Promissory note—Deposit of title deeds—Endorsement of note and handing over of title deeds.*

Where a promissory note secured by a deposit of title deeds was endorsed even to the plaintiff and the title deeds were also delivered over to him. *Held*, that along with the transfer of the promissory note debt by endorsement, the equitable mortgage passed thereunder to the transferee under S. 8 of the Act. S. 54 of the Transfer of Property Act applies only to transfers by act of parties and does not cover a statutory transfer as that provided in S. 8 in respect of transfer of the securities as attendant on the transfer of the debt. (*Wallis, C. J. and Napier, J.*) CUNNIAH *v.* GOPAL CHETTIAR. **26 M. L. T. 242 : 52 I. C. 879 : (1919) M. W. N. 613.**

——— S. 59—*Equitable mortgage—Deposit of title deeds.*

An equitable mortgage is not effected by the deposit of a deed which does not establish the title set up by the mortgagor when there are other documents not deposited, showing such title. (*Krishnaswami Aiyar and Ayling, JJ.*) VENKATARAMAYYA *v.* NARSINGA ROW. **(1911) 1 M. W. N. 137 : 9 M. L. T. 292 : 9 I. C. 309 : 21 M. L. J. 454.**

——— S. 59—*Equitable mortgage—Scope and requirements of.*

There is no technical rule that all the title deeds must be deposited to create an equitable mortgage ; it is merely a question of intention. (*Chapman and Roe, JJ.*) BHUPENDRA NATH BASU *v.* WAJIB UNNISSA BEGUM. **2 Pat. L. J. 293 : 39 I. C. 564 : 3 Pat. L. W. 20.**

——— S. 59—*Equitable mortgage—Mortgage by deposit of title deeds.*

Where the T. P. Act has been applied a deposit of title deeds can create a valid mortgage securing a debt. (*Ormond and Pratt, JJ.*) SHU KYI *v.* HAJEE BEE BEE. **55 I. C. 248 : 12 Bur. L. T. 217.**

——— S. 59—*Equitable mortgage—Mortgage by a deposit of title deeds—Possession—Registration.*

Where on a mortgage by deposit of title deeds the mortgagee was put into possession so as to appropriate the profits towards the interest due on the debt. *Held*, that no registered document was required for such a transfer of possession as was effected. The transaction was not one of sale or mortgage requiring such an instrument under Ss. 54 and 59. The mortgagees had a charge on the land and were entitled to retain possession thereof until the charge was paid off and in the meantime to take the rents and profits in lieu of interest as arranged at the time when they were put into possession. (*Twomey, C. J. and Ormond, J.*) SHWE LON *v.* HLA GYWE. **12 Bur. L. T. 46 : 47 I. C. 133 : 9 L. B. R. 172.**

——— S. 59—*Equitable mortgage—Document reciting delivery of securities to equitable mortgagee—Registration if necessary.*

A document which merely recites, what securities are handed over to mortgagee is a memorandum and does not require registration. (*Ormond and Pratt, JJ.*) BADRI DAS *v.* O. A. M.K. CHETTY FIRM. **45 I. C. 918.**

——— S. 59—*Equitable mortgage—Deposit of title deeds—Effect of.*

The Court treats the deposit of title-deeds as an agreement to execute a legal mortgage and therefore carrying with it all the remedies incident to such a mortgage; so in a suit based on such a mortgage the appropriate remedy is a decree for sale. 4 Ch. D. 605, 13 Cal. 322, 24 Cal. 349, Ref. (*Fox, C. J.*) BADIER RAHMAN CHOWDHURY *v.* M. A. R. R. M. R. M. CHETTY FIRM. **8 L. B. R. 450 : 35 I. C. 288 : 9 Bur. L. T. 245.**

——— S. 59—*Equitable mortgage—Assignment of—T. P. Act, S. 2 (e)—Burma.*

An equitable mortgage made prior to 1st January 1905 can be assigned by an oral agreement in the Districts where after that date the parties could make the mortgage. (*Ormond and Parlett, JJ.*) KO KYO *v.* A. K. CURPEN CHETTY. **24 I. C. 700 : 7 Bur. L. T. 140.**

——— S. 59—*Equitable mortgage—Share certificate.*

Deposit of share certificates without any transfer as security for a loan amounts to an equitable mortgage of the shares and gives a right to legal transfer of the shares carrying with it the remedies incident to a mortgage, including the right to

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Equitable Mortgage.

foreclosure. *Harold* v. *Plenby*, (1901) 2 Ch. 314. Foll. (*Fox, C. J. and Hartnoll, J.*) M. L. R. M. A. FIRM *v.* ARIFF GOOLAM MEHATAR.
11 I. C. 783 : 4 Bur. L. T. 166.

——S. 59—*Equitable mortgage — Property outside towns mentioned in S. 59.*

S. 59 of the Transfer of Property Act contains no restrictions regarding the situation of the property to which the title-deeds relate. It contains restriction regarding the place where the equitable mortgage is effected. Therefore a loan secured in Moulmein by depositing title-deeds referring to lands outside that town, is perfectly valid and creates an equitable mortgage. (*Hartnoll, O. C. J. and Ormond, J.*) VALLIAPPA CHETTY *v.* KO THA HMYIN. **4 Bur. L. T. 169 : 11 I. C. 721 : 6 L. B. R. 23.**

Invalid attestation.

——Ss. 59, 67 (a) and 100—*Invalid attestation —Charge—Personal liability by implication.*

A mortgaged his property to B by a deed which was not validly executed for want of proper attestation. The material portion of the deed was as follows:—"It is desired that the said Zarbharnadar (mortgagee) should realise in full his dues, principal with interest by remaining in possession of each of the said properties during the said years and by collecting the rents with cesses thereof " and there was a personal undertaking to pay certain specific sums in certain events. Though the mortgage was invalid, the mortgagee was put into possession in accordance with it. In a subsequent suit to realise the amount due, *held*, that the deed did not create a charge but was a usufructuary mortgage and upon the construction of the document no intention to assume a personal liability except in the events and to the extent specified could be inferred. (*Sir John Edge.*) RAM NARAYAN SINGH *v.* ADHINDHRA NATH MOOKERJEE.
20 C. W. N. 989 : (1916) 1 M. W. N. 428 : 4 L. W. 15 : 20 M. L. T. 216 : 14 A. L. J. 1017 : 18 Bom. L. R. 862 : 25 C. L. J. 115 : 34 I. C. 900 : 31 M. L J. 251. (P. C.)
[On appeal from 13 I. C. 440 ; 17 C. W. N. 369.]
[*See* on rehearing by the P C.38 I. C. 932 : 44 Cal. 388 (P. C.)]

——S. 59—*Invalid attestation — Personal liability.*

Where a mortgage deed is not properly attested it is not admissible in evidence as a mortgage-deed but it is admissible in evidence as a simple money-bond. (32 Mad. 410 ; 26 Cal. 78 ; 30 Mad. 251, Foll.) (*Banerji, J.*) MATHRA PERSHAD *v.* CHEDDI LAL. **29 I. C. 363 : 13 A. L. J. 553.**
See also **34 I. C. 397 : 3 O. L. J. 164**

——S. 59—*Invalid attestation—Bond—Enforceability.*

A mortgage deed is not validly attested unless the attestors had actually seen the executant sign the document. Where a mortgage is invalid for want of proper attestation it can be enforced as a bond against those who are personally liable under it. (*Spencer and Devadoss, JJ.*) KURU KONDI SAMA RAO *v.* FIRM OF MARWADI VANNAPI VAJIJI. **(1922) M. W. N. 708 : 32 M.L.T. 9: 17 L. W. 661: 46 M. 64 : 43 M. L J. 745 : 1923 M. 36.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Meaning of attestation.

——Ss. 59 and 91—*Invalid attestation—Melcharth—Necessity for attestation.*

Melcharth is a deed of mortgage and of lease and is invalid if not properly attested ; if invalid it cannot be relied upon as a lease. (*Spencer and Krishnan, JJ.*) KUPPIMI *v.* PARASA PATTAR.
39 I. C. 167 : (1917) M.W.N. 3.

——S. 59—*Invalid attestation—Non-attestation—Plea of—Duty of Court to entertain.*

Where in the course of a trial a deft. raises the plea that the mortgage is invalid as not being attested by two witnesses as required by S. 59, the Court should not dismiss the suit for that reason. It must give parties an opportunity to adduce fresh evidence on the issue and then decide the question. 39 I. A. 220, Foll. (*Sadasiva Aiyar and Napier, JJ.*) RATNA NAIDU *v.* AIYANACHARIAR. **29 I. C, 991 : (1915) M. W. N. 637.**

——S. 59—*Invalid attestation—Attestation by witness, not witnessing execution.*

A document requiring attestation, must be attested by a witness who has witnessed the attestation otherwise it cannot be enforced. Attestation on an acknowledgment by the person executing is not sufficient. (*Sankaran Nair and Napier, JJ.*) CHIDAMBARAM CHETTYAR *v.* SUBBARAGAVA SASTRI. **16 I.C. 207.**

Marksman as attestor.

——S. 59—*Marksman as attestor.*

A marksman is an attesting witness within the meaning of S. 59, T. P. Act and S. 68 of the Evidence Act. (*Sundar Lal, J.*) CHIRANJI LAL *v.* POORNA. **26 I. C. 84 : 12 A. L. J. 1114.**

——S. 59—*Marksman as attestor—Meaning of attestation.*

If the executant is illiterate, his mark is his signature independently of any writing by which the mark may be explained. The attesting witness need not formally be described as such in the document. (*Batchelor and Shah, JJ.*) GOVIND BHIKAJI *v.* BHAOO GOPAL. **41 Bom. 384 : 19 Bom. L. R. 147 : 39 I. C. 61.**
[*See also* 18 A. L. J. 105 : 55 I. C 230 : 2 U. P. L. R. (All.) 58.

Meaning of attestation.

——S. 59—*Meaning of Attestation — Requirements of S. 59.*

S. 59 of the Transfer of Property Act requires that the attesting witness must be able to make a statement on oath regarding the identity of the person performing the transfer as well as execution of the deed of such transfer by him. Thus in case of a deed executed by a pardanashin lady, if she sits on one side of the *parda* and the witness is on the other side and the deed is taken to the lady and returned with a signature on it purporting to be her and given out to be by her, whereupon the witnesses signs, the attestation is not valid inasmuch as the requirements of

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Meaning of attestation.

S 59, T.P. Act, are not complied with. (*Haldane.*) GANGA PRASAD SINGH BAHADUR *v.* ISHRI PARSHAD SINGH. **4 P L. W 349 : 16 A. L. J. 409 : 27 C L.J. 548: 22 C. W. N. 697 : 20 Bom. L. R 587, 23 M L. T. 388 : (1918) M W.N. 382 : 8 L.W. 176: 45 C. 748 : 45 I. A. 94 : 45 I. C. 1. 34 M. L.J. 545 (P.C.).**

——S. 59—*Meaning of attestation—Subsequent acknowledgment of signature—Insufficiency of—Evidence Act*, S 68.

The word 'attest' in S. 59 means the witnessing of the actual execution of the mortgage-deed and not as in S. 50 of the Succession Act, the attestation of an acknowledgment of execution merely. An instrument not duly attested as aforesaid cannot operate either as a mortgage or as a charge. 26 All. 69, Overruled. (*Mr. Ameer Ali.*) SHAMU PATTAR *v* ABDUL KADIR ROWTHAN. **35 Mad. 607 : 39 I. A. 218 : 16 C. W. N. 1009 : 12 M. L. T. 338 : (1912) M W. N. 935 : 10 A. L. J. 259 : 14 Bom L. R. 1034: 16 C.L.J 596: 16 I. C. 250 : 23 M. L. J. 321 (P.C.).**

——S. 59—*Meaning of attestation.*

'Attesting witness' in S, 68 of the Evidence Act means the same thing as 'attesting witness' in T.P. Act, S. 59, when the question is as to the proof of a mortgage. (*Newbould and Panton, JJ.*) JAGANNATH KHAN *v.* BAJRANG DAS. **62 I.C. 97 : 48 Cal. 61.**

——S. 59—*Meaning of attestation—Deed consisting of three sheets—Witness signing on the second—Third added subsequently.*

A mortgage deed consisted of two sheets. The mortgagor signed at the foot of the second and the two witnesses also signed there as having witnessed the signing by the mortgagor, a third sheet was then added which included other properties of the mortgagor and it was signed by the mortgagor in presence of the witnesses who, however, did not sign the third sheet. *Held*, the attestation was valid. (*Walmsley and Greaves, JJ.*) JANKI NATH ROY *v.* ASWINI KUMARI DEVI. **60 I. C. 736.**

——S. 59—*Meaning of attestation—Pardanashin lady—Proof.*

A mortgage was executed by a pardanashin lady and was attested by her husband and another witness. The husband actually saw the lady signing the deed and the other witness was outside the screen in the same room and he knew her voice and heard her say "yes" when the document was being explained to her. *Held*, that the document was duly attested. (*Chatterjee and Chapman, JJ.*) MT. RUKMANI KOERI *v.* NIMALI BANDOPADHYAYA. **32 I.C. 170 : 19 C. W. N. 1309.**

——S. 59—*Meaning of attestation—Inclusion of item after attestation—Effect of.*

With the consent and knowledge of the mortgagor and in the presence of the attesting witnesses an item was put in the mortgage to avoid delay in registration and to get the document registered in an office near the place where the mortgagor was living. *Held*, there was a valid mortgage as regards the item and that the deed must be deemed to have been properly executed

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Meaning of attestation.

and attested with regard to that item. (*Seshagiri, Aiyar and Moore, JJ.*) SANKARAN NAMBIAR *v.* NARAYANAN TIRUMANPU. **43 Mad. 405 : 11 L. W. 192 : (1920) M. W. N. 205 : 55 I C. 86 : 38 M. L. J. 251.**

——S. 59—*Meaning of attestation—Attestor signing before executant—Invalidity.*

Attestation of a mortgage deed within the meaning of S 59 of the T. P. Act must be made by the witnesses signing their names after seeing the actual execution of the deed. Mere acknowledgment of his signature is not sufficient to show valid attestation. An attestation is an act done after execution and until the deed has been executed there can be no attestation. 35 M. 607 : 6 N. L. R. 152 Ref. (*Prideaux, A.J.C.*) MT. GODAWARIBAI *v.* SAMPAT. **68 I C. 198.**

——S. 59—*Meaning of attestation—Pardanashin lady—Execution.*

A suit was brought on a mortgage bond purporting to have been executed by Deft. No. 1, a Mahomedan, and Defts. Nos. 2 and 3, his pardanashin wives. Defts Nos. 2 and 3 signed the documents sitting behind the *parda* They had admitted that they were the wives of Deft. No. 1 and had also been identified by Deft. No. 1 as his wives. The attesting witnesses who were present but did not see the ladies, then made their signatures. *Held* that it was not essential that the attesting witnesses should have actually seen the ladies sign the document and that the attestation was valid. 13 C.W.N. 40 : 14 C.W N. 165, 37 Cal. 526 Foll. (*Kotval, A. J. C.*) MUSSAMMAT KASIDANBI *v.* GANGULAL. **16 N. L. R. 196 : 56 I. C. 247.**

[For a similar case. *See* 45 I. C. 691 : 4 Pat. L. W. 417.] [But *See* 45 I. C 1 : 45 Cal. 748 (P. C.)] and 16 I. C 250 : 35 Mad. 607 (P. C.)]

——S. 59—*Meaning of attestation—Execution—Proof of.*

The execution of a deed creating a charge can be proved by the witnesses who signed it upon the executant's acknowledgment of his signature thereon but such a witness is not an attesting witness within the meaning of S. 59. (*Stanyon, A. J. C.*) KHEM CHAND *v.* MALLOO. **26 I. C. 601 : 10 N. L. R. 81.**

——S. 59—*Meaning of attestation—Acknowledgment of execution—T. P. (Validating) Act* S. 2.

Under S. 2 of the Transfer of Property (Validating) Act, 1917, it is sufficient if the witness before signing his name, received from the executant a personal acknowledgment of his signature to the same. *Held*, on the evidence the presumption under S, 69 of the Evidence Act, had not been rebutted. (*Lyle and Ashworth, A. J. Cs.*) CHANDIKA BAKHSH SINGH *v.* WIDOW OF JANGAN SINGH. **52 I. C. 449: 6 O. L. J. 331.**

——S. 59—*Meaning of attestation—Invalid mortgagee—Personal decree.*

To satisfy the requirements of S. 59 of the T. P. Act the witnesses must sign their names after seeing the actual execution of the deed. Merely witnessing the execution is not sufficient compliance

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Modification of Mortgage.

with law. 35 M. 607 P. C. Ref. A mortgage deed which is not enforceable as such by reason of non registration or want of attestation is admissible in evidence to prove a personal covenant to pay on the strength of which a simple money decree can be passed. 16 C. 540 : 10 C. 740 : 22 C 434 : 4 C.L.J. 510 dist. (*Robinson, C. J. and Duckworth, J*) QUAH CHENG GWAN *v.* MAUNG PO MYI.
66 I. C. 589: 11 L. B. R. 148.

Modification of Mortgage.

——S. 59—*Modification of mortgage—Agreement modifying—Attestation.*

Subsequent agreement providing for the discharge of a previous mortgage on receipt of a smaller sum than the mortgage amount, will not constitute a re-hypothecation of the properties mortgaged already, merely because it refers to the details of the properties mortgaged previously, and it does not require to be attested. (*Lindsay, A. J. C.*) BISHESHAR SINGH *v.* RAMBHAROSE. **20 I. C. 544.**

Mortgage before T. P. Act.

——S 59 — *Mortgage before the Act—Writing not necessary—Delivery of possession.*

Before the T.P. Act came into force, a usufructuary mortgage could be created in the mufassal (outside the Presidency Towns) without any writing but by simple delivery of possession. (*Mr. Ameer Ali.*) AHMED RAZA *v.* ABID HUSAIN.
38 All. 494: 43 I. A. 264: 18 Bom. L. R. 904 : 14 A. L. J. 1099 : 20 M. L. T. 447: 24 C. L. J. 504 : (1916) 2 M W. N. 548: 21 C. W. N. 265 : 5 L. W. 153: 39 I. C. 11 1 Pat. L. W. 90 (P. C.).

Oral Mortgage.

——S. 59—*Oral mortgage—Mortgage—Evidence of.*

A verbal mortgage followed by possession completes the transaction and any document subsequently executed is no bar to the original transaction being orally proved. (*Mc Coll, A. J. C.*) NGA LU DAW *v.* MI MO YI. **31 I. C. 87 : 2 U. B. R. (1915) 66.**

Proof of attestation.

——S. 59—*Proof of attestation—Pardanashin ladies—Executants.*

A mortgage deed was executed by two pardanashin ladies. The attesting witnesses saw the hand of each executant when she signed the deed seated behind the curtain, and though they could not see the faces of the executants they heard them speak and recognised their voices. *Held*, that the deed was duly attested under S. 56 of the T. P. Act. (*Sir John Edge.*) PADRATH HALAWAI *v.* RAM NARAIN UPADIYA.
37 All. 474: 42 I. A. 163: 13 A. L. J. 809 19 C. W. N 991: 17 Bom L. R. 617: 18 M. L. T. 85: 2 L. W. 639: 29 M. L. J. 159: 22 C. L. J. 165: 30 I. C. 366 : (1915) M. W. N. 709 (P. C.)

——S. 59—*Proof of attestation—Further evidence.*

Where the only attesting witness produced did not see the executant sign, the plaintiff ought to

TRANSFER OF PROPERTY ACT (IV OF 1882), S 59—Proof of attestation.

be given the further opportunity to produce evidence to prove the mortgage. (*Griffin and Chamier, JJ.*) RAM *v.* LILADHIR BAKHSHI. **35 All. 353: 21 I. C. 619: 11 A. L. J. 371.**

——S. 59—*Proof of attestation—Execution of mortgage—Attestation.*

When one out of two attesting witnesses is dead and the other denies all knowledge of it and there is no other evidence to show that the document was executed in the presence of any of the attesting witnesses, due execution and attestation are not proved. (*Richards, C. J. and Lyle, J.*) WAZIRKHAN *v.* RAMPHAL. **19 I. C. 643.**

——S. 59—*Proof of attestation—Want of proper attestation—Effect of.*

A mortgage bond is not duly executed and cannot operate as a mortgage unless it is in fact signed by the mortgagor in the presence of at least two witnesses who sign the document as attesting witnesses. (*Mookerjee and Rankin, JJ.*) BENOY BHUSAN ROY *v.* DHIRENDRA NATH DEY.
38 C. L. J. 114 : 1924 C. 415.

——S. 59—*Proof of attestation—Not given—Personal decree.*

A mortgage bond properly attested, but not proved in conformity with S. 68 of the Evidence Act is not receivable in evidence to prove the personal obligation thereby created. 3 M. 337: 35 M. 607, Rel.; 26 C. 78 dist. (*Suhrawardy and Cuming, JJ*) SUDHAYA KUMAR SINGH *v.* GOUR CHANDRAPAL. **35 C. L. J. 473: 27 C W. N. 134: 1922 C. 160.**

——S. 59—*Proof of attestation—Mixed question of law and fact.*

The objection that a mortgage is not duly attested cannot be allowed to be taken for the first time in appeal as it is a mixed question of law and fact. (*Teunon and Walmsley, JJ.*) SRICHARAN BHANDARI *v.* MAKHAN LAL BHANDARI.
51 I. C. 378.

——S 59—*Proof of attestation—Admission by party.*

If the sole executant of a document required by law to be attested, admits of its execution by himself there is no necessity of calling an attesting witness under S. 68 of the Act for the purpose of proving its execution as against any person (*Woodroffe, Chatterjee and Newbould, JJ.*) SATISH CHANDRA MITTRA *v.* JOGENDRA NATH.
44 Cal. 345 : 20 C.W.N. 1044 : 34 I. C. 862 : 24 C. L. J. 175.

——S 59—*Proof of attestation — Question if to be raised in appeal.*

Where the validity of a mortgage deed has never been questioned, the question of attestation or of its proof does not arise Such a point cannot be raised for the first time in appeal, (*Odgers and Hughes, JJ*). RANGASWAMI AIYANGAR *v* VEERA RAGHAVACHARI
46 M. L. J. 56 : 18 L. W. 620 : (1923) M W. N. 789 : 33 M. L. T. 73 · (H. C.) 1924 M. 13.

TRANSFER OF PROPERTY ACT (IV OF 1882), S 59—Proof of attestation.

——S. 59—*Proof of attestation—Malabar Law.*

Kanom, Melkanom, and *Melcharth* deeds required attestation as mortgage deeds under Ss. 59. (*Sadasiva Aiyar and Napier, JJ.*) KANDIYAL PARKUR *v.* THOTTOLI KOTTARATHIL.
44 Mad. 314 : (1921) M. W. N. 229 : 14 L. W. 69 : 62 I. C. 386 : 40 M. L. J. 282.

——S 59—*Proof of attestation.*

To prove the creation of a valid charge by a mortgage deed the evidence of one of the attesting witnesses is sufficient to prove the execution o fthe mortgage ; but this proof may be rebutted by the proof on the other side that the other witness or witnesses did not really see his execution. (*Sadasiva Aiyar and Spencer, JJ.*) VENKATA REDDI *v.* MUTHU PAMBULU NAIK.
60 I. C. 554 : 39 M. L. J. 463.

——S. 59—*Proof of attestation.*

An "attested" document means a document whose execution by the executant has been actually seen by the apparent attestor. 35 Mad. 607 (P. C.), Foll. To prove an attested document it is enough if one attestor is called. He need not depose that he saw the other attestor witness the execution. 39 All 109 : 39 All. 241, Rel. An allegation of proper attestation of a mortgage in a plaint not denied specifically or by necessary implication by the defendant, must be taken to have been admitted by him. Consequently it need be proved under S. 58, Evidence Act. (*Sadasiva Aiyar and Spencer, JJ.*) VENKATA REDDI *v.* MUTHULU PAMBULU. **28 M. L. T. 213 : 58 I. C. 801 : (1920) M. W. N. 512.**

——S. 59—*Proof of attestation—Formalities—Admission of execution—Effect of.*

An attestor of a mortgage must not merely see the execution of the document but must also subscribe his name on the document as having seen the execution A document without a proper attestation is ineffectual to create a mortgage. Even where the execution of a mortgage is admitted it is competent to the Court to require strict proof of valid attestation. 35 Mad. 607: 31 M. L. J. 240, Ref. (*Abdur Rahim and Oldfield, JJ.*) MUNIAPPA CHETTIAR *v.* VELLACHAMI MANNADI. **25 M. L. T. 19 : 9 L. W. 5 : 49 I. C. 278 : (1918) M. W. N. 853.**

——S. 59—*Proof of attestation—Execution admitted*

A mortgage deed to be valid must have been duly attested by two witnesses who have seen the execution ; proof of due attestation is necessary though execution is admitted by the mortgagor. 35 Mad. 607, (P.C.), Foll. (*Sadasiva Aiyar and Spencer, JJ.*) VADLA NAGIAH *v.* VALURU DIVAKARA MUDALIAR. **6 L. W. 147 : 41 I. C. 585 : (1917) M. W. N. 583.**

——S. 59—*Proof of attestation—Onus on mortgagee.*

In a mortgage suit the onus of proving due attestation of the deed is upon the mortgagee notwithstanding the admission of execution by the mortgagor. If the validity of an attestation (which *ex facie* is regular) is not disputed, then the maxim "*Omnia Praesumuntor rite esse actae*" applies and the attestation is presumed to be valid. (*Batten, A. J. C.*) BALAKRISHNAN *v.* NARASIMHA. **42 I. C. 299 : 13 N. L. R. 121.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Proof of attestation.

——S. 59—*Proof of attestation—Nature of.*

It is enough if one attesting witness proves execution and his attestation after seeing the executant sign, though he does not say whether he saw the other attesting witnesses sign it. (*Daniels, A. J. C.*) KESHEO *v.* SITLU. **39 I. C. 274 : 4 O. L. J. 65.**

——S. 59—*Proof of attestation—Evidence Act, S. 71.*

When a mortgagor does not execute his deed in the presence of the witnesses there is no proper attestation as required by S. 59 of the T. P. Act. When there is no proper attestation of a mortgage deed by reason the execution of the deed not having taken place in their presence, evidence of the witnessing of the execution by some other person is not sufficient to prove the attestation as required by S 71 of the Evidence Act. 16 I C. 250 (P. C.), Foll. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) MAHADEO PRASAD *v.* GAJRAJ SINGH. **34 I. C. 397 : 3 O. L. J. 164.**

——S. 59—*Proof of attestation.*

Where a witness states a mortgage bond was executed in the presence of himself and others and that he signed after seeing it executed, it is sufficient proof that he signed as attesting witness. (*Das and Kulwant Sahay, JJ.*) ISHWAR-PRASAD NARAYAN DEO *v.* CHOTA NAGPUR BANKING ASSOCIATION, LTD. **1924 P. 317.**

——S. 59—*Proof of attestation—Mixed question of law and fact.*

It is mixed question of law and fact whether or not the evidence led by a mortgagee suing on his mortgage on whom the onus rests is sufficient to show that the terms of S. 59 have been duly complied with. (*Mullick and Adami, JJ.*) DULHIN SUNDARI *v.* BEHARILAL. **51 I. C 328 : 1919 Pat. 279.**

——S. 59—*Proof of attestation.*

Where A one of the attesting witnesses admitted that he signed the deed, but said that he did not see the executants sign the deed, but that he did accompany the executants to the Registration office to identify them. Another witness said that the deed was executed in the presence of A. It was found that A was speaking false. *Held* the deed was properly attested. (*Robinson, C. J. and May Oung, J.*) DAWSON'S BANK LTD. *v.* C. R. V. V. CHETTY FIRM AND ANOTHER.
1 Rang. 121 : 1923 R. 254.

——S. 59—*Proof of attestation—Acknowledgment of signature—Mortgage invalid—Evidence Act, S. 68.*

A mortgage deed purported to have been signed by two witnesses as required by S. 59. But it was admitted in evidence that one of them was not present at the time of the execution but signed it on being told by the executant that he had executed it. *Held*, that the document was not only inadmissible under S. 68 of the Evidence

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 59—Proof of execution.

Act but did not effect a mortgage at all. (*Twomey, C. J. and Parlett, J.*) PERIANNAN CHETTY *v.* MAUNG BA THAW. 11 Bur. L. T. 114 : 43 I. C. 916 : 9 L. B. R. 159.

Proof of execution.

——S. 59—*Proof of execution— Illiterate mortgagor.*

Where an executant is a marksman, it must be proved not merely that the mark is that of the executant but also that it was affixed to the deed in the presence of the witnesses. (*Piggott and Walsh, JJ.*) KASAIMDHAN *v.* MUKHDHUM BAKSH. 40 I. C. 191.

——S. 59—*Proof of execution — Personal decree—Appellate Court.*

Where a document is not executed in the manner prescribed by Sec. 59 of the Transfer of Property Act, it does not operate as a mortgage. If the appellant asks for a personal decree, the Court can grant it. (*Richards, C.J. and Rafique, J.*) RADHESHIAM *v.* CHUNNI, 35 I. C. 192 : 14 A. L. J. 361.

——S. 59—*Proof of execution—Admission.*

An admission by a person of the execution by himself of an attested document is sufficient proof of its execution against himself though the document is required by law to be attested and in the absence of any plea or evidence of want of due attestation it need not be proved (*Schah, C. J. and Crump, J.*) JAGANNATH *v.* RAOJI TULSIRAM. 24 Bom. L. R. 1296 : 47 B. 137: 1923 Bom. 90.

——S. 59—*Proof of execution.*

Formalities imposed by law against perjury and fraud must be strictly observed. A mortgage is not duly executed and cannot operate as a mortgage or create a charge unless it was in fact signed by the mortgagor in the presence at least of the attesting witnesses. 35 Mad. 607 ; 27 C. L. J. 548 Ref. (*Richardson and Suhrawardy, JJ.*) ARJUN CHANDRA BHADRA *v.* KAILAS CHANDRA DAS. 27 C. W. N. 263 : 36 C. L. J. 373 : 1923 C. 149.

——S. 59—*Proof of execution—Admission of execution by defendant rendors proof unnecessary.*

Admission by deft. of the execution of a mortgage-deed in a suit on it, renders it unnecessary for the plff. to prove that the document was executed and attested as required by S. 59. (*Dass and Adami, JJ.*) HIRA BIBI *v.* RAMDHAN LAL. 2 Pat. L. T. 752 : 62 I. C. 540 : 6 P. L. J. 465.

Registration.

——S. 59—*Registration— Mortgage before T. P. Act—Title by estoppel.*

Where in execution of a money decree a compromise was arrived at as a result of which the decree-holder took possession of certain properties of the judgment-debtor as usufructuary mortgagee but the document was not stamped or registered, *held* that the transaction having been entered into before the Transfer of Property Act did not require registration and that, even otherwise, the long course of conduct on the part of the mortgagor prevented him from disputing the validity of the mortgage. (*Ryves and Gokul Prasad, JJ.*) RAMSEWAK RAI *v.* SHEO NAIK RAI. 45 A. 388 : L. R. 4 A. 389 : 21 A. L. J. 294 : 1923 A. 433 (2).

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 59—Registration.

——S. 59—*Registration—Rights of parties before registration—Attachment of debt in the hands of mortgagee.*

Until the mortgage deed has been duly registered the mortgagee is not under any obligation to advance any mortgage money to the mortgagor consequently it is not open to a creditor of the mortgagor to attach the mortgage money in the hands of the mortgagee until registration of the mortgage. (*Lindsay and Gokul Prasad, JJ.*) TULSHI RAM *v.* HARAKH NARAIN BHAGAT. L. R. 3 A. 430 : 1922 A. 384.

——S. 59—*Registration —Mortgage—Interest in a grove—Whether registration required.*

Rights and interests of a grove-holder are rights and interests in immoveable property and registration is essential for a mortgage thereof. 9 I. C. 478, Dist. (*Richards, C. J. and Banerji, J.*) SHEO NAIK RAM *v.* SHEO RAM. 23 I. C. 963.

——S. 59—*Registration— Mortgage deed—Construction—Registration.*

A mortgage recited that a sum of Rs. 91 only was due at the date of its execution but provided for payment of Rs. 180 on default. *Held*, that it did not require registration, (*Rafique, J.*) JODH RAM *v.* SHAH LAJJA RAM. 21 I. C. 78 : 11 A. L. J. 729.

——S. 59—*Registration—Inclusion of stranger's property in mortgage to resume registration—Effect.*

If a property has been introduced in a mortgage bond, which has either no existence or does not belong to the mortgagor, with a view to registration of the document in a particular office, the registration must be deemed to be futile, with the result that there is no enforceable security under S. 59, T. P. Act. 41 I. A. 110 ; 48 I. A. 127 foll. (*Mukerjee and Chotzner, JJ.*) KEDARNATH DAS *v.* JYANTA KUMAR SHOME. 38 C. L. J. 355 : 1924 C. 348.

——S. 59—*Registration —Moveables—Mortgage of—No writing, etc. required in the Punjab.*

In the Punjab a hypotheca of moveable property is not required to be by deed in writing and if made orally is effectual for all purposes (except as provided for by S. 48, Registration Act) provided always it can be proved. 11 I. C. 869 Foll. (*Rattigan and Rossignol, JJ.*) MRS. STEWART *v.* BANK OF UPPER INDIA, LTD. 32 P. R. 1916 : 34 I. C. 932 : 214 P. W. R. 1915.

——Ss. 59 and 100—*Registration—Charge—Unregistered—Admissibility as regards moveables.*

Where an unregistered document creates a charge over moveables and immoveables the document though inadmissible as regards immoveable property can be admitted in evidence so as to affect rights in immoveable property. (*Ayling and Seshagiri Aiyar, JJ.*) PASHUPATI VENKATAPATHIRAJU *v.* VENKATASUBHADRAYAMMA. 47 I. C 563.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Registration.

——S. 59—*Registration— Registered deed —Subsequent transferee if bound—Question of notice when arises.*

A registered mortgage by a person entitled to dispose of immoveable property binds the property as against subsequent transferees with or without notice and question of notice arises only where there is conflict between a registered and an unregistered deed or oral sale or when the transferee is not entitled to dispose of the property. 13 C. P. L. R. 43 Dist. (*Skinner, A. J. C.*) SHRIKISON *v.* CHATAR SINGH.

13 I. C. 904 : 8 N. L. R. 18.

——S. 59—*Registration--Want of—Enforceability as a bond.*

Where owing to non-registration a mortgage is not enforceable as a mortgage, it is open to the creditor to obtain a simple money decree on the covenant to repay. 9 M. 441 : 12 O. C. 275 : 20 O. C. 155 Ref. (*Kanhaiya Lal, J. C.*) RAM AUTAR *v.* RAM ASRE. **66 I. C. 680 : 8 O. L. J. 414.**

——S. 59—*Registration—Mortgage of royalty.*

Interest in a royalty does not constitute an interest in immoveable property. Mortgage on royalty does not require registration or attestation. (*Das and Adami, JJ.*) KRISHNA KISHORE ADHIKARY *v.* KUSUNDA NYADI COLLIERIES.

1922 P. 36.

——S. 59—*Registration—Necessity- Burma.*

In a simple mortgage effected after 1st January 1905, a registered instrument is necessary in Burma whatever the amount may be. An unregistered instrument is invalid. (*Twomey, J.*) MG. SHAWE BYA *v.* CHAWARI MUTHU.

12 I. C. 25 : 4 Bur. L. T. 219.

Scribe as attestor.

——S. 59—*Scribe as attestor—Attestation improper—Effect of.*

A document though registered in which the scribe wrote the name of the second witness without proof of authorization creates no mortgage or charge. But a money decree may be given as it is a registered document. (*Walsh and Sunderlal, JJ.*) PARAM HANS *v.* RANDHIR SINGH.

38 All. 461 : 35 I. C. 748 : 14 A. L. J. 673.

——S. 59—*Scribe as attestor—Evidence Act, S. 68—Attesting witness, who is.*

A mortgage was signed in the presence of the writer of the deed and one of the attesting witnesses. The other attesting witness put his attestation on the deed later on. *Held*, tha the deed was not validly executed under S. 59 of the T. P Act. 41 Bom. 384, Ref. Per *Macleod, C. J.*— A Court will be loath to hold that in any case a scribe wherever he wrote his name, could be considered to sign the document as an attesting witness unless he actually said so in the document. There is a very great difference between an attesting witness and a scribe and it would lead to attempts to evade the plain words of S. 59 and would also lead to constant difficulties thereafter if the law was not strictly observed. (*Macleod, C. J. and Heaton, J.*) DALICHAND SHIVRAM MARWADI *v.* LOTU SAKHARYM. **22 Bom. L. R. 136 : 55 I. C. 616 : 44 Bom. 43.**

See also **56 I. C. 945 : 12 Bur. L. T. 261.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Scribe of attestor.

——S. 59—*Scribe as attestor.*

Where a scribe of a mortgage document has himself written the name of the executant and the document contains no mark, seal or thumb-impression of the mortgagor, the scribe is not competent to become an attesting witness to the signature he himself has written out and in the absence of two other attesting witnesses the document will not operate as a mortgage or a charge. (*Mookerjee and Buckland, JJ.*) SRISTIDHAR GHOSH *v.* RAKSHAKALY DASSI. **63 I. C. 507.**

——S. 59—*Scribe as attestor—Competency as witness.*

A person who is present and witnesses the execution of deed and whose name is there on the deed, is a competent witness to prove the execution though he is described as merely a writer. (*Newbould and Panton, JJ.*) JAGANNATH KHAN *v.* BAJRANG DAS. **62 I. C 97 : 48 Cal. 61.**

——S. 59—*Scribe as attestor —T. P. Act, S. 60.*

Where no mark or seal or thumb-impression of the mortgagor appears on a mortgage deed, the scribe who executes the document for and on behalf of the mortgagor is not competent to attest his own signature as an attesting witness. 34 Mad. 607, Ref. (*Fletcher and Walmsley, JJ.*) RAJANIKANTA BHADRA *v.* PANCHANAND.

46 Cal. 522 : 48 I. C. 720 : 23 C. W. N. 290.

——S. 59—*Scribe as attestor—Scribe deposing to execution of deed—Proof.*

The essence of attestation of a document is that the person attesting must have seen the document executed by the executant The fact that a person calls himself a scribe in a certain document does not necessarily debar him from being an attesting witness thereto and the question whether a scribe is also an attestor and was indebted to witness the execution of the document is a question of fact depending upon the facts of each case. 24 M L. J. 534 ; 20 C W. N. 699, and 5 C. W. N. 458 Ref. (*Seshagiri Aiyar and Napier, JJ.*) PARAMASIVA UDAYAN *v.* KRISHNA PADAYACHI.

41 Mad. 535 : 43 I. C. 983 : 7 L. W 241:
See also **(1913) M. W. N. 400 : 24 M. L. J. 534 : 19 I. C. 589 : 13 M. L. T. 463.**

——S. 59—*Scribe as attestor.*

A writer of a document can be an attestor for the purpose of S.59. (*Sadasiva Aiyar and Napier, JJ.*) KOTTAPALLI SUBBAMMA *v.* JATAVALLABHULA SUBRAHMANYAM. **39 Mad. 1035 : 32 I. C. 813 : 30 M. L. J. 260.**

——S. 59—*Scribe as attestor.*

The writer of a document, who signs after an admitted attestor signs as an attestor though

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59—Scribe as attestor.

he merely describes himself as the writer. 24 M L. J. 534 ; 35 Mad. 670 ; 39 I. A. 220, Foll. (*Sadasiva Aiyar and Napier, JJ.*) AYYASAMI IYENGAR *v.* KYLASAM PILLAI. **26 I. C. 409**

——— **S. 59**—*Scribe as attestor—Evidence Act (1872), Ss. 68 69 and 71—Attesting witness—Whether scribe an attesting witness.*

Under S 59 of the T.P. Act and Ss. 68, 69 and 71 of the Evidence Act the scribe of the mortgage deed who writes it and signs it and in whose presence it is executed is not an attesting witness. A witness who has signed the document but who was not present at the time of its execution is not an attesting witness. 39 I.A 220. Ref. (*Stuart, J. C.*) RAM SAHU *v.* GOURI SHANKER. **39 I. C. 153 : 4 O. L. J. 101.**

——— **S. 59**—*Scribe as attestor — Proof of—Onus.*

Where a person who has signed a deed as a scribe subsequently asserts that he signed as a witness the onus of proving this assertion lies heavily on him 1 Pat. L. J. 129, Foll. (*Roe and Atkinson, JJ.*) NAGESWAR PRASAD *v.* BACHU SINGH. **53 I.C. 79 : 4 Pat L. J. 511.**

——— **S. 59**—*Scribe as attestor— Meaning of attestation.*

An attestor is said to 'attest' when he witnesses the execution of the deed and subscribes as an attesting witness. *Chamier, C. J.*—The scribe of a document who was present at its execution but who subscribes himself only as a scribe is not deemed as an attesting witness. There is no presumption that a scribe or a person describing himself as an attestor of a document witnesses its execution : the fact must be proved by evidence. (*Chamier, C. J. and Jwala Prasad J.*) RAM BAHADUR SINGH *v.* AJODHYA SINGH **1 Pat L. J. 129 : 20 C. W. N. 699 : 34 I. C. 370 : 3 Pat. L. W. 93.**

——— **S. 59**—*Scribe as attestor.*

Where a mortgage is signed by the writer as well as the mortgagee without indicating that they signed as attestors, the mortgage is not validly attested. 35 A. 254 ; 4 Pat L. J. 511 Ref. (*Saunders, J C.*) MAUNG PO THAUNG *v.* P.L.N. R. M. MUTHIA CHETTY. **(1921) 4 U B, R. 78.**

——— **S. 59**—*Scribe as attestor.*

The writer of a document who does not subscribe as a witness but merely as a scribe, is not an attesting witness within the meaning of S, 59 although he witnesses the execution of a document. (*Twomey, C J and Robinson, J.*) S. V. S. T. CHETTY *v.* PO MYA. **56 I. C 945: 12 Bur. L. T. 261.**

——— **S. 59**—*Scribe as attestor—Attestation—Validity of.*

For the validity of a mortgage deed it is essential that the attesting witnesses should have witnessed the execution by the executant.

Thus a mortgage attested by one and signed by the scribe as a writer cannot be said to be a valid mortgage as the other does not sign it as an attesting witness (*Ormond and Partett, JJ.*) MG. SO *v.* O. A R. RAMASWAMY CHETTY **24 I. C. 375 (1).**

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 60—Clog on redemption.

Who can be attestor.

——— **S. 59**—*Who can be attestor,*

A person not a party but interested in the money advanced can validly attest a deed of mortgage. (*Scott, C.J. and Rao. J.*) BALU RAVJI *v*, GOPAL GANGADAR. **12 I. C. 531 : 13 Bom. L. R. 944**

——— **Ss. 59 (1) and 100**—*Who can be attestor—Executant—Mortgage invalid.*

One of the two executants, signed as an executant, also as writer and as one of two attesting witnesses. The first Court held the document invalid as mortgage but gave a charge. *Held* a party to a document could not be allowed to sign it both as an attesting witness and as an executant 32 Cal. 729 ; 33 Cal. 985. Foll. Therefore the bond could not be held to be valid as against deft No. 1 as a mortgage ; as the document, if valid, amounted to a mortgage and no charge was created by it on the property. 33 Cal. 985 Rel. The plff could sue on the personal covenant, but that remedy having been barred, the suit should be wholly dismissed. (*Brett and Sharfuddin, JJ.*) DEBENDRA CHANDRA ROY *v.* BEHARI LAL MUKHERJI. **15 I. C. 666 : 16 C. W. N. 1075.**

——— **S. 59**—*Who can be attestor—A person giving his approval.*

A person signing a mortgage-deed not as a witness but as a person who merely approves of the transaction is not an attesting witness. (*Das and Adami, JJ.*) BARKUARIN ALAK *v.* SIRCAR BARNARD & CO. **2 P. L. T. 761 : 62 I C. 668 : 6 P.L.J. 473.**

——— **S. 60.**

Charge.
Clog on Redemption.
Duty of Mortgagee.
Mortgage money.
Partial Redemption.
Redemption out of Court.
Rights of Redemption.
Rights of Mortgage.
Splitting up to Security.

Charge.

——— **S. 60**—*Charge, deed of, construction of—Redemption.*

A mortgagor borrowed certain sum from his mortgagee with an agreement that the debt would be a charge over the mortgaged property and that he would pay it up at the time of redemption. *Held*, the deed was a mortgage of, or at least a charge over the mortgaged property and the mortgagor could not redeem without paying the debt borrowed. (*Shadilal and Le Rossignol, JJ.*) HUKAM CHAND *v.* KADAR BAKSH **37 I. C. 166 : 100 P. W. R. 1916.**

Clog on Redemption.

——— **S. 60**—*Clog on redemption—Provision against raising money by sale of further mortgage of property.*

Semble.—A provision in a mortgage deed that the mortgagor should pay the mortgage money within the stipulated period out of his own pocket without selling or charging the mortgaged property, would be illegal as an encroachment on

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Clog on redemption.

a mortgagor's right to redeem from whatever source he might procure the funds to do so. (*Lord Atkinson.*) JHANDA SINGH *v.* WAHID-UD-DIN.

38 All. 570 : 43 I. A. 284 : 31 M. L. J. 750 : 21 C. W. N. 66 : 20 M. L. T. 529 : 14 A. L. J. 1189 : (1916) 2 M. W. N. 570 : 19 Bom. L. R 1 : 5 L. W. 189 : 25 C. L. J. 524 : 36 I. C. 38 : 10 Bur. L. T. 131 (P. C.).

——S. 60—*Clog on redemption—Subsequent arrangement qualifying right to redeem.*

Where a few years after the creation of a mortgage another agreement was entered into between the mortgagor and mortgagee whereby the right of redemption was subjected to the condition that it could not be exercised so long as small annuity was paid, *held*, that such an agreement was not bad in law, even though it operated to clog the equity of redemption. The law does not prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to dedeem. It is not alleged that the action is brought upon a breach in the covenant contained in the deed of compromise. The suit therefore is rightly dismissed. (*Mr. Ameer Ali,*) SHANKAR DIN *v.* GOKUL PRASAD.

34 All. 620 : 14 Bom. L. R. 1098 : 23 M. L J. 621 : 15 O. C. 285 : 12 M. L. T. 419 : (1912) M. W. N. 1061 : 10 A. L. J. 344 : 17 C. W. N. 1 : 16 I. C. 78 : 17 C. L. J. 9 (P.C.).

——S. 60—*Clog on redemption—Mortgages prior and subsequent—Redemption.*

A usufructuary mortgage was followed by another mortgage in favour of the same person over the same property which recited that if interest was not paid aunually the mortgagee could sue and also that the first mortgage could not be redeemed without redemption of the second also: *Held*, it was a clog and could not be enforced. (*Gokul Prasad, J.*) LALA MAKHAN LAL *v.* KISHUN LAL. 1923 All. 454

——S. 60—*Clog on redemption—Vendee from mortgagor cannot plead.*

It is not open to the vendees from mortgagor to plead that the long term of the mortgage is excessive. (*Ryves and Stuart, JJ.*) RAM SAMUJH *v.* SHEORAJ TEWARI. 1923 All. 123.

——S. 60—*Clog on redemption.*

A mortgage deed stated : "I have taken Rs. 125 from *J* and *K*, and have discharged my necessities ; and so in lieu of Rs. 45 the balance with interest at Re. 1-8-0 per cent. per annum along with the mortgage money and will pay interest every year in the month of *Jeith*, and if anything remains unpaid out of principal and interest I will be entitled to redemption on payment of the same along with the mortgage money." *Held*, that the mortgage deed secured a sum of Rs. 125 and that the plff. could redeem on payment of the entire sum with interest. (*Richards, C. J. and Banerjee, J.*) JAGARDIP RAI *v.* NAUBAT RAI. 38 I. C. 149.

——S. 60—*Clog on redemption—Long term of 59 years.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Clog on redemption.

Under a mortgage deed possession was to be with the mortgagee for 59 years before the mortgagor was entitled to redeem ; *held*, the condition could not be set aside as being onerous, there being no evidence of fraud or undue influence. (*Piggott, J.*) MT. DULARI *v.* LAL BAHADUR SINGH. 28 I. C. 129.

——S. 60—*Clog on redemption—Stipulation for redemption of prior mortgage.*

A stipulation in a second mortgage not to redeem an earlier mortgage in favour of the same person, without redeeming the later also, is not a clog on the equity of redemption and can be enforced (*Piggott, J.*) RAM CHARAN *v.* JAGAN BEHARI LAL. 24 I. C. 737.

——S. 60—*Clog on redemption—Provision allowing one day for redemption in 80 years—Redemption not with borrowed money—Validity.*

Where an usufructuary mortgage was executed for forty years and only the day following the completion of term was fixed for redemption failing which the mortgagee was to continue for another forty years and it was also provided that redemption was not to be effected with borrowed money it was held that the provision was a clog on redemption. (*Chamier and Rafique, JJ.*) SARABDAWAN SINGH *v.* BIJAI SINGH.

36 All, 551 . 24 I. C. 705 : 12 A. L J. 927.

——S. 60—*Clog on redemption—Agreement to redeem before prior usufructuary mortgage—Clog.*

A simple mortgage provided that it should be redeemed before a prior usufructuary mortgage on the property. *Held* the provision is not a clog on the equity of redemption. (*Banerji and Chamier, JJ.*) GAYA DIN SINGH *v.* GAJADHAR. 24 I. C. 611.

——S. 60—*Clog on redemption—Long period—Not to be redeemed before 35 years,*

The provision in a usufructuary mortgage that it would not be redeemed for 35 years is not hard or unconscionable where there is no fraud or undue influence. (*Rafique, J.*) DALTHAVAN SINGH *v.* AMERDEO SINGH. 23 I. C. 926 : 12 A. L. J. 492.

——S. 60—*Clog on redemption— Postponement for 58 years—Unconscionable.*

If a mortgage deed provides that the mortgagor would have no right of redemption for 58 years, that stipulation is not, *per se* a hard and unconscionable bargain. 1 Ch. D, 620 ; 26 All. 479 ; 20 Bom. 677 Ref. (*Karamat Husain and Tudball, JJ.*) RAM PRASAD *v.* JAGRUP. 15 I. C. 880 : 10 A. L. J. 157.

——S. 60—*Clog on redemption—Option to redeem.*

The conditions in a mortgage-deed were that the mortgagor should redeem the mortgage after 13 years failing which it would hold good for 13 years more. The mortgagor brought a suit for redemption after 14 years, alleging that the term of 13 years was a penalty. *Held*, that it was not penal and the mortgagor could not redeem before the expiry of the next 13 years. (*Griffin, J.*) RAMABARAN SINGH *v.* RAMKER SINGH.

10 I. C. 243.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Clog on redemption.

——S. 60—*Clog on redemption—Permanent lease.*

Contemporaneous agreement to lease the land on permanent tenure and a mortgage of the property make the agreement of lease void is a clog on redemption. (*Macleod, C. J. and Shah, J.*) BHIMRAO *v.* SAKHARAM. **64 I. C. 612 : 23 Bom. L. R. 1268.**

——S. 60—*Clog on Redemption — English Rule not applicable to India.*

The English law regarding clog on the equity of redemption does not obtain in India. A provision that a mortgage shall not be redeemed so long as there are fruit trees planted by the mortgagee standing on the mortgaged land is not a clog, and a suit for redemption is premature if it is brought while such trees are standing on the land. (*Heaton, A. C.J. and Crump, J.*) GENU TUKARAM *v.* NARAYAN RAGHU, **45 Bom. 117 : 59 I. C. 258 : 22 Bom. L. R. 1147.**

——S. 60—*Clog on redemption—Equitable relief.*

Equity relieves a mortgagor from the forfeiture of his right of redemption due to a clog on his equity after the lapse of the mortgage period. But he and the mortgagee can settle among themselves the arrangement of the payment of the mortgage money after its execution. Where a mortgage recites certain conditions of the disposal of the property in a certain manner if it is not paid within a certain period and the parties to it agree after the lapse of the prescribed period to the manner of its disposal, the transaction becomes independent of the original mortgage and is valid (*Macleod, C. J. and Heaton, J.*) SHANKER DHONDEO *v.* RAGHUNATH GAITANDE. **58 I. C. 384 : 22 Bom. L. R. 965.**

——Ss. 60 and 986—*Clog on redemption—Mortgage anomalous.*

One of the elementary rules of equity is " once a mortgage always a mortgage " and a mortgagee should not be allowed to obtain any undue advantage by his mortgage except the amount of the principal, interest and costs due on his mortgage. S. 60 which embodies this principle applies to all mortgages including anomalous mortgages under S. 98 (*Fletcher and Smither, JJ.*) BADAL MOLLA *v.* CHEMAI MONDAL. **40 I. C. 894.**

——S. 60—*Clog on redemption—Long period fixed—Mortgagees at liberty to make any improvements and charge for same—Effect.*

The mere fact that the mortgagors are prohibited from redeeming for a long period of 51 years does not render the clause unconscionable. But when in addition to this, the mortgagors are not entitled to rents and profits though they have to pay interest at 7½ per cent, and the mortgagees are entitled to spend any amount they take on improvements and charge the same on the property with interest at 6 per cent ; and that at the same time the mortgagors are not entitled to the increase in rents or profits, the whole transaction is unconscionable and courts can give relief. (*Shadi Lal, C. J. and Fforde, J.*) FAUJDAR KHAN *v.* ABDUL SAMAD KHAN. **5 Lah. L. J. 394 : 1924 Lah. 129.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Clog on redemption.

——S. 60—*Clog on redemption.*

Where after execution of a usufructuary mortgage a simple mortgage was executed with a stipulation that the money under the simple mortgage would be paid at the time of the redemption of the usufructuary mortgage the mortgagor must first pay the money due on the simple mortgage if he wants to redeem the usufructuary mortgage. 37 All. 634, disapproved (*Broadway and Wilberforce, JJ.*) NATHWA *v.* KANHAIYA. **65 I. C. 642 : 3 Lah. L. J. 432.**

——S. 60—*Clog on redemption —Conditions as to improvements and interest on the cost of improvements—If justifiable.*

A condition in a mortgage of a house by a mother for her infant son, as to the liability of the minor for improvements, does not justify the demolition and reconstruction of the house and the condition for interest on the sum expended on improvements is most inequitable and unconscionable. (*Le Rossignol and Wilberforce, JJ.*) SURAPU *v.* DEWAN CHAND. **59 I. C. 764 : 43 P. W. R, 1921.**

——S. 60—*Clog on redemption—Hard terms —Dealing at arm's length.*

The mere fact that the terms of a mortgage are hard is not sufficient to hold them to be so onerous as to be a clog on redemption, A man who enters into a transaction with his eyes open and without being subjected to undue influence cannot ask to be relieved from the natural consequences of his action. (*Broadway, J.*) NATHU RAM *v.* SHADI RAM. **49 I. C. 946 : 40 P. W. R. 1919.**

——S. 60—*Clog on redemption—Agreement giving power of sale—Punjab.*

A provision in a mortgage giving the mortgagee a power of sale over the property for the discharge of his debt and of prior incumbrances, is not a clog on the equity of redemption. In Punjab the principles of the T. P. Act are generally respected. (*Johnstone and Le Rossignol, JJ.*) SATDAR ALI *v.* GHULAM MOHI-UD-DIN. **103 P. R. 1915 : 158 P. L. R. 1915 : 30 I.C. 526 : 145 P. W. R. 1915.**

——S. 60—*Clog on redemption—Postponement of redemption for fifty years—Interest at Rs. 1½ per cent per mensem.*

A mortgage deed provided that the mortgagor should have no right to redeem until the expiry of fifty years. *Held*, that the provision was not inequitable and will not be set aside in the absence of fraud or undue influence nor will a provision for interest at Rs. 1½ per cent per mensem be set aside as inequitable. (*Shah Din and Scott-Smith, JJ.*) SUNDAR SINGH *v.* HUKAM SINGH. **24 I. C. 926 : 219 P. L. R. 1914.**

——S. 60—*Clog on redemption—Postponement for 150 years.*

In a suit for redemption, in which the period of the mortgage was fixed at 150 years, the fixation of period is of the essence of the contract and the right to redeem does not mature before the expiry of the term fixed in the deed. (*Barten, J. C.*) ABDULLA *v.* SADULLA KHAN. **15 I. C. 917.**

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 60—Clog on redemption.

——— S. 60 *Clog on redemption— Mortgage with possession – Condition of absolute transfer on non-payment within time.*

A mortgage with possession provided among other things that the mortgage should not be redeemable for 5 years and that if the mortgage is not redeemed within a period of 20 years, the mortgagee should have the land absolutely as on a sale, *held*, the postponement of the date of redemption did not make the mortgage an anomalous one and that the mortgage being usufructuary, the latter clause was a clog on the equity of redemption and unenforceable and hence did not bar redemption even after 20 years. *Oldfield and Ramesam, JJ.*) NARAYANA MOORTHY *v.* APPALA NARASIMHALU. **14 L W. 536 : 68 I C. 717 : 41 M. L. J. 563.**

——— S. 60 *—Clog on redemption—Anomalous mortgage.*

The recital in a mortgage-deed creating a combination of simple and usufructuary mortgages, that in default of payment of principal and interest on the due date, the mortgagee was to treat the land as sold to him and was not to exercise his right of redemption was held invalid under S. 60 of the T. P. Act, being a clog on the equity of redemption. (*Wallis, C.J., Oldfield and Seshagiri Aiyar, JJ.*) KANDULA VENKIAH *v.* DONGA PALLAI. **43 Mad. 589 : (1920) M. W. N. 349 : 57 I. C. 724 : 28 M. L. T. 56 : 13 L.W. 123 (F. B.).**

——— Ss. 60 and 62—*Clog on redemption—Usufructuary mortgage—Appropriation of the usufruct—Option to redeem on a particular date before expiry of the period Default—Redemption postponed for 37 years.*

A usufructuary mortgage provided for the appropriation by the mortgagee of the rents and profits towards the principal and interest. The period necessary to wipe off the entire debt was 37 years. The mortgagor was given an option to redeem at the end of 10 years by paying the amount then due on the mortgage. *Held*, that if the mortgagor failed to pay the money at the end of 10 years he could not redeem at any other period before the expiry of the 37 years. The provision in the mortgage-deed that the mortgagee was to remain in possession until the mortgage money was paid off by the appropriation of the usufruct (a period of 37 years in this case) was not a clog on the equity of redemption. The validity of such a covenant is expressly recognised in S. 62 of the T. P. Act. (*Phillips and Krishnan, JJ.*) AGA MUHAMMADALLY BEG SAHIB *v.* VENKATAPAYA. **48 I. C. 379 : 35 M. L. J. 287.**

——— Ss 60 and 98—*Clog on redemption—Anomalous mortgage — Malabar Law—Kanom — Covenant for renewal.*

Per Phillips, J—A kanom is an anomalous mortgage within the meaning of S. 98, T P. Act, as to which a condition for renewal even though they constitute a clog on redemption can be enforced. A provision for a perpetual renewal is therefore not invalid. 30 M 61 : 30 M. 300 R (*Bakewell and Phillips, JJ.*) KUTTIKATT *v.* KUNHIKAVAMMA. **(1918) M. W. N. 235 : 23 M. L. T. 67 : 43 I. C. 989 : 7 L. W. 119.**

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 60—Clog on redemption.

——— S. 60—*Clog on redemption—Agreement of parties to a mortgage as to character of possession—Effect of.*

If no agreement of parties to a mortgage can operate, *ipso facto*, to clog or restrain the equity of redemption and that was the law which was applicable in Madras up to the passing of the Transfer of Property Act, agreement of parties to a mortgage cannot affect the character of the mortgagee's possession so as to convert it from that of a mortgagee, into that of a person prescribing for a full title. The effect of the Transfer of Property Act is to preserve the same equity of redemption unfettered, S. 60 providing that only an independent act of the parties or an order of Court could operate to extinguish it. (*Ayling and Spencer, JJ.*) ATHANKUTTI *v.* KUTTANAT ILLOTH NARAYAN NAMBUDRI'S WIFE. **(1917) M W N. 9 : 5 L. W. 461 : 37 I. C. 756 : 32 M. L. J. 317.**

——— S. 60—*Clog on redemption—English Law and Indian Law.*

Before the Transfer of Property Act, the law in India as to stipulations in a deed of mortgage restricting the right of redemption was not the same as that of the English Courts of Chancery. 15 M. 230 ; 30 M. 61 ; 1 M. 1, Foll. 1915 M. W. N. 793. (*Sadasiva Aiyar and Phillips, JJ.*) KOLANGORATH RAMAN NAIYAR *v.* KANNOTH. **2 L. W. 941 : 31 I. C. 184 : (1915) M. W. N. 793.**

——— Ss. 60 and 98—*Clog on redemption—Anomalous mortgage—English principles of equity.*

Where a *swadina tanaka meddalu sharatu putram* (possessory mortgage deed containing a condition for a period fixed) provided for redemption within a fixed period on default of which the mortgagee was to be the owner. *Held*, in a suit for redemption brought 17 years after the time had expired, that the document was anomalous mortgage and the parties must be strictly bound by the term of their contract and neither the conditions of S 60 as to survival of the rights of redemption nor the English principles of equity could be applied. 37 M. 540 ; 1 M. 1 ; 4 M. 179; 29 M. 531 Dist. 27 C. 297; 21 M. 1 ; (1904) A. C. 326 : 11 M. 403 : 26 M. L. J. 47 : 30 M. 61 . 2 B. 234, Ref. (*Spencer and Kumaraswami Sastri, JJ.*) HAKEEM PATTE MUHAMMED *v.* SHEIK DAVOOD. **39 Mad. 1010 : 29 M. L. J 525 : (1915) M. W. N. 852 : 30 I. C. 569 . 18 M.L.T. 209.**

——— S. 60—*Clog on redemption.*

A provision, that the mortgage shall be redeemed only through the enjoyment of the net profits by the mortgagee, is not illegal according to Indian Law unless perhaps the terms of the mortgage are such that future redemption is made practically impossible. 34 M. 493 : 7 M. 434 : 36 A. 195 Foll. (*Sadasiva Aiyar and Napier, JJ.*) GUNNAM DORAYYA *v.* VADAPALLI AYYAMACHARYALU. **26 M. L. T. 226 : (1914) M. W. N. 648 : 25 I. C 797 : 27 M. L. J. 295.**

——— S. 60—*Clog on redemption—Mortgage to be given possession on failure to pay on certain date.*

The provision in a mortgage dated 1871 that the mortgagee shall be put in possession on default of payment on a certain day is a clog on the

TRANSFER OF PROPERTY ACT (IV OF 1882), S 60—Clog on redemption.

equity of redemption. (1 M. 1 Foll.) (*Wallis and Sadasiva Aiyar, JJ.*) RACHAMADUGU LAKSHMI NARAYANA *v.* SANNUTHI RAMA SUBBIAH CHETTY. **25 I. C. 108 : 1 L. W. 503.**

——S. 60—*Clog on redemption—Permanent lease by mortgagor to mortgagee — Lease and mortgage forming part of the same transaction.*

Where a mortgage and a permanent lease by the mortgagor to the mortgagee form part of the same transaction the lease is a clog on the equity of redemption and the court would not recognise or enforce it. 46 B. 409 Foll. (*Prideaux, A. J. C.*) VITHAL *v* BHOLU. **1923 Nag. 115 (1).**

——S. 60—*Clog on redemption—Preliminary decree for foreclosure—Compromise for foreclosure of portion.*

The only objection to any agreement for the purpose of clogging the equity of redemption agreed to by the mortgagee with the mortgagor arises if it constitutes part and parcel of the original loan or mortgage transaction. But there is nothing to prevent that being done if it is effected by an agreement which in substance and in fact is subsequent to and independent of the original bargain. (*Mittra, A. J. C.*) DHARAM SINGH *v* GANESHRAM. **43 I. C. 399.**

——S. 60—*Clog on redemption— Perpetual lessee.*

A stipulation in a deed of usufructuary mortgage that after the mortgage-money is paid off, the mortgagee shall remain as perpetual lessee, on payment of a yearly rent, is a clog on the equity of redemption. (*Batten. A.J.C.*) DAOLAT RAI *v.* SHEIK CHAND. **31 I. C. 869 : 11 N L.R. 180.**

——S. 60—*Clog on redemption — Onerous terms—Long terms for redemption.*

It is an essential ingredient of every mortgage, that it should be redeemable, until the right of redemption is extinguished or lost in the manner provided by Law; and any fetters intended to render redemption practically difficult or impossible cannot be recognised unless there are circumstances indicating that they were intended to compensate for the advantages allowed to the mortgagor and were not unreasonable or repressive. A mortgagee cannot be allowed to fetter redemption by terms which are unreasonable or oppressive. An agreement made at the time of the mortgage between a mortgagor and the mortgagee cannot operate to make that mortgage irredeemable. Incidental to every mortgage is the right of the mortgagor to redeem it, which is called his equity of redemption. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage shall not be redeemable or that the right shall not be exercised except in a particular manner or under certain onerous conditions. If the conditions are one sided and designed to thwart or defeat redemption, equity will interpose in favour of the mortgagor and relieve him of the oppressive conditions which unreasonably hinder redemption without interfering with what might really be due to the mortgagee on account of the principal and interest secured by the mortgage. There could have been no object in fixing such a long term for redemption and requiring the mortgagors to pay three times the principal sum secured by the mortgage in addition to any deficiency in the interest, which was to be paid out of the profits unless the intention was to hinder redemption by rendering the same extremely onerous to the mortgagors. A long term may not by itself operate as a clog on the equity of redemption, but where such a long term is accompanied by other conditions, such as exist in this case, rendering redemption extremely difficult and onerous without any corresponding benefit to the mortgagors, the mortgagee cannot be allowed to take advantage of those conditions to defeat the right of redemption. A mortgagor cannot compel the mortgagee to accept payment of the mortgage money before the date fixed for redemption where there is a covenant in the mortgage deed that redemption shall not take place before that date but where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor, or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term as it may deem fit. (*Kanhaiya Lal, J. C.*) ABDUL HAKIM *v.* SAJJAD HUSAIN. **26 O. C. 209 : 9 O & A. L. R. 733 : 10 O L J 46 : 1923 Oudh 209.**

——S. 60—*Clog on redemption—Deed of further charge—Effect of.*

The doctrine as to clog on redemption relates only to dealings which take place between the parties at the time when the original contract of mortgage is entered into and they are at liberty to deal subsequently with each other so as to vary the terms upon which redemption of the original mortgage can be had. 20 O C. 97 : 24 O. C. 240: 25 O. C. 134 Rel. (*Ashworth and Simpson, A. J. Cs.*) SANGAT BAKSH SINGH *v.* DIJDEO SINGH. **9 O. L. J. 511 : 1923 Oudh 143.**

——S. 60—*Clog on redemption—Long term for redemption—Effect of.*

A covenant postponing redemption for a long term does not by itself amount to a clog on the equity of redemption but if the effect of all the conditions in the deed would be to make redemption very difficult, if not impossible, at the end of the term, the court may ignore the covenant postponing redemption and may allow redemption at any time on such terms as it thinks fit. 17 O. C. 313 : 12 A. L. I. 927 Rel. (*Daniels and Lyle, A. J Cs.*) KUNJ BEHARI LAL *v.* PANDIT PRAG NARAYAN. **9 O. L. J. 294 : 1922 Oudh 283.**

——S. 60—*Clog on redemption—Long term by itself not unenforceable—Usufructuary mortgage.*

A long term in a mortgage does not necessarily amount to a clog on the equity of redemption. It only does so where it is such as to render redemption practically impossible or where the bargain is unconscionable and the long term is unaccompanied by any corresponding advantage to the mortgagor. It is obvious that a long term in a usufructuary mortgage is less likely to operate as

a clog on redemption than in any other class of mortgage, because redemption is effected on payment of a fixed sum and there is no danger of arrears of interest amounting up to an extent which may far exceed the value of the property. (*Daniels, A. J. C.*) SAIYID ZULFIQAR ALI *v.* SURAJ PRASAD. **9 O. L. J. 365 : 1922 Oudh 221.**

——S. 60—*Clog on redemption—Long period.*

A stipulation for a long period before which redemption is not allowed is not by itself a clog on the equity of redemption, but that, coupled with other collateral covenants, may show an intention to make redemption extremely difficult, if not impossible, so as to make it a clog. (*Lindsay, J. C.*) SOHAN LAL *v.* KUNWAR. **61 I. C. 962 O. L. J. 136.**

——S. 60—*Clog on redemption—High rate of interest.*

Mere high rate of interest is no clog on redemption. (*Lindsay, J. C.*) SAHEB BAKHSH SINGH *v.* MOHAMMAD ALI. **58 I. C. 115 : 7 O. L. J. 389.**

——S. 60—*Clog on redemption—Long period.*

Postponement of redemption to fifty years from the date of mortgage does not amount to a clog on the equity of redemption. (*Lindsay, J. C.*) NAIKU LAL *v.* GAYADIN. **57 I. C. 603.**

——S. 60—*Clog on redemption—Long period.*

Where in a possessory mortgage the redemption is postponed to 70 years and the principal sum secured being Rs. 90 the annual profits arising from the property are Rs. 90, the stipulations was held to be a clog on the equity of redemption. (*Kanhaiya Lal, A. J. C.*) RAM DAS *v.* SWAMI DAYAL. **57 I. C 553 : 23 O. C. 108.**

——S. 60—*Clog on redemption—Covenant postponing redemption if and when a clog.*

A covenant postponing the redemption of a mortgage till the lapse of a certain period is not by itself illegal but when along with other circumstances its effect is to create an unreasonable and oppressive fetter on the right to redeem, a Court may allow a redemption irrespective of that term on such condition as it may deem fit to impose. (*Kanhaiya Lal, J. C.*) MATHURA PRASAD *v.* HARAKH NARAIN. **22 O. C. 191 : 6 O. L. J. 474 : 53 I. C. 770 : 1 U. P. L. R. (J. C.) 88.**

——S. 60—*Clog on redemption—Long term—Provision for payment.*

Where a mortgage-deed provided that on default of the mortgagor to pay off the principal and interest due under the mortgage the mortgagee was to take possession and remain in possession for a particular period after which alone redemption was allowed, the provision is not a clog on the equity of redemption. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) MUHAMMAD SHER KHAN *v.* SWAMI DAYAL. **48 I. C. 32 : 5 O. L. J. 572.**

——S. 60—*Clog on redemption—Mortgagees authorised to claim principal with interest in case of loss of possession—Conduct of mortgagees—Excessive interest.*

A mortgage-deed contained a provision that if for any reason the mortgagees lose possession, the mortgagors will make an effort to pay the mortgage-money at once ; and if they delay, the mortgagees will be entitled to recover their money with interest at 2 per cent per month by a suit. When the possession of the mortgagees was ousted for two years, they would have been entitled in equity to enforce the contract. Neither did the mortgagees resort to this measure nor the mortgagors paid up the money They made no complaint for 17 years, when the mortgagors brought a redemption suit, the mortgagees put in their claim to receive interest. *Held*, reading the deed and considering attendant circumstances, no doubt is felt that it provides that the mortgagees shall enjoy net profits in lieu of interest. No doubt they can claim, in an account upon the mortgage some allowance for the two years when their money lay unproductive but not at the rate of 2 per cent ; and they are not entitled to the excess revenue nor to any interest on the same. (*Kendall, A. J. C.*) MAHABIR SINGH *v.* MATA BADAL. **40 I. C. 402 : 40 O. L. J. 348.**

——S. 60—*Clog on redemption—Subsequent agreement.*

An agreement between the parties to a mortgage subsequent to the mortgage extending the period for redemption is not a clog. Doctrine of clog applies only to dealings entered into at time of mortgage. Parties are at liberty to enter into any terms as to redemption. (*Lindsay, J. C.*) HARI HAR BAKSH SINGH *v.* BHAWANI SINGH. **39 I C. 593 : 20 O C. 97.**

——S. 60—*Clog on redemption—Interest in addition to usufruct.*

A mortgage-deed executed by a *pardanashin* lady and her son provided "that after thirty years at the time of redemption we shall pay interest at 1 per cent per mensem along with principal, that we allow and give to the mortgagee whatever profits he may realise from the said property after paying the land revenue and that we shall have no claim for mesne profits." In a suit for redemption, *held*, that the intention of the mortgagee to levy interest from the date of the mortgage at the time of redemption irrespective of the usufruct was hard and oppressive and a clog and therefore invalid (*Kanhaiya Lal. and Kendall, A. J. Cs.*) MAHOMED ALI *v.* RAM ZAMALLI. **38 I. C. 454 : 3 O. L. J. 746.**

——Ss. 60 and 61—*Clog on redemption—Consolidation.*

A covenant in a subsequent deed postponing the right of redemption of a previous mortgage, without creating any charge on the property previously mortgaged does not amount to a contract of consolidation of the two deeds and may operate as a clog on the equity of redemption. (*Kanhaiya Lal, A. J C.*) RAJENDRA NARAIN *v.* DY. COMMISSIONER BAHRAICH. **37 I. C. 438 : O. L. J. 643.**

——S. 60—*Clog on redemption—Charge—Further advances—Provision for redemption of whole.*

If subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the latter without paying the former is

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Clog on redemption.

not enforceable. Case-law discussed. (*Kanhaiya Lal, A. J. C.*) CHAUHARAJA BAKSH *v.* RAM HARAK.
32 I. C. 740 : 2 O. L. J. 601.

——S. 60—*Clog on redemption—Postponement of period for redemption.*

As a general rule, the right of foreclosure and the right of redemption should be co-extensive. If the mortgage-deed is one-sided and provides that the mortgagee shall be at liberty to foreclose at any time but that the mortgagor should not redeem till after 60 years. from the date when the mortgage would be converted from simple into usufructuary, the contract postponing redemption is an unreasonable fetter on the equity of redemption and could not be enforced. The mortgagor is entitled to redeem irrespective of the fetter. 20 B 677: 22 B. 375 : 25 I. C. 912 Ref. (*Stuart and Kanhaiya Lal, A. J. Cs.*) LAL BAHDUR *v.* ZALIM SINGH. **27 I. C. 581 : 2 O. L. J. 1.**

——S. 60—*Clog on redemption—Redemption before period fixed—Postponement.*

Where there is a covenant in the mortgage-deed that the mortgage is not redeemable before a certain date, a mortgagor is bound by it, but where the effect is to unduly postpone redemption without any corresponding advantage to the mortgagor and there are circumstances to show that the covenant is unreasonable and oppressive redemption may be allowed irrespective of the covenant for the postponement. (*Kanhaiya Lal, A. J. C.*) DURGA SINGH *v.* MUHAMMAD RAZA HUSSAIN KHAN. **25 I. C. 912 : 17 O. C. 313.**

——S. 60—*Clog on redemption—Subsequent deed—Covenant—Effect of.*

Where a mortgagor executes a subsequent deed agreeing not to redeem the earlier mortgage before the subsequent one, the covenant is a personal one not enforceable against a subsequent transferee of the mortgaged property. 9 B. 233: 11 O. C. 248. Dist. (*Stuart, J. C.*) RAM ADHIN MISRA *v.* SITLA BAKSH SINGH.
25 I. C. 905 : 17 O. C. 303.

——S. 60—*Clog on redemption.*

A condition in a usufructuary mortgage that on default of payment of mortgage money on a fixed date the mortgagor would lose his right to redeem, is invalid and inoperative. (*Jwala Prasad, J.*) GULAH CHAND *v.* PANCHAM.
59 I. C. 338.

——S. 60—*Clog on redemption—Compromise—Arrangement between mortgagors* inter se

Where under a compromise two of the mortgagors bind three other mortgagors to pay a fair amount for redemptton, the arrangement is a clog on the equity of redemption and invalid under S. 60 of the T. P. Act. 31 All 482 and 32 All. 631 Dist. (*Coutts and Adami, JJ.*) LALA RAM NARAIN *v.* LALA MURLIDHAR.
5 Pat. L. J. 644 : 58 I. C. 129 : 1 Pat. L. T. 616

——S. 60—*Clog on redemption—Mokurrari lease to mortgagee.*

Once a mortgage transaction has been entered into it is not within the competency of the parties to clog the equity of redemption whereby even after redemption, the mortgagee would retain an interest in the property as lessee upon payment of a comparatively trifling rent. Such a transaction is invalid both as against the mortgagor and as against a purchaser from the mortgagor of his interest. *Quaere.*—Whether a lease by a mortgagor to the mortgagee subsequent to the mortgage transaction may correctly be called a clog on the equity of redemption ? (*Miller, C. J. and Das, J.*) RAM NARAIN *v.* SURATHNAH.
5 Pat. L. J. 423 : 1 Pat. L. T. 575 : 57 I. C 337 : 1920 Pat. 351.

——S. 60—*Clog on redemption — Restrictions on right of mortgagor.*

The mere length of the period fixed for a mortgage is not sufficient to constitute an undue restriction on the right to redeem.

Whatever authorities there are for the view that the terms of the mortgage, however, onerous, must be upheld if the parties entered into a contract with their eyes open, there is equally good authority for the view that those terms must not be such as to prevent redemption in all circumstances. (*Pipon, J. C.*) RAM CHAND *v.* GHULAM HASAN **72 I. C. 941.**

——Ss. 60 and 98—*Clog on redemption—Provisions of T. P. Act not extended—Effect.*

In all mortgages except anomalous mortgages, clauses which take away the right of the mortgagor to redeem after stipulated period should be deemed to be clogs on the equity of redemption and as such not enforceable, even in those parts of India to which the T. P. Act has not been extended. The rule enunciated in S. 60, would be applicable as a rule of justice, equity and good conscience. (*Robinson, C. J. and May Oung, J.*) MA MIN BYU *v.* MAUNG CHIT PE.
1 Rang 419 : 1924 Rang. 83.

——S. 60—*Clog on redemption—Mortgage converted into sale—Sale, whether questionable by mortgagor.*

Plaintiff (mortgagor) sued to redeem a mortgage subsequently converted by him into sale questioning the validity of sale. It was beld that the plaintiff cannot impugn the validity of the sale. (*Pratt, J. C.*) MA YE BAU *v.* MAUNG SHWE HINAN. **56 I. C. 253 : 3 U. B. R. (1919) 192.**

——S. 60—*Clog on redemption.*

The rule of English equity courts which forbids any clogging of the right of redemption does not apply in India and a clause for forfeiture in a mortgage should be given effect to in the absence of any specific law or of any established practice to the contrary. 13 M. I. A. 560; 1 M. 1, P. C., Foll. (*Maung Kin, J.*) MA LA *v.* MAUNG CHOT.
40 I. C. 863.

——Ss. 60 and 98—*Clog on redemption—Anomalous mortgage— Applicability*

S. 98 should be read subject to S. 60 which applies to all kinds of mortgages and the rule 'once a mortgage always a mortgage'' applies to anomal ous mortgages. The mere insertion of a forfeiture clause in a simple mortgage bond does not make the mortgage anamalous ; even if it, were so the mortgage would be subject to provisions of S. 60 of the T. P. Act. (*McColl, J. C.*)

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Clog on redemption.

NGA PO NAGUN *v.* MI YIN.
2 U. B. R. (1916) 141 : 39 I. C. 377 : 11 Bur. L. T 36.

——S. 60—*Clog on redemption—Loss of right.*

Under a mortgage executed before the T.P. Act, the mortgagor agreed to redeem it on a certain date after seven years paying Rs. 50 more and in default the mortgagee was to take possession of the land. The mortgagor failed to redeem on the due date but sued to redeem a year later. *Held*, that it was in accordance with justice, equity and good conscience to keep the parties to their agreements made voluntarily and with full knowledge, especially when those agreements are themselves reasonable. (*Young, J.*) MA THIN HTON *v.* MA HNIN THET.
29 I. C. 709.

——S. 60—*Clog on redemption—Not enforceable.*

A stipulation restricting the period of redemption to one year is inoperative under S. 60 of the T. P. Act. Such a stipulation is a penalty which the courts would not enforce. (*Twomey, J.*) MA NYIN *v.* KADIRESAN CHETTY.
28 I. C. 264.

——S. 60—*Clog on redemption—Agreement that property should be considered sold outright if interest was not paid—Failure of payment—suit for specific performance—Interest if allowable after specified date.*

Where it was agreed at the time of mortgage that the properties should be deemed to be sold to the montgagee for certain amount if interest was not paid on a certain date, and that the mortgagor should be paid the difference between that amount and the amount due by the mortgagee for principal and interest and where the mortgagor committed default and the mortgagee sued for specific performance *Held*, that the mortgagee was the owner of the property on the date of the mortgagor's default but that he is not entitled to further interest on the mortgage amount and that he should pay back the difference in amount, between the purchase-money and the principal and interest due thereon up to the specified date. (*Fox, C. J. and Parlett, J.*) DINYAR DOHIRJI KHORASHED *v.* MAUNG.
26 I. C. 877 : 8 Bur. L. T, 63.

——S. 60—*Clog on redemption—Provision for continuance of possession after redemption.*

There was a condition in the mortgage that the mortgagee shoud be in possession until the expiry of 12 years even though satisfied before 12 years and the mortgagor himself discharged the debt within 12 years after which period the mortgagor was entitled to redeem and recover possession. A mortgage and a lease to the mortgagee executed on the same day must be read together, and the mortgagee may remain on the land till the mortgage is satisfied, but the continuance of such lease after the mortgage is a fetter on the equity of redemption and the Court ought not to enforce. (*White, C. J. and Phillips, J.*) PAMARLAPATI *v.* SAMARLAPATI.
35 Mad. 744 : 21 M. L. J. 1010 : 10 M. L. T. 256 : 12 I. C. 382 : (1911) 2 M. W. N. 231.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Mortgage money.

Duty of mortgagee.

——S. 60—*Duty of mortgagee—Redemption—Notice to mortgagee—When necessary.*

A mortgagee ordinarily has a right to six calendar months' notice of intention to pay off the mortgage or in default thereof is entitled to six months' interest in advance in lieu of notice ; but if the mortgagee has given notice calling in the mortgage debt the mortgagor even though he is a few days late in complying with the notice and tendering the money is not bound to give six months' notice before redeeming. (*Fawcett, J.*) NADERSHAW *v.* SHIRINBAI.
25 Bom L. R. 839 : 1924 Bom. 264.

——S. 60—*Duty of mortgagee—Failure of consideration—Damages—Duty of mortgagee to restore possession—Non-delivery of portion.*

Where there is only a partial failure of the consideration payable for a mortgage, the loss occasioned in consequence of that failure can only be recovered by a separate suit, and cannot be set off in a suit for redemption. Where possession of the property was not delivered to him at the time of the mortgage or at any time thereafter, the mortgagee need not restore possession on redemption, (*Kanhaiya Lal, A. J. C.*) ANGAD SINGH *v.* KASHI PRASAD.
54 I. C. 313 : 6 O. L. J. 519.

Mortgage Money.

——S. 60—*Mortgage money—Tender before suit for redemption not necessary.*

Tender of the mortgage money is not a condition precedent, under S. 60 of the Act, to the institution of a suit for redemption ; but in such a suit redemption will not be allowed unless the amount found due is paid or tendered within the time fixed by the Court. (*Banerji, Tudball and Stuart, JJ.*) RAGHUNANDAN RAI *v.* RAGHUNANDAN PANDE.
43 All. 638 : 61 I. C. 812 : 19 A. L. J. 573 (F.B.).

——S. 60—*Mortgage money—Redemption suit—Tender of mortgage money before suit not necessary.*

S. 60 of the Act does not necessarily mean that before a suit for redemption can be instituted the amount must be paid or tendered where the mortgage money is stated to have been satisfied out of the usufruct, a tender would obviously be out of the question. (*Sulaiman and Kanhaiya Lal, JJ.*) HAIT SINGH *v.* BEHARI LAL.
43 All. 95 : 59 I. C. 92 : 18 A L. J. 947.

——S. 60—*Mortgage money—Mortgagor to redeem on paying principal sum only.*

A mortgagee under a mortgage-deed remaining in possession of the property and receiving profits in lieu of interest, was in the absence of covenant by the mortgagor to add the deficiency in the profits to the principal or to pay it up at the time of redemption. *held* entitled to redeem on paying the princioal sum only. (*Richards, C.J. and Rafique, J.*) ALI AHMAD *v.* KALKA PRASAD.
37 I. C. 95 : 14 A. L. J. 986.

——S. 60—*Mortgage money—Covenant by mortgagor not to take accounts.*

Where there is an express agreement by mortgagor not to claim accounts, he is debarred

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Mortgage-money.

from claiming an account at the time of redemption, 7 A. L. J. 787, Ref. (*Knox and Kamamat Husain, JJ.*) RAMPRASHAD *v.* KHAM KARAN. **9 I. C. 978.**

——**Ss. 60 and 72 (c)**—*Mortgage money—Costs of litigation incurred by mortgagee—Right to add to the mortgage-money.*

The mortgagee has a right to tack on the costs of litigation relating to the security as part of the terms on which redemption is allowed. A mortgagee is allowed proper costs, charges and expenses incurred by him in relation to the mortgage debt or mortgage security including the costs of litigation properly undertaken by him. But all these items are allowed only as a condition of redeeming. There is no implied contract by the mortgagor to pay them, and they are not, in the absence of express agreement, recoverable against him personally.

The words "mortgage-money" in S. 60 must be taken as including all money which on taking account between the parties may be properly allowed to the mortgagee. S. 72 cannot be taken to imply that a mortgagee not in possession has no similar right to charge the mortgaged property for payments properly made by him in relation to the security and that the mortgagee is not entitled to have amounts so paid added to the amount of the original lien. The expression "mortgage money" as used in S 60, includes costs properly incurred by the mortgagee such as costs of litigation which are allowed under the law of mortgage in England. (*Fawcett, J.*) NADERSHAW *v.* SHIRINBAI. **25 Bom. L. R. 839 : 1924 B. 264.**

——**S. 60**—*Mortgage-money—Interest—Provision for redemption on payment—Vendee undertaking to pay mortgage-money—Interest whether charge on property.*

The vendee of the equity of redemption who undertook to pay off a mortgage is not personally liable for interest. When according to the terms of a mortgage-deed the mortgagor himself could redeem the land on payment of the mortgage-money only, his vendee could not be in a worse position. 45 P. R. 1913. Foll. The interest was no charge on the land and plaintiff's mortgagees could not, therefore, follow the land (*Chevis and Shadi Lal, JJ.*) LOK CHAND *v.* HAZAR KHAN. **98 P. R. 1917 : 41 I. C. 59 : 107 P. W. R. 1917.**

——**S. 60** — *Mortgage-money — Mortgagee making improvements as tenant—Jurisdiction—Civil or Revenue Court—Compensation in redemption suit.*

Where in a redemption suit the mortgagee claimed compensation for improvements made by him during the term of his tenancy, prior to the mortgage, and the mortgage did not contain any clause for payment of compensation to the mortgagee prior to redemption *Held*, that the mortgagor should be given a decree for redemption of the property and be put in the same position as regards the mortgagee, *qua* the mortgage, as he was at the time of mortgage, and that the Civil Courts could not enter into a condition regarding the terms of tanancy. (*Robertson and Shah Din, JJ.*) DYAL SINGH *v.* RAM RAKHA. **54 P. R. 1912 : 14 I. C. 78 : 122 P. W. R. 1912.**

TRANSFER OF PROPERTY ACT (IV OF 1882) S. 60—Mortgage-money.

——**S. 60**—*Mortgage money—Arrears of rent and interest—Mortgagees allowing decree for rent to be barred—Election of remedies.*

In a suit for redemption the mortgagee cannot claim any arrear of rent with interest thereon in respect of the mortgaged land leased to the mortgagor as tenant under the terms of the mortgage deed, when the mortgagee has already sued for and obtained a decree in respect of such rent and interest and allowed the decree to become barred by limitation. This is so even though the arrear of rent is made a charge on the property under the deed. 25 M L.J. 561, 40 I.C. 358, Dist. (*Phillips and Krishnan, JJ.*) MANGESHWAR NARAINA RAO *v.* S. SHIVA RAO. **24 M. L. T. 370 : 8 L. W. 405 : 41 Mad. 1043 : (1918) M. W. N. 917 : 49 I. C. 123 . 35 M. L. J. 414.**

——**Ss. 60 and 72**—*Mortgage money—Usufructuary mortgage—Portion of consideration not paid—Unregistered letter—Accounts.*

A part of the consideration of a usufructuary mortgage for 10 years was not paid at the time of registration but an unregistered letter was passed at the same time to the mortgagor that the money would be paid in ten days and in case of default interest would be paid at one per cent. per mensem and that interest on this sum would be given credit for till the mortgage bond was discharged. After the expiry of the term mortgagor brought a suit for redemption in which the mortgagee claimed the full amount without deduction of the amount of the letter. *Held*, that the letter was inadmissible though mortgagor was entitled to institute a suit to recover any amounts under it. The defendants (mortgagees) are not entitled on that ground to contend that they were entitled to the full amount of the mortgage-deed. When mortgagees have spent money for litigation connected with the property they should prove the exact amounts so spent and in default of such evidence, the Court will not make any presumption as to the expenses likely to have been incurred. (*Sankaran Nair and Spencer JJ.*) ALLAM SETTI APPALA SURYANARAYAN *v.* PEELEKHAVA VENKATVIRA RAO. **28 I. C. 186 : 2 L. W. 224.**

——**Ss. 60, 58 and 92**—*Mortgage-money.*

The term "mortgage-money" in these sections includes all monies which may properly be allowed to the mortgagee on taking account. (*Bakewell, J.*) VARADARAJULU *v.* DHANALAKSHMI AMMAL. **26 I. C. 184 : 16 M. L. T. 365.**

——**Ss. 60 and 61**—*Mortgage-money—Rent—Payment of arrears.*

Where a mortgage-deed provided that at the time of redemption all arrears of rent due from the tenants must be paid to the holder of the deed. *Held*, that the provision meant that only the arrears of rent, the recovery of which was not barred by limitation, were payable as a condition precedent to redemption. (*Stuart, A.J.C.*) JANG BAHADUR *v.* MATSDIN. **46 I. C. 80 : 5 O. L. J. 159.**

——**S. 60**—*Mortgage-money—Time-barred—Rent, deduction of.*

Under a usufructuary mortgage the mortgagee was to pay the annual rent to the landlord but he

failed to do so and the debt became time-barred. The mortgagor in a suit for redemption claimed to deduct the sums which should have been paid by the mortgagee. *Held*, that the mortgagor cannot deduct the amount claimed and that the mortgagee was entitled to the benefit of the non-payment. (*Das, J.*) TOKHAN PANDEY *v.* SIVAKANTA PROSAD SINGH. **56 I. C. 743.**

——— S. 60—*Mortgage—Splitting up—Right of redemption—Partial redemption.*

Ordinarily a mortgagee is entitled to claim that his security should not be split up, but if he becomes by his own act the purchaser of a portion of the mortgage security, he has no longer any right to claim that the security should not be split-up and mortgagors or assignees from mortgagors become liable for only so much of the mortgage debt as is proportionate to the portion of the mortgage security that they have purchased. (*Robinson, C.J. and Macgregor, J.*) KO THINE *v.* ISMAIL CASSIM MORAD. **1923 Rang. 61.**

Partial Redemption.

——— S. 60—*Partial redemption—Mortgage—Purchaser of portion of property.*

It is open to a transferee of a part of the mortgaged property to redeem the entire mortgage on the properties. But he cannot compel the mortgagee to allow him to redeem his part by itself unless something had happened which extinguished the mortgage in whole are in part such as an exercise of a power of sale originally conferred upon the mortgagee by his security or such conduct on the part of the transferees as would estop them from asserting what normally would have been their right. (*Viscount Haldane.*) MIRZA YADALLI BEG *v.* TUKARAM. **48 Cal. 22: (1920) M. W. N. 369 : 16 N.L. R. 154 : 25 C. W. N. 241 : 28 M. L. T. 95 : 18 L. W. 503: 47 I. A. 207 : 2 U. P. L. R. P. C. : 123 : 22 Bom. L. R. 1315 : 57 I. C. 535 : 39 M L. J. 147 (P.C.)**

——— S. 60—*Partial redemption—Splitting up of mortgage—Acquisition by mortgagee.*

Where the mortgagee has acquired a portion of the equity of redemption and thereby split up the integrity of the mortgage, it is open to the mortgagor to redeem as much of the property as did not belong to the mortgagee on payment of a proportionate part of the mortgage debt. (*Piggott and Walsh, JJ.*) SHIAM SARAN *v.* BANARSI DAS. **20 A. L. J. 258 : 4 U. P. L. R A. 102: 1922 A. 192.**

——— S. 60—*Partial redemption—Redemption of proportionate share—Acquisition by mortgagee of equity of redemption.*

When a mortgage is split up by the mortgagee who buys up the equity of redemption from some of the heirs of the original mortgagor, any one of the heirs of the mortgagor can redeem his share of the mortgaged property if a proportionate sum of money due on his share is paid. (*Rafique and Walsh, JJ.*) MEWA RAM SINGH *v.* GANGA RAM. **52 I. C. 229 : 17 A. L. J. 910.**

——— S. 60—*Partial redemption—Extent of share.*

One of the mortgagors has the right only to redeem the share which he owns in the mortgaged property only where the integrity of a mortgagee has been broken. **2 A. 565; 29 A. 262,** Foll. 10 B. 656. Not Fol. (*Tudball and Rafique, JJ.*) ZAIBUNNISA BIBI *v.* PARBHU NARAIN SINGH. **39 All. 618 . 40 I. C. 345 : 15 A. L. J. 625.**

——— S. 60—*Partial redemption—Proportionate amount payable.*

H. executed mortgage-deeds dated March 27, 1864, April 3, 1864, and February 6, 1873, respectively. By the first he mortgaged 9½ biswas of village called Paniyala along with other property and in the second he mortgaged five more biswas of the same village. The third mortgage was for Rs. 15,000 but out of the consideration he declared Rs. 3,500 to be a further charge on the villages already mortgaged in the first deed. In the list of the properties mentioned Halla Nagla was entered instead of Paniyala. The plaintiffs acquired the rights of the mortgagors in Paniyala and the defendants representatives of the mortgagees purchased portions of the mortgaged property. *Held*, that the plaintiffs could redeem Paniyala on payment of the proportionate liability for the mortgages existing thereon and that evidence was admissible for the purpose of showing that Paniyala was liable for the proportionate part of the further charge of Rs. 3,500, the entry in the mortgage-deed of 1883 of Halla Nagla being a case of misdescription and due to mutual mistake. (*Bannerjee and Walsh, JJ.*) MAHABIR PRASAD *v.* MAHOMED MASHI YETTULLA. **38 All. 103 : 32 I. C. 174 : 14 A. L. J. 15.**

——— S. 60—*Partial redemption—Usufructuary mortgage— Mushrut-ul-rehan— Apportionment.*

H. B, P. and K. mortgaged with possession in favour of M and H alone, executed a *Mushrut-ul rehan* in favour of the same mortgagee (promising to pay) the amount due under this mortgage together with the money due under the usufructuary mortgage. K instituted a pre-emption suit as regards H's share. *Held*, that he was not liable to pay the money under the *Mushrut-ul-rehan*, as it was a separate and independent transaction but he must pay in proportion to the consideration of the usufructuary mortgage on H's share. A.W.N, (1881) 80 Ref. to. (*Karamat Husain and Tudball, JJ.*) KALLA *v.* HARGIAN. **34 All. 416 : 15 I. C. 907 : 9 A. L. J. 661.**

——— S. 60—*Partial redemption—Portion of mortgaged property sold in another decree—Liability of mortgagor and mortgagee.*

Where certain properties were usufructuarily mortgaged but a portion was sold in execution of a prior mortgage of the mortgagor and the mortgagee was thus deprived of possession but the mortgagee without taking any steps in respect of the property sold, remained in possession of the remaining property. *Held*, in a suit for redemption by the mortgagor, that the mortgagee was not entitled to claim loss of interest sustained by the deprivation of a portion of the properties and that the mortgagor was not entitled to a reduction of the principal money because the mortgagee failed to deliver the entire properties.

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 60—Partial redemption.

24 A. 521 P. C. Ref to. (*Bannerjee and Tudball, JJ.*) BIHARI LAL *v.* DURGA DAS **13 I. C. 156.**

——**Ss. 60 and 95**—*Partial redemption—One of the mortgagors passing a* razinamah *in favour of the mortgagee.*

One out of four brothers mortgagors, who was the registered occupant of the mortgaged land, passed a *razinama* of the land in favour of the mortgagee, who executed a *kabuliyat* for the same. The remaining three mortgagors sued to redeem the mortgage alleging that the *razinama* passed by their brother conveyed only his interest. *Held*, though the conveying brother was a co-mortgagor with the plaintiffs he had no right to sell their interest in the equity of redemption, and that so far as they were concerned he was in the same position as an outsider and the plaintiffs were entitled to redeem their shares in the mortgage. (*Macleod, C. J. and Fawcett, J.*) LALCHAND *v.* KHANDU. **59 I. C. 762 : 22 Bom. L. R. 1431.**

——**S. 60**—*Partial redemption — When allowed.*

Partial redemption is allowed only in exceptional cases, *e. g.* where a severance has been effected at the instance or with the consent of mortgagee. (*Mukerjee and Buckland, JJ.*) DINANATH MAHISH *v.* NABAKUMAR HAJRA. **35 C. L. J. 332.**

——**S. 60**—*Partial redemption— Sub-mortgage by mortgagee—Mortgagor when entitled to redeem sub-mortgage.*

A mortgagee is fully entitled in law to effect an assignment of his mortgagee rights either in whole or in part, and if he does so in part, this does not mean that he is destroying the indivisibility and integrity of the mortgage security *qua* the mortgagor 91 P. R. 1905 Dist. A mortgagor is not entitled to redeem a sub-mortgagee without effecting a complete redemption of the entire mortgaged property. (*Moti Sagar and Adbul Raoof, JJ.*) ANAND SINGH *v.* NIAMAT. **64 I. C. 211.**

——**S. 60**—*Partial redemption—Redemption by co-mortgagor, if can be allowed by mortgagee.*

A mortgagee can allow redemption by a co-mortgagor of his share of the mortgaged property. (*Johnstone and Ratligan, JJ.*) AHMADKHAN *v.* RATAN CHAND. **53 P. W. R. 1912 : 50 P. R. 1912 : 13 I. C. 539 : 100 P. L. R. 1912.**

——**S. 60**—*Partial redemption—Partition of mortgaged properties—Consent of parties—Possession of undivided share.*

The partition of the properties between several mortgagors of the mortgaged property cannot be allowed in a redemption suit without the consent of all the sharers. But a decree may be granted for redemption of plaintiff's undivided share and for being put in as a tenant in common with the other sharers where the mortgage has been split up by the action of the mortgagors or mortgagees or both. Where two of the mortgagors sold their interest in the equity of redemption and the purchasers executed a fresh mortgage deed in favour of the mortgagee, the mortgage is split up and the third mortgagor is entitled to

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 60—Partial redemption.

redeem his undivided one-third share. (*Sadasiva Aiyar and Hannay, JJ.*) PLOTT CHANDU *v.* KOLATHUM KARAMMAL CHAPPILLA. **28 I. C. 248 : (1915) M. W. N. 189.**

——**Ss. 60 and 82**—*Partial redemption — Rights of purchaser.*

S. 60 of the T. P. Act cannot be read subject to S. 82 and the fact of the purchase of several items piecemeal by different persons will not give them a right to redeem the properties piecemeal. There must be a redemption of all the items at once. 21 B. 619, Dist. (*Ayling and Hannay, JJ.*) PANCHANADAM PILLAI *v.* SELLA PILLAI. **26 I. C. 194.**

——**S. 60**—*Partial redemption—Co parcener of his share—Sale.*

Where a joint family becomes divided in status the co-parceners become tenants in common and any one of them can redeem his share of the family property mortgaged by the manager and seek ascertainment and possession thereof. (*White and Oldfield, JJ.*) KURUCHA GANGU NAIDU *v.* KOVVURI BASAVA REDDY. **13 M. L. T. 145 :18 I. C. 691 : (1913) M. W. N. 821.**

——**S. 60**—*Partial redemption—Consent of mortgagor and mortgagee.*

The owner of share of property mortgaged cannot, in all circumstances, insist on redeeming the whole mortgage. One of the mortgagors and the mortgagee acting together can deal with the former's interest in the equity of redemption, and the mortgagee's right as against him, if the rights of the other owners in the equity of redemption are not affected. But a mortgagor or a mortgagee alone cannot affect the right of the other. Where the mortgagee has dealt with one of those entitled to the equity of redemption, persons entitled to the equity of redemption in the remainder may claim to redeem their share. *Per Sadasiva Aiyar, J.* :—A release of any portion of the mortgaged property by a mortgagee will not affect the rights and liabilities as between the owners of the different portions of the equity of redemption. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) RATHNA MUDALI *v.* PERUMAL REDDY **38 Mad. 310 : 12 M. L. T. 484 : (1912) M. W. N. 1168 : 17 I. C. 837 : 23 M. L. J. 576.**

——**S. 60**—*Partial redemption—Purchase of portions of equity of redemption by plaintiff and defendant—Right of plaintiff to redeem the whole mortgage.*

S. 60 provides that a mortgage is one and indivisible and the exception only arises when the mortgagee or, if there be more of them, all such mortgagees have acquired, in whole or in part, the share of a mortgagor. Plaintiff, as the purchaser of a part of the equity of redemption sued for exemption of a mortgage. First defendant, who was one of the several mortgagees, was the purchaser of the other part. *Held*, that the plaintiff was both bound and entitled to redeem the whole mortgage and not only the part purchased by him. 22 M. 209 Ref. 28 A. 155 ; 6 M. 61 ; 20 M.

TRANSFER OF PROPERTY ACT (IV OF 1882), S 60—Partial redemption.

295, Diss. (*Benson and Wallis, JJ*) VELAYUDAN CHETTY *v.* NILABAGAM CHETTY.
15 I. C. 605 : 23 M. L. J. 475.

——S. 60—*Partial redemption— Mortgagee becoming owner.*

Where the equity of redemption in certain properties vests in several persons one of whom is the mortgagee, one of those persons cannot under S. 60 of the T. P. Act compel the mortgagee to allow him to redeem the entire property. He can only redeem his share in the property. (*Stuart and Kanhaiya Lal, A. J. C.*) MUHAMMAD ZAKI ALI KHAN *v.* AHMAD SHAH.
58 I. C. 983 : 7 O. L. J. 585

——S. 60—*Partial redemption—Owner of a portion of the equity of redemption—Mortgagee acquiring the property.*

Where a mortgagee acquiries a portion of the mortgaged property, the right of the owner of the other portion of the property to redeem the whole is not absolute. In such a case right of redemption depends on the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage ; but if he acquires any portion of the mortgaged estate he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate. (*Lindsay, J.C.*) RAMADHIN *v.* JOKHAN. 47 I. C. 115 : 5 O. L. J. 248.

——Ss. 60 and 82—*Partial redemption—Part owner of equity of redemption.*

A purchaser of a payment of the equity of redemption cannot claim to redeem the part purchased by him without paying the whole mortgage-money due to the mortgagee on the mortgage. 29 A. 471 : 3 M. 230 : Dist. (*Kanhaiya Lal, A.J.C.*) BASANT SINGH *v.* RAMESWAR BAKSH SINGH. 20 I. C 765 : 16 C. O. 159

——S. 60—*Partial redemption—Indivisibility of mortgage security.*

K and *D* mortgaged each a third share to *P*. *D* the third co-sharer died and his wife mortgaged his share to *P* except a certain village. *K* also mortgaged with possession his share again to the same person a part of the consideration being half the amount due on the first mortgage. In a suit by *D*'s heirs for redemption they contended that *K*'s share in the first mortgage was paid up and that his share was free. *Held*, that this was not sufficient to show that a part of the mortgage security had been released and therefore the mortgagee was entitled to retain the whole of the mortgagad property. (*Sundar Lal, J. C.*) KEDAR SINGH *v.* SUMER SINGH. 10 I. C 196.

——S. 60—*Partial redemption—When allowed.*

As a general rule no partial redemption is allowed unless the mortgagee becomes interested in the equity of redemption and a mortgagee (purchaser) impleaded as a defendant in a suit brought by the subsequent mortgagee can claim the right to redeem the latter. (*Dass and Adami, JJ.*) PAWAN KUMAR CHAND *v.* DULARI KUAR.
5 Pat. L. J. 544 : 58 I. C. 216: 1 Pat L. T. 544.

——S 60—*Partial redemption—Purchaser of portion of equity of redemption—Rights of.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

A purchaser of a portion of the equity of redemption who has been left out of a mortgage action is entitled to claim partial redemption of the mortgaged property in which he may be interested. The general rule that a person who has any right to redeem has a right to redeem the whole of the mortgaged peoperty and not a part of it, unless a special bargain is, subject to the exception that he has a right to redeem his own share only, where a mortgagee has acquired in whole or in part the rights of the mortgagor. The rule where the integrity of the mortgage is broken up, as where the equity of redemption is with different persons. (*Das, J.*) SHEO NARAIN SAHU *v.* RAM NIREKHAN OJHA. 52 I. C. 512.

Redemption out of Court.

——S. 60—*Redemption out of Court—Suit for surplus profits.*

Redemption of a mortgage had taken place out of Court. There was nothing to show that any adjustment of accounts had been made or that the payment had been accepted in full discharge of mutual rights and liabilities. *Held*, that a suit for surplus profits was maintainable. (*Kanhaiya Lal and Kendall. A. J. Cs.*) RAJ RAGHUBAR SINGH *v.* BIKRAM JIT SINGH. 28 I.C. 171: 18 O. C. 3

Right of Redemption.

——Ss 60 and 98—*Right of redemption put off under certain circumstances—Effect of clause.*

Where under the terms of a mortgage deed if the amount was not paid at a certain time, the right of the mortgagor to redeem was to be suspended for a further period. *Held*, the provision was of no effect as it offended against the statutory right of redemption conferred by S 60 (*Sir Lawrence Jenkins.*) MUHAMMAD SHER KHAN *v.* RAJA SETH SWAMI DAYAL.
44 A. 185: 20 A. L. J. 476: 9 O. L J. 81: 30 M. L. T 220: 49 I. A 60: 42 M. L J 584: 25 O. C. 8: 24 Bom. L R. 695 (P. C.) 35 C. L. J 468: 4 U. P. L. R (P. C) 50 : L. R. 3 P. C. 119: (1922) M. W. N. 378: 1922 P. C. 17.

——S. 60—*Right of redemption—Partial owner.*

Subject to the proper safeguarding of the equal right to redeem which any other person may possess, one of several mortgagors can redeem the whole of the mortgaged property. (*Viscount Haldane.* (YADALLI BEG *v.* TUKARAM.
48 Cal. 22: (1920) M. W. N. 369: 47 I. A. 207: 12 L. W. 503: 16 N. L. R. 154: 2 U. P. L R (P C.) 123: 22 Bom L R. 1315: 28 M. L. T. 95: 25 C. W. N 241. 57 I. C. 535 : 39 M. L J. 147. (P. C.)

——S 60—*Right of redemption—Right before expiry of term—Agreement between parties—Limitation.*

In the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But the parties may agree that the mortgagor may discharge the debt within the specified period and take back the property, in which case limitation for a suit for redemption commences on the date when the mortgage is

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

discharged and is not postponed till the expiry of the term prescribed. (*Mr. Ameer Ali.*) BAKHTAWAR BEGAM *v.* HUSAINI KHANAM.
36 All. 195: 41 I A. 84: 18 C. W. N. 586: 12 A.L.J. 473 : 19 C. L. J 477 : (1914) M.W.N. 411: 15 M. L. T. 389 : 16 Bom. L. R 344 : 23 I. C 355 : 1 L. W. 813 : 26 M. L. J. 474. (P. C.)

——S. 60—*Right of redemption*

The defendants, successors of the mortgagee, who had somehow obtained possession of the mortgaged plot under a usufructuary mortgage, got their names entered in the revenue papers, as if they were occupancy tenants of the disputed land and set up their title by adverse possession. *Held*, no such possession, short of the statutory period of sixty years, would be a bar or defence to a suit for redemption, if the parties were otherwise entitled to redeem. If the defendants obtain unlawful possession by ousting the mortgagees at any time within last twelve years or before, still their possession cannot be treated as adverse to the owner (mortgagor) so as to defeat his lawful title, because the right of the successors of the mortgagor to get possession could only arise on redemption and not earlier. 32 Cal. 296; 38 A. 411 foll. (*Kanhaiya Lal, J.*) MT. DURGA DEVI *v* GIRWAR SINGH. **1923 A. 11 (2).**

——S. 60—*Right of redemption—Mortgage money advanced by several mortgagees in specific shares.*

Where mortgagees advanced money in specific shares on the security of specific portions of the mortgaged property but there was a provision that the money should be paid in a lump sum on redemption, *Held*, that the mortgage could be redeemed in a single suit. (*Rafique and Lindsay, JJ.*) LACHMI PRASAD *v.* GOKUL. **20 A. L J. 157: L. R. 3 A. 109. 1922 A. 80.**

——S. 60—*Right of redemption—Extinguishment by act of parties.*

An admission by a mortgagor or an undertaking between him and the mortgagee that the mortgagee has become the owner of the mortgaged property cannot extinguish the mortgage or destroy the right of redemption of the mortgagor. A mortgagor and mortgagee may enter into a contract subsequent to the mortgage for the sale of the mortgaged property to the mortgagee. But it must not be part and parcel of the original loan mortgage bargain In other words, the act of the parties that is referred to in S. 60 of the T. P. Act as extinguishing a mortgage transaction is not a part and parcel of it 14 B. 75: 27 B. 297, Rel (*Rafique and Piggott, JJ*) RAM SINGH *v.* BAIJ-NATH. **49 I. C. 353: 17 A. L. J. 117.**

——S. 60—*Right of redemption—Partial owner.*

The owner of a part of the equity of redemption has a right to redeem the entire mortgage. 23 M. L. J 375; 21 I.C. 251 Rel) 3 C. 397 (P.C.) Fol. 22 M. 209, Rel. *Piggott and Walsh, JJ.*) FAKIR CHAND *v.* BABULAL. **39 All. 719 42 I C. 879: 15 A. L. J. 791.**

——S. 60—*Right of redemption—Mortgage—Construction.*

Where a mortgage-deed provided "If within period of ten years we have paid the whole of the mortgage-money in one lump sum, the mortgaged property specified below will be redeemed. If we do not pay the whole of the mortgage money the property will be sold out-right and the aforesaid creditor will be considered as in proprietary possession of the mortgaged property." *Held*, that under the terms the mortgaged property could be redeemed within ten years. To hold that the mortgagor cannot, under the above terms, redeem within the period of ten years is to hold that he could never redeem it at all. (*Tudball and Rafique, JJ*) AMIR MUHAMMED *v.* WAZIR. **39 I C. 643.**

——S. 60—*Right of redemption—Proof of—Suit.*

No suit is maintainable for the redemption of a mortgage unless the plaintiff produces *prima facie* evidence of that right (*Knox and Lindsay, JJ.*) SAHDEO OJHA *v.* LACHMINA KUAR. **34 I. C. 207.**

——S. 60—*Right of redemption—No offer of payment—Tender of mortgage money.*

Where the mortgagor failed to pay or to tender the debt due to the mortgage, no suit is maintainable by him for redemption as there is no cause of action. Tender of mortgage-money or what the mortgagee considers as the debt due, is a condition precedent to the institution of a suit for redemption of the mortgaged property, Foll. (1894) A. W. N. 143 Ref. (*Tudball and Walsh, JJ.*) MOHAMMAD ALI *v.* BALDEO PANDEY **38 All. 148: 34 I. C. 183: 14 A. L. J. 55.**

——Ss. 60 and 91—*Right of redemption—Nature of—Equity of redemption—Nature of.*

The equity of redemption where possession is with mortgagor, is different from equity of redemption where possession is with the mortgagee. Adverse possession against a mortgagee does not bar the mortgagor's right of redemption. (*Richards, C. J. and Bannerjee, J.*) KUNWAR SEN *v.* DARBARI LAL. **34 I. C. 171 : 38 All. 411.**

——S. 60—*Right of redemption—Purchaser of a portion of the equity of redemption.*

The purchaser of a share of the equity of redemption can sue to redeem the prior mortgage without being compelled to set up or to exercise against his will his right in respect of another and distinct mortgage (*Piggott, J.*) RAN PIYARI *v.* RAGHUNATH SINGH. **29 I C 794.**

——S. 60—*Right of redemption—Proof of title—Onus on plaintiff.*

In a suit for redemption, the mortgagor must prove that at the commencement of the suit, he had a subsisting title to the possession of the property and that it continues. He must make such allegation in the plaint. (*Knox, J.*) RAM LAL *v.* SRI MAKURJI KISHORI RAVAN MAHARAJ **22 I. C. 574 : 12 A. L. J. 102.**

——Ss. 60 and 61—*Right of redemption—Tender—Usufructuary mortgagee purchasing a portion of mortgaged property—Stranger purchasing equity of redemption in the other portion · Tender of mortgage amount—Suit for redemption by purchaser — Mortgagee claiming tacking other mortgages—Conditional decree for redemption, if can be passed.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

Where a usufructuary mortgagee purchased a portion of the mortgaged property and a stranger purchased the equity of redemption in the remaining portion and tendered the mortgage amount into Court and the mortgagee ignored the tender and when the purchaser sued to redeem the mortgage, the mortgagee claimed amounts due in respect of other mortgages, tacked on to the mortgage in suit, a conditional decree may be passed directing the purchaser to obtain possession on payment to the mortgagee of the remaining sums due. (*Richards, C. J. and Bannerjee, J.*) NARSINGHA SINGH *v.* ACHHAIBAR SINGH. **36 All 36 : 22 I. C. 539 : 11 A. L. J. 1004.**

——S. 60—*Right of redemption— Mortgage by a conditional sale—Extinguishment of right of redemption by act af parties.*

If after the date of the mortgage the mortgagor consented to the mortgagee being recorded owner under a clause to that effect in the deed the right of redemption was extinguished by act of parties. (*P. C. Bannerjee, J.*) IBRAHIM *v.* MUNSHI. **21 I. C. 87.**

——S. 60—*Right of redemption—Failure of mortgagee to perform essential part of contract—Right of redemptin before expiry of period.*

Where the mortgagee has failed to perform the covenant he has entered into to redeem prior encumbrances the mortgagor has the right to redeem before expiry of the period of mortgage. (*Richards. C. J. and Bannerjee. J.*) CHHATKU RAI *v.* BALDEO SHUKUL. **34 All. 659 : 17 I. C. 340 : 10 A. L. J. 330.**

——S. 60—*Right of redemption—Tender or deposit—Suit for redemption—Cause of action—Right when lost.*

The cause of action in a suit for redemption is the mortgagor's title *plus* a valid tender or the deposit of the mortgage debt; the right to redeem continues until it is expressly taken away by some decree of a competent Court which has the effect of extinguishing the right. 24 All. 45 Ref. (*Piggott, J.*) GANPAT SINGH *v.* TOHFA. **15 I. C. 15 : 10 A. L. J. 36.**

——S. 60—*Right of redemption.*

Where the mortgagee sells the property to a stranger and then repurchases it his possession is not as representative of the purchaser, but only as a mortgagee and is liable to be redeemed within 60 years. (*Macleod, C. J. and Heaton, J.*) KALU DEOBA *v.* RUPCHAND KISHANDAS. **22 Bom L. R. 933 · 58 I. C. 39 : 44 B. 848**

——S. 60—*Right of redemption—Sale of portion of hypotheca.*

Where a mortgagor mortgaged two properties to the plaintiff and subsequently sold one of them, a house site, to defendants and later on sold the other, a field, to the mortgagee himself who set off the sale price towards his mortgage-debt. *Held*, in a suit by the mortgagee to enforce the payment of balance due under his mortgage, against the house-site in the hands of the defendants, that as the sale to the plaintiff was subsequent to the sale of the house-site to the defendants and without their privity or consent, the defendants had not been deprived of their right

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

of redemption. (*Scott, C.J. and Beaman, J.*) MAHMADALI KAMRUDDIN *v.* ABDULALI KARIMBHAI. **27 I. C. 38 : 16 Bom. L. R. 645.**

——Ss 60 and 62—*Right of Redemption—Period fixed for—Redemption before that date.*

The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, the right to redeem and the right to forceclose are co-existence and this principle is embodied in Ss. 60 and 62 of T. P. Act but there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the period specified for the redemption and take back the property. Such a provision is usually for the advantage of the mortgagor. There is nothing illegal or unusual for a debtor to come to an agreement with the creditor that he will have the right to repay the money before a certain date although the mortgagee would not be entitled to foreclose him before that date. 5 Bom. 22 ; 8 All. 95; 29 All. 471; 36 All. 195 ref. (*Chatterjee and Newbould, JJ.*) JAMIR HOWLADAR *v.* ARABIAN-BIBI. **65 I. C. 273.**

——S. 60—*Right of redemption— Partial owner of equity—Right to redeem.*

A partial owner of the equity of redemption is entitled to redeem the whole of the mortgaged property in opposition to the wishes of the mortgagee. The general rule is that a person having any right at all to redeem has a right to redeem the whole of the mortgaged properties. (*Richardson and Walmsley, JJ.*) PROTAP CHANDRA DHAR *v.* PEARY MOHUN DHAR. **48 I. C. 669 : 22 C. W. N. 800.**

——S. 60—*Right of redemption— Partial owner of equity of redemption.*

A partial owner of the equity of redemption is entitled to redeem the whole mortgage. (*Fletcher and Newbould, JJ.*) BAIKANTHA NATH DEY *v.* MOHESH CHANDRA DEY. **44 I. C. 77 : 22 C. W. N. 128.**

——S. 60—*Right of redemption—Conditional decree—Hindu widow—Mortgage by husband.*

In a case where the wife wants to recover the property which is found to have been mortgaged by her husband for debts for which her husband's property in her hands would beljustly liable, to allow her, therefore, to recover her property without any condition would not be equitable. (*Chatterjee and Chapman, JJ.*) SANATAN CHAKRAVARTI *v.* KAURI MANI DASI. **29 I. C. 925.**

——S. 60—*Right of redemption—Due date—Demand for payment—Interest.*

A mortgagor is not entitled to redeem before the debt becomes due even though he may offer to pay interest for the whole period. If the mortgagee makes the demand for payment before time, and the mortgagor complies he cannot demand interest for the whole of the term. When once the mortgagee has given notice demanding payment before term, he cannot withdraw without the consent of mortgagor. (*Mookerjee and Beachcroft, JJ.*) PROKSH CHANDRA GHOSE *v.* HASAN BABOO BIBI. **42 Cal. 1146 : 28 I. C. 450 : 19 C. W. N. 389.**

TRANSFER OF PROPERTY ACT IV OF 1882), S. 60—Right of redemption.

——— S. 60—*Right of redemption--Mortg age—Usufructuary—Suit for redemption.*

A suit for redemption of a usufructuary mortgage is in substance a suit for possession of land and if the plaintiff proves title and the defence is simply that the mortgage is void, the plaintiff would be entitled to a decree. (*Jenkins, C. J. and Mookerjee, J.*) ANANDA HAIT *v.* KHUDI RAM HAIT.
25 I. C. 558 : 19 C. L. J. 532.

——— S. 60—*Right of redemption.*

The owner of only half of the property mortgaged can reedeem the whole on payment of the sum due. (*Scott-Smith and Abdul Raoof, JJ.*) KABUL SINGH *v.* KALA SINGH.
67 I. C. 737 : 3 Lah. L. J. 259.

——— S. 60—*Right of redemption—Suit for redemption by mortgagors vendee—Plea of undue influence and fraud by the mortgagor.*

The transferee of the equity of redemption from a mortgagor is at least a trustee and thus can redeem by impleading the mortgagor as a party who pleaded that the transfer to the plaintiff was obtained by undue influence and fraud. (*Chevis and Dundas, JJ.*) MOKANDI *v.* HARNAM DAS. **2 Lah. L. J. 446.**

——— S. 60—*Right of redemption—Term of 40 years—Mortgage with possession—Interest at 2 per cent per mensem.*

In the absence of proof that the mortgage was entered into under undue influence the Court could not decree redemption before expiry of the period of 40 years agreed upon, even if the terms of the mortgage were unconscionable. 35 M. L. J. 614, Foll, (*Rattigan, C, J. and Martineau, J.*) NIHAL *v.* SHIB SANT KUMAR. **52 I. C. 542 : 94 P. R. 1919.**

——— S. 60—*Right of redemption—Hindu reversioner.*

Where a Hindu widow, surrenders her property to the next reversioner, on condition of her receiving a fixed annual grant for maintenance, the reversioner can sue to redeem a mortgage of that property created by her. (*Le Rossignal, J.*) JUMMA RAM *v.* SONI BAI. **50 I. C. 868 : 178 P. W. R. 1918.**

——— S 60—*Right of redemption—Construction of mortgage for fixed term with a clause abridgement of the term on certain conditions.*

A mortgage deed stipulated that the mortgagor could redeem before the time fixed by selling the property, but that in that case it was incumbent on him to give the mortgagees notice of his intention to sell and the actual price at which a definite purchaser was willing to buy on which the mortgagee could either purchase at the settled price or allow the sale to be effected *Held*, that notice ofthe actual price at which the mortgagees were entitled to the property not having been given to them, they were entitled to retain possession to the term of the mortgage. (*Shadi Lal and Broadway, JJ.*) ABDUL AZIZ *v.* NAIDAR MAL **41 I. C. 397 : 123 P. W. R, 1917.**

——— S. 60—*Right of redemption—Interested in a portion of the equity of redemption.*

A person having an interest in a portion of the mortgaged property is entitled to redeem the whole unless his claim is opposed by a part owner of the equity of redemption (who may be the mortgagee himself) and in that case he can redeem only the part to which he is entitled. 14 W R. P. C. 17 ; 5 C. W. N. 83, (*Chevis and Shadi Lal, JJ.*) FAZLUDDIN *v.* KHARAK SINGH. **83 P. R. 1915 : 31 I. C. 230 : 141 P. W. R. 1915.**

——— S. 60—*Right of redemption— Prior mortgagee assignee of equity of redemption—If, can redeem puisne mortgagee.*

A prior mortgagee, who is also the purchaser of the equity of redemption can redeem the puisne mortgagee even without his consent. The redemption by a puisne mortgagee of a prior mortgage is not a condition precedent to the exercise of the right of redemption of the puisne mortgage itself by an assignee of the mortgagor's equity of redemption. (*Spencer and Ramesam, JJ.*) SARVOTHAMA RAO. *v.* RAJA RAO.
14 L. W. 355 : 69 I C. 942 : (1921) M. W. N. 603.

——— S. 60—*Right of redemption—Moveables—Contract to the contrary.*

In the case of mortgage of moveables the right of redemption subsists notwithstanding a contract to the contrary. The pinciple of S. 60 of the T. P. Act applies to moveables also. (*Seshagiri Aiyar and Phillips, JJ.*) SUJIR RAGHUNATHAYYA *v.* SALDHANA. **36 M. L. J. 161 : 25 M. L. T. 331 : 49 I. C. 722: (1919) M. W. N. 369.**

——— S. 60—*Right of redemption—Right to redeem on or before certain date—Intention.*

Ordinarily and in the absence of a special stipulation to that effect,the mortgagor is not entitled to redeem before the close of the priod for which the mortgage was executed; but a provision in a mortgage deed providing for payment by the mortgagor on or before a certain date is sufficient indication of an intention to allow him to redeem before that date, especially where a stipulation is made applicable only to the balance of the mortgage debt. (*Wallis, C. J, and Seshagiri Aiyar, J.*) CHANDU *v.* KOAJA POOJARI.
30 I. C. 370: 29 M. L. J. 86.

——— S. 60—*Right of redemption--Extinguishment of—Mortgagee purchasing equity of redemption—Effect.*

Where the equity of redemption in a usufructuary mortgage was sold in a court auction but the auction purchaser did not get symbolical delivery of the right purchased and the mortgagee subsequently purchased the equity of redemption from the heir of the auction purchaser. *Held*, that the mortgagee became full owner by reason of such purchase, that the non-delivery of the right purchaser to the auction purchaser did not revest that right in the mortgagor (judgment-debtor), and that a purchaser from the heir of the mortgagor had no right to claim redemption of the mortgage. (*Sadasiva Aiyar and Hannay, JJ.*) LAKSHMINARAYAN AIYAR *v.* ULAYAMMAL.
26 I. C. 528: 28 M. L. J. 256.

——— S. 60—*Right of redemption—Time for.*

Ordinarily the right of redemption will arise only at the expiry of the specified period in the

TRANSFER OF PROPERTY ACT (IV OF 1832), S. 60—Right of redemption.

mortgage document. (*Sadasiva Aiyar and Napier, JJ.*) GUNNAM DORAYYA *v.* VADAPALLI AYYAMACHARYALU. **16 M. L. T, 226 : (1914) M. W. N. 648 : 25 I. C. 797. 27 M. L. J. 295.**

——— S. 60—*Right of redemption—Period for redemption.*

A mortgage for a definite term cannot be redeemed before the expiry of the term unless a contract to the contrary exists. (*Sadasiva Aiyar and Napier, JJ.*) BIR MAHAMAD ROWTHER *v.* NAGOOR ROWTHER. **16 M. L. T. 163 : 25 I. C. 576 : 27 M. L. J. 483.**

——— S. 60—*Right of redemption—Redemption suit, when can be commenced.*

A suit for redemption can be filed any time after the mortgage-money becomes payable even if there is a stipulation for payment only within certain dates. (*Sadasiva Aiyar and Spencer, JJ.*) CHAKKANGAL GOVINDA MENON *v.* CHAKKANGAL CHATTIN MENON. **22 I. C. 907.**

——— Ss. 60 and 61—*Right of redemption—Two mortgages on the same property in favour of some mortgagee.*

If there are two mortgages on the same property in favour of the same mortgagee, the mortgagor cannot redeem the one before the other, (*Ayling and Spencer, JJ.*) MELOTH KANNAN NAIR *v.* CODATH KAMMARAN NAIR. **(1914 M. W. N. 231 : 22 I. C. 609: 1 L. W. 102.**

——— S. 60—*Right of redemption—Proof of mortgage—Nature of evidence.*

Where in a redemption suit a plaintiff relies for his title on a sale for arrears of rent, he must prove the validity of the sale. But it is not necessary that he should do so in a particular way. It is sufficient if he offers general evidence of the sale, and of the subsequent conduct of parties. (*Ayling and Oldfield, JJ.*) RASA GOWNDEN *v.* SINNAPPAYYAN **22 I. C. 17 : 1 L. W. 55.**

——— S. 60—*Right of redemption—Mortgagee a Hindu widow in possession.*

It is not the duty of mortgagor to see that the money paid to a Hindu widow to redeem his lands is applied by her for the benefit of the estate nor should he associate the reversioners in the transaction. (*Chevis, J.*) DAL SINGH *v.* BAKHSHISH SINGH. **19 I. C. 8 : 36 Mad. 7.**

——— S. 60—*Right of redemption—Extinction of—Agreement to surrender possession to mortgagee as full owner on expiry of term.*

It is open to the parties to a mortgage, the mortgagor and the mortgagee, to agree at any time that the mortgagee shall be in possession of the mortgaged property as owner thereof and possession so held by the mortgagee for over twelve years will extinguish the mortgagor's title to redeem. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) USUMAN KHAN *v.* NAGALIA DASANNA. **37 Mad. 545 : (1912) M. W. N. 995 : 16 I. C. 694 : 12 M. L. T. 330 : 23 M.L.J. 360 : Also (1921) M.W.N. 1 : 40 M. L. J. 105.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

——— S. 60—*Right of redemption—Kanom—Mortgage to third person—Redemption decree—Ineffective—Assigment of Kanom rights.*

A grant was made to a person on *kanom*, the property was subsequently mortgaged to another and a decree for redemption was passed thereon but it had become inoperative; afterwards the interest of the mortgagor and mortgagee was assigned to the plaintiff. *Held*, that though as the assignee of the inoperative decree from the mortgagee he was not entitled to redeem yet as the assignee of the mortgagor he could redeem the *kanom* even after the decree in favour of mortgagee had become incapable of execution. (*Subramania Aiyar and Boddam, JJ.*) KUTTISSERI ILLATH *v.* ACHUTA PISHARODI. **14 I. C. 415. 35 Mad. 42 :**

——— S. 60—*Right of redemption—When arises—Expiry of period fixed—Contract to the contrary.*

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiry of the specified period, though there is nothing to prevent the parties from making a special condition. 36 A. 195 (P. C.) : 39 C. 828 f. ll. 16 C. P. L.R. 59 not foll. Unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be regarded as co-existent. (*Halijax, A. J. C.*) BALA *v.* GHASI. **64 I. C. 730 : 17 N. L. R. 202.**

——— S. 60—*Right of redemption—Partial owner of equity.*

A person holding equity of redemption in certain property with others including the mortgagee himself, cannot under S. 60 compel the mortgagee to allow him to redeem entire property. At the most he can redeem his share only. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MUHAMMAD ZAKI ALI KHAN *v.* AHMED SHAH. **58 I. C. 983 : 7 O. L. J. 585.**

——— S. 60—*Right of redemption—Time for redemption.*

A mortgagor creating subsequent mortgage on the same property together with other properties in favour of the same mortgagee with intermediate mortgages on all these properties in favour of the third person, cannot redeem the first mortgage without redeeming all the subsequent ones as, before such redemption of the subsequent mortgages, his right of redemption which he has parted with by the subsequent mortgages does not become vested in him. (*Lindsay, J. C.*) SURAJ BAKSH SINGH *v.* BISHSHAR SINGH. **23 O. C. 113 : 7 O. L. J. 470 : 57 I. C. 559 : 2 U. P. L. R (J. C.) 144.**

——— S. 60—*Right of redemption—Fallow season—Where there is no stipulation restraining redemption, but only a period is fixed for payment it is fixed as a a protection for the debtor till the contrary intention is shewn.*

Where a mortgage-deed in respect of houses of groves provides for redemption in the fallow season such limitation is without any significance

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

and it is not necessary that a suit for redemption of such mortgage should be filed in the fallow season. 40 I.C. 381 and 4 O.L.J. 334 Dist. (*Kanhaiya Lal, A. J. C.*) ANANT RAM *v.* KALAW. **51 I. C. 880**

——S. 60—*Right of redemption—Tender of money after suit.*

Tender of mortgage-money by mortgagor after a suit for possession had been filed by the mortgagee under the terms of the mortgage was held good and a redemption was allowed. (*Stuart, J. C.*) RAM DAYAL *v.* ARJUN SINGH. **50 I. C. 332.**

——S. 60—*Right of redemption—Second suit.*

There can be no second suit for redemption when once a decree has been passed, though it does not fix time for payment and the consequences of non-payment. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) SHEORAJ BAHADUR SINGH *v.* GAJADHAR SINGH. **48 I. C. 922 : 5 O. L. J. 698.**

——Ss. 60 and 77—*Right of redemption—Redemption before date fixed—Right of mortgagee to remain in possession after mortgage satisfied by the usufruct.*

A usufructuary mortgagee has no right to remain in possession of the mortgaged property after the money is satisfied from the usufruct, though the parties may have miscalculated that the liquidation of the mortgage money from the usufruct shall take a longer period. (*Stuart and Kanhaiya Lal, A. J. Cs.*) PRAG *v.* MOHAN LAL. **47 I. C. 161 : 5 O. L. J. 263.**

——S. 60—*Right of redemption—Redemption at a particular season.*

Where in cases of mortgage with possession in respect of agricultural land, redemption is agreed to be allowed only at a particular season of the year known as ' Khali fasl jeth '. *Held*, time is of the essence of the contract and the mortgagor must make an offer to redeem in 'Khali fasl jeth ' before he can sue for redemption. (*Lindsay, J. C.*) KARIM BAKSH *v.* IDU SHAH. **40 I. C. 381 : 4 O. L. J. 334.**

——S. 60—*Right of redemption—Right of mortgagor before delivery of possession to mortgagee.*

It is not open to the mortgagor to obtain a right of redemption which would have the effect of defeating the mortgagee's claim for possession. There is nothing in the provisions of the T. P. Act, which would give the mortgagor a right to redeem, other than the right which he agreed to accept under the terms of the deed. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MUHAMMAD SHER KHAN *v.* RAJA SETHUSWAMI DAYAL. **18 O. C. 105 : 30 I. C. 377 : 2 O. L. J. 372.**

——S. 60—*Right of redemption—Money payable by a fixed date.*

A mortgagor may redeem at or before the time fixed for redemption in the absence of a contract to the contrary. (*Kanhaiya Lal, A. J C.*) GOPAL SINGH *v.* KARAN SINGH. **25 I. C. 302 : 17 O. C. 218.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

——S. 60—*Right of redemption—Deed—Construction—Mortgage.*

If the parties agree that the mortgage money should be paid in Jeth in a year and the property redeemed, payment in any other month is not a good and valid tender and does not stop interest thereafter. When the mortgage was one with possession, but the mortgagee did not obtain possession and claimed interest. *Held* that the mortgagee ought to have sued for possession and must appropriate the net profits of the property towards his interest but he could not charge the mortgagor with interest. (*Lindsay, J. C.*) MATA DIN *v.* AHMAD ALI. **24 I. C. 874 : 1 O. L. J. 263.**

——S. 60—*Right of redemption—Person inheriting part of mortgaged property—Redemption of more than his share, if possible.*

A person inheriting part of mortgaged property cannot redeem more than his share against the will of the mortgagee where he has acquired part of the mortgaged property. (*Lindsay, J.C.*) RAJ BAHADUR SINGH *v.* MAHABIR PRASAD. **21 I. C. 251.**

——Ss. 60 and 58 (d)—*Right of redemption—Proof of terms.*

In a suit for redemption on a usufructuary mortgage for Rs. 50 the plaintiff proved the fact of mortgage by the evidence of a witness. The witness did not prove the terms of the mortgage. The defendant denied the mortgage. *Held*, that in the absence of evidence, a mortgage for a greater period than the plaintiff alleged could not be presumed and that in the absence of evidence to the contrary, it could not be assumed that the interest exceeded the usufruct. (*Chamier, J. C.*) PANCHAM TIWARI *v.* RAM UDID UPADHAYA. **10 I. C. 7.**

——S. 60—*Right of redemption—Extinguishment of.*

The right to redeem is not extinguished when no steps to foreclose the same according to the provisions of law have been made merely on the ground that the settlement officer had expunged the name of the mortgagor. 32 C. 296, Foll. (*Sunder Lal, A. J. C.*) ANGNE LAL *v.* JAGDISH SINGH. **9 I. C. 431.**

——S. 60—*Right of redemption—Sale of equity of redemption—Mortgagor's right to redeem first mortgage.*

The mortgagor cannot redeem the first mortgage after his equity of redemption has been sold away in execution of a decree on a second mortgage. 39 Ch. D 630. Dis. (*Mullick and Kingsford, JJ.*) JAHMANI PRASAD SINGH *v.* GHARBARAN DUBEY. **35 I. C. 404.**

——S. 60—*Right of redemption—Period fixed by deed—Expiration of—Rights of parties.*

When a period for a mortgage is specified, the right of redemption can only arise on the expiration of that period in the absence of a special condition entitling the mortgagor to redeem during the term for which mortgage was created. Where nothing more than a period is specified the onus lies on the mortgagor to prove that he

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Right of redemption.

can redeem before that period and not upon the mortgagee to show that the mortgagor cannot do so. The view that the simple expression "*ba mayad*" or "*ta mayad*" without qualification means that the time is the essence of the contract and that the mortgagor cannot redeem before the expiry of that term is one which must be taken as settled law for the North-Western Frontier Province (*Pipon, J. C.*) DHANNA RAM *v.* CHHABIL DAS. 72 I. C. 931

——S. 60—*Right of redemption—Time fixed by compromise not to be extended.*

A Court cannot without the parties consent extend the time fixed by a compromise between the parties for redemption. (*Ormond, J.*) MAUNG SEN LIN *v.* MAUNG SHWE THEIN.
37 I. C. 672 : 10 Bur. L. T. 240.

——S. 60—*Right of redemption—Effect of.*

When a mortgage is redeemed by mortgagor or even a person not entitled to do so and against the mortgagor's will the mortgage as well as mortgagee's rights cease to exist. (*Mc Coll, A. J. C.*) MA HUA YIN *v.* MI HUAN. 32 I. C. 506 : II U. B. R. (1915) 89.

Rights of Mortgagor.

——S. 60—*Rights of mortgagor—Tacking—Simple and usufructuary mortgage on the same day—Option to sue for interest at the end of each year—Redemption.*

Where a simple mortgage and a usufructuary mortgage were executed on the same day, over the same property and in favour of the same person, with a condition that the money under the simple mortgage was to be paid along with that due under the usufructuary mortgage and that the mortgagee might sue for the deficiency in interest, if any, in a particular year. *Held*, that there was a clear case of tacking and the usufructuary mortgage could not be redeemed without payment of the simple mortgage and the fact that the mortgagee was given an option of realising the deficiency in interest by a suit against the mortgagor personally, did not make the interest cease to be part of the mortgage money and recoverable as such before redemption. (*Ryves and Gokul Prasad, JJ.*) ULFAT RAI *v.* KANHAIYA LAL.
20 A. L. J. 86 : L R. 3 A. 125 : 1922 A. 41.

——S. 60—*Rights of mortgagor—Usufructuary mortgage—Redemption suit—Mortgagee not producing accounts—Amount due, how to calculate.*

In a redemption suit under a usufructuary mortgage, if the mortgagee fails to produce proper accounts, the Court can calculate the amount due on the basis that all the tenants have paid their rents. (*Tudball and Rafique, JJ.*) HARDEO PRASAD *v.* GANGA SAHAI. 61 I. C. 48 : 19 A. L. J. 155.

——S. 60—*Rights of mortgagor—Preliminary decree for foreclosure—Expiry of time allowed—Right of mortgagor to redeem at any time before the passing of the final decree.*

The mortgagor has a right to redeem at any time before the passing of the final decree. (*Chatterjee and Panton, JJ.*) YSAF ALI *v.* KASIM ALI.
26 C. W. N. 532.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Rights of Mortgagor.

——S. 60—*Rights of mortgagor—Re-transfer of the mortgaged property.*

After a decree for redemption the executing Court should see that all the rights acquired by the mortgagee under the mortgage are retransferred to the mortgagor and that the latter is placed in his original position. (*Shadi Lal, C. J.*) MAHMAN SINGH *v.* NIHAL. 57 I. C. 763.

——S. 60—*Rights of mortgagor— Mortgagee purchasing mortgage properties in auction—Sale afterwards set aside in part—Effect.*

When the mortgagee in court auction purchases the equity of redemption, and afterwards the sale is held partly invalid, the security is discharged only to the extent to which the sale is valid. 43 Mad. 372 F. B. Foll. (*Odgers and Hughes, JJ*) RAMASWAMI REDDIAR *v.* PERIA VEERAKUDU.
45 M L. J. 719 : 18 L. W. 692 : (1923) M. W. N. 781 : 1924 Mad. 364.

——S. 60—*Rights of mortgagor—Title-deed—Loss of—Compensation.*

In India, as in England, a mortgagor is entitled to compensation from his mortgagee for the loss of title-deeds. He will have his remedy by way of a separate suit for damages, or even under the mortgage decree where the latter contains provision for it. (*Ayling, A. J. C. and Ryves, J.*) MARATH SIVARAMAN NAIR *v.* SESHU PATTAR.
42 M. L. J. 356 : 16 L. W. 589 : 1922 Mad. 299.

——Ss. 60 and 91—*Rights of mortgagor—Kanom of temple property—One of two Uralans—Right to redeem—Costs—Uralan, right of, to claim, often renewal of kanom.*

One of two *Uralans* of a temple can redeem a *kanom* of the temple property without consulting the other *Uralan*. An *Uralan* who incurs costs in defending the plaint Devaswom's jenmi title to the property is not entitled upon a renewal of the *kanom* to claim the costs so incurred. (*Sadasiva Aiyar and Napier, JJ.*) KAYARAT KIZHAKKETHIL RARU NAIR *v.* THIRUNARAYANAPURAM URALAN KARUTHEDATH. 13 L. W. 425 : 61 I. C. 510 : (1920) M. W. N. 646.

——Ss 60 and 95—*Rights of mortgagor—Co-mortgagors—Redemption—Purchase of a portion of mortgaged property by mortgagee.*

Co-mortgagors entitled to a portion of the mortgaged property could redeem against the will of the mortgagee who has himself purchased a portion of the hypotheca only their own village. (*Dalal and Simpson, A. J.Cs.*) JAI GOVIND SINGH *v.* ABHAI RAJ SINGH. 26 O. C. 308 : 10 O. L. J. 216 : 9 O. & A. L. R. 651 : 1924 Oudh 40.

——Ss. 60 and 61—*Rights of mortgagor—Deed of further charge—Redemption—Consolidation.*

Where a deed of further charge expressly stipulates that the mortgagor would not be entitled to redeem the earlier mortgage without paying the money due under the further charge there is a covenant for consolidation and the earlier mortgage cannot be redeemed without payment of the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Splitting up of security.

money due under the latter. 17 O. C. 301 Dist. (*Kanhaiya Lal, J. C.*) NAUNIDH LAL *v.* MAHADEO SINGH. **25 O. C. 134 : 8 O. L. J. 640 : 1922 Oudh 58.**

Splitting up of security.

——S. 60—*Splitting up of security—Suit by mortgagee for his share of the mortgage money—Decree—Form of—Merger — Acquisition of interest.*

In order to effect a merger, the two rights must be co-extensive in same share however small, though one be higher than the other. Ordinarily the acquisition of a share in the equity of redemption by only one of several mortgagees does not necessarily break up the integrity of the mortgage so as to entitle a mortgagor, interested in only a fractional part of the property, to redeem his share on payment on a proportionate amount: *Held*, that the plaintiff's co-mortgagees by suing for their share of the mortgage money must be deemed to have admitted that the balance of the mortgage money had been satisfied by the acquisition of a proportionate share of the mortgaged property and that the plffs. should be given a decree for their share of the mortgage money as against a proportionate share of the mortgaged property. (*Stuart and Sulaiman, JJ.*) MOHAN LAL *v.* PARSHADI LAL. **L. R. 3 A. 472 : 45 All. 46 : 1924 All. 11.**

——S. 60—*Splitting up of security—Partial redemption—Decree on prior mortgage— Sale—Right of auction-purchaser.*

There was a first mortgage and subsequent thereto all the rights which the original mortgagor had, were mortgaged to the second mortgagee. In execution of a decree on the prior mortgage, the whole of these rights (that is the whole of the equity of redemption of the prior mortgage) vested in the auction-purchaser. No part of the equity of redemption vested in the successor to original mortgagor. *Held* that the integrity of the prior mortgage was not broken up and the mortgage would not be redeemed piecemeal. (*Mears, C.J. and Banerjee, J.*) ABDUL GHAFOOR *v.* QAMAR UDDIN. **21 A. L. J. 279 : L. R. 4 A. 360 : 1923 A. 397.**

——S. 60—*Splitting up of security — Effect on redemption.*

On splitting up of the integrity of a mortgage, acquisition of interest of mortgagor by prior and subsequent mortgagees does not necessitate the redemption of the whole by the former or renunciation of interest by the latter. (*Stuart and Kanhaiya Lal, JJ.*) AMBA PRASAD *v.* WAHID ULLAH. **20 A. L. J. 583 : 44 A. 708 : 1922 A. 405.**

——S. 60—*Splitting up of security—Acquisition of part of equity of redemption by mortgagee decree-holder—Merger.*

The principle that when a mortgagee acquires a part of the mortgaged property, the integrity of his mortgage is broken up and the mortgage is extinguished, *pro tanto*, the balance only being recoverable from the residue, applies equally where after the decree for sale the mortgagee (decree-holder) acquires a part of the mortgaged

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Splitting up of security.

property. (*Tudball and Sulaiman, JJ.*) SARJU KUMAR MUKERJI *v.* THAKUR PRASAD. **42 All. 544 : 18 A. L. J. 690 : 58 I. C. 743 : 2 U. P. L. R. (All.) 174.**

——S. 60—*Splitting up of security—Integrity of mortgage broken with consent of mortgagee—Piecemeal redemption.*

Where the integrity of a mortgage is broken up with the consent of a mortgagee and a moiety is redeemed, neither he nor those who claim through him can afterwards invoke in their aid the rule prohibiting the breaking up of a mortgage so as to entitle a mortgagor to redeem any portion thereof which he feels disposed to redeem. (*Walsh and Ryves, JJ.*) SARADANAND RAI *v.* SOHAWAN KHAN. **51 I. C. 815.**

——S. 60—*Splitting of security—Mortgage of two properties—Money left with the mortgagee to pay off a prior mortgage on one—Default—Sale in consequence—Purchase by the mortgagee in the name of a stranger—Suit for partial redemption.*

One of two properties comprised in a mortgage was subject to a prior mortgage and was brought to sale for default of payment of the mortgage amount and was purchased by the second mortgagee in the name of a third person. A suit for redemption as regards the other property was allowed the integrity of the mortgage being broken and the money was calculated as if there was no prior mortgage on that property. (*Banerjee and Piggott, JJ.*) WAJAHAT HUSAIN *v.* RATAM LAL. **12 I. C. 182 : 8 A. L. J. 1092.**

——S. 60—*Splitting up of security—By mortgagee.*

In 1881 *A* mortgaged his *Sir* to B and in 1888 at a sale in execution of a simple money-decree *B* purchased the proprietary right in the *Sir* leaving *A* owner of the ex-proprietary, rights only; *B* could not place the whole burden on the ex-proprietary rights as he by his own act had broken up the integrity of his security. (*Stanley, C. J. and Griffin, J.*) CHUNNI LAL *v.* SIKISHAN SINGH. **33 All. 434 : 10 I. C. 729 : 8 A. L. J. 227.**

——S. 60—*Splitting of security—Co-mortgagee purchasing the equity of redemption.*

The purchase of the equity of redemption by one of several co-mortgagees does not extinguish the right of the others. (*Stanley, C. J. and Banerjee, J.*) RAMJAS DAS *v.* SHEO LAL. **9 I. C. 1026.**

——S. 60—*Splitting up of security—Partial failure of consideration.— Omission to include item in redemption suit.*

On 12-2-1903 Bapat mortgaged his Kelghar property to Ganesh Joshi and his brother (plaintiffs) for Rs. 2,000 which consideration included a mortgage charge of Rs. 1,200 under a prior mortgage created by Bapat. In April 1900, the plaintiffs mortgaged their own properties together with their mortgagee interest in the Kelghar property for Rs. 4,000 to Narayan Paranjpe. The consideration here also included the mortgage claim of Rs. 1,186 1-6 under the mortgage of 1890. This mortgage was renewed on 28-5-1906. In the meanwhile one Rodes who had obtained a money-decree against Bapat in 1899 applied in

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Splitting up of security.

1901 to execute his money decree against Bapat and attached the Kelghar property. The plaintiffs intervened and put forward the mortgage of 1900. On 15-11-1902 the court ordered that the property should be sold subject to the mortgage lien of the plaintiffs and the property was accordingly sold and purchased by Rodes. Rodes sued in 1904 and obtained a declaration that the mortgage of February 1900 was fraudulent and not binding on him subject to a lien for Rs. 1,186-1-6 on the Kelghar property. In 1909 Rodes filed another suit against plff. and Narhar Paranjpe to recover possession of the property and the suit was decreed. The Kelghar property however remained in possession of the plaintiffs all along. In 1917 the plaintiffs sued to redeem the mortgage of 1906 excluding the Kelghar property. *Held*, that the omission to include the Kelghar property was no transgression of the rule against partial redemption enunciated in S. 60 of the T. P. Act. (*Shah, A. J. C. and Crump, J.*) GANESH MORESHWAR JOSHI *v.* VASU DEO VITHAL PARANJPE. **24 Bom. L. R. 911 : 1922 Bom. 424.**

——— **Ss. 60 and 100**—*Splitting up of security—Maintenance—Annuity—Suit by assignee—Assignee purchasing a portion of property charged——Abatement.*

A Hindu widow's maintenance was charged on certain properties. The plaintiff, the assignee of this right of the widow, subsequently purchased a portion of the properties subject to the charge created by the deed of maintenance. *Held*, that the case was covered by the last few words, of the final clause of S. 60 of the T. P. Act. In a suit by plaintiff for arrears of maintenance charged. *Held* that he was bound to apportion the money as between the properties acquired by him subject to the charge and the rest of the mortgaged properties. (*Fletcher and Cuming, JJ.*) RAJAT KAMINI DEBI *v.* RAJA SATYA NIRANJAN. **53 I. C. 587.**

——— **S. 60**—*Splitting up of security—Rights of Mortgagee—Purchase of share of equity by mortgagee—Mortgagee's rights.*

The purchaser of the rights of some joint mortgagors is entitled to joint possession with remaining mortgagors though he was a mortgagee himself from all of them. (*Beachcroft, J.*) KORLIAN ALI *v.* MAKBUL ALI. **50 I. C. 743.**

——— **S. 60**—*Splitting up of security—Acquisition of the interest of one of the mortgagees by one of the mortgagors—Effect.*

A purchase by some mortgagors of the interest of a mortgagee does not entitle the other co-mortgagors to claim apportionment of their debt for redemption of their share of the property. (*Beachcroft and Walmsley, JJ.*) JAGABANDHU PAL *v.* HALADHAR PAL. **41 I. C. 269 : 27 C. L. J. 110.**

——— **S. 60**—*Splitting up of security.*

Where the plaintiff himself purchased the whole of the equity of redemption, without consulting the other landlords, and then by virtue of litigation between himself and the other landlords he was allowed to retain ¼ share of the equity of redemption of the occupancy rights, *Held*, he himself was responsible for dividing up the equity of redemption and cannot now take advantage of its being originally indivisible. (*Shadi Lal, C. J. and Abdul Qadir, J.*) KARIM BAKHSH *v.* KARIM BAKHSH. **1923 Lah. 22.**

——— **S. 60**—*Splitting up of security—Mortgagee acquiring part of equity of redemption—Right of other part owner to redeem whole mortgage—Partition if necessary.*

Where a mortgagee has acquired a share in the equity of redemption either by purchase or inheritance, a part owner of the equity can only redeem his own share and not the shares of his co-owners because the security has been broken up; in such cases no partition is necessary before redemption can be made. (*Reid, C. J. and Johnstone, J.*) SHANKAR DAS *v.* GOBIND RAM. **62 P. R. 1911 : 206 P. W. R. 1911 : 11 I. C 100 : 197 P. L. R. 1911.**

——— **Ss. 60 and 82**—*Splitting up of secuirty—Purchase by mortgagee of equity of redemption in part of the mortgaged property—Discharge of mortgage.*

When a mortgagee buys at auction the equity of redemption in part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing only that portion of the mortgage debt which was chargeable on the property purchased by him even though the value of the property purchased be equal to the amount due on the mortgage. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) PONNAMBALA PILLAI *v.* ANNAMALAI CHETTIAR. **43 Mad. 372 : 38 M. L J 239 : (1920) M. W. N. 235 : 55 I. C. 666 : 11 L. W. 429 (F. B.): [Overruling 10 M. L. T. 240 : 12 I. C. 130 : (1911) 2 M. W. N. 342.]**

——— **Ss. 60 and 82**—*Splitting up of security—Purchase by mortgagee of portion of the equity of redemption—Right of mortgagee how far affected.*

A mortgagee who bought a part of the mortgaged property at a low price, because it was sold under the burden of his debt, must be considered to have paid to himself towards satisfaction of the mortgage the difference between the full price of what he bought and the price he paid for it. There is no reason why only so much should be considered as having been paid as bears the same proportion to the whole debt as the value of the property bought bears to the whole property. 24 W. R. 83 foll. (*Hallifax, A. J. C.*) ADKU *v.* RAJARAM. **64 I. C. 453.**

——— **S. 60**—*Splitting up of security—Purchase of portion of mortgaged property by mortgagee—Effect of.*

Where a mortgagee purchases a portion of the mortgaged property at an auction sale, held in execution of his decree for money at which his prior lien was notified, the effect is to extinguish the mortgage only to an amount proportioned to the extent of the property purchased. The question of the price paid at the sale is quite immaterial. (*Kanhaiya Lal and Daniels, A. J. Cs.*). SHAMSHAD ALI KHAN *v.* MUHAMMAD ALI KHAN. **47 I. C. 200 : 21 O. C. 172.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 60—Splitting up of security.

——S. 60—*Splitting up of security—Redemption.*

In 1878 *A* mortgaged certain property to *R*. In 1881 he usufructuarily mortgaged the same property with some other property of the same nature to plaintiff and one *S*. In 1885 *R* and *S* brought a suit and obtained a decree for sale. Plaintiff and *S* were parties to this suit. In 1893, the heirs of the mortgogors redeemed half of the property mortgaged in 1881 from *S*. In 1906 *R* put into execution his decree and got the other half sold. Plaintiff brought a suit to recover half the mortgaged property. *Held*, that irrespective of the mortgage of 1881 the mortgage security had with the consent of all the parties been split up in 1893 and so the portion redeemed in 1893 was not liable to plaintiff's claim ; and his rights in the other half were lost in the execution of the prior mortgage decree. (*Evans, A. J. C.*) BALJIT SINGH *v.* BAHADUR SINGH. **10 I. C. 15.**

——S. 60—*Splitting up of security—Rights of mortgagee—Part payment—Effect of.*

A mortgagee is entitled to bring a suit for sale of the entire mortgaged property for the balance due upon his mortgage, although he received half the mortgage debt from one in whom one half of the equity of redemption became vested subsequent to the mortgage, unless it was proved that he had consented to the integrity of the mortgage being broken up. (*Das and Adami, JJ.*) PANDE SATDEO NARAIN *v.* RAMAYAN TEWARI.
4 Pat. L. T. 147 : 2 Pat. 335 : 1923 P. 242 (2).

——S. 60—*Splitting up of security—Right of redemption—Partial redemption.*

Ordinarily a mortgagee is entitled to claim that his security should not be split up, but if he becomes by his own act the purchaser of a portion of the mortgage security, he has no longer any right to claim that the security should not be split up and mortgagors or assignees from mortgagors become liable for only so much of the mortgage debt as is proportionate to the portion of the mortgage security that they have purchased. (*Robinson, C. J. and Macgregor, J.*) CO THINE *v.* ISMAIL CASSIM MORAD. **1 Bur. L. J. 117 : 1923 R. 61.**

——S. 61—*Contract to the contrary—Consolidation.*

Where by each of two mortgages a separate property was mortgaged with possession and the second mortgage contained this clause "and when the whole of the mortgaged money due under this deed together with the amount due under the previous deed shall be paid then the mortgage shall be redeemable and the deed shall be taken back." *Held*, the mortgagee was entitled to consolidate the two mortgages by the "contract to the contrary". (*Stuart, J.*) JADU RAI *v.* RAM BIRICH RAJ. **1922 All. 403 (1).**

——S. 61—*Further charge—Mortgage, usufructuary—Second mortgage—Covenant to pay second mortgage first—Suit on second mortgage barred—Effect of.*

A second mortgage was created in favour of a person in whose favour a usufructuary mortgage had been previously executed on the same property

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 61.

The covenant in the second bond provided that the money due under that bond should be paid first and then the money due under the previous bond. In a suit for redemption of the first mortgage only, it appeared that at the date of the suit for redemption if the second bond (simple mortgage) had been sued upon the suit would be barred by limitation. *Held*, that the mortgagors were entitled to get possession of the property mortgaged by paying the money due on the first mortgage only. (*Richards, C. J. and Piggott, J.*) KESAR KUNWAR *v.* KASHI RAM. **37 All. 634 : 30 I. C 777 : 13 A. L. J. 889.**
Also **40 I. C. 404.**

——S. 61—*Further charge—Agreement in subsequent mortgage to redeem prior mortgage at time of redemption of subsequent mortgage—Effect.*

Where an agreement in a later usufructuary mortgage to repay a prior simple mortgage before redeeming the former is part and parcel of the contract of usufructuary mortgage, the parties will be held bound by it. (*Griffin and Rafique, JJ.*) IMAM BAKSH *v.* ANWARI BEGAM.
18 I. C. 718.

——S. 61—*Consolidation—Contract to that effect.*

R and *B* mortgaged certain fields with possession. *R* alone mortgaged another property by way of simple mortgage to the same mortgagee containing the clause 'Frist I shall pay this money and then the money borrowed on the security of the fields.' *Held*, this did not amount to consolidation but merely fixed the time for payment of the amount of the second mortgage. (*Stanley, C.J. and Banerjee, J.*) GANGAI RAM *v.* KIRTARTH RAI. **33 All. 393 : 9 I. C. 319 : 8 A. L. J. 158.**

——S. 61—*Tacking mortgage—Redemption.*

Where two of the members of a joint family mortgaged certain joint property and where one of them along with another co-parcener created a further charge on the same property in favour of the same mortgagee, with a covenant that the earlier mortgage could not be redeemed unless the subsequent mortgage also was at the same time redeemed, such covenant is no clog and binds the joint family in the absence of repudiation by the member who was a party to the first but not to second mortgage. (*Banerjee and Griffin, JJ.*) SHEO KUMAR UPADHYA *v.* JITHU SINGH,
9 I. C. 52.

——S. 61—*Consolidation—No right to.*

As consolidation has the effect of interfering with the right of a mortgagor to redeem a mortgage on one property without being required to redeem another mortgage relating to a different property, a Court of Justice will always struggle against an interference with mortgagor's right, unless the covenant is shown to be express and unequivocal. 33 All, 393 ; 22 I.C. 132 ; 26 All. 559 Ref.; 2 P. R. 1890, Dist.; 4 All. 85, Diss. (*Shadi Lal and Dundas, JJ.*) JIWAN DAS *v.* THARAJ.
1 Lah. 105 : 14 P. L. R. 1920 : 55 I. C. 509 : 5 P. W. R. 1920.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 61.

——S. 61—*Several mortgages—Suit to redeem one particular mortgage.*

In a suit upon a mortgage the plaintiff should state clearly, especially in cases where there are more mortgages than one which mortgage he is seeking to redeem. (*Chevis, J.*) KARAN CHAND *v.* SULTAN. **72 P. W. R. 1912 : 13 I. C. 650 : 92 P. L. R. 1912.**

——S. 61—*Scope—Rule of Vint* v. *Padget —No applicability in India.*

Per *the Chief Justice.*—The right of separate redemption does not arise under S. 61 where the property sought to be redeemed is also included in another mortgage. *Quaere.*—Whether any right of consolidation is recognized in S. 61 Per *Seshagiri Aiyar, J.*—The rule of *Vint* v. *Padget* that where the equity of redemption has passed to a stranger he is bound by the same equities as the mortgagor ought not to be imported into India. The rule as to consolidation of mortgages against the mortgagor is not applicable against purchasers of the equity of redemption. (*Wallis, C. J. and Seshagiri Aiyar, J.*) PANAGANTI RAMARAYANINGAR *v.* MAHARAJAH OF VENKATAGIRI. **44 Mad. 301 : 12 L. W. 685 : 28 M. L. T. 234 : 61 I. C. 612 : 40 M. L. J. 236.**

——S. 61—*Consolidation—Prior time barred mortgage.*

Where a person has executed several mortgages in favour of one party, some of which are barred, he can sue for redemption of such of the mortgage-deeds only as are not barred. He is under no obligation to redeem those which are time barred. 43 I. C. 286, Foll. (*Spencer and Krishnan, JJ.*) ANIKADEN MANAPATTIKANARI KARNAVAN *v.* THAYYAN KALLIANI. **52 I. C. 622.**

——S. 61—*Consolidation—Time-barred debt —Mortgagor not bound to pay—Usufructuary mortgage—Mortgagee taking mortgage for arrears of rent due from mortgagor—Effect of.*

Assuming that all the mortgages over the same property and in favour of one and the same person ought to be simultaneously redeemed the rule should be confined to the cases where the mortgages insisted on being redeemed, are enforceable and are not such as are barred by limitation or any other cause from being enforced by suit. 32 M. L. J. 317; 19 A. 496 Rel. Per *Spencer, J.*—Where a mortgagee gets simple mortgages executed in respect of the arrears of rent due from the mortgagor on the property usufructuarily mortgaged he (the mortgagee) could not fall back on the security of the earlier usufructuary bond which contained a stipulation for payment of arrears of rent or redemption as the later mortgages constituted a novation of the original contract. (Per *Krishnan, J.*) There being merely a personal covenant to pay arrears of rent in the original usufructuary mortgage bond the lease to the mortgagor could not be said to be part of the mortgage transaction or the rent payable on the mortgage money, and therefore charged on the property equally with the principal sum. 37 A. 634, 26 M. 62, Ref. The mortgagee's claim for arrears of rent was a simple money debt and became merged in the judgment debt and the secured mortgage debts obtained by the mortgagee could no longer be enforced as such. 32 M. L. J. 263 ; 4 L. W. 477, Dist. (*Spencer and Krishnan, JJ.*) RAMA KRISHNA KUKKILAYA *v.* NEKKAR KUPPANNA. **22 M. L. T. 422 : (1918) M. W. N. 75 : 43 I. C. 286 : 6 L. W. 621 : 33 M. L. J. 581. *Also* 52 I. C. 622.**

——S. 61—*Consolidation—Mortgages—When allowed.*

Both under S. 61 of the T. P. Act and the law prior to its enactment, it was necessary for the consolidation of mortgages, that the two mortgages to be consolidated should have become united in title or come into the same hand. 79 L. T. 244, Ref. (*Benson and Wallis, JJ.*) VELAYUDAN CHETTY *v.* NILABAGAM CHETTY, **15 I. C. 605 : 23 M. L. J. 475.**

——S. 61—*Consolidation—When allowed.*

Per *White, C. J.*—S. 61 implies as is shown by the illustration, that when there are different mortgages in favour of one and the same person not in respect of different properties but the same property, the mortgagor cannot seek to redeem any one mortgage without redeeming the others also. The same principle will be equally applicable to a mortgagee having several mortgages over the same property seeking to obtain order for sale on one mortgage. (*White, C. J. and Krishnaswami Aiyar, J.*) BALASUBRAMANIA NADAR *v.* SIVAGURU ASARI. **11 I. C. 629 : 21 M. L. J. 562.**

——S. 61—*Consolidation—Rule of—Redemption—Contract — Validity— Central Provinces Laws Act, 1875—Mortgage by conditional sale—Right of redemption.*

The rule of consolidation does not apply in India. Even before the T. P. Act it was open to a mortgagor to redeem a subsequent mortgage without redeeming a prior mortgage of the same property, in the absence of a contract to the contrary. A contract curtailing the sixty years period of redemption allowed by law would be void. A document executed before the Central Provinces Laws Act which provided that the mortgagees will be the owners if the debt is not repaid within two years would in effect be a mortgage by conditional sale and the mortgagor would still have sixty years within which to redeem. (*Mittra, Offg. A.J.C.*) DEOCHAND *v.* BINJRAJ. **48 I. C. 368 : 14 N. L. R. 184.**

——S. 61—*Contract to the contrary—Consolidation of mortgages.*

A covenant that the mortgagor shall not redem a later mortgage without redeeming the earlier one is valid and enforceable even against a subsequent mortgagee or a transferee of the equity of redemption. (*Daniels, J. C.*) ABHAI NARAIN TIWARI *v.* MATA PRASAD. **24 O. C. 240 : 64 I. C. 83 : 8 O. L. J. 489.**

——S. 61—*Further charge—Transferee from mortgagor.*

Where a deed of further charge provides for redemption of an earlier mortgage before itself, the fact that there is a further covenant allowing redemption of the second independently of the

first mortgage, if the money is paid within a certain period, does not detract from the effect of the first clause. The covenant is not merely personal but can be enforced against a transferee from the mortgagor. (*Kanhaiya Lal, A. J. C.*) SURAJ BALI LAL *v.* RAM DULAR SINGH.
50 I. C. 897 : 6 O. L. J. 147.

——S. 61—*Consolidation—Prior mortgage—Subsequent deed in favour of mortgagee providing for consolidation— Transferee of mortgaged property if liable to pay both.*

A personal covenant in a subsequent simple deed not to redeem a prior mortgage until the subsequent deed is satisfied will not affect a subsequent transferee of the mortgaged property. 25 I. C. 905 Dist. But where the subsequent deed pledges as security the property already mortgaged, the transferee is bound to satisfy the amount due on both as a condition precedent to redemption. (*Stuart, A.J.C.*) JANG BAHADUR *v.* MATADIN.
46 I. C. 80 : 5 O. L. J. 159.

——S. 61—*Further charge—By one of several mortgagors—If enforceable against other mortgagors seeking redemption of original mortgage.*

Where a deed of further charge was executed by one of several co-mortgagors, subsequent to the original mortgage and the other co-mortgagors sued for redemption of the original mortgage, the mortgagee cannot in that suit claim that the plaintiffs should pay off the deed of further charge also. (*Lindsay, A. J. C.*) SANT SAHAI *v.* CHIHUTAE KURMI. **20 I. C 667.**

——S. 61—*Consolidation—Right of—Severance of equity of redemption—Mortgagors different.*

The right of consolidation can be exercised against successors in-title to the mortgagors only so long as the equity of redemption is not severed. There cannot be a consolidation of mortgages where the first mortgage is executed by the sole owner of the land mortgaged and the subsequent mortgage is executed by some one of the successors of the original owner. There cannot be two different usufructuary mortgages on the same land at the same time. (*Coutts and Adami, JJ.*) LALA RAM NARAIN LAL *v.* LALA MURLIDHAS.
1 Pat. L. T. 616 : 58 I. C. 129 : 5 Pat. L. J. 644.

——S. 62—*Mortgage— Usufructuary—Automatically determined—Ejectment of mortgagee.*

A mortgagee whose right to possession is automatically determined by the terms of the contract cannot claim to remain in possession thereafter and the mortgagor can maintain a suit for ejectment against him. 5 C.P.L.R. 103 Doubted. (*Mittra, A. J. C.*) PARAMSUKH *v.* YADOJI.
46 I. C. 743 : 15 N. L. R 101.

——S. 62—*Scope of.*

S. 62 is a special section supplementary to the general provisions of S. 60 and provides a summary remedy to the mortgagor in two special cases of usufructuary mortgage: (*a*) Where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the mortgaged property ; (*b*) Where the mortgagee is authorised to pay himself from such rents and profits the interest on the principal money. It

cannot apply to cases where from the conditions of the mortgage, accounts have to be made up between the parties. It contemplates the existence of only one transaction and does not apply to a case where a usufructuary mortgage having been executed, other mortgages by way of further charge have been executed by the same mortgagor. (*Lindsay, J. C.*) ZAHID ALI *v.* KEDAR NATH. **27 I. C. 427 : 17 O. C. 388.**

——S. 62 (b)—*Right to redeem usufructuary mortgage without redeeming prior simple mortgage.*

A mortgagor has a right to redeem a usufructuary mortgage and get possession of the mortgaged property without paying of a prior simple mortgage. (*Wallis, C. J. and Seshagiri Aiyar, J.*) PANAGANTI RAMARAYANINGAR *v.* MAHARAJAH OF VENKATAGIRI. **44 Mad. 301 : 12 L. W. 685 : 28 M. L. T, 234 : 61 I. C. 612 : 40 M. L. J. 236.**

——S. 63—*Improvements—Compensation.*

A mortgagee in possession has a right to the value of any additions made to the mortgaged premises irrespective of as to whether the additions were accessions within S. 63 of the T. P, Act, or were necessary for the preservation of the property, or were lasting improvements, reasonably made for the benefit of the property which added to selling value of it. 17 A, 282, Foll. 19 M. 927, Dist. (*Banerjee, J.*) RAHAMATULLAH BEG *v.* YUSUF ALI.
16 I. C. 635 : 10 A. L. J. 124.

——S. 63—*Accession— Substitution of property through mistake.*

The mortgagee had been in possession of extra land not as if it were an accretion to the property in the original mortgagee but as a substitution through mistake.

Held, obviously the mortgagor in a suit for possession would be entitled to recover that property. (*Macleod, C. J.*) NANCHI KOM KHATAL *v.* CHITITI KULSAMBI KOM. **1923 Bom. 42 (1).**

——S. 63—*Mortgage of share in Joint Stock Company.*

The mortgagor of certain shares in original capital of a Joint Stock Company has the right to the new shares purchased out of dividends on the old shares where the new shares were issued for increase of capital. (*Macleod, C. J. and Shah, J.*) MOTILAL HIRALAL *v.* BAI MANI.
23 Bom. L. R. 1279.

——S. 63—*Accession— Acquisition of sub-tenure—Expenses of acquisition.*

A mortgagor's right to the accession under S. 63 of the T. P. Act does not depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee in making the acquisition. Every acquisition by mortgagee of the sub-tenure does not enure to the benefit of the mortgagor. Raiyati lands purchased by a mortgagee in possession of the mortgagor's share of the mahal are accessions to the extent of the mortgagor's share in the mahal. The mortgagor can redeem the accession on payment of his proportionate share of expenses incurred in the acquisition. (*Coxe and Chatterjee, JJ.*) RAM BRICK NARAYAN SINGH *v.* AMBIKA PRASAD SINGH.
19 I. C. 90 : 17 C. W. N. 586.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 63.

——— S. 63—*Acquisitions by mortgage—Redemption.*

The mortgagee who has acquired what any stranger or even the mortgagor himself could have acquired equally well despite the mortgage, cannot be compelled to hand over his rights to the mortgagor. It is, therefore, competent to a mortgagee during the continuance of the mortgage to purchase an absolute occupancy tenure and to treat it as his separate property after the mortgage comes to an end. 5 Cal 198, Foll. 17 C W. N. 586 Dist. (*Leslie Jones, J.*) GIRDHARI RAM *v.* MUHAMMAD KARIM DAD KHAN.

63 P R. 1918 : 26 P. L. R. 1918 : 44 I. C. 266 : 53 P. W. R. 1918.

——— S. 63—*Accession—Mortgagor's right to.*

Upon redemption a mortgagor is entitled to take over the accession to the mortgaged property on payment of the cost of the acquisition. The mortgagor is not obliged to take them. (*Chevis, J.*) KHUDA DAD KHAN *v.* GIRDHARI RAM.

42 I. C. 468 : 163 P. W. R. 1917.

——— Ss. 63 and 70—*Accretions—Acquisitions after decree for sale.*

Ss. 63 and 70 must be read together and the accession must be received during the continuance of mortgage. Accessions after the decree for sale does not pass to the auction-purchaser but belongs to the mortgagor as the mortgage interest had ceased to exist at the time of accession. (*Spencer and Ramesam, JJ.*) KAPNIAH SIVANANJIAH *v.* SITHAY GOUDAR.

4 L. W. 449 : 70 I. C. 367 : (1921) M. W N. 510 : 41 M. L. J. 490.

——— S. 63—*Accretions to mortgaged property.*

Where a mortgagee in possession availing of his position as such, presents a single Dharkast for the accretion adjoining the mortgaged land as well as for accretion adjoining his land and the Dharkast is granted to him he holds the whole property in trust for the mortgagor. (*Ayling and Spencer, JJ.*) MELOTH KAMAN NAIR *v.* KODATH KUMARAN NAIR.

(1914) M. W. N. 231 : 22 I. C. 609. 1 L. W 102.

——— S. 63—*Improvements by mortgagee.*

Agreement by mortgagor to pay sums expended on repairs and improvements by mortgagee is not compulsorily registrable. (*Hallifax, J.*) RAMBILAS *v.* LAXMI NARAYAN. **1922 Nag. 262.**

——— S. 63—*Accession—Acquisition of subsisting tenancy.*

Where one of several mortgagees acquires tenancies while in possession and claims the cost of such acquisitions upon redemption, no merger under S. 63 takes place. The section does not require the accession to have been made by the mortgagee by availing himself of his position as such, nor can it be urged that the acquisitions might have been made even if the mortgage had not been taken. (*Drake Brockman, J C.*) PYARELAL *v.* PANNA LAL. **56 I. C 193.**

——— Ss. 63 and 72 (b)—*Accession—Wells—Improvements.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 63.

A well constructed by the mortgagee in possession without the express or implied consent of the mortgagor, the separate possession of which apart from the land is not possible and which is not necessary for the preservation of the property from destruction or deterioration, must be delivered to the mortgagor along with the land on redemption. 20 M. 120 ; 20 M. 124, Dist. 19 M. 327, Foll. (*Hallifax, A. J. C.*) RAJARAM *v.* VITHAL RAO. **26 I. C. 712 : 10 N. L. R. 166.**

——— S. 63—*Mortgage of Sir—Rights of mortgagee.*

Mortgagee is entitled to proceed against what is left of *Sir* rights of the mortgagor, *viz.*, the ex-properietary cultivating rights though the proprietary right may have passed to another person. (*Stanyon and Hallifax, A. J. Cs.*) SHEOLAL *v.* NANHELAL. **17 I. C. 129 : 8 N. L. R. 123.**

——— Ss. 63, 72 and 76—*Improvements by mortgagee—Rights to costs—Whether can be awarded under circumstances.*

The Transfer of Property Act contains no express provisions regarding the rights of a mortgagee making lasting improvements in respect of the property mortgaged, to reasonable costs for the same. But this does not signify that the silence amounts to an intention of the legistature that such rights should not be exercised. Therefore, proper costs will be allowed to mortgagees making lasting improvements which have the effect of increasing the value of the property. (Per *Marten, J.*).—While awarding such costs the Court should pay particular attention to the question whether the costs are extravagant and should take an inquiry regarding the *bona fides* of the claim under the circumtances of each particular case. (*Batchelor A. C. J. and Marten, J.*) HALAGATHI *v.* SATAVIRAPPA. **47 I. C. 751 : 5 O. L. J. 513.**

——— S. 63—*Accretion to mortgaged property—General rule.*

Though the general rule is that accretions to the mortgaged properties are subject to redemption, mortgagee may, if he chooes, keep them for his benefit and distinct from the mortgaged property. (*Das and Adami, JJ.*) MAHESWAR PRASAD SINGH *v.* BABU RAM RAI.

1921 Pat. 93 : 2 Pat. L T. 225 : 60 I. C. 308 : 3 U. P. L. R. (Pat.) 22.

——— S. 63—*Accession—Waste-land.*

S. 63 does not contemplate Government waste land adjoining a mortgage holding as coming within the category as an accession. (*Pratt, J.*) MAUNG SHWE ON *v.* PONNIAH MUDALIAR (A) KAU-LAH. **1 Bur. L. J. 262 : 1923 R. 127 (1)**

——— Ss. 63 and 76—*Growing crops—Right of mortgagee—Usufructuary mortgage.*

An ordinary usufructuary mortgagee or his tenant is entitled to all the crops sown or planted by him on the land which were growing there on at the time of redemption and to free ingress and egress to gather and carry them provided that such crops were grown or planted before the person who grew them had notice of

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 63.

the intended redemption. 2 B. 670; 13 M. 15; 8 A. 502, Ref. (*Heald, A. J. C.*) MAUNG GAW YA *v.* MAUNG TALOK. **53 I. C. 444 : (1919) 3 U. B. R. 141.**

——Ss. 63 and 70—*'Accession'—Meaning.*

A mortgagee in possession of ten acres of land and bringing under cultivation eight adjacent acres of land cannot be said to form an accession of eight acres to the ten acres mortgaged. (*Saunders, J. C.*) NGA CHO *v.* MI SE MI. **10 Bur. L. T. 245 : 36 I. C. 7. 2 U. B. R. (1916) 110 :**

——S. 63—*Accession—Addition of new ar ea—Possession by mortgagee of such area if on behalf of mortgagor.*

An addition to the mortgaged property of new area covered up by extensions is not an accession within S. 63 of the T.P. Act and the possession of such area by the mortgagee is not one on behalf of the mortgagor. (*Twomey, J.*) THA DUN *v.* THE ZAN. **11 I. C. 808 : 4 Bur. L. T. 167.**

——S. 65—*Mortgagor in possession— Duty of—Notice.*

A mortgagor in possession of the mortgagee's property must give notice to the mortgagee to enable him to defend his rights if he is threatened or obstructed by any person claiming as the true owner. (*Russell and Chandavarkar, JJ.*) HILLAYYA *v.* NARAYANAPPA TIMAYYA. **36 Bom. 185 : 12 I. C. 913 : 13 Bom. L. R. 1200.**

——S. 65—*Lease—Mortgage—By two persons—Lease to one of them—Agreement without consideration as regards the other.*

Where two persons mortgaged the properties to another with possession and one of them took the mortgaged properties on lease which stipulated that rent should be a charge upon the properties, *held*, that the agreement in the mortgage document by the other mortgagor to pay rent was without consideration and that he could not be held liable for rent though he is liable only for the mortgage money. (*Rattigan and Scott-Smith, JJ.*) KISHEN CHAND *v.* SOHAN LAL. **20 P. L. R. 1915 : 26 I. C. 913 : 245 P. W. R. 1915.**

——Ss. 65 and 66—*Mortgage by manager or guardian.*

A mortgage-deed executed by a manager appointed under the Guardians and Wards Act limits the ordinary rights of a mortgagor in possession. (*Atkinson and Kingsford, JJ.*) ANAND RAM *v.* DHANPAT SINGH. **1 Pat. L. J. 563 : 38 I.C. 37: 2 Pat. L. W. 341.**

——S. 65 (a)—*Knowledge of—Defect of title.*

To a mortgage before the T. P. Act the provisions of S. 65 (*a*) are not applicable. If there is a defect of title regarding a portion of the mortgaged property and the mortgagee is aware of the fact he has no right to get compensation. (*Lord Macnaughten.*) ABDULLA KHAN BARRAT *v.* HUSSAIN. **35 All. 48 : 40 I. A. 31 : 17 C. W. N. 233 : 13 M. L. T. 182 : (1913) M. W. N. 131: 17 C.L. J. 312 : 15 Bom. L. R. 432 : 17 I. C. 737 : 25 M. L. J. 91 (P. C.).**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 65.

——S. 65 (a)—*Mortgage deed including lands not belonging to the mortgagor.*

A mortgagee can sue on his mortgage to enforce his charge on lands belonging to mortgagor who had by mistake included in the deed some lands which he had no power to charge. 33 C. 613; 1 C. L. J. 337, Dist. (*Harrington and Carnduff, JJ.*) HARKU SINGH *v.* MAUN LAL. **19 I. C. 423.**

——S. 65 (a)—*Mortgage—Covenant for title—Breach—Waiver.*

The statutory right given on the breach of covenant for title could not be taken away except by an express release of such rights by him or by acquiescence of such a very long duration that a release could be safely presumed. 24 A. 521, (P. C.), Dist, 35 A. 48, Rel. The damages should be ascertained on the basis of the present income minus all reasonable charges or expenses. (*Sadasiva Aiyar and Hannoy, JJ.*) THEKKEMAUNENGATH RAMAN *v.* KAKKESSARI POZHIYOT MANAKKAL. **28 M. L. J. 184 : 27 I. C. 989 : 2 L. W. 433.**

——S. 65 (c)—*Public charges—Duty to pay.*

The duty to pay public charges cast on the mortgagor in possession is in the nature of a personal covenant, not running with the land. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) PUNUGU SUBBIAH *v.* NUKALAPATI RAMI REDDI, **39 Mad. 959: 19 M. L. T. 210 : 33 I. C. 326 : (1916) 1 M. W. N. 239 : 30 M. L. J. 331.**

——Ss. 65 (c) and 72—*Mortgage—Prior and subsequent—Sale of equity of redemption to prior mortgagee—Taxes—Repairs.*

Where after a sale of the equity of redemption to a first mortgagee he pays off the taxes covenanted to be paid by the mortgagor he cannot charge the same as against the second mortgagee on redemption. But he can add the necessary expenses of repairs to the amount of his mortgage as against second mortgagee. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) IBRAHIM SAHIB *v.* ARUMUGATHAYEE. **16 I. C. 877 : 38 Mad. 18.**

——S. 65 (c)—*Public charges on the land—Sale or resumption by Government on default of payment—Re-acquisition by original mortgagor.*

It is the duty of the mortgagor under S. 65 (*c*) of T. P. Act to pay the public charges due on the property in his possession. If he commits default, and the land is sold or resumed by the Government for arrears of revenue and the mortgagor subsequently reacquires his original interest in the land, the original mortgage is not extinguished. 26 Mad. 385 Foll. (*Pratt, J.*) PO DWE *v.* K. M. T. S. CHETTY. **51 I. C. 574 : 12 Bur. L. T. 41.**

——S. 65 (c)—*Implied covenant—Liability to pay land revenue.*

The implied covenant under S. 65 for the mortgagor to pay land revenue, extends to the purchaser of the mortgaged property. Where the land has been sold for default to pay revenue and purchased by the defaulter free of mortgage, the property is not freed from the mortgage, but continues subject to it, as the omission to pay revenue is in fraud of the mortgagee. (*Parlett, J.*) VEERAPPA CHETTY *v.* KANNAPPA CHETTY. **17 I. C. 878 : 5 Bur. L. T. 268.**

——S. 66—*Mortgage of ship—Right of mortgagee of ship to interfere with contracts for its employment — Prejudice to security—Onus of proof.*

Mortgagees of ships can interfere with the contracts for the employment of the ships if they prejudiced the security. If no such prejudice is shown they will be restrained from interfering with the performance of the charter parties. The onus of proof of prejudice lies on the mortgagee. (*Scott, C. J. and Batchelor, J.*) ANDREW YULE & CO. *v.* ARDESHIR BOMENJI DUBASH.
24 I. C. 758 : 16 Bom. L. R. 178.

——S. 66—*Power of leasing—Mortgagor's power.*

A simple mortgage in India, unlike the legal mortgage in England, does not prevent the mortgagor from leasing in the ordinary course of management but not so as to impair the value or impede the operation of the mortgage. 10 W. R. 325, Foll. (*Jenkins, C. J. and Holmwood, J.*) BAL MAKUND RAUYIA *v.* MOTILAL BARMAN.
32 I. C. 195 : 20 C. W. N. 350.

——S. 66—*Mortgagor in possession—Right and liabilities of.*

A mortgagor in possession may take a lease which is usual in the ordinary course of management, *i.e.*, a lease from year to year or month to month, but he cannot grant a lease on unusual terms so as to alter the character of the land or so as to authorise its use in a manner different from that in which he was using it. (*Beachcroft and Mookerjee, JJ.*) MADAN MOHAN SINGH *v.* RAJ KISHORI KUMARI. **17 I. C. 1 : 17 C. L. J. 384.**

——Ss. 66 and 65—*Lease by mortgagor — Power to make leases.*

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management; but it is not competent to him to grant a lease on unusual terms to alter the character of the land or to autherise its use in a manner or for a purpose different from the mode in which he himself had used it before creating the mortgage. (*Mittra, Offg. A. J. C.*) SHANKER SINGH *v.* HUKUMCHAND. **47 I. C 99 : 14 N. L. R. 117.**

——S. 66—*Rights of mortgagee.*

A mortgagee cannot have his rights, created on the date of mortgage, impaired by any subsequent act of the mortgagor to which he was not a party (*Stanyon, A.J.C.*) JAINAM *v.* DELEDAYAL SURAJ PRASAD. **46 I. C. 789.**

——S. 66—*Long lease—Covenant against alienation—Suit for declaration.*

A mortgagor cannot by any dealings with the mortgaged property subsequent to the date of mortgage affect the rights of the mortgagee. The assignee of the mortgagor's rights takes them subject to the mortgage and if the property is sold or foreclosed by the mortgagee in proper proceedings, the interest which the mortgagor might have created subsequent to the mortgage may be destroyed. A grant of a long lease, *viz.*, for 20 years by the mortgagors, is prejudicial to the saleable value of the mortgage security and injurious to the interest of the mortgagee. The lease is not void on that ground, but holds good in every respect except as to the long period. Where the mortgagee sues for a declaration that the lease for a long term is void as against him. *Held*, that there was a good cause of action and that the court could grant a declaration in a modified form to the effect that the lease is not absolutely void and inoperative but only in so far as the long term is concerned. (*Lindsay, J.C. and Kanhaiya Lal, A.J.C.*) SYED HUSAIN *v.* BANK OF UPPER INDIA, LTD. **30 I. C. 289 : 2 O. L. J. 291.**

——Ss. 66 and 65—*Permanent lease—Mortgagee, if bound.*

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management but he cannot make a perpetual lease so as to bind the mortgagee in case it is prejudicial to his rights. 17 C. L. J. 384 ; 2 A. L. J. 294 ; 36 A. 248, Ref. (*Kanhaiya Lal, A. J. C.*) RAM SARUP *v.* SURAJ DIN. **30 I. C. 258 : 2 O. L. J. 276.**

——S. 66—*Lease by mortgagor—Right of mortgagee to take possession.*

A mortgagor cannot, by any dealings with the mortgaged property subsequent to the date of the mortgage, affect the mortgagee's rights under the contract. Lessees claiming through the mortgagor under leases granted to them subsequent to the date of mortgage could not, on the ground of the leases, defeat the mortgagee's right to take possession under the mortgage. 30 B. 250 ; 2 A. L. J. 294, Foll. 6 C. 317, Dist. (*Lindsay and Rafique, JJ.*) QURABAN ALI *v.* RAGHUBAR DAYAL. **16 I. C. 476 : 15 O. C. 239.**

——Ss. 66 and 65—*Settlement of tenants.*

Where a person gets a contractual benefit from the mortgagor in possession after the mortgage, the onus is on such person to prove that it was a benefit which he retains in usual course of the management of the property. Rents settled by the mortgagor in possession with his tenants are not binding on the mortgagee. Where in proceedings under S. 109 (*c*) of the B.T. Act there were agreements between the mortgagor in possession and the tenants by which the Bhoali rents were converted into Nakdi and at low rentals the former taking large Nazranas as the property was going to be sold in execution of the mortgage-decree. *Held*, that the mortgagee was not bound by the said agreements which no prudent manager would have entered into in the usual course of management. 1 Pat. L. J. 563; 17 C. L. J. 384, Foll. (*Coutts and Sultan Ahmad, JJ.*) MATHURA RAI *v.* MANDIL DAS. **56 I. C. 805 : 1 Pat. L. T. 392.**

——S. 66—*Right of mortgagor — When in possession.*

A manager under Guardians and Wards Act acknowledged the title of the tenants to a Mokurari right at nominal rent and agreed to their being entered in the record of rights as such. *Held*, that the mortgagor in possession can deal with the property in the usual and customary way, without prejudicially affecting the property as security for the debt. Where a person gets a contractual benefit from the mortgagor in possession after the mortgage, the onus is upon such

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 66.

person to prove that it was a benefit which he might derive and retain in the usual course of management of the property. (*Atkinson and Kingsford, JJ.*) ANAND RAM MARWARI *v.* DHANPAT SINGH. **1 Pat. L. J. 563 : 38 I. C. 37 : 2 Pat. L. W. 341.**

——S. 66—*Rights of mortgagor— English mortgage.*

Under S. 58 of the T. P. Act an English mortgage does not transfer the property absolutely to the mortgagee but the mortgagor remains owner subject to the mortgagee. He can therefore exercise the ordinary rights of an owner in possession such as leasing out the property, etc., except committing such acts as are contemplated in S. 66. In an English mortgage where the mortgagor is in possession he can lease the property and his receipt of rent in advance for a certain period will not render the lease invalid unless the security is thereby rendered insufficient. (*Fox, C. J. and Twomey, J.*) TANA PEENA CHUNA *v.* MAMAKKANTAKATH. **8 L. B. R. 413 : 34 I. C. 24 : 9 Bur. L. T. 243.**

——S. 67—*Surety—Mortgage of immeveable property as security for due performance--Failure of judgment-debtor—Decree-holder whether can proceed against the property of surety.*

Where a surety has failed to perform his contract in default of the judgment-debtor, the decree holder can proceed against the property of the surety mortgaged by him as security for due performance of his suretyship. (*Piggott and Walsh, JJ.*) MUKTA PRASAD *v.* MAHADEO PRASAD. **38 All. 327 : 33 I. C. 982 : 14 A. L. J. 385.**

——S 67—*Right to sell—Security.*

When money is secured on property whether by usufructuary or other mortgage the mortgagee can sell the property to realise the amount of his mortgage subject to the limitation imposed by T. P. Act. (*Richards, C.J. and Tudball, J.*) BHARI LAL *v.* DEOKI NANDAN LAL. **24 I. C 867 : 12 A. L. J. 897.**

——S. 67—*Decree for sale — English mortgage.*

In view of the provisions of S. 67 of the Act a decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage. (*Mookerjee and Buckland, JJ.*) ASKARAN BAID *v.* GOBORDHAN KOBRA. **26 C. W. N. 318 : 1922 Cal. 52.**

——S. 67—*Right of mortgagee to sell—Adverse possession against mortgagor—Mortgagee's right of suit not lost by title by adverse possession being enforced.*

The mortgagee's right of suit for his debt and realisation of his security within the time allowed by law is not lost by a person enforcing a title by adverse possession against the mortgagor. (*Sanderson, C. J. and Mookerjee, J.*) PRIYA SAKHI DEBI *v.* BIRESHWAR SAMANTA. **44 Cal. 425. 21 C. W. N. 177 : 37 I. C. 277 : 27 C. L. J. 212.**

——S. 67—*Rights o mortgagee—Release of one mortgagor—Maintainability of suit against others—Execution of a fresh mortgage by release, effect of, on mortgagee's right) suit.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 67.

A mortgagee may apart from S. 60 abandon part of his claim releasing one of the mortgagors and sue others on the mortgage bond to recover their proportionate share of the mortgage money. The release may be gratuitous. But the released mortgagor must be joined as a party so that the owners of the equity of redemption may be fully represented. 30 C 755 : 2 C. L. J. 202 : 33 C. 613 : 11 C. W. N. 408 : 12 C. W. N. 911, Foll. 2 A. 903, Dist. The execution of a fresh mortgage by the released mortgagor on the same security does not effect the plaintiff's right of suit against the other mortgagors on the original mortgage. The fresh mortgage is a separate transaction and does not allow the mortgagee to release so as to increase the burden on the mortgagors. 6 C.L.J. 46. Ref. (*Newbould, J.*) BASANTA KUMAR SARVAGYA *v.* JOGENDRA NATH DUTTA. **36 I. C. 530.**

——S. 67—*Duty of mortgagee — Payments made—Appropriation—Mortgagee holding several mortgages from the same person.*

Where a mortgagee holds several mortgages from the same person and is paid out of the sale proceeds of one security, must apply the amount in reduction of the amount under that security and cannot apply it to unsecured debt or debts secured on other securities so as to effect other mortgagees. (*Sadasiva Aiyar and Burn, JJ.*) LAKSHMANAN CHETTY *v.* MUTHAYA CHETTY. **40 M. L. J. 126 : 62 I. C. 833 : 29 M.L.T. 189.**

——S. 67--*Trustee mortgaging his own properties to temple—Suit on.*

A trustee took a loan from temple funds and executed mortgage of his property for the purpose. In a suit under S. 92, C. P. Code, the transaction was declared a breach of trust and the trustee was directed to immediately pay the money. In a suit by the successor of the trustee to enforce the mortgage before the mortgage term, *held*, that the money had become payable under S. 67 and the suit was not premature. (*Wallis, C. J. and Sadasiva Aiyar, J.*) ARUNACHALA CHETTIAR *v.* RAJAH OF KALAHASTI. **13 L. W. 312 : 29 M. L. T. 176 : 62 I. C. 505 : (1921) M. W. N. 172.**

——S. 67—*'Contract to the contrary'—Suit for interest only.*

A mortgage-deed provided for the payment of interest every month and for enhanced interest on default. *Held*, that there was a 'contract to the contrary' within S. 67 of the T. P. Act, and that a suit for interest would lie even before the principal money became due 14 Mad. 477 Dist. But if there is an absolute covenant in the deed, prohibiting the mortgagee from suing for interest alone, he cannot sue for interest before the principal amount becomes payable. (*Seshagiri Aiyar and Napier, JJ.*) SUBBIAH CHETTY *v.* KUPPAMMAL. **31 M. L. J. 437 : (1916) 2 M. W. N. 86 : 35 I. C. 104. 3 L. W. 587.**

——S. 67—*Foreclosure against mortgagor—Redemption by* zuripeshgi *lessee— Mortgagor's right of redemption not revived.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 67.

Where after a mortgage had been foreclosed a *zurpeshgi* lessee, who was not a party to the foreclosure suit, redeems the mortgage for his own benefit, a representative on the mortgagor is not entitled to redeem the lessee in turn. (*Mittra, A. J. C.*) GULAM NABI *v.* KANHAISINGH.
59 I. C. 511 : 16 N. L. R. 180.

——S. 67—*Mortgage — Foreclosure —Money due for an instalment.*

It is open to a mortgagee to bring a suit for foreclosure for an instalment consisting of a part of the principal and interest secured by a mortgage by conditional sale. There is nothing to prevent the parties agreeing to allow a foreclosure for interest only or for part of the mortgage money. 1906 1 Ch. 804 : 31 C. 922 : 14 M. 477, Ref. (*Batten, A. J. C.*) KARNIDAN *v.* MEGHRAJ.
30 I. C. 981 : 11 N. L. R. 153.

——S. 67—*Mortgage — Date for payment fixed—Usufructuary mortgage—Sale.*

Where a due date is fixed for payment of the mortgage money in a mortgage deed, the mortgage is not a pure usufructuary mortgage and the mortgagee is entitled to sell immediately after the due date has passed even though he still remains in possession of the property. (*Coutts and Ross, JJ.*) JAG SAHU *v.* MUST. RAM SAKHI KUER.
1 P. 350 : 3 P. L. T. 332 : 1922 Pat. 58 : 1922 P. 167.

——S. 67—*Usufructuary mortgage—Remedies.*

A usufructuary mortgagee cannot sell or foreclose but he can protect himself by adding the personal covenant and charge. (*Jwala Prasad and Ross, JJ.*) JAINANDAN *v.* BAIJ NATH.
63 I.C. 297 : 2 Pat. L.T. 229.

——S. 67—*Decree creating charge—Execution of suit.*

A decree-holder who was to get a particular allowance from the judgment-debtor which was charged on a certain property is not bound to file a suit to enforce the decree for the purpose of realising the money. The property can be sold in execution of the decree and no receiver is necessary. S. 67 does not apply to this case. (*Jwala Prasad and Adami, JJ.*) RAJA BRAJA SUNDAR DEB *v.* SIVARANJAN DEI.
59 I.C. 282 : 1 Pat. L. T. 647.

——S. 67—*Right of first mortgagee.*

The first mortgagee is entitled to bring the mortgaged property to sale in exscution of his decree irrespective of whatever other claims there may be that are subsequent to his and irrespective of litigation likely to prejudice the interests of a subsequent mortgagee. (*Hartnoll, Offg. C.J. and Twomey, J.*) MAUNG MAUNG *v.* WIGHTMAN.
24 I. C. 468 : 7 Bur. L. T. 64.

——S. 67 (a)—*Simple mortgagee—Right to sell.*

A simple mortgagee is entitled to a decree for a sale as a matter of course though under the terms of the mortgage bond he could on the mortgagor's default in payment of interest take possession of mortgaged properties and enjoy the same as under a usufructuary mortgage. (*Lord Macnaghten.*) LINGAM KRISHNA *v.* MANYA SULTAN OF VIZIANAGRAM.
15 C. W.N. 441 : 9 M. L. T. 445 : 8 A. L. J. 594 : 13 C. L J. 584 : 13 Bom. L. R. 447 : (1911) 1 M. W. N. 429 : 10 I. C. 272 : 21 M. L. J. 1147 (P. C.).

——S. 67 (a)—*Foreclosure—Suit for sale—Defendant not prejudiced—Decree for foreclosure.*

Where the plaintiff sued for sale on a usufructuary mortgage containing a provision for foreclosure and the defendants bought the property but failed to pay the price on account of the plaintiff's mortgage, a foreclosure decree could be passed in plaintiff's favour. (*Griffin and Ryves, JJ.*) MANOHAR SINGH *v.* LACHMAN SINGH.
21 I. C. 457 : 11 A. L.J. 793.

——S. 67 (a)—*Usufructuary mortgage—Mortgagee's right of sale.*

In a usufructuary mortgage the mortgagee has no right to recover the money by sale of the mortgaged property unless there is a covenant to pay the money. The terms of the mortgage-deed in suit in this case were construed not to indicate any covenant to pay the money. (*Cox and Richardson, JJ.*) BASWAN SINGH *v.* MAHAMED FARIZ.
27 I. C. 800.

——Ss. 67 (a) and 68—*Personal remedy.*

According to English Law, mortgagee has always a personal remedy open to him against the mortgagor. The principle applies here in India, when the relations of the parties are not covered by any Act or enactment. (*Hayward, J. C. and Walley-Cohen, A. J. C.*) TOTA DAS *v.* UTUMAL.
10 I. C. 975 : 4 S. L. R. 244.

——Ss. 67 (d) and 68—*Co-mortgagees—Tenants in common—Suit by one, the other refusing to join—Addition of, as defendant—Form of decree, etc., to be passed.*

Where a property is mortgaged to two persons as tenants in common and there is no covenant to repay each separately a moiety of the amount, the right of either mortgagee who desires to realise, failing the consent of the co-mortgagee, is to sue for a mortgage decree in respect of the whole sum secured, joining his co-mortgagee as a defendant. In such a case the decree should provide for all necessary accounts and payment, except that there can be no judgment for a sum of money entered as between the mortgagee (defendant) and the mortgagor. (*Lord Buckmaster.*) SUNIT ABALA *v.* DHARASUNDARI.
46 I. A. 272 : 37 M. L. J. 483 : 17 A. L. J. 997 : (1919) M. W. N. 821 : 22 Bom. L. R. 1 : 24 C. W. N. 297 : 53 I. C. 131 : 11 L. W. 227 (P. C.).

——S. 67 (d)—*Applicability of—Severance of interests of mortgagees.*

One of two mortgagees, each having a half share in two simple mortgages, took a usufructuary mortgage of the whole of the property mortgaged from the mortgagors, the consideration being the amount of the two simple mortgages. *Held*, that the discharge operated only in respect of the share of the usufructuary mortgagee

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 67.

and that the other mortgagee could recover his share. (*Knox, A. J. C. and Bannerjee, J.*) JAUHARI SINGH *v.* GANGA SAHAI. **41 All. 631 : 17 A. L. J. 731 : 51 I. C. 107 : 1 U. P. L. R. (H.C) 71.**

——S. 67 (d)—*Decree in suit by one co-mortgagee for his share—Severance.*

A decree for sale in a suit by one co-mortgagee to which the mortgagor was a party for his share of the debt can be said to effect a severance with the consent of the mortgagor within S. 67 (*d*) and another co-mortgagee can maintain a suit to recover his share. (*Sadasiva Aiyar and Tyabji, JJ.*) VIJAYA BHUSHANAMMAL *v.* EVALAPPA MUDALIAR. **25 I. C. 91 : 39 Mad. 17.**

——S. 68.

S. 68 (a) Personal Liability.
S. 68 (b) Loss of Secuirity.
S. 68 (c) Failure to Secure Possession.
S. 68 (a) [Waste Personal Liability.]

——S 68 (a)—*Usufructuary mortgage—Occupancy holding—Mortgage void—Suit to enforce personal covenant.*

Where a usufructuary mortgage is void as effecting a transfer of an occupancy holding, the personal covenant in the mortgage is also void and unenforceable, 16 I. C. 42; 22 A. 205 : 18 A, 121 Rel. (*Lindsay and Stuart, JJ.*) HAR PRASAD TEWARI *v.* SHEO GOVIND TEWARI. **44 A. 486 : 20 A. L. J. 318 : 1922 A. 134.**

——S. 68 (a)—*Personal liability—Occupancy holdings mortgaged—Indemnity clause, not enforceable.*

The defendants mortgaged with possession their occupancy holdings to the plaintiffs for seven years. The amount was agreed to be paid by instalments from the usufruct. In case the holdings went out of the possession of the mortgagees they were entitled to recover their money by sale of certain other property of the mortgagors The mortgagees were dispossessed from the occupancy holding and sued for sale of the property as promised. *Held*, that the deed embodied one single transaction. The right to recover the amount by sale of other property was not enforceable. (*Sulaiman and Gokul Prasad, JJ.*) TULSI RAM *v.* SAT NARAIN. **18 A. L. J. 703 : 2 U. P. L. R. (All.) 229 : 57 I. C. 445 : 43 All. 81.**

——S. 68 (a)—*Money-decree against mortgagor—Sale.*

A sale of the mortgaged property can be held in execution of a decree for money obtained under S 68 if the claim under the mortgage-deed is unenforceable. (*Walsh and Sundar Lal, JJ.*) CHEDI LAL *v* SADAT-UN-NISSA BIBI. **39 All. 36 : 36 I. C. 907 : 14 A. L. J. 902.**

——S. 68 (a)—*Suit on mortgage—Money-decree.*

In a suit to recover mortgage-money a simple money-decree can be given only as a matter of grace. Even then the Court should have the plaint amended by adding that claim. (*Richards, C. J and Rafique, J.*) MOHAN LAL *v.* LEKHRAJ SINGH. **33 I. C. 111.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (a)—Personal liability.

——S. 68 (a)—*Mortgagor in possession—Mortgagee, if can sue for profits alone.*

A mortgagee who, though entered in the revenue papers as such, is not in possession cannot sue for profits especially when the mortgagor is himself in possession. His remedy is to sue for possession. (*Bannerjee, J.*) HANUMAN DIN *v.* RAM BISHAL. **14 I. C. 260.**

——S. 68 (a)—*Agreement to pay within fixed period—Default—Rights of mortgagor.*

Where under a mortgage with a condition for foreclosure, the mortgagor agrees to pay the mortgage money within a fixed period, the only remedy mentioned in the deed as available to the mortgagees is foreclosure. The agreement for payment cannot be construed into a personal covenant on the part of the mortgagor. Where there is no personal liability created under the terms of a mortgage, a subsequent acknowledgment cannot extend the time for meeting a non-existent liability. (*Kotwal and Prideaux, A.J.Cs.*) HARLAL SA *v.* SHAIKH RAHIM. **1924 Nag. 53.**

——S. 68 (a)—*Application by mortgagee for personal decree—Unregistered mortgage deed—Contract Act, S. 65—Meaning of 'becoming void.'*

In the absence of an express contract in the mortgage deed to pay personally, no such contract can be implied and the mortgagee cannot get a personal decree against mortgagor in such cases. The fact that the mortgage deed is ineffectual in law cannot be presumed to alter the intention of the parties, that the advanced money was to be realised from the mortgaged property. (*Kotwal, A. J. C.*) BHOJRAJ *v.* DUKALA. **57 I. C. 680.**

——S. 68 (a)—*Personal liability—Intention of the Legislature.*

The language of S 58 (*a*) of the T.P. Act indicates an intention on the part of the legislature to exclude the personal liability of the mortgagor in all cases where it is not expressly provided for. The mere fact that mortgagor undertakes to pay the mortgage-money by a fixed date does not amount to a stipulation to repay the same within the meaning of S. 68 (*a*) when the only remedy mentioned in the mortgage deed is foreclosure. (*Drake Brockman, J. C*) GOVIND *v.* JAGANATH. **33 I. C. 753 : 12 N. L. R. 19.**

——S. 68 (a)—*Usufructuary mortgage—Mortgagor retaining possession after abandonment by the mortgagee — Personal covenant becomes operative.*

In a usufructuary mortgage, upon the mortgagee's abandonment of possession and the mortgagor's taking back the same, the personal covenant to pay with interest comes into force from such date. (*Mittra, Offg. A. J. C.*) HARI *v.* SHRIDHAR. **23 I. C 131 : 10 N. L R. 9.**

——S. 68 (a)—*Mortgage by widow—Death of widow before expiry of term—Possession taken by reversioners—Rights of mortgagee.*

Where a Hindu widow mortgages her husband's estate and dies before the expiry of the term whereupon possession is taken by the reversioners of her husband, it is open to the mortgagee to obtain a decree against the assets of the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (a)—Personal liability.

widow in the hands of the reversioners. (*Dalal, A. J. C.*) CHHANNU LAL *v.* MT. RAJ KUAR.
9 O. L. J. 24 : 1922 Oudh 48.

——S. 68 (a)—*Personal liability — Money decree.*

After an application for personal decree is disallowed under O. 31, R. 5, no separate suit to enforce the personal remedy provided by S. 68 of the T. P. Act is maintainable. R. 6 covers cases where mortgaged property cannot be sold at all for any reason other than the wrongful act of the mortgagor. (*Stuart and Kanhaiya Lal, JJ.*) BRIJ BIHARI LAL *v.* INDAR PAL SINGH.
23 O. C. 145 : 57 I. C. 967 : 2 U. P. L. R. (J. C.) 139.

——S. 68 (a)—*Right to sue for mortgage-money—Deeds of further charge—Agreement that whole amount should be paid on redemption.*

Where the mortgagors executed a deed of further charge to a mortgagee under which the amount thereunder was to be paid at the time of redemption or if the debt due on the deed was not repaid within a certain time, the mortgagor should repay it at the time of the redemption of the mortgage and redemption was not to be allowed until the debt was discharged. *Held*, that the amount due under the said deeds could not be recovered either at any time after their execution or even at the time when redemption of the mortgage first became possible, but only at the time when the mortgagors or their successors-in-interest attempted to redeem the mortgage. (*Lindsay, J.C. and Stuart, A. J. C.*) MEHARBAN SINGH *v.* RAGHUNATH SINGH. 49 I.C. 115: 5 O. L. J. 768.

——S. 68 (a)—*Personal covenant—Mortgage.*

In a mortgage a mere promise to pay the mortgage-money within a certain period does not import a personal liability. The remedy provided in the deed for the satisfaction of the morgage-debt is the real criterion. (*Lindsay, J. C.*) SHIAM SUNDAR *v.* DILGANJAN SINGH. 20 O. C. 155 : 39 I. C. 540 : 4 C. L. J. 380.

——S. 68 (a)—*Personal covenant—Zurpeshgi mortgage.*

In a *zurpeshgi* lease, where the mortgagor authorises the mortgagee to remain in possession till realisation and to proceed against other properties of the mortgagor, if necessary, but where the mortgagee sued for money-decree. *Held*, that the *zurpeshgi* mortgagee was entitled to get a personal decree against his mortgagor, he having already surrendered the mortgaged property in connection with the execution of another mortgage-decree and there being nothing in the deed to show that the personal liability was extinguished. (*Chapman and Roe, JJ.*) HARIHAR PRASAD *v.* MUNNI LAL. 39 I. C. 852 : 1 Pat. L. W. 612.

——S. 68 (a)—*Interest—Personal covenant—Suit for interest lies though personal remedy for principal barred.*

A mortgage-deed contained a personal covenant to pay interest independently of the principal, *held*, that a suit for interest will lie although the personal remedy for the principal is time-

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (b)—Loss of security.

barred. 21 B. 267, 7 A. 502, 27 B. 330, Dist. (*Maung Kin, J.*) THAIR MAISTRY *v.* K. N. L. A. CHETTY FIRM. 41 I. C. 72.

——S. 68 (a)—*Mortgage invalid—Money-decree.*

When a mortgage cannot be enforced against the property owing to the Revenue Laws retatin g to the property, a money-decree can be granted. (*Twomey, J.*) ARUNACHALLAM CHETTY *v.* VEERAPPA CHETTY. 10 I. C. 864 : 4 Bur. L. T. 117.

S. 68 (b) [Loss of security.]

——S. 68 (b) and (c)—*Invalid mortgage—Right to sue for mortgage-money.*

Where in a mortgage there is no personal covenant to pay, yet, if the mortgagee is dispossessed, a suit for money is maintainable, though the mortgage was unattested and invalid as such. (*Lord Parker.*) RAM NARAYAN SINGH *v.* ADHINDRA NATH. 44 Cal. 388 : 21 M. L. T. 12 : 15 A. L. J. 107: (1917) M. W. N. 94 : 25 C. L. J. 121 : 21 C. W. N. 383 : 19 Bom L. R. 194 : 38 I. C. 932 : 44 I. A. 87 : 32 M. L. J. 39 (P.C.).

——S. 68 (b)—*Diminution in rent is diminution in security—Inclusion of plots not belonging to mortgagor—Rright to sue for money.*

The value of a property depends largely on the income derivable from it and where it falls, the mortgage security is diminished and the mortgagee is entitled to sue for his mortgage money. The inclusion of plots not belonging to the mortgagor and the failure to give possession of the same entitles the mortgagee to sue for his money. (*Lindsay and Daniels, JJ.*) FATEH DIN *v.* KISHEN LAL. L. R. 5 A. 29 : 1923 A. 584.

——S. 68 (b)—*Diminution in value of security—Effect.*

Both under the Hindu Law and under S. 68 of the Transfer of Property Act, a mortgagee could, if the property mortgaged is diminished, insist on the mortgagor giving another security. 40 A. 187 referred to. (*Ryves and Gokul Prasad, JJ.*) RAM SEWAK RAI *v.* SHEO NAIK RAI. 45 A. 388 : L. R. 4 A. 389: 21 A. L. J 294 : 1923 A. 433 (2).

——Ss. 68 (b) and 66 — *Mortgage — Misdescription—Action in deceit.*

In a mortgage-deed certain property was misdescribed as belonging to the mortgagor ; as it was not security for the mortgage debt because it belonged to a third party, it must be considered as non-existent for the purpose of mortgage and the only remedy the mortgagee would have against the mortgagor, for having inserted in the details of the mortgaged property which did not belong to him, would be an action in deceit. Misdescription of property forming security is not "insufficient" as defined in S. 66 which deals with waste by the mortgagor in possession and accordingly has nothing whatever to do with regard to the land which the plaintiff thought he got in mortgage. (*Macleod, C. J. and Kanga, J.*) RAGUNATH SADASHIV THAKUR *v.* DADAJI SHAMRAO THAKUR. 1922 Bom. 217.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (b)—Loss of security.

——S. 68 (b)—*Mortgagee deprived of part of security—Right to sue for mortgage-money.*

Where a mortgagee is deprived of a part of the mortgaged property by the act of the mortgagor he is entitled to recover the mortgage-money from the mortgagor. (*Fletcher and Cuming, JJ.*) HARIS CHANDRA NANDI *v.* KESHAB CHANDRA. **54 I. C. 785.**

——S. 68 (b)—*Fault of mortgagee—Section does not apply.*

It is clear from the wordings of S. 68, T. P. Act, that it is applicable only to cases where the security is lost to the mortgagee otherwise than by his own fault, and that a suit for the mortgage money is not maintainable where the property is lost owing to the default on the part of the usufructuary mortgagee himself. The help of section 68 can be invoked only in cases where the mortgage is not void. To hold otherwise would be tantamount to enforcing an agreement part of the consideration of which was unlawful. In such cases under section 24 of the Contract Act the whole contract must be considered to be void. 16 I. C. 42 ; 20 A. L. J. 318, Foll. (*Abdul Raoof and Moti Sagar, JJ.*) HAMAD YAR KHAN *v* SHANKAR DAS.

——S. 68 (b) and (c)—*Usufructuary mortgagee—Deprivation of possession—Mortga unattested.*

A usufructuary mortgagee dispossessed by a third person cannot sue the mortgagor for the money if the mortgage was not attested especially if there is no collusion between the mortgagor and the third person and the mortgagor was not guilty of any default prior to the deprivation of possession. S. 68 (*c*) T. P. Act had no application as the mortgagor was not called upon to furnish other security before suit. 44 C. 388, Dist. (*Oldfield and Seshagiri Aiyar, JJ.*) ANGIAKUPPIER *v.* PERIAKARUPPA KAVUNDAN. **42 Mad. 578 : 50 I. C. 758 : 26 M. L. T. 43 : 36 M. L J. 286.**

——Ss. 68 (b) and (c) and 67—*Usufructuary mortgage—Remedy of mortgagee when possession not delivered.*

A usufructuary mortgagee can sue for the sale of the property mortgaged when the mortgagor fails to deliver possession to him of same. 39 M. 1010, Not Appr. (*Wallis, C.J., Ayling and Kumaraswami Sastri, JJ.*) MARTURUSUBBAMMA *v.* GADDA NARAYYA. **41 Mad. 259 : 22 M. L T. 429 : 6 L. W. 738 : 43 I. C. 4 : (1917) M W. N. 8 28 : 33 M.L.J. 623 (F. B.).**

——S. 68 (b)—*Mortgagee unable to restore property—Redemption.*

If the mortgagee cannot for any reason restore to the mortgagor possession of the whole of the mortgaged property it does not follow that he cannot recover the mortgage debt. The proper course in such a case is to debit the mortgagor with the value of the land not restored, in taking accounts under S. 76, T. P. Act. (*Wallis, C. J. and Kumaraswami Sastri, J.*) KATTAYAT GOPALA MENON *v.* KOLAT NARAYANA KURUP. **5 L. W. 339 : 40 I. C. 70 : (1917) M. W. N. 289.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (b)—Loss of security.

——S. 68 (b)—*Mortgage security—Waste o —General Law—Liability under.*

A person who commits waste on the security, whether he be mortgagor or stranger, is liable to the mortgagee under the general law to the extent of the damage caused, and S. 68 merely extends the rights of the mortgagee if the wrong doer is the mortgagor, by enabling the mortgagee to sue for the whole of the mortgage-money. The representative of or a purchaser from the mortgagor who is directly responsible for the waste committed, is liable under S. 68 (*b*). (*Sadasiva Aiya r and Napier, JJ.*) RAMAKRISHNAMA CHETTY *v.* VUWATI CHANGU AIYAR. **33 I. C. 321 : 27 M. L. J. 494.**

——S. 68 (b)—'*Security*'—*Meaning of.*

The security referred to in S. 68 (*b*) must be one effected by a mortgage under the Act. (*Drake Brockman, J. C.*) GOVIND *v.* JAGANNATH. **33 I. C. 753 : 12 N. L. R. 19.**

——S. 68 (b)—*Destruction of security—Sale of mortgaged property under Land Acquisition Act—Mortgagee's remedy--Charge on purchase-money.*

The mortgaged property is destroyed within the meaning of S. 68 where mortgaged property is sold under the Land Acquisition Act, and the mortgagee has no charge on the purchase-money when property is acquired under the Land Acquisition Act. 13 M. 321 ; 6 M. 344 ; 36 C. 415 ; 33 M. 429 Diss. (*Stuart, A. J. C.*) SAJJADA BEGAM *v.* MUSSAMMAT JANKI BIBI. **42 I. C. 793 : 20 O. C. 256.**

——S. 68 (b)—*Mortgage invalid—Suit to recover money—Limitation Act, Art.* 97.

Where a mortgage is declared invalid the mortgagee is entitled under S. 68 (b) of the T. P. Act to recover the mortgage-money from the mortgagor personally and Art. 97 of the Lim. Act, applies. (*Lindsay, A. J. C.*) DEBI PRASAD *v.* SHEO NARAIN. **21 I. C. 581.**

——S. 68 (b)—*Loss of security—Compensation.*

Under a mortgage-deed providing that if on partition any portion of the mortgaged land is taken from the mortgagee, other land of the same value will be given to him or the annual loss of the mortgagee will be compensated, the mortgagee is entitled to compensation for the loss suffered by him by the substitution of inferior land in partition. In a redemption suit, the mortgagee cannot claim the deficiency of mesne profits already paid by him to one of the mortgagors unless there is a condition to that effect. (*Chamier, J. C.*) AJUDHIA SINGH *v.* KUNWAR BAHADUR. **12 I. C. 407.**

——S. 68 (b) and (c)—*Mortgage usufructuary —Dispossession—Remedy when he is at fault.*

A usufructuary mortgagee, who fails to take a defence to a suit by a subsequent mortgagee which would have preserved the security, is not entitled to sue for the mortgage-money under S. 68. (*Sharfuddin and Roe, JJ.*) DUNIA LAL *v.* NOWRATAN KOER. **41 I. C. 806 : 2 Pat. L. J. 490.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (b)—Loss of security.

——S. 68 (b)—*Loss of security—Mortgage—Mortgagee dispossessed by stranger—Suit for recovery of mortgage money is maintainable.*

When a mortgagee is dispossessed through adverse possession shown against the mortgagor, the latter must repay the former the money or else defend him against possessing adversely. (*Heald, J.*) MAUNG PO KIN *v.* MAUNG KYAUK YE. **2 Bur. L. J. 47 : 1924 R. 143.**

[S. 68 (c). Failure to secure possession.]

——S. 68 (c)—*Mortgage dispossessed by person holding better title than mortgagor—Section applies.*

Where a mortgagee is dispossessed by a person holding a better title than the mortgagor, S. 68 (c) will apply and the mortgagee is entitled to recover the mortgage money from the mortgagor. (*Ryves and Gokul Prasad, JJ.*) RAM SURAT MISRA *v.* GUR PRASAD. **43 All. 484 : 19 A. L. J. 357 : 63 I. C. 998 : 3 U. P. L. R. (All.) 64.**

——S. 68 (c)—*Defective title of mortgagor—Remedy of mortgagee.*

A mortgagee should not take secret mortgages from persons supposed to be owners when he suspects the title of mortgagor He must demand a fresh security from the mortgagors. (*Richards, C. J. and Rafique, J.*) AMIRULLAH *v.* RASUL BAKSH. **50 I. C. 744 : 17 A. L. J. 474**

——S. 68 (c)—*Usufructuary mortgagee—Possession not secured to mortgagee—Right to sue for mortgage money.*

In 1910, the defendants mortgaged their land with possession to the plaintiff for one year. The profits were to be enjoyed in lieu of interest if the mortgage amount was not paid on the due date, the plaintiff was at liberty to sell the property and the mortgagor was personally liable for the deficit. The plaintiff never went into possession of the property. In 1918 he sued to recover the mortgage amount with interest at 12 per cent *Held*, that the plaintiff was only entitled to the mortgage amount and not to any interest, since the terms of the deed clearly showed that the mortgaged property was a security only for the amount borrowed and not for interest and it was the fault of the plaintiff himself if he took no steps to recover possession of the mortgaged property. 17 Bom. 425 Ref. (*Macleod, C. J. and Fawcett, J.*) MANIKCHAND *v.* KANGAPPA. **22 Bom L. R. 1435 : 59 I. C. 765 : 45 Bom. 523.**

——Ss. 68 (c) and 72—*Mortgagee wrongfully kept out of possession—Money paid to avert rent sale—Interest—Charge.*

The mortgagee was to be in possession of the mortgaged property in lieu of interest and if the mortgagors failed to pay the amount of the debt at the end of the period specified, the mortgagee should be at liberty to foreclose according to law. The mortgagee in spite of his efforts was wrongly kept out of possession by the mortgagors for the greater part of the period. *Held*, that the mortgagee was clearly entitled to add the interest as a charge on the property and the interest claimed

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (c)—Failure to secure possession.

was not excessive Where a mortgagee though out of possession pays rent so as to avert a rent sale by the superior proprietor he can add the money to the principal and claim reasonable interest thereon. (*Tennon and Richardson, JJ.*) SITA NATH GHOSE *v.* THAKURDAS CHAKRAVARTY **52 I. C. 433 : 46 Cal. 448.**

——Ss. 68 (c) and 67—*Usufructuary mortgagee dispossessed—Remedy.*

A usufructuary mortgagee who has been dispossessed of the mortgaged property, has no remedy by way of foreclosure or sale but he can only get a money-decree if he sued the mortgagor only for that relief. (*Fletcher and Newbould, JJ.*) AGHORE NATH SAHA *v.* NATABAR BAIRAGI. **41 I. C. 406.**

——Ss. 68 (c) and 67—*Usufructuary mortgagee—Remedies of.*

A usufructuary mortgagee who has not been given possession can sue either for possession or for recovery of the mortgage-money under S. 68 but not for sale of the properties as a simple mortgagee. 24 C. 677, Rel. upon. (*Carnduff, J.*) LAZARANNESSA BIBI *v.* MOHAMED JAFER. **13 I. C. 336.**

——S. 68 (c)—*Dispossession gives the usufructuary mortgagee a right to sue for money.*

Where in a usufructuary mortgage there is no covenant to pay by the mortgagor, the right of the mortgagee to sue under S. 68 (*c*) arises when the mortgagor fails to deliver possession to the mortgagee. (*Abdur Rahim and Oldfield, JJ.*) KUNHIMAI KUTTY BEARI *v.* HALECOTE AISABI. **62 I. C. 723 : 13 L. W. 434.**

——S. 68 (c)—*Interest—Mortgagee entitled to possession.*

A mortgagee entitled to the possession of the mortgaged property but omitting to take any steps to obtain possession under his mortgage, is not entitled to recover damages for the period he is out of possession. (*Drake-Brockman, J.C.*) BALWANT RAO DOWLAT RAO *v.* NARHAR GANGARAM. **54 I. C. 814.**

——S. 68 (c)—*Mortgage—Substituted security.*

A mortgagee claiming property not mortgaged to him in substitution of the destroyed mortgaged property must establish circumstances so as to raise an equity in his favour. (*Stanyon, A. J. C.*) DEORAO *v.* BANAMI. **10 I. C. 689: 7 N. L. R. 2.**

——S. 68 (c)—*Usufructuary mortgage—Dispossession from a portion of the mortgaged property—Acquiescence—Right to claim interest.*

Where a usufructuary mortgagee who is dispossessed by a portion of the mortgaged property keeps quiet without claiming compensation or possession, he is not entitled to claim interest in a subsequent suit for redemption. (*Lindsay, J. C.*) MAHADEO TEWARI *v.* SITLA BAKHSH SINGH. **8 O. L. J. 660 : 1922 Oudh 102.**

——S. 68 (c)—*Simple mortgage—Possession on default of payment within the stipulated period—Right to money-decree.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 68 (c)—Failure to secure possession.

Even if there is a provision in a simple mortgage that the mortgagee would be entitled to take possession on non-payment within the period fixed and to appropriate the profits thereof in lieu of interest, the mortgagee is entitled to a money decree. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MANGAL *v.* INDAR KUAR.
49 I. C. 77: 5 O. L. J. 752.

——— **S. 68 (c)**—*Usufructuary mortgage—Dispossession.*

The dispossession of a usufructuary mortgagee, is a failure on the part of the mortgagor, to secure him an undisturbed possession and S. 68 (c) applies to such a case. (*Jwala Prasad and Ross, JJ.*) JAINANDAN *v.* BAIJNATH.
63 I. C. 297: 2 Pat. L. T. 229.

——— **S. 68 (c)**—*Usufructuary mortgage—Prior mortgagee selling property and taking of possession by auction purchaser—Effect.*

Where a usufructuary mortgagee does not redeem a prior simple mortgage and the property is sold in execution of a decree on the simple mortgage, and he is dispossessed, by the auction-purchaser, he is not disentitled thereby to recover the debt, from the mortgagor, on the personal covenant, if any. (*Adami and Bucknill, JJ.*) RAM JANAM SINGH *v.* KUNJ BEHARI. **63 I. C. 252.**

——— **S. 68 (c)**—*Usufructuary mortgage—Dispossession from portion of mortgaged property—Acquiescence.*

A usufructuary mortgagee stipulated that, if the mortgagee was dispossessed, he would be entitled to damages or to interest at a specified rate. *Held*, that the plaintiff (mortgagee) having been dispossessed for twelve years and not having done anything during that time either to obtain compensation from the mortgagor, or to realise from the mortgagor or from the property his mortgage-debt or to claim additional security or to enforce the payment of interest, must be deemed to have acquiesced in the changed state of affairs and was consequently estopped from claiming interest. (*Miller, C. J. and Adami, J.*) UCHIT MANDAR *v.* GOSAIN SINGH RAID. **51 I. C. 816.**

——— **S. 68 (c)**—*Usufructuary mortgage—Dispossession—Remedy of mortgagee—Suit against trespasser.*

S. 68 of the T. P. Act contains provisions of an enacting nature and they do not preclude any mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to the general law, claiming as against him a declaration of title and recovery of possession. There is nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which S. 68 of the T. P. Act empowers him to claim from his mortgagor. (*Mullick and Atkinson, JJ.*) BECHU SAHU *v.* ARJUN. **43 I. C. 917: 3 Pat. L. J. 162.**

——— **S. 68 (c)**—*Usufructuary mortgagee—Dispossession—Acquiescence—Interest.*

A usufructuary mortgagee dispossessed of a portion of the mortgaged property but continuing in possession of the remainder for a considerable time, must be deemed to have acquiesced in the dispossession and cannot claim interest from the date of dispossession, though stipulated for in the mortgage-deed. (*Mullick, J.*) UCHAIT MANDAR *v.* GOSAIN SINGH BAIT, **41 I. C. 55.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 69.

S. 68—[Waste].

——— **Ss. 68 and 100**—*Charge—Enforcement of.*

Having regard to S. 100, the provisions of S. 68 as to the liability of a mortgagor who commits waste, apply equally to persons creating a charge. (*Sadasiva Aiyar and Napier, JJ.*) RAMAKRISHNAMA CHETTY *v.* VUOVATI CHENGU AIYAR.
33 I. C 321: 27 M. L. J. 494

——— **S. 69**—*Power of sale outside Court—Validity—Where the Act does not apply.*

It is possible in India to put a clause into a mortgage deed allowing of sale except through the medium of the Court, at least there is no positive enactment prohibiting such a stipulation being annexed to a mortgage where S. 69 of the T. P. Act does not apply. To say that a limited company, a creature of statute requires protection or that the trustees for the debenture holders are the persons who might take advantage of the scanty knowledge of the mortgaging company is really to consider the situation in a light almost absurd. (*Lord Dunedin.*) KANHAIYA LAL *v.* NATIONAL BANK OF INDIA, LTD.
45 M. L. J. 497: 33 M. L. T. 349 (P. C.) 25 Bom. L. R. 1248 : 50 I. A. 162: 4 Lah. 284: 1923 P. C. 114 (P. C.).

——— **S. 69**—*Mortgage—Power of sale*—Bona fide *exercise of—Mortgagor when entitled to avoid.*

A mortgagee is not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage-debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even thoughthe sale be very disadvantageous; unless, in deed, the price is so low as in itself to be evidence of fraud. (*Lord De Villier.*) HADDINGTON ISLAND QUARRY CO., LTD. *v.* ALDEN WESLEY.
13 I. C. 261 10 M. L. T. 554 (P. C.).

——— **S. 69**—*Default in payment of interest—Power to sell.*

Default in payment of interest alone does not justify the exercise of the power of sale where that power was to be exercised on default in payment of even a part of the principal sum on the terms of the deed it was held that the principal did not become payable as soon as interest for three months fell into arrears. Parties however could contract specifically that if interest remained unpaid for three months the whole of the principal would become payable and that the mortgagee could exercise his power of sale. (*Macleod, C. J. and Shah, J.*) JERUP TEJA AND CO. *v.* PEERBHOY. **64 I. C. 634: 23 Bom. L. R. 1241.**

——— **S. 69**—*Surplus sale-proceeds—Attachment under S. 386, C. P. Code* (1882).

If a mortgagee sells the property under a power of sale reserved to him in the deed of mortgage, he is a trustee of the surplus sale-proceeds

for the mortgagor. This character of trust attaching to the proceeds is not lost though the mortgagee retains them for over a month and mixes them with his private moneys. Such sale-proceeds are moveable property and are liable to distress under S. 386 of the C. P. Code, 1882. 6 I. A. 145; 16 B. 141, Ref. (*Ayling and Seshagiri Aiyar, JJ.*) PICHU VADHIAR *v.* SECRETARY OF STATE.
40 Mad. 767: 21 M. L T. 71: (1917) M. W. N. 20: 18 Cr. L. J. 426 : 5 L. W. 664: 38 I. C. 986.

———S. 69—*Mortgage with power of sale—Default of payment of prinoipal or interest—Right to sell.*

Where the mortgage deed provides a right of sale at any time on default of payment of principal or interest, the right of redemption is dependent on punctual payment of monthly interest as it falls due, and a power of sale can be exercised even though there is no default in payment of principal money. (*Twomey, C. J. and Parlett, J.*) THE FIRM OF A. C. KUNDU *v.* BABU ROOKONAND.
11 Bur. L. T. 147 : 43 I. C. 921: 9 L, B. R. 106.

———Ss. 70 and 71—*Good will and stock-in-trade—Mortgage of—Stock acquired after mortgage—Effect on such stock.*

A certain person mortgaged the goodwill and the stock in-trade including therein a list of the stock-in-trade as a schedule thereof; he also inserted a clause that the stock-in-trade would not be transferred. This was however sold subsequently, but was replaced by another. *Held*, that the stock-in-trade acquired after the mortgage was not affected by the mortgage. (*Richards, C. J. and Banerjee, J.*) ANDERSON *v.* BANK OF UPPER INDIA, LTD. **37 All. 390: 29 I.C. 984: 13 A.L.J. 489.**

———S. 70—*Mortgage—Fixtures on land—Accession.*

Unless a contrary intention is shown, a mortgage of land or buildings passes the right to the fixtures then upon the premises, and fixtures attached by the mortgagor to the property after the date of the mortgage will also, except under an agreement to the contrary, pass to the mortgagee. (*Chaudhuri, J.*) THE BANK OF UPPER INDIA *v.* THE ADMINISTRATIOR-GENERAL OF BENGAL.
45 Cal. 653: 47 I. C. 529: 22 C. W. N. 793.

———S. 70—*Mortgage—Accession—Wargland—Kumaki—Assignment under Dharghast.*

Where after a mortgagee of certain *wargland* and the *kumaki* land adjoining it, the Government assigns the *kumaki* lands on Dharghast to the wargdar, the lands so assigned do not form an accession to the mortgaged property, as they were at the absolute disposal of the Government at the time of mortgage. (*Oldfield and Sadasiva Aiyar, JJ.*) KODI SANKARA BHATTA *v.* MOIDIN.
35 M. L. J. 120: 49 I. C. 147: 8 L. W. 100.

———S. 70—*Accession after decree on mortgage—Section does not apply.*

S. 70 of the Act does not apply to an accession to the mortgaged property after a decree on the mortgage. Where, after a decree on a mortgage of a *mokarari* right in a property the judgment-debtor acquired the *Brahmottar* right therein, *held*, that the latter right cannot enure to the

benefit of the mortgage under S. 70 of the Act. (*Jwala Prasad and Ross, JJ.*) HARADHAN CHAKRAVARTY *v.* HARGOBIND.
6 Pat. L. J. 347 : 63 I. C. 552 : 2 Pat L. T. 665.

———S. 72—*Improvements to suit the tenant—Increased rent—Mortgagor not to pay as for repairs.*

Where a mortgagee incurs expenses in making improvements to suit his tenant and receives increased rent in consequence, the mortgagor cannot in redemption be asked to pay the money spent on the same. (*Ryves and Daniels, JJ.*) CHHAMMU LAL *v.* BHAJAN LAL.
1924 A. 47.

———S. 72—*Unreasonable and excessive improvement.*

A mortgagor must not be deprived out of his right to redeem by an unreasonable improvement. Where a usufructuary mortgagee for Rs. 100 claimed to have improved the property at a cost of Rs. 3,000, the Court, in view of the fact that the mortgagee had the advantage of his improvements for a long time, awarded a sum of Rs. 1,200, as, after paying the sum the mortgagor would have the benefit of the increased value of his property. (*Macleod, C. J. and Shah, J.*) DNYANU LAXMAN GAIKWAD *v.* FAKIRA EBRAM LOHAI.
45 Bom. 1301 : 64 I. C. 16 : 23 Bom. L. R. 567.

———S. 72—*Puisne mortgagee—Redemption—Right to be paid moneys paid for prior mortgage.*

Though the Transfer of Property Act does not in terms apply to the Punjab, the general principles contained in the Act govern the rights of parties. Consequently where a puisne mortgagee has paid off a decree on a prior mortgage he is entitled to be paid that decree amount as well as the amount of his own mortgage in a suit for redemption by the mortgagor. (*Shadi Lal, C. J. and Abdul Qadir, J.*) HENRY ALFRED *v.* KARIM BAKHSH.
1924 Lah. 154.

———S. 72—*Expenses of repair—Interest on moneys spent.*

Both according to general principles and the terms of the mortgage deed in question the mortgagee is entitled to reconstruct and repair the shops which had been mortgaged in order to keep his security in act. 55 P. R. 1890 ref. The mortgagee is not entitled to interest on amount of expenses incurred. (*Broadway and Abdul Raoof, JJ.*) TOHLU MAL *v.* BUTA.
67 I. C. 132 : 3 Lah. L. J. 184.

———S. 72—*Chattels—Accession.*

Hypothecation is a mode of creating a security whereby not merely the ownership but also the possession of the thing remains with the owner but in a pledge possession is transferred. The rights of the person in whose favour the hypothec is made are limited strictly to the actual chattel hypothecated and not to the offspring of the hypothecated animal. The former cannot be treated as *accessories*. (*Rattigan, J.*) JOT SINGH. *v.* AMIR CHAND.
10 P. R. 1915 : 28 I. C. 230 : 16 P. L. R. 1916.

TRANSFER OF PROPERTY ACT (IV OF 1882). S. 72.

——S. 72—*Interest.*

The mortgagee is entitled to interest on the sums which he as tenant lent to his landlord (mortgagor) owner of the house, for repairs which did not enhance the letting value but merely kept that value at its former level. (*Hallifax, A. J. C.*) RAMBILAS *v.* LAXMINARAYAN.

1922 Nag. 262.

——S. 72—*Powers of leasing—Lease granted after institution of suit—If binding on mortgagee.*

A mortgagor is not entitled after making the mortgage to grant leases which may have the effect of materially diminishing the value of the security for the remedies of the mortgagee under the mortgage. Where a suit has been filed to enforce the mortgage the rights of the lessee are subject to the result of that suit and no effect can be given to them over the rights which another person may acquire in enforcement of the mortgage. 15 O. C. 239 Ref. (*Kanhaiya Lal, J. C.*) MUSSAMMAT BIBI SAIDUNISSA *v.* FAIYAZ HASSAN.

4 U. P. L. R. (O.) 76 : 9 O. L. J. 319 : 1923 Oudh 1.

——S. 72—*Zamindar's rent paid by mortgagee is payable by mortgagor.*

A usufructuary mortgage contained the following stipulation, "Then payment of Zemindari rent shall rest with the Bharnadar. I, the executant, neither have, nor shall have any concern therewith. The Bharnadar shall himself obtain receipt on my behalf. At the time of payment of the said principal amount I shall pay the rent with interest at Rs. 2 per cent per mensem." *Held* that both under the law and under the contract the mortgagee was bound to pay the rent due to the Zemindar and entitled to add it to the mortgage money. (*Ross, J.*) HIRA RAUT *v.* FAKIR CHAND.

1 Pat L. R. 167 : 1924 P. 372.

——S. 72—*Improvements—Right of mortgagee to value of improvements.*

A mortgagee who makes improvement on the mortgaged property is entitled to compensation for improvements on established principles of equity and not on the principle embodied in S. 51 of the Transfer of Property Act. In valuing the improvements regard must be had to the actual moneys spent by the mortgagee and not to the appreciated value of the property at the date of redemption. (*Pipon, J. C.*) JIT SINGH *v.* GURDIT SINGH.

70 I. C. 1.

——S. 72 (a)—*Usufructuary mortgage—Lease to mortgagor—Suit for accounts not merged.*

Where a usufructuary mortgagee leases the property to the mortgagor for specified rent, his right to file a suit for accounts based on his right to interest on his mortgage is not merged, in or substituted for his rights to rent arising from the relation of landlord and tenant. (*Sheppard and Subramania Aiyar JJ.*) VEPA KASEMAM *v.* VARIGONDA NARSINGHAM.

34 I. C. 701.

——S. 72 (a)—*Usufructuary mortgagee—Repairs—Rent—Right to enhanced rent.*

Where a usufructuary mortgagee of a house carries out repairs and improvements with the object of realising enhanced rent, he ought to have the benefits of the enhancement. (*Kanhaiya Lal, J. C.*) NAWAB SAIYAD WILAYAT HUSSAIN *v.* ZAMANI BEGAM.

54 I. C. 112 : 6 O. L. J. 608.

——S 72 (a)—*Mortgagee in possession—Expenses of suits to recover arrears of rent—Whether an act of management.*

Filing of suit to recover arrears of rent by a mortgagee in possession is in the absence of bad faith, an act of management and expenses incurred on that account are recoverable under S. 72 of the T. P. Act. 21 Mad. 32, Not Foll. (*Lindsay, J. C.*) BASANT SINGH *v.* MATA BAKSH SINGH.

23 I. C. 456 : 17 O. C. 47.

——S. 72 (b) — *Improvements —Interest on costs of improvement.*

A mortgagee in possession is entitled to interest on the amount spent for repairs effected with the object of preserving the property in pursuance of the terms of the mortgage, and also on the rates and cesses paid by him therefor. The mere circumstance that in the mortgage-deed, it is not specifically mentioned that interest would be paid on costs of repairs, is not to be deemed to be a contract to the contrary in respect of interest. (*Banerjee, J.*) RAHAMATULLAH BEG *v.* YUSUF ALI.

16 I. C. 635 : 10 A. L. J. 124.

——S. 72 (b)—*Forced payment of a call.*

Forced payment of the call by the registered holder of shares who held them as security is not an expenditure for the preservation of the security. (*Scott, C. J. and Heaton, J.*) BIRDICHAND JIVRAJ *v.* STANDARD BANK, LTD.

42 Bom. 159 : 40 I. C. 167 : 19 Bom. L. R. 341.

——S. 72 (b)and 73—*Execution sale—Payment by mortgagee to set aside sale in rent-decree—Lien on property*—S. 73—*C. P. C., O. 21, R. 89.*

The decree in which are merged the rights of the mortgagor under the deed does not put an end to the relationship of mortgagor and mortgagee. A mortgagee is entitled to add the amount deposited by him to set aside a sale in execution of a rent-decree under O. 21, R. 89, and acquires a lien for that deposit on the mortgaged property which is not discharged by the payment of the sum due under the preliminary decree. That payment satisfies the decree but leaves the lien (acquired subsequent to the decree) outstanding. The inclusion in a mortgage-deed of a remedy which the mortgagee has already by law (S. 73 of T. P. Act) cannot debar the mortgagee from pursuing any other remedy which may be open to him. (*Jenkins, C. J. and Mookerjee, J.*) AMBICA CHARAN DUTT *v.* RANGATI GUHA.

28 I. C. 571 : 21 C. L. J. 284.

——S. 72 (b)—*Rent-decree — Payment by mortgagee to satisfy rent-decree obtained by mortgagor's landlord—Lien on mortgaged property.*

A got a perliminary decree on his mortgage and afterwards the mortgagor's land was sold by his landlord in execution of a rent-decree against him and A paid the decretal amount to set aside the sale. Subsequently the mortgagor sold the land to C who paid into Court only the amount of the preliminary decree. A then sued to establish his lien for the amount paid by him

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 72.

to have the sale set aside, *Held*, that he was entitled to a decree. (*Richardson, J.*) AMBIKA CHARAN DATTA *v.* RAM GATI GUHA. **14 I. C. 718.**

——S. 72 (b)—*Extension of buildings—Compensation for.*

Where a mortgagee in addition to repairing the house which had become uninhabitable, extended the same and it was found the amount of money spent was not unreasonable he is on equitable grounds entitled to be paid for the improvements. (*Martineau and Zafar Ali, JJ.*) LABHU RAM *v.* ABDULLA. **1923 Lah. 587.**

——S. 72 (b)—*Reconstructing and repairing shop.*

A mortgagee in possession of shops can repair and reconstruct them to keep his security in tact but cannot claim interest on the expenses incurred. (*Broadway and Abdul Raoof, JJ.*) TOHLU MAL *v.* BUTA. **67 I. C. 132 : 3 Lah. L. J. 184.**

——S. 72 (b) — *Mortgagee in possession—Compensation for improvements.*

If a mortgagee in possession spends money on permanent works in the property which enhances its value it would be inequitable to allow the mortgagor to redeem without making him pay at least the actual expenses incurred by the mortgagee. (*Scott-Smith, J.*) REKHI KESH *v.* JWALA SAHAI. **52 I. C. 862 : 78 P. R. 1919.**

——S. 72 (b)—*Repairs and preservation of property—Mortgagor—Right to claim.*

Where there is condition in a mortgage deed that the mortgagor is to be responsible for repairs, the mortgagee is not entitled to do them himself without notice to the mortgagor and make the costs an additional charge on the property. (*Martineau, J.*) MOTI RAM *v.* SANT RAM. **51 I. C. 979.**

——S. 72 (b)—*Conditional sale—Improvement by mortgagee—Right to value of.*

After the period for redemption in a mortgage by conditional sale, the mortgagee might reasonably claim to have had *bona fide* belief that there was no intention on the part of the mortgagor to redeem and as the improvement to the house was of a permanent nature and had undoubtedly increased its value it was equitable that the mortgagor should pay its cost though he did not give his consent to it. 119 P. R. 1876, Ref. 33 P. L. R. 1903 Dist. (*Broadway, J.*) MUSSAMAT RAMKAN *v.* PARTAB SINGH. **51 I.C. 689 : 58 P. R. 1919.**

——S. 72 (b)—*Right to compensation for improvements.*

A mortgagee is entitled to compensation for improving the mortgaged property it allowed to do so by the mortgagor and the money due to the former is a charge on the latter's interest. A mortgagee accepting a mortgage with knowledge that a third person had interest in the property cannot claim from the mortgagor costs incurred by him in litigation for opposing such person's claim. (*Ratligan, J.*) RAM DITTA MAL *v.* KARAM DEVI. **167 P. W. R. 1912 : 17 I. C. 243 : 190 P. L. R. 1912.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 72.

——S. 72 (b)—*'Sale'—Meaning.*

Per *Spencer, J.*—The word 'sale' in S. 72 (*b*) covers a sale in execution of a simple money decree, which does not affect or extinguish the security. Per *Ramesam, J.*—The word 'sale' should be construed '*ejusdem generis*' : with the words 'destruction' 'forfeiture' that precede it, and so it applies only to sales endangering the mortgagee's security and not to sales merely of the equity of redemption. (*Spencer and Ramesam, JJ.*) VENKATA NARASIMHU RAJUGARU *v.* KUPPU CHETTY. **40 M. L. J. 524 : 63. I. C. 24 : (1921) M. W. N. 479**

——Ss. 72 (b) and 76 (c)—*Enhanced revenue—Usufructuary mortgage—Right to add to the mortgage money.*

S. 76 (*c*) of the T. P. Act merely imposes on a mortgagee an obligation to pay the revenue and Government charges if they can be paid out of the income. If they can be so paid, he cannot recover them under S. 72 (*b*). If they cannot be so paid, in the absence of a contract to the contrary, a mortgagee who has paid them out of his own pocket can recover them under S. 72 (*b*). (*Lyle and Ashworth, A. J. Cs.*) FARZAND ALI *v.* SADIQ HUSSAIN KHAN. **54 I. C. 264: 22 O. C. 270.**

——S. 72 (b)—*Subsequent mortgagee—Purchase in execution—Payment of prior simple mortgage—Right to possession.*

S. 72 of the T. P. Act is wide enough to cover the case of a subsequent mortgagee who has obtained an order for possession in execution of his decree and who pays up the money due to a prior mortgagee. If a prior mortgagee neglects to make a puisne mortgagee a party to his suit, the puisne mortgagee cannot be affected by the decree passed in such suit. A payment of money made which was not immediately necessary to have the security cannot be brought within the provisions of S. 72. (*Daniels, A. J. C.*) GAYA PRASAD *v.* GUR DAYAL. **22 O. C. 32 : 51 I. C. 549 : 6 O. L. J. 270.**

——S. 72 (b)—*Improvements— Mortgagee—Mortgage money.*

S. 72 of the T. P. Act does not allow a mortgagee to make improvements at the expense of the mortgagor with the object of deriving greater benefit during the period of his enjoyment from his mortgaged property and to add the costs of the same to the mortgage money. (*Stuart and Kanhaiya Lal, A. J. Cs.*) JANGI RAM *v.* SHEORAJ SINGH. **30 I. C. 234 : 2 O. L. J. 338.**

——S. 72 (b)—*Sale of equity of redemption—Usufructuary mortgagee paying amount to avoid sale.*

Money paid by usufructuary mortgagee to avert sale in execution of money-decree is not money charged on the property and the mortgagee is entitled to a personal decree. S. 72 is intended to apply to cases where forfeiture or sale is likely to imperil the mortgage security. (*Kanhaiya Lal, A.J.C.*) SHEO DULARI *v.* MUSSAMMAT BALASHA. **19 I. C. 744 : 16 O. C. 48.**

——Ss. 72 (b) and 100—*Arrears of Government revenue—Mortgagee paying off arrears of Government revenue to prevent sale—Charge.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 72.

Where a mortgagee pays off arrears of Government revenue to prevent the sale of the property he can add on the amount to the mortgage debt under S. 9 of the Bengal Revenue Sales Act. The amount will at least be a charge upon immoveable property within S. 100 of the T. P. Act, and could only be enforced by a suit under. O. 34, C. P. C. (*Jwala Prasad, J.*) RAJ KUMARLAL *v.* JAIKARAN DAS. **5 Pat. L. J 248 : 57 I C. 653 : 1 Pat. L. T. 225.**

——S. 72 (b)—*Scope of—Sale of equity of redemption.*

S. 72 does not cover a case in which the right, title and interest only of the mortgagor may be put up for sale, but covers only payments made to save the security itself. (*Roe and Jwala Prasad, JJ.*) RAJENDRA PRASAD *v.* BAHURIA RATAN JOVE KUER. **1 Pat. L. J. 589 : 38 I. C. 232 : 3 Pat. L. W. 37.**

——S. 72 (b)—*Payment of arrears of revenue by mortgagee after preliminary decree—Right to charge—Burma Land Revenue Code, S. 48.*

A mortgagee who after a preliminary decree, to save the mortgaged property from being sold under S. 48 of the Lower Burma Land Revenue Act, pays the arrears of revenue due, gets a charge and lien over the mortgaged property for the amount so paid. 30 C. 794 ; 14 C. 809 ; 14 A. 273 ; 26 B. 437 ; 26 M. 686 ; 11 M. 452 ; 31 C. 975 ; 13 A. 195, Rel. (*Maung Kin, J.*) MA PWA KIN *v.* K. P. S. A. R. P. FIRM. **43 I. C. 190 : 12 Bur. L. T. 36.**

——S. 72 (c)—*Expenses incurred in protecting mortgagor's title—Separate suit for, if lies.*

A mortgagee is entitled to recover monies spent by him in protecting the mortgagor's title ; and this can be done either by separate suit or by adding the expenses incurred to the mortgage-money and to insist on those sums being paid before redemption. *Quære.*—Whether the mortgagee is justified in conducting an expensive criminal litigation ? (*Seshagiri Aiyar and Napier, JJ.*) VENKITASAMI NAIKER *v.* MUTHUSAMI PILLAI. **23 M. L. T. 280 : 45 I. C. 949 : 34 M. L. J. 177.**

——S. 72 (d)—*Mortgagor and mortgagee—Costs of litigation.*

A mortgagee is entitled to add to his mortgage security the costs incurred by him in defending an unsuccessful suit for redemption by the mortgagor because payment of such expenses is regarded as an implied term of the mortgage (*Bakewell, J.*) VARADARAJULU CHETTY *v.* DHANALAKSHMI AMMAL. **26 I. C. 184 : 16 M L. T. 365.**

——S. 73—*Undivided share—Substituted security—Partition—Share allotted.*

In a mortgage of a share of landed property a clause was inserted in the mortgage bond that after partition, the whole of the property allotted to the lady shall be substituted for the property mortgaged. The effect of this clause was to quadruple the amount of property mortgaged. *Held*, that the clause relating to the substitution of the whole of the lady's share for what had been originally mortgaged would be operative and would subject the whole of her share to the mortgage. (*Lord Moulton.*) LALA MAHABIR PRASAD *v.* MUSAMMAT TAJ BEGAM. **1 L. W. 959 : 19 C. W. N. 162 : (1915) M. W. N. 387 : 23 I. C. 642 : 27 M. L. J. 13. (P.C.)**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 73.

——S. 73—*Sale proceeds of mortgaged property—Right of puisne mortgagee*

Where a first mortgagee brings a suit on his mortgage impleading the second mortgagee as party and a decree for sale is passed and the surplus sale proceeds are withdrawn by the first mortgagee in execution of a decree on the third mortgage, the second mortgagee has a right to recover the money in satisfaction of his mortgage. The surplus sale proceeds represent the security. (*Sir John Edge.*) BARHAMDEO PRASAD *v.* TARACHAND. **41 Cal. 654 : 41 I. A. 45 : 15 M. L. T 62 : 12 A. L. J. 82 : 18 C. W. N. 345 : 19 C. L. J. 132 : 16 Bom. L. R. 89 : (1914) M. W. N. 38 : 21 I. C. 961 : 26 M. L. J. 243 (P.C.).**

——S. 73—*Sale of mortgaged property in execution of rent decree against mortgagor—Charge on surplus proceeds—Right of mortgagee against property.*

If property subject to a mortgage is sold in execution of a rent-decree against the mortgagor, the mortgagee even though he has got a decree, has a charge under S. 73 of the T. P. Act upon the surplus sale-proceeds that remain in Court after satisfaction of the rent-decree. That charge continues to subsist notwithstanding that the amount is drawn out from Court by the judgment debtors and others. The mortgagee in the first instance must see how much he can recover from the judgment-debtor and others who have drawn out the surplus money, and to that extent there cannot be a charge on the mortgaged property. For any sum beyond that, the mortgage decree can be executed in the usual manner against the mortgaged property. (*Fletcher and Cuming, JJ.*) PARAMESHWAR DAW *v.* ANANTH BHANDU DAW. **51 I. C. 333.**

——Ss. 73 and 100—*Rent decree—Charge on holding—Successive decrees—Sale on last decree.*

Where a patni tenure is sold in execution of the last of a series of rent decrees, the charge in respect of the prior rent-decree is transferred to the surplus sale proceeds on the principle embodied in S. 73 of the T. P. Act which is a principle of justice, equity and good conscience. The charge which the landlord has in respect of his rent is not one created by law under S. 100 of the T. P. Act. Such a charge is not an encumbrance within the meaning of S. 161 of the B. T. Act. (*N. R. Chatterjee and Smither, JJ.*) SATYA SHANKAR GHOSHAL *v.* MON MOHAN GUHA. **43 I. C. 996 : 22 C. W. N. 131.**

——S. 73—*Rent sale—Proceeds—Mortgage—Charge.*

A mortgagee has a charge upon the surplus sale-proceeds where property has been sold in execution of a decree for arrears of rent notwithstanding that the mortgage-debt has been trans-

ferred into a judgment-debt. (*Mookerjee and Beachcroft, JJ.*) BASANT KUMAR BOSE *v.* KHULNA LOAN COMPANY. 20 C. L. J. 1 : 26 I. C. 197 : 19 C. W. N. 1001.

——S.73—*Substituted security—Sale proceeds—Surplus—Right of puisne mortgagee.*

Where a fourth mortgagee in satisfaction of his decree withdraws the surplus sale-proceeds deposited in Court after discharging the second mortgage, the third mortgagee cannot sue for the money as his own but might in equity regard it as part of the security and follow it in the hands of the fourth mortgagee. (*Harrington and Carnduff, JJ.*) NATHANSAO *v.* MRS. ANNIE BESANT. 19 I. C. 226 : 19 C. W. N. 535.

——S. 73—*Scope of.*

S. 73 only gives a right to the mortgagee, over the surplus sale-proceeds and refers to cases where the law otherwise provides that the effect of the sale would be to nullify a mortgage. It is not intended to enlarge the interest of the purchaser at a sale for arrears of revenue or rent. 24 C. 746. Foll. (*Chatterjee, J.*) CHHATARDHARI LAL *v.* BIRANCHI LAL. 9 I. C. 248.

——S. 73—*Principle of— Applicability to Court sales.*

The principle of the substitution of properties and securities in favour of persons who through no fault of their own are deprived of the original rights and securities, applies to a case where an auction-purchaser of lands is deprived of the crops on it by a lessee *pendente lite.* The auction-purchaser can claim the rent due from the lessee to the judgment-debtor. (*Sadasiva Aiyar and Napier, JJ.*) PENMUETSA SUBBARAJU *v* VEEGISSENA SEETHARAMA RAJU. 17 M. L T. 57 : 28 I. C. 232 : (1915) M. W. N. 174 : 39 Mad. 283.

——S. 73—*Land acquisition—No new cause of action.*

A new cause of action does not arise, where S.73 of the T.P. Act comes into operation but the charge of the mortgage is merely transferred from one item of property to another. (*Drake-Brockman, J. C.*) VISHWANATH *v.* SHANKARLAL. 34 I. C. 704 : 12 N. L. R. 20.

——S. 73—*Land acquisition proceedings—Substituted security.*

Where mortgaged property has been acquired under the Land Acquisition Act the mortgage could not be redeemed as the mortgaged property had been destroyed and had ceased to exist. But the mortgagee can sue for the proceeds 20. O. C. 256 Foll. (*Stuart, J. C.*) LADLI PRASAD *v.* NIZAM UD-DIN KHAN. 22 O. C. 342 : 54 I. C. 535 : 2 U. P. L. R. (J. C.) 25.

——S. 73—*Land Acquisition—Mortgagor in possession—Right of mortgagee to compensation awarded.*

Where during the pendency of a mortgagee's suit for sale a part of the mortgaged property is compulsorily acquired under the Land Acquisition Act, the mortgagee is entitled to an injunction restraining the mortgagor from taking the purchase-money out of the hands of the Land Acquistion Deputy Collector. 16 All. 78, Diss. 6 Mad. 344; 6 C. L. J. 745; 10 C. L. J. 150, Foll. (*Coutts and Sultan Ahmad, JJ.*) ASHUTOSH RAI *v.* BADU LAL JHUNGAR. 5 Pat. L. J. 650 : 59 I. C. 513 : 2 Pat. L. T. 110.

——Ss. 74 and 75.

See also (1) C. P. C., O. 34, R. 1.
(2) MORTGAGE—PRACTICE.

——Ss. 74, 75 and 98—*Rights of puisne mortgagee—Anomalous mortgage—Right of puisne incumbrancer to redeem prior mortgage.*

In the case of an anomalous mortgage the intention of the parties has to be gathered from the terms of the mortgage. If they show that the parties had no thought of sale, the mortgagee has no right to enforce a judicial sale. A puisne incumbrancer can always pay off a prior incumbrance, and the mortgagor who created both has neither interest nor right to object. (*Lord Phillimore.*) MADHO RAO *v.* GULAM MOHIUDDIN. 56 I. C. 717 : 15 N. L. R. 134.

——S. 74—*Suit on prior mortgage—Puisne mortgage—Rights of.*

Where a suit on a prior mortgage is brought without impleading the puisne mortgagee and decree and sale follow, the puisne mortgagee's rights to redeem, etc., remain unaffected. (*Sir John Edge.*) MAHOMMED IBRAHIM HOSSEIN KHAN *v.* AMBIKA PERSHAD SINGH. 39 Cal. 527 : 39 I. A. 68 : 11 M. L.T. 265. (1912) M. W. N. 367 : 9 A. L. J. 332 : 14 Bom. L. R. 280 : 16 C. W. N. 505 : 15 C. L. J. 411 : 14 I. C. 496 : 22 M. L. J. 468 (P. C.).

——S. 74—*Prior mortgagee purchasing property—Suit for sale by subsequent mortgagee—Rights of parties—Form of decree.*

Where a prior mortgagee has brought the properties to sale under his decree and purchased them himself he is entitled to hold up his mortgage as a shield against any attempt made by the subsequent mortgagee to deprive him of his rights. In a suit by the latter the form of decree should be that unless within the date fixed he pays in the amount due under the earlier mortgage the prior mortgagee would be entitled to ask for a dismissal of the suit. (*Ryves and Daniels, JJ.*) PHUL CHAND *v.* MT. SURJI. 1923 All. 457.

——Ss. 74 and 75—*C. P. C O 34, Rr. 11 and 12—Suit on puisne mortgage—Prior mortgagee not impleaded—Equities in a suit for establishing priority of claim between purchasers at execution sales.*

Prior and puisne incumbrancers and all necessary parties should be included in a suit to enforce a mortgage, but when the prior and puisne

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 74 and 75.

incumbrancers bring separate suits without impleading each other and property is bought by different persons at execution sales, it is incumbent on the Court in a suit for establishing a priority of claim as between the purchasers, impleading judgment-debtors and decree-holders, to grant relief according to the equities on the basis of the exact positions of the parties. (*Piggott and Lindsay, JJ.*) BABU LAL *v.* JALAKIA.
37 I. C. 343 : 14 A. L. J. 1146.

——— S. 74—*Mortgage—Prior and subsequent.*

Suit by prior mortgagee suing the mortgagor without impleading puisne mortgagee and obtaining decree for foreclosure is not debarred of his right to redeem puisne mortgagee. (*Ryves and Gokul Prasad, JJ.*) PARASRAM SINGH *v.* PANDOHI. **L. R. 3 A. 217.**

——— Ss. 74 and 75—*Rights of prior and subsequent mortgagees—Suit by prior mortgagees without impleading puisne mortgagors—Rights of purchaser—Improvemem—Subsequent suit by puisne mortgagee.*

Where a prior mortgagee brought a suit for sale without impleading the puisne mortgagee and as a result of the decree the properties were sold and purchased, the rights of the puisne mortgagee are not affected. If the puisne mortgagee want to sell the property in a suit on his own mortgage the decree must direct redemption by the second mortgagee of the first mortgage or a sale if the purchaser of the property in execution of the decree on the prior mortgage does not wish to redeem the puisne mortgagee. 31 M. 425 Ref. There is no distinction in such cases between purchasers at court auction and those by private treaty. The auction-purchaser has no right to claim to be paid the value of his improvements before the puisne mortgagee could bring the property to sale. 31 M. 425 Ref. (*Ryves and Gokul Prasad, JJ.*) BUDHI LAL *v.* THE ADMINISTRATOR GENERAL OF MADRAS.
20 A. L. J. 216 : L. R. 3 A. 160 : 44 All. 418 : 1922 All 104.

——— S. 74—*Subrogation—Two mortgages in favour of the same person —Third mortgagee paying off first mortgage—Effect.*

The plaintiff held two mortgages in respect of the same property. The defendant a subsequent mortgagee of the same property satisfied the first mortgage in favour of the plaintiff. The plaintiff then brought a suit for sale of the mortgage property wherein the defendant claimed priority to the extent of the mortgage he had satisfied. *Held* the Transfer of Property Act does not purport to consolidate the law relating to mortgages in India but only defines and amends certain parts of the law. On principle there is difference between the case where a purchaser pays of a prior mortgage in favour of a third person and the case where he pays off a prior mortgage against the same creditor against whom he claims the right of subrogation. (*Ryves and Gokul Prasad, JJ.*) MOHAN LAL *v.* PREMRAJ.
L. R. 3 A. 145 : 4 U. P. L. R. (A.) 78 : 1922 All. 59.

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 74 and 75.

——— Ss. 74 and 95—*Puisne mortgagee discharging prior mortgage--Right to reimbursement —Limitation—Contract Act, S. 69.*

A puisne mortgagee discharging the prior mortgage acquire a charge on the property on the date of the payment of the prior mortgage and his right to reimbursement accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagor of the obligation which, under the decree exists on them. (*Banerji and Gokul Prasad, JJ.*) BARA SHIB LAL *v.* MUNNI LAL.
3 U. P. L. R. (A.) 193 : 63 I. C. 604 : 19 A. L. J. 840 :

——— S. 74—*Simple mortgagee paying off a prior mortgage—Mortgagor in possession—Effect.*

Where on a simple mortgagee paying off a prior mortgagee of a portion of the property, the mortgagor and not the mortgagee took possession of the portion, the intention of the latter was not to keep alive the prior mortgage for his benefit. (*Richards, C. J. and Banerjee, J.*) HAR NARAIN *v.* HAR PRASAD. **23 I. C. 827: 12 A. L. J. 470.**

——— Ss. 74 and 75—*Suit on puisne mortgage —Rights of purchaser.*

The purchaser of the equity of redmption who pays the decretal amount to save the mortgaged property from sale to the first mortgagee who was to be paid by the second mortgagee under an agreement with the mortgagor out of the consideration for his mortgage, can sue the second mortgagee for the amount and time begins from the date of payment by the purchaser. (*Griffin and Ryves, JJ.*) HAKIM ALI KHAN *v.* DALIP SINGH
19 I. C. 676 : 11 A. L. J. 478.

——— Ss. 74 and 101—*Subrogation— Puisne mortgagee paying off prior mortgage—Prior mortgage whether kept alive—Presumption.*

A puisne mortgagee paying off a prior mortgage is presumed to keep it alive for his benefit. (*Knox and Karamat Husain, JJ.*) SUNDAR LAL *v.* AMANATULLA. **11 I. C. 469.**

——— S. 74—*Subsequent mortgagee paying prior mortgage without receipt or assignment does not affect the extinguishment of the prior mortgage.*

If the second mortgagee pays a prior mortgage but does not get it assigned nor does he get a receipt for the amount paid but only gets hold of the mortgage deed it cannot be said that the first mortgage is not extinguished and that the second mortgagee has no right to sue for the amount due on the first mortgage.(*Macleod, C.J. and Shah, J.*) NARAYAN BUDHAJI *v.* POSHA JAMA.
46 Bom. 1112 : 62 I. C. 477 : 23 Bom. L. R. 466.

——— S. 74—*Suit on prior mortgage—Parties —Puisne mortgagees.*

Where there is more than one mortgage upon a property the rule is redeem up, foreclose down, which means that the first mortgagee suing for foreclosure must make all subsequent mortgagees parties and afford them a chance of redemption. The first mortgagee can neither foreclose nor be redeemed by the original mortgagor

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 74 and 75.

without taking into account intermediate encumbrances. The intermediate mortgagees must be dealt with before the first mortgagee can come in touch with the mortgagor. (*Beaman, J.*) HOPE-MILLS, LTD. *v.* SIR COWASJEE J READY MONEY. **10 I. C. 748 : 13 Bom. L. R. 162.**

——S. 74—*Applicability of—Decree on prior mortgage.*

S. 74 applies even after a decree has been obtained on a prior mortgage. 27 A. 325, Rel. on. (*Jenkins, C. J and Stephen, J.*) BRAHAM DEO *v.* SUKUWAR DUBE. **24 I. C. 734.**

——S. 74—*Suit on prior mortgage—Second mortgagee previously in possession—Purchaser—Right of.*

A first mortgagee having bought the property in a suit on his mortgage to which the second mortgagee was not a party is, if he purchases in execution, entitled to possession as against the latter even though he had previously obtained possession thereof by a sale under his own mortgage. 21 M. L. J. 213 Not Foll. (*Coxe and Imam, JJ.*) CHATTURDHARY CHOWDHURY *v.* GAYA PRASAD SINGH, **23 I. C. 791,**

——Ss. 74 and 101—*Discharge of prior mortgagee by puisne mortgagee—Right to sue on prior mortgage—Defence.*

A puisne mortgagee who had discharged two prior mortgages sued to enforce all the three mortgages and the defence was that he had done so in pursuance of a contract for the purchase of the property itself. *Held* that assuming the contract to be true the plaintiff was entitled under the specific terms of S. 74 of the Contract Act to enforce the prior mortgages. 4 A. L. J. 349 : 6 A. L. J. 549. Dist. In cases where S. 74 of the T. P. Act applies, no question arises as to whether the payment was for the benefit of the mortgagor or the mortgagee. It is enough if the person claiming the benefit of the payment was a mortgagee at the time of the payment. (*Oldfield and Ramesam, JJ.*) GUJULUVA NAGAYYAR *v.* THUDUKUCHI GOVINDAYYAR.
17 L. W. 14 : 1923 Mad. 349.

——S. 74—*Subrogation— Prior mortgage dischagred by subsequent mortgage—Partial discharge is not enough.*

In order to sustain a claim for priority under S. 74 of the T. P. Act there must be a complete discharge of the prior mortgage and a partial discharge of the prior mortgage by the puisne mortgagee does not entitle him to subrogation. 35 M. 183 foll. : 38 A. 502 Dist. 41 M.L.J. 399 ; 36 C. 193 ; 48 I. C. 779 Ref, (*Spencer and Odgers, JJ.*) BRAHMANONDAM VENKATA LAXMINARAYANA RAO *v.* ALLAMNENI VENKAYYA.
31 M. L. T. 170 (H. C.) : 16 L. W. 216 : 43 M L. J. 284 : 1922 Mad. 441.

——S. 74—*Redemption by subsequent mortgagee—Landlord's rights over the tenants of the prior mortgagee do not pass.*

S. 74 gives the redeeming second mortgagee only the rights and powers of the redeemed mortgagee as such and does not pass any of his rights as a landlord. Subsidiary rights, such as lease hold rights created by the prior mortgagee come to an end *ipso facto* and any tenant continuing in possession must be treated as a trespasser. (*Krishnan and Odgers, JJ.*) ALAGIRISAMI *v.* AKKULU. **14 L. W. 399 : (1921) M. W. N. 752 : 69 I. C. 651 : 41 M. L. J. 462.**

——Ss. 74 and 75—*C.P.C.* (1908), *O.* 34, *R.* 1—*Rights of puisne mortgage.*

Per Srinivasa Aiyangar, J :—A puisne mortgagee who is not made a party to a suit for sale of a prior encumbrance is entitled to insist on a decree for sale subject to the previous mortgage. *Per Coutts Trotter, J.*—Of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so and the earlier cannot reedeem the later save by consent. What is transferred to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of the mortgage, subject only to this that in his suit he must make all subsequent mortgagees parties, if he wishes the sale to be free of their encumbrances. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) CHINNU PILLAI *v.* VENKATASAMI CHETTIAR. **40 Mad. 77 : (1916) 1 M. W. N. 245 : 19 M. L. T. 217 : 34 I. C. 507 : 30 M. L. J. 347.**

——Ss. 74 and 91—*Subrogation— Sub-mortgagee—Right to redeem prior mortgage—Suit to recover amount paid to discharge.*

A sub-mortgagee of a second mortgagee's right is entitled to redeem the first mortgage and on redemption becomes entitled to his right by subrogation and to recover the amount due on the first mortgage also. S. 74 of the T. P. Act does not prevent the redemption of the kind mentioned herein. (*Benson and Sundara Aiyar, JJ.*) VENKATANARAYANASWAMI REDDY *v.* KANNI AMMAL. **14 M. L. T. 390 : 21 I. C. 560 : (1913) M. W. N. 903.**

——S. 74—*Subrogation—Prior mortgage—Decree—Payment by puisne mortgagee—Right of latter—Suit or execution.*

A puisne mortgagee paying off a decree on a prior mortgage is only entitled to proceed by way of suit on the prior mortgage and not by execution of the decree. (*Benson and Sundara Aiyar, JJ.*) SUNDARA REDDIAR *v.* SUBBAIYA KOUNDAN. **13 M. L. T. 266 : (1913) M. W. N. 369 : 18 I. C. 610 : 24 M. L. J. 28.**

——S. 74—*Subrogation—Right to—Payment of portion by stranger.*

A person who advances money to pay off a part of the first mortgage cannot have priority over the second mortgagee without being either a purchaser or a mortgagee. (*Abdur Rahim and Spencer, JJ.*) HANUMANTHAYAN AIYAR *v.* MEENAKSHI NAIDU. **35 Mad. 183 : 10 M. L. T. 380 : (1912) M. W. N. 158 : 12 I. C. 412 ; 22 M. L. J. 12.**

——S. 74—*Suit on prior mortgage—Puisne mortgage—Rights of—Sale by the former.*

Where there are two mortgages to two different persons neither being usufructuary, and the first mortgagee makes the sale and purchases it himself, his possession cannot be disturbed by the second mortgagee. His right is not lost

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 74 and 75.

even if he is joined as a defendant to the suit by the second mortgagee who, however, has a right to redeem the prior mortgagee. The prior mortgagee (purchaser) can redeem the puisne mortgagee and if he fails to do so, property could be sold and balance can be paid to the purchaser. The puisne mortgagee's right to sell the property can be exercised even after the sale by the first mortgagee. But he must first redeem the prior mortgagee who can enforce his right of being redeemed or making sale even when he is a defendant. (*Munro and Sankaran Nair, JJ.*) VENKATAGIRI AIYAR *v.* SADAGOPACHARIAR.

10 I. C. 83.

——S. 74—*Subrogation—Subsequent mortgagee discharging prior mortgage.*

A subsequent mortgagee discharging a prior mortgage is not entitled to stand in the shoes of the prior mortgage. If the prior mortgage had been executed by an additional party who was not concerned with the subsequent mortgage and there is no express intention to keep alive the first discharged mortgage and there is no intermediate mortgage from which benefit may be presumed, and the rate of interest is different, there is no presumption of keeping alive. 9 C. 961 ; 2 C. L. J. 288 ; 6 C. L. J. 134 and 20 M. L. T. 380 Foll. (*Krishnaswamy Aiyar and Ayling, JJ.*) SUNDARAMAYYA *v.* MUMMAREDI YANADAMMA.

9 M. L. T. 258 : 9 I. C. 139 : 21 M. L. J. 180.

——S. 74—*Suit by prior mortgagee—Effect of not impleading latter—Rights of party.*

Although in a suit for sale by a prior mortgagee, the puisne mortgagee is not impleaded and a sale takes place, the estate becomes vested in the purchaser, subject to redemption by the puisne mortgagee. His only remedy, however, is to redeem. (*Hallifax, A. J. C*) LAXMI CHAND *v.* NARAYAN. **6 N. L. J. 237 : 1923 Nag. 225.**

——S. 74—*Decree on prior mortgage—Payment by puisne mortgagee—Right to interest is also included.*

Where a puisne mortgagee pays off the money due on a prior mortgage decree, he gets the rights of the prior mortgagee including the right to get the interest. The puisne mortgagee is not debarred by the rule of *damdupat* from getting interest at the rates prescribed by the mortgage decree. (*Kotval, A. J. C.*) NARAYAN *v.* NATHMAL.

17 N. L. R. 200 : 1922 Nag. 155.

——S. 74—*Suit on puisne mortgage—First mortgagee (purchaser).*

In a suit by puisne mortgagee to which the purchaser in execution of a decree on prior mortgage is party, the puisne mortgagee can only sell the property subject to prior mortgage. (*Drake-Brockman, J. C.*) GANGADAS *v.* BHIKAJI.

58 I. C. 295 : 16 N. L. R. 215.

——S. 74——*Suit on prior mortgage—Foreclosure decree—Second mortgagee made party to suit—Form of decree—Lim. Act, Art. 132—Suit by puisne mortgagee paying off decretal amount and redeeming mortgage—Limitation—Commencement of.*

Where a preliminary decree for foreclosure is passed in a case in which a puisne mortgagee is also joined as a party, the proper form of decree is that provided in form No. 6 of the Appendix D to the 1st Sch. of C. P. Code. By paying off the prior mortgagee, the puisne mortgagee becomes subrogated to the prior mortgagee's rights and under Art. 132 of the Lim. Act, time begins to run from the date of the prior mortgage and not from the date of payment. (*Mitra, A.J.C.*) NATHURAM *v.* SHEOLAL.

42 I. C. 796 : 13 N. L. R. 217.

——S. 74—*Subrogation — Redemption of prior mortgage by puisne mortgagee.*

Where a prior mortgage is redeemed by a subsequent mortgagee the latter acquires all the rights and powers of the prior mortgagee. (*Stuart, J. C.*) JAGMOHAN SING *v.* RAGHO RAM.

55 I. C. 638 : 7 O.L.J. 304.

——S. 74—*Puisne mortgagee—Payment of prior simple mortgage—Rights.*

A party who is in the position of a defendant may often rely on rights he might have been unable to enforce as plaintiff. A usufructuary mortgagee can use a simple mortgage redeemed by him as a shield against a person seeking redemption though on that date, a suit on the simple mortgage would be barred. He is also entitled to the interest accrued due since the date of payment of the money paid by him. (*Daniels, A. J. C.*) GAYA PRASAD *v.* GUR DAYAL. **6 O. L. J. 270 : 51 I. C. 549 : 22 O. C. 32.**

——Ss. 74 and 95—*Subrogation—What is equitable and statutory.*

Subrogation is a substitution by operation of law to the rights and interests of the mortgagee by virtue of redemption and may be as of right, such as is referred to in Ss. 74 and 95 of the T.P. Act, or equitable or conventional, such as where a payment is made by a surety of a debtor, or is made by another under an agreement, express or implied, with the debtor or creditor or to protect a subsisting interest which could not otherwise be protected. 36 C 193, App. (*Piggott, J. C. and Kanhaiya Lal, A. J. C.*) SOHAN LAL *v.* JOT SINGH. **20 I. C. 458 : 16 O. C. 148.**

——S. 74—*Rights of prior mortgagee—Possession—Possessory right unaffected by subsequent mortgage—Usufructuary mortgagee, right to resist a suit for possession by a prior mortgagee—Accrual of right to take possession—Priority.*

Where certain property was first mortgaged to the defendant under a simple mortgage and then mortgaged to the plaintiff under a covenant giving him possession in certain events and the plaintiff got a right to possession under the terms of his mortgage, but before he could obtain actual possession, the defendant took a subsequent usufructuary mortgage of the same property in lieu of the money due under his previous simple mortgage. *Held*, in a suit by plaintiff to recover possession under the terms of his mortgage, that the defendant though he held a prior simple mortgage would not be entitled to resist the plaintiff's suit for possession; the mere execution of a subsequent usufructuary mortgage would not take away from the plaintiff his right to take possession, which had already accrued to him prior to the execution

of the usufructuary mortgage to the defendant. (*Piggott, J. C.*) JANGU SINGH *v.* GANESH RAM.
14 I. C. 735.

——— S. 74—*Subrogation—Right when can be claimed.*

The right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound, and that right cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage debt without having any interest to protect. A purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside.(*Coutts and Das, JJ.*) SIBANAND *v.* BABU JAGMOHAN LAL.
3 P.L.T. 533 : 1 P. 780: 1922 Pat. 331 : 1922 P. 499.

——— S. 74—*Subrogation—Creditor advancing money to pay off prior mortgage decree—Rights of as against mesne encumbrancers.*

Where in a suit by a prior mortgagee for sale impleading the mortgagor as well as the puisne mortgagee as parties, a decree for sale is passed and the puisne mortgagee fails to redeem with the result that the properties are brought to sale in execution, it is open to a third person under an agreement with the mortgagor to pay off the decree amount due to the prior mortgagee and get himself subrogated to his rights. It is immaterial that the puisne mortgagee is not given notice of the payment to the judgment-creditor. (*Das and Bucknill, JJ.*) MOULVI MAHOMED MUSA *v.* EDUL SINGH. 3 Pat. L T. 232 : 1922 P. 92.

——— S. 74—*Right of puisne mortgagee—Redemption.*

A puisne mortgagee has a right to redeem the prior mortgagee. The prior mortgagee obtained symbolical possession in execution of his decree. The puisne mortgagee was not a party to it. *Held* the prior mortgagee cannot eject him if he is ready to redeem him. (*Mullick, J.*) BISWAMBAR LAL *v.* JHULAN RAM TEWARI. 35 I. C. 87.

——— Ss. 74 and 75—*Puisne mortgagee—Rights—Second mortgage after decree on the first mortgage.*

Where a second mortgage was executed after the decree for sale on the first mortgage the second mortgagee has no rights other than those of his mortgagor and as the latter's right of redemption of the first mortgage was determined by the decree for sale the second mortgagee has no remedy against the land but is only entitled to a personal decree against the mortgagor. What was sold at the sale in execution of the decree on the first mortgage was the right, title and interest of the mortgagor at the time of the first mortgage. (*Pratt, J. C. and Crouch, A. J. C.*) KANAYRAM *v.* TIRITH SINGH. 31 I. C. 37 : 9 S. L. R. 86.

——— Ss. 74 and 75—*Rights of puisne mortgagee—Interest.*

A puisne mortgagee suing to redeem a prior mortgage is not entitled to get the benefit of a reduction in the contract rate of interest allowed in the prior mortgagee's decree to which he was not a party, 18 C. 164 P. C.; 31 M. 258 Foll. 11 C. W. N. 403, Dist. (*Pratt, J. C. and Fawcett, A. J. C.*) AWAKMALL *v.* GOKAL SINGH.
19 I. C. 614 : 6 S. L. R. 227.

——— S. 75—*Suit for sale by puisne mortgagee—Prior mortgagee in possession under decree for foreclosure.*

Where a puisne mortgagee sued for sale against the defendants who were in possession under a decree for foreclosure on foot of their prior mortgage. *Held*, that the defendants could hold up their prior mortgage as a shield, and the plaintiff was entitled to redeem by reason of not having been impleaded in the suit on the prior mortgage. There is no difference between the case of property which has been transferred by sale under a simple mortgage and property which has been transferred under a decree for foreclosure. In neither is the old mortgage sought to be enforced; it is held up as a shield only. (*Tudball and Rafique, JJ.*) GULAM SUKHDAR KHAN *v.* SUKHI.
38 I. C. 573 : 15 A. L. J. 190.

——— S. 75—*Prior and subsequent mortgages—Decrees separately obtained on—Sale in execution of both decrees—Conflict of titles—Determination of.*

Where *A*, the prior mortgagee, sued in 1910 and *B*, the subsequent mortgagee sued in 1911 on their respective mortgages each without impleading the other as party to his suit and in the Court sales that followed, the plaintiff and one *C* became the respective purchasers, but *C* obtained actual possession and the plaintiff obtained only formal possession of the mortgaged property whereupon the plaintiff sued *C* and *B* for the amount due on his mortgage. *Held*, (1) that *C* must either surrender possession to the plaintiff or pay up the mortgage amount; (2) that as the right of sale of the mortgagees had been exhausted by their having brought the properties to sale already, the only question to be determined was the respective rights of the rival auction-purchasers and (3) that limitation for the suit begins to run only from the date of the plaintiff's purchase. 5 C. 265 : 5 C. 269, Dist. (*Piggott and Lindsday, J.*) BABULAL *v.* JALAKIA. 37 I. C. 343 : 14 A. L. J. 1146.

——— S. 75—*Prior and subsequent mortgagees—Decree not providing for redemption—Failure to redeem prior and subsequent mortgagee—Right to bring suit.*

Where a mortgage decree provides for redemption by subsequent mortgagees but no priod is fixed for the redemption of each other, any subsequent mortgagee who pays off the decretals amount may stand on foot of the mortgage paid off as a shield against the other puisne mortgagees. 10 C. 1035. Foll. (*Karamat Hussain and Chamier, JJ.*) KANHAI LAL *v.* HULAS SINGH.
13 I. C. 939 : 9 A. L. J. 29.

——— S. 75—*Property—Extent of.*

Where four adult brothers mortgaged the family properties on behalf of themselves and

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 75.

as guardian of their minor brothers and subsequently the four brothers mortgaged it to another person. *Held*, that the first mortgagee had a priority to the extent of his mortgage over the subsequent encumbrancer and that the first mortgagee was entitled to be paid the full amount of his mortgage out of the sale-proceeds of the properties. (*Teunon and Newbould, JJ.*) GOPI NATH MONDAL *v.* ASHUTOSH GHOSH. **44 I. C. 1003.**

——**S. 75**—*Prior and subsequent mortgages—Puisne mortgagee also a prior mortgagee—Whether should set up and plead his prior mortgage also when added as* pro forma *defendant.*

Where a puisne mortgagee who has also a prior mortgage is added as a party to a mortgage suit he must set up both the mortgages. But if he is only a prior mortgagee and not a subsequent mortgagee he need not appear and defend his rights under his prior mortgage. 39 C. 527 Dist. (*Holmwood and Carnduff, JJ.*) KISHEN DAYAL GIR *v.* MAHOMED AMIRUL HUSEIN.
26 I. C. 673 : 19 C. W. N. 942.

——**S.75**—*Subsequent charges—Suit on mortgage—Decree for possession fixing charges—Subsequent suit for redemption—Amount due—Whether* res judicata—*Mortgagor whether liable to redeem subsequent charges.*

A property was mortgaged for Rs. 500 in 1891, and further charges were created on it by three deeds for Rs. 90, 98 and 76 respectively. The plaintiff who purchased the equity of redemption from the sons of the mortgagor sued for redemption. The mortgagee had previously brought a suit upon the mortgage of 1891 and obtained a decree for possession, the charge on the land being fixed at Rs. 700. *Held*, the question of the amount due on the mortgage of 1891 was *res judicata* and that mortgagee's heirs could not claim interest for the period during which they were out of possession. 101 P. R. 1891; 66 P. R. 1912, Dist. The subsequent deeds which created charges on the same land did not confer on the mortgagee any right to possession but simply a right to recover the principal and interest due and, therefore, the mortgagor could not be compelled at the time of redemption to pay off the amounts due under those deeds. 25 M. 108; 21 M. L. J. 562, Dist. (*Scott-Smith and Broadway, JJ.*) PHULA SINGH *v.* BUR CHAND. **39 I. C. 250: 60 P. W. R. 1917.**

——**Ss. 75 and 101**—*Mortgage—Subrogation—Puisne mortgagee paying prior mortgagee for protection of his interest—Rights of.*

The puisne mortgagee is on payment of a sum subrogated to the rights of the prior mortgagee if his interest cannot be adequately protected except by payment of the sum to a prior mortgagee. 46 C. 193 (221), Foll. (*Scott-Smith and Broadway, JJ.*) AMIR BEG *v.* GHULAM NABI. **38 I. C. 893: 1 P. R. 1917.**

——**S. 75**—*Suit on prior mortgage—Decree without making a subsequent usufructnary mortgagee a party—Purchase by him—Subsequent mortgagee renewing his mortgage after decree—Effect—Suit for possession by first mortgagee.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 75.

When there is competition for possession between a first mortgagee auction-purchaser and the puisne usufructuary mortgagee who renewed his mortgage after decree in the first mortgagee's suit and was not a party to it, then in the absence of proof of an intention on the part of the usufructuary mortgagee to give up his security under the first deed, he must be presumed to have intended to keep it alive unless there is clear and cogent evidence that the mortgagee intended to extinguish his previous mortgage which is always a question of fact. The principle by which persons renewing prior incumbrances are protected against intervening incumbrances applies also to intervening decrees under which property has been sold. (*Abdur Rahim, Offg. C.J. and Krishnan, J.*) SREE MAHANT PRAYAG DOSS JEE VARU *v.* RAVUR CHENGAMMA NAIDU.
20 M. L. T. 295: (1916) 2 M.W.N. 288: 37 I. C. 456: 4 L. W. 477.

——**S. 75**—*Prior and subsequent mortgages—Decree and sale by both mortgagees—Rights and liabilities of mortgagees—Priority*—Res-judicata—Lis pendens.

Where the first mortgagee sues on his mortgage without impleading the subsequent mortgagee, obtains a decree and himself purchases the property in Court auction, and the second mortgagee afterwards brings the same property to sale in execution of a decree on his mortgage subject to the first mortgagee's rights (the first mortgagee being a party to the suit). *Held*, that the purchaser in the second sale takes no interest as against the first purchaser, as once the property is sold at the instance of one mortgagee, there is no further saleable interest left in the judgment-debtor to be sold again. 32 M. 485 Foll, If in such a case the first mortgagee is disturbed in his possession by the second mortgagee and the former brings a suit for confirmation of his possession such a suit will not be *res judicata* by reason of the second mortgagee's suit as the decree in that suit expressly preserved*A's* right; nor will the first mortgagee's purchase be affected by the doctrine of *Lis pendens*. 32 M. 485, Foll. The proper course for the non-impleaded second mortgagee is to redeem the first and then the purchaser in execution of the decree on the first mortgage can redeem the two mortgages vested in the second mortgagee. And if the purchaser does not redeem the puisne mortgagee who has obtained by redemption the right of the first mortgagee, the properties may be sold, the mortgagees paid and the balance paid to the purchaser as the representative of the motrgagor. The prior mortgagee cannot be deprived of his rights to require the puisne mortgagee to redeem him and in default to enforce his right by sale or foreclosure and there is no reason why he should not be allowed to do this even as a defendant in a mortgage suit. 21 M. L. J. 213, Doubt. 32 M. 485, Foll. (*Munro and Sankaran Nair, JJ.*) VENKATAGIRI AIYAR *v.* SADAGOPACHARIAR. **14 I. C. 449: 22 M. L. J. 129.**

——**S. 75**—*Subrogation—Mortgagee compounding with creditor.*

Where by a mortgage-deed, the mortgagee undertook to discharge a debt due to a creditor from

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 74 and 75.

the mortgagor and in consequence thereof compound with the creditor for a sum less by Rs. 200 than the sum actually due, *held*, that in the absence of a contract to the contrary the mortgagor was not entitled to the benefit of the remission even though such a remission was made at the instance of the creditor. (*White, C J. and Munro, J.*) BACHU CHENCHURAMAYYA *v.* AKKARAJU SUBBARAMAYYA. **9 I. C. 208 : 9 M. L. T. 79.**

——— S. 75—*Prior and subsequent mortgagees —Suit for foreclosure by subsequent mortgagee—Purchase of equity of redemption by prior mortgagee—Effect of.*

Where during the pendency of a suit for foreclosure by a puisne mortgagee, the prior mortgagee obtains a conveyance of the equity of redemption, the puisne mortgagee as representative of the mortgagor had a better equity to redeem the prior mortgagee. (*Mittra, A.J.C.*) KARNIRAM NATHURAM *v.* HARDEO JAGANNATH. **51 I. C. 374.**

——— S. 75 — *Puisne mortgagee—Right to redeem—Mesne inoumbrancer.*

A puisne mortgagee has power to redeem a prior one, even where there is a mesne incumbrance. (*Dalal and Simpson, A. J. C.*) DUBER *v.* RAM SAHAI. **10 O. L. J. 305 : 1924 Oudh 56.**

——— S. 75—*Sub-mortgage—Subsequent mortgage with knowledge—Right of puisne mortgagee.*

Where a prior sub-mortgagee under an unregistered deed is in possession of the mortgaged property, which is known to the subsequent mortgagee, the former is entitled to obtain redemption before the latter can take possession of the mortgaged property. (*Stuart, J. C.*) BISHAL *v.* PANCHAM. **38 I. C. 465: 3 O. L. J. 699.**

——— S. 75—*Mortgage—Decree for sale obtained by a prior mortgagee without impleading the puisne mortgagee—Latter in his subsequent suit for redemption impeaching the accounts contained in the previous decree—Proper procedure.*

In cases where the correctness of the account contained in a previous decree to which the person seeking redemption was not a party is impugned, the proper course is to proceed on the basis of the mortgage to find out whether the amount then declared to be due to the mortgagee was excessive and if it was, to re-adjust the account as if no such decree had been obtained. (*Kanhaiya Lal, A.J.C.*) GOURI SHANKAR SINGH *v.* BAJRANG BAHADUR SINGH. **35 I.C. 434 : 19 O.C. 39.**

——— S. 75—*Rights of puisne mortgagee—Sale of property.*

Puisne mortgagee can sell the equity of redemption subject to the prior mortgagee's rights though a decree for sale is passed in favour of the prior mortgagee to which the puisne mortgagee is not a party. (*Kanhaiya Lal, A. J. C.*) KUNDAN LAL *v.* WAJIR HUSAIN. **32 I. C. 359: 2 O. L. J. 480.**

——— S. 75—*Prior and subsequent mortgages —Suit and sale on prior mortgage—Rights of subsequent mortgagee.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 74 and 75.

Where a prior mortgagee brought a suit on his mortgage and got a decree for sale of the mortgaged properties without impleading the subsequent mortgagee and in execution sale he purchased some of the properties mortgaged to him and thereafter the subsequent mortgagee brought a suit for sale of the properties included in his mortgage making the prior mortgagee a party to the suit. *Held*, that the subsequent mortgagee was entitled to a sale of the properties mortgaged to him some of which had been purchased at the prior sale, conditionally on his redeeming the property purchased by the prior mortgagee at the execution sale by paying off the proportionate amount due to him as calculated by their respective values. Case-law considered. (*Chamier, J C. and Evans, A. J. C.*) SURAJ KISHAN *v.* AJUDHYA PRASAD SINGH. **27 I. C. 960 : 2 O. L. J. 73.**

——— S. 75—*Prior and subsequent mortgages —Mortgage of property not in the possession of mortgagor—Redemption by assignee of mortgage not allowed in suit for possession by mortgagee —Mortgagee bound to pay money paid for redemption of prior-mortgage—Suit for possession a suit for specific performance.*

One *K* mortgaged in 1886 a share in village with possession to one *J*. Subsequently, in 1898, the same share was mortgaged with possession to the plaintiff for a term of 80 years, it being expressly stipulated that the mortgagor shall not redeem until the expiry of the said period. In 1905 *K* sold the property to the defendant who then paid off *J*'s mortgage of 1886 and took possession of the property mortgaged. Plaintiff now brought a suit for possession on the basis of the mortgage of 1898. *Held*, that although the property was not in the possession of the mortgagor in 1898, when he mortgaged it to the plaintiff, yet that circumstance could not prevent the plaintiff from recovering possession of the property mortgaged to him. *Held*, further that the suit for possession could not be treated as a suit for the specific performance of the contract, and that the defendant could not be allowed to redeem as he had not offered to redeem the plaintiff's mortgage nor paid the Court-fee payable for a prayer for redemption of the mortgage. *Held* also, that it was premature to consider whether the provision that the mortgage shall not be redeemed for 80 years should be enforced or not, as the question of redemption could arise only after the plaintiff's taking possession. *Held*, lastly, that the plaintiff before obtaining possession of the property mortgaged, must pay to the defendants the amount of money paid by them to the mortgagee of 1886. (*Chamier, J. C.*) KANCHAN SINGH *v.* JAFRI BEGAM. **10 I. C. 190.**

——— S. 75—*Prior and subsequent mortgagees —Puisne mortgagee—Rights of.*

If the prior mortgagee is in possession as lessee subsequent to the puisne mortgage and if the property is sold for default of payment of revenue and he then purchases it, he does so subject to the burden of the puisne mortgage. (*Das and Adami, JJ.*) KISHUNDAYAL BHAGAT *v.* MAHABIR BHAGAT. **5 Pat. L. J. 492 : 58 I. C. 291 : 1 P. L. T. 711 : 1920 Pat. 277 : 8 U. P. L. R. (Pat.) 208.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76.

——— S. 76.

S. 76 [Miscellaneous.]
S. 76 (a) [Management of Property.]
S. 76 (b) [Collection of Rents.]
S. 76 (c) [Payment of Government Revenue.]
S. 76 (d) [Repairs and Improvements.]
S. 76 (f) [Policy of Insurance.]
S. 76 (g) [Account of sums-spent.]
S. 76 (h) [Occupation Rent.]
S. 76 (i) [Accounts of sums received.]

S. 76 [Miscellaneous.]

———S. 76—*Possession taken with consent of mortgagor—Liability.*

Where a mortgagee takes possession of mortgaged property with consent of mortgagor according to agreement between the parties the mortgage does not become a usufructuary mortgage but the mortgagee's liability arises under S. 76. (*Mookerjee and Cuming, JJ.*) AFSAR SHEIK *v.* SAURAVA SUNDARI DASI. **40 I. C. 371 : 25 C. L. J. 560.**

———Ss. 76 and 68—*Accounts—Redemption—Mortgagee unable to give possession—Recovery of debt.*

If the mortgagee cannot for any reason restore to the mortgagor possesssion of the whole of the mortgaged property, it does not follow that he cannot recover the mortgage debt. The proper course in such a case is to debit the mortgagee with the value of the land not restored, in taking accounts under S. 76, T. P. Act. (*Wallis, C. J. and Kumaraswami Sastri, JJ.*) KOTTAYAT GOPALA MENON *v.* KOLAT NARAYANA KURUP. **5 L. W. 339 : 40 I. C. 70 : (1917) M. W. N. 289.**

———S. 76—*Mortgagee in possession—Denial of mortgagor's title—Estoppel.*

There is no room for controversy that a mortgagee cannot be permitted to resist a claim for redemption on the ground that that the mortgagor had no title to the property included in the mortgage. As between a mortgagor and a mortgagee the attornment by the latter to the superior landlord cannot in any way prejudice the rights of the former. (*Mookerjee and Richardson, JJ.*) ABHURAM SIL *v.* HARACHAND DAS. **29 I.C. 746.**

———S. 76—*Mortgagee holding under prior lease—Redemption—Position of mortgagee.*

The possession of a usufructuary mortgagee who after the mortgage-money has been paid off continues in possession under a lease previously given him by the mortgagor is that of a tenant and not that of a mortgagee. (*Abdur Rahim and Napier, JJ.*) DUDDAMPUDI VENKATRAYUDU *v.* BIKKINA SUBBARAYUDU. **24 M. L. T. 376 : (1918) M. W. N. 643 : 49 I. C. 179 . 8 L. W. 599.**

———S. 76—*Lease given by mortgagee binding on mortgagor after redemption — Mortgagor's position after redemption.*

A lease given by the mortgagee in possession as being incidental to the management of the mortgaged property is binding on the mortgagor even after redemption unless he brings the tenancy to a close by a regular suit. The lessees would continue as tenants from year to year

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (a)—Management of Property.

under the mortgagor and liable to be evicted by him if the deed of redemption assures the mortgagor of the extinguishment of all the mortgagee's rights and transfers the rights to rent from the mortgagee to the mortgagor. 25 M 507 ; 8 A. L. J. 802, Foll. (*Sadasiva Aiyar and Napier, JJ.*) CHINAPPA THEVAN *v.* PAZHANIAPPA PILLAI, **18 M. L. T. 492 : 31 I. C. 630 : 2 L. W. 1132.**

———S. 76—*Usufructuary mortgage—Lease by mortgagor—Effect.*

A mortgagor taking a lease from the usufructuary mortgagee is in the position of a tenant and the nature of the possession is not changed till the mortgage is redeemed. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SUBRAYA KINI *v.* RAMAPPA ADIGE. **17 I. C. 265 : (1912) M. W. N. 907.**

———S. 76—*Mortgagee entering into possession of mortgaged proterty—Possession if adverse.*

Where mortgagee takes possession of the property mortgaged, with or without the consent of the mortgagor, his possession is only that of a mortgagee and cannot be adverse to that of the mortgagor. 28 A. 496 P. C. ; 34 A. 213 P. C. ; 32 C. 296 P. C., Foll. (*Stanyon, A.J.C.*) AWADH SINGH *v.* NANHAI. **46 I. C. 872.**

———S. 76—*Mortgagor put in possession as tenant—Arrears of rent— Maintainability of suit.*

A suit by the mortgagee for arrears of rent from the mortgagor is maintainable separately without being included in a suit on the mortgage (*Stuart, J. C.*) MAHADEO *v.* BHIKHAN. **17 I. C. 424 : 15 O. C. 291.**

———Ss. 76 and 101—*Applicability of—Extinguishment of mortgage.*

S. 76 of the T. P. Act does not apply to a case where the mortgage has in fact become extinct. (*Roe and Coutts, JJ.*) BASAWAN SINGH *v.* GANGAPHAL RAI. **47 I. C. 224.**

S. 76 (a) [Management of Property.]

——— S. 76 (a)—*Tenancy created by usufructuary mortgagee whether binds mortgagor after description—Remedy of mortgagor — Tenancy created by usufructuary.*

Lease by mortgagee in possession is binding on the mortgagor after redemption so far as the relationship of landlord and tenant continues ; the mortgagor can put an end to such a tenancy only by a regular suit under the Tenancy Act The mortgagor is not bound to recognise the lease for any period after redemption. (*Piggott, J.*) COLLECTOR OF BASTI *v.* SARMAN GHARAK. **11 I. C. 817 : A. L. J. 802.**

———S. 76 (a) and (h)—*Mortgagee, in possession—Duties of—Principles.*

The intention of parties in a case where the mortgagee is put in possession is merely that the land shall be properly cultivated and that the mortgagee in possession of the land shall put it to the best use so that a fair amount of profits may be realised and credited towards interest on

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (a)—Management of Property.

the principal mortgage-debts. Where the mortgagee is in possession of land, it is his duty to keep accounts. If he has neglected to cultivate the land it is his fault. The intention in such a case is that profits should go towards interest, by the land being put to the best use. (*Chevis, J.*) ZORA *v.* CHANDU. **1923 Lah. 71 (2).**

——S. 76 (a)—*Lease created by mortgagee—Termination of—Redemption by the mortgagor—Obiter.*

A lease created by a mortgagee determines *ipso facto* on redemption by the mortgagor or on the purchase of the equity of redemption. The position, is, however, different where the mortgage is only assigned. (*Spencer, Krishnan and Srinivasa Aiyangar, JJ.*) GOVINDASWAMI PILLAI *v.* PETHAPERUMAL CHETTY. **44 I.C. 839.**

——S. 76 (a)—*Profits from land — Income from Sindi trees—When to be taken in account.*

It cannot be said as a rule that Tadi from Sindi trees is ordinarily a source of income and that the mortgagor of land on which there are Tadi trees can claim any profits on account of Tadi which it is possible to tap from the trees, though he can claim the lease money if it is proved that the trees were actually leased in any year. (*Kotwal, A.J.C.*) SHAM RAO *v.* PANDURANG.
6 N.L.J. 93 : 1923 Nag. 137 (2).

——S. 76 (a) and (b)—*Rights of mortgagee.*

A usufructuary mortgage-deed provided that after payment of revenue and other village expenses, the collections made by the mortgagee should be appropriated towards the interest on the mortgage-money ; that if the balance of the collections was insufficient, he should prepare an account every year and the mortgagor should either pay the difference or execute a separate bond for the difference at the same rate of interest as the mortgage deed and that if the profits were more than the interest, the excess should be paid to the mortgagor. No accounts were taken in any year between the mortgagor and the mortgagee. In a suit for redemption. *Held*, that the mortgagee was responsible, not for the total rental but only for so much as he had actually collected and what he might have failed to collect through his negligence and that the mortgagee was not entitled to compound interest on the amount which had remained unpaid after deducting the profits for each year. (*Mohammad, A. J. C.*) GAURI NATH *v.* FATEH SINGH.
38 I. C. 537 : 3 O. L. J. 689.

——S. 76 (a)—*Mortgage in possession—Power of, to grant leases—Raiyati land—Status of tenant.*

A person in possession, as usufructuary mortgagee of the *Zamindari* right in certain lands, has the power in law to induct a tenant into the tenanted land subject to such a mortgage when the whole or part of such tenanted land became unlet or vacant and without a tenant. Such tenant when inducted by the mortgagees acquires non-occupancy rights in the tenanted land subject to such mortgage. (*Atkinson, J.*) SHEO BARAT SINGH *v.* PADARATH MAHTON. **52 I. C. 473.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (c)—Payment of Government Revenue.

S. 76 (b) [Collections of Rents.]

——S. 76 (b)—*Accounts—Possession of mortgagee under invalid agreement.*

Where a mortgagee has obtained possession under an invalid agreement for sale his possession may be deemed to be that of a mortgagee when it is established that the agreement was inoperative in law and he may be called upon to account for the rents and profits as if he were the mortgagee in possession. 1 Giff 421 Ref. (*Mookerjee and Panton, JJ.*) BAMA CHARAN CHAKRABARTI *v.* KISHORE MOHAN ROY.
35 C.L.J. 58 : 1922 Cal. 114.

S. 76 (c) [Payment of Government Revenue.]

——S. 76 (c)—*Enhancement of Government Revenue.*

A mortgagee in possession was to pay Government revenue and a *malikana* and in case of enhancement of Government revenue to deduct the enhancement from the *malikana*. The Government revenue was enhanced to such an extent that the enhancement exceeded the *malikana*. *Held* the mortgagees were entitled to deduct the enhancement from the *malikana* allowance. But if the enhancement exceeded the *malikana* the mortgagee was not entitled to add the excess to the mortgage amount. Enhancement of revenue necessarily implies enhancement of rents and the mortgagee is not liable to account for such enhancement of rent. (*Richards, C. J. and Banerjee, J.*) MAHARAJ SINGH *v.* LALTA PRASAD.
57 I.C. 774 : 17 A.L.J. 93.

——S. 76 (c)—*Landlord and tenant — Landlord ejecting on a decree for arrears of rent—Effect on mortgage.*

Where a *Zemindar* has obtained a decree for arrears of rent and has in execution obtained ejectment of the mortgagor tenant in the Revenue Court and subsequently the mortgagee becomes a tenant under an ordinary patta in a suit by mortgagor for redemption, the contention of the mortgagee was that the mortgagee ceased to exist and no suit for redemption lies. It was held that the mortgagors were entitled to set up the plea of invalidity of the sale without taking formal steps to get rid of the Revenue Court proceedings which were actually found to be collusive and fraudulent and as such had no legal validity. (*Walsh, J.*) BENI MADHO *v.* BASANTO KUNBI.
35 I. C. 252.

——S. 76 (c)—*Rent — Mortgagee escaping payment of rent—Accounts.*

A mortgagee who was in possession and who was to take the profits after paying rent by way of interest, escaped from the payments for certain years. *Held*, that the mortgagor could not deduct that amount from the money due. (*Griffin, J.*) FAKIR MUHAMMAD *v.* ALI SHER KHAN.
10 I. C. 113.

——S. 76 (c)—*'Charge of a public nature'—Tagavi advance.*

A *Tagavi* advance granted to the mortgagor by the Government is a 'charge of a public nature' within the meaning of S. 76 (c) of the Act. (*Scott, C. J. and Heaton, J.*) CHITTA BHULLA *v.* BAI JAMNI. **40 Bom. 483 : 37 I. C. 295 : 18 Bom. L. R. 438.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (c)—Payment of Government Revenue.

——S. 76 (c)—*Duty to pay arrears of rent —Rent sale.*

Under S. 76 (c) of the T. P. Act, the mortgagees were responsible for the sale of the properties in execution of decrees for arrears of rent, even though they were for a period prior to the execution of the kobala, and that, therefore plaintiffs (mortgagors) were entitled to recover those plots. 11 Mad. 254, Rel. (*Chaudhuri and Cuming, JJ.*) KSHETRA NATH ADHIKARI *v.* DURGAPADA MANDAL. **52 I. C. 902.**

——S. 76 (c)—*Mortgagee in possession—Liability to pay enhanced Government revenue.*

It is the mortgagee in possession and not the mortgagor that is liable to pay the enhanced Government revenue. 25 I. C. 641, Foll. (*Spencer and Seshagiri Aiyar, JJ.*) NANU NAIR *v.* KANTAN ASHTA MOORTHI. **29 M. L. J. 772 : 29 I. C. 386 : 2 L. W. 509.**

——S. 76 (c)—*Sale of property—Default of payment on revenue, when liable to be set aside*

S. 76 (c) does not apply where the mortgage provides for payment of the Government revenue by the mortgagor. Where a mortgage, expressly provided that the Government revenue need not be paid by the mortgagee the property was put up to sale for arrears of revenue and purchased by the mortgagee in a suit for redemption by the assignee or the mortgagor. *Held*, that as the mortgagee was not bound by law to pay the revenue, the purchaser was not guilty of any fraud and the sale could not be set aside. (*Sankaran Nair and Seshagiri Aiyar, JJ.*) OOPPATH NARAMPARAMBATH KUTTAN *v.* KOYAKUTTY. **29 I.C. 344.**

——S. 76 (c)—*Government revenue for other lands— Time of redemption.*

Government revenue due upon other lands contained in the same *patta* issued in the mortgagor's name is revenue due on the mortgaged land also and therefore a mortgagee paying such revenue under S. 76 (c), T. P. Act is entitled to the amount on redemption. (*Sadasiva Aiyar and Napier, JJ.*) GUNNAM DORAYYA *v.* VADAPALLI AYYAMACHARYALU. **16 M. L. T. 226 : (1914) M. W. N. 648 : 25 I. C. 797 : 27 M L. J. 295.**

——S. 76 (c)—*Government revenue—Contract to the contrary.*

Where out of the amounts and profits due to the mortgagor by a mortgagee in possession under a deed of mortgage a fixed amount was allowed for Government revenue and this was subsequently enhanced by Government. *Held*, that this constituted a contract to the contrary under S. 76 (c) and the mortgagee was not bound to pay the amount of enhancement. 14 I. C. 590; 18 M. L. J. 31 Dist. ; 17 M. L. J. 517, Foll. (*Oldfield, J.*) PANAMBATTA KALATHIL KUNCHU MENON *v.* KALATHINPADIKIL NARAYANAN EZHUTESSAN. **25 I. C. 641 : 16 M. L. T. 317.**

——S. 76 (c)—*Government revenue—Kanom —Stipulation for payment by kanomdar—Enhancement of Government revenue—Liability of kanomdar—Improvements—Reclamation.*

Where the *kanom* tenant is liable to pay the actual Government revenue during the period of his holding, he is liable to pay the enhanced assessment. Every document must be construed in the light of the surrounding circumstances which would include the usage with regard to the relation between the parties to the document. 17 M. L J. 517 ; 18 M. L, J. 31, Ref. and Rel. *Quaere.* Whether S. 76 of the T. P. Act applies to the determination of the liability of a *kanom* tenant in Malabar. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) THIRUMATHUR *v.* SWAMINATHA PATTAR KRUAKAR. **16 I. C. 184.**

——S. 76 (c)—*Revenue—Liability of usufructuary mortgages.*

In the absence of a contract to the contrary an usufructuary mortgagee must pay enhanced Government revenue even if it was not contemplated at the date of the mortgage. 18 M. L. J. 31, Foll ; 14 M. L. J. 488 ; 17 M. L. J. 517 Diss. (*Ayling and Sadasiva Aiyar, JJ.*) KOLLI VALAPPIL *v.* NATUWATHPAPU. **14 I. C. 590.**

——S. 76 (c)—*Enhanced revenue—Incidence.*

The burden of enhanced revenue of the mortgaged property falls on the mortgagee unless a distinct contract to the contrary is proved. (*Abdur Rahim, J.*) NATHUVATHA PAPPU *v.* KARNAVAN RAVUNNI NAIR. **(1911, 2 M. W. N. 236 : 10 M. L. T. 571 : 12 I. C. 140 : 22 M. L. J. 151.**

——S. 76 (c)—*Government revenue — Payment provided for on redemption—Charge.*

Where the mortgage deed provided that if revenue should be assessed in future, the mortgagor would pay it and would not be entitled to redeem without paying it, *held*, the intention of the parties was to make it a charge. Under S. 76 (c) the mortgagee in possession is primarily responsible for payment of the revenue (*Daniels and Lyle, J. C.*) MUHAMMAD HADI *v.* PARBATI. **25 O. C. 2 : 9 O. L. J. 312 : 1922 Oudh 91.**

——S. 76 (c)—*Enhanced land revenue—Usufructuary mortgagee—Redemption.*

Where by a usufructuary mortgage the mortgagee was to retain the profits after paying the land revenue in lieu of interest and the land revenue is subsequently enhanced, he is entitled on redemption to claim the difference between the original and the enhanced land revenue if the amount of the profits had been reduced thereby. (*Stuart and Kanhaiya Lal, A. J. Cs.*) CHARU CHANDRA BISWAS *v.* LALLAN SINGH. **40 I. C. 42 : 4 O. L. J. 148.**

——S. 76 (c)—*Enhanced Government revenue —Usufructuary mortgage—Portion retained by mortgagor for rent — Enhancement of land revenue—Right of parties.*

Where a mortgagor takes back the property usufructuarily mortgaged on a lease undertaking to pay rent but makes default therein, the mortgagee is entitled to claim payment of their amount as a condition precedent to redemption. Where in such a case the usufructuary mortgagee undertakes to pay the land revenue himself and the revenue was enhanced which possibility was well within the knowledge of the parties at the time they entered into the transaction, the mortgagee is liable to pay the enhanced rate and is

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (d)—Repairs and Improvements.

not entitled at time of redemption to claim the difference between the original and the enhanced rate which he had to pay. 14 I. C. 590, R. 22 B. 440 Dist. (*Stuart, J.C.*) AKHAR KHAN *v.* KALE KHAN. **39 I. C. 437 : 4 O. L. J. 118.**

S. 76 (d) [Repairs and Improvements.]

——S. 76 (d)—*Improvement made by a mortgagee in possession—Mortgagee can recover costs of improvements from the mortgagor.*

A mortgagee in possession is entitled to recover from his mortgagor reasonable costs incurred in making improvements, though the T. P. Act is silent on the subject. *Per Martin, J.*—The Court in allowing costs of improvements must naturally be on its guard against extravagant or unfounded claims. It shall enquire strictly into the *bona fides* and fairness of the claim in each particular case. 19 Mad. 327. Foll. (*Batchelor, A. C.J. and Martin, J.*) NIJALINGAPPA *v.* CHANBASAWA. **43 Bom. 69 : 47 I. C. 751 : 20 Bom. L. R. 895.**

——S. 76 (d)—*Repairs—Failure of mortgagee to keep accounts.*

The failure of the mortgagee to keep accounts of the money spent for additions and repairs is not fatal to the claim for compensation otherwise proved though it may give rise to presumptions in favour of the mortgagor. (*Shadilal and Rossignol, JJ.*) THAKUR DAS *v.* RADHA KISHAN. **37 I. C. 125 : 99 P. R. 1916.**

——S. 76 (d)—*Improvements by mortgagee.*

Where under the terms of a mortgage-deed the mortgaged house is re-built, the price of old, materials should be deducted from the costs of improvements allowed to the mortgagee. (*Shah Din, J.*) THAKAR DAS *v.* NANDI BAI. **105 P. L. R. 1915 : 28 I. C 375: 39 P. W. R. 1915.**

——S. 76 (d)—*Improvements—Mortgagee in possession—Building of a granary—Payment of increased water tax—Introduction of water pipes—Mortgagee if entitled to compensation.*

A usufructuary mortgagee who claimed compensation in respect of improvements effected by him such as building of a granary, payment of increased water tax and introduction of water pipes, is not entitled to the same as (1) the granary being a moveable structure can be removed by him, (2) the increased water tax paid would fetch an increased rent and (3) the introduction of water pipes is not a 'substantial repair' within the meaning of S. 76, clause (*d*), so as to make the mortgagor liable for the same. (*Sadasiva Aiyar and Tyabji, JJ.*) KUTHUVA NARAYANASWAMI AIYAR *v.* SORNAMMAL. **22 I. C. 635 : 15 M. L. T. 374.**

S. 76 (f). [Policy of Insurance.]

——S. 76 (f)—*Agreement to keep mortgaged premises insured—Failure—Insurance effect by receiver in mortgage suit—Money received under Insurance Policy—Application of.*

The money received by the receiver of mortgaged properties during suit on the mortgage under a policy of insurance effected by him is not

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (g)—Account of sums spent.

subject to the terms of the mortgage-deed inasmuch as the insurance was kept on foot by the Court through the receiver as a matter of protection for the benefit of all persons who were parties to the mortgage suit, and not by the mortgagor or the mortgagee in accordance with their contract in the mortgage-deed. The Court can direct in what manner the money so received, should be laid out notwithstanding any terms in the mortgage-deed to the contrary. (*Fletcher and Smither, JJ.*) SETH DOOLY CHAND *v.* RAMESHWAR SINGH. **40 I. C. 623.**

S. 76 (g) [Account of Sums spent.]

——S. 76 (g)—*Duty to keep accounts cannot be contracted against.*

Under S. 76 (g), T. P. Act a mortgagee cannot contract himself out of the statutory liability to keep accounts. It is only under the circumstances mentioned in S. 77 that the duty can be dispensed with. (*Simpson and Wazir Hasan, A. J. C.*) LAL BAHADUR *v.* MURLI DHAR. **1923 A. 175.**

——S. 76 (g)—*Collection of cesses—Accountability.*

Certain usufructuary mortgagees, who had as such got into possession and who were entitled under the mortgage to collect rents, took advantage of their position to collect other sums, *e.g.*, cesses from the tenants payable by the latter in their character as tenants of the mortgagor. The mortgagees were held liable to account for the profits received. (*Mookerjee and Carnduff, JJ.*) RAM AWATWAR *v.* TULSI PRASAD SINGH. **16 C. W. N. 137 : 11 I. C. 713 : 14 C. L. J. 507.**

——S. 76 (g)—*Mortgage—Accounts—Duty of mortgagee.*

In a *leka mukhi* mortgage it is the duty of the mortgagee to keep full and clear accounts of the income and expenditure of the mortgaged lands and if he fails to keep or produce such accounts every presumption will be made against him. (*Shah Din and Scott-Smith, JJ.*) ALLAH YAR *v.* THAKAR DAS. **46 P. W. R. 1918 : 44 I. C. 9 : 24 P. L. R. 1918.**

——S. 76 (g) and (h) — *Accounts suit—By holder of equity of redemption.*

The purchaser of the equity of redemption is entitled to sue the mortgagee for accounts and the mortgagee's claim in a suit for accounts against the mortgagor is alike enforceable against a subsequent purchaser of the property from the mortgagor. Referring 41 Ch D 126 (1889). (*Sheppard and Subramaniah, JJ.*) VEPA KAMESAM *v.* VARIGONDA NARASIMHAN. **34 I. C. 701.**

——S. 76 (g)—*Omission to keep accounts—Presumption.*

If on taking the accounts of a usufructuary mortgage, it appears that the mortgagee has kept no regular accounts, every reasonable presumption should be made against him. (*Batten and Mitra, A. J. C.*) MUKUND RAM SUKUL *v.* SHEO NARAIN. **47 I. C. 21.**

——S. 76 (g)—*Accounts—Stipulation not to claim—Mortgagee not discharging debts undertaken to be paid off.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (h)—Occupation Rent.

Notwithstanding a stipulation in the usufructuary mortgage that the mortgagee was not liable to account to the mortgagor, accounts should be taken at the time of redemption of the realizations made by the mortgagee. Such account should not be adjusted on the footing of the consideration actually advanced by the mortgagee but the mortgagee is entitled to set off for the amount paid by him in satisfaction of a prior encumbrance undertaken to be discharged by the mortgagee. (*Stuart and Kanhaiya Lal, A. J. Cs.*) PRAG *v.* MOHAN LAL.
47 I. C. 161 : 5 O. L. J. 263.

[S. 76 (h) Occupation Rent].

——S. 76 (h)—*Liability of mortgagee in possession.*

Mortgagee in possession as manager or receiver is not a trustee of the mortgagor, but he has to prove that the accounts are proper and the debts are not satisfied. (*Sir John Edge.*) B. L. RAI *v.* BHAIYA LAL. **16 N. L R. 94 : 24 C. W. N. 769 : 28 M. L. T. 345 : 58 I. C. 13 : (1920) M. W. N. 685.**

——S. 76 (b)—*Mortgage in possession—Accounts—Mode of taking.*

Where the mortgagee in possession has kept no accounts it is open to the owner of an interest in the equity of redemption to redeem on the footing of paying the balance left of the mortgage-debt after debiting the mortgagee with a fair occupation rent during his possession and crediting the mortgagee with simple interest on the mortgage-debt. (*Viscount Haldane.*) MIRZA YADALI BEG *v.* TUKARAM. **48 Cal. 22 : 39 M. L. J. 147 : 28 M. L. T. 95 : (1920) M. W. N. 369 : 12 L. W. 503 : 2 U. P. L. R. (P. C.) 123 : 16 N. L. R. 154 : 22 Bom. L R. 1315 : 47 I A. 207 : 57 I. C. 535 : 25 C. W. N. 241.**

——S. 76 (h)—*Mortgagee in possession—Account—Personal remuneration.*

Nothing is better established than that mortgagee in possession cannot, in the absence of an agreement or stipulation, charge the mortgagor for his personal service. (*Beaman, J.*) HOPE MILLS, LTD. *v.* SIR KOVAJI, J. READYMONEY.
10 I. C. 748 : 13 Bom. L. R. 161.

——S. 76 (h)—*Usufructuary mortgagee—Accounts—Liability to render.*

Where a usufructuary mortgagee was placed in possession of property the income and the are of which were fluctuating and the deed provided that the net profit of the property would be Rs. 110 out of which Rs. 80 would be set off against interest and the balance against the principal *Held*, the parties did not intend to have their rights fixed on the basis of the figures mentioned in the mortgage-deed. The mortgagee was liable to render the usual accounts. (*Mookerjee and Beachcroft, JJ.*) SURENDRA NATH *v.* KSHITINDRA MOHUN MITRA. **53 I. C. 59 : 29 C. L. J. 434.**

——S. 76 (h)—*Accounts—Settlement between mortgagor and mortgagee—Mortgagee in possession.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (h)—Occupation Rent.

Where in a mortgage deed there was an agreement that the principal would be paid in a lump sum after the expiry of the term of the mortgage and the possessor was to pay a certain sum of money presumably to the mortgagor, but the mortgagee never paid so, the effect of keeping back suit monies by the mortgagee was that that money must go in an adjustment of accounts between the parties to discharge the principal due at the time. (*Woodroffe and Chaudhury, JJ.*) BRIJKUMAR LAL *v.* MAJTES SAHAI.
34 I. C. 899.

——S. 76 (h) — *Mortgage—Lease — Same transaction—Suit for rent—Subsequent suit on mortgage.*

A mortgagee must sue for both principal and interest due ; otherwise he cannot sue subsequently for the other. Where a mortgage deed and a lease form one transaction (the latter merely providing a mode for realising interest) a suit for rent instituted after the mortgage debt had become due, bars a subsequent suit for recovery of principal and interest due on the mortgage. (*Shah Din and Wilberforce, JJ.*) NATHA SINGH *v.* CHUNI LAL. **69 P. R. 1918 : 112 P. W. R. 1918 : 47 I. C. 364 : 117 P. L. R. 1918.**

——S. 76 (h)—*Accounts—Limitation.*

No question of limitation arises as between the mortgagors and mortgagees when accounts are taken at the time of redemption. (*Sadasiva Aiyar and Hannay, JJ.*) THEKKEMAUNENGATH RAMAN *v.* KAKKESSERI PAZHIYOT MANAKKAL.
28 M. L. J. 184 : 27 I. C. 989 : 2 L. W. 433.

——S. 76 (h)—*Accounts—Agreement—Usufructuary mortgagee.*

Where there is an agreement between the parties the mortgagee is not bound to render account of the profits. (*Benson and Sundara Aiyar, JJ.*) PARASURAMA PATTAR *v.* VENKATACHALAM PATTAR. **25 M. L. J. 561 : 21 I. C. 701 : (1914) M. W. N. 198.**

——S. 76 (h) and (i)—*Redemption—Claim to possession after discharge of usufructuary mortgage—Money found due to mortgagee—Form of decree—Accounts—Mesne profits—Costs of litigation—Interest.*

A mortgagor alleged that the debt due on a usufructuary mortgage has been repaid out of the usufruct, and sought to recover the property mortgaged. *Held*, the suit was in one for redemption. If, on accounts being taken, it is found that the whole of the debt has not been paid, the decree ought to be conditional on payment of whatever might be found due to the mortgagee. Even if such a suit is regarded as one in ejectment, the Courts have a discretion to allow redemption to the plff. The proper course to follow in such a case is for the Court to direct that account be taken of the amount due to the mortgagee and of any amount for which the mortgagee might be accountable to the mortgagor on account of the profits of the mortgaged property received by him and then pass a final decree for redemption. Where a mortgage-deed stipulates for the appropriation of profits towards interest

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (h)—Occupation Rent.

without specifying the rate of interest, and a portion of the principal amount is received by the mortgagee, the Court in its decree should direct the appropriation of a portion of the rent proportionate to the balance of principal remaining unpaid toward interest and to hold the mortgagee accountable for the balance. If no portion of the amount paid would be debitable towards the principal, there is no question of accountability for profits. Where a mortgagee defended a prior suit brought by a third party he must be reimbursed to the extent of the amounts expended by him and to interest at 9 per cent. per annum. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) RANGANATHA *v.* PARIPPURANAM. 16 I. C. 217.

——S. 76 (h)—*Interest—Surplus profits.*

A mortgagee in possession ought to be charged with interest when he received surplus profits after the payment of his debt. (*Drake-Brockman, J. C.*) BHAYALAL *v.* MOHAMAD HOKIM MIRZA. 57 I. C. 294.

——S. 76 (h)—*Accounts to be ordered only in suit on mortgage.*

Apart from any special statutory provisions accounts cannot be adjudicated upon by a Court where no relief can be granted. Ordinarily a suit for accounts upon a mortgage cannot be maintained by the mortgagor unless he asks for redemption. (*Batten and Mittra, A. J. Cs.*) MUKUND RAM SUKUL *v.* SHEO NARAIN. 47 I. C. 21.

——S. 76 (h)—*Interest—Profits—Rights of mortgagee.*

Where under a mortgage the rate of interest on the mortgage money is fixed and certain, the mortgagee is not entitled to any portion of the usufruct which might be in excess of that rate and the mortgagor can sue for accounts of the profits realized by the mortgagee from the mortgaged property. It would require very clear words to induce a Court to put upon a mortgage deed a construction to the contrary. (*Kanhaiya Lal, A. J. C.*) LALA NARAIN DAS *v.* BAIJ NATH SAHAI. 56 I. C. 692 : 7 O. L. J. 231.

——Ss. 76 (h) and 60—*Suit for account—Mortgage—Redemption—Limitation.*

An usufructuary mortgage provided that the mortgagee should, after deducting the stipulated interest from the collections pay out of the balance annually to the mortgagors, the property being redeemable on the payment of the principal money at the end of seven years. A suit by a mortgagor after redemption for the recovery for surplus collections made by the mortgagee during their possession as mortgagee, having been brought within three years from the date of the restoration of possession to the mortgagor, was governed by Art. 105, Limitation Act, and was within time. (*Kendal and Daniels, A. J. Cs.*) BIKRAMJIT SINGH *v.* RAJ RAGHU BAR SINGH. 38 I. C. 610 : 20 O. C. 25.

——S. 76 (h)—*Mortgagee must be in possession as such.*

S. 76 (h) applies only to the case of a mortgagee being in possession *qua* mortgagee.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (i)—Accounts of sums received.

(*Stuart, J.C.*) MUHAMMAD HUSAIN *v.* MUHAMMAD ASGHAR. 19 O. C. 328 : 37 I. C. 23 : 3 O. L. J. 462.

——S. 76 (h)—*Mortgagee in possession as lessee—Obligations of—Puisne mortgagees.*

The case of a mortgagee who enters into possession of the mortgaged property by virtue of a lease under which a rent is payable to the lessor and the case of the mortgagee who enters into possession of the mortgaged property by virtue of a lease under which the rent is appropriated by the lessee towards the reduction of the mortgage debt are different. In the former case he is not chargeable as a lessee in possession under S. 76 of the T. P. Act and in the latter case he is so chargeable. (*Das and Adami, JJ.*) KISHANDAYAL BHAGAT *v.* MAHABIR BHAGAT. 5 Pat. L. J. 492 : 1920 Pat. 277 : 1 Pat.L. T. 711 : 58 I. C. 291 : 2 U. P. L. R. (Pat.) 208.

[S. 76 (i) Accounts of sums received].

——S. 76 (i)—*Mortgage in possession—Failure to keep accounts.*

The rule applicable to the taking of accounts in a case where the mortgagee is in possession of the mortgaged property is that the gross receipts therefrom are ascertained at the end of each year and after deducting the necessary outlay on account of Revenue collection expenses, and preservation of the estate, the balance goes to reduce the interest and if there is surplus, to reduce the principal the account being closed at the end of each year. If the mortgagee refuses or neglects to deliver the accounts the Court must take the best evidence available and decide upon it. The presumption will, no doubt, be against the mortgagee but this would not justify the Court in accepting without any examination any evidence which may be offered by the mortgagor. (*Abdul Raoof and Moti Sagar, JJ.*) MUHAMMAD *v.* UTTAM CHAND. 63 I. C. 598.

——S. 76 (i)—*Liability of mortgagee for delivering possession — Mortgagee in possession after valid deposit—Gross receipts, meaning of.*

It cannot be laid down that if the mortgagees do not deliver possession even after legal tender, they are not entitled to credit for amounts which they paid after the tender, to meet the revenue demands on the mortgaged property, and for necessary repairs and collection charges. Such a rule would involve a great hardship to a mortgagee who refused to accept the tender under a *bona fide* claim of right. In fact it would put him in a worse position than a trespasser, and there seems no need for so stringment a rule. Gross receipts in the Act do not include interest upon the amounts collected. (*Krisnnan and Venkatasubba Rao, JJ.*) TADEPALLI SUBBA RAO *v.* SRI BALUSU BUCHI SARVARAYUDU. 18 L. W. 61 ; (1923) M. W. N. 533 : 44 M. L. J. 534 : 1923 M. 533.

——Ss. 76 (i) and 83—*Applicability of—Malabar mortgage.*

S. 76 of the T. P. Act has no application to money due on improvements to a mortgagee in Malabar because the value of the improvement

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 76 (i)—Accounts of sums received.

effected by such mortgagee cannot be brought under the expression "amount due on the mortgage" in S. 83 of the T.P. Act. (*Sadasiva Aiyar and Napier, JJ.*) MOORIATH VARIATH *v.* MELEDATH K. KUNJI NANGAYAR AMMA.
10 L. W. 300 : 26 M. L. T. 329 : 52 I. C 834 : 37 M. L. J. 206.

——Ss. 76 (i) and 83—*Tender—Cessation of interest.*

The provision for cessation of interest from the date of tender of the mortgage money does not in terms refer to a case when the mortgagor claims to split up the mortgage amount on the ground that the mortgagee has become the owner of a part of the equity of redemption or when there are disputes as to the extent of the subsisting interest of the mortgagor in the equity of redemption so as to force on the mortgagee the talk of deciding the disputes rightly at the risk of losing the interest on money due to him and becoming responsible for mesne profits. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) VENKATARAMA AIYAR *v.* RANGASAWMI AIYENGAR.
17 I. C. 368 : (1912) M. W. N. 1175.

——S. 77—*Provision for payment of portion of income to mortgagor.*

A contract that a definite portion of the income of properties usufructuarily mortgaged shall be paid annually to the mortgagor may legally find a place in the mortgage or in an agreement for that purpose, (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MEENAKSHISUNDARAM MUDALIAR *v.* RATHANASAMI PILLAI.
41 Mad. 959 : 24 M. L. T. 315 : (1918) M. W. N. 811 : 8 L. W. 438 : 49 I. C. 291 : 35 M. L. J. 489.

——S. 77—*Usufructuary mortgage—Mortgagee to pay land revenue whether profit or loss—Contract.*

In a usufructuary mortgage, where the net profits after payment of land revenue were agreed to be taken in lieu of the annual interest, the mortgagee must, by the terms of the contract, pay land revenue, whether there was profit or loss and an inquiry whether the land remained fallow through his negligence or not is excluded by the very terms of the contract. Whether mortgagee must bear enhancement of revenue at periodical resettlement is question of fact depending on intention of parties to contract. (*Mittra, O. A. J. C.*) HARI *v.* SHRIDHAR.
23 I. C. 131 : 10 N. L. R. 9.

——S. 78—*Priority—Waiver of—Conduct.*

The first mortgagees of two villages did not contest by appeal a decree which erroneously subordinated their rights against one of the villages to those of the second mortgagee of that village. The first mortgagees subsequently sued to enforce their entire mortgage against the other village in the hands of auction purchasers from the mortgagors. *Held*, that the first mortgagees were not precluded from fully enforcing their security against the auction purchasers. (*Sir John Edge.*) PADRATH HALWAI *v.* RAM NARAIN UPADHIA.
37 All. 474 : 42 I. A. 163: 13 A. L. J. 809 : 19 C. W. N. 991 : 17 Bom. L. R. 617 : 18 M. L. T. 85 : 2 L. W. 639: 22 C. L. J. 165: 30 I. C. 366 : (1915) M. W. N. 709 : 29 M. L. J. 159.

——S. 78—*Mortgage—Priority.*

When the first mortgagee helped the mortgagor to induce the second mortgagee to advance money by declaring that the property was free from encumbrances, he cannot then turn round and claim priority over that mortgage in his own favour. (*Sir Arthur Wilson.*) RAMAN CHETTY *v.* STEEL BROTHERS & CO., LTD.
15 C. W. N. 813 : 13 Bom. L. R. 542 : 14 C. L. J. 79 : (1911) 2 M. W. N. 413 : 4 Bur. L. T. 225 : 10 M. L. T. 239 : 11 I. C. 503 : 6 L. B. R. 21 : 21 M. L. J. 936.

——S. 78—*Misdescription of property—Transferee of mortgaged property.*

In 1876, one B purported to hypothecate four plots of land in Mouza N. As a matter of fact, the name of N. was inserted in the mortgage-deed by mistake, the property being situated in Mouza A. The heirs of B. sold their proprietary right in Mouza A to one K in 1910, free of all charges. In a suit brought on the basis of the mortgage of 1876, *held*, that K was not bound by that mortgage. 18 Cal. 556 ; 18 Mad. 364 ; 29 Cal. 654, Ref. (*Piggott, J.*) KINLOCK *v.* TOTA RAM.
15 I. C. 335.

——S. 78—*Priority—Defence.*

By a mortgage of 1889 sufficient money to discharge the two prior mortgages of 1886 and 1887 respectively was left in the hand of the mortgagee G to discharge the two mortgages. G paid off the mortgages. There was one more mortgage of 1888 in respect of the same property. G sued on his mortgage making the mortgagees of 1888 parties to the suit for priority over the mortgage of 1888 for the money he had to pay to discharge the mortgages of 1886 and 1887. It was for the benefit of G that the mortgages of 1886 and 1887 should remain alive and therefore, he was entitled to the priority claimed. A plff. can put forward, in a suit by himself, the priority which he could claim by way of defence, if the suit had been instituted against him. (*Richards, C.J. and Benerjee, J.*) GUR NARAIN *v.* SHADI LAL.
34 All. 102 : 12 I. C. 607 : 8 A. L. J. 1289.

——Ss. 78 and 79—*Priority—Mortgage in satisfaction of prior mortgage decree.*

A mortgage executed in satisfaction of a prior mortgage decree has priority over a mesne incumbrance. 7 A. L. J. 984 : 28 All. 778 Foll. (*Richards and Tudball, JJ.*) RAHIM-UN-NISSA *v.* BADRADAS.
33 All. 368 : 9 I. C. 205 : 8 A. L. J. 112.
[*See also* **7 I. C. 468 : 7 A. L. J. 984.**]

——S. 78—*Fraud—Gross negligence.*

Fraud is not necessary to bring a case under S. 78. The words fraud, misrepresentation and gross negligence are quite disjunctive. It is gross negligence when vendor having full notice that the vendee is impecunious allows the vendee

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 78.

to retain the title deeds and thereby enables him to effect a second mortgage on the same property. (*Holmwood and Imam, JJ.*) NAND LAL ROY *v.* ABDUL AZIZ. **34 I. C. 115 : 43 Cal. 1052.**

——— S. 78—*Priority—Estoppel—Mortgagee of non-transferable occupancy holding.*

Where a landlord mortgagee of the holding sues as mortgagee, he is estopped from questioning the validity of a prior mortgage of the holding on the ground of its non-transferability and that it was effected without his consent. (*Woodroffe and Choudhuri, JJ.*) NATABAR SARKAR *v.* NATABAR MANDAL. **33 I. C. 112.**

——— Ss. 78 and 80—*Priority, right of—Limitation for enforcement of—Limitation Act, Art.* 132.

Where a puisne mortgagee paying off the amount due under a decree for sale by a prior mortgagee claimed priority against intermediate mortgagees, the suit in respect of the priority is governed by Art. 132 of the Lim. Act., just as if it were a suit by the prior mortgagee. (*Lindsay, J. C.*) DEPUTY COMMISSIONER OF LUCKNOW *v.* SUKHNANDAN. **23 I. C. 448 : 17 O. C. 38.**

——— S. 78—*Priority — Earlier registered mortgage — Title-deeds left with mortgagor—Subsequent mortgage.*

A subsequent mortgagee who has wilfully abstained from the obvious course of searching in the registration office, cannot obtain priority over an earlier registered mortgage, merely on the ground that the latter did not call for the title deeds and retain them in his control. (*Twomey, C. J. and Maung Kin, J.*) THE BANK OF BENGAL, AKYAB *v.* AUNG THA HLA. **47 I. C. 774.**

——— S. 79—*Partition deed — Family debts distributed among members to be discharged—maximum specified — Each member's properties liable for such debts and for losses to the family in case the debts are not paid—Charge.*

Where in a partition deed the common family debts allotted to each sharer were agreed to be discharged by the sharer to whom they fell and in case of failure to discharge them, his properties were to be liable for such debts and for the losses that might happen to the family, *held* in a suit on a mortgage executed by a member subsequent to the partition, that the partition deed created a prior charge in favour of the other members over the properties of the alienating mortgagor to the extent of the maximum specified in the schedule to the partition, that the property can be sold only subject to the above charge, that the charge becomes operative and the amount of the same becomes ascertained when the payment comes to be actually made on behalf of the alienating member and that the other members of the family are entitled to a declaration of their right to such a charge though they have not actually made the payments at the date of the suit. (*Oldfield and Ramesam, JJ.*) SESHA AIYAR *v.* SRINIVASA AIYAR. **14 L. W. 559 : (1921) M. W. N. 680 : 70 I. C. 362 : 30 M. L. T. 43 : 41 M. L. J. 282.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 80.

——— S. 79—*Mortgage—Redemption—Deed of further charge—Right to redeem.*

Where the purchasers of one of the mortgaged properties desired to redeem the property on payment of the whole debt and mortgagees set up a deed of further charge, which was found to be a simple money bond, *Held*, the plffs. had a right to redeem without paying the amount of the bond. (*Stuart, J. C.*) PURAN SINGH *v.* BHIKHAM SINGH. **36 I. C. 709 : 3 O. L. J. 402.**

——— S. 79—*Mortgage—Consolidation — Undertaking to pay money advanced on later security along with that due on earlier.*

A mere undertaking by the mortgagor to pay money advanced on a later security between the same parties along with the former is not a consolidation of the debts. (*Kanhaiya Lal, A. J. C.*) GAYA DIN SINGH *v.* HAR KHAN SINGH. **22 I. C. 132 : 16 O. C. 267.**

——— Ss. 79 and 80—*Priority—Rule—Exception.*

The general rule as contained in S. 80 of the Act is that a mortgagee making a subsequent advance to the mortgagor does not acquire any priority in respect of his security for such subsequent advance as against an intermediate mortgagee. S.79 engrafts an exception on that general rule and provides that the intermediate mortgagee who has notice of the prior mortgage is postponed in respect of all advances subsequently made on the security of the mortgage, provided it expresses the maximum to be secured thereby and that the maximum is not exceeded. (*Coutts and Das, JJ.*) BAIJ NATH GOENKA *v.* DALEEP NARAIN SINGH. **1 Pat. L. T. 582 : 1920 Pat. 261 : 58 I. C. 489.**

[*See also* **17 I. C. 927 : 16 C. L. J. 394.**]

——— Ss. 80 and 79—"*In the case mentioned in S. 79*" *and* "*subsequent*"—*Interpretation.*

The words of S. 80 "in the case mentioned in S. 79" do not really mean mortgages to secure future advances or the balance of a running account. But the words of S. 79 mean that the mortgages there referred to must express a maximum. The words "to secure future advances, etc," denominate the different classes of mortgages, but to bring them under S. 79 they must have the common feature of a maximum expressed. The word 'subsequent' from the content must mean subsequent to the intermediate mortgage, and if that is so, then in the sense of section an advance when made after another mortgage is granted becomes a subsequent advance. (*Lord Dunedin.*) THE IMPERIAL BANK OF INDIA *v.* U. RAI GYAW THU & CO., LTD. **1 Rang. 637 : 45 M. L. J. 505 : 21 A. L. J. 784 : 25 Bom. L. R. 1279 : 9 O. & A. L. R. 937 : 33 M. L. T. 395 (P. C.) : 2 Bur. L. J. 254 : 50 I. A. 283 : (1923) M. W. N. 609 : 51 Cal. 86 : 39 C. L. J. 186 : 28 C. W. N. 470 : 1923 P. C. 211.**

——— S. 80—*Fresh advance—Undertaking by mortgagor to pay—Rights and liabilities of purchaser.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 81.

An undertaking by a mortgagor who takes a fresh advance that he will not redeem the mortgage until he has repaid the advance is legal and enforceable, against himself, but it is not a charge on the land and it is not enforceable against a purchaser of the land. 17 O. C. 203 : 9 B. 233 : 9 B. 236 Ref. (*Simpson, A. J. C.*) GAYA PRASAD *v.* RACHPAL. **9 O. L. J. 484 : 4 U. P. L. R. (O. C.) 110 : 1923 O. 24.**

——**S. 81**—*Marshalling—Right to.*

Properties A. and B were mortgaged to plff. then B. was mortgaged to deft. who had no notice of the plff 's mortgage and again A. and B. together with property C. were mortgaged to plff. partly in discharge of the first mortgage and then again B. was mortgaged to deft. *Held*, plff. should get a decree on the first mortgage for the remainder due but deft. can under S. 81 ask the plff. to sell A first and if the deft. would fail to redeem B. within a certain time fixed by Court the properties would he sold as follows : A first, B. next and then C, if necessary. (*Chatterjee and Newbould, JJ.*) JAMINI MOHAN GUPTA *v.* RAM NARAYAN PAREY. **38 I. C. 542.**

——**S. 81**—*Marshalling—Subsequent mortgagee with notice.*

The doctrine of marshalling cannot be availed of by a subsequent mortgagee who has notice of the prior mortgage. (*Shadi Lal and Jones, JJ.*) KISHEN CHAND *v.* RAMSUKH DAS. **81 P. W. R. 1916 : 33 I. C. 815 : 86 P. R. 1916.**

——**S. 81**—*Marshalling—Applicability of—Notice of prior mortgage.*

The right to marshall arises only when the contending creditors are creditors of one and the same person and they claim against the same property. Where the defendant had notice of the plaintiff's mortgage when he obtained his security, it is sufficient to exclude his claim under S. 81 of the T. P. Act. (Per *Abdur Rahim.*) S. 81 of the T. P. Act does not avail the mortgagees of a purchaser, as their right to marshall is in the right of their assignor, the vendee of the original mortgagor. 31 Mad. 419 Foll. The right to marshall is a discretion vested in the Court, which however is not a right of particular party, to direct the sale of any particular item if that would be sufficient to pay off the mortgage debt. This discretion the Court is entitled to exercise at the time when final execution is ordered. It is doubtful whether the Full Bench decision in 31 Mad. 419 applies also to a mortgagee from the purchaser. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) MADURA MILLS CO, LTD. *v.* RAMASWAMY CHETTY. **34 I. C. 338 : (1916) 1 M. W. N. 265.**

——**S. 81**—*Marshalling—Puisne and prior mortgagees—Estoppel*

A prior incumbrancer cannot, on the principle of marshalling be compelled by a puisne mortgagee to proceed against properties not mortgaged to the puisne when the prior could not include it in the suit and obtain a decree against those items owing to the conduct of puisne incumbrancer himself. (*Oldfield and Tyabji, JJ.*) MULLA VEETTIL SEETHIKUTTI *v.* KUNHI KOYAMUTTI NAHA **28 I. C. 386.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82.

——**S. 81**—*Marshalling—When available.*

Where a mortgage decree has been obtained in respect of three properties, and subsequently one of them is subjected to a second mortgage. the second mortgagee cannot claim marshalling, if the other two properties had been sold in execution of the mortgage decree, and the property subject to the second mortgage is sought to be proceeded against. 22 A 284 not app. 28 A. 700 Foll. (*Hayward, J C. and Leggatt, A. J. C.*) GUL MAHOMED *v.* LOTO MAL. **9 I. C. 725 : 4 S. L. R. 224.**

——**S. 82**—*Equity of redemption vesting partly in prior mortgagee and partly in subsequent mortgagee.*

Where a mortgage is split up and the rights of the mortgagor vest partly in a prior mortgage and partly in a subsequent the former cannot be compelled to redeem the whole nor the latter to give up his interest in the share of the mortgage. (*Stuart and Kanhaiya Lal, JJ.*) AMBA PRASAD *v.* WAHID ULLAH. **20 A. L. J. 583 : 44 A. 708 : 1922 A. 405.**

——**S. 82**—*Auction sale of portions of mortgaged property—Rights of purchasers* inter se.

An auction-purchaser in execution of a decree obtained upon a mortgage purchased the rights of the mortgagor and the mortgagee at the date on which the mortgage was made, any subsequent equities or liabilities which arose in respect of the mortgaged property could not attach to them inasmuch as they acquired the property free from any such liabilities or equities. 23 A. 355 ; 19 A. 545 Dist. (*Mears, C. J. and Banerjee, J.*) KARAMAT ALI *v.* THE GORAKHPUR BANK. LTD. **20 A. L. J. 337 : 44 A. 488 : L. R. 3 A. 369 : 4 U. P. L. R. (A) 150 : 1922 All. 495.**

——**S. 82**—*Contribution between several properties subject to same mortgage.*

Where property belongs to different owners and is subject to a common mortgage, the liability of each of the properties subject to the mortgage, is proportionate to its value as compared with the value of all the properties mortgaged and a suit for contribution by one owner who has been made to pay the whole would lie. (*Mears, C. J, and Banerjee, J.*) RAMASHANKAR PRASAD *v.* GHULAM HUSAIN. **43 All. 589 : 19 A. L. J. 584 : 63 I. C. 209 : 3 U. P. L. R. (All.) 88.**

——**S. 82**—*Contribution—Puisne mortgage.*

Properties sold in execution of decree on a prior mortgage, are not liable for contribution towards a puisne mortgage. The fact that the auction-purchaser at a sale is the decree-holder and the owner of the puisne mortgage and obtained the property at low price, does not affect the case in any way. (*Tudball and Kanhaiya Lal, JJ.*) BHAGWATI PRASAD *v.* SHAFAT MUHAMMAD CHAUDHRI. **43 All. 42 : 58 I. C. 414 : 18 A. L. J. 860.**

——**S. 82**—*Rateable liability.*

Properties T. and A. were mortgaged to the predecessor in title of plaintiff who has also a prior mortgagor of T. Plaintiff sued on the prior deed and in execution of his decree purchased T.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82.

He then sued on the subsequent mortgage for the sale of A. *Held*, that the liability of A was to be ascertained by finding the value of A and the value of T, but the amount of the liability of T. under the earlier mortgage should be deducted from the value of T, and that A, would then be liable rateably for the second mortgage having regard to its own value and the value of T, after deduction. (*Richards, C. J. and Banerjee, J.*) GOPAL DAS *v.* DURGA SINGH. **38 I. C. 649.**

——— **S. 82**—*Contribution—Extent of—Valuation for ascertaining liability to contribution.*

In a suit for contribution under S. 82 all the persons in whom the mortgaged property is vested should be made parties ; when such persons are properly before the Court a proper decree finally setting all disputes can be made and unless they are before the Court the value of the different items of the property cannot be ascertained satisfactorily. In estimating the valuation of the different items it ought to be as at the date of the mortgage. Where a purchaser produced evidence to show the valuation at the date of his purchase, the other party must show that the valuation at the date of the mortgage was different. (*Richards, C. J. and Rafique, J.*) SHANKAR LAL *v.* LATAFAT ALI. **35 I. C. 600 : 14 A. L. J. 713.**

——— **S. 82**—*Several properties under the same mortgage—Mortgage discharged by one—Rateable contribution by others.*

Where the owner of one of several properties under the same mortgage discharges the mortgage, the owners of the others are bound to contribute rateably their quota of liability for the mortgage debt Principle by which Court should arrive at the individual share of contribution explained. (*Richards, C. J, and Banerjee, J.*) BHAGWAN SINGH *v.* MUHAMMAD MAZZAR ALI KHAN. **36 All. 272 : 23 I. C. 339 : 12 A. L. J. 394.**

——— **S. 82**—*Mortgagee releasing part of the mortgaged property for less than its value—Suit for recovery of entire balance from residue.*

A first mortgagee cannot release part of the mortgaged property for less than its due proportion of the mortgage money of the whole of the balance of the mortgage money out of the remainder of the property. 15 C. W. N. 800 : 30 Cal. 755 ; 31 Mad. 333 Ref. 28 All. 174 ; 25 All 79 ; 28 A. 19 ; 29 A 369 Dist. (*Chamier and Piggott, JJ.*) JUGAL KISHORE SAHU *v.* KEDDAR NATH. **34 All. 606 : 16 I. C. 401 : 10 A. L. J. 211.**

——— **Ss. 82, 100 and 73**—*Mortgage-decree against two properties—Rateable contribution—One property contributing more—If entitled to a charge on the other—Lien on surplus sale proceeds—Personal decree—Limitation—Lim. Act, Arts. 62 and 132.*

Where in execution of a mortgage decree against two parties both are sold the owner of property which has contributed more than its rateable share has a charge against the property which has borne less ; he has also a right to a personal decree against the owner of the latter property to the extent of the surplus sale proceeds received by him. The suit for the latter relief is governed by Art. 62 of the Lim. Act. (*Richards, C. J. Banerjee and Chamier, JJ.*) BHAGWAN DAS *v.* KARAM HUSSAIN. **33 All. 708 : 11 I. C. 145 : 8 A. L. J. 854.**

——— **S. 82**—*Purchase by mortgagee—Discharge of debt.*

The mortgagee purchased at an auction sale half of the mortgaged property belonging to one of two mortgagors; then he brought a suit for the remaining half claim against the other property, It being contended that the whole debt was satisfied ; *held*, that only half the debt was extinguished. 22 A, 284 Foll. (*Richards, J*) JAGANATH PRASAD *v* MIHIN. **10 I. C. 235.**

——— **S. 82**—*Contribution—Right when arises.*

Where the amount due under the first mortgage exceeds the value of the property comprised therein the whole of the burden of the second mortgage falls on the other property comprised therein. Where before the properties comprised in a mortgage decree were brought to sale, a subsequent mortgage was effected over a portion of the parties and the subsequent mortgagee paid the entire decretal amount he is entitled to contribution for saving the property excluded from his mortgage from sale, the amount of the money under the second mortgage being left out of consideration. (*Stanley, C. J, and Banerji, JJ.*) GHULAM HAZRAT *v.* GOBARDHAN DAS. **33 All. 387 : 9 I. C. 933 : 8 A. L. J. 195.**

——— **S. 82**—*Equity of redemption—Splitting up after mortgage—Suit—Proportionate liability—Mortgagee's rights barred against some.*

It is contrary to the principles of equity that the plaintiff mortgagee who by his own negligence had lost his remedy against the owner of half the equity of redemption should seek to throw the whole burden of the mortgage on the owner of the other half. 33 Cal. 613, 621 Foll. (*Macleod, C. J. and Heaton, J.*) BUDHAMAL KEVALCHAND *v.* RAMA YESU. **44 Bom. 223 : 55 I. C. 327 : 22 Bom. L. R. 68.**

——— **S. 82**—*Mortgage not affected.*

S. 82 of the T. P. Act defines the relation of the mortgagors *inter se* ; a mortgagee is under no obligation to distribute his debt in a certain manner or enforce it against each and every part of the property mortgaged. Each item can be sold for the whole debt. (*Batchelor, C. J. and Shah, J.*) TIMAJI KRISHNA POTDAR *v.* RAMA PIRAJI BHAT KHANDE; **45 I. C. 862 : 20 Bom. L. R. 175.**

——— **S. 82**—*Contribution—Right of— Mortgagee—Distribution.*

The mortgagee's rights to proceed against any one of several mortgaged properties for the entire debt is not affected by the principle of contribution among the several mortgagors or their representatives. If the mortgagee releases one or more of jointly mortgaged properties from liability under the mortgage with knowledge that the properties have changed hands, the other properties are liable to the extent of their proportionate share of the debt only. 33 Cal. 613 Rel. (*Teunon and Greaves, JJ.*) MIDANPUR ZAMINDARI CO., LTD. *v.* ABINASH CHANDRA. **23 C. W. N. 308 : 50 I. C. 790 : 29 C. L. J. 297.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82.

——— **Ss. 82, 95 and 100**—*Contribution—Apportionment of liability—Life tenant and remainder man.*

A reversioner mortgaging the properties jointly with the widow can, on redeeming the mortgage claim a rateable contribution of the mortgage debt from the purchaser of the life interest of the widow in one of those properties and has a charge upon that interest in respect of his claim for contribution, which can be enforced under S. 100, 28 A. 482 Ref. The principle for apportioning liability between a tenant for life and a remainder man or reversioner discussed. (*Chatterjee and Richardson, JJ.*) TARAK NATH ROY CHOUDHURY *v.* SYAMA CHARAN CHOUDHURY. **36 I. C. 292.**

——— **S. 82**—*Mortgagee's right to enforce—Security—Estoppel.*

Where property over which the plaintiffs held two mortgages was sold and purchased by them in execution of a decree on the 2nd mortgage and subsequently plffs. allowed the sale to be set aside by being present at and ratifying a sale of a portion of the property to third parties and by receiving consideration therefor, it is not open to the plffs. to proceed in their suit on the first mortgage against that portion of the property in the hands of the third parties. (*Holmwood and Chapman, JJ.*) ATAB PRAMANICK *v.* MEHRULLAH SARDAR. **23 I. C. 426 : 19 C. L. J. 590.**

——— **S 82**—*Mortgagee if affected—Release of one mortgagor.*

A mortgagee must not release the properties of one of the mortgagors to the detriment of the others. If the mortgagee relinquishes a valuable property for an inadequate consideration, he would not be allowed to throw the burden of the balance upon the other properties. (*Mookerjee and Beachcroft, JJ.*) DALAP NARAIN SINGH *v.* CHAITNARAIN SINGH. **17 I. C. 931 : 16 C. L. J. 401.**

——— **S. 82**—*Acquisition of share of equity of redemption by mortgagee—Debt if extinguished.*

When a mortgagee buys at an auction the equity of redemption in a part of the mortgaged property, such purchase, in the absence of fraud, has not the effect of discharging or extinguishing the mortgage debt though the value of the property purchased be equal to the amount due on the mortgage. The mortgagee will have to forego a proportionate part of the debt but might enforce for the residue. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) PONNAMBALA PILLAI *v.* ANNAMALAI CHETTIAR. **43 Mad. 372 : 38 M. L. J. 239 : (1920) M. W. N. 235 : 55 I. C. 666 : 11 L. W. 429 (F. B.).**
[Overruling (1911) 2 M. W. N. 342 : 12 I. C. 130 : 10 M. L. T. 240.]

——— **Ss. 82 and 60**—*Release of items by mortgage—Effect of—Right to sue for whole debt.*

A mortgagee voluntarily releasing a portion of the mortgaged property is not bound to abate a proportionate part of the debt but the action of the mortgagee in so releasing does not affect the right of the part owners of the equity of redemption to contribution. 20 Mad. 217 ; 31 M. 333 ; 30 C. 755 Diss. 1 C. L. J. 337, Diss. (*Wallis, C. J., Oldfiled and Kumarasami Sastri, JJ.*) PERUMAL PILLAI *v.* RAMAN CHETTY. **40 Mad. 968 : 33 M. L. J. 211 : 6 L. W. 450 : 42 I. C. 352 : (1917) M. W. N. 752 (F. B.).**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82.

——— **S. 82**—*Contribution—Mortgage—'Contract to the contrary.'*

Ss. 69 and 70 of the Contract Act do not apply to claims for contribution under S. 82 of the T. P. Act. The "contract to the contrary" mentioned in S. 82, second clause must be between the parties who are liable to contribute. A contract between mortgagor and one of the purchasers of the equity of redemption is not a contract between the purchasers *inter se*. (*Seshagiri Aiyar and Napier, JJ.*) KUNCHITHAPATHAM PILLAI *v.* PALAMALAI PILLAI. **(1917) M.W.N. 166 : 39 I.C. 405 : 32 M. L. J. 347.**

——— **Ss. 82 and 101**—*Contribution—Usufructuary and simple mortgage in favour of same person—Purchase by mortgagee of some mortgaged lands—Suit on simple mortgage.*

First deft. and another mortgaged certain lands usufructuarily to the plff. Later on, first deft. and his brother the second deft. executed a simple mortgage in respect of the same land as well as the house and a vacant site in favour of the plff. The plff. then purchased the lands, the sale deed containing a recital that the simple mortgage debt should be unaffected by the sale. In a suit, by plff. to enforce the mortgage security under the second mortgage impleading the subsequent purchaser of the house and vacant site. *Held*, that the plff. took the lands under his purchase subject to all the incidental liabilities attaching to them by reason of their previous inclusion in the simple mortgage and therefore liable to contribute proportionately towards the simple mortgage debt and that the liability to contribute on the part of the plff. arose not by reason of his position as usufructuary mortgagee but by his purchase of the mortgagors' equity of redemption. (*Spencer and Napier, JJ.*) ARUNAGIRI *v.* KUPPUSWAMY. **29 I. C. 124.**

——— **Ss. 82 and 60**—*Mortgagee—Not bound to distribute debt.*

It is open to a mortgagee to release one of the items of the mortgaged property on receipt of less than the proportionate share of the debt and to proceed for the rest of the mortgage amounts against the residue. The mortgagee is not bound to distribute his debt equally among the several items mortgaged. (*Spencer and Napier, JJ.*) THUVOOR VENKATASUBBA REDDI *v.* BAGIAMMAL. **39 Mad. 419 : 2 L. W. 469 : (1915) M. W. N. 339 : 17 M. L. T. 411 : 29 I. C. 113 : 29 M. L. J. 319.**

——— **S. 82**—*Contribution—Purchaser of equity—Redemption of one of the mortgagors by mortgagee.*

Where A purchased a mortgage-decree against the interests of two persons, B and C, and subsequently purchased the equity of redemption in the interest of B and then claimed half the decree

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82.

amount from the interest of C. *Held*, he was entitled to do so. (*Benson and Sundara Aiyar, JJ.*) ADERSUMALLI SURYANARAYANA *v.* VALLURAPALLI SHRIRAMULU.
20 I. C. 825 : 25 M. L J. 16.

——Ss. 82 83 and 100—*Several lands burdened with payment of revenue—Nature of decree—Right to a charge.*

Where several lands are liable under a common burden for payment of a definite amount of Govt. Revenue and the whole burden has been discharged by the owner of one of such lands, the latter is entitled, in a suit for contribution, to a charge on the land of each of the others for the proportionate fraction of the amount payable by each and not to a personal decree. 26 Mad. 68 ; 28 Mad. 493 ; 14 C. W. N. 361 Ref. (*Miller and Sadasiva Aiyar, JJ.*) PUTHEN PURAYIL AMMAN PARUYKYI *v.* MANGALASERI PULLIKANDI PAKRAM HAJI.
36 Mad. 493 : 15 I. C. 262 : 24 M. L. J 548.

——S. 82—*Execution sale in another decree—Purchase by mortgagee of part of mortgaged property whether extinguishes mortgage.*

Where property subject to a mortgage is sold in execution of a decree other than one on the mortgage, and portions of the mortgaged property are purchased by the mortgagee the sale operates as a full discharge of the mortgage if the value of the encumbrance is fully paid therewith. *Ayling and Spencer, JJ.*) SWAMI ROWAPPA *v.* KUPPUSAWMY IYENGAR.
10 M. L. T. 240 : (1911) 2 M.W. N . 342 : : 12 I. C. 130. [Overruled 43 Mad. 372 : 55 I. C. 666 : 38 M. L. J. 239.]

——S. 82—*Contribution — Mortgagee not affected.*

The right for contribution under S. 82 is available only as between the representatives of the mortgagor or between co-mortgagors themselves except in cases of merger of the interests of the mortgagor and mortgagee. A part owner of the equity of redemption can redeem only on payment of the whole mortgage money. (*Kanhaiya Lal, A. J. C.*) BASANT SINGH *v.* RAMESHAR BAKSH SINGH.
20 I. C. 765 : 16 O. C. 199.

——S. 82—*Contribution claim against mortgagor—Failure of mortgagee to redeem prior mortgage—Integrity if broken.*

Two properties were mortgaged to same deft. A prior mortgagee of one of the properties brought a suit on his mortgage impleading the subsequent mortgagee had it sold. *Held* the failure of the subsequent mortgagee to redeem did not split up the mortgage and when he recovered the whole of the mortgage amount from the other mortgagor, the latter was entitled to claim contribution against his co-mortgagee. (*Das and Macpherson, JJ.*) SANT LAL SINGH *v.* NANKU LAL SINGH.
1923 Pat. 369 : 1924 P. 174.

——S. 82—*Contribution—Right to—Decision.*

The question of contribution between several subsequent mortgagees can be decided only in a properly framed suit for contribution. (*Das and Kulwant Sahay, JJ.*) JAI PRAGASH SINGH *v* RUP MANJARI.
4 Pat. L. T. 91 : 1923 P. 199.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 83.

——S. 82—*Decree on mortgage satisfied on sale of some items—Liability of the remaining properties.*

In a suit on a mortgage comprising several items the Court directed that the properties should be sold in a certain order. *Held* that in the event of the decretal amount being satisfied by the sale of only one property, it did not follow that the remaining mortgagors were released from all liability to contribute to the mortgagor whose property alone has been sold. There must at least be in the previous proceedings an indication of an intention in the mind of the Court to release them such liability. (*Roe and Coutts, JJ.*) BABU BHEKDHARI SINGH *v.* BAIJNATH GOENKA.
51 I. C. 49.

——S. 82—*Decree on first mortgage—Sale in execution—Whether property purchased if enures towards the second mortgage.*

The sale in execution of a decree on the basis of a prior mortgage destroys the right, title and interest of the mortgagor in the property and extinguishes all incumbrances subsequent to the mortgage. The owner of two villages of A. and B mortgaged A. and subsequently mortgaged A. and B, to the same person. The mortgagee purchased A, in execution of his decree on the second mortgage. *Held*, that the effect of the sale of A. in execution of the decree on first mortgage was to estinguish the right, title and interest of the mortgagor in it and to extinguish all incumbrances subsequent to the first mortgage so that it was open to the mortgagee to enforce the whole of the debt upon the remaining security. (*Roe and Jwala Prasad, JJ.*) DAND BAHADUR SINGH *v.* DEONANDAN PRASAD SINGH.
4 Pat. L. W. 108 : 43 I.C. 915 : (1918) Pat. 69.

——S. 82—*Mortgage—Subsequent sale of part of the mortgaged property—Purchaser's liability—Contribution.*

Certain properties including a house were mortgaged. Subsequently the deft. purchased half of the house from the mortgagor who then sold the equity of redemption in respect of all the mortgaged properties, to the mortgagee. In a suit by the latter to enforce his mortgage by sale of mortgaged properties, *held* that having regard to the terms of S. 82 the property cannot be sold without fixing the proportion of the mortgaged debt chargeable on the house purchased by the deft. 6 C. L. J. 612, Ref. (*Mullick and Kingsford, JJ.*) MAHARAJA RAM NARAIN SINGH *v.* RAM KUMAR LAL BHAGAT.
1 Pat. L. J. 228 : 36 I. C. 208 : 3 Pat. L. W. 101.

——S. 82—*Co-mortgagors—Contribution.*

Mortgagors are jointly and severally liable to mortgagee for the debt and have a right to contribution as among themselves. (*Atkinson, J.*) RAJA RAM LAL *v.* HANUMAN UPADHYA.
35 I. C. 43.

——S. 83—*Tender of mortgage money—Offer and refusal—If necessary—Propriety of tender—Test of.*

It is not the practice of the Court to require a party to make a formal tender where from the facts

stated in the plaint or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. At the same time there must be a clear release to the mortgagor of his obligation to tender the money to justify the latter in not having presented the money to the mortgagee In considering the question of tender it is not necessary for the Court to speculate as to whether the mortgagor had the money or the control of the money that would have enabled him to meet the large amount that was due on the mortgage. It is very difficult indeed to say whether or not a man will be able to have control of money at a future date. (*Lord Buckmaster J.*) CHELIKANI VENKATARAYANIM GARU *v.* SREE RAJAH VATSAVAYA VENKATA SUBADRYAMMA. **44 M. L. J. 631 : 46 Mad. 108 : 25 Bom. L. R. 541 : 38 C. L. J. 34 : 28 C. W. N. 25 : 50 I. A. 41 : 32 M. L. T. (P. C.) 70 : 17 L. W. 383 : 1923 P. C. 26.**

——Ss. 83 and 84 — *Redemption decree — Deposit in court pending appeal by mortgagee— Lapse of deposit to Government—Liability of mortgagee.*

Where in execution of a redemption decree the mortgagor deposits in Court an amount sufficient to satisfy the decree and the mortgagor is let into possession, although an appeal against the decree by the mortgagee is pending, *held* that the mortgagee ought to take the amount deposited out of Court without prejudice to his pending appeal either by arrangement or with the sanction of the Court which would be given as a matter of course, and that if he fails to do so and the amount lapses to the Government, the mortgagee must bear the loss. (*Lord Macnaghten.*) CHAMPAT SINGH *v.* ANGU SINGH. **16 C W. N. 793 : 12 M. L. T. 482 : 10 A. L. J. 379 : (1912) M. W. N. 1150 : 14 Bom. L. R. 1223 : 16 I. C. 830 : 17 C. L. J. 14 : 23 M. L. J. 738 (P. C.)**

——S. 83 —*Deposit—Non-acceptance by mortgagee—Effect of—Mortgage if subsists.*

The making of a deposit under S. 83 of the T. P. Act by the mortgagor does not *ipso facto* extinquish the mortgage when the mortgagee has refused to accept the deposit. The parties remain in the relationship to one another of mortgagor and mortgagee. It is for the mortgagor dissatisfied with the action of the mortgagee in refusing to accept the money deposited to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully the mortgage still subsists. (*Mears, C. J. and Piggott, J.*) AHMADULLAH *v.* ABDUR RAHIM. **45 A. 592 : 21 A. L. J. 545 : 1924 A. 26.**

——Ss. 83 and 84 —*Minor mortgagee—Appointment of guardian to draw out money—Duty of mortgagor—Interest when ceases to run.*

Where a mortgagor deposits the money due in court, but the mortgagee happens to be a minor, it is the duty of the former to see that a proper guardian is appointed for the purpose. The mere fact of making an application will not enable any one to withdraw amount unless a person is appointed by court, and until that is done, interest will not cease to run. (*Mears, C, J. and Banerjee J.*) KHUNNU MAL *v.* INDARPAL SINGH. **21 A. L. J. 39 : L. R. 4 A. 331 : 45 A. 273 : 1923 A. 183.**

[On appeal from 64 I. C. 907.]

——Ss. 83 and 84—*Deposit by mortgagor—Refusal by mortgagee to accept—Subsequent withdrawal of deposit—Interest ceases to run.*

Where deposit has been made under S. 83 of the Transfer of Property Act of the full amount due under the mortgage and due notice given and the mortgagee appeared in court but definitely refuses to accept the money, and subsequently the mortgagor withdrew it from court. *Held*, that interest ceased to run from the date of deposit. (*Ryves and Gokul Prasad, JJ.*) HUKAM SINGH *v.* BABU LAL. **44 A. 198 : 20 A. L. J. 7 : L. R. 3 A. 573 : 1922 All. 181.**

——Ss. 83 and 84—*Minor mortgagee--Deposit —Duty of mortgagor—Interest, when ceases to run.*

While making a deposit of the mortgage money, it is the duty of a mortgagor when dealing with a minor mortgagee, to take all steps which are necessary to procure an appointment of a guardian *ad litem*. He must apply to the Court and must bring before it some person who is willing to act as a guardian, or failing that, he must satisfy the Court in whatever way he can, that there is no person to his knowledge who is willing to accept the duty of a guardian. In that case he can ask the court to take action under O. 22, R. 4, Until the appointment of the guardian *ad litem*. he has not done all that has to be done by him to enable the mortgagee to take money out of Court, and so in that case interest will continue to run even after the date of the deposit. Per *Stuart, J.*—All that a mortgagor making a deposit of the mortgage money has to do is to present a duly verified petition and to state best to his knowledge and ability the correct address of the mortgagee and if he be a minor to propose a person suitable to act as his guardian *ad litem*. If he does this honestly and to the best of his ability he will not be liable to pay subsequent interest, even if the person proposed to act as guardian does not accept that office. Each case should be looked at upon its merits. (*Lindsay and Stuart, JJ.*) KANNO MAL *v.* INDERPAL SINGH **64 I. C. 907 : 19 A. L. J. 893.**

——S. 83—*Mortgagee a minor—Deposit in Court—Guardian*-ad-litem *not appointed—Interest does not cease to run.*

Where a mortgage is in favour of a minor, and the mortgagor deposited the money in Court under S. 83 of the Act without taking steps to have a guardian-*ad-litem* appointed, *held* that the deposit was invalid and interest would not cease to run. (*Lindsay nnd Stuart, JJ.*) SHEO SARAN *v.* RAM LAGAN. **64 I. C. 413 : 19 A. L. J. 852.**

——S. 83—*Deposit of mortgage money.*

Suit by prior mortgagee for foreclosure without impleading puisne mortgagee ending in a final decree for foreclosure does not put an end to the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 83.

right of prior mortgagee to deposit money due on puisne mortgage. (*Ryves and Gokul Prasad, JJ.*) PARASRAM SINGH *v.* PANDOHI.

L. R 3 A. 217.

——Ss. 83 and 84—*Deposit insufficient — Interest does not cease to run.*

If the amount deposited is insufficient by however trifling a sum, the mortgagor is not entitled to the benefit of S. 84 of the Act and to claim cessation of interest. (*Walsh and Ryves, JJ.*) DEBI PRASAD *v.* KADAR SINGH.

19 A. L. J. 582 : 63 I. C. 563 : 3 U. P. L. R. (All.) 93.

——S. 83—*Covenant to redeem in* Jeth—*Deposit in* Jeth—*Notice of tender could not be served in* Jeth.

A usufructuary mortgage was to be redeemed in the *Jeth* of any year. The mortgagor deposited the money due into Court on the last day of *Jeth* of 1910 A. D.; but the notice of tender could not be served on the mortgagee in that month. The money therefore remained in Court as the mortgagee did not appear. Five years after, the mortgagor sued for redemption and damages for three years preceding the suit. *Held* the tender was valid and the suit was wrongly dismissed by the Lower Court. (*Ryves and Gokul Prasad, JJ.*) AHMAD BEG *v.* DHORMUN RAI.

43 All. 424 : 3 U. P. L. R. (All.) 45 : 60 I. C. 760 : 19 A. L. J. 259

——S. 83—*Deposit—Mortgagor to redeem on the last day of* Jeth—*Notice.*

Under a usufructuary mortgage, the mortgagor was to redeem the mortgage on the last day of *Jeth* of the year 1917 fasli, corresponding with the 22nd June of 1910. On the 17th of June 1910 the full amount of the mortgage money was deposited by the mortgagor under S. 83 of the T. P. Act. But the Court could not issue the notice of deposit before the 27th of June 1910. *Held*, that the mortgagee was entitled to a notice of the deposit either on or before the 22nd of June 1910. Under the circumstances he was entitled to maintain his possession and cultivate the land for two more harvests and was not liable to damages. (*Piggott, J.*) DWARKA PERSHAD *v.* SHEO AMBAR KOERI.

15 I. C. 592.

——S. 83—*Deposit by mortgagor—Notice to mortgagee—Duty of Court.*

After the mortgagor deposits the money in the Court, the Court must, under 2nd paragraph of the section, see that notice of the deposit is served on the mortgagee. The mortgagor is not bound to see that the notice is so served. (*Mukerjee, A.C.J. and Fletcher, J.*) NIBARAN CHANDRA *v.* PARBATI CHARAN NASKEI.

60 I. C. 454.

——S. 83—*Tender of greater sum than is due if valid.*

A tender of the greater includes the smaller, *Dean* v. *James*, 4 B. and Ad 546, Rel. (*Mookerjee and Beachcroft, JJ.*) RAJA BAIKUNTH NATH *v.* BENODE BEHARE.

51 I. C. 13 : 29 C. L J. 256.

——S. 83—*Full deposit— Mortgagee part owner of the mortgaged property.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 83.

The plaintiff mortgagor is entitled to make a deposit of the whole mortgage debt notwithstanding that the mortgagees have become the owners of part of the mortgaged property (6 M. 61 Doubted); and on the principle of the greater including the less, *omne majus continet in se minus*, the tender would be good even if the plaintiff is entitled to tender a lesser sum, but the plaintiff is not so entitled to tender lesser sum, as the amount of the proportionate reduction in the mortgage debt had not been ascertained either by agreement or by the Court, and in these circumstances it cannot be said that there was any lesser sum which the plaintiff was entitled to tender or the mortgagees were bound to accept. Even where the mortgagee has become owner of a part of the mortgaged property, the deposit must be of the whole amount where the amount of proportionate reduction of the mortgage debt has not been ascertained. An assignee of the share of the mortgagor's interest can also deposit the amount. After a valid deposit, the mortgagee in possession will become liable not only for actual collections but also for the amount left uncollected by him on account of his failure to make his best endeavours to collect them. (*Krishnan and Venkatasubba Rao, JJ.*) TADEPALLI SUBBA RAO *v.* SRI BALUSU BUCHI SARVARAYADU.

18 L. W. 61 : 1923 M. W. N. 533 : 44 M. L. J. 534 : 1923 M. 533.

——S. 83—*Deposit in Court — Interest — Mesne profits.*

Where the mortgagor deposited the sum due in court and did all he could to enable the mortgagee to draw the amount, and the same was not done because of the disputes among the mortgagee's heirs interest ceases to run from the date of deposit, and the mortgagor is entitled to mesne profits. (*Phillips and Devadoss, JJ.*) NAGATHAL *v.* ARUMUGAM PILLAI.

32 M. L. T. (H. C.) 371 : 44 M. L. J. 362 : 17 L. W. 154 : 1923 Mad 354 (1)

——Ss. 83 and 84— *Deposit after suit— Interest.*

A deposit under S. 83 of the T. P. Act is invalid if made after institution of the suit by the mortgagee. If the deposit was made before the mortgagor received notice of the institution of the suit, it must include the costs incurred by the mortgagee. (*Phillips and Kumaraswami Sastri, JJ.*) THIAGARAJA AIYAR *v.* RAMASWAMI AIYAR.

48 I. C. 693 : 35 M. L. J. 605.

——S. 83—*Tender—More amount than is due—Validity of.*

Per Seshagiri Aiyar J.—A tender of a sum larger than the amount due on a mortgage from which the mortgagee is asked to take whatever is due to him is valid and interests ceases to run from the date of such deposit. The rule as to tender is part of the law laid down in S. 38 of the Contract Act and if there is a *bona fide* attempt, the rights of the parties ought not to be defeated by technicalities. *Per Napier, J.*—If a tender under S. 83 of the T. P. Act is accompanied by a prayer for costs and the Court refuses to take action, the tender is bad. The tender is equally bad, if in

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 83.

making the deposit, the mortgagor requires the Court to ascertain the amount due on the mortgage (*Seshagiri Aiyar and Napier, JJ.*) SUBRAMANIA AIYAR *v.* NARAYANASWAMI VANDYAR.
7 L. W. 537 : 45 I. C. 638 : 34 M. L. J. 439.

——Ss. 83 and 84—*Deposit into Court to mortgagee—Tender—Interest.*

A mortgagor deposited the amount due into Court and notice was sent to the mortgagee through the Court. The mortgagee refused to accept the money and the money remained in deposit in Court. *Held*, that there was a valid tender within S. 84 of the T. P. Act, and the fact that notice was through Court could not make it any the less a valid tender. 40 M 804, Ref. 85 M. 44 not Foll. (*Abdur Rahim and Phillips, JJ.*) GOVINDAN NAIR *v.* CHERUYANNA.
(1917) M. W. N. 853 : 7 L. W. 81 : 43 I. C. 126 : 35 M. L. J. 313.

——Ss. 83 and 84—*Tender—Essentials of.*

A tender is valid when made to party direct and the payment need not be made into Court. If it is refused, interest will cease to run. An offer to pay may be made to party direct and money need not be paid into Court and on refusal to receive, interest will cease to run. (*Ayling and Seshagiri Aiyar, JJ.*) BEDURUKOTA PEDDA VEERANNA *v.* GOMDIMALLA VEERANNA.
(1917) M. W. N. 308 : 38 I. C. 295 : 5 L. W. 718.

——Ss. 83 and 84—*Deposit in Court—Conditions thereof—Tender and deposit, distinguished.*

In order that a deposit under S. 83 of the Act may be effective it must be allowed to remain in Court until the mortgagee or his successor can draw it out of Court. A motgagor who makes a deposit in Court and withdraws it before the heirs of a mortgagee, who is dead, are ascertained, cannot claim cessation of interest, and in the case of the mortgagor again depositing the amount after the institution of mortgagee's suit in calculating interest from that date the amount deposited should be deducted from the principal, and interest should be allowed only for the balance. *Per Seshagiri Aiyar, J.*—Tender and deposit are not analogous. In the case of the former, the debtor takes the risk of deciding who is the proper person to be paid, but in the latter the debtor leaves the decision to the Court. *Per Phillips, J.*, *Obiter* :—On the refusal of the mortgagee to accept the deposit, notice of which is sent through Court, interest ceases as in the case of the mortgagee's refusal to accept tender out of Court. The cessation of interest being a penalty, there can be no remission of it by the mortgagee changing his mind after his refusal and the withdrawal by the mortgagor of the money paid into Court. (*Abdur Rahim, C.J., Seshagiri Aiyar and Phillips, JJ.*) THEVARAYA REDDY *v.* VENKATACHALA PANDITHAN. **40 Mad. 804 : 31 M. L. T. 548 : (1916) 2 M. W. N. 321 : 4 L. W. 433 : 37 I. C. 444 : 20 M. L. J. 403.**

——Ss. 83 and 84—*Tender—Small deficiency—Running of interest—When stops.*

If a mortgagor pays the exact amount due on his mortgage into Court and causes notice to be issued to the proper address of the mortgagee

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 83.

paying batta therefor he has done all that is required of him under Ss. 83 and 84 of the T. P. Act to prevent the running of interest. 35 M. 44 Foll. Where the amount deposited by the mortgagor falls short of what is due by even a few annas, owing to a *bona fide* mistake in calculation it is not a sufficient tender to the mortgagee within the meaning of the section and the mortgagor is not entitled to mesne profits on the mortgagee's refusal to accept it. 16 B. 141 Disapp. 8 A. 502 Ref. to. (*Sadasiva Aiyar and Moore, JJ.*) SUBBAI GOUNDAN *v.* PALANI GOUNDAN.
34 I. C. 825 : 30 M. L. J. 607.

——Ss. 83 and 84—*Tender and notice to parties—Withdrawal of petition—Effect.*

The mortgagor paid the money into Court and issued notices to the four sons of the mortgagee and before all of them could be served, he requested the Court to dismiss the petition. *Held*, that there was no proper tender and interest did not cease to run. *Per Ayling, J.*—The dismissal of the petition was tantamount to withdrawal of money. 35 M. 44 Foll. Per *Tyabji, J.*—The mortgagors had not done all that had to be done to enable the mortgagees to take the amount. Tender through Court consists at leaat of deposit and notice to the parties. (*Ayling and Tyabji, JJ.*) VENKATESWARUDU *v.* BALA TIRUPURA SUNDARI. **30 I. C. 769 : (1915) M. W. N. 763.**

——S. 83—*Deposit— Penalty— Compound interest at an enhanced rate—Penal interest not deposited—Amount tendered subsequently accepted by Court as sufficient—Tender, valid.*

The words "amount remaining due on the mortgage" in S. 83 of the T. P. Act mean the amount which a Court finds as due, and not the whole amount stipulated for payment under the mortgage deed. A mortgagor is not bound to deposit the full amount including the penal rate of interest, and the Court having found that the amount tendered was sufficient, the tender was valid and interest ceased to run from the date of tender and the mortgagor was entitled to mesne profits from that date. (*Coutts-Trotter and Kumaraswami Sastri, JJ.*) AYYAKUTTI MANKONDAN *v.* PERIYA SWAMI KAVANDAN. **39 Mad. 579 : 18 M. L. T. 161 : 30 I. C. 497 : 2 L. W. 585.**

——S. 83—*Conditional deposit—Validity.*

If a condition requiring a return of certain documents to which the mortgagor is not entitled, is attached to a deposit under S. 83, the tendor is invalid. 17 M. 267 Dist. (*Sadasiva Aiyar, J.*) *In re* ACHATH SANKARAN NAIR. **29 I. C. 586.**

——Ss. 83 and 84—*Deposit—Essentials of.*

It is only the actual payment of the full mortgage amount into court that makes interest on the mortgage amount cease to run under S. 84 and not a mere presentation of a petition for that purpose under S. 83. (*Ayling and Tyabji, JJ.*) MUSALIUM VEETIL THEYATHIL MAHAMMADUNNI *v.* KUDUMPALATH PADINHARA PARAMBIL BAVA.
29 I. C. 145 : 2 L. W. 408.

——S. 83—*Deposit—Effect of.*

Where deposit of the amount due under a lease of mortgage does not put an end to the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 83.

relationship between the parties. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) BALASIDHANTAM *v.* PERUMAL CHETTI. **1 L. W. 641 : 27 I. C. 162 : 27 M. L. J. 475.**

——Ss. 83 and 84—*Right to tender—Equity—Redemption—Contract for purchase of.*

A tender by a person entering into a contract for purchasing the equity of redemption is not valid if it is made conditional on the endorsement cancellation and delivery to him of the mortgage deed. (*Bakewell, J.*) VARADARAJULU CHETTY *v.* DHANALAKSHMI AMMAL.

26 I. C. 184 : 16 M. L. T. 365.

——S. 83—*Deposit—Mortgagee drawing money—If mortgagor can object.*

A mortgagor cannot object to the mortgagee drawing the money deposited by mortgagor under S. 83. (*Sadasiva Aiyar and Napier, JJ.*) KOTAVENGATTIL *v.* KEZATATH KRISHNA MENON.

25 I. C. 369.

——Ss. 83 and 84—*Deposit—Interest—Before and after action.*

'Deposited in Court' in S. 84, T. P. Act, contemplates a case of continuing deposit and interest does not cease to run if the mortgagor subsequently withdraws it and tender the same in Court before suit. 35 M. 44 Foll (*Ayling and Tyabji, JJ.*) THEVARAYA REDDY *v.* VENKATACHALA PANDITHAN. **16 M. L. T. 131 : 25 I. C. 96 : 1 L. W. 595.**

——S. 83—*Condition for depositing money.*

S. 83 presupposes that the mortgagor has a valid right to redeem and that he is not attempting to exercise that right contrary to provisions of the contract between them. A mortgagor cannot deposit money under S. 83 unless he puts the mortgagee in possession if required by their contract. S. 83 should be read with Ss. 67 and 86. (*Benson and Sundara Aiyar, JJ.*) BAYYA DAS *v.* NARASINGA MAHAPATRAO. **35 Mad. 209 : 10 M. L. T. 37 : 10 I. C. 393 : (1911) 2 M. W. N. 126.**

——S. 83—*C. P. C. O. 24, R. 1—Deposit—Tender after suit.*

After one Court has taken cognizance of a suit by a mortgagee for the enforcement of his mortgages the mortgagor cannot deposit the mortgage amount in another Court under S. 83 When once a suit has been instituted payment into Court is regulated by O. 24, R. 1 and not by S. 83 of the T. P. Act. (*Benson and Sundara Aiyar, JJ.*) BAYYA DAS *v.* NARSINGA MAHAPAT RAO. **35 Mad. 209 : 10 M. L. T. 37 : 10 I C. 393 : (1911) 2 M. W. N. 126.**

——S. 83—*Deposit of mortgage money—Sufficiency of—Penal provision for interest.*

Where a mortgagor deposits the amount due on a mortgage disregarding a penal provision for payment of enhanced interest in the mortgage deed forthe court finds that the amount deposited covers the principal and reasonable interest thereon, then the deposit is a valid deposit under S. 83 of the T. P. Act. (*Kotval, A. J. C.*) TARA CHAND DIP CHAND *v.* NARAYAN. **18 N. L. R. 47 : 1922 Nag. 199.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 83.

——S. 83—*Tender by deposit in Court—When sufficient.*

In a suit for redemption of a mortgage which provided that redemption shall take place in the fallow season but did not mention any specific months, the mortgagor made a deposit in court on 14 h May 1919 but the mortgagee was actually served with notice after the crops were sown. *Held* that the deposit must be regarded as sufficient since the mortgagor was not responsible for the delay. (*Kanhaiya Lal, J. C.*) SANT RAM *v.* JARBHANDAN. **1922 Oudh 17.**

——S. 83—*Interest — Deposit —Duties of person—Entitled to the money—Effect.*

A mortgagor is not liable to pay interest after he has made a deposit according to the terms of S 83. If through the fault of the person or persons entitled to the money it is not clear exactly to whom the money is to be paid the mortgagor is not deprived of the right conferred on him by S. 83 on account of the omissions and errors of such persons. (*Stuart, J. C.*) HARIHAR BAKSH SINGH *v.* SHEO SINGH. **36 I. C. 814 : 19 O. C. 145.**

——S. 83—*Tender—Valid—Requisites of.*

The tender must be full in order to stop the interest ; if the tender is inadequate the mortgagee can ignore it altogether and recover the interest at contract rate till date of redemption. There is no *via media* in the matter. (*Lindsay, J. C.*) GAURISHANKER *v.* ABAI JAFAR KHAN.

34 I. C. 690 : 3 O. L. J. 204.

——Ss. 83 and 103—*Minor deft.—C. P. C., O. 32, R. 3—Guardian-at-litem—Appointment of, in deposit proceedings—Duty of Court.*

Whenever a mortgagee is a minor, a guardian *ad-litem* should be appointed by Court as a preliminary to proceedings under S. 83 of the T. P. Act ; this function rested with the Court itself under S. 443 of the C. P. C. (*Sabonadiere, A. J. C.*) SHIVANATH SINGH *v.* MANOHAR LAL.

22 I. C. 245 : 16 O. C. 261.

——S. 83—*Deposit by mortgagor—Refusal to accept deposit—Subsequent application by mortgagee to withdraw deposit—Legality of.*

Where the deposit by the mortgagor is refused by the mortgagee and the petition is disposed of, the mortgagee cannot come in later and ask to be given the deposit. After the disposal of the case there is no other tender, and the money was the mortgagor's money and the mortgagor was entitled to withdraw it at her own pleasure. Being therefore of opinion that there was no tender outstanding the order directing the money to be paid to the mortgagees seems to have been made without jurisdiction. It is also not clear how a security bond was taken for S. 83 of the Transfer of Property Act does not authorize the Court to take any security bond from any party. (*Mullick and Bucknill, JJ.*) MT. RATNA KOER *v.* MT. NANHAKI

4 Pat. L. T. 720 : 1923 Pat. 256 : 1924 P. 41.

——S. 83—*Tender—Continued readiness to pay—Proof of.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S.84.

It is necessary that a mortgagor should after tender keep the money ready for payment. To establish that the amount tendered had always been kept available for payment involves consideration of evidence and should not be allowed to be raised for the first time in second appeal. (*Coutts and Ross, JJ.*) JAG SAHU *v.* RAM SAKHI KUER. (1922) Pat. 58 : 3 Pat. L. T. 332 : 1 Pat. 350 : 1922 P. 167.

——S. 84—*Cessation of interest—'All that has to be done.'*

Where the mortgagor did apply for issue of notice to the mortgagee and gave the correct address, though as a matter of fact notice was not actually served on the mortgagee till after a long time the duty of getting service effected on the mortgagee was no part of the duty of the mortgagor. The mortgagor therefore had done all that had to be done by him to enable the mortgagee to take the money out of Court and hence interest ceased to run from that date. (*Stuart and Sulaiman, JJ.*) PANDIT JIVA RAM *v.* THAKURAIN KHEM KOER. 1923 A. 24.

——Ss. 84 and 103—*Deposit of mortgage money—Minor mortgagee—Steps—Cessation of interest.*

It is not enough for a person making a deposit, in cases of a minor mortgagee to apply to the Court for the appointment of a guardian-*ad-litem* for the minor, but he must procure the appointment of such a guardian and it is not until the Court finally appointed such a guardian that he could be deemed to have done all that he has to do under S. 84 of the Act and interest does not cease until that date. (*Lindsay and Stuart, JJ., Stuart, J., Dissenting.*) Per *Stuart, J*—When the depositor has honestly done his best to inform the Court as to who is a suitable person to be appointed guardian-*ad-litem* of the minor mortgagee, his duty ends there and it does not extend to his seeing that the guardian is actually appointed and interest will cease to run from the date of deposit. (*Lindsay and Stuart, JJ.*) KANNO MAL *v.* INDRAPAL. 64 I. C. 907 : 19 A. L. J. 893.

——S. 84—*Tender—Mere offer by notice.*

An offer by notice of the amount due under a mortgage without production of the money is not a good tender under S 84 of the T. P. Act. (*Mears, C. J and Rafique, J.*) MUHAMMAD MUSHTAQ ALI *v.* BANKEY LAL. 55 I. C. 991 : 18 A. L. J. 440.

——S. 84—*Tender—Meaning of—An offer by letter, if good tender.*

Under S 84, an order by letter is not a good tender. Money must have been actually produced unless it can be shown that the person entitled to receive the money waived this condition. (*Richards, C. J. and Banerjee, J.*) CHETAN DAS *v.* GOVIND SARAN. 36 All. 139 : 22 I C. 659 : 12 A. L. J. 111.

——S. 84—*Tender— Person denying— If can question validity.*

A person denying a tender cannot question its sufficiency or validity. (*Holmwood and Chapman, JJ.*) MAHOMED MOZAFFAR ALI *v.* ASRAF ALI. 25 I. C. 93.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 84.

——S. 84—*Tender—Partial-Payment after demand of whole amount.*

An offer of a part-payment after demand for payment of the full amount due under the mortgage is not a valid tender so as to stop the running of interest. (*Scott-Smith and Le Rossignol, JJ.*) SALIG RAM *v.* SABGHAT ULLA. 83 P. W. R. 1918 : 45 I. C. 175 : 81 P. L. R. 1918.

——S. 84—*Tender—When proper.*

The mortgagor gave the defendants mortgagees a notice to redeem. To that notice the defendants replied that the deed was really one of sale and not of mortgage, but at the same time they set forth the sum which they claimed. The mortgagors never asked for further details of the defendant's claim and made no counter. They sued nearly two years later, they did not offer any specified sum in the plaint or pay anything into Court, *held*, that they made no legal tender within S. 84 36 All. 139 ; 42 All. 420 Ref. (*Scott Smith and Fforde, JJ.*) BUDHU RAM *v.* NIAMAT RAI. 4 Lah. 406 : 1923 Lah. 632.

——S. 84—*Tender — What is—Mortgagor asking mortgagee for an account of what is due with an expression of willingness to pay—Mortgagee setting up absolute title in himself but mentioning amount due—Mortgagor not ready to pay amount—Tender if valid.*

Where a mortgagor wrote to the usufructuary mortgagee asking for an account of what was due on the mortgage and expressing his willingness to pay and the mortgagee stated he had an absolute title to the property, but at the same time mentioned the amount due and the mortgagor had not given the money to pay the amount, interest on the mortgage will not cease to run from the date of the mortgagee's reply. Mere expression of willingness on the part of the mortgagor to pay the amount due on a mortgage is not a tender. Nor does the assertion of an absolute title by the mortgagee coupled with a statement of the amount due by the mortgagee to a dispensation with tender. (*Abdur Rahim and Olafield, JJ.*) CHALIKANI VENKATARAYANIM GARU *v.* VATSAVYA VENKATA SUBHADRYAMMA. (1918) M. W. N. 371 : 24 M. L. T. 56 : 45 I. C. 437 : 8 L. W 416 : 34 M. L. J. 488.

——S.84—*Deposit—Interest—Computation of.*

In calculating the interest due on a mortgage amount for making a deposit under S. 84 of the Transfer of Property Act, interest accruing due for the day of deposit should be included. (*Sadasiva Aiyar and Moore, JJ.*) SUBHAI GOUNDAN *v.* PALANI GOUNDAN. 34 I. C. 825 : 30 M. L. J. 607.

——S. 84—*Interest—No tender of mortgage money.*

If there is no tender of the mortgage amount interest can rightly be charged. (*Ayling and Phillips, JJ.*) KRISHNA BATTA *v.* SRINIVASA SHAMBAGU. 32 I. C. 97.

——S. 84—*Tender—What is—Mere willingness to pay, if sufficient.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 84.

A mere readiness and willingness to pay not communicated to the creditor, without the debtor being in position to pay immediately, if the offer is, accepted does not amount to a valid tender. 30 C. 865, Dist. (*Kotval, Offg. A. J. C.*) SHEORATAN *v.* BEHARILAL SOERAM MARWADI. **45 I. C. 106.**

——S. 84—*Tender--Due date.*

A tender of the mortgage amount before it becomes payable is of no effect. 2 B. 231. Rel; U.B.R. (1907—1909) II Mortgage. (*McColl, J. C.*) GUO PO NYUM *v.* MI YIN. **2 U. B. R. (1916) 141: 39 I. C. 377: 11 Bur. L. T. 36.**

——S. 84—*Tender—Production of money—When unnecessary—Waiver.*

Production of money is not in all cases necessary to constitute a valid tender; it may be waived by the creditor and offer of payment is enough where it is shown that money would not have been accepted even if produced. (*Maung Kin, J.*) MAUNG PO TUN *v.* MAUNG E KHA.
9 Bur. L. T. 117: 33 I. C. 735: 9 L. B. R. 18.

——S. 85.

See also C. P. CODE, O. 34, R. 1.

——S. 85—*Parties to suit.*

Only persons interested in the mortgage are necessary parties in a suit under S. 85 before the Code. So a creditor of the mortgagor who attached the mortgaged property is not a necessary party. (*Holmwood and Chapman, JJ.*) SHAUNDA CHANDRA PAUL *v.* SREE NATH ROY CHOUDHURY. **17 I C. 432: 17 C. W. N. 871.**

——Ss. 86 to 90.

See also C. P. CODE, O. 34, RR. 2—12.

——Ss. 87 and 88—*Mortgage suit—Scope of.*

The scope of a mortgage suit is to cut off the equity of redemption and to bar of the rights of the mortgagor and all persons claiming under him. (*Sanderson, C. J. and Mookerjee, J.*) PRIYA SAKHI DEBI *v.* BIRESHWAR SAMANT.
21 C W. N. 177: 44 Cal. 425: 37 I. C. 277: 27 C. L. J. 212.

——Ss. 88 and 89—*Attachment of property—Mortgage pending attachment—Decree for sale on mortgage—Purchase by money decree-holder—Order of—Exemption from sale under mortgage decree—Rights of mortgagee.*

Certain properties were attached in execution of a money decree and during the attachment the judgment-debtor mortgaged the properties. The mortgagee sued to enforce the mortgage and obtained a decree for sale. On the objection of the attaching decree-holder the properties attached by him were exempted from sale under the mortgage. The money decree-holder purchased the property in execution and obtained possession. In a suit by the mortgagee decree-holder for possession of the properties. *Held* that the order exempting the properties from sale under the mortgage decree had become final and that in the absence of an order absolute, the mortgagee was in the possession of a money decree-holder. Consequently the mortgage decree-holder's suit was not maintainable. (*Sir John Edge.*) SARJU PRASAD MISSIR *v.* MADHUSUDAN CHOWDHURY.
21 A. L. J. 195: (1922) M. W N. 793: 31 M. L. T. 219: 27 C. W. N. 279: 1922 P. C. 341 (P. C.).

——S. 88—*Decree under Old act—Repeal by C. P. Code—Effect of.*

A person obtaining a decree under S. 88 of the Act, before the passing of the C. P. Code of 1908, has a right to execute the decree under S. 88 of the T. P. Act and the subsequent repeal of that section by the C. P. Code of 1908 does not deprive him of that right. (*Oldfield and Seshagiri Aiyar, JJ.*) VISWANATHA SASTRI *v.* SITALAKSHMIAMMAL. **(1921) M. W. N. 181: 61 I. C. 979: 13 L. W. 37.**

——S. 89—*Mortgage—Decree for sale—Effect of.*

Where a decree for sale is passed rights under the decree are substituted for those under the mortgage, a first mortgagee suing on his mortgage without impleading the puisne mortgagee obtains a decree. The puisne mortgagee suing on his mortgage will have to pay only the amount of the decree on first mortgage and not the amount due under the mortgage deed, with interest at the contract rate. (*Sir John Edge.*) MATHU MAL *v.* DURGA KUNWAR. **11 L. W. 529: 22 Bom. L. R. 553: (1920) M. W. N. 338: 18 A. L. J. 396: 2 U. P. L. R. (P. C.) 75: 32 C. L. J. 121: 55 I. C. 969: 38 M. L. J. 419 (P. C.)**
[Also 40 All. 407: 45 I. C. 798: 45 I. A. 130 (P.C.)]

——S. 89—*Order absolute—Application for—Limitation.*

Limitation Act (1877) Art. 179 is applicable to an application for an order absolute under S. 89 of the T. P. Act as it is an application for execution. (*Lord Mersey.*) ASHFAQ HUSAIN *v.* GAURI SAHAI. **33 All. 264: 38 I. A. 37: 15 C. W. N. 370: 8 A. L. J. 332: 13 C. L. J. 351: 9 M. L. T. 380: 13 Bom. L. R. 367: 4 Bur. L.T. 121: 9 I. C. 975: (1911) 2 M. W. N. 177: 21 M. L. J. 1140 (P. C.).**

——S. 89—*Order absolute for sale—Effect of—Advance to pay off the mortgage—No revival of mortgage.*

An order absolute under S. 89 of the T. P. Act has the effect of extinguishing both the security and the rights of redemption in the entire mortgage. Consequently the mortgage cannot be revived by an advance of money for the payment of decree. (*Rafique and Stuart, JJ.*) JAGANNATH PRASAD *v.* MT. CHATUR KUER. **L. R. 3 A. 619: 45 All. 149: 1923 All. 171.**

——S. 90—*Mortgage—Decree for sale—Composite decree—Personal decree for unrealised balance.*

Under S. 90 of the T. P. Act (O. 34, R. 6 of the C. P. Code) it is not a condition precedent to the making of a personal decree for the balance of the mortgage money, that the mortgaged properties should have been sold and the proceeds found insufficient to satisfy the debt. It is open to the Court to provide in a decree for sale, that if the proceeds of sale are not sufficient to cover

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 90.

the amount of the mortgage debt together with interest, the deft. shall pay the balance personally. (*Lord Buckmaster.*) JEUNA BAHU *v.* PARMESHWAR NARAYAN MAHTHA. **17 A. L. J. 207 : 23 C. W. N. 490 : 25 M. L. T. 278: 29 C. L. J. 443: 21 Bom. L. R. 589: 10 L. W. 26: (1919) M. W. N. 347: 12 Bur. L. T. 80: 49 I. C. 620 : 36 M. L. J. 215 (P. C.).**

——— **S. 90**—*Co-mortgagees—Rights of.*

A co-mortgagee brought a suit on the mortgage and joined the other mortgagees as *pro forma* defts. and obtained a decree in his own name. The property was sold in execution of the decree and was purchased by the decree-holder alone. *Held*, that the equitable right of the other mortgagees attached to the purchase money and not the property purchased. (*Richards, C. J. and Rafique, J.*) GANESH LAL *v.* JAGAN NATH. **32 I. C. 171.**

——— **S. 90**—*Lease obtained in representative capacity—Advantage.*

Where a lease is given to and accepted by a person in his representative capacity and as such gains an advantage for himself he must under S. 90 of the Trusts Act hold the advantage as trustee for the benefit of all. (*Mittra and Prideaux, A.J.Cs.*) FAGWA *v.* BUDHRAM. **24 I. C. 855 : 10 N. L. R. 64.**

——— **S. 91**—

See also C. P. C., O. 34, R. 1.

——— **S. 91**—*Redemption—Right to—Usufructuary mortgage of* Sir *lands prior to Agra Tenancy Act—Sale of mortgagor's proprietary right after Tenancy Act—Mortgagor ex-proprietary tenant—Right to redemption.*

Where after creating a usufructuary mortgage of certain *sir* plots, the mortgagor sells his proprietary rights to a third person who later on acquires the mortgagee's right also, the mortgagor continuing an ex-proprietary tenant has, as such, an interest in the property within S. 91 of the T. P. Act, which would enable him to redeem the usufructuary mortgage. (*Richards, C. J. and Tudball, J.*) MUHAMMAD HUSSAIN *v.* HANUMAN. **47 I. C. 861: 16 A. L. J. 796.**

——— **S. 91**—*Execution purchaser--Redemption.*

A purchaser of mortgaged property in execution of a money decree, who is not impleaded as a party to the suit on the mortgage, in which the mortgaged property is sold, is entitled to redeem the purchase in execution of the mortgage decree even though he was not the purchaser before the date of the suit on the mortgage since he claimed under the money decree-holder who had already attached the mortgaged property. *Quaere.*—Whether attachment has the effect of conferring an estate? (*Richardson, C. J. and Banerjee, J.*) LAKHPAT RAI *v.* ESAKARUDDIN.. **39 All. 536 : 41 I. C. 190: 15 A. L. J. 471.**

——— **S. 91**—*Suit—Parties—Execution purchaser—Suit by, for possession—Interested person not impleaded—If suit lies.*

A suit by an execution purchaser under a mortgage decree for possession from a person interested but who is excluded from the mortgage suit is maintainable subject to that person's right to redeem. (*Carnduff, J.*) SALI MUDDI *v.* UZIR MAHOMED. **13 I. C. 299.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 91.

——— **S. 91**—*Right to redeem—Grand-daughter—Collaterals.*

A Mahomedan lady mortgaged her property to defendant and assigned her mortgagor's right to her daughter after whose death the names of her daughter (plaintiff) and son were entered in the revenue papers. After her brother's death, plaintiff sued for redemption. *Held*, the defendant was certainly entitled to object to redemption being claimed by any one except the original person. The plaintiff without showing that she had a right of succession against the collaterals was not entitled to a decree, and the question as to whether plaintiff had preferential right of succession must be tried in the suit for redemption. (*Abdul Raoof, J.*) MAHAMMADA *v.* MUSSAMMAT AJJAN. **1923 Lah. 222.**

——— **S. 91**—*Joint estate—Mortgage by all the joint-holders severally—Redemption by joint-holder of all the lands mortgaged by all the joint owners severally—Objection by one joint owner's widow—Priority of rights of redemption.*

Where in a joint holding though technically each has an interest in every inch of the joint estate its joint character may be regarded as in a state of suspension till the respective mortgages are redeemed. The interest contemplated by S. 91 of the T. P. Act, is an interest derived directly or indirectly from the mortgagor since making the mortgage. A mortgagor or his heir in possession has the preferential right to redeem the mortgage over the other joint owners of the estate, who are merely reversioners. (*Shahdin and Le Rossignol, JJ.*) GEEVAN SINGH *v.* ACHHAR SINGH. **56 P. L. R. 1916: 30 I. C. 389 : 92 P. W. R. 1915.**

——— **S. 91**—*Hindu reversioner--One reversioner purchasing the mortgagee's rights—Vendee o share of one reversioner, if competent to redeem.*

Where one of the reversioners of a Hindu widow purchases the mortgagee's right in part of the estate and on partition among them his share of the mortgage money due is assigned over to a stranger the assignee has a right of redemption and in a suit for the same the assignor and the alienees are necessary parties. (*Kensington, J.*) JAGAT SINGH *v.* BUTA. **98 P. W. R. 1911 : 11 I. C. 512 : 189 P. L. R. 1911**

——— **S. 91**—*Attaching creditor—Rights of.*

An attaching creditor cannot acquire any interest in the equity of redemption in a mortgaged property under S. 91, T. P. Act and O. 34, R. 1. C. P. Code, gives him merely a right to redeem which is not an interest but a right to be impleaded in the mortgage proceedings. Without these provisions and as an attaching creditor he obtains neither an interest in it nor any equity founded on their infringement. (*Oldfield and Seshagiri Aiayr, JJ.*) VEYNDRAMUTHU PILLAI *v.* MAYA NADAN. **43 Mad. 696 : (1920) M.W.N. 299 : 58 I. C. 501 : 28 M. L. T. 312 : 39 M. L. J. 456.**

——— **S. 91**—*Co-trustees—Mortgage by some—Redemption.*

Where a mortgage of temple properties was made by some of the temple trustees, without consulting the co-trustees, some of the trustees cannot apply to redeem under S. 91 of the T. P.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 91.

Act when the question whether such redemption was in the interest of the temple was not considered by all the trustees as a body. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) ISTOOF v. AYAPPAN. **16 I. C. 435.**

——— S. 91— *Parties — Attaching money decree-holder—Sale.*

Where after certain property had been attached by a money decree-holder, a mortgagee of that property brought a suit on the mortgage, without impleading the attaching decree-holder as a party, obtained a decree for sale, and himself bought the property in execution of his decree. *Held*, that the order for sale, and the sale held thereunder, were not binding on the attaching decree-holder and that the latter was entitled to bring the properties to sale under his attachment. An attaching decree-holder has, under S. 91, T. P. Act, an interest in the mortgaged property entitling him to redeem the mortgage, and is a necessary party in a suit on the mortgage. 23 A. 167, Ref. (*Sundara Aiyar and Ayling, JJ.*) VENKATA SEETHARAMAYYA v. VENKATARAMAYYA. **15 I. C. 334 : 37 Mad. 418.**

——— S. 91—*Hindu— Reversioner — Right to redeem.*

A reversioner has no such interest as to entitle him voluntarily to redeem a mortgage made by the last male holder or to institute a suit for that purpose. But if a suit is instituted by the mortgagee for sale, a reversioner has sufficient interest in the property to give him a right to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow. (*Sundara Aiyar and Spencer, JJ.*) NARAYANA KUTTI GOUNDAN v. PACHIAMMAL. **35 Mad. 426 : 15 I. C. 206 : 11 M. L. T. 174 : (1912) M. W. N. 353 : 22 M. L. J. 364.**

——— S. 91—*'Interest in property'—Permanent lessee—Nature and scope.*

A person cannot be said to have any interest in property unless he can be prejudiced by a foreclosure or a sale in pursuance of the mortgage. A lessee in perpetuity has an interest in property, subject to mortgage executed before the date of his lease, as the mortgage would not be affected by his lease and any foreclosure or sale would affect his permanent lease. He can therefore redeem the mortgage. (*Mittra, O. A. J. C.*) SHANKAR SINGH v. HUKUMCHAND. **47 I. C. 99 : 14 N. L. R. 117.**

——— S. 91—*Parties—Dismissal of a deft. to suit on ground of his paramount title—Subsequent redemption.*

A party to a mortgage suit who claims to be dismissed from the suit on the ground of paramount title, cannot afterwards claim to redeem the mortgage in any subsequent suit. His dismissal on his own showing, amounts to an adjudication disentitling him to redeem the mortgage. (*Mittra, A. J. C.*) RAGHUNATH v. SHEOLAL. **39 I C. 849 : 13 N. L. R. 69.**

——— S. 91—*Hindu reversioner—Redemption.*

During the life time of a limited owner a Hindu reversioner has only a *spes successionis* and cannot sue to redeem a mortgage by the limited owner. (*Daniels and Lyle, A.J Cs.*) BASANT SINGH v. RAMPAT SINGH. **6 O. L. J. 248 : 51 I. C. 985 : 1 U. P. L. R. (J. C.) 45.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 91 (f).

——— S. 91—*Compromise by some mortgagors.*

Compromise of the mortgagors is invalid and the others have a right to redeem the whole. (*Coutts and Adami, JJ.*) RAM NARAIN LAL v. MURLIDHAR. **5 Pat. L. J. 644 : 58 I. C 129 : 1 P. L T. 616.**

——— S. 91—*Right to redeem — How extinguished.*

The right to redeem can be extinguished only by an order of Court or the act of the parties subsequent to the mortgage. (*McColl, J. C.*) NGA PO NYUM v. MI YIN. **2 U. B R (1916) 141 : 39 I. C. 377 : 11 Bur. L T. 36.**

——— S. 91 (b)—*Suit for redemption by second mortgage—Mortgage impugned by first mortgagee—Right to redeem— Effect on.*

A mortgage impugned as invalid is valid until questioned by the mortgagor and set aside and a second mortgagee who claims to redeem the first mortgage and is met with the defence that his mortgage is invalid is entitled to redeem under S. 91 (*b*). (*Sadasiva Aiyar and Spencer, JJ.*) CHAKKANGAL GOVINDA MENON v. CHAKKANGAL CHATTU MENON. **22 I. C. 907.**

——— S. 91 (b)—*Assignee of mortgagor's interest.*

An assignee of the mortgagor's interest in a mortgage suit after the passing of the decree conditional for foreclosure but before final decree is not entitled to redeem under S. 91 (*b*). (*Drake-Brockman, J. C.*) DIGAMBER v. GANPAT. **33 I. C. 496 : 12 N. L. R. 50.**

——— S. 91 (f)—*Right to redeem—Attaching creditor.*

The conflict on the question whether an attaching creditor who is given a right to redeem by clause (*f*) of S. 91 of T. P. Act, has any interest in the mortgaged property and is thereby entitled under S. 85 of the T. P. Act to be joined as a defendant in a suit on the mortgage, appears to have been completely set at rest by the amendment of S. 85 of T. P. Act by the substitution for it of R. 1 of O 34 of the C. P. Code whereby the interest of those to be joined in a mortgage suit is no longer restricted to an interest in the property but is stated to be "an interest either in the mortgage security or in the right of redemption. These words cannot possibly exclude any person of any of the classes mentioned in S. 91 of the Transfer of Property Act whether the words of S. 85 of the T. P. Act did so or not and therefore every attaching creditor under a money decree against mortgagor is entitled to redeem the mortgage (*Hallifax, A. J. C.*) MEGHRAI MARWASI v. KESHO GOPAL BUTI. **6 N L J. 181 : 1923 Nag. 311.**

——— S. 91 (f)—*Suit for redemption—Right of attaching creditor.*

Under S. 91 (f) of the Transfer of Property Act an attaching creditor is entitled to redeem the attached property, but he had no lien or charge

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 92.

on the property under attachment, as against a purchaser of the property at a sale under a mortgage decree to which he was not a party. (*Maung Kin, J.*) HAN SU *v.* A. T. K. B. L. M. CHETTY.
64 I. C. 525 : 13 Bur. L. T. 221.

——**Ss. 92 to 99.**

See also C. P. CODE, O. 34, RR. 1—14.

——**S. 95**—*Redemption by one co-mortgagor —Right of other co-mortgagors.*

Where one of several mortgagors redeems a mortgage, the other mortgagors can bring a suit for redemption against the redeeming mortgagor. Limitation Act Art. 148 is applicable. (*Lindsay and Kanhaiya Lal, JJ.*) SURAT SINGH *v.* UMRAO SINGH. **20 A. L. J. 611 : 1922 A. 410.**

——**S. 95**—*Co-owners—Payment of debt by one—Effect.*

If one member of a joint family (not the manager) mortgages the family property to pay off a prior mortgage-debt due thereon from the family, the first mortgage must be considered to have been redeemed by a person interested in the mortgaged property and not kept alive under any colour of subrogation. When a co-owner redeems a mortgage subsisting on the common undivided property belonging to him and others as co-owners, he does not step into the shoes of the mortgagee but he acquires a charge on the remaining co-owner's share of the debt. (*Tudball and Piggott, JJ.*) JAI, KRISHNA *v.* BUDHANAND.
38 All. 138 : 34 I. C. 244 : 14 A. L. J. 41.

——**S. 95**—*Contribution — Co-mortgagors—relieving his co-mortgagor of a burden.*

A mortgagor relieving his co-mortgagors of a burden, whether under compulsion of law or as a private transaction can claim that his co-mortgagors should pay him, what he has paid for their benefit and he need not be put in possession of the property of the co-mortgagors. 26 A. 22; 1 A. 533, Foll. (*Banerjee and Walsh, JJ.*) ABID ALI *v.* IMAM ALI.
38 All. 92 : 32 I. C. 177 : 14 A. L. J. 18.

——**S. 95**—*Redemption in part—Integrity if broken—Co-heir in redeeming mortgage—Charge.*

Where the mortgage deed provides that the mortgagor might redeem any portion of the property by the mortgagors upon payment of a proportionate part, and some of the mortgagors so redeem their share, the integrity of the mortgage is not broken up. One of the co-heirs of a mortgagor being interested in the property if he pays off the debt and redeems the property, is entitled to possession of the property and other co-heirs cannot defeat the charge he acquires under S. 95 by keeping him out of possession. (*Chamier, J.*) SHAFEAT ULLAH *v.* IZIZULLAH.
28 I. C. 677 : 13 A. L J. 372.

——**S. 95**—*Redemption—Adverse possession.*

In the absence of an open disclaimer of the hostile title by a co-sharer against the others he cannot get adverse possession of the joint property that is in his possession. Two persons mortgaged their property to a third person. After some time one of them redeemed the whole without the others' knowledge, and remortgaged it to

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 95.

a fourth person, who leased to the heirs of the first mortgagee. There was no knowledge to the other of exclusion and adverse possession by the redeemer He brought a redemption suit afterwards. *Held*, as the first redeemer asserted no title against the other, challenging his right to redeem his interest from the first redeemer, his and his mortgagee's possession is not adverse though a limited title under Art. 134 of Limitation Act may be set up by the mortgagee. (*Scott, C. J., Beaman and Hayward, JJ.*) BHAIJI SHAMRAO *v.* HAJIMIYA MAHANAD.
15 I. C. 500 : 14 Bom. L. R. 314.

——**S. 95**—*Contribution—Nature of the right.*

Whether the party seeking contribution has voluntarily made payment or he is compelled to pay the money by coercive process, *e. g.*, execution of decree, the right to contribution arises when the person has paid in excess of his share for joint liability of all. (*Chatterjee and Panton, JJ.*) GOTI NATH MUNSI *v.* CHANDRA NATH MUNSHI.
57 I. C. 884.

——**S. 95**—*Redemption by co-mortgagor—Rights of—Suit for contribution—Limitation.*

A co-mortgagor redeeming a mortgage becomes assignee of the original security and therefore the limitation for his suit for contribution is the same as that for a suit by mortgagee in the mortgage. Art. 132 of the Lim. Act governs the suit. (*Chatterjee and Panton, JJ.*) RAJ KAMINI DEBI *v.* MUKUNDA LAL BANDHOPADHYA. **25 C. W. N. 283: 57 I. C. 868.**
[**But. see contra 45 Cal. 111 : 45 I. C. 783.**]

——**S. 95**—*Redemption—Charge in favour of co-mortgagor—Limitation.*

Art. 148 of the Limitation Act, is not applicable to a suit for redemption of a charge which one of several mortgagors redeeming the mortgaged property has under S. 95 of the T. P. Act on the shares of the other co-mortgagors. Art. 144 is applicable. (*Richardson and Walmsley, JJ.*) PURNA CHANDRA PAL *v.* BARADA PURNA BHATTACHARJEE. **46 Cal. 111 : 45 I. C. 783 : 22 C W.N. 637.**
[**But see contra 57 I. C. 868].**

——**S. 95**—*Co-mortgagors—Redemption by one—Contribution.*

When one of the several mortgagors redeems the whole mortgage he acquires a charge on the share of his co-mortgagors for his proportion of the expenses properly incurred in redeeming the property. The purchaser of a portion of the mortgaged property is in the same position. The right to claim contribution is the same whether the mortgage is redeemed in the usual way or whether the debt is realized by a forced sale of the property of one of several owners of the equity of redemption. (*Mookerjee and Beachcroft, JJ.*) DHAKESHWAR PROSAD SINGH *v.* HARIHAR PROSAD NARAIN SINGH.
27 I. C. 780 : 21 C. L. J. 104.

——**S. 95**—*Co-mortgagors—Redemption by one—His rights.*

A mortgagor who redeems the whole property is entitled to a rateable contribution from the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 95.

other mortgagors and as a security for which he is entitled to hold the entire property in charge until he is in turn redeemed by his co-sharers on payment of their share of the debt. He has only an equitable charge and it cannot be said that the shares of the co-mortgagors are mortgaged to him who has redeemed the whole mortgage. Once one of the mortgagors has redeemed the whole mortgage, the whole mortgage comes to an end and the redeeming mortgagor is not a mortgagee within the meaning of S. 58 of the Transfer of Property Act but merely has an equitable charge against his co-mortgagors on the security of their share. 27 C. L. J. 110 referred to. (*Scott Smith, and Brasher, JJ.*) ALI AKBAR *v.* SULTAN-UL-MULK. **1923 Lah. 129.**

——S. 95—*Redemption by co-mortgagor—Position of charge.*

A co-mortgagor redeeming the whole of the mortgage does not become a mortgagee of the portion belonging to the other co-owners. He simply gets a charge. (*Wilberforce, J.*) BASANTA *v.* DHANNA SINGH. **55 I. C. 450.**

——S. 95—*Mortgagee becoming a part owner.*

The principle in S. 95 is equally applicable to a case where part of the mortgaged property has been purchased by the mortgagee. In such a case the mortgagee's right to possession as mortgagee is equally determined by the tender or deposit and transferred to the redeeming mortgagor. (*Krishnan and Venkatasubba Rao, JJ.*) TADEPALLI SUBBA RAO GARU *v.* SRI BALUSU BUCHI SARVARAYADU. **44 M. L. J. 534 : 18 L. W. 61 : 1923 M. W. N. 533 : 1923 M. 533.**

——S. 95—*Usufructuary mortgage—Redemption of whole property by one of two co-mortgagors.*

Where one of two mortgagors redeems a usufructuary mortgage completely he is not entitled to the rights of the mortgagee but only to a charge for the excess sum he paid. 2 M. 223; 2 M. 18, Dist (*Sadasiva Aiyar and Napier, JJ.*) IYATHURAI AIYAR *v.* KUPPAMUTHU PADAYACHI. **(1919) M. W. N. 467 : 49 I. C. 416 : 9 L. W. 120.**

——S. 95—*Co-mortgagors—Redemption by one—Rights of person redeeming—Mere charge-holder—Possession adverse.*

A Hindu father and his son mortgaged the joint property in 1892. Then the father sold the whole of the equity of redemption to the third deft. who paid off the mortgage and obtained possession in 1898. After the father's death, the son transferred his share to plff. who brought this suit in 1912 to redeem and obtain possession of the son's share. *Held*, that the suit is barred by Art. 126 of the Lim. Act, Art. 148 will not apply to a suit for possession by one co-owner of mortgaged property redeemed by another co-owner and transferred by the latter. 26 Bom. 500 Foll. Per *Sadasiva Aiyar, J.*—Art, 126 applies also to a suit in which possession is decreed and does not contemplate only a mere declaratory suit. (*Oldfield and Sadasiva Aiyar, JJ.*) MURAJALLI MUNIA GOUNDAN *v.* RAMASWAMI CHETTY. **41 Mad. 650 : 34 M. L. J. 528 : (1918) M. W. N. 448 : 24 M. L. T. 22 : 45 I. C. 867 : 8 L. W. 28.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 95.

——S. 95—*Interest—Redemption by one mortgagor with borrowed money at high rate of interest—Co-mortgagor's liability.*

The fact that a co-mortgagor redeems mortgage with money borrowed at a high rate of interest is not a ground for charging a high rate of interest to his co-mortgagors in a suit under S. 95 of the T. P. Act. (*Batton, A. J. C.*) JAGO *v.* ARJUN. **49 I. C. 230.**

——S. 95—*Payment by one co-mortgagor out of court—Right to a charge—Requirements.*

One of several co-mortgagors should redeem the mortgaged property in order to obtain a charge on the share of the other co-mortgagors; the redemption need not take place in Court. If the decree-holder accepts payment made out of court and certifies the same, the provisions of the section are complied with. (*Mittra, A. J. C.*) TUKARAM *v.* ARJUNA. **45 I. C. 904.**

——S. 95—*Co-mortgagors—Redemption by one—Rights of persons redeeming.*

Where one of several mortgagors has redeemed a mortgage under which all were liable he is entitled to be treated as an assignee of the security which he pays off and his remedy would be to enforce that security in the usual way by a suit for sale. (*Dalal and Simpson, A. J. Cs.*) LUTAR RAM *v.* LAL RANJIT SINGH. **9 O. & A. L. R. 677 : 1924 Oudh 185.**

——S. 95 — *Co-mortgagors—One mortgagee paying the amount—Charge.*

Where a sale in execution of a mortgage-decree is set aside on paying the decretal amount by one of the mortgagors, he cannot be said to have a charge on the property as by so paying he cannot be said to have redeemed the mortgage, which is already extinguished by the decree. (*Lindsay, J. C.*) RAB NATH BAKSH *v.* GANESH PRASAD. **60 I. C. 213 : 23 O. C. 334.**

——S. 95—*Execution of mortgage decree—Payment by co-mortgagor of, is not one by way of redemption.*

Where after a sale in execution of a mortgage decree a payment is made by one of the mortgagors, it cannot be said to be a payment by way of redemption within S. 95 and there is no charge created in favour of the person who makes the payment. As soon as a decree is passed there is an end of the mortgage. (*Lindsay, J. C.*) RAB-NATH BAKSH *v.* GANESH PRASAD. **60 I. C. 213: 23 O. C. 334.**

——S. 95—*Co-mortgagors—Redemption by one—Rights against others.*

One of several mortgagors redeeming a mortgage can where the question of contribution by another co-mortgagor arises take advantage of a decree in favour of the mortgagee affirming the validity of the mortgage. A redeeming mortgagor is the representative in interest of the mortgagee in respect of the share for which contribution is claimed to be due. (*Ashworth, A. J. C.*) LACHMI NARAYAN *v.* RAJ NARAYAN. **54 I. C 269; 22 O. C. 278.**

——S. 95—*Co-mortgagors— Covenants between mortgagor and mortgagee, if applicable.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 95.

Persons occupying the position of co-mortgagors are entitled to a charge as against the other mortgagors but they are not entitled to set up in defence a covenant which was only enforceable as between such other mortgagors and the mortgagee. (T. P. Act S. 106) (*Kanhaiya Lal, J. C.*) NAROTAM PRASAD *v.* SHANKAR SINGH.
52 I. C. 91 : 22 O. C. 112.

——— S. 95—*Usufructuary mortgage — Co-mortgagor redeeming—Necessity of taking possession—Transferee's rights—Time for exercise of option.*

Where one of several mortgagors redeems a usufructuary mortgage, it is essential that he should obtain possession of the property before he can claim the benefit of S. 95. 4 O. C. 273; 26 A. 227; 28 A. 462 Foll. (*Stuart, A. J. C.*) JAG MOHAN SINGH *v.* SITA RAM SINGH.
39 I. C. 186 : 20 O. C. 72.

———S. 95—*Redemption of mortgage by one of several representatives of mortgagor—Charge on shares of others for proportionate expenses.*

One of several representatives of a mortgagor redeeming the mortgage is entitled to a charge on the shares of the other representatives in the property, for the proportionate expenses incurred by him in redeeming the mortgage. Such a charge includes, in the case of a usufructuary mortgage a right to retain possession of the shares of others till payment. A co-mortgagor redeeming a usufructuary mortgage and obtaining possession cannot be given a decree for sale in his favour on the ground of his so redeeming. (*Kanhaiya Lal, A. J C.*) MEMOLA *v* KEDAR NATH. **22 I C. 918.**

———S. 95—*Scope of—Property not in the hands of mortgagee.*

S. 95. of the Transfer of Property Act applies also to a case where property is not in the hands of the mortgagee and so is incapable of being transferred to the person releasing the security. (*Roe and Coutts, JJ.*) HIRE KOER *v.* PALKA SINGH. **3 Pat. L. J. 490 : 5 Pat. L. W. 144 : 46 I. C. 479 : 1918 Pat. 274.**

———S. 95—*Discharge of mortgage by one co-mortgagor — Right to a charge — Nature — Redemption.*

Where one of several mortgagors paid off the mortgage debt and remained in possession with the consent of the other heirs, and his creditors obtained a decree against him and attached his property and sold it in execution, *held* that the transaction between the deft. and his co-mortgagors amounted to a joint charge given by the latter to the former on their joint undivided share of the property in respect of the amount of their share in the debt. The charge was not an interest in that land, and therefore, all that the auction-purchaser obtained by his purchase was the share of the deft. in the mortgaged property. (*Twomey, C. J., and Ormond, J.*) KYA ZAN *v.* TUNGYAW. **12 Bur. L. T. 19 : 47 I. C. 121 9 L. B. R. 169.**

———Ss. 98 and 60—*Anomalous mortgage—Clog on redemption is invalid.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 98.

The rights and liabilities of the parties to a mortgage transaction must depend on the terms of the instrument as controlled by the T. P. Act. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents of the property in satisfaction of interest, will be valid if it does not also hinder an existing right to redeem. A hindering of such right existing in the mortgagor will be invalid and ineffectual. (*Sir Lawrence Jenkins,*) MOHAMMED SHER KHAN *v.* RAJA SETH SWAMI DAYAL. **44 A. 185 : 42 M. L. J. 584 : 30 M. L. T. 220 : 49 I. A. 60 : 9 O L. J 81 : 20 A. L. J. 476 : 25 O. C. 8 : 24 Bom. L. R. 695. 35 C. L. J. 468 : 4 U. P. L. R. (P C.) 50 : L. R. 3 P C. 119 : (1922) M. W N. 378 : 1922 P. C. 17 (P. C.).**

———S. 98—*Right of sale—Sale mortgagee whether titled to.*

In considering an anomalous mortgage the intention of the parties must be seen If the intention appears that sale was not contemplated, the mortgagee has no right to a judicial sale. (*Lord Phillimore.*) MADHEORAO *v.* GULAM MOHIDDIN. **56 I. C. 717: 15 N. L. R. 134 (P.C.).**

———S. 98—*Kanom is an anomalous mortgage.*

A kanom is similar to a usufructuary mortgage and a lease, and is an anomalous mortgage however small the amount may be. (*Sadasiva Aiyar and Napier, JJ.*) KANDIYIL PARKUR *v.* THOTTOLI KOTTARATHIL. **44 Mad. 344 : 40 M. L. J. 282 : (1921) M W. N. 229 : 62 I. C. 386 : 14 L. W. 69.**

———S. 98—*Anomalous mortgage—Swadina—Tanaka—Meddatu Sharatu Patram—Period fixed for redemption—Agreement to relinquish the land in default—No clog—Equity*

Where a document of 1894 described as a *swadina tanaka meddatu sharatu patram* ran as follows :—"Having paid interest, these ten rupees, within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and house as if this is a sale." *Held*, in a suit for redemption several years after the time fixed had expired, that the document was an anomalous mortgage falling under S. 98 of the T. P. Act. The parties must be strictly bound by the terms of their contract and neither the conditions of S. 60 as to the survival of the rights of redemption nor the English principles of Equity could be applied. 37 M. 545; 1 M. 1; 4 M. 179, 29 M. 531 Dist. 27 B. 297 : 11 M. 403, 26 M. L. J. 47; 30 M. 61, 2 B. 231 Ref. (*Spencer and Kumaraswami Sastri, JJ.*) HAKEEM PATTI MUHA ED. *v.* SHEIK DAVOOD **39 Mad. 1010 : 29 M. L. J. 525 : 18 M. L. T. 209 : 30 I. C. 569 : (1915) M. W. N, 852.**

———S. 98—*Anomalous mortgage — Period fixed—Redemption.*

A mortgage for a fixed term without any provision for accounting is in the nature of an anomalous mortgage and it automatically redeems

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 98.

itself at the end of the fixed period. (*Batten, J. C.*) BHICKA *v.* SHAIKH AMIR. **19 N. L. R 1 : 1923 Nag. 60.**

——S. 98—*Intention of parties—Simple and usufructuary.*

A simple mortgage which was to be converted into usufructuary after some period, continues to be simple, until the mortgagee expressly or impliedly signifies his intention to convert to the mortgagor. (*Stuart, J. C.*) RAM DAYAL *v.* ARJUN SINGH. **50 I. C. 332.**

——Ss. 98 and 68—*Covenant to pay—Money-decree.*

An anomalous mortgage did not contain an independent covenant to pay except the usual stipulation for repayment after the fixed term. *Held*, there was a covenant to pay if the property proved insufficient and not otherwise. (*Daniels, A. J. C.*) KALKA *v.* MATHURA DAS. **50 I. C. 220 : 21 O. C 341**

——S. 98—*Mortgage — Construction — Interest—Post diem.*

A mortgage deed provided that it was made for three years with interest at two per cent. per-mensem payable for every six months. In default compound interest was to be charged to be realised by way of suit or in any other way ; the mortgagor would redeem by payment of the total amount due ; on failure of redemption the mortgagees were to be placed in possession for four years and the mesne profits to be taken in lieu of interest ; the mortgagor could redeem during the four years and on failure of redemption, the mortgagees should become proprietors of the land. *Held*, the document was an anomalous mortgage being a combination of a simple mortgage, a usufructuary mortgage and a mortgage by conditional sale. Interest would not run after the period of four years as the mortgage deed was silent about interest. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SUNDER DEI *v.* BALDEO BAKSH SINGH. **2. O. L. J. 165 : 28 I. C. 161 . 18 O. C. 10.**

——S. 98—*Simple and usufructuary mortgage—Remedies.*

Where a mortgage deed provided that the mortgage money with interest would be paid in two instalments and in case of non payment of the first instalment the mortgagee would be entitled to be put in possession of the mortgaged property taking profits in lieu of interest, in case of failure to deliver possession, the mortgagee could take possession through court, the mortgage was a combination of simple and usufructuary mortgage to which S. 98 of the Transfer of Property Act would not apply. If the mortgagors did not deliver possession, the mortgage continued to be a simple mortgage and a decree for sale was permissible. (*Kanhaiya Lal, A. J. C.*) LALTA PRASAD *v.* HON LAL. **19 I. C. 748 : 16 O. C. 90.**

——S. 98—*Simple mortgage — Convertible into usufructuary—Condition—Waiver.*

Where a mortgage was simple in its inception but convertible into a usufructuary mortgage under certain conditions, and in breach thereof

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 99.

the mortgagee took possession of a portion of the mortgaged property without claiming the deficiency within the limitation period, *held*, that he could not sue for the mortgage money on the original covenant which had been superseded ss he cannot condone the breach and at the same time claim benefit under the breach. (*Kanhaiya Lal, A. J. C.*) HAR KISHAN *v.* MAHABIR. **18 I. C. 286.**

——S. 98—*Rights of mortgagee — Power given to foreclose and to sell—Decree if can restrict the power—C. P. C., O. 34. R. 4.*

In a suit for foreclosure on an anomalous mortgage providing both for foreclosure or for sale at the option of the mortgagee, the mortgagor cannot compel the mortgagee to accept a decree for sale unless it is satisfactorily proved that the remedy sought by the mortgagee is manifestly injurious to the mortgagor's interest and that some advantage would accrue to him if the discretion is exercised in his favour. There is nothing in O. 34, R. 4, Cl. 2, C. P. C. to override the provisions of S. 98, T. P. Act. (*Piggott, J. C. and Stuart, A. J. C.*) BAQUAR HUSSAIN *v.* BALAK RAM. **18 I. C. 24.**

——S 98—*Clog on equity of redemption—how far enforceable.*

Clogs on equity should not be enforced in places where T. P. Act has not been extended. (*Robinson, C. J and May Oung, J.*) MA MIN BYU *v.* MAUNG CHIT PE. **1 Rang. 419 : 1924 Rang. 83.**

——Ss. 99 and 100—*Mortgage—Invalid.*

A mortgage deed attested by only one witness is neither a mortgage nor a charge, 35 M. 607, Foll. (*Richards, Banerjee and Tudball, JJ.*) COLLECTOR OF MIRZAPUR *v.* BHAGAWAN PRASHAD. **35 All. 164 : 18 I. C. 311 : 11 A. L. J. 141.**

——S. 99—*Applicability—Punjab—C. P. C., O. 34, R. 14.*

The principle of S. 99 of the T. P. Act can no longer be applied to the Punjab, the legislature having repealed that section and substituted therefor O. 34, R. 14 of the C. P. Code which is expressly inapplicable to this province. (*Chevis and Broadway, JJ.*) KISHEN NARAIN *v.* PALA MAL. **88 P. R. 1918 : 102 P. L. R. 1918 : 47 I. C. 937 : 167 P. W. R. 1918.**

——S. 99—*Applicability—Punjab.*

S. 99 has not been applied to the Punjab. The section was disapproved of as a legislative mistake by the select committee appointed to consider the amendment of the C. P. C. Where a mortgagee with possession had obtained a decree for arrears of rent against the mortgagor who was occupying the house as his tenant and in execution thereof brought the property to sale, and purchased it himself, it was held that as the mortgage deed itself contained a provision for the recovery of the interest from the mortgaged and other property of the mortgagor the sale was really of the nature described in T. P. Act S. 67 and S. 99 had no application. 12 I. C. 265 : 2 P. R. 1907; 3 S. L. R. 17 ; 10 C. L. J. 91 ; 32 C. 296 : 3561 : 23 B. 119 : 22 B. 624 : 22 M. 372 : 30 M.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 99.

362 ; 13 A. 432 Ref. (*Reid, C. J.*) MOTI RAM *v.* HAR BHAGWAN DAS. **30 P. L. R. 1911 : 15 P. R. 1911 ; 9 I. C. 549 : 109 P. W. R. 1911.**

——S. 99—*Sale in contravention—Suit for redemption.*

If the persons claiming to redeem through the judgment-debtor take no objection before confirmation of the sale, they cannot bring a suit for redemption against the purchaser in execution whether he is a decree-holder or a stranger. 37 A 165 Foll. (*Ayling and Napier, JJ.*) ARJUNA REDDI *v.* VENKATACHALA ASARI.

19 M. L. T. 121 : 5 L. W. 242 : 32 I. C. 611 : 32 M. L. J. 525.

——S. 100—*Charge — Creation of —Village granted by talukdar for maintenance of junior member, liability to pay Government revenue.*

It was arranged between a talukdar and a junior member of the family that the junior member should get 11 villages in lieu of maintenance for his branch, the talukdar himself having undertaken to pay the Government Revenue on the 11 villages. *Held*, that the obligation undertaken by the talukdar to pay the Government revenue was personal and no charge was created on the estate. Where there is no allegation that the talukdar had not ample property to carry out his undertaking or that any contingency had arisen which actually jeopardised the possession of the villages by the junior member, the latter cannot maintain a suit for a declaration that the revenue payable in respect of the villages is a charge upon the talukdar's estate. (*Mr. Ameer Ali.*) SUNDAR LAL *v.* RAMJI LAL **28 M. L. T. 319 : 24 C. W. N. 929 : 16 N. L. R. 114 : 47 I. A. 149 : (1920) M. W. N. 447. (P. C.)**

——S. 100—*Moveable property— Breach of contract to supply future goods—Money advanced if can be a charge on those future goods.*

A charge on moveable property not in existence at the time of the contract is valid and the claim is enforceable against the transferee of the property with notice of the equitable interest. (38 Mad. 500. Ref.) 5 All. 238 Ref. (*Sulaiman, J.*) JUGAL KISHORE *v.* RAM NARAIN.

1923 All. 199.

——S. 100—*Charge—Simple mortgage—Makbuza—Effect of using the word.*

Where a document ran thus: " We agree that we shall pay annually the interest and in default of payment of interest for 2 years the creditors shall have the right, without waiting for the expiry of the time fixed, to file a suit and to recover their dues from the property mortgaged (*Makbuza*) and if the creditors make delay in realising the principal and interest, then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged. (*Makbuza*). *Held, Richards, C. J. dubitante* that the document did not purport to create a mortgage. (*Richards, C. J. and Tudball, JJ.*) KHURSHED ALI *v.* ABDUL MAJID. **38 All. 361 : 35 I. C. 210 : 14 A. L. J. 441.**

——Ss. 100 and 130—*Assignment — Agreement between debtor and creditor for the debt being paid out of a specific fund—Whether valid.*

An agreement between a debtor and a creditor that the debt shall be paid out of a specific fund

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 100.

coming to the debtor is a good assignment. (1905) A.C. 454, Foll. Hence a person can assign his fixed deposit with a Bank to another either absolutely or by way of charge. (*Chamier and Rafique, JJ.*) GURPRASAD *v.* GORAKHPUR BANK, LTD. **36 All. 507 : 24 I. C. 385 : 12 A. L. J. 886.**

——S. 100—*Mortgage or charge—Simple bond—Limitation.*

A executed a usufructuary mortgage in favour of B in 1864 and four days later, he executed another document in favour of the mortgagee in which he promised to pay Rs. 500 with interest before he redeemed the mortgage. The document was described as a *Tamasuk. Held*, that the document amounted to neither a mortgage nor a charge. It was merely a money bond and the suit on it in 1910 was either barred by limitation or was premature. 26 A. 559, Rel. (*Chamier and Rafique, JJ.*) RAMPRASAD RAI *v.* NAWAB CHOWDHURY. **16 I. C. 222.**

——S. 100—*Charge—Creation of.*

A subsequent mortgage of different property to the same mortgagee provided : " first I shall pay this money and then the money borrowed previously on the security of the fields". *Held*, this did not create a charge in respect of the property compromised in the first mortgage. (*Johnstone, C. J. and Banerjee, J.*) GAGA RAM *v.* KIRTARTH RAI. **33 All. 393 : 9 I. C. 319 : 8 A. L. J. 158.**

——S. 100—*Charge—Creation of.*

It was held that annuity was payable out of estate of grantor and also it created a charge on the estate for that amount. (*Teunon and Newbould, JJ.*) RAJENDRA MOHAN *v.* UPENDRA NATH. **64 I C 518.**

——S. 100—*Charge—Essentials.*

Where under a document executed by a person in whose favour a lady released her claim to certain property the lady was to get an annuity from the said property to be recovered by suit if necessary, *held* that the annuity was made a charge on the share even though there was no specification of the property in the schedule attached to the document as the property was easily ascertainable without such schedule. The question whether a charge is or is not created upon a property is one of intention. (*Chatterjee and Newbould, JJ.*) SYAM PEARY DASSYA *v.* EASTERN MORTGAGE AND AGENCY CO., LTD. **40 I. C 865.**

——S. 100—*Charge and mortgage—Distinction.*

Charge only secures payment out of the property lent; mortgage creates an interest in the property. A charge holder cannot follow the *bona fide* purchaser for value without notice but a mortgagee can. The burden of proving want of notice lies on the purchaser before he can succeed as against the charge holder, even if he has notice; provided he claims through one who had notice he will succeed. (*Mookerjee and Beachcroft, JJ.*) AKSHOY KUMAR *v.* CORPORATION OF CALCUTTA. **42 Cal. 625 : 19 C. W. N. 37 : 27 I. C. 261 : 21 C. L. J. 177.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 100.

——S. 100—*Operation of law—Payment of Government revenue by grantor—Suit against grantee.*

There is no equity giving a charge to any person having an interest in an estate who makes a payment of revenue to save the estate. A condition in babuana grant of properties that the grantee should pay his share of the Government revenue to the grantor is not enough to create a charge in favour of grantor on the property, in case he pays the revenue. (*Beachcroft and Newbould, JJ.*) MAHARAJAH SIR RAMESHWAR SINGH *v.* SRIMATI JANESHWARI BABOOSHIN AND EKRADESHWAR SINGH. **18 C. W. N. 129 : 21 I. C. 397 : 19 C. L. J. 19.**

——S. 100—*Charge — Creation of—Implication.*

A charge in the nature of a mortgage cannot be created by implication. (*Holmwood and Chapman, JJ.*) MAKBUL ALI *v.* ALI AHMAD. **18 I. C. 80 : 40 Cal. 514.**

——S. 100—*Charge—Maintenance—Compromise—Widow—Reversioner.*

A compromise between the widow and the reversioners by which the widow was to receive a certain sum annually as maintenance from the income of the estate, the estate was to vest in the reversion but the reversioners were not to alienate the properties during the lifetime of the widow, makes the maintenance a charge on the estate and a subsequent alienee from the reversioners takes only subject to such charge. (*Mookerjee and Carnduff, JJ.*) CHAMARU SHAHA *v.* SONA KOER. **16 C. W. N. 99 : 11 I. C. 301 : 14 C. L. J. 303.**

——S. 100—*What is charge.*

At the foot of a hundi a note was added in the following words:— "*Hamari Delhi wa Ludhiana ik jaidad is qarze ki zimmewar hogi*" ; *held* these words do not create a charge. (*Abdul Raoof, J.*) PURANCHAND *v.* PURAN CHAND. **1923 Lah. 652 (2).**

——S. 100—*Charge—Creation of—Right in future—Distinction.*

For a document to create a charge on immoveable property under S. 100, T. P. Act, it must create such charge immediately on its execution, and not one that merely creates a charge that operates at some future time. (*Scott Smith and Harrison, JJ.*) ABDUL SAMAD *v.* MUNICIPAL COMMITTEE, DELHI. **67 I. C. 939.**

——S. 100—*Charge—Special provisions regarding attestation—Applicability — Evidence Act, Ss. 69 to 71.*

The special provisions of the T. P. Act relating to attestation of mortgages and of the Evidence Act relating to the method of proof of mortgages are not applicable to the deeds creating charges. (*Wallis C.J. and Oldfield, J.*) RAMASAMI IYENGAR *v.* KUPPUSAMI AIYAR. **(1921) M. W. N. 472 : 66 I. C. 554 : 14 L. W. 99.**

——S. 100—*Improper alienation—Proceeds, if can be followed in the hands of third parties.*

Persons attacking improper alienations of limited owners cannot follow the proceeds in whatever form they might assume in the shape of property in the possession of third parties or claim any charge therein. (*Wallis and Oldfield, JJ.*) RAMAYYAR *v.* MAHALAKSHMI **(1921) M. W. N. 434 : 64 I. C. 481 : 14 L. W. 38.**

——S. 100—*Future property—Charge on—Repudiation of contract before property comes into existence.*

Where loans advanced with the object of financing a litigation are charged on an amount which may be secured by a compromise in the suit to be effected in a particular manner, and the compromise is effected in a different manner, the lien will not attach itself to the substituted property, especially where the parties put an end to the contract of loan before the compromise. (*Ayling and Seshagiri Aiyar, JJ.*) PUSAPATI VENKATAPATHIRAJU *v.* VENKATA SUBHADRAYAMMA. **47 I. C. 563.**

——S. 100—"*Tanaka*"—*Charge.*

Use of the word 'Tanaka' in a document clearly creates security and not merely an assignment of revenue. (*Sadasiva Aiyar and Napier, JJ.*) RAJA KUMARA VENKATA PERUMAL *v.* UDDAGIRI PAPA. **41 I. C. 208 : 21 M. L. T. 351.**

——S. 100—*Future debt—Contingent debt—Charge of.*

A charge to secure a liability not in existence but contingent and liable to arise in future is valid under S. 100, T. P. Act. Where in a partition deed, the properties and debts of the family were allocated to the co-parceners in specified shares and in default in payment of his debt by any of the co-parceners, any other member paying it was authorised to recoup himself out of the properties of the defaulter, *held*, that the deed created a charge within S. 100, T. P. Act. (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) IMULUCHI *v.* ACHAMPAT AVUKOYA HAJI. **6 L. W. 115 : (1917) M. W. N. 533 : 39 I. C. 867 : 33 M. L. J. 58.**

——Ss. 100 and 59—*Charge—Invalid mortgage.*

An instrument invalid under S. 59 of the T. P. Act as a mortgage cannot create a charge under S. 100. (*Sadasiva Aiyar and Moore, JJ.*) ANANTARAMA AIYAR *v.* YUSSUFJI OOMER SAHIB. **(1916) 2 M. W. N. 236 : 36 I. C. 903 : 31 M. L. J. 133.**

——S. 100—*Charge — Mortgage — Covenant not to alienate property.*

A mere covenant not to alienate property is insufficient to create a charge. (*Benson and Sundara Aiyar, JJ.*) SIVANNA *v.* VENKATAKRISHNA MURTHY. **(1913) M. W. N. 337 : 19 I. C. 478 : 24 M. L. J. 474.**

——S. 100—*Charge—Contingent charge.*

Charge may be created on the happening of a condition where the condition itself is first stipulated and the condition happens afterwards. (*White, C.J., and Krishnaswami Aiyar, J.*) BALASUBRAMANIA NADAR *v.* SIVAGURU ASARI. **11 I. C. 629 : 21 M. L. J. 562.**

——S. 100—*Charge—Invalid—Mortgage.*

Where a document of mortgage is not completed by attestation or other formality prescribed

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 100.

by law, it cannot be used to establish a charge. But when the parties are under an erroneous belief that they have created a simple mortgage in a case where the instrument merely creates a charge, the act or contract of parties cannot change the nature of the transaction and failure to effect attestation would not stand in the way of enforcing a charge. (*Stanyon, A. J. C.*) KHEM CHAND *v.* MALLOO. **26 I. C. 601 : 10 N. L. R. 81.**

——S 100—*Dahyak or Daswant—Nature of—Charge.*

Dhayak or Daswant is closely analogous to *nanker* and is a charge on the property. A cash allowance in perpetuity awarded by an order of the Settlement Officer and amounting to a tenth of the assumed rental is technically known as Dahyak or Daswant. (*Daniels, A. J. C.*) PREM KUNWAR *v.* SHANKAR BAKSH SINGH. **21 O. C. 327 : 49 I. C. 509 : 6 O. L. J. 152.**

——S. 100—*Charge—Creation of.*

Where if the intention of parties to a transaction as gathered from the document as a whole is to create a charge, absence of description of the mortgaged property because the money advanced is tacked on to a previous mortgage does not affect the validity of that charge. (*Karhaiya Lal, A.J.C.*) CHAUHARAJA BAKSH *v.* RAM HARAKH. **32 I. C. 740 ; 2 O. L J. 601.**

——S. 100—*Charge—Mortgage—Distinction,*

A charge does not transfer to the charge-holder any interest in specific immoveable property as a mortgage does. (*Lindsay, J. C.*) PARBHU DAYAL *v.* BABBAN LAL. **23 I. C. 867 : 1 O. L.J. 43.**

——S. 100—*Lease—Security of property for rent—If creates a mortgage or charge—Distinction.*

In cases of lease, the moveables and immoveables shall ever be regarded as a security for the payment of the rent. If it creates a mortgage or a charge the difference is very little. (*Das and Adami, JJ.*) RAJA SHIVA PRASAD *v.* BENI MADHAV. **1 P. 387 : 4 P. L. T. 6 : 1922 P. 529.**

——S. 100—*Further debt— Property subject to charge—Liability of purchaser.*

Where the landlord has a charge for rent on the crops, a person removing the crops with notice of the charge is liable for the difference between the amount of the rent due and the quantity of the crops removed and not for the whole of the crops removed. (*Parlett, J.*) MAUNG HTAT *v.* MAUNG SANDUN. **44 I. C. 109.**

——S. 100—*Charge—Operation of law—Invalid sale.*

A purchaser of immoveable property worth more than Rs. 100, without a registered deed but in possession gets a charge on immoveable property but he cannot set aside an attachment of the property. He can claim however that the property be sold subject to his charge. (*Young, J.*) MAUNG PE GYI *v.* VELLIAN CHETTY. **33 I. C, 610 : 8 Bur. L. T. 268.**

——S. 100—*Charge—Security, when amount to charge.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Extinction of mortgage.

S. 100 does not enable a mortgage to be converted into a charge if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law, such as registration prescribed by S. 59 of the T. P. Act. If the relation of mortgagor and mortgagee does not exist between the parties S. 100 might come into play. (*Maung Kin, J.*) MA BON LAN *v.* MAUNG PO LU. **9 Bur. L. T. 64 : 32 I. C. 595 : 8 L. B. R. 553.**

——Ss. 100 and 54—*Charge — Operation of law—Invalid conveyance.*

A conveyance which is invalid for want of registration does not give the purchaser a charge on the property for his purchase-money. S. 100 of the Act is not intended for the protection of those who take conveyances in violation of express provisions of law. (*Parlett, J.*) MA LONNA *v.* MG SHWE BYA. **10 I C. 919 : 4 Bur. L. T. 115.**

——S. 101.

Doctrine of merger.
Extinction of mortgage.
Keeping alive.
Payment by stranger.
Subrogation.
Miscellaneous.

Doctrine of merger.

——S. 101—*Doctrine of merger—Application—Intention.*

In applying the doctrine of merger, the dominating principle guiding the Court is intention, express or implied, in absence whereof, the Court should look to the benefit of him in whom the two estates have become vested. (*Imam and Chapman, JJ.*) GOPAL LAL ROY *v.* SHAILENDRABASINI CHOUDHURANI. **23 I. C. 393**

——S 101—*Doctrine of merger—Mortgage.—Suit on—Defence of fictitious nature of mortgage.*

Where the deft. in a suit on mortgage combine in himself a two-fold character being the holder of the equity of redemption as also a prior incumbrancer, the defence is available to him that the mortgage in suit is fictitious, There is no merber of the two interests in the same deft. 10 C. 1035 (P. C.) Ref. to. (*Mookerjee and Beachcroft, JJ.*) SHIB NARAIN MANDAL *v.* BAI KUNTH NATH SANTRA. **20 I. C. 864 : 19 C. L. J. 200.**

——S. 101——*Doctrine of merger—Widow—Keeping alive debt—Possession of—Assets of husband.*

The widow's stridhanam not being at law a charge or incumbrance within S. 101, there is no merger of her debt by reason of her possession of her husband's assets because in the case of a limited owner the presumption is against merger. (*Spencer, J.*) CHIDAMBARAM *v.* MEENAKSHI AMMAL. **52 I. C. 842.**

Extinction of mortgage.

——S. 101—*Extinction of mortgage—Mortgage decree—Sale—Purchase by mortgagee.*

Where a mortgagee obtained a decree on his mortgage and in execution thereof purchased the property in Court-auction himself he becomes

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Extinction of mortgage.

the owner of the property from the date of the purchase and he cannot maintain as against himself or third parties unconnected with the mortgage transaction on the property, the position that his mortgage remained an incumbrance thereon after that date. (*Lord Shaw.*) BHAWANI KUMAR *v.* MATHURA PRASAD SINGH.

40 Cal. 89 : 39 I. A. 228 : 16 C. W. N. 985 : 12 M. L. T. 352 : (1912) M. W. N. 244 : 14 Bom L. R. 1046 : 16 C. L. J. 606 : 16 I. C. 210 : 23 M. L. J. 311. (P. C.).

[*See also* **31 I. C. 891**].

[**Also 59 P. R. 1909 : 86 P. L. R. 1909 : 2 I. C. 949 : 94 P. W. R. 1909.**]

——S. 101—*Extinction of mortgage—Subsequent sale to mortgagee, providing for discharge of mortgage.*

After a mortgage was executed, the properties were purchased by the mortgagee and a portion of the consideration for the sale was retained for the discharge of the mortgage-debt. Subsequently it turned out the sale was partly invalid and on a suit being brought on the mortgage deed, *held* the suit was not maintainable as the mortgage had been extinguished at the time of the sale. (*Piggott and Walsh, JJ.*) LACHMAN PRASAD *v.* LACHMESWAR PRASAD. **20 A. L. J. 151 : 1922 All. 76.**

——S. 101—*Extinction of mortgage—Purchase by mortgagee of mortgaged property.*

Where a usufructuary mortgagee purchases the property in execution of his own decree on the basis of a simple mortgage, he becomes the absolute owner and the mortgagee right ceases to exist by the virtue of the law of merger. (*Richards, C. J. and Banerjee, J.*) JAWAHIR MAL *v.* UDAI RAM. **31 I. C. 891.**

——S. 101—*Extinction of mortgage—Mortgagee purchasing equity of redemption—Effect.*

The second part of S. 101, T. P. Act does not apply where no intervening encumbrances exist and in such a case where the mortgagee purchases the equity of redemption, the mortgage is extinguished. (*Broadway and Zafar Ali, JJ.*) GOBIND SARUP *v.* KULDIP SINGH. **1924 Lah. 377.**

——S. 101—*Extinction of mortgage—Decree-holder taking fresh mortgage—Prior mortgage paid off.*

Where a mortgage is merged in a decree in favour of the mortgagee, his remedy is no longer that of a mortgagee, but that of a decree-holder who is entitled to bring certain property to sale. If he wishes to retain this position he should execute the decree and not take a fresh mortgage the consideration for which is the decree. Where a prior mortgagee who obtains a decree upon his mortgage and after that decree is made absolute takes a fresh mortgage in lieu of it he cannot claim priority over intermediate mortgagees. Where a decree is obtained upon a mortgage the decree upon the making of an order absolute extinguishes the mortgage security as well as the deft.'s right to redeem, by substituting for that security a right to sell conferred by the decree, and thenceforward the mortgagee's remedy is under the decree. 40

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Extinction of mortgage.

A. 407 (P. C.) Foll. (*Richards, C. J., Rafique and Lindsay, JJ.*) CHHOGGAN LAL *v.* MUHAMAD HUSSAIN KHAN. **41 All. 456 : 17 A. L. J. 741 : 51 I. C. 133 : 1 U. P. L. R. (R.C.) 71 (F. B.).**

——S. 101—*Extinction of mortgage—Purchase of part by mortgage.*

Purchase by mortgage of a part of the mortgaged property does not extinguish the debt *pro tanto.* (*Piggott and Lindsay, JJ.*) JAMANADIE *v.* KALABAM. **39 All. 74 : 37 I. C. 4 : 14 A. L. J. 1025.**

——S. 101—*Extinction of mortgage—Mortgagee purchasing mortgagor's right at auction-sale.*

Where the mortgagee purchased the right of the mortgagor in Court auction and sued for possession as full owner, which suit was dismissed for default, *held*, that a second suit on the mortgage will not lie as the mortgage security has been extinguished by the auction purchase and that the intention to keep it alive was negatived by the institution of the previous suit for possession. (*Tudball, J.*) BALDEO PRASAD *v.* MAHABIR PRASAD. **18 I. C. 99.**

——S. 101—*Extinction of mortgage—The mortgages over the same property by the same person—Property purchased in execution of decree on first mortgage—Second mortgage if extinguished.*

Where a mortgagee holding two different mortgages over the same property sues and obtains a decree on the first and purchases the property himself "subject to his second mortgage" this second mortgage was held extinguished. (*Beaman and Macleod, JJ.*) LAXMAN *v.* MATHURABAI. **38 Bom. 369 : 23 I. C. 121 : 16 Bom. L. R. 26.**

——S. 101—*Extinction of mortgage.*

A mortgage debt is not extinguished by a fraudulent revenue sale. (*Mookerjee and Panton, JJ.*) SATISH KANTAH *v.* SAHISH CHANDRA **24 C. W. N. 662 : 55 I. C. 689 : 30 C.L.J. 475.**

——S. 101—*Extinction of mortgage—Mortgagee becoming absolute owner of equity of redemption.*

"The equitable estate merges in the legal, when the mortgagee becomes also absolute owner of the equity of redemption unless there are any puisne or mesne encumbrances against which the equity of redemption is required to be kept alive. *Per Sadasiva Aiyar.*—The Courts can consider whether under O. 21, R. 66 (*a*), C. P. Code, they ought not to notify in the same proclamation that the attached property is a right which had ceased to exist long ago, though they are bound to bring non-existent equity of redemption to sale at the instance of a decree-holder and are not entitled under S. 151, C. P. C. to stop the sale altogether on account of its non-existence. (*Sadasiva Aiyar and Moore, JJ.*) RAJAH OF KALAHASTI *v.* PRAYAG DOSSJEE VARU. **30 M. L. J. 391 : 35 I. C 224 : (1916) 2 M. W. N. 92.**

——S. 101—*Extinction of mortgage—Mortgagee purchasing equity of redemption—Effect—Intention—Proof.*

A purchase by the mortgagee of the equity of redemption extinguishes the mortgage, unless

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Extinction of mortgage.

circumstances exist at the time of the purchase which show an intention to prevent the merger. A mortgagee purchaser of the equity of redemption of his mortgage can use his prior mortgage only as a shield if there are mesne encumbrances and only in respect of the properties which are covered by such incumbrances, but he is not entitled to sue upon his mortgage. (40 C. 89, P. C.) ; 38 B. 369, F.) *Per Wallis, C. J.*—The word "absolutely" in S. 101 cannot mean that there are no mesne encumbrances. *Per Seshagiri Aiyar, J.*—S. 101 leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the incumbrance is extinguished. It only enacts that where there are other mortgages on the property, an intention will be imputed to the mortgagee-purchaser that he intended to keep alive his own mortgage against subsequent claimants. (*Wallis, C. J. and Seshagiri Aiyar, J.*) ARUMUGASUNDARAM *v.* NARASIMHA. **(1915) M. W. N. 397 : 2 L. W. 542 : 18 M. L. T. 110 : 29 I. C. 916 : 29 M. L. J. 583.**

——S. 101—*Extinction of mortgage.*

Under S. 101, T. P. Act, the charge will not be extinguished if the owner of the charge declares by express words or necessary implication that it should continue to subsist or such continuance would be for his benefit. (*Kulwant Sahay and Foster, JJ.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* LAKHU RAI. **1923 Pat. 258 : 4 Pat. L. T. 525 : 1923 P. 581.**

——S. 101—*Extinction of mortgage—Equity of redemption—Purchase by mortgagee—Validity.*

Right of the mortgagor ends, when equity of redemption is purchased by mortgagee. (*Miller and Adami, JJ.*) BALDEO SINGH *v.* MEGHU SINGH. **1919 Pat. 336.**

Keeping alive.

——S. 101—*Keeping alive—Suit—Prior mortgage without impleading puisne mortgagee—Decree—Suit on puisne mortgage—Prior mortgagee, if can keep alive prior mortgage right.*

A mortgagee who has obtained a decree on his mortgage without impleading the mortgagee as a party to the suit is entitled, when afterwards sued by the puisne mortgagee on his mortgage to use his prior mortgage as a shield in all cases in which he could have done so before the Act of 1882, T. P. Act, S. 89 compared with O. 34, R. 1 of the C. P. Code. (*Lord Dunedin.*) SUKHI *v.* GHULAM SAFDAR KHAN. **43 All. 469 : 48 I. A. 465 : (1921) M. W. N. 445 : 42 M.L.J. 15 . 65 I. C. 151 : 14 L. W. 162 (P. C.).**

——S. 101—*Keeping alive—New invalid mortgage.*

Where a new mortgage taken in supersession of the old mortgage proves invalid, the mortgagee has a right to fall back on the old mortgage. (*Lord Parker.*) HARCHANDI LAL *v.* SHEORAJ SINGH. **39 All. 178 : 44 I. A. 60 : 15 A.L.J. 223: 1 Pat. L. W. 330: 5 L. W. 502 : (1917) M. W. N. 290 : 25 C. L. J. 316 : 21 M. L. T. 292 : 21 C. W. N. 765 : 39 I. C. 343 : 19 Bom. L. R. 444 : 32 M. L. J. 241 (P. C.).**

——S. 101—*Keeping alive—Intention—Mortgage by testator—Renewal by legatee—Legatee found to have no interest—Rights of creditor.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Keeping alive.

In renewal of mortgages granted by a testator one of his legatees believing that he had an absolute interest in the property granted a fresh mortgage. It was subsequently found that the legatee had no more than a mere life interest in the properties. A question arising as to the rights of the mortgagee on the death of the legatee, *Held*, that the mortgages granted by the testator were kept alive for the benefit of the creditors and that the renewals of the mortgages by the legatee were not intended to and did not operate as discharge of the mortgages created by the testator. (*Lord Shaw.*) RICHARD ROSS SKINNER *v.* KUNWAR NAUNIHAL SINGH. **35 All. 211 : 40 I. A. 105 : (1913) M. W. N. 500 : 13 M. L. T. 488 : 11 A. L. J 494 . 17 C. L. J. 555 : 15 Bom. L. R. 502 ; 19 I. C. 267 : 17 C. W. N. 853. 25 M.L J. 111 (P. C.).**

——S. 101—*Keeping alive—Extinguishment of mortgage—Intention of parties.*

The question whether a mortgage which is paid off is extinguished or kept alive depends upon the intention of the parties ; and a man having a right to act in either of two ways will be presumed to have acted according to his interests. (*Sir John Edge, J.*) MAHOMED IBRAHIM *v.* AMBIKA PERSHAD. **39 Cal. 527 : 39 I. A. 68 : 11 M. L. T. 265 : (1912) M. W. N. 367 : 9 A.L.J. 332 : 14 Bom. L. R. 280 : 16 C. W. N. 505 : 15 C. L. J. 411 : 14 I.C. 496 : 22 M. L. J. 468 (P.C.).**

[See also (1920) Pat. 261 : 58 I. C. 489 : 1 Pat. L. T. 582]

[Also 34 All. 268 : 13 I. C. 619 : 9 A. L. J. 226]

——S. 101—*Keeping alive—Decree on prior mortgage—Subsequent suit by puisne mortgagee.*

Where the prior mortgagee of a property purchases it and thus satisfies his mortgage and the subsequent mortgagee of the same property brings it to sale after impleading the prior mortgagee as defendant, it is settled law that the prior mortgagee is entitled to hold up the earlier mortgages. The plaintiff subsequent mortgagee cannot insist that the decree should direct the property to be sold. (*Ryves and Daniels, JJ.*) PHUL CHAND *v.* MT. SURJI. **1923 All. 457.**

——Ss. 101 and 74—*Keeping alive—Acquisition of the rights of prior mortgagee—Difference.*

A suit was brought by a subsequent mortgagee for the recovery of the money due to him on simple mortgages the claim was resisted by a prior mortgagee who had purchased the mortgaged property in execution of simple money decree; *held* that the presumption is that the defendant intended to keep alive the prior mortgage. (*Lindsay and Kanhaiya Lal, JJ.*) RAM SARUP *v.* SETH RAM LAL. **20 A. L. J. 596 : 44 A. 659 : 1922 All. 394.**

——S. 101—*Keeping alive—Equity of redemption—Purchaser of—Decree on mortgage paid off by purchaser—Decree on subsequent mortgage made absolute—Position of purchaser.*

The father of the defts. in 1903 purchased an eight-anna share of a village which was comprised in three mortgages to plff. A decree was

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Keeping alive.

passed on the mortgage of 1874 in 1895 and it was made absolute in 1896. The defts. in 1906 paid off the amount due under the decree. In 1906 plff. obtained a decree for the mortgages of 1886 and 1888 in a suit to which the father of the defts. was a party. The decree was made absolute in 1907 and in execution thereof the plffs in 1911 purchased a portion of the mortgaged property. In 1909 the defts. (their father having died) applied to have the decree of 1895 made absolute but they did not implead the plff's. *Held*, that the payments made by the defts. in 1906 discharged the decree of 1895 and it could not be made absolute in favour of the defts. Consequently the property in the possession of the plffs. could be sold in execution thereof. The decree having been satisfied the plffs. could assert their rights by a separate suit and not in execution proceedings. (*Richards, C. J. and Banerji, J.*) GOBARDHAN DAS *v.* ANMOLE SINGH. **49 I. C. 803 : 17 A. L. J. 219.**

——— S. 101—*Keeping alive—Acquisition by mortgagor of prior mortgage by inheritance—Right of puisne mortgagee.*

Two mortgages were created on the same property. A decree was obtained by the puisne mortgagee for sale subject to the prior mortgage. The mortgagor subsequently inherited the rights of the prior mortgagee. *Held* that the puisne mortgagee was entitled to sell the property free of prior mortgage, as it would be inequitable to allow the mortgagor to set up a mortgage created by himself against a subsequent mortgagee, whom he had undertaken personally to discharge. 5 C. L.J. 95 Foll.; 9 C. 961 (P.C.); 10 C. 1035 Ref. (*Chamier and Piggott, JJ.*) BADAN *v.* MURARI LAL. **37 All. 309 : 28 I. C. 973 : 13 A. L. J. 397.**

——— S. 101—*Keeping alive—Partial discharge.*

Where a mortgage is executed in partial discharge of a prior mortgage, unless there are circumstances from which an intention to abandon the prior mortgage can be gathered, it must be presumed that the mortgagee did not abandon the prior mortgage but kept it subsisting. (*Banerjee and Tudball, JJ.*) RAM KRISHAN DAS *v.* FAKIR CHAND. **19 I. C. 18 : 11 A. L. J. 386.**

——— S. 101—*Keeping alive—Intention should be considered—Intention to keep alive a mortgage.*

When deciding whether an incumbrance is to be regarded as kept alive or extinguished as for the benefit of the person acquiring a property the circumstances and intention appearing from such circumstances at the date of the acquisition of the property should be taken into consideration. If at the date of acquisition, the parties intended to keep it alive it must be regarded as one continuing to subsist. (*Karamat Husain and Chamier, JJ.*) JOGAL KISHORE *v.* RAM NARAIN. **9 A. L. J. 226 : 13 I. C. 619 : 34 A. 268.**

——— S. 101—*Keeping alive—Acquisition of equity of redemption by mortgagee—Effect of—Presumption.*

The last clause of S. 101 of the T. P. Act (i.e.) the words "continuance would be for his benefit" are merely a guide to the intention of the owner, and it seems to be clear that the question of benefit must be decided in view of the circumstances existing at the time of the transaction. Otherwise the nature of the title might be in suspense for an indefinite time. Where there is no mesne incumbrance outstanding at the time of the sale, the conclusion is inevitable that the mortgage has been extinguished, 18 Bom. 86 ; 26 B. 88 Ref. In any case, the terms of the section throw the onus on the owner to prove circumstances from which it can be inferred that it was to his interest to keep the charge alive so that at the time of the transaction that was his intention. (*Pratt and Fawcett, JJ.*) BAI REVA *v.* VALIMAHOMED MYAMAHOMED. **24 Bom. L. R. 720 : 46 B. 1009 : 1922 Bom. 211.**

——— S. 101—*Keeping alive — Purchase in execution of puisne mortgage degree—Effect of.*

Where a puisne mortgagee obtains a decree for sale without impleading the prior mortgagee and purchases the property in execution with leave of the Court, the incumbrance is not extinguished, for it is to his benefit to keep it alive. The leave of the court puts an end to the disability of the mortgagee and makes him an independent purchaser. (*Batchelor and Shah, JJ.*) SHANKAR VENKATESA KARGUPPI *v.* SADASHIV MAHADJI KULKARNI. **38 Bom. 24 : 21 I. C. 39 : 15 Bom. L. R. 817.**

——— S. 101—*Keeping alive — Payment of mortgage decree—Benefit.*

There is a presumption that a person intends to keep alive a security when it is for his benefit to do so. But the Court cannot act upon that when no question was raised on the point in the Court of first instance and the other side had no opportunity of meeting such a case or the presumption. (*N. R. Chatterjea and Pearson, JJ.*) ALI MAHOMED KHAN *v.* SHEIKH MAHARAJ BEPARI. **64 I. C. 266 : 36 C. L. J. 186.**

——— S. 101—*Keeping alive—Purchase—Payment of mortgages.*

Subrogation does not apply where there is a duty to pay. This doctrine does not apply where a person fulfils or discharges a duty under a covenant, hence a purchaser who retains a portion of the purchase money to discharge two mortgages on the property, and pays off the prior one cannot use it as a shield against the subsequent mortgagee whom he is bound to satisfy except when the latter enables the mortgagor to commit a fraud upon the purchaser. So a purchaser who is aware of only two of the three mortgages on the property and retains a portion of the purchase-money for paying the two, cannot on discovery of the third satisfy the third and use the third as a shield against the other of the two mortgages which he is bound to satisfy except when fraud was committed upon the purchaser by the mortgagee's conduct. (*Mukerji and Richards, JJ.*) HAR SHYAM *v.* SHYAMLAL SAHU. **43 Cal. 69 : 22 C. L. J. 227 : 20 C. W. N. 601 : 31 I. C. 22 : [See also 23 M. L. T. 106 : (1918) M. W. N. 251 : 7 L. W. 420 : 44 I. C. 753]. [Also 32 I. C. 729 : 2 O. L. J. 620.]**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Keeping alive.

——S. 101—*Keeping alive—Mortgage—Conversion of usufructuary into simple—Charge.*

Land given in possession under a usufructuary mortgage is security for both principal and interest. The conversion of a usufructuary into a simple mortgage merely indicates a charge in the form of security. The fact of a charge being paid off by the execution of a second bond does not extinguish it. After execution of the second bond no lien can be claimed in the property for the interest due under the former bond. (*Chatterjee, J.*) KUMAR KULNAND SINGH *v.* MOHAN MANDAR. **25 I. C. 500.**

——S. 101—*Keeping alive--Purchaser—Prior mortgage paid by—Purchaser of equity of redemption—Priority.*

The original owners of certain property effected three mortgages on the same property and then sold the property to the deft., who retained a portion of the purchase-money for the payment to the encumbrances. It was established that the deft. paid off the two first mortgages. *Held*, that the deft. had priority in respect of the two sums paid by him. When a mortgage is paid off, whether it is extinguished or kept alive, is a question of intention of the parties, but in the absence of an express intention to the contrary it must be presumed, that when a person claiming to be absolute owner of an estate, borrows money to pay off a mortgage, he intends to extinguish it if there is no intermediate incumbrance. 9 C. 961 (P. C.) Foll. On paying off prior mortgages, the purchaser of an equity of redemption is subrogated to the rights of the mortgagees paid off, the mortgage paid being considered as part of the purchaser's title to the premises. (*Mookerjee and Carnduff, JJ.*) SAT NARAIN *v.* SHEOBARAN SINGH. **11 I. C. 649: 14 C. L. J. 500.**

——S. 101—*Keeping alive —Vendee paying off prior mortgage.*

A vendee who has paid off prior mortgages in the Punjab is presumed to intend, to keep alive the mortgages, for his own benefit. (*Wilberforce and Abdul Quadir, JJ.*) BUR SINGH *v.* HAZARA SINGH. **63 I. C. 760.**

——S. 101—*Keeping alive—Decree on prior mortgage.*

Where an intermediate mortgagee discharged a prior and puisne mortgage on which a decree had been passed in a suit to which the intermediate mortgagee was a party. *Held*, that the intermediate mortgagee must be deemed to have kept alive the two mortgages for his own benefit. (*Oldfield and Ramesam, JJ.*) GUJULUVA NAGAYYAR *v.* THUDUKUCHI GOVINDAYYAR. **17 L. W. 14: 1923 Mad. 349.**

——S. 101—*Keeping alive—Subrogation—Subsequent encumbrancer paying off prior mortgagee out of consideration money.*

A subsequent encumbrancer paying off a prior encumbrance with the consideration money of his encumbrance, in pursuance of a stipulation in the mortgage bond that he and not the mortgagor shall pay off the prior encumbrance, can, in the absence of any indication to the contrary, be presumed to have wished to make that payment by his own hand with a view to keep the prior encumbrance alive for his own benefit. 9 Cal. 961, expl.; 10 Cal. 1035, appl. (*Ayling and Coutts Trotter, JJ.*) CHIDAMBARA NADAN *v.* MUNI NAGENDRAYYAN. **(1920) M. W. N. 534: 28 M. L. T. 300: 39 M. L. J. 445: 58 I. C. 813: 12 L. W. 393.**

——S. 101—*Keeping alive—Intention of parties.*

A Hindu widow alienated her husband's properties directing the alienee to discharge a mortgage binding on the estate. During the pendency of a suit for declaration that the alienation was bad, the alienee mortgaged the properties to pay off the existing encumbrance. The mortgagee brought a suit on his mortgage and purchased the properties in execution. *Held*, that it was for the mortgagee's benefit to keep alive the mortgage both when he advanced the money and when he purchased the properties in execution of the mortgage decree. It was equally for the defendant's benefit to keep the original mortgage alive under S. 101 of the T. P. Act. (*Wallis, C. J. and Ayling, J.*) SUPPU SOKKAYYA BHATTAR *v.* SUPPU BHATTAR. **7 L. W. 30: 43 I. C. 714: (1918) M. W N. 41.**

——S. 101—*Keeping alive—Purchase of property under attachment.*

A mortgagee bought the mortgaged property which was under attachment in execution of a money decree against the mortgagor at the time of sale. The sale was held to be void. *Held*, that the mortgagee could not have intended to forego his mortgage though the sale was held to be bad. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) LINGHAM KRISHNA BHUPATHI DEO GARU *v.* KOVVURI BASIVI REDDI GARU. **38 I. C. 468.**

——S. 101—*Keeping alive—Renewal of first mortgage—Intention to keep alive—Right of second mortgagee—Priority.*

A third mortgage was executed to the first mortgage mortgaging the same and other properties to secure the same debt and an endorsement was made on the first mortgage cancelling it. The second mortgagee claimed priority over the first mortgage on the ground that it was extinguished. A new change in the form of indebtedness, in the mode or form of payment, a variation in the rate of interest or the giving of additional security will not raise the presumption of the extinction of security if it is to the interest of the mortgagee not to do so. The third mortgage is a renewal of the first mortgage and will not be postponed to the second, the right to enforce the first is barred under Art. 132, Limitation Act, at the time when a suit is brought on the third mortgage. 39 C. 527, P. C. Dist. (*Ayling and Srinivasa Aiyangar, JJ.*) KAVANOOR VELAYUDA REDDI *v.* REDDY VARI NARASIMHA REDDI. **5 L. W. 111: 21 M. L. T. 105: 38 I. C. 240: 32 M. L. J. 263.**

——S. 101—*Keeping alive—Vendee discharging mortgage.*

Where a vendee discharges certain mortgages on properties purchased by him in the belief of his full title to them, an intention to keep alive the mortgage must be imputed to him. In imputing the intention the courts must look to the real state of facts and not to the facts as understood by the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Keeping alive.

person paying off the mortgages at the time. 35 M. 642 ; 10 C. 1035, Foll., 30 M. 67 : 34 M. 119, Dist. (*Ayling and Oldfield, JJ.*) SUBRAMANIA PILLAI *v.* PALANIAPPA MUDALI. **14 M L. T. 585 : 26 M. L. J. 94 : 21 I. C. 978.**

——S. 101—*Keeping alive—Sale of equity of redemption to prior mortgage after creation of a puisne mortgage—Prior mortgagee's rights.*

A prior mortgagee to whom the mortgagor sells the equity of redemption often creating a puisne encumbrance is entitled to keep his mortgage alive against the puisne encumbrancer though not against the mortgagor, under S. 101, T. P. Act. He will not be entitled to get interest after the date of sale. Nor can he be reimbursed for payment which the mortgagor covenanted to-day, as Ss. 72, 65 (c) and 76 (c) do not warrant such payment. He may, however, be entitled to get costs of necessary repairs. 9 Cal. 961 and 21 Mad. 143, Dist. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) IBRAHIM SAHIB *v.* ARMUGATHAYEE. **38 Mad. 18 : 16 I. C. 877.**

——S. 101—*Keeping alive— Discharge of mortgage debt by subsequent mortgagee—Priority.*

It is a question of intention whether a mortgage which has been satisfied is kept alive for the benefit of the person making the payment ; in the absence of anything to the contrary the law presumes an intention to keep it alive. 20 M. 486; 16 C. 523, Ref. (*White, C.J. and Munro, J.*) YELLAPADDI MAHALAKSHMI AMMAL *v.* MADHVA SIDDHANTA OONAHINI NIDHI. **35 Mad. 642 : 10 M. L. T. 169 : (1912) M. W. N. 24 : 11 I. C. 865 : 21 M. L. J. 811.**

——S. 101—*Keeping alive— Presumption—Intention of mortgagee.*

In cases where the ownership of the property itself has come into the hands of the mortgagee and the mortgagee wishes to hold up his mortgage as a shield against some person, who is entitled to a decree for possession of the property the question is whether the mortgagee kept the mortgage alive at the time he came into possession of the equity of redemption or whether he allowed it to become extinguished. In England where the rules of the conveyancing are very strict, it is the invariable practice to have the mortgage assigned to trustees for the express purpose of keeping it alive. This is never done in India and the Courts have usually looked to see whether it was to the interest of the mortgagee to keep his mortgage alive, and if they found it to be this interest, they have assumed that he did intend to keep it alive. (*Dalal and Simpsons, A. J. Cs*) BALDEO SINGH *v.* THE DEPUTY COMMISSIONER, KHERI. **10 O. L. J. 112 : 1924 Oudh 1**

——S. 101—*Keeping alive—Mortgagee purchasing equity of redemption.*

Where a mortgagee purchases the interest of a mortgagor, the presumption is that the lien would continue to subsist for his benefit. (*Atkinson and Jwala Prasad, JJ.*) SIVA NARAYAN RAM MARWARI *v.* HARI NARAYAN. **51 I. C 758 :** *See also* **32 All. 1 : 6 A. L. J. 987 : 4 I. C. 810.**

——S. 101—*Keeping alive — Intention of parties.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Payment by stranger.

If the owner of an estate pays off charges on it, though he is personally not liable to pay, it is a question of intention whether these charges are to be considered as extinguished or kept alive for his benefit, and it is to be ascertained from the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot, the intention that is to be established is the intention of the parties, i.e. of the mortgagor and mortgagee. (*Mullick and Jwala Prasad, JJ.*) MAHABIR PRASAD *v.* BIBI NAGIN. **1 Pat. L. W. 466 : 39 I. C. 500.**

——S. 101—*Keeping alive—Mortgage—Subrogation—Prior mortgage paid off—Intention.*

Where a third mortgagee pays off a first mortgage without notice of a second mortgage, the mortgage paid off would be kept alive if it is for his benefit to do so. In such cases the real test is that he must be presumed to have intended to do if he had known all the facts. (*Fox and Hartnoll, JJ.*) NACHIAPPA CHETTY *v.* PERIACUPPAN CHETTY. **5 Bur. L. T. 285 : 18 I. C. 487 :** [*See also* **5 L. B. R. 138 : 4 I. C. 1032.**]

——S. 101—*Keeping alive—Purchaser at first mortgagee's sale.*

The purchaser at the first mortgagee's sale can always use the mortgage as a shield against a puisne mortgagee. There can be no merger of rights unless the holder of the incumbrance becomes absolutely entitled. (*Pratt, J. C and Couch, A. J. C.*) CHANDAR BAI *v.* BASARMAL. **28 I. C. 67 : 8 S. L. R. 264.**

Payment by Stranger.

——S. 101—*Payment by stranger—Presumption.*

If a purchaser pays off a charge on the property purchased, which he was personally under no obligations to pay, the question whether such charges are kept alive or extinguished will depend on the intention of the purchaser and it may be proved from the surrounding circumstances. There is a presumption that the purchaser intended that which is for his benefit but this presumption can be rebutted by means of an evidence showing a contrary intention on his part.

When a person buys a property while it is under attachment and redeems the mortgagee the presumption is that he intended to keep the incumbrance alive for his advantage. (*Sir Henry Griffin, and Chamier, JJ.*) JAMILUNNISSA *v.* PITAMBAR DAS. **18 I. C. 704 : 11 A. L. J. 127.**

——S. 101—*Payment of mortgage by a stranger.*

A stranger who pays off the mortgage stands in the shoes of mortgagee and can enforce sale of the property. The presumption is that he intends to keep alive the mortgage for his benefit. (*Batchelor and Shah, JJ.*) TANGYA FALA *v.* TRIMBAK DAGA. **40 Bom 646 : 36 I. C. 794 : 18 Bom. L. R. 700.**

——S. 101—*Payment by stranger—Subrogation— Doctrine —Applicability to stranger or volunteer—Collusive transferee.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Payment by stranger.

A collusive transferee without consideration is not entitled to a lien on the mortgaged property for the sum paid off by him. Per *Ayling, J.* The doctrine of subrogation, is not applied, for the benefit of the mere stranger who has paid the debt of another without any assignment or agreement for subrogation. In the absence of such assignment or agreement there must at least be an obligation to make the payment or the person paying must be compelled to do so for the preservation of any rights or properties of his own (*Ayling and Tyabji, JJ.*) KARUPPAN AMBALAGARAN *v.* MUHAMMAD SAKUTH.

14 M. L. T. 478 : (1914) M. W. N. 131 : 22 I. C. 253 : 26 M. L. J. 74.

——S. 101—*Payment by stranger—Mortgage—Subrogation—Stranger paying off debt on estate.*

A person who pays off a mortgage debt on the properties of a deceased male owner cannot claim to be subrogated to the rights either of the daughter or of the original mortgagee whose debt he discharges. The scope of the rule of subrogation is much narrower in India than in England (1910) 2 Ch. 277 Diss. 33 C. 133. Not foll. Mere payment of a mortgage debt by a stranger would not entitle him to the mortgagee's right by subrogation. Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay or where he had some interest to protect or where he advanced money under an express agreement. 2 I. A. 131. Ref. (*Sundara Aiyar and Spencer, JJ.*) NARAYANA KUTTI GOUNDAR *v.* PACHIAMMAL.

36 Mad. 426 : 11 M. L. T. 174 : (1912) M. W. N. 353 : 15 I. C. 206 : 22 M. L. J. 364.

——S. 101—*Payment by stranger—Compensation—Maxim "He who seeks equity must do equity."*

Though a person who under a *bona fide* mistake incurs expenditure upon the property of another has no equity against the real owner who is ignorant of and does not encourage him in such expenditure, yet if the true owner is to proceed in equity he must first do equity and make compensation for the expenditure so far as it is necessary and permanently beneficial. Where a person *bona fide* thinking he is the heir of a deceased person, spends money in freeing the estate from debts which if he were the real heir he would be bound to pay, he is entitled to a relief and the person subsequently found entitled to the estate must pay the amount before he can get possession. (*Lindsay, J. C.*) SITTA BAKSH SINGH *v.* SAMI-UD-DIN-HYDER.

42 I. C. 428 : 4 O. L. J. 514.

——S. 101—*Payment by stranger.*

Where a first mortgagee's decree is satisfied out of advance by stranger the latter is entitled to priority over puisne mortgagees. (*Das and Adami, JJ.*) RAM NARAYAN LAL *v.* SAHADEO SINGH.

1 P. 332 : 3 P. L. T. 261 : 1922 Pat. 174 : 1922 P. 181.

——S. 101—*Payment by stranger—Keeping alive.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Subrogation.

Irrespective of a clause in a document definitely keeping alive the mortgage, the payment of a mortgage debt by a third party with the consent of the mortgagee (who had a second mortgage) for the payment of his mortgage, is in itself sufficient to warrant the presumption that the prior mortgage would be kept alive as against the second mortgage. 10 C. 1035 (P. C.) Foll. (*Sharfuddin and Roe, JJ.*) RAI BENODE HEHARY BOSE *v.* HIRA SINGH.

44 I. C. 726 : 1918 Pat. 76.

——S. 101—*Payment by stranger—Equitable transferee.*

Where a third party pays off the mortgage-debt to the mortgagee, with the knowledge of the mortgagor without a valid assignment of the mortgage, he becomes in effect an equitable transferee of the mortgage and can look to the mortgaged property for his money. In a suit for redemption of the mortgage, the money should be paid not to the original mortgagee, but to the equitable transferee. (*Parlett, J.*) MAUNG PAW *v.* MAUNG SAN U.

12 I. C. 805 : 4 Bur. L. T. 127.

Subrogation.

——S. 101—*Subrogation—Mortgage money applied to discharge a prior mortgage—Intention to keep prior charge alive—Suit to enforce prior mortgage—Limitation Act, Art. 132—Starting point.*

Where the money raised on a third mortgage is applied by agreement of the parties to discharge first mortgage over the same properties for the same amount, and the first mortgage deed is handed over to the third mortgagee, though no formal assignment thereof was made, *Held*, that the first mortgage was kept alive for the benefit of the third mortgagee, who thereby obtained priority over the second mortgagee. 10 I A. 62; 11 I. A 126; 29 I A. 9, Ref. The claim to enforce that priority, in a suit brought more than 12 years after the expiry of the term of the first mortgage is barred by Art. 132 of the Lim. Act. (*Sir John Edge.*) MAHOMED IBRAHIM HUSSAIN KHAN *v.* AMBIKA PERSAD SINGH.

39 Cal. 527 : 39 I. A. 68 : 11 M. L T. 265 : (1912) M. W. N. 367 : 9 A L. J. 332 : 14 Bom. L. R. 280 : 16 C. W. N. 505 : 15 C. L. J. 411 : 14 I. C. 496 : 22 M. L. J 468.

——S. 101—*Subrogation—Sale to discharge mortgages—Vendee paying off all mortgages but one—Vendee not entitled to interest on sums paid by him as against mortgagee not paid off.*

Where in a suit by a mortgagee against the vendee of a property in possession and enjoyment of it, the latter claims the amounts he has paid to prior mortgagees, he is not entitled to any interest on those sums. (*Tudball and Sulaiman, JJ.*) ANANDI PRASAD *v.* KRISHNA CHANDRA.

19 A. L. J. 792 : 63 I. C. 738 : 3 U. P. L. R. (All.) 152.

——S. 101—*Subrogation— Money spent in paying prior incumbrance.*

The mere fact that money borrowed is spent in paying a previous charge, does not entitle the lender to the benefit of the discharge security. There

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Subrogation.

must be agreement between the lender and borrower to the effect. The agreement may be presumed from circumstances of the transaction. (*Rafique and Lindsay, JJ.*) GULZARI LAL *v* AZIZ-FATIMA. **41 All. 372 : 50 I. C. 375 : 17 A.L.J. 357.**

[*See also* **14 A. L. J. 953 : 35 I. C. 647 and 36 I. C. 992 : 10 Bur. L. T. 232**]

——S. 101 —*Subrogation — Purchaser of equity of redemption*

A purchaser of an equity of redemption is entitled to stand in the shoes of the incumbrancer even when he has with his consent partially discharged the liability. (*Richards, C J. and Rafique, J.*) UDIT NARAYAN MISER *v.* ASHRAFI.
38 All. 502 : 35 I. C. 732 : 14 A. L. J. 662.

——S. 101—*Subrogation—Doctrine of.*

Subrogation is the right of one creditor to stand in the shoes of another and to avail himself of the latter's security, it necessarily follows that before the right can arise in favour of the subsequent creditor, there must have been an earlier creditor whose rights devolve upon the later creditor after the latter's debt has been discharged. (*Piggott and Lindsay, JJ.*) UMRAI LAL *v.* RUKMIN KUAR.
35 I. C. 647 : 14 A. L. J. 953.

——S. 101—*Subrogation—Prior mortgages—Paid by purchaser—Right to interest against puisne mortgagee.*

A purchaser of a property paying off a prior usufructuary, and prior simple mortgage can claim as against the puisne mortgagee, the principal money under the former and the principal and the interest on the latter. (*Griffin and Chamier, JJ.*) LAJJA RAM *v.* GUR BAKHSH.
18 I. C. 946 : 11 A. L. J. 345.

——S. 101—*Subrogation--Discharge in* bona fide *belief.*

A discharge of mortgage by an auction purchaser under the belief that he had a title while really the judgment-debtor had already sold his property, entitles the auction-purchaser to stand in the shoes of the mortgagee. (*Karamat Hussain and Chamier, JJ.*) KESARI LAL *v.* MUBARAK HUSAIN, **10 I. C. 556 : 8 A. L. J. 663.**

——S. 101—*Subrogation—Fraud.*

A person purchased property subject to two mortgages to his knowledge. He retained a part of consideration to pay off the mortgages but paid only one of the two. He cannot treat the paid off mortgage as a shield against the unpaid mortgage. The doctrine of subrogation cannot be used to defeat the ends of justice. (*Mookerjee and Richardson, JJ.*) HAR SHYAM CHOWDHURY *v.* SHYAM LAL SAHU. **43 Cal. 69 : 22 C. L. J. 227 : 31 I. C. 22 : 20 C. W. N. 601.**

——S. 101—*Subrogation—Prior mortgagee purchasing property—Agreement to pay subsequent mortgage—Priority if can be pleaded in suit by latter.*

The prior mortgagee of the suit property purchased the property and as part of the consideration agreed to redeem the subsequent mortgagee. *Held*, in a suit by the puisne encumbrancer on his mortgage, the former cannot set up his own priority as a shield, his own charge shall be extinguished. (*Krishnan and Venkatasubba Rao, JJ.*) GARUDAPPA *v.* JANAKI.
45 M. L. J. 693 : 18 L. W. 530 : 1924 M. 103.

——S. 101 — *Subrogation — Purchaser in execution of prior mortgage—Can hold prior charge as shield against subsequent mortgagee not impleaded in suit on prior mortgage.*

Where in execution of decree on a prior mortgage some of the mortgaged properties were sold and the prior mortgage amount to a certain extent discharged, the purchaser and his representatives in interest can, in a suit against him by a puisne mortgagee not impleaded in the prior suit, maintain his right to a prior charge in respect of the moneys paid by him towards the decree on the prior mortgage. This right of the purchaser is not affected by the Law of Limitation. The purchaser, however, has not a general right of subrogation by reason of his having paid off the prior mortgage decree. (*Sadasiva Aiyar and Spencer, JJ.*) VENKATARAMANA REDDI *v.* RANGAIAH CHETTY. **41 M. L. J. 399 : 1922 M. W. N. 15 : 1922 M. 249.**

——S. 101—*Subrogation—Purchase payment of mortgage.*

A purchaser of equity of redemption discharging an encumbrance on the property should obtain subrogation. Where a person bought a property charged with three successive incumbrances, and paid off the puisne incumbrance, he was subrogated to the rights of the puisne incumbrancer and was entitled to the benefits accrued against the third mortgage and to interest against the second mortgage amount. (*Oldfield and Seshagiri Aiyar, JJ.*) MATI REDDI AIYYA REDDI *v.* ADUSUMALLI GOPALA KRISHNAYYA.
58 I. C. 493 : 12 L W. 101.

——S. 101—*Subrogation— Direct payment if necessary—Partial payment.*

A mortgagee who pays off an earlier mortgage is entitled to be subrogated not only to the rights of that mortgagee, but also to the rights of the mortgagee who was paid off by that (intermediate) mortgage amount. In determining whether the right of subrogation exists or not what must be taken into account is not the hand that pays the money but the intention of the parties, *viz.* whether by paying the money the earlier mortgage was intended to be kept alive. The right to subrogation might be full or partial according to circumstances. 36 M. 426: 35 M. 642, Dist. (*Seshagiri Aiyar and Moore, JJ.*) GHUNDAN V. P. O. ABARTHORAMAN KUTTI *v.* ITTIKAPARAM BILATHAN. **11 L. W. 215 : 27 M. L. T. 92 : 55 I. C. 658 : (1920) M. W. N. 143.**

——S. 101—*Subrogation—Purchaser under void sale—Paying off martgages.*

Where a person buys property in good faith and for the purpose of clearing a mortgage binding on that property and pays money to the vendor to be so applied, the vendee becomes an equitable assignee of the mortgage if it subsequently turns out that the vendor had no right to convey. He cannot, however, claim to be reimbursed in respect of the simple money debts of

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Subrogation.

the vendor paid of by him out off the sale consideration. 21 M. 143 ; 31 M. 439, Ref. (*Sadasiva Aiyar and Napier, JJ.*) AMMANI AMMAL *v.* RAMASWAMI NAIDU. **37 M. L. J. 113 : 10 L. W. 75 : 51 I. C. 57 : (1919) M. W. N. 866.**

——— **S. 101**—*Subrogation—Equitable right—Fraudulent purchaser.*

Where a person purchases joint family property under a collusive decree obtained against some of the co-parceners, the purchaser cannot claim, against the co-parceners who are not parties, an equitable remedy by subrogation even though they have discharged certain family debts. (*Spencer and Krishnan, JJ.*) NADHAMUNI AIYAR *v.* APPU ODHAYAN. **48 I. C. 799.**

——— **S. 101**—*Subrogation—Right of prior mortgagee if can be enforced by suit—Keeping alive.*

The right of a prior mortgagee obtained by subrogation by a puisne mortgagee paying him off can be enforced by suit. The right of subrogation is an equitable right. To recognise an equitable right and then to refuse the means of enforcing it, would in effect result in refusing the equity. 34 All. 102, Foll. (*Phillips and Krishnan, JJ.*) A. RAMA RAO *v.* MANDACHALUGAI. **35 M. L. J. 467 : (1918) M W. N. 505 : 8 L. W. 175 : 47 I. C. 882 : 24 M. L. T. 133.**

——— **S. 101**—*Subrogation—Mortgage.*

Properties subject to two mortgages were sold by the mortgagor. The purchaser subsequently paid the first mortgage, got an assignment of it in favour of a third party, and then sold the property and part of the consideration was applied towards the discharge of the first mortgage. *Held*, that the second vendee was subrogated to the rights of the first mortgagee and his right was upheld, in a suit by the second mortgagee and the purchaser in execution sale could not question vendee's rights. (*Oldfield and Phillips, JJ.*) KUPPUSWAMI AIYANGAR *v* NARASIMHA IYER. **(1917) M. W. N. 333 : 21 M. L. T. 382 : 38 I. C. 715: 5 L. W. 360.**

——— **S. 101**—*Subrogation—Partial payment.*

In the absence of any conflicting equities the mere fact that the whole of the previous mortgage has not been wiped off, is not a ground for depriving the purchaser of the right of subrogation to the extent he has actually paid off the mortgage. 35 M. 183, Dist.; 36 M. 29, Foll. (*Oldfield and Tyabji, JJ.*) UMMACHAKUTTI *v.* UMMERKUTI HAJI. **29 I. C. 583 : [Contra 29 I C. 511.]**

——— **S. 101**—*Subrogation—Partial discharge of prior mortgage—Priority.*

A mortgagee advancing money towards the charge in part of a first mortgage on the property is entitled to priority over an intermediate mortgagee to the extent of the debt discharged. 11 M. 345, Foll.; 35 M. 183, Ref. (*Sankaran Nair and Oldfield, JJ.*) SAMINATHA PILLAI *v.* KRISHNA IYER. **38 Mad. 548 : 28 I. C. 966: 28 M. L. J. 484.**

——— **S. 101**—*Subrogation—Right to—When arises.*

Subrogation will arise only in those cases where the party claiming to advance the money to pay a debt which, in the event of default by the debtor, he would be bound to pay or where he had some interest to protect or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. In India the scope of the rule is narrower still. A mere agreement, either with the creditor holding a mortgage or with the debtor owning it, cannot give a person lending money to discharge a mortgage, a lien over the property. (*Sundara Aiyar and Spencer, JJ.*) NARAYANA KUTTI GOUNDAN *v.* PACHIAMMAL. **35 Mad. 426 : 22 M. L. J. 364 : 11 M. L. T. 174 : 15 I. C. 206 : (1912) M. W. N. 353.**

——— **S. 101**—*Subrogation, principle of.*

The purchaser cannot, under a purchase accompanied with possession which cannot be legally recognised, claim the right of apportionment of a prior mortgage on it. The equity to subrogation rests on the payment of prior encumbrance coupled with justification for such payment derived from a conveyance, notwithstanding its imperfection. (*Sundara Aiyar. J.*) PASUPULETTI VENKAMMA *v.* SHAIK HAMID. **14 I. C. 741 : 11 M. L. T. 424.**

——— **S 101**—*Subrogation — Invalid sale—Purchser paying off incumbrance.*

A purchser of land who, while in possession pays off an incumbrance is entitled when the purchase is found to be invalid to stand in the shoes of the mortgagee paid off. 21 M. 143 ; 31 M. 439, F. (*Wallis and Sankaran Nair, JJ.*) BALASUBRAMANIAN *v.* RAMASAWMY CHETTIAR. **(1911) 1 M. W. N. 197 : 9 I. C. 789 : 9 M. L. T. 358.**

——— **S. 101**—*Subrogation — Assignment of security if necessary.*

A claim to subrogation can be sustained where there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagees. Such an agreement may be express or may be presumed from the circumstances of the case. The qustion to ask will be, whether the new lender was lending money on the personal security of the borrower or on the understanding that he would be substituted in place of the former mortgagee. (*Dalal and Simpson, A. J. Cs.*) LAL RANJIT SINGH *v.* LUTAR RAM. **9 O. & A. L. R. 677 : 1924 Oudh 85.**

——— **S. 101**— *Subrogation— Redemption of mortgage by mortgagor.*

The question of subrogation arises only when a puisne mortgagee redeems a prior mortgage. The doctrine of subrogation cannot apply where the mortgagor himself or his successor in interest redeems it. (*Daniel, A. J. C.*) MOHAMMAD MOHSIN *v.* MOHAMMAD ABID. **52 I. C. 159 : 22 C C. 72.**

——— **S. 101**—*Subrogation—Mortgage —Mortgagor—Paying off prior mortgage with borrowed money—Right of creditor.*

The mere fact that money borrowed by a debtor is used to pay off a prior mortgage does

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101—Miscellaneous.

not entitle the lender to the benefit of the discharged security. (*Fox, C. J. and Twomey, J.*) MA PYU *v* V. R. N. E. CHETTI FIRM.
36 I. C. 092 : 10 Bur. L. T. 232.

Miscellaneous.

——— S. 101—*Mortgage—Annuity reserved for mortgagor—Equity of redemption acquired by mortgagee—Liability.*

An annuity reserved to be payable to a mortgagor under a mortgage is payable though the equity of redemption was finally acquired by the mortgagee. (*Piggott and Ryves, JJ.*) LACHMI NARAIN *v.* SAJJADDI BEGAM.
39 All. 700 : 41 I. C. 839 : 15 A. L. J. 671.

——— S. 101—*Priority—Mortgage—Discharge of previous mortgage.*

A co mortgagor discharging a prior mortgage has a prior charge against those who discharge a subsequent mortgage. 31 A. 166, Applied. (*Richards, C. J. and Banerjee, J.*) KASHI RAM *v.* HET SINGH. **37 All. 101 : 26 I. C. 417 : 13 A. L. J. 34.**

——— S. 101—*Mortgage—Substituted security—Suit on prior—Security when maintainable.*

Where a mortgage is executed for amount due on a previous mortgage, the latter cannot be sued on when the debt is not wholly realised by suing on the former. (*Richards, C. J. and Banerjee, J.*) SHEORAJ SINGH *v.* HARCHANDILAL.
19 I C. 127 : 11 A. L. J. 365.

——— S. 101—*Mortgage decree—Paid off by transferee of property—Rights of transferee.*

A transferee of property, paying off a mortgage decree thereon, is entitled to claim the amount due under the mortgage on which the decree was obtained and not merely the sum paid for the decree, 21 C. 366 ; 19 A. 527, Rel on. (*Karamat Hussain and Chamier, JJ.*) KANHAI LAL *v.* HULAS SINGH. **13 I. C. 939 : 9 A. L. J. 29.**

——— S. 101—*Charge—Payment of prior mortgage by purchaser from a limited owner.*

Where reversioners bring a suit for a declaration that an alienation by a limited owner is not binding on the reversion, the vendee cannot claim that he having paid off a prior mortgage, can retain possession during the life of the alienor and can stand in the shoes of the prior mortgagee redeemed by him. (*Rattigan, J.*) PARTAPA *v.* ATTAR SINGH. **262 P.L.R. 1913 : 20 I.C. 289 : 37 P.R. 1913.**

——— S. 101—*Revival of prior mortgage—Proprietary rights acquired by mortgagee—Loss of such rights—Revival of mortgage.*

Proprietary rights acquired by a mortgagee at an auction sale in execution of decree obtained by a subsequent mortgagee, were subsequently lost on account of certain proceedings. *Held*, that the mortgage revived as soon as the proprietary rights acquired by the mortgagee were wiped out. (*Stuart and Kanhaiya Lal, A. J. Cs.*) JAI KISHORI *v.* AFZAL KHANAM. **22 O. C. 349 : 54 I.C. 544 : 2 U.P.L.R. (O.C.) 17.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 105.

——— S. 101—*Mortgagees—Purchase of equity of redemption.*

A mortgagee can purchase the equity of redemption at an auction sale in execution of a money decree, obtained by a third person, and he is not a trustee for the mortgagor in respect of such purchase. (*Roe and Jwala Prasad, JJ.*) TIKAIT DAL NARAYAN *v.* CHRISTIAN. **50 I. C. 472 : 1919 Pat. 92.**

——— S. 103—*Scope of—Minor mortgagee—Deposit—Appointment of guardian* ad litem.

S. 103, T. P. Act, was intended to provide for preliminary proceedings to be adopted by a mortgagor before making a tender or deposit and it could not have been the intention that the mere making of an application for appointing a guardian would be sufficient to prevent interest running against a minor mortgagee, There should be a person appointed by a court to whom a tender could be made or by whom a deposit could be taken out of court. (*Mears, C.J. and Banerjea, J.*) KHUNNU MAL *v.* INDAR PAL SINGH.
21 A. L. J. 39 : L. R. 4 A. 331 : 45 A. 273 : 1923 A. 183.

——— S. 105—*Kabuliyat without lease—Value thereof.*

The existence of the *Kabuliyat* without the lease will not enable the executant of the former to use the contents thereof to the prejudice of the landlord and for his own benefit. The landlord, however, can rely on the *Kabuliyat* to prove the undertaking of the executant. 26 A. 368; 27 A. 136; 27 A. 462; 27 A. 190, Foll. 31 A. 276 (F.B.) ; Ref. to. (*Knox, J.*) BEJAI NARAIN SINGH *v.* PARBHU NARAIN SINGH. **15 A.L.J. 317 : 37 I.C. 395 : *But see* 35 Mad. 95 (F.B.).**

——— S. 105—*Lease—License — Distinction—Exclusive right of occupation.*

In the case of a license there is no transfer of interest in land, whereas in the case of a lease there is a transfer of such interest. 35 C. 82, Rel. If an instrument taken as a whole has the effect of giving the holder an exclusive right to occupation of land, though subject to certain reservation or to a restriction of the purpose for which it may be used, it is in law a demise of the land itself. (1904) A. C. 405, Rel. To give exclusive possession express words to that effect are unnecessary ; it is sufficient if the acts to be done by the grantee require that he should have exclusive possession. (*Mookerjee and Beachcroft, JJ.*) MAHIPAL SINGH *v.* LALJI SINGH.
16 I. C 705 : 17 C. W. N. 166.

——— S 105—*Lease—Commencement of lease postponed to future date—Effect.*

A completed contract of lease is an executed contract although the commencement of the lease has been postponed to a future date and a suit for specific performance is not necessary to such a lease. (*Shah Din and Chevis, JJ.*) MIHAN KHAN *v.* MUHAMMAD BAKHSH.
66 P. W. R. 1913 : 18 I. C. 496 : 97 P. L. R. 1913.

——— Ss. 105, 108 (b) and (c)—*Lease—Premium not paid—Right to possession of lessee—Implied covenant.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 105—Lease.

A lessee under a registered sale-deed is entitled to the possession of the lands demised and the non-payment of the premium was no answer to his suit for possession. A lease is a transfer of a right to enjoy property, and the right of the lessee to be put into possession arises from the words of demise which imply that the right to possession is granted to the lessee and the lessor is not entitled to refuse to give up possession to the lessee unless the document provides that the latter is not to have possession until the fulfilment of a certain condition. 34 All. 659, Not foll. 34 Mad. 543 ; 30 Mad. 524, Appl. (*Abdur Rahim, Oldfield and Coutts-Trotter, JJ.*) KANDASAMY PILLAI *v.* RAMASWAMI MANNADI. **42 Mad. 203 : (1919) M.W.N. 194 : 51 I. C. 507 : 36 M. L. J. 313.**

——S. 105—*Lease— Agreement to lease—Distinction.*

A lease which is to operate from a future date is distinguished from an agreement to lease, in that the former creates an interest in the land and the latter does not. (*Mittra, A. J. C.*) VITHU JAIRAM *v.* AKARAM. **42 I. C. 372.**

——Ss. 105 and 107—*Lease — Registration —Agreement among co-sharers for distribution or profits.*

One of the essential conditions of a lease is that there should be a consideration to be rendered periodically or on special occasions to the lessor. Where there is nothing but an agreement between the co-sharers as to the method of distribution of profits and they agree that, instead of dividing the profits each year, that each party should take the profits for years in turn, the agreement does not require to be embodied in a registered instrument. (*Lyle, A. J. C.*) SITA RAM *v.* SARJU PRASAD. **25 O. C. 39 : 9 O. L. J. 184 : 1922 Oudh 201.**

——S. 106.

Applicability.
Covenant for renewal.
Holding over.
Nature of tenancy.
Notice to quit
Permanent tenancy.
Miscellaneous.

Applicability.

——Ss. 106 and 108 (*c*)—*Applicability—Destruction by fire—Notice by lessee.*

A notice by the lessee under S. 108 (*c*) avoiding the lease on the ground of destruction by fire takes effect immediately S. 106 of the Act has no application to such a notice. (*Fletcher and Teunon, JJ.*) DAMODA COAL CO., LTD. *v.* HURMOOK MARWARI. **31 I. C. 697 : 19 C. W. N. 1019.**

——S. 106—*Applicability--Applies to Punjab.*

S. 106 merely lays down in a codified form what in fact has always been understood to be the general law on the subject. A condition in the lease that the landlord would give one month's notice if he wanted to have the premises vacated, does not mean that notice could be given at any time and that it was not to expire with the end of the month of tenancy as required by S. 106. (*Moti Sagar, J.*) CHUNI LAL *v.* CHUNI LAL. **1923 Lah. 659.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S 106—Holding over.

——S 106 — *Applicability — Agricultural lease.*

S. 106 of T. P. Act is not applicable to agricultural leases. (*Benson and Sundara Aiyar, JJ.*) VENKATACHALA GOUNDAN *v.* RANGARATNAM. **13 M. L. T. 450 : (1913) M. W. N. 434 : 20 I. C. 374 : 24 M. L. J. 571.**

——S. 106—*Applicability—Service tenure—Refusal to perform service—Notice to quit, if necessary.*

A service tenure holder is not entitled to a notice to quit before ejectment it be fails to fulfil the condition on which he held land in which case he becomes a mere trespasser. (*Jwala Prasad, J.*) WAZIR NONIAN *v.* RAM PRASAD LAL. **59 I. C. 893.**

Covenant for renewal.

——S. 106—*Covenant for renewal—Undefined terms—Option for renewal when unenforceable.*

An option to the tenant of renewal on the expiry of a lease according to the terms on which the lessor will wish to lease out in future cannot be enforced as the terms are undefined and depend upon the will of the lessor. (*Chatterjee and Richardson, JJ.*) RAJANI KANTA *v.* YOUSUF ALI. **34 I. C. 92 : 21 C. W. N. 188.**

——S. 106—*Covenant for renewal—Construction.*

Covenants for renewal should as far as possible be interpreted so as to make them operative and not futile. Where a covenant for renewal does not state the terms of the renewal the new term will be for the same period and on the same terms as the original lease in respect of all the essential conditions except as to the covenant for renewal itself. 33 I. C. 450 Foll. (*Mookerjee and Chatterjee, JJ.*) LANI MIA *v.* MUHAMMED EASIN MIA. **33 I. C. 448 : 20 C. W. N. 948.**

Holding over.

——S. 106—*Holding over—Tenant from year to year.*

When a tenancy is from year to year, and for a fixed term and the tenant holds over after the expiry of the term, the tenancy continues as a yearly tenancy and is determinable by six months' notice terminating with the year of the tenancy. (*Piggott, J.*) CHATTAR SINGH *v.* NAND KISHORE. **26 I. C. 107 : 12 A. L. J. 1139.**

——Ss. 106 and 116—*Holding over—Invalid permanent lease by head of religious endowment —Position of lessee.*

Where a tenant took a lease for 10 years from the *mutwalli* of a mosque with a covenant for renewal and it was found that the covenant for renewal was beyond the jurisdiction of the trustee, the lessee holding over must be deemed to be holding on a monthly tenancy. 32 C. 123 Rel. (*Mookerjee and Cumming, JJ.*) GAJENDRA NATH DEY *v* MOULVI ASHRAF HOSSAIN. **27 C. W. N. 159 : 36 C. L. J. 48 : 1923 Cal. 130**

——S 106—*Holding over—Notice to quit homestead land—Lease for ten years—Holding over*

A tenant of homestead land within a town holding over on the terms of an expired ten years'

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Holding over.

lease is not entitled to a six-months' notice ending with the end of a year of the tenancy. (*Fletcher and Walmsley, JJ.*) MONMATHA NATH SANTRA *v.* PEARY MOHAN MUKERJEE.
52 I. C. 180 : 23 C. W. N. 596.

——— **S. 106**—*Holding over—Tenancy by sufference.*

There is no such thing as tenancy at sufference in agricultural leases not governed by the T. P. Act. (*Miller and Sadasiva Aiyar, JJ.*) GANAPATHI MUDALI *v.* VENKATALAKSHMINARASAYYA. **25 I. C. 109 : (1914) M. W. N. 728.**

——— **Ss. 106 and 117**—*Holding over—Consent of lessor—Notice to quit.*

A lessee, who after the expiry of the term of his lease, holds over with the consent of the lessor, he occupies the same character as he did under the expired lease, and has no right to set up any title adverse to that of the lessor and in derogation of the rights of the latter. The mere consent of a landlord to a tenant retaining in possession after the expiry of the term of his lease during the pendency of his negotiations for a fresh lease, does not create a contract of tenancy. (*Jwala Prasad and Foster, JJ.*) MOORE *v.* MAKHAN SINGH. **53 I. C. 180.**

Nature of Tenancy.

——— **Ss. 106 and 116**—*Nature of tenancy—Holding over—Lease for one year—Rent payable by instalments—Presumption—Notice to quit—Period of—Leases before Transfer of Property Act.*

A lease reserved a yearly rent and the rent was payable according to monthly instalments. The tenant held over for a considerable number of years after the expiry of the lease. *Held*, that the tenancy could be presumed to be a yearly tenancy. 20 C. W. N. 1005, Foll. The agreement of yearly tenancy, which was implied from a yearly rent having been reserved by the lease, was a valid agreement. 32 Cal. 123, Dist. A provision for enhanced rent in a lease after the expiry of the term does not take away the right of the landlord to eject the tenant after service of notice to quit according to law, if the landlord did not choose to exercise the right to call upon the tenant to pay additional rent. (*Chatterjee and Newbould, JJ.*) SUNISSA BIBI *v.* SATYA SEBAK GHOSAL.
23 C. W. N. 641 : 51 I. C. 415 : 29 C. L. J. 394.

——— **S. 106**—*Nature of tenancy—Rent payable annually—Dwelling house on land.*

The mere fact that rent is expressed in a lease at so much a year does not make the lease of land on which a dwelling-house had been built a yearly one. (*Walmsley, J.*) BISESWAR RAY *v.* PITAMBAR NATH. **51 I. C. 44.**

——— **S. 106**—*Nature of tenancy from year to year—Tenancy—Annual rent.*

The fact that the rent is to be paid once a year does not by itself make the tenancy one from year to year. 11 C. W. N. 1124, Ref. (*Fletcher and Beachcroft, JJ.*) MOHENDRA NATH MOZUMDAR *v.* NAGENDRA NARAIN ROY.
50 I. C. 918.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Nature of tenancy.

——— **Ss. 106 and 107**—*Nature of tenancy—Annual rent reserved—Not registered.*

A lease of immoveable property reserving an annual rent will be deemed to be a lease from month to month under S. 106 when the contract has not been put into writing and registered under S. 107. (*Sanderson, C. J. and Mookerjee, J.*) AKLU *v.* EMMAN. **44 Cal. 408.**
38 I. C. 899 : 20 C. W. N. 1005.

——— **Ss. 106 and 107**—*Nature of tenancy.*

Where certain premises were rented on an unregistered lease and a yearly rental was fixed but the period was not mentioned and the tenant continued for several years paying rent. *Held*, that the tenancy was for a year only and the effect of holdidg over was to make it a monthly tenancy terminable by 15 days' notice. The presumption of a yearly taking does not always arise from the rent being payable yearly. (*Mookerjee and Walmsley, JJ.*) GOBINDA CHANDRA SHAH *v.* DWARKA NATH PALATA. **20 C. L. J. 455 : 26 I. C. 962 : 19 C. W. N. 489.**

——— **S. 106**—*Nature of tenancy—Presumption.*

The mode in which the rent is expressed to be reserved raises a presumption that the tenancy is of a character corresponding thereto and therefore where rent is claimed annually the presumption is that the tenancy is from year to year which rule however is not of universal application. *Wilkinson* v. *Hall* 43 P. R. 728; *Atherstone* v. *Bostock* 134 Eng. Rep. 850; *Wilson* v. *Abbot*, 107 Eng. Rep. 667, Rel. on. (*Mookerjee and Beachcroft, JJ.*) DURGI NIKARINI *v.* GOBERDHAN BOSE. **20 C. L. J. 443 : 24 I. C. 183 : 19 C. W. N. 525.**

——— **S. 106**—*Nature of tenancy—Renting house at a fixed rate, if creates a tenancy.*

A renting by the lessee for twenty years of shops at a fixed rent as long as the sub-lessee kept them and paid monthly rents, creates a monthly lease. Where neither party proves the tenancy alleged, Court must presume the tenancy and not dismiss the suit for ejectment. (*Shah Din and Scott-Smith, JJ.*) JAMSETJI BOJA *v.* DUNI CHAND.
180 P. L. R. 1913 : 19 I. C. 493: 120 P. W. R. 1913.

——— **S. 106**—*Nature of tenancy—Presumption—Monthly tenancy—Inference of.*

Where a tenant who originally came into possession of the demised land under an unregistered deed and therefore invalid lease for 10 years and continued in possession with the consent of the lessor paying rent at a monthly rate, the presumption is that a monthly tenancy was created between the parties by oral agreement, accompanied by possession. (*Spencer and Krishnan, JJ.*) MANICKAM PILLAI *v.* RATNASAMI NADAR.
(1917) M. W. N. 837 : 43 I. C. 210 : 6 L. W. 689 : 33 M. L. J. 684.

——— **S. 106**—*Nature of tenancy from year to year—Possession for a long period.*

To determine whether a tenancy is from year to year in any particular case the length of possession of the tenant, the presence or absence of variation in the state of the rent, the manner in

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Nature of tenancy.

which the tenant has been dealing with the same and the other circumstances in the case have to be considered. (*Abdur Rahim and Sundara Aiyar, JJ.*) PERIA KARUPPAN *v.* ANNASAMY AIYAR. **10 M. L. T. 185 : (1911) 2 M.W. N. 162 : 12 I.C.1 : 21 M. L. J. 845.**

———S. 106—*Nature of tenancy — Lease of house.*

The tenancy of a house is presumed to be monthly in the absence of a written and registered lease, and is subject to S. 106 of the Act. The mere payment of an annual rent, does not make it an annual tenancy. (*Jwala Prasad and Ross, JJ.*) SUNKER RAM *v.* TULSHI BHAGAT. **61 I. C. 976 : 2 Pat. L. T. 178.**

———S. 106—*Nature of tenancy—No period specified—Whether from year to year.*

Where no term is mentioned in a lease it must be regarded as a lease from year to year terminable upon notice by either side according to law. (*Roe and Jwala Prasad, JJ.*) KAILASPATI CHAUDHURY *v.* MUNESHWAR CHAUDHURY. **3 Pat. L. J. 576 : 43 I. C. 965 : 4 Pat. L. W. 109.**

———S. 106—*Nature of tenancy — Presumption.*

The presumption under S. 106 does not arise if there is a contract to the contrary. (*Robinson, J.*) PAZUNDAUNG BAZAAR CO., LTD. *v.* GWAN CHWAN. **9 Bur. L. T. 80 : 32 I. C. 692 : 8 L. B. R. 351.**

Notice to quit.

———S. 106—*Notice to quit—Service of—Joint tenants—Notice sent by post—Presumption.*

In the case of joint tenants service of a notice to quit upon one is *prima facie* evidence that it has reached the others 5 Esp. 196; 7 East 551, 6 Ir. C. L. P. 367. A notice proved to have been properly directed and posted is to be presumed to have reached the person to whom it is directed in the ordinary course of postal business until the contrary is proved. That presumption would apply with greater force to registered letters. The fact that the receipt for a registered letter is signed on behalf of the addressee by a person who is not proved to have been authorised in this respect, is no evidence that the letter did not reach the addressee. L.R. 5 H.L 561; (1870) W.N. 119 Rel. (*Lord Atkinson.*) HARIHAR BANERJI *v.* RAMSASHI ROY. **46 Cal 458 : 45 I. A 222 : 23 C. W. N. 77 : 16 A. L J. 969 : 29 C. L. J. 117 : 9 L. W. 148 : 25 M. L. T. 159 : 21 Bom L. R. 522 : (1919) M. W. N. 471 : 48 I. C. 277 : 1 U. P. L. R. (P. C.) 56 : 35 M. L. J. 707 (P. C.).**

———S. 106—*Notice to quit—Covenant to pay at an enhanced rate if the premises are not vacated by a certain date.*

A notice by the landlord to vacate the premises by a certain date and in case of failure to pay rent at an enhanced rate is a valid notice and if there is no proof that the tenant agreed to pay at the increased rate, tenancy would be deemed as determined. (*Piggott and Walsh, JJ.*) SHANKAR LAL *v.* BABU RAM. **43 All. 330 : 19 A. L. J. 92 : 60 I. C. 842 : 2 U. P. L. R. (All.) 414.**

———S. 106—*Notice to quit—Period—Monthly tenancy.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Notice to quit.

In the case of monthly tenancy ending on the fifteenth day of each month a notice served at the end of the month to vacate at the beginning of the next month is not a valid notice, as a notice to be valid should be of a period terminating with the end of the month of tenancy. (*Tudball and Sulaiman, JJ.*) SEOTI BIBI *v.* JAGANNATH PRASAD. **18 A. L. J. 854 : 57 I. C. 593 : 2 U. P. L. R. (All.) 271.**

———S. 106—*Notice to quit—Sub-lessee—Surrender of lease.*

When a lessee sublet it to another and then surrendered his lease to the lessor, the sub-lessee is not entitled to a notice to quit before ejectment under S. 106 of the Act. (*Tudball, J.*) SHYAM LAL *v.* BACHCHU LAL. **20 I. C. 11 : 11 A. L. J. 951.**

———S. 106—*Notice to quit—Conditional notice.*

A notice to a tenant that he must within fifteen days either execute an agreement to pay enhanced rent or must vacate the house is valid (*Lyle, J.*) JUGLA *v.* HAR NARAIN SINGH. **19 I. C. 758.**

———S. 106—*Notice to quit—Delivery--Wrong place and wrong person—Validity of lessee holding over, if enabled to notice to quit.*

A notice to quit delivered at a place where the lessee did not reside and to a person who was not the lessee is not a good notice within the meaning of S. 106. A lessee holding over in defiance of his lessor is not entitled to notice to quit (*Chamier, J.*) GOKUL CHAND *v.* SHIB CHARAN. **13 I. C. 59 : 9 A. L. J. 574.**

———S. 106—*Notice to quit—Service of notice—Joint tenants.*

Where in a case of joint tenants, there is a tender or delivery of the notice to quit to the heads of their respective families, the service is sufficient notwithstanding that there is no proof of prior tender or delivery to each of them personally. The word "or" in S. 106, T. P. Act, is used in an alternative sense. The expression "if such tender or delivery is not practicable" is used with reference to the contingency, *i.e.*, when service is effected by fixing the notice to a conspicuous part of the property. (*Mookerjee and Chotzner, JJ.*) KEDAR NATH SADHUKHAN *v.* MADHU SUDAN DAS. **37 C L. J. 478 : 1923 Cal. 682.**

———S. 106—*Notice to quit—Cases not within the Act.*

In cases not governed by the T. P. Act there is no fixed period of notice and the question has to be decided according to the rules of justice, equity and good conscience A reasonable notice is enough. (*Chatterjee and Newbould, JJ.*) SHAMSOONNESSA BIBI *v.* SATYA SEBAK GHOSAL. **23 C. W. N. 641 : 51 I. C. 415 : 29 C. L. J. 394.**

[*See also* **42 I. C. 375.**

———S. 106—*Notice to quit—Service of.*

A notice to quit served on *Bhadon* 6th requiring the tenant to quit the land in the following month of *Aswin* is sufficient. A Civil Court

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Notice to quit.

peon who went to serve a notice upon two tenants, one of whom was a *pardanashin* lady and the other a minor boy, beat a drum, read the notice aloud and affixed a copy of the notice to the wall of the house. There were servants present. *Held*, that the service of the notice was bad, the affixing of the notice to the wall being of no avail unless tender or delivery was not practicable. (*Walmsley, J.*) BISESWAR ROY *v.* PITAMBER NATH. **51 I. C. 44.**

——— S. 106—*Notice to quit—Contract to the contrary—Provision in lease for re-entry.*

If a lease itself provides that the landlord may at any moment resume possession of the land on payment of compensation to the lessee for buildings he may have erected thereon, a notice to quit under S. 106 of the T. P. Act need not be given in order to get back *Khas* possession of the land (*Fletcher and Huda, JJ.*) MONDIRA NATH CHOUDHURI *v.* RADHA PROSONNO GON. **47 I. C. 19.**

——— S. 106—*Notice to quit—Contract as to.*

When a lessor has undertaken to determine the lease on breach of the condition against transfer of the tenancy only after giving him notice in accordance with law, the lease does not determine on transfer of the tenancy by the lessee in the absence of a notice under S 106 of the T. P. Act. A covenant in a lease forbidding transfer by the lessee is not the less enforcible, because the lessee has not transferred the whole holding but has resumed to himself a fraction. (*Chatterjee and Beachcroft, JJ.*) UMESH CHANDRA GHOSE *v.* KALA CHANDRA GUHA. **34 I. C. 516.**

——— S. 106—*Notice to quit—Joint landlords.*

Notice by some of the owners determining the lease is sufficient if other co-owners have assented by conduct (*Sharfuddin and Chapman, JJ.*) KARAMAT ALI *v.* HANUMAN DAS MARWARI. **34 I. C. 56**

——— S 106—*Notice to quit—Notice ending with Bengali year—Bengali calendar— Local usage.*

Where a lease created after the passing of the T. P. Act showed that the tenancy was one from year to year according to the Bengali calendar, a six-months' notice terminating with the Bengali year of the tenancy is in compliance with S. 106 of the T. P. Act. If there is a tenancy from year to year according to the Bengali calendar a month of that year should be calculated according to that calendar 22 C. L. J. 74 ; 22 C. L. J. 75 ; 11 C. W. N. 1124, Dist. (*Mookerjee and Roe, JJ.*) RAJ BEHARI NATH *v.* KAILAS CHANDRA DUTT. **30 I. C. 887 : 22 C. L. J. 78.**

——— S. 106—*Notice to quit—Cases not within the Act—Bengali year.*

S. 106 of the T. P. Act is not applicable to a tenancy which commenced prior to the Act. Where the tenancy is regulated by the Bengali year six months' notice according to the Bengali year is enough. (*Mittra, J.*) GOPINATH CHONGDAR *v.* ABDUL GAFAR. **30 I. C. 886 : 22 C. L. J. 74.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Notice to quit.

——— S. 106—*Notice to quit—Signature—Signed by Am-Mukhtear—Reckoning of time.*

A notice is valid if signed by the *Am-Mukhtear* of the landlord. In reckoning the 15 days' time the day on which the notice is served is excluded and the day on which it expires is included. The notice must expire with the end of the month of the tenancy. (*Mookerjee and Walmsley, JJ.*) GOBINDACHANDRA SHA *v.* DWARKA NATH PATTA. **20 C. L. J. 455 : 26 I. C. 962 : 19 C. W. N. 489.**

——— S. 106—*Notice to quit—Lease before the Act.*

S 106 of the T.P. Act does not apply to a lease created before the Act. In the case of such a lease the notice to quit must be a reasonable one. 36 C. 927; 26 C. 761 Foll. (*Richardson and Newbould, JJ.*) DURGA NATH *v.* RAJENDRA NATH. **20 I. C. 363 : 17 C. W. N. 1073.**

——— S. 106—*Notice to quit—Service of—Tender by post-peon—Non-acceptance.*

A notice may be delivered at the residence to one of the family of the person intended to be bound by it or to his servants. Where notices were sent by post and the post peon went to the family dwelling-house of the tenants with notices for all the tenants and several of the latter who were present saw the covers but refused to accept them. *Held*, that the requirements of S. 106 had been fulfilled (*Sharfuddin and Coxe, JJ.*) MOHIN CHANDRA *v.* RUP MANJARI DASI. **16 I. C. 213.**

——— S. 106—*Notice to quit—Joint landlords.*

Notice to quit given by some of several joint landlords is bad. The rule is different in the case of trespassers and tenants when *khas* possession is not sought for. (*Casperse and Chatterjee, JJ.*) SURENDRA NATH ROY *v.* KRISHNA SAKHI DASI. **15 C. W. N. 239: 9 I. C. 110 : 13 C. L. J. 228.**

——— S. 106—*Notice to quit—Contract to the contrary.*

Where it was clearly stated that, after the expiry of the time of lease, the lessor, if he wanted the lessee to quit, was to give him a week's notice and if the lessee quitted the premises in accordance with the notice well and good ; otherwise he would be liable to pay rent at the enhanced rate entered in the notice. *Held*, ten days notice was sufficient and as lessee did not quit he was liable to pay rent for that month at the enhanced rate if it is reasonable. (*Scott-Smith, J.*) SAHIB DAYAL *v.* DHANPAT RAI. **1923 Lah. 281 (2).**

——— S. 106—*Notice to quit—Denial of landlord's title—Attornment and payment of rent by lessee to lessor's assignee.*

Payment of rent by a lessee to the lessor's assignee and attornment to him do not amount to the denial of the title of a purchaser of the property at Court sale. *Held*, after the date of the said assignment, notice to quit prior to and action in ejectment by the said purchaser to the lessee is essential. (*Benson and Sankaran Nair, JJ.*) MANIYAM PATTAR *v.* LAKSHMANA NATTAMAKARAN. **15 I. C. 52.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Notice to quit.

——S 106—*Notice to quit—Tenancy from year to year.*

A tenancy from year to year is terminated by a notice to quit. (*Mittra, A. J. C.*) MUNUALD *v.* SHEIKLAL. **57 I. C. 311.**

——Ss. 106 and 111—*Notice to quit—Contract to the contrary—Lease terminable by default of payment of rent—Notice to quit.*

Where the lease is terminable upon the happening of an event as, *e.g.*, a default in the payment of rent, it cannot, in the absence of such event happening, be terminated by the lessee. A notice sent by tenant terminating the lease is therefore of no value in such a case. (*Kanhaiya Lal, J. C.*) BISHESHWAR *v.* CHHEDI LAL. **53 I. C. 109.**

——S. 106—*Notice to quit—Tenancy from year to year—Holding over.*

Where a tenant of agricultural lands continues to be in possession after the expiry of his lease with knowledge and consent of his landlord, then there is, by operation of law a new tenancy from year to year in favour of the tenant determinable only by a notice under S. 106 of the T. P. Act. (*Das and Kulwant Sahay, JJ.*) STONEWIGG *v.* KAMESHWAR NARAYAN SINGH. **1923 Pat. 122 : 1923 P. 340.**

——S. 106—*Notice to quit—Tenancy by holding over.*

A tenant who continues to hold over after the expiration of the term of lease, in defiance of the authority of the lessor, is not entitled to a notice to quit under S. 106 of the T. P. Act. (*Jwala Prasad and Foster, JJ.*) MOORE *v.* MAKHAN SINGH. **53 I. C. 180.**

——S. 106—*Notice to quit—Alternative to pay enhanced rent—Notice invalid—Effect.*

Where a landlord gives notice to quit or in the alternative asks for enhanced rent, and the notice is found to be invalid for want of proper period, the tenancy continues and the landlord can neither sue in ejectment, nor ask for enhanced rent. (*Jwala Prasad, J.*) FARZAND ALI *v.* MOTILAL CHOUDHRY. **62 I. C. 421 : 2 P. L. T. 282.**

——S. 106—*Notice to quit—Period—Yearly tenancy.*

Where no specified time is fixed for the service of notice to quit, six months' notice should be given according to English Law where the contract is on yearly tenure at yearly rent. (*Atkinson and Manuk, JJ.*) GANGA SINGH *v.* CHAIRMAN OF THE DISTRICT BOARD, PATNA. **50 I. C. 8 : 1919 Pat 285.**

——S. 106—*Notice to quit—Objection of legality of not to be raised on appeal for the first time.*

Where there is an allegation in the plaint as to the service of a due and proper notice to quit which is not denied in the written statement and no issue is raised as to the sufficiency of the notice, the deft. must be held to have waived any objection to the adequacy of the notice. The objection cannot be permitted for the first time on appeal. (*Robinson, C. J. and Macgregor, J.*) THE PUNJAB MOTOR CO. *v.* SHEIKH JUMAN. **1923 Rang. 13.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Miscellaneous.

Permanent tenancy.

——S. 106—*Permanent tenancy—Transferable under.*

A permanent tenancy created before the passing of the Act to which if created after its passing its provisions would apply is transferable. (*Teunon and Newbould, JJ.*) MADHU MATI DEBI *v.* HARENDRA LAL ROY. **33 I. C. 502.**

——S. 106—*Permanent tenancy—Partition—Joint lessee for a term—Objection by.*

When permanent lessees in joint possession with other lessees sue for partition of their share, the latter, *i.e.*, their joint lessees, cannot object to the partition on the ground that the permanent leases were granted by the lessor in excess of his powers and are therefore liable to be set aside by the lessor's reversioner. (*Chatterjee and Richardson, JJ.*) SALIMULLAH BAHADUR *v.* PROVAT CHANDRA. **43 Cal 1118 : 33 I. C. 129 : 24 C. L. J. 26.**

——Ss. 106 and 108—*Permanent tenancy—Burden of proof—Plea of permanent tenancy—Structures—Compensation—Estoppel.*

Where in a suit for eviction a landlord set up a specific tenancy which is not proved but the defts. admitting that they are tenants set up a permanent tenancy, the burden is on the tenants to prove the permanent character of the tenancy. In the absence of such proof, the tenancy must be deemed to be a monthly one and if the necessary notice under S. 108 of the T. P Act, has been given, the plff. must succeed. In the absence of a contract, a tenant is not entitled to compensation to permanent structures erected on the land unless the landlord encouraged the tenant to erect them. (*Wallis, C.J. Oldfield and Seshagiri Aiyar, JJ.*) THAVASI AMMAL *v.* SALAI AMMAL. **22 M. L. T. 530 : (1918) M. W. N. 46 : 7 L. W. 178 : 43 I. C. 643 : 35 M. L. J. 281 :**

Miscellaneous.

——S. 106—*Waiver of forfeiture.*

Acceptance of rent subsequent to forfeiture of a lease by an act done in contravention of the terms thereof will amount to a waiver. (*Piggott, J.*) CHATTER SINGH *v.* NAND KISHORE. **26 I. C. 107 : 12 A. L. J. 1139.**

——Ss. 106, 111 and 116—*Position of tenant after determination of tenancy—Damages if liable for.*

The position of a tenant after determination of the tenancy is the same as that of a trespasser and he is bound to pay any rent at a fair rate by way of damages, not at the rate contracted for during the subsistence of the tenancy. (*Banerjee, J.*) MUNNA LAL *v.* BUCHU LAL. **22 I. C. 7.**

——S. 106—*Lease created before T. P. Act—Law applicable to the transfer of.*

In a suit for possession by the landlord against the transferee of tenancy created before T. P. Act, and not created for purposes of residence the deft. must prove that the lease was transferable by the law as it then stood. The fact that it was heritable does not make it transferable in

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 106—Miscellaneous.

absence of express contract to that effect. (*Mookerjee, A. C. J. and Fletcher, J.*) SULIN MOHAN BANNERJEE *v.* RAJ KRISHNA GHOSH. **25 C. W. N. 420 : 60 I. C. 826 : 38 C. L. J. 193.**

——— **S. 106**—*Lease—Construction—Absence of fraud or common mistake.*

In the absence of fraud or common mistakes a lessee is entitled to the possession of a plot of land described in the lease of boundaries. (*Jenkins, C. J. and Chatterjee, J.*) SOMARUDDI MOLLAH *v.* PORT CANNING AND LAND IMPROVEMENT CO., LTD. **13 I. C. 481 : 16 C. W. N. 225.**

——— **Ss. 107 and 105**—*Lease or license.*

Permission to build a market place on the land of defendant for rent without a lease-deed amounts only to a license and not to a lease and hence no suit for possession or injunction can lie against the defendant and the remedy of plaintiff, if any, is a suit for damages for wrongful revocation of license. (*Tudball and Walsh, JJ.*) BASDEO RAI *v.* DWARKA RAM. **38 All. 178 : 32 I. C. 346 : 14 A. L. J. 137.**

——— **S 107**—*Term of a lease—How computed for purposes of registration.*

For purposes of registration the "term" of a lease means the length of time for which the lessee is entitled to undisturbed possession provided he himself fulfils all the stipulated conditions. (*Ryves and Piggott, JJ.*) MUNSHI LAL *v.* GOPI BALLABHE. **36 All. 176 : 22 I. C. 933 : 12 A. L. J. 219.**

——— **S. 107**—*Lease for more than a year—Unregistered—Oral evidence—Admission of relationship—Estoppel—Compensation.*

A's interest in certain saltpans was leased to B. for three years at Rs. 500 a year during A's minority by her guardian and co-sharer, who owned the remaining two-third share. On attaining majority A. leased her share for two years more to B. on a rental of Rs. 1,000 a year. A. sued B, to recover the rent of the last two years at the rate of Rs. 1,000 a year and Rs. 653 as rent due on the previous lease. The rent deed was not registered but B. admittled A's ownership of the saltpans and also his tenancy under her and her co-sharer. *Held*, that A. could not be allowed to rely on the lease set up by her, as it was unregistered; nor could she be allowed to give oral evidence of that lease. 33 B. 610. As B. admitted A's ownership and that he was her tenant, proof of the relation of landlord and tenant became unnecessary, the admission of B. acting as an estoppel to the production of any evidence contradicting the admission. 5 B. 143 Foll. A. could only recover the money as for use and occupation for the two years of the tenancy and as the amount claimed by her was not shown to be excessive. she was entitled to it. The lease of a saltpan is not illegal merely because the sanction of the Collector of Salt Revenue has not been obtained thereto. Per *Batchelor, J.*—Receipts for rent granted by a landlord are admissible in evidence, not as proving the terms of the contract of letting but as proving from the conduct of the parties what would be a fair rent for the admitted tenancy. (*Chandavarkar and Batchelor, JJ.*) RAMCHANDRA *v.* TAMA. **36 Bom. 500 : 15 I. C 830 : 14 Bom. L. R. 390.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 107.

——— **S. 107**—*Transfer of property—Agreement for—Delivery of possession—Effect of.*

Where in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, subject to the proviso that specific performance can be obtained between parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. 21 Ch. D 9; (1892) 2 Q B. 255, 31 C. L. J. 75 Rel. (*Mookerjee and Cumming, JJ.*) GAJENDRA NATH DEY *v.* MOULVI ASHRAF HOSSAIN. **36 C. L. J. 48 : 27 C. W. N. 159 : 1923 Cal. 130.**

——— **S. 107**—*Registration—Yearly tenancy.*

After the passing of the Act, there can be no tenancy reserving a yearly rent without a registered instrument. (*Chatterjee and Panton, JJ.*) SARI SARADAMAYI DEVI *v.* SAILABALA DASI. **59 I. C. 788.**

——— **S. 107**—*Verbal creation of tenancy at will—Evidence leases other than those coming under 1st para. of S. 107 of T. P. Act.*

There can be a verbal creation of a tenancy at will, and oral evidence is admissible in proof of leases other than those coming under the first paragraph of S. 107, T. P. Act. S. 107 merely lays down that a lease of the moveable property in the specified lease mentioned in the section can be made only by a registered instrument not that a lease of immoveable property can be made only by a registered instrument. The fact that the rent is reserved at a certain amount a year does not by itself conclusively show that the tenancy is one from year to year, 20 C. L. J 448 ; 20 C. L. J. 455 Foll. (*Sanderson, C. J. and Mookerjee, J.*) SARAT CHANDRA DUTTA *v.* DADAB CHANDRA GOSWAMI. **44 Cal. 314 : 21 C. W. N. 206 : 37 I.C. 956 : 27 C. L. J. 198.**

——— **S. 107**—*Lease registered—Non-payment of consideration—Effect of.*

Where it is found that though a lease deed was executed, there was no payment of consideration no delivery of possession and no delivery of the lease deed itself, the transaction of lease is not complete and no title passes. (*D. Chatterjee and Mullick, JJ.*) NILMONI BEHARA *v.* RUKUNA BEWA. **30 I. C. 210.**

——— **S. 107**—*Tenancy for one year coupled with covenant to renew.*

A tenancy for one year coupled with an agreement to renew it from year to year cannot be created except by a registered instrument. (*Mookerjee and Walmsley, JJ.*) GOBINDA CHANDRA *v.* DWARKA NATH. **20 C L. J. 455 : 26 I. C. 962 : 19 C. W. N. 489.**

——— **Ss. 107 and 116**—*Oral lease for one year followed by successive leases for one year each.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 107.

Successive leases for one year each to a person already in possession under an oral lease for one year are quite different from leases from year to year, as the former are terminable without notice and are not registrable, while the latter are terminable only by 6 months' notice and are registrable. (*Coxe and Chatterjee, JJ.*) FAKIRA MATHON *v.* LIAKUT HUSSAIN.
23 I.C. 318 : 18 C. W. N. 858.

——— **S. 107**—*Verbal lease for one year—Relationship of landlord and tenant.*

S. 107 of the Act does not prevent the creation of a verbal lease for one year by the lessor giving possession to, and accepting rent from the lessee for that year. A verbal lease for more than one year is valid for one year if it is accompanied by delivery of possession. (*Chatterjee and Walmsley, JJ.*) MOHAMMED MOSSA *v.* JAGNANDA SINGH.
20 I. C. 715.

——— **Ss. 107, 110 and 116**—*Lessee under unregistered lease for 15 years—Payment of rent—Effect of.*

The position of a lessee, under an unregistered lease for 15 years, who continued in occupation upon payment of rent, is not higher than that of a lessee for one year who held over at the end of the year. "An agreement to the contrary" within S. 110 is an agreement referring to the terms of the tenancy. It may be expressed or implied. An agreement to hold over from year to year is an agreement to lease from year to year and must be created by a registered instrument. Acceptance of rent for a quarter, does not imply a promise to allow the tenant to stay for the whole year. (*Mookerjee and Beachcroft, JJ.*) MATILAL *v.* DARJEELING MUNICIPALITY. **18 I. C. 844 : 17 C. L. J. 167.**

——— **S. 107**—*Registration Act, I of 1877, S. 3—Registered Kabuliyat—Lease—Mistake—Apportionment.*

A registered *Kabuliyat* executed by the lessee and accepted by the lessor operates as a lease under S. 107 and the fact of the inclusion of lands not belonging to their lessor would not make it void if there was no fraud or misrepresentation. There could be an apportionment of rent for the remaining lands. 8 I. C. 668 Foll. ; 2 I. C. 994, Dist. (*D. Chatterjee and N. Chatterjee, JJ.*) RAI MONI DASI *v.* MATHURA MOHAN.
16 C. W. N. 606 : 15 C. L. J. 665 : 14 I. C. 540 : 39 Cal. 1016.

——— **S. 107**—*Permanent lease prior to the Act.*

Before the T. P. Act, for the execution of a permanent lease, the execution of a *patta* was not necessary and the acceptance of a *Kabuliyat* was sufficient. (*Mookerjee and Coxe, JJ.*) AKRAM ALI *v.* DURGA PRASANNA ROY.
10 I. C. 489 : 14 C L. J. 614.

——— **S. 107**—*Unregistered lease — Cannot be used for proving nature of tenancy.*

An unregistered deed of lease compulsorily registrable is not admissible in evidence nor can it be admitted in evidence to prove the nature and character of the possession held by the defendant or that the property to which it relates was let for a term of years. Any attempt to prove the terms of the lease by oral evidence would be excluded. 63 I C. 90 followed. (*Broadway and Abdul Qadir, JJ.*) LALA MOTI SAGAR *v.* DHANNA MAL. **29 P. W. R 1922 : 1922 Lah. 329.**

——— **S. 107**—*Registration — Lease for an indefinite period.*

Only a lease for more than a year or from year to year in express terms is compulsorily registrable. A lease for an indefinite period which could be terminated by either party at the end of any month need not be registered. (*Johnstone and Le Rossignol, JJ.*) UMAR BAKSH *v* BALDEO SINGH. **97 P. R. 1915 : 32 I. C. 35 : 193 P. W. R. 1915.**

——— **S. 107**—*Unregistered lease, if admissible to prove character of possession.*

An unregistered lease for less than a year can be admitted in evidence for proving that the occupation of the leased premises was permissive and not adverse. S. 4 of the T. P. Act would not make S. 107 part of S. 17 of the Registration Act so as to make a lease for less than one year compulsorily registrable if it is to be used as evidence of the permissive character of the lessee's possession. (*Wallis, C. J., Ayling and Krishnan, JJ.*) RAMA SAHU *v.* GOWRO RATHO.
29 M. L. T. 10 : 12 L W. 649 : (1920) M. W. N. 711 : 59 I. C. 350 : 44 M. 55 : 39 M. L. J. 639 (F. B.).

——— **S. 107**—*Lease for planting casuarina trees—Registration.*

A lease for planting casuarina trees is not one for an agricultural purpose and must be in writing and registered. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) DEVAROYA NAICKEN *v.* AMMANI AMMAL. **34 I. C. 539 : 3 L. W. 319.**

——— **S. 107**—*Applicability—Mulgeni lease—Assertion of rights—Registration.*

Where deft. has been asserting *mulgeni* rights for 40 years as against the *mulgar*, the proper inference is that he has such rights. The Act is inapplicable to *mulguni* leases and registration is unnecessary. (*Ayling and Tyabji, JJ.*) RAGHAVACHARULU *v.* SECRETARY OF STATE.
28 I. C. 599 : (1915) M. W. N. 271.

——— **S. 107**—*Instrument signed by the lessee alone—Sufficient to show the relation of lessee and lessor—Suit after expiry of lease term.*

An instrument in favour of the lessor and signed by the lessee, is sufficient to constitute a relation of lessee and lessor and a registered deed signed by the lessor not necessary. A suit for possession by lessee is maintainable even after the term of lease has expired. (*Sadasiva Aiyar and Spencer, JJ.*) KANTIPUDI SOMAYYA *v.* KHATYA BEGAM SAHEBA. **24 I.C. 784 (1) : 1 L.W. 236.**

——— **S. 107**—*Lease for life—Registration.*

A lease for life can only be by a registered instrument. (*Jwala Prasad, J.*) WAZIR NONIAN *v.* RAM PRASAD LAL. **59 I. C 893.**

——— **S. 107**—*Court has no power to reduce rate of interest under a lease.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 107.

It is not within the jurisdiction of a Court to reduce the stipulate rate of interest payable on non-payment of rent under a lease governed by the Transfer of Property Act. (*Das, J.*) SYED SAHID HUSSAIN *v* BABU JAG MOHAN LAL.
2 Pat. L. T. 276.

——Ss. 107 and 106—*Unregistered—Specific performance--Agreement to lease.*

Though an agreement to lease for 3 years which ought to be registered is not registered, a suit for specific performance is maintainable. (*Robinson, J.*) PAZANDAUNG BAZAR CO., LTD. *v.* GWAN CHAVAN. 9 Bur. L. T. 80 : 32 I. C. 692 : 8 L. B. R. 351.

——S. 107—*Lease from month to month—Registration.*

Since the passing of the Act VI of 1904, a lease of immoveable property from month to month is invalid unless it is registered. (*Twomey, J.*) T. E. O'LEARY *v.* MAUNG ON GAING. 11 I.C. 863: 4 Bur. L. T. 197.

——S. 107—*Oral lease of house—Possession not delivered.*

An oral lease of a house not accompanied by delivery of possession is invalid. (*Twomey, J.*) KARAM CHAND *v.* HURDIAL. 11 I. C 849: 4 Bur. L. T. 181.

——S. 108.

Accession.
Applicability.
Covenant for quiet enjoyment.
Disclosure of defect.
Duty to give possession to lease.
Duty to surrender possession to lessor.
Payment of rent.
Property rendered unfit.
Removal of superstructure.
Removal of trees.
Repairs.
Transfer of interest.
Waste.
Miscellaneous.

Accession.

——S. 108 (d)—*Accession—Encroachment by lessee—Enures for lessor.*

The benefit of an encroachment by a lessee on a neighbour's land enures for the benefit of the lessor. The principle of S. 108 (*d*) of the T. P. Act is applicable to cases not coming within the Act. (*Hartnoll and Ormond, JJ.*) SIT YIN *v.* THA SHIN. 29 I. C. 872: 8 L. B. R. 71.

Applicability.

——S. 108 (j)—*Applicability—Tenancy created before the passing of that Act.*

S. 108 (*j*) does not apply to a tenancy created before the passing of that Act. (*Holmwood and Sharfuddin, JJ.*) UMAKANTA *v.* KASHIRAM.
23 I. C. 246.

——S. 108 (j)—*Applicability—Assignee of lease—Liability.*

S. 108 (j) does not touch the case of the assignee of the lesee, 37 C 683, Ref. (*Stephen and Richardson, JJ.*) RAM DHAN *v.* SHARUP CHENDRA. 18 I. C. 479: 17 C. W. N. 313.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Covenant for quiet enjoyment.

——S 108 (b)—*Applicability—Crown grants.*

Though T. P. Act does not apply to Crown grants, the principles laid down in S. 108 (*b*) may be referred to for construing them regarding the nature of the ordinary covenants by which the lessors and the lessees are bound. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) SECY. OF STATE *v.* PAMMARAYA VENKAYYA 40 Mad. 910: 19 M. L. T. 318: 3 L. W. 443: (1916) 1 M. W. N. 342: 35 I. C, 254: 30 M. L. J. 575.

——S. 108 (c)—*Applicability—Agricultural leases.*

S. 108, T. P. Act, can be applied to agricultural leases as embodying the principles of justice, equity and good conscience. 25 B 269. Foll. (*Wallis, O.C.J. and Seshagiri Aiyar, J.*) SRINIVASA AIYENGAR *v.* RANGASAMI. 25 I. C, 812: 1 L. W. 858. See also 40 I. C. 590. Also (1914) M. W. N. 160 : 26 M. L. J. 160 : 22 I. C. 515 : 15 M. L. T. 160. Also 38 Bom. 716: 16 Bom. L. R. 595 : 28 I. C. 140 : Also 14 N. L. R. 188: 42 I. C 970. Also 33 Mad. 253: 5 I. C. 437 : 7 M. L. T. 231. Also 33 Mad. 499: 7 M. L. T. 119 : 5 I. C. 489: (1910) M. W. N. 221 and 280.

Covenant for quiet enjoyment.

——S. 108 (c)—*Covenant for quiet enjoyment—Extent of lessor's liability—Persons claiming under lessor—Meaning of—Interruption by trespasser.*

S. 108, cl. (*c*) of the T. P. Act secures for the lessee the benefit of an unqualified covenant for quiet enjoyment. A qualified covenant for quiet enjoyment protects the lessee against interruption by the lessor, his heirs and assigns, or any other person claiming by or under him. them or *any of them*, whereas an unqualified covenant protects the lessee against interruption by the lessor, his heirs and assigns or by any other person or persons whomsoever. The covenant, in the unqualified form covers the case of interruption by the superior landlord or other person claiming title paramount, exercising a power of re-entry, or otherwise dispossessing the lessee. But even such a covenant does not include a case of disturbance by persons having no lawful title or right of re-entry; for against them the lessee has his proper remedy and does not require a covenant nor can he on account of being evicted by such person, be relieved of his liability to pay rent. Like the express covenant the implied covenant protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but, as against other persons, it protects the lessee only against lawful disturbance. For the purposes of this rule the expression "person claiming under the lessor" means a person claiming under him the right to do the act complained of, so that if a lessor parts with the property or any adjoining property to a third person, and that person is in a position to rightfully claim under his title from the lessor, that he is authorised to do those acts, the lessor will be responsible. (1906) 1 K. B. 155 Rel. If this interpretation were not adopted, the lessor would be responsible for all interruptions by any person claiming title

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Covenant for quiet enjoyment.

through him, whether assignee or under-tenant, however wilful or negligent the interruption. (*Mookerjee and Chotzner, JJ.*) NOWRANG SINGH *v.* JANARDAN KISHOR LAL SINGH DEO. **50 C. 68: 36 C. L. J. 28: 27 C. W. N. 71 : 1923 C. 41.**

——S. 108—*Covenant for quiet enjoyment.*

Where the defendants in a suit for rent are estopped from denying the plff.'s right to lease the land to them by reason of the fact that the latter had let them into possession, the latter, in his turn is bound to secure to the defendant quiet enjoyment of the demised property. The relationship of landlord and tenant implies such an undertaking which would include also the protection of the tenant from disturbance by strangers claiming by paramount title. Where such stranger sues the defendant for a declaration of his title to the property, and the plaintiff sues the defendants for rent, the defendants are entitled to refuse to pay rent unless the plff proves his ability to secure quiet enjoyment to the defendants of the demised property. (*Sanderson, C. J. and Richardson, J.*) RAM CHANDRA CHATTERJE *v.* PRAMATHA NATH. **63 I. C. 754.**

——S. 108 (c)—*Covenant for quiet enjoyment—"Interruption", meaning of.*

The word "interruption" in S. 108 (c) includes disturbance of possession by a person with a paramount title. The clause protects the lessee from any interruption and when it is caused by the paramount owner, the lessor is bound to remove the interruption or otherwise indemnify the lessees. A widow took possession of her husband's estate and granted a lease to plff. on receipt of *salam*. The plff. was dispossessed by her husband's brother as the rightful owner. *Held*, that the widow was liable for damages under cl. (6) of S. 108. (*Chatterjee and Walmsley, JJ.*) MAKTAR AHMAD *v.* SUNDAR KOER. **19 I. C. 815: 17 C. W. N. 960**

——S. 108 (c)—*Covenant for quiet enjoyment—Interruption caused by lessor.*

If a lessee is interrupted in his enjoyment by the paramount owner himself, he must either remove the obstruction or indemnify the lessee. Deft., owner of *bungas* round the Golden Temple at Tern Taran leased one *bunga* to a *Halwai* who was obstructed from using it by manager of the Temple. *Held*, the deft. must indemnify the *Halwai*. (*Scott-Smith, J.*) DHARMA NARAIN *v.* LABH SINGH. **60 I. C. 477.**

——S. 103 (c)—*Covenant for quiet enjoyment—Disturbance by trespasser.*

A covenant for quiet enjoyment as between the lessor and the lessee does not extend to a disturbance by a trespasser. But where the trespasser has trespassed under the instructions of the lessors themselves it will be a breach of the covenant. (*Wallis, C. J. and Seshagiri Aiyar, JJ.*) SRINIVASA AIYANGAR *v.* RANGASWAMI AIYANGAR. **25 I. C. 812: 1 L. W. 858**

——S. 108 (c)—*Covenant for quiet enjoyment not conditional on payment of rent.*

T. P. Act, S. 108 (c), does not make actual payment of rent a condition for the right to enjoy the holding without interruption. The tenant after

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Duty to surrender possession to lessor.

paying rent may claim damages for breach of covenant for quiet enjoyment. In cases of constructive eviction, the tenant enjoys immunity from the payment of rent until the landlord again permits him to have quiet enjoyment. (*Benson and Sundara Aiyar, JJ.*) MEENAKSHI SUNDARA NACHIAR *v.* CHIDAMBARAM CHETTIAR. **12 M. L. T. 124: 15 I. C. 711: (1912) M. W. N. 813 : 23 M. L. J. 119.**

Disclosure of Defect.

——S. 108 (a)—*Disclosure of defect—Defect in title.*

The words "material defect in the property with reference to its intended use" in clause (*a*) have reference to the nature and condition of the property demised and a defect in the lessor's title does not fall within the meaning of the words. (*Chatterjee and Walmsley, JJ.*) MAKTAR AHMED *v.* SUNDAR KOER. **19 I. C. 815 : 17 C. W. N. 960.**

Duty to give possession to lessee.

——S. 108 (1)—*Duty to give possession to lessee—Possession by lessee before execution of deed.*

When in pursuance of an agreement for a lease the intended lessee takes possession before the execution of the lease deed the position is the same as if the deed had been executed provided specific performance can be obtained between the same parties in the same Court at the same time as the subsequent legal position fails to be determined. (*Mookerjee and Teunon, JJ.*) BEPIN BEHARI *v.* TINKOWARI. **13 C. L. J 271 : 9 I. C. 374 : 15 C. W. N. 976.**

——S. 108 (*b*)—*Duty to give possession to lessee—Notice to tenants if sufficient.*

A lessor is bound to put the lessee in possession of the property leased, notice to tenants would amount to delivery of possession only when the transferor himself is in possession and has possession to give and not when he is himself out of possession. (*Scott-Smith, J.*) ABDUR KARIM *v.* UPPER INDIA BANK. **96 P. W. R. 1917 : 110 P. L. R. 1917 : 40 I. C. 684 : 19 P. R. 1918.**

——S. 108 (c)—*Duty to give possession to lessee—Breach of—Remedy of lessee—Prior lease.*

When a prior lessee is in possession and refuses to vacate the premises, a subsequent lessee cannot sue him in ejectment. He ought to sue the lessor and get back his money together with reasonable interest. (*Lyle, A. J. C.*) IBAD ULLAH KHAN *v.* RAM CHARAN SAH. **53 I. C. 140 : 6 O. L. J. 378.**

——S. 108 (b)—*Duty to give possession to lessee.*

Delivery of possession by the lessor is a condition necessary for a suit for rent. (*Jwala Prasad and Adami, JJ.*) UDHAB CHANDRA SINGH *v.* NARAIN. **58 I.C. 186.**

Duty to surrender possession to lessor.

——S. 108—*Duty to surrender possession to lessor—Damages for holding over.*

The landlord can claim special damages where a tenant holds over, either for breach of contract

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Duty to surrender possession to lessor.

to yield possession or for possession. English Law considered. (*Page, J.*) SUNDERMULL *v.* LADHURAM KALURAM. **50 Cal. 667 : 1924 C. 240.**

———S. 108, cl. (q)—*Duty to surrender possession to lessor—Lessor's right foreclosed—Mortgagee not bound to surrender possession.*

A lessor whose right have been foreclosed, has, on the expiry of the lease, no right to eject or redeem the lessee who has redeemed the mortgagee from the lessor for his own benefit. (*Mittra, A. J. C.*) GULAM NABI *v.* KANHAI SINGH. **59 I. C. 511 : 16 N. L R. 180.**

Payment of rent.

———S. 108 (j)—*Payment of rent—Co-sharer tenants—Liability to pay entire rent—Burden of proof—Agricultural leases if covered.*

The principle of S. 108, cl. (j), applies to agricultural leases. The liability of co-sharer tenants in a holding to pay rent to the landlord is joint and several and the burden of proving that the landlord, by his conduct, treated each fractional sharer as liable only for a proportionate share of the rent lies on the party pleading it. The release of one or more joint obligee of his or their liability in one year cannot affect their joint and several liability for the rents of the subsequent years unless there has been a contract to that effect. (*Sadasiva Aiyar and Burn, JJ.*) PENUMETSA BAPIRAJU *v* GOPISETTI NARAYANASWAMI NAIDU. **40 I. C. 590.**

———S. 108 (l)—*Payment of rent—Tenant holding over—Liability of.*

A tenant holding over is liable to pay for use and occupation. Tenancy from year to year can be inferred from fact of payment of rent by the tenant and its receipt by landlord, the annual rent being ascertained from the amount paid and received. (*Sadasiva Aiyar and Moore, JJ.*) GOVINDASWAMY *v.* RAMASWAMY AIYAR **3 L. W. 408 : 30 M. L. J. 492 34 I. C. 6 : (1916) 2 M. W. N. 79.**

———S. 108—*Payment of rent—Possession to lessee.*

The right of the lessor to claim premium from the lessee does not depend upon the former's delivery of possession to the latter, but the Court should pass a conditional decree, the payment of premium and possession of land depending upon each other. 27 M. 28 ; 21 M. L. J. 236, Foll. (*Benson and Sundara Aiyar, JJ.*) RAMANATHAN *v.* VIRRA NAGAPPA. **(1911) 1 M. W. N. 325 : 10 I. C. 392 : 9 M. L. T. 510.**

———S. 108—*Payment of rent—Mortgagee of stock in a shop—Liability to pay rent—Privity of contract.*

The mortgagee of the stock in trade of a shop took possession of the stock, received the incomings and paid outgoings of the business carried on by the mortgagors. *Held*, he cannot be held liable for any rent of the premises since there was no contract between the landlord and the mortgagee regarding payment of rent and since the mortgage being only of goods and not of the lease of the rooms, the mortgagee did not acquire

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Removal of superstructure.

any interest in the rooms. (*Fox, C. J.*) BANSILAL *v.* MAHOMED EBRAHIM. **8 Bur. L. T. 163 : 30 I. C. 675 : 8 L. B. R. 164.**

Property rendered unfit.

———Ss. 108 and 106—*Property rendered unfit by fire—Notice avoids the lease.*

Notice under S. 106 has nothing to do with a notice under S. 108 which does not require any length of time for its operation ; hence where the leasehold property was destroyed by fire and the lessee avoided the lease by notice under S. 108 the lease became void *ipso facto* on serving of notice. (*Fletcher and Teunon, JJ.*) DAVUDA COAL CO. *v.* HURMOOK MARWARI. **31 I. C. 697 : 19 C. W. N. 1019.**

———Ss. 108 (e), and 117—*Property rendered unfit—Flood—Abatement of rent — Agricultural holding flooded by sea-water.*

In the case of agricultural tenancies the tenant is entitled to proportionate abatement of rent where a portion of the land demised is inundated by sea water and consequently becomes unfit for cultivation. 22 C. L. J. 569, Foll. ; 35 Bom 333 ; 23 Bom. 15, Not foll. (*Seshagiri Aiyar and Burn, JJ.*) SUBRAMANIA PATTAHAN *v.* KATTAMBATH RAMA. **43 Mad. 132 : 37 M. L. J. 654 : 26 M. L. T. 266 : (1920) M. W. N. 153 : 58 I. C. 397 : 10 L. W. 367.**

Removal of superstructure.

———S. 108 (h)—*Removal of superstructure—Court's power to grant time.*

Where the terms of a tenancy expressly exclude compensation on eviction the Court can, apart from S. 108 (*h*), on equitable grounds allow a reasonable time for the removal of the buildings constructed by the tenant. (*Phillips and Odgers, JJ.*) TIRUMALPAD RAJAH *v.* NOOR MAHOMED **14 L W 308 : 41 M. L J 265 : 66 I. C. 48 : (1921) M. W. N. 677.**

———S. 108 (h)—*Removal of superstructure—Lease invalid—Fraud.*

A lessee is not entitled to any compensation for any improvements made by him when the lease is found to be invalid except in the case of fraud ; but he is entitled to remove any superstructure erected by him (*Trotter and Seshagiri Aiyar, JJ.*) GOVINDASWAMY *v.* ETHIRAJAMMAL. **34 I. C. 1 : (1916) 1 M. W. N. 180.**

———S. 108 (h)—*Removal of superstructure—Compensation—Right of tenant to remove*

Per *White, C.J. and Miller, J.* (*Sankaran Nair, J.* contra). Under the common law of India, on the determination of a lease, the option is with the lessor either to take the building erected by the tenant on paying compensation or if he is unwilling to do so to allow the tenant to remove them. Apart from estoppel or contract the tenant has no right to demand compensation for buildings erected by him. Nor can he remove the buildings left by him on the premises when he quits them whether these buildings were erected with the landlord's consent or not (*White, C. J., Miller and Sankaran Nair, JJ.*) ANGAMMAL *v.* MALIK MAHAMED. **38 Mad. 710 : 14 M. L. T. 418 : (1913) M. W. N. 974 : 21 I. C. 583 : 25 M L. J. 625.**

[On appeal from 11 I. C. 745: 21 M. L. J. 891].

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108 (h)—Removal of superstructure.

——— S. 108 (h)—*Removal of superstructure.*

Per *White, C. J.*—Under both the common law of the land and S. 108 (*h*) of the T. P. Act, which contains the same provisions as the old law, on the point, a lessee is not entitled to remove or claim compensation for a structure raised by him during the time of the lease, unless the lessor is estopped from contesting such right. Per *Sankaran Nair, J.*—S. 108 (*h*) of the T. P. Act is only an enabling provision. A tenant had under the law previous to the passing of the Act, a right to remove and claim compensation for an erection during a lease and this rule remains untouched by S. 108 (*h*) of the T. P. Act, which gives a tenant right to remove or claim compensation for an erection during a lease unless there is local usage or contract to the contrary, which special facts must be proved by the lessor. (*White, C. J. and Sankaran Nair, J.*) ANGAMMAL *v.* MALIK MAHOMED SAEED ASLAMIS SAHIB.
10 M. L. T. 193 : 11 I. C. 745 (2) : 21 M. L. J. 891.

Removal of trees.

——— S. 108 (h) and (i)—*Removal of trees—Permanent tenancy.*

A permanent tenant who has planted trees on his land has the right of cutting down and making use of them. The principle has found legislative sanction in S. 108, cl. (*h*) of the T. P. Act. (*Beaman and Hayward, JJ.*) SITABAI *v.* SAMBHU.
38 Bom. 716 : 28 I. C. 140 : 16 Bom. L. R. 595.

——— S. 108 (h)—*Removal of trees—Lessees, whether can cut trees.*

Though a *mulgeni* tenant in South Canara cannot cut trees existing at the date of the grant, a lessee can remove trees planted by him after the commencement of the lease and trees and plants of spontaneous growth, provided he restores the land in *status quo ante* at the end of his lease. 24 M. 47 (F. B.), Ref. (*Spencer and Kumaraswami Sastri, JJ.*) KRISHNACHARYA *v.* AUTHAKKI. **18 M. L. T. 218 : (1915) M. W. N. 726 : 31 I. C. 12 : 29 M. L. J. 314.**

——— S. 108 (h) with S. 117—*Removal of trees—Rights of tenant—English law.*

Though S. 108 (*h*) of the T. P. Act does not by reason of S. 117 of the same Act apply to an agricultural lease, it lays down a principle which does apply in the absence of any special custom to the contrary. The English law of fixture has no application to this country. It is wrong to hold that apart from special custom the tenant has no right to cut trees planted by him on his holding. (*Daniels, A. J. C.*) CHATUR *v.* RUKMANGAD SINGH.
1922 Oudh 249 (1).

——— S. 108 (h)—*Removal of trees—Compensation—Mango trees planted by the tenant.*

A tenant should be awarded compensation under S. 108 (*h*) for the trees planted by him during the tenancy with the landlord's knowledge. (*Shaw, J.*) MI HMAT TOK *v.* NGA KYWE HLA.
24 I. C 708 : U. B. R. (1914) II, 11.

Repairs.

——— S. 108—*Repairs—Duty of lessor to effect—Neglect—Effect.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Transfer of Interest.

None of the clauses of S. 108, T. P. Act, entitles lessee to call upon the lessor to repair the property. In fact unless there is a contract to the contrary the lessor is not necessarily bound to make any repairs whatever. Even if the lessor was under an obligation to effect the repairs and failed to comply with the request of the lessee the lessee is not entitled to terminate the tenancy. Under S. 108 he could remedy the breach himself after giving a reasonable notice to the lessor and to recover the amount expended by him together with interest either by deducing it from the rent or otherwise. (*Mookerjee and Chotzner, JJ.*) BIJOI CHANDRA SINGH *v.* HOWRAH AMTA LIGHT RAILWAY CO., LTD.
38 C. L. J. 177 : 1923 Cal. 524.

Transfer of Interest.

——— S. 108 (j)—*Transfer of interest—Occupier of a house in* abadi qussaban.

The rights of an occupier of a house in *Abadi qussaban* in *Mohalla Atala* are those of a lessee holding under a building lease, and in the absence of evidence to the contrary are transferable. (*Chamier and Piggott, JJ.*) ABDUL HAQ *v.* DATTI LAL. **37 All. 144 : 26 I. C. 446 : 13 A. L. J. 168.**

——— S. 108 (1)—*Transfer of interest—Liability to pay rent.*

A lessee who transfers his interest in a portion of the property leased does not thereby escape liability to pay rent to the landlord under the term and covenant contained in the lease. 22 C. 494, ; 22 C. 494, Ref. (*Ghose, J.*) MANMATHANATH CHUKERBUTTY *v.* BALAICHANDRA BAG.
1924 Cal. 359.

——— S. 108 (j)—*Transfer of interest—Usage against — Noakali Dt.—Lease for erection of houses.*

In the District of *Noakali* and its neighbourhood there is no local usage or custom prohibiting the transfer of an *Osat raiyati* holding granted for the purpose of erecting houses without the landlord's consent. (*Fletcher and Cuming, JJ.*) SRIMATI HEMAPROVA MOZUMDAR *v.* DEBENDRANATH.
51 I. C. 953.

——— S. 108 (j)—*Transfer of interest—Liability of original lessee for rent.*

Under S. 108, cl. (j) of the Act, the liability of a lessee to pay rent continues even after he has parted with his interest in the lease, and it is no answer to a suit for rent that a transferee from the lease is willing to pay the rent. (*Fletcher and Huda, JJ.*) AKRUMANI *v.* MADHAB CHANDRA.
47 I. C. 800.

——— S. 108 (j)—*Transfer of interest—Homestead, if transferable.*

The interest of a lessee of a homestead is transferable under the Act. But it will not be so transferable if it was not in existence prior to the coming into operation of the Act. (*Fletcher and Smither, JJ.*) MOHENDRA LAL *v.* KRISHNA KUMARI DEBI.
46 I. C. 656.

——— S. 108—*Transfer of interest—Lessee—Under-lessee—Liability of, to lessor.*

There is neither privity of contract nor privity of estate between the head lessor and the under-

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Transfer of interest.

lessee, and hence the under-lessee is not personally liable for the rent reserved by, nor on the covenants contained in, the head lease (*Mookerjee and Beachcroft, JJ.*) AKSHOY KUMAR *v.* AKMAN MOLLA.
20 C. L. J. 551 : 27 I. C. 397 : 19 C. W. N. 1197.

——— **S. 108 (j)**—*Transfer of interest—Lease for general purposes—Heritable and transferable.*

A lease for a definite term for general purposes is heritable, and when the conduct of the parties, shows it to be transferable, it must be treated as such. 6 W. R. 48 (P. C.) Ref. to (*Jenkins, C J. and Mookerjee, J.*) KHITISH CHANDRA ROY *v.* BHIKAN MAMU PRAMANIK.
25 I. C. 530 : 19 C L. J. 448.

——— **S. 108 (j)** — *Transfer of interest—Sub-lease*

In the absence of a covenant to the contrary a tenant has power to sub-let. (*Reid, C. J.*) ALLAH DITTA *v.* FARZ BIBI.
33 P. R. 1914 : 35 P W. R. 1914 : 23 I. C. 395 : 106 P. L R. 1914.

——— **S. 108**—*Transfer of interest—Notice to quit—Assignee of reversion.*

Where there was an outstanding monthly tenancy at the time of the grant of a lease for 20 years in favour of the plff., the plff. is entitled to give a valid notice to quit to the monthly tenant of the premises and to eject the latter on the expiry of the period prescribed by such notice. The provisions of the T. P. Act are the same as the English Law on the matter. (*Spencer and Krishnan, JJ.*) MANICKAM *v.* RATNASWAMI.
(1917) M. W. N. 837 : 6 L W 689 : 43 I. C. 210 : 33 M. L. J. 684.

——— **S. 108 (j)**—*Transfer of interest—Mortgage with possession from lessee—Liability for rent.*

A mortgagee with possession from a lessee is not liable to the lessor for rent, there being neither privity of estate nor privity of contract between the parties. Even after the assignment by the lessee he is liable for rent unless the lessor accepts rent from transferee who is liable on and by reason of the transfer even if he has not taken possession. (*Wallis, C. J. and Spencer, J.*) NOCHULLIYIL EAZHUVAN THITHUS SON *v.* ERALPOD RAJAH.
40 Mad. 1111 : 21 M. L. T. 401 : 40 I. C. 841 : 32 M. L. J. 442

——— **S. 108**—*Transfer of interest—Sub-lessee—Termination of lease.*

When a lease is validly determined, a sub-lessee becomes liable to pay mesne profits to the lessor as he is in illegal occupation (*Sadasiva Aiyar and Napier, JJ.*) SHIVARAMA *v.* ALAGAPPAH.
2 L W. 946 : 31 I. C. 211 : (1915) M.W. N. 845.

——— **S. 108 (j)**—*Transfer of interest—Assignee of lessee.*

The assignee of a tenant is not bound by proceedings taken against the original tenant even in the absence of notice to or knowledge of the landlord of the assignment. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) KESAVASAMI IYER *v.* NARAYANA CHETTY.
(1913) M. W. N. 93 : 18 I. C. 632 : 13 M. L. T. 95 : 24 M. L. J. 228.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Waste.

——— **S. 108 (j)**—*Transfer of interest—Sub-lease — Rent — Breach of covenant—Right of lessor against sub-lessee.*

Where a lessee grants a sub-lease in contravention of the terms of his lease, the lessor has no cause of action against the sub-lessee either for rent or for damages, but he can recover damages for breach of covenant from the lessee. (*Mittra, J.*) SITARAM MAHARAJ *v.* NARAYAN.
56 I. C. 268.
[See also 1 Pat. L. J. 1 : 33 I. C. 408: 3 Pat. L. W. 80.]

——— **S. 108 (j)**—*Transfer of interest—Sub-lease—Covenants.*

A person who acquires a leasehold interest is bound to investigate the title of his lessor and is affected with constructive notice of any covenant contained in the documents forming part of the claim of title of his lessor. All under-lessees have constructive notice of the covenants of the head lease when the under-lessor on the face of the under-lease appears himself to be holding under a lease. (*Das and Foster, JJ.*) THE LODNA COLLIERY CO., LTD. *v.* BEPIN BEHARI.
55 I. C. 113 : 1 Pat. L. T. 84.

Waste.

——— **S. 108 (n) and (o)**—*Waste—Lease of godown—Damage to neighbouring godown by falling of premises—Liability of tenant.*

In a suit for damages against a landlord and tenant for injury done to a neighbouring godown by the crash of its walls. *Held*, that the landlord was not liable because when the godown was let, it was in a fit and proper condition and he had only contracted to make minor repairs, but the tenant was liable as tenant to make good the damage sustained by the plff. (*Beaman, J.*) BAI MONGHIBAI *v.* DOONGERSEY LAKSHMIDAS.
43 I. C. 273 : 19 Bom. L. R. 887.

——— **S. 108 (m) and (o)**— *Waste — Permissive and voluntary—Liability of tenant.*

The doctrine of permissive waste states that a tenant is bound to take reasonable care of the property entrusted to him and see that through no neglect of his own it is irreparably damaged. There is no implied warrants to repair in a contract of lease. To prove voluntary waste by the tenant the landlord must show that the tenant has not used the demised premises in a fair, reasonable and tenantable way. (*Beaman, J.*) DEONGERSEY *v.* KESHAVJI MEGHJI & CO.
43 I C. 258 : 19 Bom. L. R. 878.

——— **S 108 (c) and (m)**—*Waste—Negligence—Fire in premises—Repair to building—Notice.*

"Fire" is covered by the words "irresistible force" in S. 108 (m) of the T. P. Act and a tenant isnot in the position of an insurer of the landlord's premises against fire and he is not liable for loss caused by accidental fire Where the lessee of certain premises stored cotton bales therein and left them in charge of a watchman who left a lighted kerosene oil lamp in close proximity to the bales and the lamp burst causing considerable damage to the cotton and the premises. *Held*, (1) that the watchman was negligent, (2) that the lessee was

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 108—Miscellaneous.

liable for the damage caused, and (3) that the action of the lessee in disclaiming all liability and determining the tenancy amounted to waiver of notice. (*Wallis, C. J. and Krishnan, J.*) GIRDARIDOSS *v.* PONNU PILLAI. **39 M. L. J. 233 : 12 L. W. 19 : 59 I. C. 252 : 28 M. L. T. 464.**

Miscellaneous.

——**S. 108**—*Lease drawn up so as to the collateral security for a mortgage also—Effect.*

The appellant was the lessee under a lease granted to him on the 12th September 1912. The lease in question affected a joint family estate that was held by the lessor and his infant son the first respondent. Contemporaneously with the lease two other documents were executed ; one was a sale of a part of the family property and the other a mortgage both in favour of the present appellant. The lease was an unusual document which contrived to secure that the lease should at the same time serve the purpose of a lease and a collateral security for the mortgage-debt for, the terms provided, that out of the rent payable by the lessee under its terms, the interest that was due to him upon his mortgage debt should be deducted, the result being that after all the different payments had been made as the lease provided, the gross amount of Rs. 16,765 rent was reduced to Rs. 3,804 per annum. *Held*, it must be regarded as it was drawn and so regarding it is impossible successfully to contend that the lease is of such a character that it would justify the manager of a joint family estate binding the joint family property by means of its terms. (*Lord Buckmaster*) NARAIN DAS *v.* ABINASH CHANDER. **L. R. 3 P. C. 129 : 27 C. W. N. 299 : 31 M. L. T. (P.C.) 217 : 21 A. L. J. 201 : 16 L. W. 780 : (1922) M. W. N. 791 : 37 C. L. J. 457 : 4 U. P. L. R. (P. C.) 111 : 44 M. L. J. 728 : 1922 P. C. 347 (P. C.).**

——**S. 108**—*Lease by usufructuary mortgagee how far binding on mortgagor.*

On general principle a lease granted by a mortgagee in possession cannot endure beyond the duration of the mortgage and will be binding on the mortgagor only so far. A person so taking a lease from such a mortgagee is presumed to know the limitation on his lessor's rights. (*Piggott, J.*) THE COLLECTOR OF BASTI *v.* SARMAN GHARAK. **11 I. C. 817 : 8 A. L. J. 802.**

——**S. 108 (h)**—*Lessees from mortgagor declared subsequent incumbrancers and allowed to redeem—Failure to redeem—Estoppel.*

Where in a mortgage suit, the tenants of the mortgagor were declared to be subsequent incumbrancers and not tenants under a permanent tenure created prior to the mortgage and were allowed to redeem, but failed to redeem and the property was sold, the tenants were estopped from saying subsequently that their tenancy was prior to the interest of the auction-purchaser. (*Fletcher and Chatterjee, JJ.*) KANAI LAL JALAM *v.* RASIK LAL SADHU KHAN. **23 I. C. 762 : 19 C. W. N. 361.**

——**S. 108 (i)**—*"Lease of uncertain duration"—Redemption of a kanom mortgage.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 109.

Where in a redemption suit of a *kanom* mortgage the decree allows the mortgagor to deposit the decree amount within six months from the decree, the *kanom* mortgagee sought to be redeemed is deemed to hold the mortgaged property under a "lease of uncertain duration" (*Sadasiva Aiyar and Spencer, JJ.*) NARAYANAN NAMBUDRIPAD *v.* KRISHNA PATTER. **(1914) M. W. N. 160 : 15 M. L. T. 160 : 22 I. C. 515 : 26 M. L. J. 348.**

——**S. 108**—*Lessor and lessee—Rights and liabilities of—Person let into possession after decree.*

A lessor cannot exercise any dominion over the demised portion during the pendency of the lease. He is not justified in letting the land to any tenant without the assent of the lessee. The position of the person so let into possession by the lessor will, during the pendency of the lease, be that of a trespasser. (*Mullick and Atkinson, JJ.*) KADIR BAKSH *v.* SHEO PRASAD MISSER. **3 Pat. L. W 195 and 277 : 42 I. C. 111 : 2 Pat. L. J. 713.**

——**Ss. 109 and 111 (g)**—*Lease—Transfer of reversion—Forfeiture incurred before breach.*

A transfer of the reversion of a lease carries with it the right to enforce forfeiture of the lease for breach of a condition even where the breach has occurred prior to the transfer. (*Beaman and Heaton, JJ.*) VIGHNESHWAR *v.* MAHABLESHWAR. **43 Bom 28 : 47 I. C. 198 : 20 Bom. L. R. 767.**

——**S. 109**—*Transfer of lease-hold interest—Absence of notice to lessee—Suit for rent—Dismissal not proper.*

Where the lower Court dismissed a suit for rent on the ground that the defendant was not a tenant of the plaintiff for the reason that the transfer of the property by defendant's lessor to the plaintiff was not notified to the defendant *held*, that S. 109 of the T. P. Act provided no penalty for want of notice except the loss of rent paid by the lessee to the original lessor and that the dismissal of the suit *in toto* was improper, (*Le Rossignol, J.*) BHOLA NATH *v.* SUPPER. **1922 Lah. 318 (1).**

——**S. 109**—*Assignee of reversion from lessor—Notice to quit.*

The words "transferee of any interest" in S. 109 include lessee. The English rule that the person entitled to the immediate reversion of the demised premises is the proper person to give notice to quit applies to India. 33 M. L. J 684, Foll. (*Martineau, J.*) PARBHU RAM *v.* TEK CHAND. **53 I. C. 865.**

——**S. 109**—*Assignee of reversion in portion of demised property—Right to eject lessee for due cause from that part.*

A lessor is not entitled to eject the lessee from a part only of the holding, but an assignee of the reversion in part of the demised premises is entitled to eject the lessee for due cause from such part on payment of the value of the improvements on that part. This rule applies to tenancies

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 109.

in Malabar also. (*Wallis, C. J., Oldfield, Sadasiva Aiyar, Coutts Trotter and Seshagiri Aiyar, JJ.*) PUTHIAPURAYIL KANNYAN BADUVAN *v.* CHENNYANTEKATH. **42 Mad. 603 : (1919) M. W. N. 401 : 10 L. W. 95 : 51 I.C. 286 : 37 M. L. J. 47. (F. B.).**

——S. 109 — *Lessee claiming under foreclosure decree-purchaser.*

A lease was granted after a mortgage. The lessee purchased rights under a foreclosure decree The lessor instituted the present suit after the expiry of the lease.

Held, when the lease as terminated it is open to the man in possession to dispute the lessor's title to the land on the ground that ownership of it had passed either by a transfer or operation of law, to another. (*Prideaux, A. J. C.*) DAULAT *v.* SARDAR SINGH. **1923 Nag. 91 (2).**

——S. 109—*Tenancy—Transferability—Presumption—Long continued possession.*

When a landlord sues a person as a trespasser and that person sets up a transfer from a tenant, the latter must prove the tenancy and, also the validity of the transfer. With regard to the tenancy of the homestead land created before T. P. Act, the tendency of recent decisions has been to establish that these tenancies are in general non-transferable 12 W. R 495, Ref. The only exception to the above rule is when there has been an erection of a pucca building or an acquiescence on the part of the landlord while the tenant spends a large sum upon the land, 32 Cal 1023 : 25 Cal. 896 Rel. Mere long continued possession does not raise a presumption of transferability (*Mullick and Kingsford, JJ.*) AMBICA PRASAD SINGH *v.* BALDEO LAL. **1 Pat. L. J. 253 : 20 C. W. N. 1113 : 36 I. C. 126 : 2 Pat. L. W. 417.**

——S. 109—*Assignment of liability under contract—Other party.*

The benefit of a contract can be assigned by one party without the consent of the other but the liability cannot be so assigned. (*Parlett, J.*) DEIKMANN BROTHERS & CO. *v.* SULAIMAN HAJEE BROTHERS & CO. **7 L. B. R. 95 : 22 I. C 940 : 7 Bur. L. T. 51.**

——S. 110—*Time of commencement.*

Unless otherwise stipulated. a lease takes effect from the execution of the instrument under S. 110 of the Act. (*Mookerjee and Roe, JJ.*) KAILAS CHANDRA BHANMICK *v.* BEJOYCANT LAHIRI. **50 I. C. 177 : 22 C. W. N. 190.**

——S. 111.

Forfeiture.
Merger.
Notice to quit.
Surrender.
Miscellaneous.

Forfeiture.

Breach of Condition.
Co-lessor.
Denial of title.
Non-payment of rent.
Overt Act.
Miscellaneous.

TRANSFER OF PROPERTY ACT (IV OF 1882), S 111—Forfeiture—Breach of condition.

Forfeiture—Breach of Condition.

——S. 111 (g)—*Forfeiture—Breach of condition—Ejectment suit—Overt act necessary.*

A lease subject to S. 111 (g) is not determined immediately on the breach of covenant : the breach must be followed by some overt act on the part of the lessor. Mere institution of ejectment suit by the lessor, is not such an overt act as the forfeiture must be complete and lease determined before the action is brought. (*Mookerjee, A. C J. and Fletcher, J.*) MOTILAL PAL CHOWDHARY *v.* CHANDRA KUMAR SEN. **60 I. C. 312 : 24 C. W. N. 1064.**

——S. 111 (g)—*Forfeiture—Breach of condition—Permanent lease.*

A lease in perpetuity is liable to be forfeited for breach of a covenant notwithstanding that it is permanent. *Mookerjee, J.*—A covenant for ferfeiture of a lease upon an involuntary sale is valid both under the English and Indian Law though S. 12 of the T. P. Act expressly mentions the case of forfeiture for bankruptcy and does not specifically refer to cases of forfeiture for involuntary sales. A covenant for forfeiture of a lease by voluntary alienation does not include by implication a covenant for forfeiture for involuntary alienation, though in one sense the latter may be attributed to a remote act of the party. (*Sanderson, C. J. and Mookerjee, J.*) DWARKA NATH ROY *v.* MATHURA NATH ROY. **24 C. L. J. 40 : 34 I. C. 833 : 21 C. W. N. 117.**

——S. 111 (g)—*Forfeiture—Breach of condition.*

Where in a lease there was a condition that the lessee should dwell on the land but there was no provision that on breach thereof the lessor might re-enter or that the lease shall become void. *Held*, that on the lessee ceasing to dwell on the land after he had entered into possession, no forfeiture could take place and that the lessee could not be ejected. (*Mookerjee and Beachcroft, JJ.*) NABAKUMAR DATTA *v.* TRILOKYA NATH BOSE. **24 I. C. 354.**

——S. 111 (g)—*Forfeiture—Breach of condition.*

Unless the lease expressly provides to the contrary, a breach of a condition of a lease does not effect its forfeiture. (*Reid, C. J.*) ALLAH DITTA *v.* FARAZ BIBI. **35 P.W.R. 1914: 106 P. L. R. 1914 : 23 I. C. 395 : 33 P. R. 1914.**

——S. 111 (g)—*Forfeiture—Breach of condition—Covenant against alienation—Re-entry.*

Per *Seshagiri Aiyar, J.*—A provision in a mining lease restraining the lessee from assigning and empowering the lessor to re-enter in the event of assignment is not enforceable where the lessee mortgages his rights, unless the whole of his interest is transferred by mortgage. (*Wallis, C.J. and Seshagiri Aiyar, J.*) ANSUR SUBHA NAIDU *v.* SECRETARY OF STATE. **41 I. C. 770 : (1917) M. W. N. 794.**

——S. 111 (g)—*Forfeiture—Breach of condition—Covenant against alienation.*

Where a lessee under a lease containing a provision against alienation and a clause for re-entry, created a usufructuary mortgage on it but

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Forfeiture—Breach of Condition.

remained himself in possession, the lease is not forfeited (*Spencer and Tyabji, JJ.*) MOIDEEN *v.* GOPALA KUDWA. **31 I. C. 454.**

——— **S. 111 (g)**—*Forfeiture—Breach of condition—Agricultural lease.*

In the case of an agricultural lease not governed by the T. P. Act, where there has been a breach of condition involving forfeiture, the cause of action to the landlord to determine the tenancy arises immediately on the breach and no overt act on the landlord's part is necessary to determine the tenancy. (*Sadasiva Aiyar and Tyabji, JJ.*) VIDYAPURNA THIRTHA SWAMIAR *v.* RANGA SIPAYYA, **14 M. L. T. 344 : 25 M.L.J. 486 : 21 I. C. 405 : (1913) M. W. N. 901.**

——— **S. 111 (g)**—*Forfeiture—Breach of condition—Lease for building purposes—Presumption.*

Where there is an instrument defining the terms of the tenancy other circumstances need not be considered in determining the nature of the tenancy. There is no presumption of a permanent tenancy where land is let for building purposes and the tenant is not entitled to the value of the buildings on ejectment. The clause containing permissible conditions should not be entirely disregarded but should be given effect to as far as possible. (*White, C. J., Sankaran Nair and Tyabji, JJ.*) SIVATHA MUTHU ASARI *v.* REV, J. H. MASQUITA. **(1913) M. W. N. 480 : 13 M. L. T. 513. 19 I. C. 824 : 24 M. L. J. 642.**

[Affirming on appeal 13 M L. T. 506 : 19 I. C. 721 : (1914) M. W. N. 67.

——— **S. 111 (g)**—*Forfeiture—Breach of condition—Penal clause, relief against.*

A stipulation in a *patta* that the tenant should relinquish the right of cultivation, if he cultivated dry lands with wet crops without the landlord's consent, is penal and cannot be enforced since there is no consideration. (*Sankaran Nair and Ayling, JJ.*) MALLAKARJUNA PRASADA NAIDU *v.* VEMULA PALLI SUBBAYA. **36 Mad. 4 : 9 M L. T. 443 : 10 I. C. 68 : (1911) 1 M.W.N. 315.**

Forfeiture—Co-lessor.

——— **S. 111 (g)**—*Forfeiture—Co-lessor.*

A co-lessor cannot determine the lease. (*Piggott, J.*) PRAYAG SONAR *v.* MOTAR SINGH, **24 I C, 624.**

——— **Ss. 111 and 112**—*Forfeiture—Co-lessor—Waiver by.*

Where a lease-deed recited " If I fail to conduct accordingly, I shall at once give up the said land " *Held*, that it was not confined to a covenant to pay rent but extended to all other covenants Alienation was held not to include usufructuary mortgage without possession under the lease-deed in this case. Acceptance of rent by any one of the lessors might operate as a waiver of forfeiture for breach, committed during the period, when he had the landlord's interest in the land. The law leans against forfeiture. (*Spencer and Tyabji, JJ.*) MOIDEEN SAIBA *v.* GOPALA KUDWA. **31 I. C. 454.**

——— **S. 111 (g)**—*Forfeiture—Co-lessor—Enforcement of clause by.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Forfeiture—Denial of title.

Where two joint lessors have, subsequent to the lease, become divided, one of them may enforce the forfeiture clause in the lease notwithstanding that the other has waived his right to enforce the same. 29 Mad. 29, Foll; 35 Cal. 807, Diss. from. (*Sadasiva Aiyar and Tyabji, JJ.*) KORAPALA *v.* NARAYAN. **38 Mad. 445 : (1913) M.W.N. 655 : 20 I. C. 930 : 25 M. L. J.315.**

——— **S. 111 (g)**—*Forfeiture—Co-lessor—Determination of tenancy.*

To maintain a suit for ejectment of a tenant, by a co-sharer landlord to the extent of his share proof is necessary of the determination by all the landlords of the tenancy by an overt act. (*Chatterjee, J.*) ATUL CHANDRA MAJUMDAR *v.* BEJOYA DHUPI. **11 I. C. 695.**

Forfeiture—Denial of title.

——— **S. 111 (g)**—*Forfeiture—Denial of title.*

A denial of title to work a forfeiture must be before suit and by matter of record. The principle of the section is applicable to cases not governed by the T. P. Act. (*Lord Phillimore.*) MAHARAJA OF JEYPORE *v* RUKHIMI PATTA-MAHADEVI. **42 Mad. 589 : 36 M. L. J. 543 : 7 A. L. J. 552 : 29 C. L. J. 528. 21 Bom. L. R. 655 : (1919) M. W. N. 271 : 23 C. W. N. 889 : 26 M. L. T. 16 : 10 L. W. 381 : 50 I. C. 631 (P. C.)**

[Affirming with a slight variation 2 L W. 483 : 29 I. C. 365 : (1915) M. W. N. 346.]

——— **S. 111 (g)**—*Forfeiture—Denial of title—License.*

A licensee in possession unlike a tenant, by denying the title of the grantor of the license, does not lose the license nor becomes liable to immediate ejectment. (1901) A. W. N. 157, Foll. (*Tudball and Rafique, JJ.*) AKBAR ALI KHAN *v.* SHAH MUHAMMUD. **39 All. 621 : 40 I. C. 443 : 15 A. L. J. 592.**

——— **S. 111 (g)**—*Forfeiture—Denial of title—Filing of suit—Non-payment of rent.*

In order to work a forfeiture the denial of landlord's title must be unequivocal and unambiguous, and the mere non-payment of rent or the mere mortgaging by the tenant in more or less ambiguous terms is not sufficient work for forfeiture of his interest.

The mere filing of a suit against a tenant does not amount to an act showing the intention of the landlord to determine the lease within S. 111 (g). (*Richards and Banerjee, JJ.*) PRAGNARAIN *v.* KADAR BAKSH. **35 All. 145 : 11 A L. J. 115 : 18 I. C. 728.**

[*See also* 13 N. L. R. 11 : 39 I. C. 15 : Also 6 I. C. 927 : 6 N. L. R. 83.]

——— **S. 111 (g)**—*Forfeiture—Denial of title—Change in nature of tenancy.*

An assertion by an annual tenant that he is a permanent tenant is not a denial of the landlord's title Such a tenant is therefore entitled to notice before he can be evicted. (*Heaton, J.*) GOL DAJI HATHI *v.* DOD LAXMAN KURSAN. **58 I. C. 226 : 22 Bom. L. R. 648.**

——— **S. 111**—*Forfeiture—Denial of title—Assertion of denial in plaint.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Forfeiture—Denial of title.

Where a landlord sues for ejectment of a tenant the mere institution of the suit and the assertion in the plaint as to the repudiation of the landlords's title constitutes a sufficient manifestation, of the landlord's intention to determine the lease for the purposes of clause (g) of S. 111. (*Scott, C.J and Batchelor, J.*) ISABALI *v.* MAHADU.
42 Bom. 195 : 43 I. C. 851 : 20 Bom. L. R. 29.

——— S. 111 (g)—*Forfeiture—Denial of title—Permanent lease.*

A permanent tenure is liable to forfeiture on the ground of disclaimer of the landlord's title to constitute a disclaimer it must be the renunciation by a party of his character as tenant by setting up a title in a third person or by claiming title in himself. (*Chatterjee and Smither, JJ.*) ANANDA CHARAN DATTA *v.* MOHINCHANDRA GUHA. **42 I. C 673 : 26 C. L. J. 261**

——— S. 111 (g)—*Forfeiture—Denial of title—Plea of—Jus tertii.*

Where a tenant does not deny the whole title of his landlord but sets up a right of a third party as co-sharer, there can be no forfeiture. 9 C.W.N 928. Foll. (*Chapman and Mullick, JJ.*) NEAMATULLA *v.* BAIJIULLAH. **26 I. C. 619.**

——— S. 111 (g)—*Forfeiture—Denial of title—Payment of rent to third person.*

Payment of rent by a tenant to a third person would not amount to a denial of the landlord's title or to adverse possession against him unless it can show that such possession was in denial of the title of the real owner to his knowledge. (*Chatterjee and Teunon, JJ.*) SHYMA CHARAN PAHARY *v.* RAM PROSAD DAS. **22 I. C. 796.**

——— S. 111 (g)—*Forfeiture—Denial of title to be made to his knowledge prior to suit.*

To work a forfeiture, the denial of the landlord's title must be made to the knowledge of the landlord prior to suit and it must be unequivocal and clear. 41 M. 629, Foll. (*Napier and Odgers, JJ.*) SREEDHARAM VALIA RAJAH *v.* NARAYANA NAMBUDRIPAD. **(1921) M. W. N. 639 : 71 I. C. 270 : 41 M. L. J. 525.**

——— S. 111 (g)—*Forfeiture—Denial of title—Perpetual lease.*

To forfeit a tenancy a denial of the landlord's title by a tenant must be clear and unequivocal and must be brought to the knowledge of the landlord. If a tenant impeaches a title of the landlord on the ground that the property has vested in him (tenant) by adverse possession it amounts to denial of title. The acceptance by the tenant of a deed which described him as the absolute owner of the property does not operate as denial of title. A perpetual lease becomes forfeited on the denial of title. (*Oldfield and Seshagiri Aiyar, JJ.*) KOLENGERETH RAMAN NAIR *v.* MARIYAMMA. **43 Mad. 480 : (1920) M.W. N 332 : 56 I. C. 13 : 11 L. W. 513.**

——— S. 111—*Forfeiture—Denial of title—Permanent tenancy*—Bona fides—*Notice if necessary before ejecting.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Forfeiture—Denial of title.

Even a permanent and beritable tenancy, can be forfeited by a denial of the landlord's title. A denial of the derivative title of a person who has acquired the landlord's title works a forfeiture as much as the denial of the original landlord's title. If a tenant honestly doubtful and not intending to identify himself with a third party who sets up a title in himself against the real landlord, merely puts his alleged derivative landlord to the proof of the latter's title before the tenant could recognize him as such, such conduct may not constitute such a disclaimer of the title of the landlord as would work a forfeiture. (*Sadasiva Aiyer and Spencer, JJ.*) VENKATACHARIAR *v.* RANGASAMI.
25 M. L. T. 223 : 9 L. W. 282 : (1919) M. W. N. 336 : 51 I. C. 709: 36 M. L. J. 532.

——— S. 111 (g)—*Forfeiture—Denial of title—Applicability to agricultural lease.*

The principle of S. 111 (g), T. P. Act applies to agricultural leases. A denial of the landlord's title will work forfeiture of the lease even though it be for a long term or the life of the lessee or a permanent lease. A mere assertion of title not communicated to the landlord is not enough to work a forfeiture. In order to relieve against forfeiture the tenant must prove that the disclaimer was due to fraud, mistake or accident of the landlord and that he was not careless or negligent. In other cases there is no power to relieve against forfeiture for denial of title. A mere recital in a deed of assignment by the tenant of his own lands that the lease lands were also his own, does not amount to a disclaimer in the absence of its having been addressed to the landlord or followed by a transfer. (*Seshagiri Aiyar and Napier, JJ.*) KOMULUKUTTI *v.* PULIKALAKATH MUHAMMAD.
41 Mad. 629 : 1918 M. W. N. 200 : 23 M. L. T 178 : 7 L. W. 291 : 45 I. C. 743 : 34 M. L. J. 170.

——— S. 111 (g)—*Forfeiture—Denial of title—Repudiation—Disclaimer of title of landlord.*

Direct repudiation of relationship or distinct claim to hold possession of a land wholly at variance with that relation, is a disclaimer of landlord's title. (*Ayling and Tyabji, JJ.*) KILATH CHOZHAN *v.* KERTHWA.
31 I. C. 220 : (1916) 1 M. W. N. 11.

——— S. 111 (g)—*Forfeiture—Denial of title.*

A person having substantial rights in a land does not deny the landlord's title of an attenuated character if he asserts a title as owner. 25 I. C. 944 Foll. (*Sadasiva Aiyar and Phillips, JJ.*) KOLAGORATH RAMAN NAYAR *v.* KAMOTH
(1915) M. W. N. 793 : 31 I. C. 184 : 2 L. W. 941.

——— S. 111 (g)—*Forfeiture—Denial of title.*

A lessee describing his holding as independent and permanent at fixed rent incurs no forfeiture. (*Sankaran Nair and Oldfield, JJ.*) MAHARAJA OF JEYPORE *v.* RUKMINI PATTAMHADEVI.
(1915) M. W. N. 346 : 29 I. C. 365 : 2 L. W. 483.

[Affirmed with slight variation by 50 I. C, 631 : 42 Mad. 589 (P.C.)]

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Forfeiture—Denial of title.

——S. 111 (g)—*Forfeiture—Denial of landlord's title—Setting up* jus tertii.

A right of forfeiture should not be extended in this country beyond what the landlord has become entitled to by long established precedents. 17 Cal. 196 ; 20 Cal. 101 ; 2 C. L. J. 389, Foll. A setting up of *jus tertii* in a suit in which the landlord is not a party, and a disputing by the tenant of the extent of the landlord's interest are not such denials of title as to entail forfeiture. 20 M. L. J. 315 ; 2 C. L. J. 389, Foll. (*Sadasiva Aiyar and Napier, JJ.*) ABBAKKA SHETHI *v.* SESHAMMA. **(1914) M. W. N. 915 : 25 I. C. 944 : 16 M.L.T. 442.**

——S. 111 (g)—*Forfeiture—Denial of title in the course of pleading.*

It is the settled law that a deft.'s denial of the plff.'s title in the course of the pleading cannot furnish a cause of action. 20 B. 759 Ref. Mere non-payment of rent or even mortgaging the premises as belonging to the tenant does not necessarily constitute a denial of title. A denial to work a forfeiture must be an unequivocal and unambiguous one. 35 A 145, Ref (*Mittra, Offg. A.J.C.*) BHIVAJI *v.* TUKARAM. **39 I. C. 15 : 13 N. L. R. 11.**

——S. 111 (g)—*Forfeiture—Denial of title—Overt act.*

A denial of the landlord's title causes a forfeiture of the tenancy enabling the landlord to eject the tenant as a trespasser. Notice of the determination of tenancy is not necessary in such a case. It is enough if the landlord does something to show his intention to terminate. (*Jwala Prasad, J.*) MUHAMED ABDUL LATIF *v.* HABIBUR RAHMAN. **45 I. C. 642.**

——S. 111 (g)—*Forfeiture—Denial of title—Permanent lease.*

A permanent tenancy governed by the T. P. Act is determined if the tenant denies landlord's title. 24 C. 440, Foll. (*Mullick, J.*) BIDYA NATH *v.* KHIKHINDA KOER. **35 I. C. 544 : 1 Pat. L. J. 157.**

Forfeiture—Non-payment of rent.

——S. 111 (g)—*Forfeiture—Non-payment of rent—Execution proceedings.*

The rule that the Courts of Equity will not forego their power to grant relief against forfeiture in the case of non-payment of rent, where the relations are those of tenant and landlord applies to a suit to enforce a decree embodying the agreement and to a proceeding in execution. (*Scott, C J. and Batchelor, J.*) BALAMBHAT RANJI BHAT *v.* VINAYAK GANAPAT RAO. **35 Bom. 239 : 10 I. C. 746 : 13 Bom L. R. 154.**

——Ss. 111 (g) and 114—*Forfeiture—Non-payment of rents—Covenant for re-entry—Relief against.*

Where the landlord had taken a large sum by way of premium under a registered lease for ten years and the rent was payable on the first of every lunar month failing which the lease was to stand cancelled *held* that it was against equity and good conscience to allow the landlord to cancel the lease after having taken such a large sum as premium simply on account of a few days

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Forfeiture—Overt Act.

delay in payment of rent especially as the lessee had not even then taken possession of the premises. (*Broadway and Abdul Qadir, JJ.*) KALIAN *v.* JAWAHAR SINGH. **5 Lah. L J 99 : 1924 Lah. 49.**

——S. 111 (g)—*Forfeiture—Non-payment of rent.*

The Court has discretion to relieve against forfeiture of tenancy even though the days of grace are allowed. 29 M. L. J. 381, Foll. (*Napier and Srinivasa Aiyangar, JJ.*) NARAYAN *v.* KASHAPPAYA. **32 I. C. 525.**

——S. 111 (g)—*Forfeiture—Non-payment of rent—Money not paid by lessee or by Insolvency Court.*

A lease cannot be forfeited in the absence of an express covenant to that effect in the lease-deed, merely because the money is not paid by the lessee or on his insolvency by the Insolvency Court. (*Dhobley, A.J.C.*) MAHADEO *v.* JAINARAYAN. **62 I. C. 850 : 4 N. L. J. 61 and 207.**

Forfeiture—Overt Act.

——S. 111 (g)—*Forfeiture—Overt act—Breach of condition—Institution of suit.*

Under Cl. (g) of S. 111 of the T. P. Act it is necessary for the plff. to establish that the lessor had, prior to the institution of the suit, done some act showing an intention to determine the lease. Where the rights and obligations of the parties are regulated by S. 111 of the T. P. Act, there is no determination of a lease by forfeiture immediately on the breach of a covenant but such breach must be followed by an overt act on the part of the lessor before the institution of the suit for ejectment. The institution of the suit cannot be rightly regarded as the requisite act because the forfeiture must be completed and the lease determined before the commencement of the action. 45 Cal 469, Foll. A suit for ejectment does not lie in respect of a portion of the lands of a tenancy which has been forfeited or a condition whereof has been broken. (*Mookerjee, C. J., and Fletcher, J.*) MOTILAL PAL CHOWDHURY *v.* CHANDRA KUMAR SEN. **60 I. C. 312 : 24 C. W. N. 1064.**

[*See also* **14 I. C. 747 : 9 A. L. J. 794.**]

——S. 111 (g)—*Forfeiture—Overt act—Ejectment—Cause of action.*

There can be no forfeiture on breach of a covenant under S. 111 unless the lessor does some overt act showing his intention to determine. It need not be a formal notice to quit. The institution of a suit for ejectment cannot be regarded as the overt act Case-law discussed (*Mookerjee and Walmsley, JJ.*) NAURANG SINGH *v.* JANARDHAN KISHORE LAL SINGH. **45 Cal. 469 : 22 C. W. N. 312 : 41 I. C. 952 : 27 C. L J 277.**

——S. 111 (g)—*Forfeiture—Overt act.*

Where S. 111 dose not apply it is not necessary for a landlord prior to the institution of a suit for ejectment of the tenant to exhibit his intention to avail himself of the forfeiture, as the forfeiture is complete as soon as the breach occurs. (*Sanderson, C. J. and Mookerjee, J.*) DWARKA NATH ROY *v.* MATHURA NATH ROY. **24 C. L. J. 40 : 34 I. C. 833 : 21 C. W. N. 117.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Forfeiture—Overt Act.

——S. 111 (g)—*Forfeiture—Overt act—Necessity for, prior to suit.*

Denial of a landlord's title by a tenant to work a forfeiture of the teancy must be in clear and unmistakeable terms and must be before the suit Denial in the written statement in the suit is not sufficient. Where a person has substantial rights in the land, his assertion of a title as owner does not amount to a denial of the landlord's title and does not involve a forfeiture. Though the T. P. Act does not, *proprio vigore* apply to the Punjab still the principles embodied therein may be applied as being principles of equity, justice and good conscience. 32 M. 589 Rel. (*Broadway, J.*) CHIRAGH DIN *v.* MAHOMED USMAN KHAN. **1924 Lah. 281.**

——S. 111 (g)—*Forfeiture—Overt act.*

In the case of leases not governed by the T. P. Act where there is a forfeiture by a denial of title no separate preliminary act on the part of the landlord is necessary to enable him to maintain a suit in ejectment. (*Sadasiva Aiyar and Spencer, JJ.*) VENCATACHARIAR *v.* RANGASWAMY. **25 M. L. T. 223 : 9 L. W. 282 : (1919) M. W. N. 336 : 51 I. C. 709 : 36 M. L. J. 532.**

——Ss. 111 (g) and 117—*Forfeiture—Overt act—Agricultural lease before the T. P. Act.*

A denial of the title of the assignee of the landlord in cases of agricultural leases before the Transfer of Property Act works a forfeiture and no overt act is necessary for determination of the lease. (*Abdur Rahim and Oldfield, JJ.*) RAMA IYENGAR *v.* ANGA GURUSWAMY. **8 L. W. 109 : 46 I. C. 62 : 35 M. L. J. 129.**

——S. 111 (g)—*Forfeiture—Overt act—When necessary—Cases not governed by the Act.*

The necessity for a further act besides the breach of the covenant in the forfeiture clause is a relic of the old English Common Law and is not necessary in the case of leases not governed by the T. P. Act. 34 M. 161; 23 M.L.J. 715 Foll. (*Sadasiva Aiyar and Tyabji, JJ.*) KORAPALU *v.* NARAYAN. **38 Mad. 445: (1913) M. W. N. 655 : 20 I. C. 930 : 25 M. L. J. 315.**

——S. 111 (g)—*Forfeiture—Overt act—Necessity of.*

It is not clear whether the landlord should do some act indicating his intention to avail himself of the forfeiture before instituting a suit. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) YUNGAMMA SHETTITI *v.* KOKATI SHETTITI. **16 I. C. 803 : (1912) M. W. N. 1135.**

Forfeiture—Miscellaneous.

——S. 111—*Forfeiture—Notice to quit unnecessary.*

S. 111 (g) of the T. P. Act does not make it obligatory upon the lessor to serve a notice to quit upon the lessee who has forfeited his tenancy; even a demand for possession is sufficient. 33 Cal. 339 ; 34 Cal. 57. (*Mookerjee and Beachcroft, JJ.*) RAMNATH SIL *v.* SIBA SUNDARI DEBYAI. **40 I. C. 348 : 25 C. L. J. 332.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Merger.

——S. 111 (g)—*Forfeiture—Under lease.*

Where a lease is forfeited an under-lease or any other interest created by the lessee is extinguished but not so when the lessee surrenders. (*Sanderson, C. J. and Mookerjee, J.*) DWARKA NATH ROY *v.* MATHURA NATH ROY. **24 C. L. J. 40 : 34 I. C. 833 : 21 C. W. N. 117.**

——Ss. 111 and 105—*Forfeiture—Permanent lease.*

S. 111 read with S. 105 applies to permanent leases and the principles of the section govern leases before the passing of the Act. (*Abdur Rahim and Oldfield, JJ.*) RAMA IYENGAR *v.* ANGA GURUSWAMY CHETTI. **8 L. W. 109 : 46 I. C. 62 : 35 M. L. J. 129.**

——Ss. 111, 112 and 116—*Forfeiture—Waiver of.*

Parties are not allowed to revive an old lease once determined under the election of the lessor for forfeiture under the terms of a lease So also the election to waive the forfeiture is irrevocable. The lessees are to pay compensation for use and occupation, when they are re-admitted after forfeiture as the old tenancy is not revived. (*White, C. J., Benson and Wallis, JJ.*) CHENGIAH *v.* DAMARA KUMARA THIMMA. **15 I. C. 445 : 24 M. L. J. 263.**

——Ss. 111 and 114—*Forfeiture—Nullity—Distinction between—English law and Indian law.*

English law undoubtedly did recognize a distinction between a condition of forfeiture and a clause of nullity, but whether it does still maintain that distinction is open to some doubt. The distinction has not been recognised in the Transfer of Property Act which is supposed to have given effect to the existing law in the country. (*Das and Adami, JJ.*) HIRANANDAN OJHA *v.* RAMDHAR SINGH. **4 P. L. T. 292 : 1 P. 363 : 1923 P. 528.**

Merger.

——S. 111 (b)—*Merger—Proprietary rights—Tenure holder—Merger, when takes place.*

Apart from statute a tenure does not necessarily merge in the proprietary rights upon the union of the two interests, 18 C. W.N. 860 ; 29 C. L. J. 427 Ref. Under S. 111, cl. (d) of the T. P. Act, there must be a union of the entire interest of the lessor and the lessee to constitute merger. Where a proprietor purchases the interest of a tenure-holder, there would be no merger unless the two interests are co extensive. (*Chatterjee and Newbould, JJ.*) MONMOTHA PAUL CHOUDHURY *v.* MOHENDRA NATH BOSE. **1922 Cal. 284.**

——S. 111 (d) and (b)—*Merger—Applicability of doctrine—Equity.*

Where two leases in favour of the same person for the same land are not conterminous, the lessors of the two leases having different rights and the leases have different lives though some part of their existence might be co-existent, the different interests do not merge either under the T.P. Act or under the general law of merger. The English doctrine of merger does not apply in its entirety to land tenures in India. The intention

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Merger.

of the parties must be looked to, in deciding whether there is a merger in equity and if that is not expressed the Court will look to the benefit of the person in whom the interests coalesce. (*Chatterjee and Walmsley, JJ.*) AMATOO *v.* SHEIKH MUKSAD ALI. 28 I. C. 314 : 19 C. W. N. 435.

——S. 111 (d)—*Merger—Applicability of doctrine—Leases created prior to Act.*

S. 111 (*d*) of the Act applies to leases created prior to passing of the Act, when the superior and lease hold interests vest in the same person subsequent to the Act. *Obiter.*—Prior to T. P. Act, the doctrine of merger did not apply to property in the mofussal. (*Teunon, J.*) ABDUL KARIM *v.* AHMAD ALI. 23 I C 612.

——S. 111 (d)—*Merger.*

On one and the same day A took lease of certain *khudkast* fields in a proprietary share of which he subsequently took a mortgage. *Held*, that lease is not permanently affected by the mortgage but that the tenant right remains in abeyance during the mortgage term. On the mortgage being set aside by redemption or otherwise the lease revives. In such case there is no merger. (*Drake-Brockman, J. C.*) KASHI *v.* DURGA. 12 I. C. 734 : 7 N. L. R. 154.

——S. 111 (d) and (e)—*Merger—When takes place.*

The entire interest of the lessee and the entire interest of the lessor must vest in the same person in the same right before it can be said that a lease of immoveable property has been determined by merger. (*Coutts and Das, JJ.*) LALA NATHUNI PRASAD *v.* SYED ANWAR KARIM. 53 I. C. 16.

Notice to quit.

——S. 111 (b) and (g)—*Notice to quit—Service tenure—Forfeiture of ejectment.*

Where a service tenure was created before the passing of the Act, on forfeiture landlord can re-enter without suit. If the tenancy was created after the passing of the Act, the position of the parties is to be determined with reference to either Cl. (*b*) or Cl. (*g*) of S. 111 of that Act. A service tenant holds the land on condition that if he refuses to render service the lease shall be put an end to and the lessor be entitled to re-enter ; if the tenant renounces his character as service tenant the lease to him determines and no notice is necessary to eject him. (*Mookerjee and Beachcroft, JJ.*) RAMNATH SIL *v.* SIBA SUNDARI DEBYA. 40 I. C. 348 : 25 C. L. J. 332.

——S. 111 (h)—*Notice to quit—Landlord—Joint receivers.*

A tenancy under joint receivers can be determined by a notice given by them jointly. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) CASIMA AHAMAD MOOLA *v.* ESUF HAJI AJAM. 34 I. C. 221 : 23 C. L. J. 453.

——S. 111 (h)—*Notice to quit—Lease before Act—Bengali calendar.*

In connection with notice to quit tenancy created before T. P. Act, the time of 6 months should be calculated according to Bengali calendar. (*Mittra, J.*) GOPINATH *v.* ABDUL GAFFUR. 30 I. C. 886 : 22 C. L. J. 74.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Notice to quit.

——S. 111 (h)—*Notice to quit—Time for removing buildings.*

Where a lease was not determined by a notice to quit, a tenant, who took his right under the decree, was given by the High Court 3 months' time to remove the buildings erected by him thereon. (*Fletcher and Chatterjee, JJ.*) KANAILAL JALAN *v.* RASIK LAL SADHU KHAN. 23 I. C. 762 : 19 C. W. N. 361.

——Ss. 111 and 106—*Notice to quit—Intention to determine—Inadequate notice.*

A notice by the landlord unequivocally expressing his intention to determine the lease on the ground of forfeiture determines the tenancy under S. 111 though it may not be an adequate notice under S. 106. (*Phillips and Odgers, JJ.*) TIRUMALPAD RAJAH *v.* NOOR MAHOMED. 14 L. W. 308 : (1921) M. W. N. 677 : 66 I. C. 48 : 41 M. L. J. 265.

——S. 111, Cl. (h)—*Notice to quit—Lawyer's notice.*

"Some act showing" lessors "intention to determine the lease" does not include only an attempt at re-entry or the filing of a suit for ejectment under S. 111, Cl. (*g*), but the lessor's lawyer's notice unequivocally terminating the lease is sufficient. (*Sadasiva Aiyar and Napier, JJ.*) SIVARAM *v.* ALAGAPPA. 2 L. W. 946: 31 I. C. 211 : (1915) M. W. N. 845.

——S. 111 (h)—*Notice to quit—Landlord and tenant—Purakudi service lands—Determination of tenancy.*

The section has no application to lands held on Purakudi service. It is the refusal or neglect to perform such service that determines the tenancy and the tenants render themselves liable to be evicted without any notice. A fifteen days' notice given after the harvest is completed, is not an improper notice and cannot be objected to on the ground that it was given in the middle of the harvest season. (*Ayling and Tyabji, JJ.*) RAMASWAMI KATHAN *v.* AMBALAGARAM. 28 I. C. 915.

——S. 111 (h)—*Notice to quit.*

A denial of the landlord's title in a previous suit disentitles the occupant from a notice to quit. (*Tyabji and Spencer, JJ.*) ABDUL VENKATASWAMY *v.* NALLURI KRISHTNAMMA. 24 I. C. 803.

——S. 111 (h)—*Notice to quit—Conditions of a valid notice.*

Where a lease is for a fixed term and the tenancy is terminable on notice thereafter, the notice cannot be given until after the expiry of the fixed term. 2 Camp. 573. Dist. (*Seshagiri Aiyar, J.*) RAMASWAMI NAIDU *v.* VENKATARAMANJULU NAIDU (1914) M. W. N. 368 : 23 I C. 572 : 26 M. L. J. 467.

——S. 111 (h)—*Notice to quit.*

The mere fact that a low rent is paid by accident does not deprive the landholder of his right to eject by notice. (*Baillie, J.*) RAM ADHIN *v.* BHAGWATI PRASAD SINGH. 33 I. C. 141 : 2 O. L. J. 707.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 111—Surrender.

Surrender.

——Ss. 111 (e) and (f)—*Surrender—Writing not necessary.*

No writing is necessary in this country for surrendering a tenancy. But if the original lease is registered, the surrender can only be by a registered instrument (*Chatterjee and Newbould, JJ.*) GOPAL CHANDRA *v.* HARENDRA NATH. **63 I. C. 483.**

——S. 111 (e)—*Surrender—Registration.*

In execution of a rent decree the tenant surrendered the tenancy to the landlord and the latter agreed to forego the claims for rent due. *Held*, that the surrender though for consideration was operative. The provisions of the T. P. Act did not require a registered instrument to evidence the surrender. (*Walmsley and Huda, JJ.*) ABDUL MAJID *v.* HARI CHARAN HALDAR. **53 I. C. 17.**

——S. 111 (e) and (f)—*Surrender.*

When a lessee surrenders the lease to his landlord, under-leases or other interests created by the lessee are not extinguished as is the case when his lease is forfeited. (*Sanderson, C. J. and Mookerjee, J.*) DWARKA NATH ROY *v.* MATHURA NATH ROY. **24 C. L. J. 40 : 34 I. C. 833 : 21 C. W. N. 117.**

——S. 111 (f)—*Surrender—Abandonment.*

Abandonment is not a kind of implied surrender as the latter act must be mutual between the parties. (*Newbould, J.*) SAKAYAT MOLLAH *v.* ALAM MOLLAH. **33 I. C. 98.**

Miscellaneous.

——S. 111—*Ejectment—Owner of undivided share.*

An owner of an undivided share in a house cannot alone evict a tenant of the house. (*Piggott, J.*) PRAYAG SONAR *v.* MOTAR SINGH. **24 I C. 624.**

——S. 111—*Forfeiture—Meaning of.*

The word forfeiture must mean a complete forfeiture and not merely that a tenant has incurred a liability to have his lease forfeited. A cause of action must be complete at the date of institution of a suit and cannot be completed either by the plaint or by written statement or any other pleading in the suit. (*Chamier, J.*) QADIR BAKHSH *v.* PRAG NARAIN. **14 I. C. 747 : 9 A. L. J. 794**

——S. 111 (g)—*Forfeiture—Waiver of forfeiture—Suit for rent.*

A landlord suing his tenant for rent, cannot deny the validity or subsistency of the lease for the period for which he claims rent. He will be deemed to have waived any cause of forfeiture up to that time. (*Ayling and Coutts-Trotter, JJ.*) RAMAPPA *v.* ABDULLA BEHARI. **69 I. C. 282 : 41 M. L. J. 127**

——Ss. 111 and 116—*Lease by co-owner of undivided moiety—Expiry — Whether holding over.*

When a purchaser of an undivided moiety of a house, takes the lease of the remaining moiety for a term and then continues occupying the whole house without paying any rent and without an

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 112.

assent on the part of the co-owner lessor such purchaser's possession cannot be regarded as that of a tenant holding over under Ss. 111 and 116, T.P. Act, or of a tenant by sufferance but must be referred to his rights or co-owners. (*Ayling and Hanney, JJ.*) MADAR SAHIB *v.* KADAR MOIEDEEN SAHIB. **33 I. C. 705 : 39 Mad. 54.**

——Ss. 111 and 116—*Application to Malabar—Malabar Act I of* 1900.

The Act does not apply to agricultural leases in Malabar. Kuzhikanam lease is a lease of waste lands for 12 years on condition of making improvements and being paid for them at the time of ejectment. The tenant can retain possession till he is paid for them and till then there can be no adverse possession. (*Benson and Bakewell, JJ.*) KUMMATHA VITTIL KUNHI KUTHALI HAJI *v.* ANTONI GOVEAS. **(1913) M. W. N. 339 : 13 M. L. T. 350 : 19 I. C. 563 : 24 M. L. J. 472.**

——Ss. 111 and 117—*Agricultural lease by mortgagee in possession—Determination, effect.*

An agricultural lease granted by a mortgagee in possession does not terminate as soon as redemption by the mortgagor takes place. (*Evans, J. C. and Lindsay, A. J. C.*) GOBRE SINGH *v.* JWALA PRASAD. **11 I C. 924 : 14 O. C. 204.**

——S. 112—*Rent accepted under protest.*

The acceptance of rent due after forfeiture from the lessee, and this notwithstanding the protest of the lessor that such acceptance is without prejudice to his right to insist upon his forfeiture operates, as a waiver of a notice. (*Mookerjee and Rankin, JJ.*) BENGAL-NAGPUR RY. CO. *v.* FIRM OF BAL MUKUNDA BISSESWAR LALL. **1923 Cal. 663.**

——S. 112—*Waiver of forfeiture—Receipt of rent—Lease of fisheries.*

Where a condition against transfer in a fishery lease was broken by the lessee, but the lessor continued to receive rents for periods subsequent to the breach of the condition, *held* that the lessor has waived his right of forfeiture, and that the lessee was entitled to a declaration of his continuing right under the lease. (*N. R. Chatterjee and Newbould, JJ.*) BASANTA KUMAR CHOWDHURI *v.* SECRETARY OF STATE. **59 I. C. 273.**

——S. 112—*Non-payment of rent—Suit for ejectment—Claim for rent subsequent to default—Forfeiture—Waiver.*

Where the plff. claims rent for periods subsequent to the default in payment of rent which gave him the cause of action for ejectment, he must be taken to have waived the forfeiture under S. 112 of the T. P Act, and his suit for ejectment must fail. (*Chatterjee and Richardson, JJ.*) ABDUL RASHID KHAN *v.* SAFAR ALI. **42 I. C. 614.**

——S. 112—*Tenant—Waiver of forfeiture—Distress—Acceptance of rent.*

The mere description of tenant as his tenant by the landlord in his receipt acknowledging payment of rent accrued due before the date of forfeiture of the tenancy cannot be construed as a waiver of the forfeiture. Acceptance of rent

accrued due before forfeiture is not an act of waiver of the forfeiture *Quaere.*—Whether in India waiver by receipt of rent and waiver by distress are on the same level. (*Mookerjee and Roe, JJ*) RAJ MOHAN DE *v.* MATILAL SHAH.
33 I. C. 331 : 22 C. L. J. 546.

——S. 112—*Waiver of forfeiture—Acceptance of overdue instalment.*

The question whether acceptance of an overdue instalment amounts to waiver of the delay in payment, is to be determined on the circumstances of each case (*Carnduff and Richardson, JJ.*) PITAMBAR SAHA *v.* KRISHNA MOHAN DAS.
23 I. C. 391.

——S. 114—*Forfeiture of lease—Sub-lessee's position.*

A sub-lessee is as much entitled to be relieved against the forfeiture, under S. 114 as the lessee in whose shoes he stands for the purpose of making payment of rent. (*Sunder Lal, J.*) AHMAD HASSAIN *v.* RIAZ AHMAD.
25 I. C. 186 : 12 A. L. J. 1085.

——S. 114—*Forfeiture for non-payment of rent—Discretion of Court—Provision against transfer of holding—Transfer by co-lessee—Effect on others.*

Where non-payment of rent involves a forfeiture of the lease the Court has, at the hearing of the suit, a discretion not to eject the tenant if he pays the arrears of rent with the costs of the suit. Where a lease provided that if the lessees would transfer the building or the land, they would be liable to be ejected, and one of the lessees transferred his share, *held* that the right of other lessees to continue in possession was unaffected. (*Banerjee, J.*) KUNDAN LAL *v.* KALLU.
24 I. C. 79 : 12 A. L. J. 650.

——S 114—*Forfeiture—Relief against when Court will give.*

In equity the Court will relieve against a forfeiture clause in a lease unless lessee has done something not to deserve any consideration in equity. (*Macleod, C.J and Fawcett, J.*) KRISHNAJI GOVIND *v.* SITARAM HANMANT.
45 Bom. 300 : 59 I. C. 769 : 22 Bom. L. R. 1439.

——S. 114—*Is not abrogated by Calcutta Rent Act.*

The Rent Act does not expressly exclude the operation of S. 114 of the T. P. Act and it cannot abrogate the provisions of the section. (*Greaves, J.*) AHINDRA *v.* TWISS. **42 C. 150 : 1922 Cal. 394.**

——S. 114—*Partition—Restraint of—Void*

It is not competent to a testator to restrain partition of a house bequeathed by him and thus create a perpetuity. (*Chaudhuri and Newbould, JJ.*) KALI CHARAN SHINGHA *v.* KIRAN BALA DEBI.
51 I. C. 948 : 29 C. L. J. 494.

——Ss. 114, 116 and 117—*Forfeiture—Covenant against alienation—Breach—Agricultural lease.*

The provisions of Ss. 105 to 116 of the Act may be applied to agricultural leases in the absence of special reasons for not so doing. A Court has no power to relieve against a forfeiture for breach

of a covenant against alienation. Such a covenant is not a penalty under S. 74 of the Contract Act. 33 M. 375 Ref. (*Wallis, C. J., Napier and Kumaraswami Sastri, JJ.*) KRISHNA SHETTI *v.* GILBERT PINTO. **42 Mad 654 : 9 L. W. 431 : 50 I. C. 898 : 36 M L. J. 367.**

——S. 114—*Forfeiture—Non-payment of rent—Permanent lease—Days of grace—Relief.*

Courts have power to relieve against forfeiture even when there is a period of grace allowed in the lease-deed. Case-law reviewed. Per *Napier, J.* (*Seshagiri Aiyar, J. contra*)—It is not permissible to look to the provisions of the T P. Act for guidance in this matter as they are expressly made inapplicable to agricultural leases (*Seshagiri Aiyar and Napier, JJ.*) APPAYYA CHETTY *v.* MAHAMMAD BAHARI. **39 Mad. 834 : 29 M L. J. 381 : 30 I. C. 596 : 18 M. L. T. 336 : (1915) M. W. N. 857.**

——S. 114—*Relief against forfeiture—Non-payment of rent even within the period of grace.*

If on account of non-payment of rent within the period of grace, allowed by the landlord, the tenancy is forfeited, such forfeiture will not be relieved against. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) TUNGAMMA SHETTITI *v.* KORATTIE SHETTITI. **16 I. C. 803 : (1912) M. W. N 1135. (But *see* Contra : 59 I. C. 769 : 22 Bom. L. R. 1439 and 30 I. C. 596 : 39 Mad. 834.]**

——S. 114—*Forfeiture—Power to relieve against—Period of grace—Provision in deed—Effect of.*

It cannot be laid down broadly that if a lease provided for a period of grace the Court has no power to relieve against forfeiture for default in payment of rent. The law treats the condition of forfeiture as a penalty intended to enforce the payment of rent and liable to be relieved against by the Court. The discretion in granting relief against forfeiture for default in payment of the rent should as a rule be exercised in favour of the lessee, unless sufficient reasons for refusing it are shown. Where however the tenant pleaded discharge which was found against, the Court refused to relieve against forfeiture having regard to the failure of the tenant to pay the arrears during the hearing in the Lower Courts and having regard to the fact that a sufficiently long period of grace given by the lease was allowed to pass without payment. (*Kotwal, A, J. C.*) AKJUN *v.* NARAYAN **19 N. L. R. 50 : 1923 Nag. 193.**

——S. 114—*Condition of forfeiture and clause of nullity—Distinction between—Relief against—English and Indian law.*

Under English law the condition of forfeiture is distinct from a clause of nullity. In T. P. Act this distinction is not recognised and this has given effect to the existing law in the country. Still courts have power to relieve against forfeiture. (*Das and Adami, JJ.*) HARINUNDAN *v.* RAMDHAR SINGH. **1 P. 363 : 4 P. L J. 292 : 1922 P. 528.**

——Ss. 115 and 111 (g) *Assignment of lease—Denial of title by original lessee.*

A mere repudiation of the lessor's title by the lessee will not work a forfeiture against the

assignee of the lessee's interest. (*Beaman and Heaton, JJ.*) SHIRGAONKER *v.* PAI.
42 Bom. 734 : 47 I. C. 635 : 20 Bom. L. R. 830.

——— S. 115—*Surrender implied—Nature of.*

An implied surrender is more analogous to the case of a forfeiture than to the case of a surrender under S.115 of the Act and therefore extinguishes the rights of persons deriving the title through the tenants. (*Mittra, A. J. C.*) SARJERAO *v.* TUKARAM.
46 I. C. 244 : 14 N. L. R. 107.

——— S. 116—*Holding over—Rights of tenant*

A tenant holding over has a right to retain possession of the premises he occupied even against the landlord until ejected in due course of law (*Heaton and Hayward, JJ.*) GHULAM MAHOMED *v.* EMPEROR.
43 Bom. 531 : 21 Bom. L. R. 261 : 51 I. C. 193 : 20 Cr. L. J 417.

——— S. 116—*Holding over—Notice to quit.*

Where a tenant holds over after the expiry of the lease on payment of rent to the landlord, he must be deemed to be a tenant from year to year or from month to month according to the object for which the property was leased having regard to the provisions of S. 106 of the Act. A notice of determination of monthly tenancy must expire with the end of the month and a notice of more than 15 days expiring in the middle of a month is imperative to terminate the tenancy. (*Mookerjee and Cholmer, JJ.*) BIJOICHANDRA SINAH *v.* HOWRAH AMTA LIGHT RAILWAY CO., LTD.
38 C. L. J. 177 : 1923 Cal. 524.

——— Ss. 116 and 117—*Non-agricultural tenancy created before the Act—Holding over—Effect of.*

Where a tenancy for a term of years was created in favour of A before the Act, and after his death his heirs remained in possession and paid rent down to 1914, *held* that the legal relation between the landlord and the heirs of A must be deemed to have come into operation after the passing of the Act and as the tenancy was not an agricultural one within S. 117 of the Act, Chap. V, was applicable and therefore on the expiry of the term the heirs of A had a yearly tenancy which was capable of transfer and notice was necessary to terminate the tenancy. (*Greaves and Newbould, JJ.*) MUHOMED AYEJUDDIN MIA *v.* PRODYOT KUMAR TAGORE.
48 Cal. 359 : 61 I. C. 503 : 25 C. W. N. 13.

——— Ss. 116 and 106—*Holding over—Terms of—Implied term, where rent is not payable monthly.*

S. 116 of the T. P. Act is self-contained. What one has to see in a case where there has been holding over is whether there has been an agreement about the terms of the holding over. In the absence of such agreement, no matter what the terms were, which governed the original lease, it must be regarded as renewed from year to year or from month to month according to the purpose for which the property is leased. Where the lease is for agricultural or manufacturing purposes it is to be regarded as renewed from year to year, and in the case of a lease for other purposes it is to be regarded as renewed from month to month. It

ought not to be supposed from the fact that the rent was not payable monthly that there was an implied agreement for the holding over or that the lease would be anything but a lease from month to month. (*Beachcroft, J.*) RAM PROSAD PANDEY *v.* DEBI PROSAD.
49 I. C. 974.

——— S. 116—"*Agreement to the contrary,*" *meaning of.*

An agreement to the contrary within S. 116 of the Act means an agreement as to the terms of the holding over. (*Mookerjee and Walmsley, JJ.*) GOBINDA CHANDRA SHAH *v.* DWARKA NATH PATTA.
20 C. L. J. 455 : 26 I. C. 962 : 19 C. W. N. 489.

——— S. 116—*Effect of section—Legal representative"—Intermediate lessee.*

The effect of the section is that the acceptance of rent causes a renewal of the lease from year to year or from month to month according to the purpose of the lease, and where the tenancy is for residential purposes the lease must be deemed to have been one from month to month. The words "legal representative" in S. 116 imply a person occupying the same position as the lessor and do not include an intermediate lessee. (*Mookerjee and Beachcroft, JJ.*) DURGI NIKARINI *v.* GOBERDHAN BOSE.
20 C. L. J. 448 : 24 I. C 183 : 19 C. W. N. 525.

——— S. 116—*Successive leases for one year each—Lessee already in possession under a prior valid lease—Rent suits against raiyats.*

Where the successive leases for one year each were given to a lessee who is already in possession under a prior valid lease, in view of the lessee continuing in possession with the lessor's assent, they became lessees from year to year under S. 116 of the Act and a suit against raiyats for rents is maintainable. (*Coxe and Chatterjee, JJ.*) FAKIRA MAHTAN *v.* LARKAT HUSSAIN.
23 I. C. 318 : 18 C. W. N. 858.

——— S. 116—*Tenancy by sufference.*

It is doubtful whether in this Court the fiction of tenancy by sufferance should be kept up after the T. P. Act (*Ayling and Hannay, JJ.*) MADAR SAHIB *v.* KADAR MOIDEEN SAHIB.
33 I. C. 705 : 39 Mad. 54.

——— S. 116—*Lessee under expired lease—Right to eject a trespasser.*

A lessee holding under a time expired lease has a right to eject a mere trespasser, as an expiry of a lease does not determine the right of the lessee to possession. (*Abdur Rahim and Spencer, JJ.*) BHOGAVALLI VENKAYYA *v.* KUDAPA SETTYA.
22 I. C. 789 : 37 Mad. 281.

——— S. 116—*Holding over—Payment of rent—Effect of.*

The effect of holding over upon payment of rent to the landlord is this that defendants come within the provisions of section 116 of T. P. Act. They must be regarded as tenants from year to year. (*Das and Bucknill, JJ.*) RAM LOCHAN BAID *v.* KAMAKHYA NARAIN SINGH.
1923 Pat. 54 : 4 P. L. T. 123 : 1923 P. 201.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 116.

——S. 116—*Holding over—Dispossession by claiming under landlord—Suit for possession.*

A lessee holding over after the expiry of his term without the express or implied consent of the landlord is only a trespasser and in the event of dispossession by a person claiming under the landlord, he cannot maintain a suit for possession or declaration of title on the basis of his previous possession. (*Jwala Prasad, A. C. J and Ross, J.*) MATHURA PRASAD *v.* NAJU KHAN.
4 Pat. L. T. 696

——S. 117—*Agricultural lease—Oral lease valid.*

The letting out of agricultural land need not be by a document only ; it may be by oral agreement or even by conduct of parties. (*Suhrawardy and Cuming, JJ.*) ALAM MULLA *v.* SURENDRA KUMAR KARFORMA. **1923 C. 433.**

——S. 117—*Leases not within Act—Law applicable to—English Law.*

The general rights between the lessor and the lessee as laid down in the English Law would govern cases not within the Act unless the B. T. Act contains anything to the contrary. (*Newbould, J.*) BROJABASHI RUDRA PAL *v.* SARAT CHANDRA RUDRA PAL. **53 I. C. 545.**

——S. 117—*Agriculture—Casuarina cultivation.*

A lease of lands for growing casuarina trees to be used as fuel is a lease for agricultural purposes within the meaning of S. 117 of the T. P. Act. 8 L. W. 485 : 38 M. 738 not followed. 24 M 421 : 13 C. L. J. 318 Ref. (*Spencer and Ramesam, JJ.*) PAVADAI PATHAN *v.* RAMASWAMI CHETTI.
45 Mad. 710 : 31 M. L. T. 76 (H. C) : (1922) M W. N. 384 : 16 L. W. 264 : 43 M. L. J. 191 : 1922 Mad. 351.

——S. 117—*Agricultural lease—Provisions of T. P. Act not applicable.*

Per *Napier, J* (*Seshagiri Aiyar, J.* contra.) It is not permissible to look to the provisions of the T. P. Act for guidance in the matter of agricultural leases as they are expressly exempted from the operation of the Act. (*Seshagiri Aiyar and Napier, JJ.*) APPAYA SHETTY *v.* MAHAMMAD BEARI.
39 M. 834 : 18 M. L. T. 336 : (1915) M. W. N. 857 : 30 I. C. 596 : 29 M. L. J. 381.

——S. 117—*Lease for reclamation—Agricultural lease.*

The lease of a village or of a share therein for bringing it under cultivation is an agricultural lease and Ch. V of the Transfer of Property Act does not apply to it. (*Batten, Offg. J. C.*) BANMALI *v.* NIHAL SINGH. **48 I. C. 354.**

——Ss. 117 and 106—*Agricultural lease—S. 106 not applicable.*

Generally S. 106 of the T. P. Act does not apply to agricultural leases. But so much of it as is specially directed by the LocalGovernment applies to such leases. (*Jwala Prosad and Foster, JJ.*) MOORE *v.* MAKHAN SINGH. **53 I. C. 180.**

——Ss. 118 and 119—*Exchange—Land not got in return—Suit for possession.*

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 118.

Where a plff. has parted with possession of land on the representation of the deft. that he could give other land in exchange but the plff. has actually received no land in exchange or consideration he is entitled to sue for a declaration of his title and possession. His remedy is not by suit to enforce specific performance of the alleged agreement. (*Mookerjee and Newbould, JJ.*) JAHARADDI MANDAL *v* DEBNATH.
33 I. C. 762 : 20 C. W. N. 657.

——S. 118—*Exchange—Part cash payment.*

A transaction by which one person gives his property in exchange for a property of another and a sum of money, is an exchange and not a sale. (*Broadway, J.*) PRABHUDIAL *v.* SHADI RAM.
50 I. C. 288.

——S. 118—*Exchange—Payment of money—Effect of.*

The mere fact that one of the parties to an exchange has, in addition, paid a small sum of money by way of adjusting the values, cannot alter its nature. (*Rattigan, J.*) QUZA *v.* SHARFA.
100 P. W. R. 1913 : 19 I. C. 301 : 199 P. L. R. 1913.

——S. 118—*Title by estoppel—Unregistered sale or exchange—Part performance—Erection of buildings.*

Relying on an unregistered deed of exchange deft. began to build costly buildings on the plot exchanged, plff. kept quiet and even received additional sum as compensation, in a suit for ejectment. *Held*, per *Sadasiva Aiyar and Napier, JJ.* (*Abdur Rahim, J. dissenting*) that the plffs. were entitled to a decree for ejectment subject to the liability to pay compensation for improvements to the defts. There was no estoppel by acquiescence in the case as when the erection of the building was going on, plffs. were not aware of their subsisting right but had acted in the full belief that plffs. had no longer any title to the land they had parted with. Per *Abdur Rahim, J.*—Under the circumstances the equities in favour of the defts were a sufficient answer to the plff.'s suit for ejectment : what are the circumstances which should be sufficient to raise an equity that would be an answer to a suit for possession by a person who purported to convey the property by an unregistered instrument must depend on the facts of the particular case ; but they must be such as should have altered though not irretrievably, the position of the deft. acting on the faith of the bargain sought to be resiled from. (*Abdur Rahim, Sadasiva Aiyar and Napier, JJ.*) RAMANATHAN CHETTY *v.* RANGANATHAN CHETTY.
40 Mad. 1134 : 6 L. W. 300 : 22 M. L. T. 173 : (1917) M. W. N. 757 : 43 I. C. 138 : 33 M. L. J. 252.
[On appeal from 32 I. C. 5 : 30 M. L. J. 1.]

——Ss. 118 and 119—*Exchange of properties of over Rs. 100 in value—Oral transfer—Possession given—No estoppel—Charge.*

An exchange of property of over Rs 100 in value can be made only by a registered instrument. A mere oral transfer and delivery of possession cannot effect a transfer of title. No estoppel can be pleaded against the provisions

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 118.

of a statute and therefore the fact that the other party to the exchange had sold away the property got in exchange cannot affect the title to the property in dispute. A charge on the property cannot be given simply because the transaction is not valid in law under Ss. 120 and 55 (6) of the T. P. Act. (*Sadasiva Aiyar and Spencer, JJ.*) CHIDAMBARA CHETTIAR *v.* VAIDYA LINGA PADAYACHI.
30 I. C. 408 : 38 Mad. 519.

——S. 118—*Exchange—Meaning.*

A mutual transfer of immoveable property between two persons, amounts to an exchange and each party aquires, on execution of the deed of transfer in his favour, a good title to the property. (*Syed Wazir Hassan, A J. C.*) RIAZAT HUSSAIN *v.* ALI BANDI. **60 I. C. 725 : 7 O. L. J 699.**

——Ss. 118 and 54—*Exchange—Pre-emption—Equity of redemption if a "thing"—"Price."*

Where a person assigned his equity of redemption in consideration of the assignee transferring to him proprietary rights over certain other lands the transaction is an exchange and no right of pre-emption could be exercised with respect to it. An equity of redemption would fall within the definition of the word "thing" in S. 118 of the T. P. Act. Neither the equity of redemption nor the rights in lands which formed the subject of exchange could be treated as "price" within S. 54 of the Act. (*Stuart and Kanhaiya Lal, A.J. Cs.*) LACHMAN PRASAD *v.* MIR FIDA HUSSEIN.
18 O. C. 109 : 30 I. C. 232 : 2. O. L. J. 220.

——Ss. 119 and 43—*Operation of the sections.*

The special provisions as to exchange contained in S. 119, do not exclude the operation of S. 43, and hence for purposes of S. 43 an exchange stands on the same footing as a sale. (*Mukerji, A. C. J. and Fletcher, JJ.*) BHAIRAL CHANDRA MONDAL *v.* JIBAN KRISHNA MONDAL
60. I. C. 819 : 33 C. L. J 184

——S. 119—*Exchange—Warranty of title—Suit to recover equivalent portion—Agreement to the contrary.*

Parties making an exchange are deemed to covenant for title in the absence of a contract to the contrary, and if in consequence of defective title, either party is deprived of the whole or part of the property exchanged, he can cancel the bargain and get back his own property or obtain compensation for loss, but cannot recover an equivalent portion of the land given by him in exchange. A clause in the deed of exchange to the effect that neither party would have any claim against the other, does not amount to an agreement excluding the implied warranty of title. (*Scott-Smith and Shadi Lal, JJ.*) SALABAT *v.* ABDUL RAHMAN. **51 P. R. 1917 : 41 I C. 248 : 114 P. W. R. 1917.**

——S. 119—*Exchange—Covenant for return of property—Suit on covenant—Position of vendee.*

Where the parties to an exchange covenant that in the event of obstruction to enjoyment of the properties exchanged, each should return to the other what is taken, the covenant is in the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 122.

nature of a condition subsequent, the enforcement of which is governed by Art 146. The deft. cannot plead a *bona fide* purchase without notice for he cannot take a better title than his transferor. (*Bakewell and Phillips, JJ.*) SRINIVASA AYYANGAR *v.* KOTTAPPAK GHONSA ROWATHAR.
51 I. C. 939 : 42 M. 690.

——S. 119—*Exchange of lands before the passing of T. P. Act.*

The law applicable to exchanges of immoveable property prior to the passing of the T. P. Act is the Common Law of England and not the Real Property Act An exchange of property effected prior to 1882 implied a warranty of title, a condition for re-entry on the land given in exchange and also the right to certain compensation for breach of the warranty. S. 119 of the Act preserved to the parties in India the English Common Law right as to warranty. Per *Bakewell, J.*—S. 119 of the Act embodies rules of "justice, equity and good conscience" which under Cl. 21 of the Letters Patent the High Court may apply to exchanges effected prior to the Act. (*Seshagiri Aiyar and Bakewell, JJ.*) BALUSU VEERARAGHAVALU *v.* BOPPANA MANIKYAM.
31 M. L. J. 380 : 35 I. C. 92 : 20 M. L. T. 329.

——Ss. 120, 118 and 119—*Exchange and sale are on same footing.*

The provisions of sections 118, 119 and 120 show that the Legislature has put an exchange on the same footing with a sale in almost every respect. For example, a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale. According to S. 120, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes. (*Abdul Raoof, J.*) KUNDAN LAL *v.* ANUND SARUP. **1923 Lah. 456.**

——S. 122—*Transfer of shares in company—No entry made in Company's books—Effect.*

Where the owner of shares in a company executed a deed purporting to transfer the same to his wife, with the intention of making her owner from that time, *Held*, (1) the gift having been intended to take effect by way of transfer, cannot operate by way of trust; (2) as the shares could be legally transferred only by entry in the books of the company, which was not done, the disposition failed. (*Rankin, J.*) AMARENDRA KRISHNA DUTT *v.* MONIMUNJARY DEBI.
66 I. C. 586 : 48 Cal. 986.

——Ss. 122 and 123—*Gift—Donor in pecuniary embarrassment—Possession with donor.*

A gift of immoveable property in favour of a wife was secretly executed at a time when the failure of the firm of which the donor (husband) was a partner, was in sight, if not actually imminent The gift was kept secret till the firm had been declared insolvent, the lady never obtained possession of the properties and no convincing explanation was attempted to justify the transaction. *Held*, that the title did not pass

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 122.

from the donor to the donee. (*Mookerjee and Panton, JJ.*) THE OFFICIAL ASSIGNEE OF THE CALCUTTA HIGH COURT *v.* BIDYASUNDARI DASI.
24 C. W. N. 145 : 54 I. C. 700 : 30 C L. J. 428.

——Ss. 122 and 123—*Gift deed—Donor adopting after handing over deed to donee but before registration—Gift is valid.*

A Hindu made a gift of his immoveable properties, but between the date of handing over the deed to the donee and the registration thereof, adopted a son to himself. *Held*, the deed was irrevocable and the adopted son could not question the same. (*Schwabe, C. J., Coutts Trotter and Kumaraswamy Sastri, JJ.*) KALIYANASUNDARAM PILLAI *v.* KARUPPA MUPPANAR. **17 L. W. 232 : 1923 Mad. 282.**
[On appeal from 62 I. C. 280.]

——Ss. 122 and 127—*Gift to minor—Acceptance by minor, if valid.*

A minor donee can, under S. 122 of the Act, accept a gift personally without the intervention of a guardian, 33 Mad. 312 at 314, Ref. (*Stanyon, A J. C.*) FIRM OF GANESH DAS *v.* SURYA BHAN.
39 I. C. 46 : 13 N. L. R. 18.

——S. 122—*Gift of mere proprietary rights—Restrictions regarding alienation valid.*

Where a deed transferring certain lands for maintenance authorised the grantee to cultivate them and granted to them the usufruct thereof but they were not to transfer the lands to any one but the grantor and his descendents, to whom the lands were to go also if the donee at any time died childless. *Held*, that (i) full proprietary rights were not granted by the deed but only usufruct and therefore restrictions regarding alienation were valid ; (ii) that on execution sale for satisfying the claim of a mortgagee of such lands was not a sale '*in invitum*' and could not override the provisions and conditions of the grant. Such a sale arises out of voluntary transfer and the decree and sale are the necessary consequences of the same. (*Lindsay, J. C. and Stuart, A. J. C.*) JAGDEO BAKHSH SINGH *v.* JWALA PRASAD.
15 I. C. 244 : 15 O. C. 345.

——Ss. 122 and 123—*Gift— Essentials of—Intention to give—Acceptance—Gift of moveables.*

In order that a transaction may operate as a gift there must first be a transfer of the property which in the case of moveable property may be effected either by a registered instrument or by delivery, and secondly, there must be acceptance by or on behalf of the donee. Under S. 123 of the T. P. Act a gift of moveables may be made by doing anything which has the effect of putting them in the possession of the donee or of any person authorised to hold them on his behalf. (*Das and Adami, JJ.*) RAMESHWAR NARAIN SINGH *v.* RIKNATH KOER. **1923 P. 165.**

——S. 122—*Interest in land — Delivery of possession.*

Where the gift is of an interest in land, the donor is not required to transfer the corpus of the property but only possession of that interest. If the donor has done all that lies in his power

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 123.

to transfer that interest, then the omission to deliver the corpus is immaterial (*Mullick J.*) BASIRUL HAQ *v.* MOHAMMED AJIMUDDIN.
43 I. C 857 : 3 Pat. L. W. 213.

——Ss. 122 and 123—*Burmese Buddhist gifts—Registration.*

A Burmese Buddhist religious gift is not valid anless registered. (*Ormond, J.*) UZAYANTA *v.* U NAGA. **11 Bur. L. T. 259 : 45 I. C. 926 : 9 L. B. R. 258.**

——S. 123.

See also (1) ATTESTATION.
(2) EVIDENCE.
(3) T. P. ACT, S. 59.

——S. 123—*Hindu Law—Gift—Delivery of possession—Necessity for.*

A Hindu lady who is the full proprietor of immoveable property can by a registered instrument, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her life-time and without detaining any power of alienation over it. Delivery of possession is not essential to the validity of the gift. 14 C. 446; 34 C. 853; 24 M. 513; 34 B. 287; 4 A 40; 16 A. 185. (*Mears, C. J, Piggott Gokul Prasad, Kanhaiya Lal and Sulaiman, JJ.*) LALLU SINGH *v.* GUR. NARAIN. **20 A. L. J. 744 : L. R. 3 A. 437 : 1922 All. 467 (F. B.).**

——S. 123—*Gift—Delivery of possession—Hindu Law.*

Under the Hindu Law, delivery of possession is not essential to the validity of a gift. 27 A. 169, 25 A. 353 foll. (*Ryves and Gokul Prasad, JJ.*) DEBI SINGH *v.* BANSIDHAR. **1922 All. 44.**

——S. 123—*Gift—Donee unregistered body—Validity—Societies Registration Act (XXI of 1860.)*

A gift of immoveable property to an unregistered body of persons is void, as such a body has no legal existence and is incapable of holding property. It is otherwise if the body is registered under the Act. (*Richards, C. J. and Rafique, J.*) MATHURA KUER *v.* DHARAM SAMAJ.
38 I, C. 183: 14 A. L. J. 1038.

——Ss. 123 and 129—*Religious gift—Registration.*

S. 123 applies to religious gifts and therefore a registered deed of gift to a *Thakur* is necessary to validate the dedication. (*Richards, C. J. and Rafique, J.*) MANNU LAL *v.* RADHA KISHENJI.
36 I. C. 989.

——S. 123—*Gift under Muhammadan Law.*

Gifts under Mahomedan Law are not governed by S. 123, T. P. Act. (*Richards, C. J. and Rafique, J.*) KARAM ILAHI *v.* SHARFUDDIN.
38 All. 212: 35 I. C. 14: 14 A. L. J. 119.

——S. 123—*Attestation—Proof.*

Where the witnesses attesting a deed never saw the executant actually sign the deed but merely heard her acknowledge the execution, the deed cannot be said to have been attested according to the interpretation put on the word by the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 123.

Privy Council, (*Lyle, J.*) SUBHEDA KOERI *v.* RAGA RAM. 21 I. C. 83: 11 A. L. J. 757.

——S. 123—*Gift—Registration—Consent of donor.*

If a document creating a gift is registered in accordance with the Registration Act, it is a registered instrument making a valid and complete gift. It is not at all necessary that it must be registered at the owner's instance or with his consent (*Richards, C. J. and Banerjee, J.*) PARBATI *v.* BAIJ NATH PATAK. 10 A. L. J. 300: 35 All. 3: 16 I. C. 406.

——S. 123—*Gift—Registration without consent of donor—Validity.*

A gift registered without the consent or against the will of the donor does not thereby become invalid, 33 Cal. 584, Foll. (Per *Karamat Husain, J., dissenting.*)—A gift deed registered without the consent of the donor is invalid. 19 All 392, Dist. (*Karamat Husain and Chamier, JJ.*) PARBATI *v.* BAIJNATH PATHAK. 14 I. C. 61: 9 A. L. J. 300.

——S. 123—*Incomplete gift—Rights of donor and donee—Relationship of trustee.*

The defendent was the employee of a Railway company and on his retirement the company sanctioned a retiring gratuity of Rs. 7,700. On defendant's request that the payment should be made in London, the company remitted the amount to their bankers at Bombay for being forwarded to the Secretary of the G. I. P. Ry. in London. The plaintiff in execution of a money decree against the defendant attached the sum in question before the remittance of the money: *Held* that at the date of the attachment there was no completed gift of the amount or any part thereof to the defendant and that the attachment was therefore inoperative. The retiring gratuity being in the nature of a gift it should be completed either by a registered document or by actual payment. A transfer intended to operate as a gift but invalid as such will not constitute the donor a trustee of the property for the intended donee; in other words, an imperfect gift will not be construed as a declaration of trust. (*Mulla, J.*) NATHA GULAB & Co. *v.* W. C. SHELLER. 26 Bom. L.R. 599: 1924 Bom. 88.

——S. 123—*Oral gift—Invalid—Actions of parties—Estoppel.*

As there was no registered deed of gift, as required by S. 123 of the Act, the gift was not complete in law and the title to the land was still vested in the plff. donor. The mere consent of the plff's father to make a gift of the land was not sufficient to vest the land in the Municipality and inasmuch as the deft. had occupied the land and constructed a part, at any rate, of the road before the plff.'s father was induced to make an oral gift of the land, the plff. was not estopped, from denying the validity of the gift. (*Shah and Hayward, JJ.*) KUVERJEE KAVASJI *v.* THE MUNICIPALITY OF LONAVLA. 58 I. C. 403: 45 Bom. 164: 22 Bom. L. R. 654.

——S. 123—*'Attested'—Meaning of.*

The word 'attested' in Sec. 123 means the witnessing of the actual execution of the document by the person purporting to execute it. (*Macleod, C.J. and Heaton, J.*) AMARAPPA SANALASAPPA GUMALPUR *v.* RACHAVA SUGAPPA. 22 Bom. L. R. 86: 55 I. C. 355: 44 B. 231.

——S. 123—*Delivery of possession—Mahommedan law.*

The registration of a deed of gift in accordance with S. 123 of the Act cannot make up for the want of delivery of possession required by the rule of Mahomedan Law. (*Mookerjee and Beachcroft, JJ.*) RAHIM BAKHSH MANDAL *v.* SAJJAD AHMAD CHOWDHARY. 26 I. C. 466: 19 C. W. N. 1311.

——S. 123—*Gift—Delivery of possession—Endorsement on registration deed.*

Where there is a deed of gift and before its registration an endorsement is made therein that possession is delivered to the donee and the deed is subsequently registered, the burden of proving that possession was not given and therefore the gift is invalid is on those asserting its invalidity. Where there are tenants on the property, their attornment to the donee is sufficient delivery of possession. (*Schwabe, C. J. and Wallace, J.*) FATIMA BIBI *v.* KHAIRUM BIBI. 16 L. W. 894: 1923 Mad 52.

——S 123—*Donor adopting son after execution and before registration of a deed of gift—Effect.*

A executed a deed of gift in favour of charitable and religious purposes; he then adopted *B* as his son and a few days later registered the deed. *Held* per *Ayling, J.*, the gift was complete by the execution of the document though the registration took place later. Per *Hughes, J.*—That the gift was not complete before adoption and after the adoption. *A* could not give away any property by completing the gift. (*Ayling and Hughes, JJ.*) KALIANASUNDARAM PILLAI *v.* KRISHNASWAMI AIYAR. 62 I. C 280: 13 L. W. 187: (1921) M.W. N 141.

——S. 123—*Gift of mortgage can be only by a registered document.*

The transfer of a mortgage by way of gift must be made only by a registered instrument whether the mortgage is for less than Rs. 100 or not, as S. 123 of the Act contains no exception in favour of gifts of small value. (*Wallis, C. J. and Hughes, J.*) PERUMAL AMMAL *v.* PERUMAL NAIKER. 44 Mad. 196 : 13 L. W. 69 : 61 I. C. 461 : (1921) M. W N. 5 : 40 M. L. J. 25.

——S. 123—*Gift—Dedication—Writing and registration.*

Property may be dedicated to a temple in one of three modes (1) by making a gift of the property to trustees on behalf of the idol, (2) by a dedication to the idol it elf, and (3) generally on occasions of death or marriage by taking a leaf of the tulsi plant in hand and with water offering the property in the presence of the persons assembled. Of these modes, (1) must comply with the provisions of S. 123 of the T. P. Act. In mode (2) if the dedication is in writing, it must be registered. In mode (3) the gift is not within the provisions of the T. P. Act, although the intention may

be that the embodiment of the universal soul worshipped in the particular temple should have the benefit of the dedication. (*Seshagiri Aiyar and Phillips, JJ.*) RAMALINGA CHETTY *v.* SIVACHIDAMBARA CHETTY, 42 Mad. 440: 36 M. L. J. 575: (1919) M. W. N. 426: 25 M. L. T. 253; 49 I. C. 742. 9 L. W. 224.

——S. 123—*Registration of gift after donor's death.*

A deed of gift registered by the donee after the donor's death without the consent of his legal representatives is valid. 19 Mad 433, Overruled. Once an instrument is duly executed, it can be registered in spite of the donor's wishes. Per *Seshagiri Iyer, J* :—Compulsory registration is not avoided either by this Act or by the Registration Act. (*Abdur Rahim, O. C. J., Seshagiri Iyer and Phillips, JJ.*) VENKATI RAMA REDDI *v.* PILLATI RAMA REDDI. 40 Mad. 204: 31 M. L. J. 690: 20 M. L. T. 450: (1917) M. W. N. 112: 38 I. C. 707: 4 L. W. 465.

——Ss. 123, 128 and 129—*Insurance Policy assignment—No delivery—Validity.*

An assignment of a policy of insurance unaccompanied by delivery of documents is valid under the law. The execution of deed of assignment and getting the assignee's name registered in the Company's register, are enough. This being a transfer of an actionable claim nothing more in the way of delivery, etc., is necessary. (*Sadasiva Aiyar and Napier, JJ.*) YACOOB SAHIB *v.* PACHA BIBI. 38 I. C. 248 : 4 L. W 339.

——S. 123—*Gift—Compulsory registration—Subsequent deed registered by donor.*

Where a deed of gift was not registered by the donee after the death of the donor, who had executed and registered another deed of gift before her death, the prior deed registered against the donor's wishes would not convey any title. (*Sankara Nair and Ayling, JJ.*) DASISWARANAM *v.* DEIVANAYAGAM PILLAI. 28 M.L.J. 378 : 28 I. C. 271 : 2 L. W. 269.

——S. 123—*Gift—Mahomedan Law.*

Under the Mahomedan Law a valid transfer by gift can be effected by delivery of possession to the donee with the intention of passing the property to him. The T. P. Act has no application to such a transfer. (*Lindsay, J. C.*) ALI BAKSH *v.* GHURAI. 18 O. C. 122 : 28 I. C. 180 : 2 O. L. J. 97

——S. 123—*Gift—Formalities—Attestation—Proof of—Waiver of formal proof—Effect of—Acknowledgment of execution.*

The attestation of a witness on the acknowledgment or admission of the executant of the document without witnessing the actual execution of the document is insufficient to create a valid gift (35 M. 607; 45 C. 748; 35 C. L. J. 473 Ref.) Though proof of the document might be waived, this does not affect the legal character of the document or its invalidity as a gift. An attestation of a deed of gift by a person without seeing the actual execution of the document but merely on the executant's acknowledgment or admission of its execution is insufficient. Where there was no issue in the court below as to whether the deed of gift relied on by the plaintiff was validly attested but it was clear from the document itself that the witnesses who purported to attest had not been present at the time of the execution of the deed, the High Court refused to frame an additional issue on the point and to send it down to the lower Court for decision and declared the invalidity of the gift. (*Miller, C. J. and Mullick, J.*) BAIJNATH SING *v.* MT. BIRAJ KUER. 2 Pat 52 : 4 P. L. T. 239 : 1922 P. 514.

——S. 123—*Gift—Delivery of possession—Acceptance by donee—Hindu Law.*

Among Hindus gifts made subsequent to the Act do not require delivery of possession if there is registration. Acceptance by the donee is essential under Hindu Law. It may be implied and may be presumed until dissent is signified. (*Mullick, J.*) MUHAMMAD ABDUL NAYEEM *v.* JHONTI MAHTON. 41 I. C. 389

——S 123—*Gift—No registered deed—Once in possession—Estoppel—Equitable relief.*

Where there is a gift of lands in favour of a minor under which the donors divested themselves of the ownership of these lands and the minor has alone been in possession since the date of the gift. *Held*, in a suit by the donors or any person claiming through them, the minor can resist the claim on the ground of estoppel even though there was no registered deed of gift. The Transfer of Property Act was enacted in order to prevent fraud and deception and it is founded on the highest principles of justice, equity and good conscience. (*May Oung, J.*) M. P. L. M. P. CHETTY *v.* MA NGWE SIN. 1 Rang. 665: 1924 R. 200.

——S. 123— *Gift — Attestation— Proof—Denial of attestation by attestor.*

In spite of the denial of one of the attestors of having attested the execution of a deed of gift, it is open to the Court to conclude from other evidence that he had in fact so attested (*Duckworth, J.*) AUNG DHI *v.* MA HUNG KEWA PREK. 1 R 557 : 1924 R. 139.

——S. 123—*Gift unregistered—Actions of parties—Possession given—Estoppel.*

Where a donor made a gift of immoveable property and transferred possession of the land without any registered deed and on the death of the donor the donee submitted a report to the revenue surveyor for mutation of names in the official record the heirs of the donor attesting the report and being present when it was made. *Held*. that the heirs of the donor were estopped from impeaching the gift thereafter. (*Heald, J.*) MA SHIN *v.* MAUNG HMAN. 1 Rang. 651 : 1924 Rang. 102.

——S. 123—*Gift—Partition— Distinction—Registration—Necessity for.*

A division of property by a father in his lifetime to his children except in the case of an *erasa* is not a partition but in reality a gift. Therefore it is invalid in the absence of a registered deed. (*Maung Kin, J.*) PO MAUNG *v.* AUNG DIN. 1 Bur. L. J. 26.

——S. 123—*Burmese gift.*

Burmese-Buddhist religious gifts are not exempted from the operation of this section. (*Heald, A. J C.*) U NO MEIN *v.* ME HMIN ON. 57 I. C. 809 : (1920) 3 U. B. R 207.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 123.

——S. 123—*Buddhist Law—Gift—Delivery of possession—Last illness.*

Buddhist Law cannot be applied to the case of a gift unless a question of marriage, inheritance succession, or religious usage is involved in it. A gift made during the donor's last illness is not valid without delivery of possession. (*Maung Kin, J.*) MAUNG BA MAUNG *v.* MAUNG PYU.
40 I. C. 854.

——S. 123—*Attestation—Scribe.*

An attesting witness need not add the word "witness" after his signature. The writer of a deed is not necessarily an attesting witness. But if there is sufficient evidence to show that the writer signed, not as a writer, but as an attesting witness after the execution of the document he may be considered as one of the attesting witnesses. (*Ormond, J.*) MA KIN *v* MAUNG KYA WIN.
36 I. C. 275 : 10 Bur. L. T. 106.

——S. 123—*Burmese Law*—Kanwin *gift—Registration.*

A *Kanwin* gift *i. e.*, a gift by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair, must be in writing and registered as required by S. 123 of the Act, otherwise if there is mutual divorce, the property will revert to the husband as being only *payin.* property. (*Maung Kin, J.*) MAUNG SHWE KHO *v.* MA MYA. **33 I. C. 129 : 9 Bur. L. T. 87.**

——S. 123—*Partition—Registration.*

The provisions of the T. P. Act do not apply to a partition of joint family property by private arrangement without an instrument in writing. (*Twomey, J.*) MA SEIN NYUN *v.* MAUNG U.
25 I. C. 498.

——S. 123—*Burmese Law—Transfer of joint property of husband and first wife to daughter—Effect.*

A transfer by a Burmese Buddhist of joint property of himself and his first wife to their daughters with the intention of keeping the land out of the hands of the second wife, amounts to a partition of inheritance and not a gift. (*Twomey, J.*) MAUNG HMVE *v.* MA LUN AUNG.
11 I. C. 855: 4 Bur. L. T. 186.

——S. 126—*Gift—Condition—Revocation.*

A voluntary deed of gift is not voidable by the donor merely because it does not contain a power of revocation. The absence of the power of revocation in a deed of gift is one of the circumstances to be taken into consideration when the Court has to consider whether a deed of gift shall stand or be set aside. The donor and the donee may agree that on the happening of a specified event which does not depend on the will of a donor, a gift shall be suspended or revoked but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be. (*Davar, J.*) RAJA RAM *v.* KHANDU BALU.
15 I. C. 529 : 14 Bom. L. R. 340.

——S. 126—*Gift—Rescission of—Relief when granted.*

While in contracts for sale, mortgage, lease or exchange there is pecuniary consideration, there

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 130.

is no such consideration in a gift; but the right of rescission in the case of a gift on the part of the grantor, is limited by the same set of circumstances such as fraud, mistake, coercion, undue influence, misrepresentation or the like as would operate to invalidate a contract. (*Mookerjee and Walmsley, JJ.*) BEHARI LAL GHOSE *v.* SINDHU BALA DASI. **45 Cal. 434: 22 C. W. N. 210: 41 I. C. 878 : 27 C. L. J. 497.**

——S. 126—*Voidable gift—Right to avoid is personal to donor.*

The right of a person to avoid a voidable gift is one personal to himself and cannot be transferred. (*Miller, C. J. and Mullick, J.*) BAIJNATH SINGH *v.* MT. BIRAJ KUER. **2 P. 52: 4 P. L. T. 239 : 1922 P. 514.**

——Ss. 129, 122 and 123—*Mahomedan Law—Gift—Execution and registration of deed.*

Under the Mahomedan Law the mere execution and registration of a deed does not operate as a valid gift. Transfer of possession is essential. The T. P. Act does not overrule Mahomedan Law. (*Lord Atkinson,*) SADIK HUSAIN KHAN *v.* HASSIM ALI KHAN. **38 All. 627 : 43 I. A. 212 : 14 A. L. J. 1248: 19 O. C. 192: 18 Bom. L. R. 1037: 21 C.W.N. 130: (1916) 2 M.W.N. 577: 21 M.L.T. 40. 1 Pat. L. W. 157 : 4 O. L. J. 22: 25 C. L. J. 363 : 6 L. W. 378: 10 Bur. L T. 140: 36 I C. 104: 31 M. L. J. 607 (P. C.)**

——Ss. 129 and 130—*Gift of actionable claim.*

A gift of an actionable claim is not governed by Chapter VII of the Act, and S. 129 does not therefore apply to a transfer by way of gift governed by S. 130 of the Act. (*Sadasiva Aiyar and Napier, JJ.*) SYED YAKOOB SAHIB *v.* PACHA BIBI. **38 I. C. 248: 4 L. W. 339.**

——Ss. 129 and 54—*Mahomedan Law—Transfer in lieu of dower—Sale—Registration.*

A transfer of immoveable property in lieu of dower amounts to a sale and can only be effected by a registered document as required by S. 54 of the T. P. Act. When a party desires to get out of the application of a general rule like S. 54 by virtue of the exception created by S. 129, he must allege and prove clearly that the transaction was intended and purported to be under the Mahomedan Law. (*Kotwal, A. J. C.*) FAHMIDUNNISA *v.* HIRALA. **64 I. C. 126 : 17 N. L. R 103.**

——S. 130—*Deposit receipt—Transfer of—Rights of transferee—Resulting trust.*

A deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement but where the money mentioned in the receipt is immediately payable and the receipt is presented duly endorsed together with an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee. When a person holding a fixed deposit receipt endorses it and guides it to the bank on the date of maturity, and asks the bank to pay the amount to his nephew, who drew interest and a portion of the principal and deposited the balance in his own name, the heirs of the

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 130.

original depositor have no claim to it. Before the heirs can file a suit they should have obtained Letters of Administration and the plaint filed without it should have been returned on presentation. (*Scott, C. J. and Batchelor, J.*) SETHNA *v.* GRACE EDITH HEMMINGWAY.

38 Bom. 618 : 28 I. C. 114 : 16 Bom. L. R. 534.

——Ss. 130 and 131—*Contract for supply of goods—Assignment—Notice of address of Solicitor of assignee—Not a sufficient compliance.*

To attract the operation of the Exception in S. 130 of the T.P. Act, there must be a strict compliance with the requirements of S. 131 of that Act. Where therefore a notice of assignment of a contract for sale of goods did not state the address of the assignee but only his Solicitor's address, *Held*, that the notice was defective and did not prevent the vendor from dealing direct with the vendee, 9 Bom. L. R. 838; 8 Bur. L. T. 266, Rel. on. *Per Rankin. J.* In construing Ss. 130 and 131 of the T. P. Act it must be remembered that they contain a very special scheme which must be regarded as a whole in itself. At Common law a chose in action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian Legislature has composed a new scheme which has some of the features of both and the law, while regarding the transfer of an actionable claim as valid if effected in a certain manner, will not undertake to enforce against a debtor the assignment except upon the terms that the debtor may arrange with the original creditor unless and until he has received in writing a particular kind of notice. (*Mookerjee and Rankin, JJ.*) MRS. SADASOOK RAMPROTAP *v.* HOARE MILLER AND CO.

27 C. W. N. 733 : 1923 Cal. 719.

——S. 130—*Assignment—Release.*

A mere release of his rights by a partner to his fellow partners would enable the latter to sue on a debt due to the firm. An assignment or transfer is necessary. 33 Cal. 967, Foll. (*Mookerjee and Beachcroft, JJ.*) DHANAMCHAND BOID *v.* MORIJI SAHU.

16 I. C. 440: 16 C. L. J. 436.

——S. 130—*Deposit of title deeds—Endorsement of negotiable instrument without transfer of equitable mortgage by a registered instrument—Endorsee cannot enforce the mortgage.*

The endorsee for value of a negotiable instrument the amount of which had been secured by mortgage of deposit of title-deeds, is not entitled to enforce the mortgage where there is no registered instrument conveying the mortgage right to him. (*Napier and Krishnan, JJ.*) ELUMALAI CHETTY *v.* BALAKRISHNA MUDALIAR.

44 Mad. 965: (1921) M. W. N. 704 : 14 L. W. 379 : 66 I. C. 168 : 41 M. L. J. 297.

——S. 130—*Transfer of actionable claim—Words of transfer essential.*

A mere written acknowledgment of the receipt of money, due under a pro-note signed by the payee, does not, by itself amount to a transfer of an actionable claim, without words of assignment (*Spencer and Odgers, JJ.*) CHANDU *v.* RAMUNNI.

(1920) M. W. N. 600 : 59 I. C. 943 : 13 L. W. 183 : 38 M. L. T. 262 : 39 M. L. J. 273.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 130.

——S. 130—*Actionable claim—Assignment of—Form of—Consent of debtor—Consent of debtor if necessary to validate transfer.*

The words "instrument in writing" in S. 130 of the T.P. Act, do not mean a document couched in a technical language in a particular form. What is intended is that the transfer should be made and in writing and it is sufficient if the intention of creditor to transfer the debt due to him to the transferee, can be gathered from writing. An assignment made in a statement of accounts by way of an entry is an assignment within the meaning of the section. After the date of the transfer, the transferee is the only person entitled to sue for the debt. An assignment does not become invalid for want of consent of the original debtor or by reason of the absence of a novation of the contract (*Abdur Rahim and Napier, JJ.*) SEETHARAMA IYER *v.* NARAYANASWAMY PILLAY.

47 I. C. 749.

——S. 130—*Chose in action—Partial assignment of, if valid—Judicature Act, S. 25.*

Quære :—Can a part assignment of a chose in action be regarded as valid in India with due regard to the absence of the word 'absolute' from S. 130 as compared with S. 25 of the Judicature Act. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) SABJAN SAHIB *v.* ABDUL AZEEZ SAHIB.

42 I. C. 684.

——S. 130—*Hypothecation of pro-note by deed—Transfer of actionable claim.*

Hypothecation of a promissory note as security for money owing is a transfer of an actionable claim under S. 130 of the T. P. Act. The transferee is entitled to recover the debt and if he allows it to become barred he is liable to the pledger. (*White, C. J., Miller and Oldfield, JJ.*) MUTHUKRISHNA AIYAR *v.* VEERARAGHAVA AIYAR.

38 Mad. 297 : (1913 M. W. N. 839 : 14 M. L. T. 411 : 21 I. C. 316 : 25 M. L. J. 356.

——S. 130—*Endorsement of pro-note.*

The mere endorsement of a pro-note is not an assignment of an actionable claim. So the endorsee of a pro-note executed by the managing member cannot sue the other members (*Benson, O. C. J. and Sankaran Nair, J.*) SEETHARAMA CHETTY *v.* SESHIAH CHETTY.

17 I. C. 417 : (1912) M. W. N. 1011.

——S. 130—*Assignment—Instalment bond—Letter to assignee accompanied by delivery of bond.*

An assignment of the right under an instalment bond, by the person in whose favour it was executed, made by means of a letter of assignment, accompanied by delivery of the bond to the assignee, is valid as an assignment of debt under S. 130 of the T. P. Act. 30 Mad. 75, Ref. (*Benson, Offg C. J. and Napier, J.*) KONJETTI VEERASAMI *v.* VARADA VEERASAMI.

16 I. C. 708 (1) : 18 M. L. T. 77.

——Ss. 130 and 137—*Promissory note—Assignment—Writing.*

A promissory note, if not transferred under the Negotiable Instrument Act, must be transferred according to S. 130 of the T. P. Act. S. 137 of

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 130.

that Act does not render oral assignments valid, 17 M. L. J. 393, Foll. (*Wallis. J*) RAMAN CHETTY *v.* NAGARATHANA NAICKER.
15 I. C. 380 : 11 M. L. T. 246.

——S. 130—*Assignment—Authorisation to collect amount.*

A document authorising a person to recover the amount of a promissory note from a person with whom it was deposited by the owner operates as an assignment of the promissory note and an attachment of it after assignment is void as against the assignee. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) KATTICK RAMUNNI *v.* UDAYAMAGALATH MITHALE. **14 I.C 279 : (1912) M. W. N. 524.**

——S. 130 — *Transfer — Instrument in writing.*

The transfer of an actionable claim within S. 130 can only be made by an instrument in writing (*White, C. J. and Abdur Rahim, J.*) VELAYUTHA CHETTIAR *v.* PILLAIYAR CHETTY.
9 I. C. 287 : 9 M. L. T. 102.

——S. 130—*Actionable claim—Right to recover goods lent or to claim damages is not an.*

A right to recover goods lent or damages for breach of contract on failure to return them is not an actionable claim. It is a right to sue with S. 6 (*e*) and is not transferable. (*Batten, A. J.C.*) MT. NAKHOLA *v* KOHAYA. **1923 Nag. 61.**

——S. 130—*Assignment of decree—Validity—Notice.*

An assignment of a decree debt is not valid as against the debtor until the debtor has in fact notice of the assignment and any payment to the original decree-holder is valid, against the assignee if made before notice of the assignment. (*Miller, C. J. and Kulwant Sahay, J.*) TATA IRON AND STEEL CO. LTD *v.* BAIDYANATH LAIK.
2 Pat. 754 : 1924 P. 118.

——S. 130—*Arrears of rent due—Assignment—Writing necessary.*

The transfer of a right to arrears of rent and current dues can only be made by an instrument in writing under S. 130 of the T. P. Act. (*Das and Adami, JJ.*) RAMESHWAR NARAIN SINGH *v.* RIKNATH KOERI. **1923 P. 165.**

——S 130—*Promissory note—Assignment by separate writing—Rights of transferee.*

A promissory note can be transferred by an assignment in writing even in places to which the T. P. Act has not been extended but of course it would not render the transferee a 'holder in due course'. (*Duckworth, J.*) PALWAN *v.* KANU.
66 I. C. 501 : 11 L. B. R. 174.

——S. 130—*Insurance policy—Deposit as security—Effect of.*

Where an insurance policy was deposited with the payee of a pro-note by way of collateral security, such deposit is neither a transfer nor an assignment of the policy. It creates no security in favour of the payee. (*Fox, C. J. and Hartnoll, J.*) OFFICIAL ASSIGNEE *v.* T. M. T. THOMPSON. **30 I. C. 602 : 8 Bur. L. T. 157.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 132.

——Ss. 130 and 131—*Actionable claim—Transfer of—Notice.*

A person who is bound to pay the debt, is not bound by the transfer of an actionable claim unless he receives an express notice in writing under S. 131 of the T. P. Act from the transferor or from the transferee stating the name and address of the latter. The notice must be given only to the person concerned or his authorised agent (*Fox, C. J.*) BASANT SINGH *v.* BURMA RAILWAYS CO. **8 L. B. R. 288 : 30 I. C. 278 : 8 Bur. L. T. 266.**

——S. 130—*Morigage—Assignment—Notice to mortgagor.*

The transfer by a mortgagee of his rights under a mortgage deed is valid even without notice of transfer to the mortgagors. (*Hartnoll and Parlett, JJ.*) MAUNG KYAW YWE *v.* A. L. V. RANGANATHAM CHETTY. **11 I. C. 778 : 4 Bur. L. T. 160.**

——S. 130 (1)—*Insurance policy—Moneys due under—Assignment of, by way of charge—Writing essential.*

S. 130 of the T. P. Act applies not only to absolute assignments but also to assignments by way of charge, and a mere deposit of a life insurance policy by way of security for a loan, without an instrument in writing, does not create any equitable charge. The positive language of S. 130 of the T. P. Act precludes the application of any analogies of the English Law. (*Lord Moulton*) MULRAJ KHATAN *v.* VISHWANATH **37 Bom 198 : 40 I. A. 24 : (1912) M. W. N. 1247 : 12 M. L. T. 652 : 11 A. L. J. 7 : 17 C. W. N. 209 : 15 Bom. L. R. 9 : 17 C. L. J. 162 : 17 I C. 627 : 24 M. L. J. 60 (P. C.).**

——S. 131 and 130—*Operation of.*

The validity of an assignment must be tested with reference to the law as it stood at the time when it was made. The provisions of S. 131 as it originally stood did not invalidate an assignment for want of a notice to the debtor, but it only suspended the operation of the assignment until notice was given. (*Mookerjee and Casperse, JJ.*) ISMAIL MOLLA *v.* JADO NATH. **10 I.C. 510 : 13 C. L. J. 641.**

——S. 132—*Purchase of debt—Rights of purchaser—Equities.*

Where a decree-holder purchases a debt due to his judgment-debtor from a third person he takes the debt as it stands at the time of sale subject to the equities and liabilities to which the judgment-debtor was subject at the time of the sale. Consequently the debtor of the judgment-debtor could set off against the debt any amounts due to him from the judgment-debtor. (*Martineau and Harrison, JJ.*) RAM BHAJ DATTA *v.* RAM DAS. **3 Lah. 414 : 69 I. C. 720 : 1923 Lah. 261.**

——S. 132—*Transfer of mortgage—Application of English Law.*

Even under English Law the principles applicable to the assignments of choses-in-action do not apply to transfers of mortgages. A mortgage is not an actionable claim within S. 132 and therefore assignment of mortgage is not covered

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 132.

by the same rules that govern assignment other choses-in-action. (*Ayling and Napier, JJ.*) SUBRAMANIA IYER *v.* SUBRAMANIA PATTAR,
40 Mad. 683 : (1916) 1 M. W. N. 351 : 34 I. C. 859 : 30 M. L. J. 615.

——S. 132—*Assignment of debt—Debtor assenting to assignment—If can afterwards assert any claim against the assignee—Assignment subject to equities.*

Where on an assignment of a money debt the debtor assents to deliver the moneys to the assignee according to the terms of the assignment he cannot afterwards assert, as against the assignee any claim in his own right of which the assignee has no notice. *Quaere*:—Whether the obligation is based on contract, estoppel or waiver ? The assignee of an actionable claim *primâ facie* takes it subject to all existing equities and it is his duty to ascertain their extent. (*Spencer, Trotter and Napier, JJ.*) VENKATA SUBBIAH *v.* SUBBA NAIDU.
2 L. W. 977 : 18 M. L. T. 533 : 31 I. C. 152 : (1915) M. W. N. 822.

——S. 132—*Set-off—Assignee—Chit Fund.*

Under Sec. 132 a set-off can be claimed by a debtor against the creditor's assignee and can be enforced, though the plaintiff is a purchaser of an actionable claim in a Court auction. (*Sadasiva Aiyar and Napier, JJ.*) SUBRAMANIAN PATTAR *v.* KIRADADASAN.
16 I. C. 686 : (1912) M. W. N. 1235.

——S. 134—*Chose-in-action — Mortgage of —Right to sue for debt—Limitation—Starting point.*

A suit by a mortgagee from the subscriber to a chit fund of the amount that will thereafter become payable to such subscriber from the *Karaswan* for the recovery of the debt given to him as security is maintainable and he is the only person that can sue for recovering that amount ; for such suit against the *Karaswan* the date when the chit money became payable and not the date of mortgage is the starting point of limitation. (*Seshagiri Aiyar and Moore, JJ.*) ARUNACHELLAM CHETTIAR *v.* MADUSWAMI,
56 I. C. 146 : 11 L. W. 238.

——S. 134 — *Hypothecation of pro-note—Transferee allowing pro-note to become time-barred.*

Where a promissory note has been hypothecated the transferee bought to recover the pro-note debt failing which he is liable to be debited with the amount if the note is allowed to become time-barred. (*White, C. J., Miller and Oldfield, JJ.*) MUTHUKRISHNA AIYAR *v.* VEERARAGHAVA AIYAR.
38 Mad. 297 : (1913) M. W. N. 839 : 14 M. L. T 411 : 21 I. C. 316 : 25 M. L. J. 356.

——Ss. 134 and 138—*Negotiable instrument —Hypothecation—Effect.*

The hypothecation of pro-note or chose-in-action by debtor to a creditor amounts to an assignment especially when possession is transferred. Per *Sundara Aiyar, J.*--Such hypothecation

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 137.

does not amount to assignment, unless the transfer is made with express words to that effect. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MUTHU KRISHNIEN *v.* VIRARAGHAVA IYER.
12 M. L. T. 15 : (1912) M. W. N. 919 : 16 I C 601 : 23 M. L. J. 430.

——S. 135—*Sales in execution.*

S. 135 has no application to sales in execution by virtue of S. 2 (d) of Act. (*Benson and Krishnaswami Aiyar, JJ.*) PALANIAPPA TEVAN *v.* SHADAGOPPA.
(1911) 1 M. W. N. 183 : 9 I. C. 729 : 9 M. L. T. 319.

——S. 136 — *Right to arrears of rent—Actionable claim—Not enforceable.*

The right to arrears of rent in respect of property purchased by a pleader along with the property is an actionable claim and cannot be enforceable. (*Jenkins, C. J. Harrington, Stephen, Mookerjee and Holmwood, JJ.*) HARI LAL SINHA *v.* TRIPURA CHARAN ROY.
40 Cal. 650 : 17 C. W. N. 679 : 19 I. C. 129 : 17 C. L. J. 438.

——S. 136—*Decree is not actionable claim.*

A decree is not an actionable claim and hence the transfer of it in favour of a pleader is not invalid. (*Abdur Rahim and Odgers, JJ.*) GOVINDARAJULU NAIDU *v.* RANGA RAO.
13 L. W. 97 : (1921) M. W. N. 98 : 29 M. L. T. 99 : 62 I. C. 255 : 40 M. L. J. 124.

——S. 136—*Unprofessional conduct.*

A pleader is guilty of unprofessional conduct by a purchase of an actionable claim prohibited by S. 136 ; especially if the purchase be speculative as when the claim is ripe for judgment and the seller is his own client unable to judge the result of the suit. A claim is still an actionable claim though the suit might have been instituted thereon. (*Benson, O. C. J., Sankaran Nair and Sundara Aiyar, JJ.*) MUNI REDDI *v.* K. VENKAT RAO.
37 Mad. 238 : . T. 615 : (1912) M. W. N. 1029 : 13 Cr. L. J. 800 : 17 I. C. 544 : 23 M. L. J. 447.

——S. 136—*Pleader advancing money to client towards redemption decree in client's favour.*

Where a pleader advances money on a mortgage to a client for the purpose of payment towards a redemption decree passed in the client's favour, the transaction does not amount to a transfer of an actionable claim within the purview of S. 136 of the Act. (*Lindsay, J.C.*) SAHIBUNNISSA *v.* ABDUL GHAFFUR.
3 O. L. J. 140 : 34 I. C. 360 : 19 O. C. 60.

——S. 137—*Mate's receipts—Shipping carriage by inland waters—Negotiable Instrument—Document of title—Strangers—Obligation.*

The duty of a Shipping Company, whose vessels ply in inland waters, arising from a document which charges the Company with receipt of certain goods from a shipper under a bargain to convey them by its ship to a certain place for a stipulated freight on certain conditions, is to deliver the goods to the shipper

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 137.

or to his nominee at the place of the delivery, and although such a document is called a Mate's receipt to which certain terms which are more suitable to Bills of Lading are appended, it is a simple ordinary receipt for goods, and not a negotiable instrument within S. 137 of the Transfer of Property Act ; nor is it a document of title and the goods do not pass upon the transfer of it. A clause in a circular issued by a Shipping Company in the course of its business intimating that the company shall not part with the goods shipped unless receipts thereof (which were called Mate's receipts) are given up or otherwise unless a guarantee obtained, does not constitute an obligation upon which a person (who is neither the shipper nor his nominee) as an outside party is entitled to found an action against the Company. (*Lord Shaw.*) NATCHEAPPA CHETTY *v.* IRAWADDY FLOTILLA CO 41 Cal. 670: (1914) M W. N. 163 : 18 C W. N. 457: 12 A. L. J. 211 : 15 M. L. T. 193 : 7 Bur L. T 40 : 19 C. L. J. 265 : 22 I. C. 311 : 16 Bom. L. R. 298 (P.C.) : [On appeal from 9 I. C. 465 : 4 Bur. L. T. 21.]

——— S. 137—*Delivery order—Contract Act,* S. 108,

Under the Contract Act, S. 108 and T. P. Act S. 137 there is now a statutory recognition of a delivery order as a document of title and under it the transferee acquires a title to the goods. (*Jenkins, C. J. and Woodroffe, J.*) ANGLO-INDIA JUTE MILLS CO *v.* OMADIMULL. 10 I. C. 859 : 38 Cal. 127.

——— S. 137—*Promissory note—Sale of—Duty of buyer.*

A person buying a promissory note must know that he is buying a mere claim and must make enquiries before buying. It is a case of *caveat emptor.* (*Johnstone, J.*) KISHEN SARUP *v.* TARA CHAND. 150 P. L. R. 1915 : 29 I. C. 887 : 76 P. W. R. 1915.

——— S. 137 —*Railway receipt —Assignment when passes title.*

Assignment of Railway receipts passes title to goods only when they are proved to be negotiable. (*Robinson and Macgregor, JJ.*) ARUNACHALLAM CHETTY *v.* KO PO YAN. 1 Bur. L J. 90 : 11 L. B. R. 341 : 1923 Rang. 1.

TRANSFER OF PROPERTY (VALIDATING) ACT (XXVI OF 1917).

——— S. 3, (Proviso 3)—*Former Court—Restoration of appeal—Finding of trial Court.*

An Appellate Court acting under S. 3 of Act, (XXVI of 1917) restored an appeal which had been dismissed. *Held,* that the appeal became once more a pending appeal and the Appellate Court which is "the former Court" within the proviso (3) to S. 3 is not bound by the finding of fact of the Original Court. (*Piggott and Walsh, JJ.*) KAMPA DEVI *v.* KESHORI LAL. 55 I. C. 981 : 18 A. L J. 447.

TREASURE TROVE ACT (VI OF 1878).

——— Ss. 4 and 20—*'Finder', meaning of,*

Where petitioners discovered treasure while cutting a tree under the orders and in the presence of the employer who at once assume control over it, *Held,* that the petitioners were nevertheless 'finders' under S. 4 of the Act. (*Sadasiva Aiyar, J.*) MALA NAICKEN, *In re.* 15 Cr. L. J. 632 : 25 I. C 640 : 27 M. L. J. 477.

——— Ss. 20 and 21—*Forbidding a person not a finder, to give notice—Charge—Usufructuary mortgagee whether owner.*

A usufuctuary mortgagee is owner ; the forbidding of a person who was not the finder or a person employed or instructed by the under to give notice on his behalf is no offence. (*Walsh, J.*) SITAL *v.* EMPEROR. 15 A. L. J. 796 : 42 I. C. 995 : 19 Cr. L. J. 35.

TREATIES.

See ACT OF STATE.

TREES.

See (1) GENERAL CLAUSES ACT, S. 3 (25).
(2) LANDLORD AND TENANT.
(3) REGN. ACT, S. 2, CL. (6).
(4) TENANCY ACTS (LOCAL).
(5) T. P. ACT, S. 3.

TRESPASS.

See ADVERSE POSSESSION.

TRUSTEE.

See (1) TRUSTS.
(2) TRUSTS ACT.

TRUSTEE ACT (XXVII OF 1866).

——— Ss. 8, 20 and 32—*High Court—Vesting order—Power to make.*

Under the Indian Trustees Act by virtue of S. 8 the High Court may make a vesting order having the effect of a conveyance with regard to properties held, by a minor trustee or mortgagee and Ss. 20 and 32 may be used in the same way as similar sections in the English Act. (*Chaudhury, J.*) BASIR ALI *v.* HAFIZ NAZEF ALI. 43 Cal. 124 : 30 I. C. 406 : 19 C. W. N. 817.

TRUSTS.

Co-trustees.
Creation of.
Intention of the author.
Reimbursement.
Removal of trustee.
Transfer of office of trustee.
Transfer of trust property.
Miscellaneous.

Co-trustees.

——— *Co-trustees—Administrator de bonis non—Suit by, against heirs of deceased administrator.*

A testator appointed two executors of the property bequeathed to an idol. One of the executors died and the testator's daughter who had obtained grant of administration *de bonis non* sued is

TRUSTS—Co-trustees.

heirs for account and delivery of moveable property. *Held*, that the heirs were under no obligation to render account to the administrator *de bonis non*. (*Walmsley and Greaves, JJ.*) GOURCHANDRA DAS *v.* MON MOHINI DASI.
62 I. C. 476. : 25 C. W. N. 332

———*Co-trustees—Right of suit—Joint action essential.*

Ordinarily all the trustees should be co-plffs. and only such of them should be made defts. as are unwilling to be joined as co-plffs. or have done some act precluding them from being joined as plffs. Where the administration of a trust is vested in several trustees, they all should be considered as forming one collective trustee, and they must exercise the powers of their office in their joint capacity. (*Mookerjee and Walmsley, JJ.*) NORENDRA NATH KUMAR *v.* ATUL CHANDRA BANDOPADHYA.
41 I. C. 837 : 27 C. L J. 605.

———*Co-trustees—Joint possession—Right to.*

Where a plff. and deft. are *mujawars* of a shrine and plff claims joint possession with the deit, in respect of a *baithak* and certain shops belonging to the shrine, a decree for joint possession could be granted and it does not involve the eviction of the defendant, 27 All. 153; 26 Cal. 553 , 43 P. R. 1906 Foll. (*Rattigan and Jones, JJ.*) MUHAMMAD HAYAT *v.* MUHAMMAD ALI.
94 P. R. 1915 : 31 I. C. 489 : 210 P. W. R. 1915.

———*Co-trustees—Suit in ejectment—Omission to implead some of the trustees as parties—Effect of.*

The general rule is that if several persons have a joint right of action all must join in suing. If any of them will not come in as plaintiffs they must be added as defendants. Co-trustees are subject to the above rule. 5 C. L. J. 527 ; 34 M. 406; 8 Cal. 42, 39 Mad. 456: Ref. Co-trustees form as it were one collective trustee and must exercise the powers of their office in their joint capacity and cannot act separately. (*Spencer and Ramesam, JJ.*) THINA SHANMUGA MOOPANAR *v.* SUBBAYYA MOOPANAR.
42 M. L. J. 133 : (1922) M. W. N. 106 : 15 L. W. : 283 : 31 M. L. T. 266 : 1922 Mad. 317 (H. C.).

———*Co-trustees—Hereditary trustees—Delegation of power to one.*

Several hereditary truestees of a charitable trust may appoint one of them as a managing trustee for some purposes, though in the case of suits, etc., all should join as parties and should act after consulting each other. (*Sadasiva Aiyar and Spencer, JJ.*) ANGAMUTHU *v.* RAMALINGA PILLAI.
60 I. C. 766 : 39 M L. J. 685.

———*Co-trusees—Acts of majority—Two trustees—Charge.*

The grant of *Kanom* by one of two trustees, without the other's consent is inoperative. 24 Mad. 296, Appl. The *Kanomdar* has a charge on the trust property if the *Kanom* amount has been applied to discharge a liability on the trust property. (*Abdur Rahim and Napier, JJ.*) KOVITTAL PARAMBIL PARUKAM *v.* ATTIMANA ILLETH NARAYANAN.
42 Mad. 335 : 9 L. W. 413 : 25 M. L. T. 272 : (1919) M. W. N. 247 : 50 I. C 371 : 36 M. L. J 295.

TRUSTS—Creation of.

———*Co-trustees—Pro-note by one, with consent of others—Personal liability.*

When any one of the trustees of a temple borrows money and executes a promissory note for the loan, he renders himself personally liable for the loan even though he uses the money for the benefit of the temple, if he takes the loan without the consent of his co-trustees. (*Seshagiri Aiyar, J.*) THIRUVENGADASWAMI IYENGAR *v.* VEERA PILLAI.
30 I C 778.

———*Co-trustees—Power of majority of.*

The whole body of a charitable trust can legally be bound by the majority. A few only of the trustees without any authority from the entire body cannot discharge third parties from payment of their dues to the trust. (*Spencer and Coutts-Trotter, JJ.*) NATRI MENON *v* GOPALAN NAIR.
39 Mad. 597 : (1915) M W. N. 586 : 2 L. W. 714 : 18 M. L. T. 220 : 30 I. C. 713 : 29 M L. J. 291.

———*Co-trustees— Ejectment suit against tenant by one—Effect of.*

A suit by one trustee against a tenant in ejectment even without consulting the co-trustees before suit but impleading them aa defendants after giving notice to them to join him in the suit, is maintainable. 20 M. L J. 951, Ref : 14 Mad. 489 : 23 Mad. 82, Dist. (*Ayling and Seshagiri Aiyar, JJ.*) CHERUKAT MADTHIL EDAKRAMANCHERI *v.* MANGATHAYA DAMODARAM NAMBUDRI.
(1914) M. W. N. 834 : 26 I. C. 207 : 16 M. L. T. 250.

———*Co-trustees—One trustee suing another in ejectment, if lies.*

A single trustee cannot recover possession of the trust properties from another by evicting him though such a suit may lie against a stranger on behalf of the trust. (*Benson and Sundara Aiyar, JJ.*) AMBALAM PAKKIYA UDAYAN *v.* BATHE.
36 Mad. 418 : (1912) M. W. N. 152 : 13 I. C. 599 : 24 M. L J. 630.

———*Co-trustees—Suit for rent—If maintainable by one alone.*

A member of charity trust and religious trust can alone sue to recover rent and yet not implead the rest. (*Po Hun, J.*) MA SE *v.* U LUN.
2 Bur. L. J. 266.

Creation of.

———*Creation of—Power of settlors to change the character of proprietary and contractual rights.*

It is plain that, however clear the principle which governs the character of the proprietary and contractual rights, it is always open to the testator or settlor, with full power of disposition, to exclude its practical consequences. He has only to say that if, for example it is his intention that the person entitled to the fixed sum, payable only after the determination of the intermediate

TRUSTS—Creation of.

title should account to those in whom the intermediate title was vested or their representatives Such an expression of intention has, at least, the effect of creating a trust in equity and might in certain cases, be operative at law by giving a special character to the title of the periodical payments It has the effect of making the question in most instances one merely of construction of the instrument. (*Viscount Haldane.*) PHIROZSHAW BOMANJEE PETIT *v.* BAI GOOLBAI.

47 Bom. 790 : 18 L. W. 940 : 26 Bom. L. R 76 : 33 M. L. T. 372 : 50 I. A. 276 : (1923) M. W. N. 616 : 1923 P. C. 171. (P C.).

——*Creation of—Uncertainty of subject-matter.*

No trust is created if the subject matter is too uncertain to enable the Court to administer it. (*Lord Buckmaster.*) BHAIDAS SHIVADAS *v.* BAI GULAB. **42 M. L. J. 385 (P. C.) : 46 Bom 153 : 24 Bom. L. R 551 : 26 C. W. N. 129 : 20 A. L. J. 289 : 35 C. L. J. 314 : 15 L. W. 412 : 30 M. L. T. 149 : 49 I. A. 1 : 1922 P. C. 193.**

——*Creation of—Presumption of advancement—Law in England and in India.*

The general rule in principle of the Indian Law as to result in trust but little from the general rule of English Law upon the same subject. The decisions have established that Hindus or Mahomedans make transfers or grants for no apparent reason or purpose. Consequently the presumption of the resulting trust in favour of the person providing the purchase-money arises in India, and there is no presumption of an intended advancement in favour of the *benamidar* as there is in England. Where a transaction takes place between persons born in India of British parents and who have resided practically all their life in India the principles and the rules of the law are those of the Court of Chancery in England that will apply to them. Which rules of law will apply to any given case in India will not wholly depend on race, place of birth domicile or residence. But the widespread and persistent usages and practices of the native inhabitants are more important. The mere statement by the husband or the father that he did not intend to confer any beneficial interest on the donee or transferee is of little avail unless he proves that he had other different motives for the action he took Their Lordships held on the evidence that the presumption was an advancement to the wife was intended was rebutted (*Lord Atkinson.*) KERWICK *v.* KERWICK.

48 Cal. 260 : 47 I. A 275 : (1920) M. W. N. 738 : 13 L. W 455 : 28 M L. T. 194 : 57 I. C 834 : 32 C L. J. 490 : 2 U. P. L. R (P.C.) 153 : 23 Bom. L. R 730 : 39 M. L. J. 296. (P.C.) [On Appeal from 47 I. C. 376.]

——*Creation of—Purchase in the name of wife or child—British descent—Presumption.*

The law relating to resulting trusts is the same in England and India. But the doctrine of the Courts of Chancery that where a husband or a father pays the money and the purchase is taken in the name of a wife or child there is a presumption of advancement does not apply in this country except in the case of persons born in India of British parents and living in British India. (*Lord Atkinson.*) KERWICK *v.* KERWICK.

(1920) M. W. N. 738 : 8 M. L. T. 194 : 32 C. L. J. 490 : 57 I. C. 834 : 47 I. A. 275 (P.C.) : 39 M L. J. 296. 48 Cal. 260 : 23 Bom. L. R. 730 : 13 L. W. 455 : 2 U. P. L. R. (P.C.) 153 [On Appeal from 47 I. C. 376.]

——*Creation of—Public purpose of charitable or religious nature.*

A charitable trust might be created by a grant for the express purpose or a grant having been made in favour of an individual or class of individuals that individual or class might after obtaining the grant create a charitable trust. (*Richards, C. J. and Banerjee, J.*) PURAN ATAL *v.* BARSHAN DAS. **9 A L. J. 709 : 14 I C. 698 : 34 A. 468.**

——*Creation of—Essentials.*

One essential of trust is that it should be imperative. If a man can perform or carry out the alleged trust just as he likes, then it is no trust. In other words if he is entitled to put the money into his own pocket, he is not a trustee known to the law. (*Marten, J.*) THE ADVOCATE GENERAL OF BOMBAY *v.* YASUFALLI EBRAHIM. **24 Bom. L. R. 1060.**

——*Creation of—Deed void—Position of trustees—Express and resultant trusts—Adverse possession by trustees—Right of* cestui que trust.

Where what purports to be a trust-deed turns out to be void and therefore not to have passed the legal estate, the position of those who took possession, believing themselves to be trustees, necessarily assumes the character of possession by trespass and is therefore from the inception in law adverse against all the world. But where the trust-deed in itself is good and valid to the extent of passing the legal estate but the trusts declared are in themselves wholly or partially bad, then there is a resultant trust over to the author of the trust and the possession of the trustees, whatever they may think of it and however they may intend to use it for the purposes of carrying out the bad trusts, could not in law be adverse to the *cestui que trust*, that is to say the grantor so long as a trustee occupies the position of a trustee as soon as the declared trusts failed and there is a resultant trust in favour of the settlor, the trustee's possession is essentially that of his *cestui que trust* and can only be changed into adverse possession by a conscious and deliberate act; that is to say he must repudiate all intention of holding for the result in *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court had declared or which are known to him, to have failed. No act performed by a person taking as trustee under his own trust settlement, purporting to be in his capacity as a donor can have any bearing at all upon the character of his possession as a trustee. In case of an express trust a *cestui que trust* can recover the trust property from the trustee even after 12 years, though during the 12 years, he had taken no steps to recover the same. But if the trust is an implied trust then he must

TRUSTS—Creation of.

sue to recover the property within 12 years from the date of assumption of an adverse title by the trustee. There can be no adverse possession of the resultant trustee until there has been some material change in the character of the trustee referable to his knowledge of his changed relation and unmistakably adverse to his true *cestui que trust*. Where the ultimate resultant trust which is to spring back to the settlor is consistent with the discharge of the declared trust, then it may by loose use of language be said to be express on the face of the deed but where the extinction or failure of all the intended trusts is a condition precedent to the resultant trusts,coming into being then the latter is clearly a true resultant trust and is not express and never can be expressed on the face of the deed. There can be no question of limitation at all until the court has pronounced some at any rate of the declared trusts to be bad. Until the question whether the trusts are good or bad, is decided limitation does not begin to run against a resultant trustee. When the relation between the trustee and *cestui que trust* is established it would of necessity go back to the moment when any or all of these declared trusts failed. (*Beaman, J.*) PEER BHAY *v.* EBRAHIM.
13 Bom. L. R. 717 : 12 I. C 225 : 36 B. 214.

———*Creation of—Deed construction.*

Where a partition deed recited that the son was to make over a certain quantity of rice and cocoanuts for the performance of divine service to the father during his lifetime and afterwards was to take over these profits himself and perform the said divine services, and it was also provided that the son should not mortgage or sell the lands, *held*, that there was no complete dedication of property to a religious trust but merely a gift subject to an obligation to perform certain services. (*Batchelor and Roe, JJ.*) DASSA RAMACHANDRA *v.* NARASINHA DAMODHAR,
35 Bom. 156 : 9 I. C. 768 : 13 Bom. L. R. 101.

———*Creation of—Conditional trust—Gift to charity—Condition not fulfilled.*

A Zamindar provided by a trust deed for the maintenance of himself and his family and 'after the liquidation and payment of debts to spend Rs. 500 for medical and educational charity within the Zamindari, as shall appear just to the trustees with his approval'. The trustees paid off the debts with a substantial balance in hand. The Zamindar dying in the meantime, his widow initiated proceedings to obtain direction from the Court whether the provision for charity was operative. *Held*, that the provision for charity was invalid. (*Mookerjee, A. C. J. and Fletcher, J.*) SANTONA ROY *v.* ADVOCATE-GENERAL OF BENGAL.
48 Cal. 124. 32 C. L. J. 453 : 62 I. C. 193 : 25 C. W. N. 343.

———*Creation of—Charitable trust.*

Although no formalaties are required to be observed in case of charitable trust, yet where the trust is created with reference to particular parties, the language should be clear enough to show that definite intention. (*Oldfield and Krishnan, JJ.*) VENKATACHALAPATHI *v.* CHAKRAPANI AIYAR.
42 M. L. J. 258 : 15 M. L. W. 279 : (1922) M. W. N. 123 : 1922 M. 83 (2).

TRUSTS—Intention of the author.

———*Creation of—Absolute estate—Intention of the testator—No power of alienation.*

Though the trust property is inalienable the testator is not precluded from creating an absolute estate in the trust property, and the trust property would descend to the heirs of the donee according to ordinary law. (*Wallis, C. J. and Ramesam, J.*) GURUVAJ AMMAH *v.* RANGASWAMI MUDALIAR.
62 I. C. 745 : 13 L. W. 513.

———*Creation of—Private or public trust—Evidence—Power of family to pull an end to private endowment — Alienation of property to family temple.*

Clear and strong proof of dedication to the public is necessary for the dedication to public of a temple which once admittedly belonged to a family. The member of a family may unanimously put an end to a private endowment such as a family temple. Property attached to a private temple belonging to a family cannot be sold in execution of a decree against the family. (*Muthuswami Aiyar and Best, JJ.*) APPU PATTAR *v* KURUMBA BHAGWATI.
11 I. C. 633 : 21 M. L. J. 588.

———*Creation of—Registration of trust-deed.*

Registration of a deed of trust passes title to the trustee in the absence of an intention to the contrary. (*White, C. J. and Abdur Rahim, J.*) PULLAYA CHETTY *v.* VEDACHELLA PILLAI.
(1911) 2 M. W. N. 376 : 11 I. C. 24 : 10 M. L. T. 44.

———*Creation of—Declaration.*

Where a person was entrusted with certain money and he was directed to defray the expenses of family ceremonials with the interest on the money there is a sufficient declaration of trust. (*Batten, J. C.*) KASHIPRASHAD *v.* MOHAN LAL.
1924 N. 63

———*Creation of—Contract.*

In a deed of sale, *A* the vendor left some money with the vendee *B*, for paying it to a third person and *A* also wrote a letter to *B*, to pay the amount to the third person. There was however no undertaking by *B* to pay to the third person, *held*, that there was no declaration of trust in favour of the third person who could not therefore recover the money from *B*. (*Ross, J.*) BHAGWAT NARAIN *v.* GANGA PRASAD.
62 I. C. 617.

———*Creation of— Disposition contrary to personal law.*

A man cannot by the interposition of a trustee make a disposition of property which under his personal law he cannot make by means of direct gift. (*Twomey, C. J. and Maung Kin, J.*) MA YU *v.* PO THAUNG.
50 I. C. 522 : 11 Bur. L. T. 234.

Intention of the author.

———*Intention of author of trust—Conduct of trustees after execution of.*

The misconduct of trustees or the neglect by them of their duties after the execution of the trust is no ground for determining the intention of the author of the trust when he executed the

deed of trust. (*Evans, J. C. and Lindsay, A. J. C.*) HASHIM ALI KHAN *v.* SADIQ HUSAIN KHAN.
13 I C. 882 : 14 O. C. 356.

Reimbursement.

——— *Reimbursement — Personal liability of the trustee.*

A trustee is personally liable for the price of articles supplied to him for the use and benefit of the temple and no charge is made on the temple property for the price (*Odgers, J.*) PONNUSAMI CHETTAR *v.* PICHU SASTRIGAL, 62 I. C. 423 : 13 L. W. 323.

——— *Reimbursement — Debt contracted on personal security—Trust purposes—Remedy of creditors*

A creditor lending money to a trustee on his personal credit though for purposes of the trust cannot get a decree against the trust property but can get a personal decree against the trustee. The money may have been spent for the purposes of the trust. 26 Ch. D. 245; (1880) 15 Ch 548; 28 Cal. 574, Foll.; 31 Mad. 47. Expl. (*Abdur Rahim and Spencer, JJ.*) SWAMINATHA AIYAR *v.* SRINIVASA AIYAR, 21 M. L. T. 91 . (1917) M. W. N 278 : 5 L. W. 323 : 38 I. C. 172 : 32 M L. J. 259

——— *Reimbursement—Right of—Money borrowed for temple.*

A trustee of a temple borrows money for the temple. He must be indemnified from the trust estate for the debt (if he) pays it though the case is not covered by Ss. 69 and 70 of the Contract Act. (*Abdur Rahim and Phillips, JJ.*) SEETHARAMA IYER *v.* MURUGAYYA. 12 I. C. 335.

Removal of Trustee.

——— *Removal of trustee—Rules as to*--shebait *—English law.*

If a *shebait* in the exercise of his duties puts himself in such a position as would prevent him from well discharging his duties, he is liable to be removed. The grounds for removing a trustee from Office in England, are not the same as in India. (*Lord Buckmaster.*) PEARY MOHAN MUKERJI *v.* MONOHAR MUKERJI.
48 I. A. 258 : 19 A. L. J. 773 : 23 Bom. L. R. 913: 34 C. L. J 86 : (1921) M. W. N. 554 : 12 L. W. 104 : 26 C. W N 133 : 62 I. C. 76 : 2 Pat. L. T. 725 : 41 M L. J. 68 (P.C.)
[On Appeal *see* 54 I. C. 6.]

——— *Removal of trustee—Trustees denying public character of trust.*

Where the trustees appointed by the founder's heir, persistently contend that it is not a public trust but a private property, and participated in violations of the trust, it is a fit case for their removal by the Court. (*Abdur Rahim and Burn, JJ.*) VAITHINATHA AIYAR *v.* TYAGARAYA AIYAR. 68 I. C. 631 : 41 M. L. J. 20.

——— *Removal of trustee—Failure to keep accounts.*

The removal and appointment of a temple trustee can only be made by a majority of the Temple Committee. The trusteeship is in

the nature of a freehold office under a corporation. In a suit by a newly appointed trustee to recover the office and properties attached thereto from the dismissed trustee, the latter can question the validity of his own dismissal and also the regularity of the appointment of his successor. A failure by a trustee to keep and to submit accounts are sufficient in law to justify his removal from the office of trustee. *Quaere* : Whether the Courts are competent to review findings of fact by a Temple Committee. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SUNDARESA GURUKKAL *v.* KUTTIAM SUBRAMANIAM MUDALI.
61 I. C. 741 : 13 L. W. 212.

——— *Removal of trustee—Breach of trust—person entitled to become trustee* in futuro—*Remedy.*

A person entitled to the office of trustee *in futuro* cannot sue for possession of the trust properties in *presenti* and the proper remedy is a suit for their removal from office and appointment of a receiver pending appointment of new trustees (*Wallis, Offg. C. J. and Seshagiri Aiyar, J.*) ETTISHERI EDATHIL *v.* FOTHERA KALOOR.
26 I. C. 946 : 2 L W. 61.

——— *Removal of trustee—Trustee obtaining interest in trust property.*

Any transaction by which a trustee obtains an interest in trust property is to be deprecated. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) NEELAKANDAN NAMBHUDRI *v.* NARAYAN NAMBHUDRI.
17 I. C. 128.

——— *Removal of trustee—Suit against trustees —No prayer for removal—If plffs. can be allowed to amend plaint asking for removal of the trustees.*

Though there is no specific prayer for removal of the trustees yet the Court can decree the removal after allowing an amendment of the plaint. (*Benson and Sundara Aiyar, JJ.*) AMBALAM PAKKIYA WDAYAU *v.* BUTHE. 36 Mad 418 : (1912) M. W. N. 152 : 13 I C. 599 : 24 M. L. J. 630.

Transfer of Office of Trustee.

——— *Transfer of office of trustee—Power to appoint a successor.*

A trusteeship with power to appoint a successor is well known to and recognized by law. (*Mookerjee, A J. C. and Fletcher, J.*) KASSIM HASAN *v.* HAZRA BEGUM. 60 I. C. 165 . 32 C. L. J. 151.

——— *Transfer of office of trustee—No right to associate stranger in management.*

It is not competent to the author of a religious endowment to introduce a stranger into the trusteeship and to join him in dealing with trust property. (*Spencer and Krishnan, JJ.*) KOTASSERI E. V. SANKARAN NAMBI *v.* KANHOLI I. D. ANTHARJEMAM. 43 M. L. J 572 : (1922) M. W. N. 428 : 16 L W. 26 : 1922 Mad. 259.

——— *Transfer of office of trustee—Whether a trustee can dispose of his office by will.*

TRUSTS—Transfer of Office of Trustee.

A trustee acts illegally in disposing of his office by ill. He has no right to affect the succsssion which must be governed by the usage of the trust or the law of the land (*Benson and Sundara Aiyar, JJ.*) RAJA RAM AIYAR *v* RAMASAMI AIYAR.
24 M. L J. 476 : 19 I. C. 660 : (1913) M. W. N. 557.

——*Transfer of Office of trustee—Agreement vesting the office in one—Whether deprives the others of their office*

An agreement among the trustees by which the management of the trustees vests in one, does not deprive the others of their office of trustee. (*Benson and Sundara Aiyar JJ.*) MALAPPURATH PARAMADHATHIL *v.* CHANNAZHI KRISHNAN.
13 I. C. 234 : (1911) 2 M. W. N. 537.

Transfer of Trust Property.

——*Transfer of trust property—Charge, creation of—Consent of settlor.*

Where trustees created a charge in favour of the settlor for his consent to a mortgage of the trust property while his consent was unnecessary and where the creditor would not have refused the loan without such consent, neither the charge nor the mortgage can affect the trust estate. (*Lord Parmoor.*) SUBRAMANIAN *v.* RAJA RAJESWARA DORAI.
39 Mad. 115 : 29 M. L. J. 856 : 19 M. L. T 150 : (1916) 1 M. W. N. 100 : 3 L. W 149 : 20 C. W. N. 201 : 23 C. L. J. 337 : 14 A. L. J. 153 : 32 I. C 258 : 18 Bom. L. R. 360 (P.C.).

——*Transfer of trust property—Permanent lease—Right of lessee to eject trespasser.*

A permanent lease of trust property in excess of the trustee's powers is not void but only voidable. It is competent to the lessee to sue for the ejectment of the trespasser from the land, 40 Mad. 212, 36 Cal 1003 and 40 Mad. 709, Ref. (*Spencer and Seshagiri Aiyar, JJ.*) KADIR MASTHAN ROWTHER *v.* SENGAMMAL.
43 Mad. 433 : 38 M. L. J. 198 : (1920) M. W. N. 185 : 55 I. C. 655 . 11 L. W. 197.

——*Transfer of trust property—Charity and private trust—Distinction.*

So far as alienation of trust property is concerned, there is no distinction between a private trust and a charity. A charity is and can be barred only when its trustee or manager is barred as the charity can only sue through natural person. 37 Cal. 885 (P. C.) Fol. (*Ayling and Srinivasa Aiyangar, JJ.*) SUBBAYA PANDARAM *v.* MAHOMED MUSTAFA
32 M. L.J. 85 : 21 M. L. T. 62 : 40 I.C. 50 : 5 L. W. 690.

Miscellaneous.

——*Trustee de son tort—Accounts—Liability—Wilful default.*

Where on the death of a shebait his son though not legally entitled to succeed took up the management he is liable as a trustee *de son tort* and cannot set up his want of title as a defence. To get a decree on the footing of wilful default, the *cestui qui* trust must allege and prove at least one instance of wilful default. He must prove some portions of the trust fund which were not received ought to have been collected. The liability in

TRUSTS—Miscellaneous.

such a case is much higher. English Law on the subject reviewed (*Mookerjee and Rankin, JJ.*) RAJA PEARY MOHAN MOOKERJI *v.* MANOHAR MOOKERJI.
27 C.W.N. 989 : 38 C. L. J. 255 : 1924 A. 161.

——*Author of trust—Position of—Revocation.*

A person who creates a trust and appoints himself as the first manager is only a manager and he cannot subsequently revoke or alter it or appoint new managers. (*Banerjee and Ryves, JJ.*) SIDDHAN LAL *v.* GAURI SHANKER.
40 I. C. 165.

——*Whole income dedicated to charity—Absolute right—Meaning of.*

Where a document gave the whole of the income of certain property of trustees "with absolute rights" *held*, that the property is dedicated completely to the trusts (2) that no one else should have any right of interference with that trustee's management and (3) that the provision did not give the trustee the power to appiont a trustee by testament. (*Benson and Sundara Aiyar, JJ.*) RAJA RAMA AIYAR *v.* RAMASWAMI AIYAR.
24 M. L. J. 476 : 19 I. C. 660 : (1913) M.W.N. 557.

——*Roman Catholic Church—Question regarding temporal rights—Trustees seceding from Roman Catholic religion—Right to recover properties.*

The Canon Law should be invoked to decide questions of temporal rights in Roman Catholic Churches. The right to the properties of the trust goes along with the right to the office of the trustee. 23 Mad. 271 (P.C); 17 Cal 3 (P. C.), Ref to. Where property dedicated to the Roman Catholic Church was in the possession of the defts who were formerly Roman Catholics. *Held*, that when the latter had seceded, the plffs. who were the managers were entitled to recover the properties and that the defts. had no right to have the trusts altered to suit the new religion which they had embraced. (*Benson and Sundara Aiyar, JJ.*) AMBALAM PAKYIA UDAYAN *v.* BATHE.
38 Mad. 418 : (1912) M. W. N. 152 : 13 I. C. 599 ; 24 M.L J. 630.

——*Money-lending by trustee—Capital partly his and partly of estate—Profits, how shared.*

In case of the money-lending business of the trustee partly from his own capital and partly from that of the wards estates, the profits of the business can be only proportionately claimed by the estate. (*White, C. J. and Abdur Rahim, J.*) RANVHODE DAS *v.* KRISHNA DAS.
10 M. L. T. 272 : (1911) 2 M. W. N. 271 : 12 I. C. 253 : 21 M. L. J. 1096.

——*Validity—Recognition by Courts.*

In India Courts only recognise the validity of trusts which they can themselves execute or can control when in process of being executed by trustees. (*Batten and Stanyon, A. J. Cs.*) MRS. ELKINS *v.* REV, DR. CULLEM.
40 I. C. 791 : 13 N. L. R. 51.

——*Trust property*—Tirumaligais.

Tirumaligais are private properties and not trust properties. (*Stuart, A. J. C.*) BISHESHAR SINGH *v.* TIRBHAWAN BAHADUR SINGH.
34 I. C. 768 : 3 O. L. J. 222.

TRUSTS—Miscellaneous.

———*Trustee*—De son tort—*Position of volunteer managing another's property.*

The payment of salary is no criterion of the liability of a trustee, and a volunteer managing another's property without salary is a constructive trustee bound to account for the due management of the property. (*Mullick and Atkinson, JJ.*) DILTOR KOER *v.* HARKHOO SINGH.

37 I. C. 367.

———*Trustee appointed to realise assets of insolvent—Negligence of trustee—Rights of creditor against insolvent while arrangement in force.*

Negligence on the part of the trustee appointed under an award to realise the assets of the insolvent will not entitle plaintiff, a creditor, to recover his debt from the insolvent as long as the arrangement under the arbitration, to which he (the creditor) was a party or which he had subsequently accepted, is in force nor has he any redress against another creditor who has assigned the debt due to him from the insolvent, with an indemnity bond, to the plaintiff until it is known whether or not the liquidation proceedings will result in the payment of insolvent's debt in full. It is impossible to allow one creditor who is a party to a settlement to proceed against a trustee in respect of one debt alone. If he wishes to proceed at all on the basis of the settlement he must sue to enforce the settlement as a whole. (*Kennedy, J. C. and Madgavkar, A. J. C.*) DOWLAT RAM *v.* RUPSI MADHOWJI.

1923 Sindh 33.

———*Trustee* de son tort—*Heirs of deceased trustee.*

The sons of a deceased trustee are not trustees *de son tort* and no suit by the surviving trustee lies against them to recover a debt due to him by the trust as the suit is not one to recover the trust funds for the trust. It is doubtful whether an ordinary creditor can follow trust funds in the hands of persons who are not trustees *de son tort.* (*Kennedy, J. C. and Kemp, A. J. C.*) RAMUMAL *v.* BHAGWAN DAS.

62 I. C. 982 : 15 S. L. R. 98.

TRUSTS ACT (II OF 1882).

———*Applicability of—Public trusts—Formalities necessary for dedication—Intention—Executory trust—Enforceability of.*

The Trusts Act does not apply to public trusts and consequently no formalities are required by law to create them—Yet, there must be a definite and imperative declaration of trust by the donor who must also have parted with his rights in the property for the benefit of the beneficiaries. A mere intention to dedicate in future does not constitute a public trust. The law relating to the enforceability of executory trusts has no application to charitable trusts where the beneficiaries are were volunteers (*Oldfield and Krishnan, JJ.*) VENKATACHALAPATHI AIYAR *v.* CHAKRAPANI AIYAR.

15 L. W. 279 : (1922) M. W. N. 123 : 42 M. L. J. 258 : 1922 Mad. 83.

———*Applicability —Bihar.*

Although the IndianTrusts Act does not in terms apply to Bihar, the principles contained therein

TRUSTS ACT (II OF 1882), S. 5.

will apply being rules of justice, equity and good conscience. (*Jwala Prasad and Fester, JJ.*) GOBIND SINGH *v.* MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH. 4 Pat. L. T. 731 : 2 Pat L. R 27 : 1924 P. 343.

———Chap. IX—*Relationship of bailor and bailee, does not fall within Chap. IX.*

A bailee of goods is not an express trustee and relationship between him and the bailor does not fall within the classes of case specified in Chap. IX of the Act. (*Ayling, O. C. J. and Odgers, J.*). KATTA RAMASAMI *v.* KAMALAMMAL.

14 L. W. 599 : (1921) M. W. N. 801 : 30 M. L. T. 156 :45 M. 173 : 42 M. L. J. 32 : 1922 M. 44.

———Ss 3 and 6—*Creation of trust.*

Where a person executed an agreement by which he appointed *N* manager and receiver of all his property moveable and immoveable for 10 years and put *N* in possession under that agreement on the understanding that *N* was to keep accounts and explain them to D in July of each year and was to receive certain remuneration for his work. *Held*, the agreement did not constitute *N* a trustee. (*Sir John Edge.*) B. L. RAI *v.* BHAIYALAL.

24 C. W. N. 769 : 16 N. L. R. 94 : 28 M. L. T 345 : 58 I. C. 13 : (1920) M. W. N. 685. (P. C.)

———S. 4—*Discharge of dower debt and preventing disputes if unlawful.*

Under S. 4 of the Trusts Act the discharge of a dower debt due from the settlor to his wife and the prevention of future disputes between the members are not unlawful. (*Evans, J. C. and Lindsay, A. J C.*) MAHOMED HASHIM ALIKHAN *v.* SADIQ HUSSAIN KHAN.

13 I. C. 882 : 14 O. C. 356.

———S. 5—*Creation of trust.*

A, a Jain widow who held a share in the Bank of Bombay transferred it to *B*, to secure a debt. After discharging the debt she desired to transfer the share to her minor nephews. Accordingly she presented the transfer signed by *B* but the Bank refused to effect the transfer as the transferees were minors. *A* then directed the transfer to her brothers as trustees for the minors and the transfer was lodged on 15th Dec. Meanwhile *A* died on the 14th. The heirs of *A*, contended that neither gift nor trust was created. *Held*, (1) *A*, had an equitable interest in the share while the legal holder was the registered proprietor, *B* ; (2) after the discharge of *B*'s debt he held the legal title as trustee for *A* ; (3) *A*, disposed of her interest in the share and had before her death, done everything necesssary to divest herself of her equitable interest in favour of her nephews; (4) as the share had passed out of *A*'s control before death and the legal holder *B*, having notice and having signed a transfer on the 1st Dec. in favour of the minors, could convey only for their benefit, the gift and trust in respect of the share where complete and (5) the trust in favour of the minors was complete, although there was no written and signed declaration of trust by *A*, as the property already vested in a trustee *B*., who had notice of the trust

in favour of the minors and could in equity be compelled to perform the trust duty. (*Scott, C. J. and Batchelor, J.*) MADANJI DEVCHAND *v.* TRIBHOWAN VIRCHAND. 36 Bom. 396 : 12 I. C. 892 : 13 Bom. L. R. 1121.

——— Ss. 5 and 6—*Author of trust himself trustee—Transfer if necessary.*

As a general rule, a transfer of property to the trustee is one of the conditions necessary for a valid trust ; but where the trust is declared by will, or the author of the trust is himself to be the trustee no such transfer is necessary. (*Chandavarkar and Heaton, JJ.*) RAI MAHARORE *v.* BAI MANGLA. 35 Bom. 403 : 11 I C. 564 : 13 Bom. L. R. 564.

——— S. 5—*Revocable trust—How far valid.*

A revocable trust is valid and the acts of the trustee up to the date of the revocation will be binding on the author of the trust. (*Johnstone and Rattigan, JJ.*) SHIB NATH *v.* ALLIANCE BANK OF SIMLA, LTD., LAHORE. 8 P. R. 1915 : 110 P. W. R, 1914: 25 I. C. 480: 215 P. L. R. 1914.

——— Ss. 5 and 6—*Minor — Incapacity to be the author of a trust.*

To create a valid trust of immoveable property in favour of a private individual the provisions of Ss. 5 and 6 of the Trusts Act must be strictly complied with. A minor cannot create a valid trust. (*Krishnan and Odgers, JJ.*) KRISHNA PATTAR *v.* LAKSHMI. 45 Mad. 415 : 42 M. L. J. 119 : (1922) M W. N. 117: 30 M. L. T. 238 : 16 L. W. 886 : 1922 Mad. 57.

——— Ss. 5 and 6—*Creation of trust—Direction for sale.*

There must be words of transfer in a document and it must vest the property in the trustee as the legal owner, if it is to be a deed of trust, although no particular form of the expression is necessary. Mere intention to create a trust, however, is not sufficient. A document described as a trust deed was executed in favour of a person empowering him to sell all moveable and immoveable properties of the executant and to recover the outstandings and distribute the assets rateably among the creditors, but the deed contained no words of transfer. *Held*, that the document did not create a trust under Ss. 5 and 6 of the Act. As the document was one and indivisible, it did not create any rights of trusteeship even in respect of moveable property. No security or charge was created in respect of the moveable property in favour of the trustee. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) ALAGAPPA CHETTIAR *v.* LAKSHMANAN CHETTIAR. 51 I. C. 253 : 24 M L. T. 267.

——— S. 5—*Trust—Creation of*—Benami *purchaser at Court-sale.*

A valid trust in respect of immoveable property can only be created by a writing signed by the author of the trust and registered in the case of a non-testamentary instrument. When it is alleged that the auction purchaser was put in possession of the properties as a trustee but no valid trust deed was produced the suit is barred

by S. 66, C. P. C. (*Sadasiva Aiyar and Tyabji, JJ.*) KAMURUDEEN *v.* NOOR MAHOMED. (1915) M. W. N. 204 : 17 M. L T. 158 : 28 I. C. 205 : 28 M. L J. 251.

——— S. 6—*Declaration of trust.*

There is a sufficient declaration of trust, within S. 6, and there is no need of transferring possession where the property, the intended beneficiaries and the purposes of the trust were specified. (*Beaman, J.*) LADAKA BAI *v.* NAVIVAHU: 31 I. C. 708: 17 Bom. L. R. 783.

——— S. 6—*Trust— Creation of—Vesting of property.*

A document not vesting any interest in the properties covered by it in the so called trustees is not strictly a deed of trust. (*Asutosh Mookerjee and Beachcroft, JJ.*) SIDHUSAHU *v.* GOPICHARAN DAS. 18 I. C. 969 : 17 C. L. J. 233.

——— S. 6—*Trust—Creation of—Fund in the hands of trustee—Acts necessary to create trust.*

To constitute himself a trustee the owner must either expressly declare himself a trustee or must use language which, taken in connection with his acts, show a clear intention on his part to divest himself of beneficial interest in it and to exercise dominion and control over it exclusively in the character of a trustee. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) SABJAN SAHIB *v.* ABDUL AZEEZ SAHIB. 42 I. C. 664.

——— S. 6—*Creation of trust—Third party to contract—Right to sue for benefit conferred by contract—Rule—Exception—Circumstances indicating trust—Contract Act, S. 25.*

Where *A* contracts with *B*, to pay money to C, C cannot merely on the basis of such a contract sue *A Empress Engineering Co. In re*: (1880) 16 Ch. D. 126, Ref In order to enable C to sue as a *cestui qui trust* the contract must be intended to secure a benefit to him. *Gandy v. Gandy*, (1884) 30 Ch. D. 69, 70, 74, Ref. The plff. sued the deft, the widow of the Zemindar of Kirlampudi, for the recovery of the arrears of salary agreed to be given to him by the Zemindar The grounds of the deft.'s liability were stated in the plaint to be that in consideration of great services rendered by the plff. and his father to the Zemindar, the latter agreed to give the plff. a salary of Rs. 20 a month during the plff's. life time and that in the deed of mortgage with possession executed by the Zemindar in favour of the deft. there was stipulation that the defendant should pay the allowances to the plff. *Held*, that plff. could not recover on the strength of the direction to pay contained in the mortgage deed unless the deft. could be held to have been constituted a trustee for the plff. Circumstances from which a trust could be inferred considered. (*Tyabji and Phillips, JJ.*) KASTURAMMA *v* VENKATASURAYYA GARU. 2 L. W. 920 : 18 M. L. T 353 : 30 I. C. 878 : (1915) M. W. N. 947: 29 M. L. J. 539.

——— S 6—*Physical delivery in addition to registered instrument if necessary to effect valid trust.*

TRUSTS ACT (II OF 1882), S. 10.

The physical delivery of property in addition to execution of a registered instrument of transfer is not necessary for the creation of a valid trust (*Evans, J. C. and Lindsay, A. J. C.*) MOHAMAD HASHIM ALIKHAN *v.* SADEQ HASAN KHAN.
13 I. C 882 : 14 O. C. 356.

——— S. 10—*Alien can be trustee.*

The appointment by a Hindu of a trustee to take over the estates collect profits, pay debts, etc., is not unlawful because the trustee is of alien race of religion. (*Johnstone and Rattigan, JJ.*) SHIB NATH *v.* ALLIANCE BANK OF SIMLA, LTD., LAHORE. **3 P. R. 1915 : 110 P W. R. 1914 : 25 I. C. 480 : 215 P. L. R. 1914.**

———Ss. 15 and 20—*Trustee—Duty of—Investment of funds*

A trustee of a religious or charitable institution may invest the proceeds in a bank possessing a good reputation and renew the deposits from year to year, so that they may be available for the probable expenditure. A direction to invest in Govt. securities in not disbeyed where the trustee put in a fixed deposit in a Bank renewing the deposit from year to year, so as to be available to him even before. (*Abdur Rahim and Phillips, JJ.*) SUBRAMANIA IYER *v.* PRAYAG DOSEE VARU. **33 I C. 677.**

———S. 15—*Care required from trustee.*

The measure of prudence required of a trustee by S. 15 must be regulated by any specific provision applicable to special matters found in the other sections of the Act. S 15 does not apply where the trustee has committed a breach of trust as by acting contrary to S. 20 The broad terms of S. 23 are not controlled by S. 15. The Indian Courts have not been given the powers conferred on English Courts by successive English statutes of relieving honest trustees from their liability for breach of trust. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) TIRUPATIRAYUDU NAIDU *v.* LAKSHMI NARASAMMA. **38 Mad. 71 : 23 M. L J. 599 : 12 M. L. T. 530 : 17 I. C. 597 : (1912 M W N. 1237.**

———S. 19—*Accounts by trustee*

A trustee must keep clear and accurate accounts of the trust property keeping it apart from his private property. The Court should scrutinize the accounts before passing it. (*White, C, J, and Spencer, J,*) NEELAYATHAKSHI AMMAL *v.* THE TALUK BOARD OF MAYAVARAM.
10 M. L. T. 353 : 12 I. C. 440 : (1911) 2 M. W. N. 350.

———S. 19—*Accounts—Liability for—Dealing on his account with rents of leasehold property—Extent of liability.*

Where a trustee is sued by the beneficiary for the recovery of possession of certain leasehold property and its profits appropriated by the trustee, the value of the produce rents at the time and place of the receipt is the measure of the liability and not the price fetched by sales at a later date The fluctuations of the market are ordinarily matters too remote to be taken into consideration in estimating liability in such cases If the person liable to account for the produce rent to his employer should, without fraud, convert it to his own use, his liability cannot be measured by the price at which the produce was subsequently sold. If the market should fall it would not deminish his liability. If it should rise, there is no reason why his liability should be increased. The rise and fall of the market are circumstances too remote to be taken into consideration. (*Miller, C. J. and Mullick, J.*) RAI BAHADUR HARIHAR PRASAD SINGH *v.* MAHARAJA KESHO PRASAD SINGH.
3 Pat. L T. 638 : 1922 P 598.

———S. 19—*Suppression of accounts by trustee—Presumption.*

Where a trustee or agent by his tortious acts make it impossible for the other party to discover the state of property every presumption consistent with established facts ought to be made. (*Das and Ross, JJ.*) GOBIND DUBEY *v.* PARMESHWAR DUBEY. **62 I. C. 83 : 2 Pat. L, T. 365.**

———Ss. 20, 36 and 40—*Power to sell land—Emergency power of Court to sanction under its extra ordinary jurisdiction,*

In cases of emergency not provided for by the trust instrument and not within the contemplation of the author of the trust, the Court has power under its extraordinary jurisdiction to sanction the trustees doing acts which are necessary for the protection of the trust estate although not expressly authorised by the trust instrument. But the jurisdiction is of an extremely delicate character and must be exercised with the greatest caution. Where house property was subject to a large set back under the Municipal Regulations and was in urgent need of sanitary and other heavy repairs, the Court sanctioned the sale of the property by the trustees, although the trust settlement contained no power of sale. *In re* New, (1901 2 Ch, 534 Foll. *In re* Tollemashe (1903) 1 Ch 457, 955 Ref. *Semble.*—In cases where there is no express or implied power of sale of immoveable property in the trust instrument itself, Ss. 40 and 36 of the Trusts Act do not enable the property to be sold by the trustees. (*Martin, J.*) SHIRINBAI MARWANJI DALAL, *In re.*
43 Bom. 519 : 49 I. C. 882 : 21 Bom.L. R. 41.

———S. 20—*Does not apply to (religious or) charitable trusts.*

The forms of instrument mentioned in S. 20 of the Indian Trusts Act are restricted only to private trusts and do not necessarily exhaust the modes of investment permissible in the case of charitable trusts. (*Abdur Rahim and Phillips JJ.*) SUBRAMANIA AIYAR *v.* PRAYAG DOSSJEE VARU.
33 I. C. 677.

———Ss. 20 and 23—*Lessee agreeing to deposit a year's lease amount with lessor—Deposit with lessor in Bank at lessee's request—Failure of Bank—Lessor, if liable.*

A lessee deposited the amount of a year's rent with his lessor till the expiry of the lease or its cancellation and at his request the lessor deposited the money in a certain bank, and paid its interest to the lessee. The bank failed *Held*, that even if the lessor be assumed to be in the position of a trustee, he was not liable for the loss of the money and the lessor's assignee was entitled

TRUSTS ACT (II OF 1882), S. 20.

to sue for rent. (*Wallis, C. J. and Hannay, J.*) RAJARAM ROY *v.* VENKATACHALA CHETTIAR. **29 I. C. 997.**

——Ss. 20 and 15 —*Construction—Trust in favour of minor,*

S 20 which regulates the mode in which a trustee is to make investments is not controlled by S. 15. Trust monies payable to a minor cannot be applied for the trust at an early date as the trustees could not pay the money, until the minor becomes *sui juris.* And even as regards money capable of being so applied at an early date, if the trustee takes the responsibility of keeping the money in investment for a long time, he must make the investment according to his obligation as trustee. (*Sundara Iyer and Sadasiva Iyer, JJ.*) TIRUPATIRAYUDU NAIDU *v.* LAKSHMI NARASAMMA **38 Mad. 71 : 23 M. L J. 599 : 12 M. L. T. 530. 17 I. C. 597 : (1912) M. W. N. 1237**

——S. 23—*Guardian and ward—Moneys of ward employed in business.*

If the ward's money are used by the guardian in his business the latter would be bound to account for the profits he had made out of the use of that money or could have made but for his gross or wilful default. Every plain neglect of duty by a guardian amounts to a breach of trust and he must compensate his ward for any loss occasioned thereby. (*Broadway and Abdul Raoof, JJ.*) LABHU RAM *v.* BHAG MAL. **54 I. C. 926 : 157 P. R. 1919.**

——S. 23—*Defaulting trustee—Public trust*

S. 23. Cl. (e) of the Trusts Act which makes a defaulting trustee liable to account for compound interest with half-yearly rests applies to private trusts ; and to cases of public trusts, a rule of that nature can only be adopted with such modifications as the circumstances of such case require. (*Abdul Rahim and Burn, JJ.*) RAJAH OF KALAHASTI *v.* GANAPATHI IYER. **48 I. C. 897 · (1918) M W. N. 555.**

——S. 23—*Trustee for payment to creditors —Negligence—Effect.*

A trustee for payment to creditors if he fails to exercise due diligence in his duties must be debited with the loss caused by his laches and should not be allowed costs of suit instituted by him after limitation He is bound to pay interest on the money he may retain after paying debts only when he is guilty of a breach of trust but when there has been negligence in the trustee and contributory negligence in the debtor which caused the loss, the trustee should not be charged with interest. (*Ayling and Srinivasa Iyengar, JJ.*) GOLLA NAGAYA *v.* KUNNUGUNTAL VENKATA SUBBARAYADU. **40 I. C. 779.**

——Ss. 23, 51—*Breach of trust—Liability.*

If the person liable to account for produce rent to his employer should without fraud convert it to his own use, his liability cannot be measured by the price at which the produce was subsequently sold (*Miller, C. J and Mullick, J.*) HARIHAR PRASAD SINGH *v.* MAHARAJAH KESHO PRASAD SINGH. **3 P. L. T. 638 : 1922 P. 598.**

TRUSTS ACT (II OF 1882), S. 35.

——S. 23 (e)—*Unauthorised investment.*

If a trustee invests money in unauthorised security it must be treated as tantamount to failure to invest under Cl (e) of S. 23 and he is liable for interest on the money lost. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) TIRUPATIRAYUDU NAIDU *v.* LAKSHMI NARASAMMA. **38 Mad. 71 : 23 M. L. J. 599 : 12 M. L T. 530 : 17 I C. 597 : (1912) M. W. N. 1237.**

——S 23 (f)—*Rate of interest.*

Under S. 23 (f) a trustee charged with employing trust monies in his own private trade or business cannot be directed to pay interest exceeding 6 per annum though he admits to pay higher rate. (*Wallis, C. J. and Phillips, J.*) VISHVANATHAM *v.* BRAMANANDAN. **34 I. C 900.**

——S. 27—*Applicability of to religious trusts —Breach of trust—Unnecessary expenditure—Right of contribution.*

A member of a Temple Committee who pays the whole sum of money which has been declared to be unnecessary is entitled to contribution from the others though some of them are not formally impleaded as parties because the liability depends upon the question whether all of them are guilty of the technical breach of trust. The Committee members exercising complete control over the manager become trustees *de son tort* and as such are liable to the *cestui que trust* for trust money spent unnecessarily. 12 Mad. 366 ; 21 Mad. 179 and 15 M. L. J. 185, Ref. to. (*Benson and Sadasiva Aiyar, JJ.*) RAMANATHAN CHETTIAR *v.* SWAMINATHA AIYAR. **12 M. L. T. 155 : 14 I. C. 520 : 23 M. L J. 278.**

——S. 32—*Principle of—Applies to public trusts.*

The trustees of a public charity have no larger rights against the trust property in respect of out of pocket expenses than are recognised in S. 32 (*Wallis, C.J., and Coutts Trotter, J.*) NARAYANAN CHETTIAR *v.* LAKSHMANAN CHETTIAR. **39 Mad. 456 : 29 I C 1. : 28 M. L. J. 571.**

——S. 32—*Trustee spending money in* bona fide *litigation—Person not entitled to office cannot be reimbursed,*

A trustee is entitled to be reimbursed the moneys spent by him on a *bona fide* litgation believed to be in the interest of the *cestui que trust* but a person not really entitled to the office cannot so claim. (*Benson and Sadasiva Aiyar, JJ.*) SUBRAMANIA AIYAR *v.* SUBBA NAIDU. **25 M. L. J. 452 : 21 I. C. 421 : 14 M. L. T. 437.**

——S. 35—*Appointment of new trustee—Charity—Application in Chambers.*

Under S. 35 of the Trustees Act a new trustee of a Hindu charity property may be appointed in place of one who is mentally infirm. An application for the appointment of a new trustee should normally be made by petition or summons to be heard in Chambers. Preferably the application should specify the provision of law under which the appointment is sought. (*Martin, J.*) BASIL LANG *v.* MOOLJI AND BHAGWAN. **54 I. C. 455 : 21 Bom. L. R. 1111.**

TRUSTS ACT (II OF 1882), S. 36.

——S. 36—*Trust—Charge, creation of—Consent of settlor—Payment for—Validity of—Charge in pursuance, if supportable on other ground*

The appellant was one of the creditors of the Rajah of Ramnad who made a voluntary settlement of his zamindari subject to payment of debts and certain allowances to himself. To pay off the debts binding on the zemindari the trustees had to borrow money on a first mortgage from certain English financiers who required the conjunction of the Rajah of Ramnad to the deed and an agreement by him to postpone his right to the allowance to the mortgage. The trustee promised to give the Rajah a mortgage for 4 lakhs as consideration for his consent. The charge thus promised to the Rajah was used to create the suit mortgage in favour of the appellant in pursuance of the compromise in the suit brought by him for the recovery of the amount due to him. *Held*, that in the absence of evidence that the English financiers would have refused to lend without the conjunction of the Rajah even if the true legal position (as to his consent being unnecessary) were explained to them or that the Rajah would have refused to join unless he was given the promised charge, the charge in his favour could not be supported. The mortgage in favour of the appellant being only the utilisation of the charge in favour of the Rajah must fall with it, in the absence of evidence that the trustees had any intention apart from the agreement with the Rajah, to create an additional charge in favour of the appellant. (*Lord Parmoor.*) SUBRAMANIYAM CHETTIAR *v.* RAJA RAJESWARA DORAI. **39 Mad. 115 : 20 C. W. N. 201 : 19 M. L. T. 150 : (1916) 1 M. W. N 100 : 3 L. W. 149 : 23 C. L. J. 337 : 14 A. L. J. 153 : 32 I C. 258 : 18 Bom. L. R. 360 : 29 M. L. J. 856 (P. C).**

[**Affirming 2 I. C. 963 : 32 Mad. 490.**]

——S. 36—*Temple property—Lease by trustee—Permanent tenancy—Onus of proof.*

Where temple properties are leased out by the trustees of a temple, the presumption is against the existence of a permanent tenancy and the onus of proof is on those who allege its existence. (*Wallis, C. J and Krishnan, J.*) CHINNAMMAL *v* RATNASABAPATHY CHETTIAR. **12 L. W. 191 : 59 I. C. 241 : (1920) M. W. N. 532.**

——S. 41—*Application of property of minor for their education—Power of Court.*

The court cannot permit the administrator to apply the property of the minor to their maintenance and education since a minor cannot be said to have a trustee in an administrator of his estate. (*Maung Kin, J.*) THE ESTATE OF A. H. COTTON, *In re*. **49 I. C. 277 : 11 Bur. L. T. 149.**

——S. 43—*'Sole acting trustee' can compromise doubtful claim.*

Where a trust deed authorizes a sole trustee to execute the trusts and powers thereof he is a sole acting trustee within S. 43 and a compromise by him of a doubtful claim is within his powers. (*Sadasiva Aiyar and Spencer, JJ.*) RAJARAJESWARA SETHUPATHI *v.* KUPPUSAMI IYER. **(1921) M. W. N. 722: 68 I. C. 352 : 41 M. L. J. 474**

TRUSTS ACT (II OF 1882), S. 44.

——S. 43—*Religious trust—Duty of Court to scrutinise compromises by trustees.*

Per *Sadasiva Aiyar, J.*—Though S. 43 of the Act does not apply to public or private religious trusts, it regulates the powers of a trustee of a religious trust. Courts in India should scrutinize with great care alienations by compromise and awards out of Court made in reference to properties belonging to a charity. (*Oldfield and Sadasiva Aiyar, JJ.*) RAVI VARMA RAJAH *v.* RAMA SUBRAMANIA PATTAR. **31 M. L J. 733 : (1916) 2 M. W. N. 312 : 37 I. C. 692 : 4 L. W. 576.**

——Ss 43 and 42—*Majority—Execution of document by—Whether operative— Intention — Payment to one of several trustees.*

The whole body of a charitable trust can legally be bound by the majority. Where there are several trustees payment to one of them who has no authority either actual or by estoppel to receive and give discharge, is not a valid payment. "Any trustee or trustees" in S. 42 of the Trusts Act mean the trustee where there is only one and all the trustees where there are more. 1 Bom. L. B. 667, Diss. (*Spencer and Coutts-Trotter, JJ.*) NETHIRI MENON *v.* MULLAPULLI GOPALAN NAIR. **39 Mad. 597 : 29 M. L. J. 291 : 18 M L. T. 220 : 2 L. W. 714 : 30 I. C. 713 : (1915) M. W. N. 586.**

——S. 43 (c)—*Public trust—Compromise in respect of—Validity.*

A compromise relating to an office of public trust is not necessarily opposed to public policy but must be scrutinized by the Court to see whether it is in violation of the trusts of the institution or affects adversely the interests to religious public. (*Sadasiva Aiyar and Napier, JJ.*) VENKATACHALLAM *v.* RAMANATHAN CHETTIAR. **(1921) M. W. N. 423 : 15 L W. 111 : 31 M. L. T. 52 : 1922 Mad. 429.**

——S. 43 (c)—*Powers of trustees — Compromise effected by.*

A compromise by trustee in good faith is lawful and the Court will not enquire whether it is beneficial to the trust. (*Abdur Rahim and Oldfield, JJ.*) PAMBAYAM CHETTY *v.* KANDASAMI IYER. **60 I. C. 22 : 12 L. W. 562.**

——Ss. 44, 45, 71 and 76—*Trustees of temple—Resignation of one—Suit by others — Death of one, pending suit—Suit whether can be continued by the rest.*

A deed of trust vesting the management of a temple in five trustees provided that they should jointly sue on behalf of the temple and laid down the procedure for filling vacancies caused by the death or resignation of any trustee. One of the trustees resigned the other four brought a suit on behalf of the temple and pending the appeal to the High Court one other trustee died. *Held*. (1) that the resignation operated as a valid discharge of the trustee from his duties, and the trust property passed to the others : (2) that the suit instituted by the remaining four trustees was maintainable and (3) that on the death of one of the trustees in the course of the appeal, it could be validly continued by the other three. 34 Mad. 1 Dist. (*Ayling and Phillips, JJ.*) KRISHNA BATTA *v.* SRINIVASA SHAMBAGU. **32 I. C. 97.**

TRUSTS ACT (II OF 1882), S. 47.

———S. 47—*Trustees cannot delegate functions.*

"Fiduciary duties cannot be made the subject of delegation," so that where property was in the hands of a person charged with expenses necessary for certain religious and charitable purposes, and his son purporting to act as his attorney executed a morasi mokurari pattah of the lands. *Held*, that the pattah was *ultra vires* and conveyed no title, for even if the father was not in the strictest sense a trustee, his position was none the less a representative one. (*Lord Buckmaster.*) K. S BONNERJI *v.* SITANATH DAS.

26 C. W. N. 286 : (1922) M. W N. 98 : L. R. 3. P. C. 34 : 30 M L. T. 182 : 20 A. L. J. 294 : 15 L W. 452 : 35 C. L. J. 320 : 24 Bom. L. R. 565 : 49 I A. 46 : 42 M. L. J. 403 : 1922 P. C. 209 (P. C.).

———S. 47—*Delegation of powers to agent—Temple servants—Discretion.*

A trustee cannot appoint an agent to do acts in which judicial discretion was intended to be exercised by himself. The power of appointment and dismissal of hereditary temple servants is not one of the powers which is capable of being delegated to an agent. (*Sadasiva Aiyar and Napier, JJ.*) PARASURAMA UDAYAR *v.* THIRUMAL RAO.

44 Mad 636 : 14 L. W. 159 : (1921) M. W. N. 533 : 63 I. C. 364 : 41 M. L. J. 17.

———S 48—*Co-trustees—Suit by some—Religious endowment.*

Two out of five trustees of temple properties, can sue tenants of the property for rent ; the suit is not bad for misjoinder. One out of many trustees can give a valid discharge, if he is authorised by his co-trustees to do so. (*Wallis, C. J. and Phillips, J.*) PONNAMBALA PILLAI *v.* MUTHU CHETTIAR.

(1916) 1 M. W. N. 181 : 33 I. C. 52 : 30 M. L. J. 619.

———S. 48—*Temple property—Co-trustees—Rent suit—Parties.*

A trustee of temple properties cannot sue singly for rent without making other co-trustees parties. (*Wallis and Sadasiva Aiyar, JJ.*) VAVUTTU NAIKEN *v.* VENKATA SESHA.

24 I. C. 806.

———S. 52—*Purchase by trustes from major beneficiaries—Validity.*

If a trustee is not a trustee for sale he may purchase a property from the beneficiaries if they are major but he must disclose to them all facts within his knowledge concerning the property. Though a trustee is otherwise entitled to purchase yet if he purchases secretly in another person's name the purchase is invalid. (*Lord Buckmaster*) PEARY MOHAN MUKHERJI *v.* MONOHAR MUKERJI.

48 I. A. 258 : 19 A. L. J. 773 : 23 Bom. L. R. 913 : 34 C. L. J. 86 : 14 L. W. 104 : (1921) M. W. N. 554 : 2 Pat. L. T. 725 : 26 C. W N. 133 : 62 I. C. 76 : 41 M. L. J. 68 (P. C.).

[On Appeal *see* 54 I.C. 6]

———S. 53—*Trustee—Incapacity to sell to himself.*

TRUSTS ACT (II OF 1882), S. 63.

When any one is in fiduciary position he cannot sell to himself. Thus an ordinary trustee cannot buy trust property nor can an official appointed to conduct a sale for creditors be himself the purchaser. But where a seller sold not on behalf of the debenture holder alone but on behalf of the Company and it was his duty and interest to secure as high a price as possible so that the balance—after meeting secured debts—should go to the Company, the fact that the buyer is himself a holder of the debentures becomes irrelevant. There is no merging of the two positions which is what is prohibited—namely, that the interest of the seller, to get the highest price, and of the buyer to get the lowest price, is centred in the same person. (*Lord Dunedin.*) KANHAYA LAL *v.* NATIONAL BANK OF INDIA, LTD

45 M.L.J. 497 : 33 M L. T. (P. C.) 349 : 25 Bom. L. R. 1248 : 4 Lah. 284 : 50 I. A. 162 : 1923 P. C. 114 (P.C.).

———Ss. 53 and 88—*Executor de son tort—Trustee acquiring a permanent tenancy in the estate—Purchase for benefit of the estate.*

A person appointed as manager by an executor of an estate should be regarded as an executor *de son tort* and therefore a trustee by purchasing a tenancy within the estate, comes within the principle of Ss. 53 and 88 of the Act. Therefore the purchase by him must be taken to have been made for the benefit of the estate. (*Beaman, J.*) GOKULDAS *v.* VALIBAI.

19 I. C. 844 : 15 Bom. L. R. 343.

———S. 59—*Scope.*

Where the settlor and the transferee of the share held by the settlor are residing abroad but the trust is set up in a British Indian Court, S. of the Trust Act applies. (*Scott, C. J. and Batchelor, J.*) MADANJI *v.* TRIBHURAN.

36 Bom. 396 : 12 I. C. 892 : 13 Bom. L. R. 1121.

———S. 63—*Guardian and ward—Purchase of property by guardian—Trust.*

A decree was passed in favour of a minor and her guardian obtained a transfer of certain lands in his own name in lieu of the decree amount. *Held*, that the guardian held the property as trustee for the minor to the extent of the minor's share in the decree. There is no question of limitation as between the minor and the guardian. (*Richards, C. J. and Bannerjee, J.*) MUNNA KUNWAR *v.* VINAIK RAM.

28 I. C. 861.

———S. 63—*Following trust property—Liability of third person.*

Trust property may be followed into the hands of any one in whose hands it can be identified. The only person who can escape liability for trust property in his possession is a *bona fide* transferee for value without notice of the trust, or a transferee from him. (*Kensington and Rattigan, J.*) GHULAM ALI *v.* SHIV NATH.

101 P. R. 1912 : 153 P. W. R. 1912 : 15 I. C. 845 : 189 P. L. R. 1912.

———Ss. 63, and 64—*Knowledge of nature of money—Effect.*

S. 63 of the Trusts Act applies to a case where Tarwad money is unlawfully used in purchasing property for the Karnavan's daughter. To such a

TRUSTS ACT (II OF 1882), S. 63.

case the last clause of S. 64 does not apply which means and includes the passing of money in the ordinary course of business. (*Oldfield and Devadoss, JJ.*) MEENAKSHI NETHIAR AMMA *v.* PARVATI NETHIAR. (1923) M.W N. 657: 1924 Mad. 174

——S. 63—*Dealing with trust property by trustee—Right of beneficiary.*

Where a trustee deals with the trust property entrusted to him in violation of the trust the beneficiary is entitled to sue for possession of the property. (*Wallis, C J. and Seshagiri Aiyar. J.*) RAJA OF RAMNAD *v.* RAJAGOPAL IYER
7 L. W. 28: 43 I. C. 164 :
(1917) M. W. N. 906.

——S. 63—*Limitation Act, S. 10—Right of beneficiary.*

S. 63 of the Trusts Act read along with S. 10 of the Limitation Act show that whenever trust property is gone into the hands of a stranger, the beneficiary can take all the necessary steps to place it in the hands of a person who can legally administer the trust even though the trustee may be stopped from suing (*Wallis and Seshagiri Aiyar, JJ.*) CHIDAMBARANATHA THAMBIRAN *v* NALLASIVA MUDALIAR. 41 Mad. 124 :
22 M. L. T. 218 : 6 L. W. 666 : 42 I. C. 366 :
33 M. L. J. 357.

——S. 64—Bona fide *transferee for value.*

Trust property in the hands of a transferee in good faith for consideration without notice of the trust cannot be followed by the beneficiary It can be so followed only when the transfer is not *bona fide* and not for valuable consideration. (*Tyabji and Spencer, JJ.*) PRASANNA VENKATACHALLA *v.* COLLECTOR OF TRICHINOPOLY.
33 I. C. 45 : 38 Mad. 1064.

——S. 64—*Applicability—Transferee from religious endowment.*

A transferee from a religious endowment is not protected by S. 64 of the Trusts Act as the Trusts Act does not apply to public or private religious endowments and also because the manager is not a trustee. 38 Mad. 1064 dissented from. (*Pipon, J. C.*) GHULAM HAIDAR *v.* MANAGER, COMMITTEE SAMADH BABA PHULA SINGH. 73 I. C. 711.

——S. 66—*Trustee mingling trust property with his own—Burden of proof.*

The established doctrine is that if a trustee or agent mixes or confuses his ward's property with his own, the onus lies heavily on him to prove the extent of his property. If he fails to do so and the properties cannot be distinguished with accuracy the whole must be considered as belonging to the other party. (*Benson and Sundara Aiyar, JJ.*) BURUGAPALLI SHRIRAMULU *v.* NANDIGAM SUBBARAYADU
10 I. C. 57 : 10 M. L. T. 313.

——S. 71—*Removal of trustee—Power of Court.*

A removal of a trustee of a private trust is within the sound judicial discretion of the Court The Court is guided by considerations of the welfare of the beneficiaries and of the trust estate and there must be a clear necessity for

TRUSTS ACT (II OF 1882), S. 78.

interference to save trust property. (*Mookerjee and Panton, JJ.*) MANOHAR MOOKERJEE *v.* RAJA PEARY MOHAN. 54 I. C. 6 : 30 C. L. J 177.

——S. 71—*Removal of—Hereditary trustee—Minority.*

A removal of the present trustee does not entail forfeiture of the hereditary office which descends to the next heir. In case of minority another trustee is appointed until the minor attains majority. (*Wallis and Sankaran Noir, JJ.*) MUTHUKUMARA MUDALIAR *v.* PALANIAPPA CHETTIAR.
(1911) 1 M. W. N. 303 :
10 I. C. 300 : 9 M. L. T. 495.

——Ss. 71, 77, 83, 94 — *Trust becoming defunct—Effect.*

On a trust becoming defunct, the trustee becomes thereafter a simple trustee for the real owner of the properties. (*Jwala Prasad and Foster, JJ.*) GOBIND SINGH *v.* MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH.
4 Pat. L T. 731 : 2 Pat. L. R. 27 :
1924 P. 343.

——S 71—*Discharge of trustee—Modes of.*

The only modes in which a trustee can divest his office are by the universal consent of all interested parties or by retiring by virtue of a special power confirmed by the trust deed or by application to Court. (*Fox, C. J. and Hartnoll, J.*) S. K. SUBRAMANIAM PILLAI *v.* GOVINDASWAMI PILLAI.
6 Bur. L. T. 180 :
21 I. C 232 : 7 L. B. R. 39.

——Ss. 73 and 74—*New trustee.*

Where a *waqf* was created, before the Waqf Validating Act. in favour of the grantor's family and descendants without ultimate dedication to charity and the District Judge removed the *mutvali* and appointed one of the beneficiaries in his place. *Held*, that the order was bad as not only the *waqf* was invalid but also a trust in favour of unborn persons from generation to generation is not supportable under Muhammadan Law. (*Tennon and Newbould, JJ*) ABDUL FOATIM MOHAMMAD *v.* IJJATANESSA KHATUN,
57 I. C. 782.

——S. 77 (c)—*Public trust—Failure of trust—Rights of donor and his heirs to get back the property.*

The land in suit having been given for the purpose of being used as a road to connect the main road with a public garden was held by the District Board as a trustee for the public, and when the land on which the gardens were planted was sold to a private individual and the gardens ceased to exist, the fulfilment of the purpose for which the land in suit had been given became impossible. The trust was then extinguished under S. 77 (c) of the Trusts Act and the donor of the property was entitled to recover the land given. 7 A 362 Ref. (*Martineau, J.*) GELA RAM *v.* DT. BOARD, MUZAFFARGARH.
4 U. P. L. R. (Lah) 79 : 1923 Lah. 93.

——S. 78—*Trust—Revocation.*

When once a valid trust is created it cannot be revoked by the author by any subsequent act. 12 Mad. 387 ; 15 All. 321 ; 2 N.W.P.H.C.R. 420 ;

TRUSTS ACT (II OF 1882), S. 78.

10 M. L. T. 44 : 12 I. C. 546 ; 14 I. C. 988, Foll. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) KRISHNASWAMY PILLAI *v.* KOTHANDARAMA NAICKEN. **16 M. L. T. 513 : (1914) M. W. N. 703: 25 I. C. 428 : 27 M. L. J. 582.**

——S. 78—*Hukdar appointed—Irrevocability of.*

A, by a registered deed settled certain property for charitable trusts and appointed himself as Hukdar for life and after him his grandson *B*. It was held that *A* had no power to revoke the appointment of *B* who obtained a vested right to property on *A*'s death, as the deed was not a will. (*Benson and Wallis, JJ.*) MAHADEVA IYER *v.* SANKARA SUBRAMANIA IYER. **12 I. C. 546 : (1911) 2 M. W. N. 382.**

—— Ss. 80 to 96—*Scope of—Duty of Courts.*

Ch. 9 gives the principles that should govern Courts in ascertaining the rights and obligations of parties in certain cases and does not relieve a party from any obligation to take the necessary steps needed by the substantive or adjective law for creating a valid trust. The object of S. 96 was to provide, consistently with the law in force for certain cases in which English Courts of equity fastened a constructive or resulting trust upon holders of property and for which there was no statutory provision till then Ownership must not be confounded with obligation in applying this rule. (*Miller and Sadasiva Iyer, JJ.*) RAJA RAJESHWAR DORAI *v.* ARUNACHALLAM CHETTIAR. **38 Mad. 321 : 13 M. L. T 469 : (1913) M. W. N. 453 : 19 I. C. 596 : 24 M. L. J. 592.**

—— —S. 81—*Construction of a will—Intention—Burden of proof.*

The intention referred to in S. 81 of the Trusts Act is the intention of the testator at the time of making the will and the burden of proving a different intention is upon those who set up the same. (*White, C J., Munro and Sankaran Nair, JJ.*) RICHARD TAYLOR *v.* COLLECTOR OF GANJAM. **11 I. C. 5 : 10 M. L. T. 42.**

——Ss. 81 and 82—*Purchase by husband in the name of his wife—Advancement.*

The rule of English Law, that when a husband buys property in the name of his wife he should be presumed to have done so for the benefit of the wife, applies to persons of the British nationality resident in India. The mere fact that after the purchase the husband continues to manage the property and collect rent is not sufficient to rebut the presumption. (*Maung Kin and Rig, JJ.*) KERWICK *v.* KERWICK. **11 Bur. L. T. 215 : 47 I. C 376 : 9 L B. R 212.**

——Ss. 82 and 83—*Resulting trust—Indian and English Law—Presumption of advancement—British parents domiciled in India.*

The Indian Law as to resulting trusts does not differ much from English Law on that subject. It has been established by decisions that owing to the widespread and persistent practice prevailing in India of owners of property making grant and transfers *benami* for no obvious reason, without any intention of vesting in the donee any

TRUSTS ACT (II OF 1882), S 82.

beneficial interest in the property granted or transferred, as well as the usages which the natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India, negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of the wife or child In such a case there is, under the general law in India, no presumption of advancement as there is in England. When such a transaction takes place between two persons, born in India of British parents and who have resided practically all there lives in India, the principles and rules of law which would apply, if the case were tried in one of the Courts of Chancery in England, do apply to it when tried in India, The question as to which rule of law is, in any given case, to apply in India, does not entirely depend on race, place of birth, domicile or residence; the usages and practices of the native inhabitants are more important. Though husband or a father has made an apparent advancement in favour of a wife or child be cannot be said to have intended to confer any beneficial interest in the thing given on the donee or transferee if he establishes at the same time with reasonable clearness that he had other and different motives for the action he took. (*Lord Atkinson.*) KERWICK *v.* KERWICK, **48 Cal. 260 : 39 M. L. J 296 : 13 L. W. 455 : (1920) M. W. N. 738 : 32 C. L. J 490 : 2 U. P. L. R (P. C) 153 : 47 I. A. 275 : 28 M. L. T. 194 : 23 Bom. L. R. 730 : 57 I. C. 834 (P.C.).**

[On Appeal from 47 I. C. 379.]

——S. 82—*Applicability of—Sale by mortgagor of equity of redemption— Pre-emption—Vendee not in possession—Rights of pre-emptor—Redemption of mortgage by vendee—Right to possession.*

The defendants purchased the equity of redemption in certain property in the possession of a mortgagee and the vendor left with the defendants a sum of money to pay off the mortgage. The plaintiffs sued for pre-emption and obtained a decree and paid the entire consideration in Court which was withdrawn by the defendants. As the defendants were not in actual possession, the plaintiffs could not apply for actual possession. Subsequently the defendants paid off the amount of the mortgage and the plaintiffs sued for possession. *Held*, that the title of the plaintiffs to possession became complete only on the date of the redemption of the mortgage, that no application for possession could have been made in execution of the pre-emption decree inasmuch as the defendants had not been entitled to actual possession and that the present suit was not barred by limitation. (*Lindsay and Daniels, JJ.*) RAGHUBIR SINGH *v.* JODHA SINGH. **45 A. 482 : 21 A. L. J. 417 : L. R. 4 A. 223 : 1923 All. 507.**

TRUSTS ACT (II OF 1882), S. 82.

——Ss. 82 and 94—*Resulting trust—Purchase in name of creditor—Rights of real purchaser.*

Held, on the facts that Defts. No. 1 and 2 were in the position of creditors in possession that there was a resulting trust so far as these properties were concerned and that the plff. was entitled to get back the properties upon the payment of the amount due to the defts. (*Chaudhuri and Cuming, JJ.*) KSHETRA NATH ADHIKARI *v.* DURGAPADA MANDAL,

52 I. C. 902.

——S. 82—*Purchase in the name of another—Presumption if any English Law of advancement compared.*

The presumption of advancement of English Law when a person purchases property in the name of another in whom he is interested, does not arise in India. Here the question in such a case is if the purchase was for the benefit of the person in whose name it was made; one test being the source of the purchase-money. (*Ayling and Napier, JJ.*) RAHIMAN BEEBI *v.* KHATHOON BEE.

35 I. C. 569 : 4 L. W. 193.

——S. 83—*Legal representative.*

"Legal representative" in S. 83 includes person or persons beneficially entitled to represent the interests of the deceased by virtue of inheritance, in cases of deceased person for whose property no administration has been granted. The law decides the representative of the deceased at the moment of death of the deceased. So on a trust created by a woman, which failed, after her death a resulting trust was created in favour of settlor and it descended to her heirs at the time of her death. (*Scott, C. J. and Davar, J.*) DWARKA DAS DAMODAR *v.* DWARKA DAS SHAMJI.

40 Bom. 341 : 31 I. C. 441 : 17 Bom. L. R. 938.

——S. 83—*Resulting trust—Debtor and creditor—Composition deed—Surplus.*

Certain debtors entered into a composition deed with the creditors under which they transfered absolutely all the properties to certain trustees for the benefit of the creditors and with a view to obtain a full discharge from all liability. *Held*, that no resulting trust was created in favour of the debtors and that they had no cause of action to sue for surplus moneys, (*Crouch, A.J.C.*) LEKHRAJ VISUMAR *v.* ASSALMAL TARUMAL

27 I. C. 332 : 8 S. L. R. 132.

——S. 84—Benami *transfer—Fraud not carried out.*

Where a mortgage was taken *benami* with having a tainted origin in the name of a person, for the plaintiff's benefit, but the fraud was not effected, it is competent for the plaintiff to sue on the mortgage. *Feret* v. *Hill*, 15. C.B. 207 (1815) Dist. (*Wallis, C. J. and Oldfield, J.*) RAJAGOPALACHAR *v.* SUNDARAM CHETTY.

45 I. C. 333 : 33 M. L. J. 696.

——S. 84—*Fraudulent transfer.*

The transferor is disentitled to set aside the transfer when it is for a fraudulent purpose and when the creditor is delayed. 29 Mad. 72 ; 18 Mad 378 Foll. (*Fawcett, A. J. C.*) HIRJI *v.* GOVERDHAN DAS. 32 I. C. 530 : 9 S. L. R. 108.

TRUSTS ACT (II OF 1882), S. 88.

——S. 88—*Adverse title of a trustee.*

A trustee acquiring property as such is not allowed to assert adverse title on his own behalf until he obtains a proper discharge from the entrusted trust. (*Lord Machnaghten.*) SHRINIVASA MOORTHY *v.* VENKATAVARADA IYENGAR.

34 Mad. 257 : 15 C. W. N. 741 : 8 A. L. J. 774 : 13 Bom. L. R 520 : (1911) 2 M. W. N. 375 : 14 C. L. J. 64 : 10 M. L. T. 263 : 11 I C. 447 : 21 M. L. J. 669 (P. C.)

——S. 88——*Mortgagor and mortgagee—Position of—Sale by mortgagee.*

A mortgagee is not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous ; unless indeed, the price is so low as in itself to be evidence of fraud. (*Lord De Villiers.*) HADDINGTON ISLAND QUARRY CO. LTD. *v.* ALDEN WESLEY. 13 I. C. 261 : 10 M. L. T. 554 (P. C.).

——S. 88—*Purchase by trustee—Rights of.*

Where a trustee purchased a mortgage bond which contained a part of the trust property when the other trustees failed to arrive at a conclusion on the date of sale, *held*, that the purchase by the trustee was for the benefit of the trust and that he could charge the trust with that amount. (*Richards, C. J. and Banerjee, J.*) GOPI NARAIN *v.* KUNJ BEHARI LAL. 34 All. 306 : 13 I. C. 625 : 9 A. L. J. 311.

——S. 88—*Advantage by fiduciary—Undue influence—Contract Act*, Ss. 19, 19-*A and* 64.

Plff, and her sister sold their land for an inadequate price to their uncle, the deft. with whom they were living after the death of their parents. The plff. after the death of her sister sued to have the sale deed cancelled as having been executed through undue influence and to recover possession of the lands. *Held*, that the case fell within the scope of S. 88 of the Act and that the sale deed was void as regards the plff.'s share and that of her deceased sister. (*Scott, C. J. and Hayward, J.*) GOVIND *v.* SAVITRI.

43 Bom. 173 : 47 I. C. 883 : 20 Bom. L. R. 911.

——S. 88—*Execution sale of trust property—Purchase by trustee.*

A trustee for sale is entirely disabled from purchasing the trust property directly or indirectly. A trustee for purposes other than for sale cannot purchase the property where the purchase would conflict with his duty respecting it or his position in regard to it. Where a decree has been obtained against a *shebait* as a representative of the *debutter* estate, he is not competent, without leave of Court, to purchase the *debutter* property in his personal capacity. Where there is no misconduct on the part of the execution creditor the property reverts to the *debutter* estate, in case of purchase by the *shebait* without such leave, and the surplus sale proceeds

TRUSTS ACT (II OF 1882), S. 88.

should be returned to the *shebait*. (*Mookerjee and Panton, JJ.*) MANOHAR MUKHERJEE *v.* PEARY MOHAN MUKHERJEE.

54 I. C. 6 : 30 C. L. J. 177.

——S. 88—*Breach of trust—Resumption of grant—Regrant by Government to trustee.*

The resumption of an inam and the levy of full assessment on the trustee for failure to fulfil the condition of the trust does not amount to a regrant to the trustee, or put an end to the trust originally created. The advantage gained by the trustee enures for the benefit of the trust. (*Ayling and Kumaraswami Sastri, JJ.*) MUHAMMAD ESUF SAHIB *v.* ABDUL SATHAR SAHIB.

42 Mad. 161 : 25 M L. T. 141 : (1919) M. W. N. 228 : 49 I. C. 821 : 36 M. L. J. 262.

——S. 88—*Principal entitled to advantage received by agent.*

A principal is entitled under S. 83 of Act to the pecuniary advantage reaped by the agent having adverse interests to those of the principal in purchasing property. (*Wallis, C. J. and Srinivasa Aiyangar, J.*) RAMASWAMI CHETTY *v.* KARUPPAN CHETTY. **31 I. C. 216 : 29 M. L. J. 551.**

——Ss. 88 and 89—*Omission by mortagagor to pay public revenue—Sale—Purchase—Rights of mortgagee.*

Where a mortgagor neglects to pay the public revenue as required by S. 65 (c) of the T. P. Act and the land is sold or resumed but subsequently re-acquired by the mortgagor, the original mortgage revives. (*Pratt, J.*) PO DWE *v.* K. M. T. T S. CHETTY. **51 I. C. 574 : 12 Bur. L. T. 41.**

——S. 88, Ill. (f)—*Scope of*

The illustration goes further than the operative portion of the section itself and does not enunciate good law. (*Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J.*) HAJEE SIDDICK HAJEE *v.* MAHOMED HUSHUM SAIT.

(1916) 2 M. W. N. 341 : 37 I. C. 728 : 4 L. W. 521.

——Ss. 89 and 96—*Advantage out of compromise.*

When a compromise is entered into as between persons one of whom could not have in good faith believed in the claim put forward by him and the latter secures an undue advantage. In derogation of the interests of another, such advantage must be deemed to be held in trust for the benefit of the person prejudiced or his representative and should be restored to the latter. 45 Cal. 17 Foll. An alienee in good faith and for consideration from the party who has secured such advantage is not, however, affected by the infirmities affecting his alienor's title. (*Wallis, C. J. and Seshagiri Aiyar, J.*) OVULA KONDAMA NAICKEN AIYAN *v.* APARANJI AMMAL.

52 I. C. 1003 : 10 L. W. 544.

——Ss. 89 and 90—*Not applicable when there is no fiduciary relationship.*

The true owner cannot claim the restitution of a fraudulent advantage gained by a person in adverse possession because the person in such possession is not "under a duty to speak" as

TRUSTS ACT (II OF 1882), S. 90.

Ss. 89 and 90 contemplate only perons under some fiduciary relationship to the true owner. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) PUNUGU SUBBIAH *v.* NAKALAPATI RAMI REDDI.

39 Mad 959 : 19 M. L. T. 210 : (1916) 1 M. W. N. 239 : 33 I. C. 326 : 30 M. L. J. 331.

——S. 90—*Co-sharers—Sale for arrears of revenue—Purchase by mortgagee of share—Intentional default—Form of the decree.*

A minor was the mortgagee of a separately owned share of the mortgaged property. The agents of the mortgagee intentionally made default in paying the revenue for which he was responsible with a view to have the whole property sold up for arrears of revenue and purchased for the mortgagee. The whole property was in fact so sold and purchased for the minor mortgagee. The co-sharers with the mortgagor never knew of the default or the consequent sale. *Held*, that the purchaser was a trustee for all the co-sharers. The proper decree to be passed was to declare that the property was held for the benefit of all the co-sharers and the mortgagee, according to their several interests at the date of sale, subject to re-payment to the mortgagee of the expense properly incurred in the purchase together with interest thereon. The relative position of co-sharers in respect of the payment of revenue demands from each, such measure of candid dealing and good faith as will ensure that a sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. 16 Cal. 194, Disappr ; 17 C. W. N. 1233, Appr (*Sir Lawrence Jenkins*) DEONANDAN PRASAD *v* JANKI SINGH.

44 Cal. 573 : 44 I. A. 30 : 15 A. L. J. 154 : 21 M. W. N. 473 : 1 Pat. L. W. 294 : (1917) M. W. N. 254 : 25 C. L. J. 259 : 21 M. L. T. 240 : 5 L. W. 526 : 19 Bom. L R. 410 : 39 I. C. 346 : 32 M. L. J. 206 (P. C.).

——S. 90—*No applicability to property acquired by a widow.*

S 90 of the Trusts Act has no application to a Hindu reversioner as to the case of an acquisition of property by a Hindu widow. (*Bannerjee, Tudball and Gokul Prasad, JJ.*) SRI RAM JANKIJI *v.* JAGDAMBA PRASAD.

43 All. 374 : 19 A. L. J. 129 : 61 I. C. 3 : 3 U. P. L. R. (All.) 33 (F.B.).

——S. 90—*Revenue sale of equity of redemption—Purchase by mortgagee—Effect.*

The equity of redemption in certain properties were sold in a revenue sale and were purchased by the mortgagee. There was nothing to show that the mortgagee had in any way contributed to the sale ; *held* that the revenue sale was valid and binding on the mortgagor and that the mortgagee beame the full owner. (*Krishnan and Venkatasubbarao, JJ.*) TADEPALLI SUBBARAO *v.* SRI BALSU BUCHI SARVARAYUDU. **18 L. W. 61 : (1923) M. W. N. 533 : 44 M. L. J. 534 : 1923 M. 533.**

——S 90—*Quasi—Contract—Money deposited in Court in* usum jus habentis—*Withdrawal by person not entitled.*

TRUSTS ACT (II OF 1882), S. 90.

Money deposited in Court, in *usum jus habentis* and withdrawn by a person having no right to it may properly be held to be received for the plaintiff. (*Stanley, C. J. and Griffin, J.*) MAHDI HUSSAIN v. SUKH CHAND. 33 All. 450 : 10 I. C. 730 : 8 A. L. J. 230.

———S. 90—*Mortgagee purchasing equity of redemption in execution.*

A mortgagee who purchases the equity of redemption in execution of a simple money decree against the mortgagor cannot be deemed to be a person who avails himself of his position to gain an undue advantage of the mortgagor. 22 Bom. 624 ; 5 B. L. R. 450, Dist. (*Scott, C. J. and Heaton, J.*) GANESH NARAIN KHARE v. GOPAL VISHNU APTE. 41 Bom. 357 : 39 I. C. 3 : 19 Bom L R. 75.

———S. 90—*Mortgagee availing himself of his position to gain an advantage—Liability of.*

A mortgagee in possession who allows the mortgaged property to be sold in consequence of his own wilful default and who purchases the property at such sale *benami* in the name of another cannot resist redemption by the mortgagor on the ground of extinction of his position as mortgagee by reason of such sale. (*Scott, C. J. and Heaton, J.*) CHOTTA BHULA v. BAI JAMANI. 40 Bom. 483 : 37 I. C. 295 : 18 Bom. L. R. 438.

———S. 90—*Mortgagor and mortgagee—Non-payment of assessment—Re-grant to old holder under new tenure—Bombay Land Revenue Code (Act V of 1879) as amended by (Act VI of 1901), S. 56.*

S. 90 of the Trusts Act has no application to a re-grant on a new tenure of property forfeited for non-payment of assessment under S, 56 of the Bombay Land Revenue Code. A clear provision of a special statute overrides S. 90 of the Trusts Act. (*Batchelor and Shah, JJ.*) VEDU SHIVLAL v. KALU UKHARDU. 37 Bom. 692 : 21 I. C. 310 : 15 Bom. L. R. 827.

———S. 90—*Co-sharer—Revenue sale—Fraud of co-sharer—Purchase by benamidar—Rights of other co-sharers.*

Due regard must be had to the relative position of co sharers in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as will ensure that a co-sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property ; where a revenue sale was collusive in the sense that the purchase was prearranged, and the parties decided to utilize the stringent provisions of the revenue laws for the accomplishment of their private fraudulent object, and put the machinery of the state in operation to cause injury to the proprietor and selected in advance the purchaser who was to hold the property for the benefit of himself and of his participators in the fraud ; *held*, that the Court would strip off all disguise from a case of fraud and look at the transaction as it really was. 10 M. I. A. 540, Ref. The sale has no higher effect than a private alienation and the purchaser who had taken with due notice of or was implicated with the fraud must be compelled to reconvey the property to the rightful owners. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice, and avoids all judicial acts, ecclesiastical or temporal. No party to a fraudulent transaction can be allowed to derive any benefit from it ; and the Court is always reluctant to condone the fraud and to permit the participant therein to retain the advantage. (*Mookerjee and Panton, JJ.*) KUMAR SATISH KANTHA v. SATIS CHANDRA CHATTERJEE. 30 C L. J. 475 : 55 I. C. 689 : 24 C. W. N. 662.

———S. 90—*Advantage by co-sharers—Revenue sale—Unfair conduct.*

The mere fact that the purchaser of an estate at a revenue sale is one of the co-sharers who did not pay his share of the revenue, is not in itself a ground to give the other co-sharer an equity to obtain a re-conveyance of their shares from their purchaser on their paying to him of their proportion of the expenses which he had incurred To support a claim to this equity, something unfair, something amounting at least to sharp practice in the conduct of the purchaser is necessary. (*Richardson and Huda, JJ.*) KURSHED ALI v. DINANATH SARMA. 49 I. C. 802 ; 29 C. L J. 492.

———S. 90—*Default in payment of revenue—Mortgage with possession—Collusive revenue sale.*

A collusive transaction by which the mortgagee who is bound to pay revenue wilfully allows the lands to be sold for arrears of revenue and immediately after purchases it from the purchaser in revenue sale, does not affect the mortgagor's right to redeem. (*Richardson and Beachcroft, JJ.*) JAMILA KHATUM v. MAHOMED KHATUM. 45 I. C. 735.

———S. 90—*Co-sharers—Default in revenue—Sale—Purchase—Fraud.*

Evidence to prove concealment of notice of sale for arrears of revenue is relevant to support allegation of fraud. It is not correct to say that as between co sharers, a relation of fiduciary character does not exist, and if any co sharer has acted fraudulently in allowing a default in the payment of revenue and purchasing the properties himself at the revenue sale the other co-sharers are entitled to a reconveyance on paying to him a share of the purchase money proportionate to their share. (*Brett and Mookerjee, JJ.*) CHOWDHURY RAM PROSAD SINGH v. CHOWDHURY PAWAN SINGH. 21 I. C. 354 : 18 C. L. J. 97.

———S 90—*Advantage by co-sharer—Revenue sale.*

There may be circumstances in which public policy would demand that a co-owner should hold an advantage obtained by him in derogation of the rights of the others, for their benefit as well as his own, as for instance where a revenue sale is caused by the default of a co-owner, and the property is purchased at the sale by the very co-owner. 16 Cal 194, Not foll. (*Jenkins, C.J. and Mookerjee, J.*) FAIZAR RAHMAN v. MAIMUNA KHATUN. 18 C. L. J. 111 : 20 I. C. 510 : 17 C. W. N. 1233.

TRUSTS ACT (II OF 1882), S. 90.

——S. 90—*Co-sharers—Revenue sale—No misleading or keeping out facts from knowledge of opposite party.*

A co-sharer who deliberately makes default in paying his share of Government Revenue with a view to purchase the estate himself when brought to sale for the arrears cannot be held to have practised fraud upon the other co-sharers when he has done nothing to mislead the latter or to keep from their knowledge the fact, that the estate was to be sold. 16 Cal. 194, Foll. 15 C. W. N. 776, Dist. (*Richardson and Newbould, JJ.*) RASH BEHARY MITTER *v.* JOTINDRA MOHAN DATTA. 20 I. C. 317.

——S. 90—*Advantage by co-sharers—Negotiations for putni lease—Default by defendant—Sale under Act (XI of 1859)—Suit by plaintiff.*

During negotiation between plaintiff and defendant co-sharers for execution of a *putni* lease by defendant the latter committed default and the land being sold under Act (XI of 1859) was purchased by the defendant *benami* for another. *Held*, that the conduct of the defendant was fraudulent and a suit by the plaintiff for damages representing the interest paid on the purchase money with a view to set aside the sale was claimable from the defendant. (*Mookerjee and Carnduff, JJ.*) HARENDRA LAL ROY *v.* PURNA CHANDRA CHATTERJEE. 14 I. C. 368 : 15 C. L. J. 132.

——S. 90—*Mortgagor and mortgagee—Assignment to mortgagor on dharkast by the Government—Effect of.*

Where after a mortgage of certain *wargland* and the *Kumaki* land adjoining it the Government assigns the *Kumaki* lands on *Dharkhast* to the *wargdar* the mortgagee does not get the benefit of the assignment as the mortgagor did not obtain the *kumaki* land on *Dharkhast* as representing all persons interested in the *wargland*. (*Oldfield and Sadasiva Aiyar, JJ.*) KADI SANKARA BHATTA *v.* MOIDIN. 8 L. W. 100 : 49 I. C. 147 : 35 M. L. J. 120

——S. 90—*Applicability—Renewal of leave.*

Where the principal lessee obtains a renewal of the lease from the lessor without representing the sub-lessees at a time when the rights both on lease and the sub-lease are determined the sub-lessees are not entitled to the benefit of the renewed lease. (*Sadasiva Aiyar and Spencer, JJ.*) SWAMINATHA MUDALI *v.* SARAVANA MUDALI. 40 I. C. 581 : 33 M. L. J. 370.

——S. 90—*Mortgage—Revenue sale of mortgaged property—Mortgagor purchasing it* benami *—Subsequent mortgage sale—Validity—Right of* bona fide *lessee.*

A, the plaintiff-mortgagee, brought a suit on mortgage which was dismissed. Pending appeal by him, mortgagor *B* let the revenue fall into arrears and purchased it in the revenue sale *benami* in the name of 2nd defendant *C*. *A* succeeded in appeal and he got the property sold but failed to get actual physical possession. 1st defendant was in possession as lessee from the judgment debtor *B*. In *A*'s suit for possession and crops on the land, *held*, that sale under

TRUSTS ACT (II OF 1882), S. 91.

mortgage-decree was valid and conveyed full title to the plaintiff, as *C* was only *benamidar* of *B* in the revenue sale. That the 1st defendant who was a *bona fide* lessee from *C* was entitled to the crops raised during the continuance of the lease. (*Sadasiva Aiyar and Napier, JJ.*) NUKALAPATI RAMI REDDI *v.* VAVILLA VENKATESAM. 27 I. C. 274 : (1914) M. W. N. 916.

——S. 90—*Advantage by co-owner.*

One of two co-owners of a debt obtaining a document in his own name in derogation of the rights of the other holds it for the benefit of the other also under S. 90 of the Trusts Act and the latter is entitled to a declaration to that effect. (*Ayling and Sadasiva Aiyar, JJ.*) ALAVALA BALAYYA *v.* ALAVALA GURUVAYYA. 26 I. C. 55 : 1 L. W. 874.

——S. 90—*Three mortgages on the same property—Suit upon last mortgagee—Sale with prior mortgages as encumbrances—Mortgagee whether trustee.*

Where a mortgagee had their mortgages on the same property and brought a suit upon the last mortgagee alone and purchased the property in court auction subject to his prior mortgage, he cannot by his failure to sue on all the mortgages be said to have gained an advantage within the meaning of S. 90 so as to hold the equity of redemption in trust for the mortgagor's sons. 2 M. L. J. 188 ; 31 Mad. 530, and 24 Mad. 96 Foll. (*Miller and Tyabji, JJ.*) GANAPATHI MUDALIAR *v.* KRISHNAMACHARIAR. 24 I. C. 187 : 27 M. L. J. 218.

——S. 90—*Scope of—Purchase by mortgagee—In contravention of O. 34, R. 14, C. P. C.*

S. 90 of the Indian Trusts Act only applies to a case where the mortgagee or other qualified owner of any property has availed himself of his position and has thereby gained an advantage in derogation of the rights of other persons, and does not invalidate a purchase by the mortgagee in contravention of O. 34, R. 14, C. P. C. (*Benson and Abdur Rahim, JJ.*) RAMKRISHNA CHATRIAVA DEO *v.* PUSHOPATI VIJAYARAMA. 15 I. C. 589.

——S. 90—*What is resulting trust.*

A resulting trust takes place, where several persons jointly furnish the purchase money and the purchase is made in the name of one of them. (*Mittra, A. J. C.*) NARHAR *v.* NARAIN. 56 I. C. 386.

——S. 91—*'Acquire'—Meaning of.*

The word "acquire" in S. 91 of the Trusts Act is quite in accordance with the English Rule that the purchase should be complete both by payment and conveyance before notice in order to defeat the claims of a person having a prior existing equity. (*Scott, C. J. and Russell, J.*) HIMATLAL *v.* VASUDEO GANESH. 36 Bom. 446: 16 I. C. 680 : 14 Bom. L. R. 634.

——S. 91—*Possession under registered sale—Purchaser's position.*

A vendee of immoveable property in possession under a registered sale-deed can resist a suit for possession by a prior registered transferee if the former conveyance was made in pursuance

TRUSTS ACT (II OF 1882), S. 91.

of a contract to sell by the vendor of which the first transferee holds the property to the benefit of the subsequent transferee under S. 91 of the Trusts Act. 29 Mad 336, Expl. and Dist. (*Wallis, C. J. and Srinivasa Aiyangar, J.*) THIRUVENKATA CHARIAR *v.* SESHADRI IYENGAR.
3 L. W. 457 : 19 M. L. T. 369 : 34 I. C. 488 : 30 M. L. J. 559.

——S. 91—*Possession under oral agreement to lease—Rights of purchaser with notice.*

It is open to defendant (a tenant in possession) to resist a suit in ejectment if he can prove that there was an oral contract to lease for a fixed term that he was in possession in pursuance of that contract and the plaintiff or his predecessor-in-title accepted rent from him on such footing. 11 C. L. J. 543; 21 Mad 291; 2 C L J. 343. Foll. (*Kumaraswami Sastri, J.*) G. CUNNIAH CHETTY *v.* ELAMANDA CHETTY. **27 I. C 877 : 2 L. W. 152.**

——S. 95—*Land purchased by one with money belonging to another Constructive trust.*

Where lands are purchased with plaintiff's money in the name of the defendant with a recital in the sale deed that the purchase was on behalf of the plaintiff, the defendant is only a constructive trustee for plff. and his liability arises under S. 95 of the Trusts Act. (*Krishnan and Odgers, JJ.*) KRISHNA PATTAR *v* LAKSHMI AMMAL. **45 Mad. 415 : (1922) M. W. N 117 : 16 L. W. 886 : 30 M. L. T. 238 : (H C.) 42 M. L. J. 119 : (1922) Mad. 57**

——S. 95 — *Money retained wrongfully — Liability to pay interest.*

When by the wrongful act of the defendant, the plaintiff has been deprived of money which was actually making interest, the court of equity would be clearly entitled to give interest. (*Krishnan, and Oldfield, JJ.*) ARUNACHALAM CHETTIAR *v.* RAJESHWAR SETUPATI. **42 M. L J 74 : 30 M L. T. 184 : 16 L. W. 63 : (1921) M. W. N. 873 : 1922 M. 55.**

ULTRA VIRES.

See also (1) DECREE.
(2) INTERPRETATION OF STATUTES.
(3) JUDICIAL ORDER.
(4) JUDICIAL PROCEEDINGS.

——*Powers of Indian Legislature are limited by Acts of Parliament.*

The Indian Legislature has powers expressly limited by the Acts of the Imperial Parliament which created it and it can do nothing beyond the limits which circumscribe those powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large, and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of that instrument by which, affirmatively, the legislative powers were created, and by which negatively, they are restricted. If what has been done is legislation within the scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions. The British Parliament intended to give the widest powers to the Indian Legislature, and that though relying on the latter's good sense not to abuse those powers, it yet retained practical checks in case of necessity. (*Macleod, C. J., Marten and Crump, JJ.*) ALFRED WILKINSON *v.* WILKINSON.
47 Bom. 843 : 25 Bom. L. R. 945 : 1923 Bom. 321.

UMPIRE.

See (1) ARBITRATION.
(2) ARBITRATION ACT.
(3) AWARD.
(4) C. P. CODE, SCH. II.

UNCERTIFIED PAYMENT.

See C. P. CODE, O. 21, R. 2.

UNCHASTITY.

See HINDU LAW—
(*a*) SUCCESSION.
(*b*) WIDOW.

UNCONSCIONABLE BARGAIN.

See CONTRACT ACT, SS. 16 AND 74.

UNDERGROUND RIGHTS.

See MINES AND MINERALS.

UNDER-PROPRIETOR.

See LANDLORD AND TENANT.

UNDER-PROPRIETARY RIGHT.

See LANDLORD AND TENANT.

UNDER-RAIYATI HOLDINGS.

See LANDLORD AND TENANT.

UNDER-RYOT.

See LANDLORD AND TENANT.

UNDER-TENURE.

See (1) LANDLORD AND TENANT.
(2) LAND TENURES.

UNDISCLOSED PRINCIPAL.

See (1) PRINCIPAL AND AGENT.
(2) CONTRACT ACT.

UNDUE-INFLUENCE.

See (1) CONTRACT ACT, S. 16.
(2) PARDANASHIN LADY.

UNDUE PREFERENCE.

See (1) PROV. INS. ACT (V OF 1920).
(2) T. P. ACT, S. 53.

UNFAIR PREFERENCE.

See RY. ACT, S 109.

UNFAIR TRANSACTION.

See CONTRACT ACT, S. 16.

UNINCORPORATED SOCIETY.

See CORPORATION.

U. P. COURT OF WARDS ACT (III of 1899).

———*Personal decree against a ward is a nullity.*

Law does not at all recoginise a ward as legal personality for the purposes of suits, and so a decree against him personally is void. A Collector cannot be substituted for him, for executing such a decree. (*Lindsay, J. C.*) SANKATA PARSHAD *v* DEPUTY COMMISSONER OF KHERI **30 I. C. 768 : 18 O. C. 145.**

———*Rules under—District Officer and Special Manager, powers of.*

Neither the Act nor the Rules thereunder empower District Officer or a special manager to make a grant of land out of an estate under the management of the Court of Wards, for a 100 years for the planting of a grove. (*Kendall, A.J.C.*) RAM NATH *v.* BINDESHURI PRASAD SINGH. **25 I. C. 599 : 17 O. C. 291.**

——— **S. 15**—*Jurisdiction of Court of Wards.*

The Court of Wards in the United Provinces of Agra and Oudh can deal with the property of a disqualified proprietor under its charge though situated outside the limits of the territories subject to the Lieutenant-Governor of those provinces. S. 15 makes no distinction between moveables and immoveables Therefore properties both within the limits of U. P. as well as outside thereof, are subject to the administration set up by the Act if a person comes under the terms of the Act. (*Fletcher and Teunon, JJ*) GADADHAR BHATA *v.* SARAT CHANDRA MUKERJEE. **35 I. C. 634.**

——— **Ss. 16 and 18** – *Mortgage suit on—Interest not allowed if mortgage not notified.*

A mortgagee, who did not notify his claim under S. 16 of the Act is entitled to sue on his mortgage and his mortgage is admissible in evidence but he will not be allowed interest under S. 18 of the Act. (*Richards, C. J., Tudball and Rafique, JJ.*) ASHARAFALI *v* KALYAN. DAS. **37 All. 585 : 30 I. C. 945 : 13 A. L. J. 796.**

——— **Ss. 16, 18 and 20**—*Duty of creditors—Notification—Interest—Admission of deeds not produced before Collector.*

As soon as the notice required under S. 16 is duly published by the collector the creditors must not only notify their claimsbut must produce before the Collector every document in proof of such claim. There being no general or special order of the Board of Revenue under S. 16 (2), the Collector is not bound to do anything more than get the notice published in English and Vernacular in the Provincial Gazette. The proviso to S. 17 does not apply to Ss. 18 and 20. The obligation to produce documents is laid on all creditors. The Court has still a discretion to admit documents though not produced before the Collector. The provisions of S. 18 as regards stoppage of interest on non-notification of claim are mandatory. (*Chamier and Piggott, JJ.*) COLLECTOR OF GHAZIPUR *v.* BAL-BHADDAR SINGH. **17 I. C. 25 : 10 A. L. J. 234.**

——— **S. 34**—*Pious obligation of ward to pay his father's debts.*

U. P. COURT OF WARDS ACT (IV OF 1912), S. 2.

A son is under no pious obligation to discharge debts contracted by his father when his estate Was under the management of the Court of wards. (*Rafique and Lindsay, JJ.*) BALDEO *v.* BINDESHRI PRASAD. **20 A. L. J 241: 44 All. 388 : 1922 All. 215.**

——— **Ss. 35 and 9**—*Powers of Court—Death of ward.*

S. 35 gives general power to the Court of Wards to sell or mortgage any part of any property under its superintendence subject to the restrictions in regard to property under its charge by the Court under S. 9. After the death of a ward,who was a disqualified proprietor, the Court of Wards may retain charge of his property till the debts and liabilities of the ward are satisfied. (*Fletcher and Teunon, JJ.*) GADADHAR BHATA *v.* SARAT CHANDRA MUKERJEE. **35 I. C. 634.**

——— **S. 48**—*Notice—Amendment of plaint—No change in cause of action, notice if necessary.*

In a suit against a ward of a Court an amendment of plaint should not be allowed if it introduces a new cause of action which was not stated in the notice given to Collector under S. 48, but if so stated in the notice, amendment should be allowed. The object of S. 48 is to give the Collector time to consider the claim and if necessary to settle it without litigation costs. (*Richards, C. J. and Tudball, J.*) BALDEO PRASAD *v.* COLLECTOR OF PHILIBHIT. **37 All. 13 : 26 I. C. 91 : 12 A. L. J. 1119.**

——— **S. 48**—*Execution proceedings—Notice to Court.*

In execution of a decree the Court of Wards attached a certain property. The judgment-debtor objected to the attachment and filed a suit for a declaration of their right without giving notice to the Court of Wards under S. 48. Notice was not necessary as the suit did not relate to the person of property of the ward. (*Richards, C. J. and Banerjee, J.*) LAL SINGH *v.* COLLECTOR OF ETAH. **36 All. 331 : 25 I. C. 398 : 12 A. L. J. 485.**

——— **S. 49**—*Proceedings against person under Court of Wards—Collector a necessary party—Duty of Court.*

The Collector is a necessary party to a proceeding against a ward of Court and it is the duty of the Court on its own motion to make the Collector in such cases a necessary party and wait for any defence he may put forward. (*Knox and Karamat Hussain, JJ.*) MEAZZAMALI SHAH *v.* CHUNNI LAL. **33 All. 791 : 11 I. C. 269 : 8 A. L. J. 935.**

——— **(IV OF 1912.)**

——— **S. 2 (2)**—*Disqualified proprietor—If can make a will under the old act.*

A person when declared a "disqualified proprietor" on his own application, was not allowed to manage his estate and was unable, to make a will without the permission of the Court of Wards but the repeal of these provisions relating to Court of Wards Act (1899) have left the right of testamentary disposition unimpaired and no per-

U. P. COURT OF WARDS ACT (IV OF 1912), S. 3.

mission of Court of Wards is now required to make a valid will. (*Mears, C. J. and Banerji, J.*) MAHAMMED ISMAIL *v.* HAMIDAH KHATOON.
42 All. 509 : 61 I. C. 910 : 18 A. L. J. 581.

——Ss. 3 (3) and 55—*Disability, proprietor 'ward' explained.*

The disability mentioned in S. 55 refers not only to the property managed by the Court of Wards but also to all possible causes of action cognisable by a Civil Court. The word 'proprietor' in S. 3 (3) means the proprietor who has actually applied under S. 10 of the Act. Therefore a member of a joint Hindu family who has neither been declared disqualified proprietor nor has joint in the application by other members of the family under S. 10 of the Act is not a 'ward' under the Act and the disability under S. 55 does not affect him and he can institute a pre emption suit notwithstanding the fact that his interest in the joint family property is under the management of the Court of Wards. 40 Cal. 784 (P.C.). Dist (*Stuart and Kanhaiya Lal, A. J. Cs.*) LALTA SINGH *v.* CHHATTAR SINGH.
3 O. L. J. 552 : 37 I. C. 188 : 19 O. C. 306.

——Ss. 8 and 11—*Decree against estate—Effect of.*

A decree against the Court of Wards is effective against the person or property of the ward to whom it relates after the property is released. The discretion of the Local Government to take property of disqualified persons under direct supervisions, cannot be questioned by Civil Courts. (*Stuart, J C. and Kanhaiya Lal, A. J. C*) NARENDRA BAHADUR SINGH *v.* OUDH COMMERCIAL BANK, LTD. 50 I. C. 887 :
6 O. L. J. 126.

——Ss. 8 and 11—*Disqualified proprietor—Mortgage-decree against Court of Wards—validity.*

Where a mortgagor has been declared a disqualified proprietor under the Act and a final mortgage decree is made against the Court of Wards, during its superintendence of the estate the decree is binding on the mortgagor, even after the Court of Wards is discharged from its superintendence in the absence of proof that the proceedings of the Court of Wards is a nullity. (*Lord Haldane.*) NARINDRA BAHADUR *v.* OUDH COMMERCIAL BANK, LTD. 43 All. 478 :
48 I. A. 494 : 24 O. C. 183 : 8 O. L. J. 387 :
(1922) M W. N 61 :
42 M L. J. 58 : 26 C. W N. 326 :
L. R. 3 P.C. 25: 1922 P.C. 1 (P.C.)

——Ss. 17 and 18—*Scope.*

The Ss. 17 and 18 protect the Court of Wards from the dishonest claims rushed on them later on ; but do not bar persons preferring late claims resulting out of honest mistakes. S. 18 means that Collector is to ask the claimants the cause of preferring his claim late. If he fails to satisfy him (the Collector), then only the claim is extinguished. (*Stuart and Kanhaiya Lal, A. J. Cs.*) KETKI *v.* MANAGER, NAN PARA ESTATE.
7 O. L. J. 589: 58 I C. 945 :
2 U.P.L. R. (J C.) 178.

U. P. COURT OF WARDS ACT (IV OF 1912), S. 54.

——Ss. 37 and 45—*Successor to estate of ward—Liabilities incurred by enforceability.*

S. 37 does not disqualify a successor to the property of a person under Court of Wards from incurring any liability which might affect the property after the debts and liabilities have been discharged. Where the defendant successor of the ward was never so declared, and he made no application under S. 10 and the property inherited by the defendant was under the superintendence of the Court of Wards, but only for a specific purpose, namely for the discharge of the debt and liabilities which were due to the ward at the time when the estate was taken over under its superintendence by the Court of Wards: *Held*, after these debts were discharged and the estate was released, any liability incurred by the successors of the lady who was the ward might be enforceable, except in so far as that liability created a charge on the property which was under the superintendence of the Court of Wards while such debts and liabilities had remained undischarged. (*Lindsay and Kanhaiya Lal, JJ.*) DALEEP SINGH *v.* KUR SHED HUSAIN.
20 A. L. J. 715 : L. R. 3 A. 462 .
4 U. P. L. R. (A). 216 : 44 A. 706:
1922 All. 459.

——S. 54—*Notice—Transferee does not get the benefit of.*

A notice given to the Court of Wards does not enure to the benefit of the transferee. (*Ryves and Deniels, JJ.*) MUHAMMAD SIDDIQ ALI KHAN *v.* ANWAR-UL-HASAIN. 45 A. 563 :
L. R. 4 A. 263 : 21 A. L. J. 521 :
1924 All. 98.

——S. 54—*Notice delivered to Special Manager of Estate is proper.*

A notice under S 54 of the Act was left at the office of the Special Manager of an estate under the charge of the Collector, as the Court of Wards held that the notice was proper and sufficient. (*Piggott and Ryves, JJ.*) LACHMI NARAIN *v.* DURG BIJAI. 65 I. C. 365 :
19 A. L. J. 32.

——S. 54—*Order by Collector to file suit in Civil Court within three months—Notice to Collector—Suit before two months.*

There is no reason for dispensing with the express provisions of S. 54 where it was in no way impossible for the appellant to have complied with that section and yet have brought his suit within the time allowed by the Assistant Collector. (*Daniels and Lyle, A. J. Cs.*) RAMDEO SINGH *v.* DEPUTY COMMISSIONER OF SULTANPUR, MANAGER, COURT OF WARDS, DERA ESTATE.
22 O. C. 147 : 52 I. C. 643 :
1 U. P. L. R. (J.C.) 66.

——S. 54—*Title of ward—Defeasible.*

S. 54 covers all suits relating to the property of any ward, *i.e.*, any property belonging to him, though his title thereto may be defeasible by reason of claim for pre-emption which may be maintainable in regard to the same. (*Kanhaiya Lal, A. J. C.*) INAU NEHAL SINGH *v.* DEPUTY COMMISSIONER, UNAO. 47 I. C 894 :
5 O. L. J. 546.

U. P. COURT OF WARDS ACT (IV OF 1912), S. 55.

——S. 55—*Disqualified proprietor being a trustee of endowment—Suit in his own name is maintainable.*

S. 55 of the U. P. Court of Wards Act has no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as trustee. He cannot be regarded as a disqualified proprietor in regard to the property which he so holds as manager, and the idol in whom the endowed property is supposed to be vested, cannot be treated as a ward within the meaning of S 55 of the Act. Consequently the disqualified proprietor can sue as manager of the idol. (*Lindsay and Kanhaiya Lal, JJ.*) SRI THAKURJI *v.* HIRA LAL.
20 A. L. J. 609 : L. R 3 A. 581 : 44 A 634 : 1922 All. 408.

——S. 55—*Son can obtain relief though father cannot.*

The disability of the father to sue for pre-emption in the personal capacity under S. 55 of the Act does not prevent the son from obtaining relief where the father and the son constitute a joint Hindu family. (*Stuart and Kanhaiya Lal, A. J. Cs*) LALTA SINGH *v.* CHHATTAR SINGH.
3 O. L. J. 552 : 37 I. C. 188 : 19 O. C. 306.

——S. 55—*Execution against ward.*

An application for execution of a decree against the person of a ward of Court, after the Act came into force is barred by S. 55 of the Act. (*Lindsay, J. C.*) SANKATHA PRASAD *v.* RAJA-KRISHNA DAT SINGH. **25 I. C. 668.**

——S. 61—*Sale by Court of Wards—Breach of warranty—Personal liability of ward.*

The breach of a warranty implied by law in respect of a sale effected by the Court of Wards cannot result in a personal liability of the ward. Though under the general law a guardian cannot covenant to improve personal liabilities on the ward, under S. 61, U. P. Court of Wards Act, if a specific covenant is entered into by the court of wards, he is personally liable on it. (*Wazir Hassan, A. J. C.*) PIRTHI PAL SINGH *v.* RAJA MUHAMMAD EJAZ RASUL KHAN. **1924 Oudh 99.**

U. P. ELECTORAL RULES.

——R. 11 (2)—*Declaration when invalid—Election petition when maintainable—Costs.*

When a declaration is filed, the presumption is that the candidate asserts that the signature is his own until some person makes an objection. An election petition is maintainable against the order of a returning officer declaring a nomination invalid. Where a nomination is held to be valid, the objector is liable for costs. (*Sherring, Bajpai and Kendall, A. J. Cs.*) SHAKER ALI *v.* ABDUL HAKEIN. **59 I. C. 846.**

U. P. GOVERNMENT RULES.

——R. 32 (3)—*Execution proceedings—Suit to set aside—Legality.*

A decree-holder purchased properties attached and sold at auction in execution proceedings transferred to a Collector under S. 68, C. P. C. After confirmation of sale, the judgment-debtor applied to the Collector to set aside sale for various grounds one of them being the fraud of the creditor in keeping the judgment-debtor in ignorance of execution proceedings. When it was dismissed instead of filing an appeal to the commissioner under R. 45 of the Rules of the Local Government, he filed a civil suit to recover the property. *Held*, (*a*) the suit was barred by O 21, R. 92 (3) or under the corresponding R. 32 (3) of the Local Government Rules, (*b*) the suit could not be treated as an application under S. 47 C. P. Code as the Court executing the decree was not the same as that in which the suit was instituted at the time of transfer of decree to the Collector. (*Piggott and Lindsay, JJ.*) NAZIR HUSSAIN *v.* KANHAIYA. **35 I. C. 478.**

U. P. LAND REVENUE ACT (III OF 1901).

——*Provisions under Ch. VII—Division of houses—Jurisdiction of Revenue Court.*

A Revenue Court making a partition under the provisions of Ch. VII of the Land Revenue Act has no jurisdiction to make a division of a house. The law with regard to buildings is definitely settled and the plaintiffs, who founded their case upon the partition in order to put forward the title which they wished to vindicate, are out of court. The order of the Revenue Court cannot give them a title to the premises in dispute. 23 All, 191 distinguished. (*Lindsay, J.*) GOVIND PERSHAD *v.* KALIAN. **1922 All. 216.**

——*Suit by rent-free tenant—Jurisdiction, Civil Court.*

A Civil Court can try a suit by a rent-free grantee against the Zemindar for the possession of his land from which he has been ejected (*Piggott and Walsh, JJ.*) GOBIND RAI *v.* BANWARI LAL.
42 All. 412: 2 U. P. L. R. (All.) 93: 58 I C. 594 : 18 A. L. J. 388.

——*Lambardar—Right to pay revenue out of collections.*

A lambardar is authorised to pay revenue out of the collections realised but cannot charge whole of the revenue against the profits of his co sharer who may be allowed in an account suit his dues from the excess collected either by the lambardar or any co-sharer. (*Kanhaiya Lal, J. C.*) RAMSARUP *v.* WAHAJUDDIN. **58 I. C. 546.**

——S. 4—*Grove land—Whether can be* sir.

A *sir* land is one cultivated by the proprietor and so grove land cannot become *sir*, and on its sale the proprietor cannot acquire ex-proprietary rights. (*Banerjee and Rafique, JJ.*) BHAGWAN DIN *v.* PEARE LAL. **42 All. 483 : 58 I. C. 620: 2 U. P. L. R. (All.) 148 : 18 A. L. J. 570.**

——S. 4—*Mahal—Waste land—Jurisdiction of Revenue Court—Partition.*

Within the boundaries of a mahal there may be many plots of land such as roadways, waste lands, and even *abadi* sites, not assessed to 'revenue' in the sense that there is no income derived from them which may be taken into account at the time of assessment of revenue on the mahal. But all areas within the mahal are primarily responsible for the revenue of the mahal, and are part and parcel of it. That is equally so

U. P. LAND REVENUE ACT (III OF 1901), S. 4.

in the case of a *khata* which is a sub-division of a mahal. The site of a *parao* (encamping ground) situate in Meerut and included in a particular *khata* of a mahal and bearing a particular khasra number, forms part of the mahal and its partition could only be effected by the Revenue Court. (*Tudball and Kanhaiya Lal, JJ.*) MAHOMED JAHAN BEGAM *v.* GOVIND RAM **43 A. 45: 59 I. C. 4: 18 A. L. J. 783.**

——— **S. 4**—*Ex-proprietary tenant—Relinquishment by—Effect.*

An ex-proprietary tenant of some land in a village sold by him to some different persons becomes tenant of all the co-sharers and his relinquishment of the same in favour of one enures for the benefit of all co sharers and none of them can claim exclusive possession of the same Joint possession is obtained according to the circumstances of each case but the relief of joint possession in favour of the co-sharer obtaining the relinquishment cannot be refused even if he be not in the possession of the land. (*Chamier, J.*) MUHAMMAD IBRAHIM *v.* RAMAKRISHNA RAI. **61 I. C. 487: 10 A. L. J. 95.**

——— **S. 32** (d)—*Land held revenue free—If part of mahal.*

Lands held revenue free may form part of a mahal. (*Ryves and Piggott, JJ.*) ABDUL RAHIM KHAN *v* AHMAD KHAN. **36 All. 231: 25 I. C. 162: 12 A. L. J 305.**

——— **S. 34, Sub-S. (5)**—*Succession report—Necessity for—Patwari's report is not substitute for succession report.*

The language of S. 34 Sub S. 5 of the U. P. Land Revenue Act is perfectly general and it is impossible to regard that section as being applicable only to cases under the Land Revenue Act. A report made by the patwari is not a substitute for the report which the Act itself requires to be made by the proprietor. A report by the proprietor is a pre-requisite to the institution of a suit for profits by a person other than the recorded proprietor. Until the report required by the section has been made the court is debarred from entertaining the suit. (*Daniels, A. J. C.*) MT. RUQAIYA BEGAM *v.* IMDAD ALI. **9 O. L. J. 590: 9 O. & A. L. R. 81: 1923 Oudh 117.**

——— **S. 34**—*Mutation of names—Possession.*

In mutation cases the question of possession does not arise unless there is evidence of succession. (*Tweedy, J.*) SHIAM BIHARI *v.* BHAGWATI SINGH. **25 I. C. 758: 1 O. L. J. 440.**

——— **S. 36**—*Mortgage of sir—Stipulation to pay interest of possession not given to mortgagee.*

Where a proprietor usufructuarily mortgages his sir land and also stipulates that, if he does not give possession of the land to the mortgagee he would re-pay the mortgage money with interest at a fixed rate and does not give possession he cannot redeem the mortgage without paying interest. (*Ryves, J.*) JANKI RAM *v.* MISRI LAL. **1923 All. 377.**

——— **S. 36**—*No assessment of rent on ex-proprietary tenant.*

U. P. LAND REVENUE ACT (III OF 1901), S. 40.

Co-sharers and the lambardars equally share the responsibility by virtue of S. 46 of the Land Revenue Act in a case where rent had not been assessed on an expropretary tenant (*Lindsay and Kanhaiya Lal, JJ.*) KUBI BEHARI LAL *v.* ABDUL HADI. **L. R. 3 A. 260 (Rev): 4 U. P. L. R. (B. R.) 200.**

——— **S. 36**—*Suit for rent—Defendant accepting agreed rent—Order passed fixing rent—Effect of.*

The deft. mortgaged his zemindari to the plff. and took lease of the lands for cultivation at a certain rent. In a suit for a recovery of rent the deft expressed his willingness to pay the said rent; the Court, however, passed an order fixing the rent under S. 36. There was no appeal against this order. *Held*, that the tenant could not challenge the correctness of the order in a subsequent suit for rent, except on the ground of jurisdiction or fraud. (*Tudball and Kanhaiya Lal, JJ.*) HAR PRASAD *v.* KHAZAN. **2 U. P. L. R. All 281: 57 I. C. 441: 18 A. L. J. 684.**

——— **S. 36**—*Usufructuary mortgage—Lease to mortgagor—Sale of equity of redemption—Liability to rent.*

Where under a usufructuary mortgage of a zemindari the mortgagor gives a lease of the landlord to the mortgagor on a certain rent, files a suit for arrears of rent and gets the equity of redemption sold to a stranger in execution of the decree in the suit, but subsequently files a suit for further arrears of rent from the date of sale it is open to the mortgagor lessee to contend that since the usufructuary mortgage is not subsisting, the lease also is at an end but if he fails to do so he will be liable for rent even from the date of the Court sale. (*Tudball and Abdul Raoof, JJ.*) MITHAN LAL *v.* CHHAJJU SINGH. **40 All. 429 : 45 I. C. 529: 16 A. L. J. 384.**

——— **S. 36, Sub-S. (2)**—*Scope of—Agra Tenancy Act, S. 41 (b).*

S. 36, Sub- S. (2) should be read with S. 41 (b) of the Agra Tenancy Act which says such enhancement or otherwise can take place at any time by registered agreement or by order of a Revenue Court. 10 I. C. 465. Foll.; 36 All. 155 Dist. (*Walsh, J.*) BHAIRON PRASAD *v.* SOMARPURI. **34 I. C. 441.**

——— **S. 40**—*Mutation of names—Civil Court can question.*

Under S. 40 of the Act a question of title can be contested in a civil suit although the Revenue Court has ordered the entry of a particular name in regard to the property. (*Banerji and Gokul Prasad, JJ.*) DALIP SINGH *v.* MANKUAR. **43 All. 389: 61 I. C 156 : 19 A. L. J. 156.**

——— **S. 40**—*Right to possession—Enquiry into.*

The questions of title to possession and of an absolute title are quite different and the fact that the decision as to possession is based merely on a summary enquiry as to the perso best entitled to the property cannot be used as an argument that the Court is not competent to decide the

U. P. LAND REVENUE ACT (III OF 1901), S. 41.

question of title to possession when the section requires a Court to put the person into possession. (*Ashworth, J. C.*) SURENDRA BIKRAM SINGH *v.* EMPEROR. 24 Cr. L. J. 537 : 1922 Oudh 300.

——— Ss. 41 and 233—*Partition—Demarcation—Arbitration—Award—Civil Court.*

A Civil Court can accept the award passed on a reference to arbitration by the parties in a dispute as to demarcation by boundaries under S.41. Once a partition is over, the parties may make such modifications as they wish regarding the shares allotted to them. (*Stuart, J. C.*) JHURI SINGH *v.* DWARKA SINGH. 50 I. C. 193 : 6 O. L. J. 84

——— S. 56—*Customary payment by occupancy tenants not recorded—Suit to recover.*

Where according to a custom in a *wajib ul-arz* of a village, the occupancy tenants had to make a payment to the Zemindar besides the rent of a head load of *Bhusa* and a bundle of fodder every year, and in a suit by Zemindar to recover money value of such payments, it was found that no record was made of those payments by the Recording Officer at the last settlement, *held*, that these payments were a cess within S. 56 and hence not recoverable. (*Ryves and Gokul Prasad, JJ.*) CHAND BEHARI *v.* NANNUA. 63 I. C. 222.

——— Ss. 56 and 86—*Applicability—Permanently settled village with no record of rights.*

The sections do not apply to permanently settled village, for which no record of rights or settlement records have been prepared. "*Gaon Kharch*", though recorded in *Patwari's* papers against each field along with rent and paid by residents for over 40 years, is no part of the contract of rent and so is not recoverable as rent in the Revenue Court. (*Tudball and Rafique, JJ*) RADHO MODAO LALJI *v* RAM SEWAK. 43 All. 422 : 62 I. C. 739 : 19 A. L. J. 238.

——— Ss. 56 and 86—*Rasum Zemindari.*

Where the defts. had agreed to pay rent both in cash and in kind, for the zemindari property let to them by usufructuary mortgage and the words used in the *Kabuliat* were. '*Rasum Zemindari*' *Held*, on the construction of the *Kabuliyat*, in a suit for rent that the defts. were held to have agreed to deliver the produce part of the rent. 35 All. 19. Dist (*Richards, C. J., Knox and Tudball, JJ.*) RANGI LAL *v.* JASSA. 38 All. 286 : 35. I. C. 208 : 14 A. L. J. 393 (F. B.).

——— Ss. 56 and 86—*Rasum zemindari.*

A tenant agreed to pay to his Zemindars certain '*Rasum Zamindari*' dues, over and above his usual rent. *Held*, that the contract was against public policy and unenforceable as its intention was to defeat the object of Ss. 56 and 86 of the Act and that the dues were not rent. (*Rafique and Piggott, JJ.*) SISRAM *v* ASGHAR ALI. 35 All. 19 : 16 I. C. 422 (2) : 10 A. L. J. 416.

——— S. 56—*Cess—Test of.*

In order to show that a certain payment is of the nature of a cess and should not be recognised, it must be proved that the nature of payment

U. P. LAND REVENUE ACT (III OF 1901), S. 106.

had not been recognised by the Settlement Officer and falls within the definition of a cess. (*Griffin, J.*) BHOLA *v.* MAHOMED HABIBULL RAHMAN KHAN. 10 I. C. 465.

——— S. 74—*Settlement with new proprietor—Payment of malikana to excluded proprietor—Estoppel.*

Where under successive settlements with the actual cultivators of the land in supersession of the old proprietors the former agreed to pay a *malikhana* of 12 per cent. to the latter, they are estopped from disputing their liability subsequently. (*Walsh and Piggott, JJ.*) NATHU *v.* GHANSHAM SINGH 41 All. 259 : 49 I C. 737 : 17 A. L. J. 177.

——— S. 79—*Under-proprietary holding.*

An under-proprietary holding is not capable of resumption. If rent free, the superior proprietor can get it assessed under S. 79, U. P Land Revenue Act. If it is assessed to rent, which is not paid the superior proprietor can only put it to auction in execution of a decree for arrears. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SHANKAR SAHAI *v.* GAJADHAR PRASAD. 20 O. C 171 : 40 I. C. 200 : 4 O. L J. 409.

——— S. 86—'*Cess*'—*Meaning of—Customary dues payable to the Zemindar.*

The word "cess" is used secondarily to denote demand for contributions in cash or kind to be devoted to the benefit of the village as a whole and when used in that sense the word almost means a rate. Another sense in which the word is used is a demand by the zemindar for provision of certain articles or the doing of certain services for his own personal benefit. When the word is used in this sense it is better to refer to the demand as a demand for dues and in these cases the dues demanded are customary dues A cess levied in accordance with village custom can only be recoverable if recorded by the Settlement Officer and generally or specially sanctioned by the local Government. Mere payment of these dues for 20 or 30 years is insufficient to establish a custom to pay the cesses. (*Stuart, J.*) MAHOMED ASGHAR ALI KHAN *v.* RAMMON. 1923 All 378.

——— S. 106, 111 and 112—*Scope of—Imperfect partition—Proprietary title—Civil Court.*

Ss. 110, 111 and 112 of the Land Revenue Act apply also to imperfect partitions. The rule that a party to a partition proceeding who had an opportunity of pleading a question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief applies also to proceedings taken for imperfect partition. 29 All 604, Foll (*Chamier, J.*) RAGHUBIR *v.* TULSIRAM. 29 I. C. 222 : 13 A. L. J. 548.

——— Ss. 106, 111 and 118—*Jurisdiction—Revenue Courts—Partition of house.*

Revenue Courts making a partition, have no jurisdiction to make the actual division of a house or building or the materials thereof. 22 All. 329, Foll. S. 111 of the U. P. Land Revenue Act deals with an objection which raise a question of title

and says nothing at all about objections taken to the jurisdiction of Revenue Courts. (*Lindsay, J. C.*) IQBAL NARAIN *v* SURAJ NARAIN.
2 O. L. J. 51 : 27 I. C. 543 : 18 O. C. 80.

——S. 107—*Partition—Right of co-sharer—Rights of Hindu daughter—Life-interest under father's will*

Under S. 107 of the U. P. Land Revenue Act a recorded co-sharer is entitled, to apply forpartition, The expression co-sharer has not been defined anywhere by the Act, but reading S. 107 with 32 and S. 111, there can be no doubt that the co-sharer who is entitled to apply for partition, must be a recorded co-sharer of some kind of proprietary interest in the mahal and not a person entitled merely to collect rents or realise a share of the profits on behalf of a proprietor, such as a mortgagee, lessee, or the kadar or an assignee of the rents. A Hindu widow in possession of an estate which has devolved on her by inheritance from her husband, represents the estate and combines in herself for certain purposes the interests of herself and the reversionary body whom she represents. The interest which a Hindu daughter receives under a devise from her father though limited in character is similarly such as will entitled her to claim a partition, because she represents herself as much as those who are likely to succeed to her on her death. She is not a mere assignee of the profits. She is the proprietor for the time being though of limited interest. She can manage the property in the way she likes and let it out to any person whom she chooses and short of making a transfer, she possesses all proprietary rights including a right to hold the property in severalty or enjoy it jointly with her co-sharers, as may suit her interests. 3 A. 400 : 9 C. 53 : 3 A. L. J. 481 ; 12 A. 51; 31 Bom. 560 : 33 A. 443 Ref (*Lindsay and Kanhaiya Lal, JJ.*) BAHADUR SINGH *v.* MUSSAMMAT MOHINI KOER.
20 A. L. J. 780 : 4 U. P. L R. (A.) 204 . 1922 All. 483.

——S. 107—*Question of proprietary title—Partition—Appeal.*

If in a suit for partition the objectors admit the proprietary title of the applicant but deny the right to demand a partition a question of proprietary title is raised an appeal lies to the District Court from the decision of the Revenue Court. 28 A. 185 Ref. (*Stuart, J.*) MUSTAJAB KHAN *v* THAKUR SRI LAXMI NARAIN. **1922 All. 26.**

——S. 107—*Right to claim partition—Hindu widow—Recorded co-sharer, meaning of.*

A Hindu widow in possession of a share zemindari for property for maintenance is not entitled to partitions under S. 107, as she is not a co-sharer though she might have been recorded as such. (*Ryves and Piggott, JJ.*) NEMAN *v.* JAS KUNWAR. **35 All. 527 : 21 I. C. 449 : 11 A. L. J. 833.**

——Ss. 110, 111 and 112—*Hindu widow in possession of property in lieu of maintenance—Claim for partition.*

A Hindu widow in possession of property in lieu of maintenance is not entitled to claim partition though she is recorded as a co-sharer in respect of that property. An application to join in a pending application for partition, amounts to a fresh application. (*Richards, C. J. and Banerjee, J.*) KAILASHI KUNWAR *v.* BADRI PRASHAD.
35 All. 548 : 21 I. C. 49 : 11 A. L. J. 849.

——Ss. 110 and 111—*Partition proceedings—Civil Court—Jurisdiction.*

Where a partition of a village was applied for, notices of the application were served on the parties under S. 110 and ample opportunity of raising a claim to the land under S. 111 was given but the parties failed to do so, and no reference was made to the Civil Court for having the question of title determined, nor did the partition Court decide any such question. *Held*, the Civil Court cannot entertain a suit for a declaration of ownership of a particular plot of land in the village. (*Lindsay, J.C.*) MUSSAMMAT RATIPALLI *v.* BHAGWANDIN. **7 O. L. J. 279 : 56 I. C. 755 : 2 U. P. L. R. (J. C.) 102.**

——S. 110—*Time for filing objections—Extension of—Revenue Court directing party to get his title declared in Civil Court.*

The date originally fixed for filing objections under S. 110 of the U. P. Land Revenue Act may from time to time be extended either on account of non-service of the notice or at the request of any of the parties. The jurisdiction of the Revenue Court to direct a party to get his title determined by the Civil Court within a certain period is not ousted so long as an objection is filed within such extended period and no order is passed by the partition officer determining the shares of the parties and directing the method in which the partition to be effected. (*Kanhaiya Lal, J.C.*) BHAGWAN BAKSH *v.* SANT PRASAD.
6 O. L. J. 523 : 54 I. C 317 : 22 O. C. 369.

——S. 110—*Partition—"Issue of proclamation"—Objection beyond time.*

Where there is a direction to fix the date as a matter of procedure a Court can after expiration of that date entertain an objection and do justice between the parties if sufficient reason is shown for delay. The date of "Issue" of a proclamation under S. 110 of Act is the day on which it is published in such a manner that the persons likely to be affected thereby can, with the exercise of reasonable prudence, obtain knowledge of its contents. If it assumes the shape of a notice to be served personally on the co-sharer, the date on which personal service is effected is the date of "Issue" of the proclamation. (*Sanders and Greaves, A. J. Cs.*) SHEO RATAN SINGH *v.* ROHAN SINGH. **54 I. C. 258 : 1 U.P.L.R. (O C.) 62.**

——S. 110 (1)—*Date of issue of proclamation is date of service—Objection when to be filed—Drawing of decrees, if necessary.*

Proclamation issued under S. 110 (1) of the Act should be understood to have been served on the date of issue on the co-sharer and he should file the objections within 33 days from the date of service. (*Stuart, J. C.*) MAHESHAR *v.* BRIJ MOHAN. **39 I. C. 719 : 4 O. L. J. 113.**

U. P. LAND REVENUE ACT (III OF 1901), S. 110.

——S. 110 (2) — *Application under — By one co-sharer — Fresh proclamation, whether necessary.*

On an application under S 110 (2) of the Land Revenue Act (III of 1901) by one co-sharer, made within the period prescribed by a prior proclamation, no fresh proclamation to the other co-sharers is necessary. (*Piggott, J.*) SHIB CHARAN *v.* HIRA LAL. 11 I. C. 9.

——S. 111—*Question of title referred to Civil suit—Suit brought three months after order, is barred.*

Where a question of title raised in partition proceedings is referred to a Civil Court, a suit brought for that purpose more than three months after the order of Revenue Court would be barred under S. 111 of the Act. (*Tudball and Lindsay, JJ.*) RAGHUBAR SINGH *v.* LAKHAN. 61 I. C. 885.

——Ss. 111, 112 and 133—*Suit for partition—Objection by unrecorded co sharers — Appeal—Forum.*

In a partition of certain land, trees and wells, the defendants objected on the ground that when their ancestors sold the village, they reserved to themselves and their heirs, the said land, etc. The Assistant Collector decided in favour of the objectors. *Held*, that the defendants not being recorded co-sharers, Ss. 111 and 112 of the U. P. Land Revenue Act had no application to the case and that the appeal, therefore, lay not to the District Judge but to the Collector or Commissioner. (*Rafique, J.*) LABHU *v.* RADHA CHARAN. 45 I. C. 544.

——Ss. 111 and 112—*Decision of Revenue Court*—Res judicata.

Only when an objection is made by a recorded co-sharer involving a question of proprietary title which the Collector determines to decide himself, the decision of the Revenue Court can operate as *res judicata*. (*Richards, C. J., Tudball and Rafique, JJ.*) KALKA PRASAD *v.* MANMOHAN LAL. 38 All. 302 : 33 I C. 86 : 14 A. L. J. 373. (F B.)

——S. 111—*Order of the Collector under, whether appealable.*

No appeal lies against an order of the Collector under Cls. (a) and (b) of S. 111 (1). (*Richards, C. J. and Banerjee, J.*) HAR PRASAD *v.* MUKAND LAL. 38 All. 70 : 31 I. C. 882 : 13 A.L.J. 1107.

——Ss. 111 and 112—*Order of Asst. Collector referring parties to Civil Court—If amounts to decree—Appeal.*

An order of an Asst. Collector referring parties to the Civil Court does not constitute a decree within S. 111 (3) of the Act, and hence no appeal lies therefrom to the District Judge. (*Rafique and Piggott, JJ.*) BABU RAM BUBE *v.* RAMJAS DUBE. 23 I. C. 656.

——Ss. 111 and 114—*Partition proceeding—Objection relating to title—Order upholding objection—Appeal against, where lies.*

An appeal against an order of an Assistant Collector in a partition proceeding upholding an objection relating to a question of title under

U. P. LAND REVENUE ACT (III OF 1901), S. 111.

S. 111, lies to the Collector and not to the District Judge, the question being one appertaining to the preparation of a partition proceeding. A mere claim to hold certain lands in a mahal in severalty is not such an objection as raises a question of title as may be dealt with under S. 111. (*Ryves and Piggott, JJ.*) NAND RAM *v.* BRAHM KHAYAL. 22 I. C. 949.

——S. 111—*Direction of Revenue Court to file civil suit—Suit filed but subsequently withdrawn—Second suit, if maintainable.*

Where a Revenue Court directed a person to file a civil suit within three months which was withdrawn with leave for some technical reason and then a fresh suit was instituted, the second suit was practically a continuation of the first and as such not barred by time-limit. (*Richards, C. J. and Banerjee, J.*) RAUDHIR SINGH *v.* BHAGWAN DAS. 35 All. 541 : 21 I. C. 654 : 11 A L. J. 746.

——S. 111—*Suit for declaration of possession—Jurisdiction of Civil Court.*

A suit for a declaration that the plff. is in possession of a property which is the subject-matter of a partition, does not come under the provisions of S. 111 of the Act (*Griffin and Ryves, JJ.*) RAM CHARAN *v.* HUB BAHADUR SINGH. 19 I. C. 397 : 11 A. L. J. 429.

——Ss. 111 and 112—*Recorded co-sharer—Proprietary question—Objection—Appeal.*

Where in partition proceedings a question of proprietary title is raised by a recorded co-sharer and his objection is disallowed, an appeal lies to the District Judge. (*Griffin, J.*) JADUNANDAN LAL *v.* DAULAT RAI. 18 I. C. 640 : 11 A.L.J. 96.

——S 111—*Decision on question of title—appeal.*

When an objection touching to the proprietary title of a person declared by a Civil Court long before the partition proceedings are instituted in a Revenue Court, and acquired by adverse possession, is determined by an Assistant Collector, an appeal therefrom lies to the District Judge because the objection raised the titled question. (*Banerjee, J.*) BABU RAM DUBE *v.* RANEJAS DUBE. 16 I.C. 396.

——Ss. 111 and 233 (k)—*Partition—Proprietary title*—Res judicata—*Person not recorded as co-sharer.*

Out of the three heirs of a deceased Mahomedan only one was recorded in the revenue papers as heir subsequently in a partition proceeding, in which B raised certain objections as to proprietary title which were overruled by the partition officer. *Held*, that in a subsequent civil suit, C and D, whose names had not been recorded, were also prohibited from raising any question as to the proprietary title. 28 All 432, Dist. (*Chamier, J.*) TARIFAN *v.* FATEH DIN. 15 I. C. 685.

——Ss. 111 and 112—*Partition—Proprietary title*—Res judicata—*Jurisdiction.*

A party to a civil suit cannot raise a question of proprietary title which he ought to and might have raised in partition proceedings under the

U. P. LAND REVENUE ACT (III OF 1901), S. 111.

Land Revenue Act. (*Richards, C. J and Banerji, J.*) MAHADEO RAI *v.* RAGHU NAIK RAI.
15 I. C. 817.

——— S. 111—*Mutation proceedings—Revenue Court, if competent to determine proprietary title.*

An order of a Revenue Court in mutation proceedings is not an order of a Court of competent jurisdiction determining a question of proprietary title within the meaning of S. 111. (*Piggott, J.*) SHIB CHARAN *v.* HIRA LAL. **11 I. C. 9**

———S. 111—*Partition proceedings—Party in, cannot agitate in Civil Court except with permission of the Revenue Court.*

A party to a partition suit may not while the partition suit is pending, bring a suit against another party in the civil Court to clear his title otherwise than under the direction of the Court hearing the partition suit. The basis of this proposition is that the partition suit is given jurisdiction in respect of title and this impliedly makes the question of title an essential part of the partition proceeding so that a Civil Court is debarred from entertaining questions of title except in a suit instituted by direction of the partition Court It does not follow from this that a party not directed to bring a title suit cannot j in a party directed to do so in bringing of one. A direction by a Revenue Court in the process of a partition suit under S. 111 (*b*) to one party to bring a title suit in a Civil Court implies the right of joinder in the suit of any person as plaintiff in whom a joint right of relief exists. The direction to bring a suit to any person must mean that he is to bring it according to, and is permitted by, the law of procedure, O. 1, R. 1, Code of Civil Procedure allows such joinder. (*Ashworth, A. J. C.*) MT. KUSAM DEI *v.* HAR DUTT.
26 O. C. 98 : 1924 Oudh 129.

———Ss. 111 and 233 (k) —*Partition—Question of title—Jurisdiction of Civil Court.*

Civil Courts have only a limited jurisdiction in regard to questions of proprietary title raised in partition proceedings. Where such questions are raised the competence of the Civil Court depends upon the choice exercised by the Revenue Court in acting under Cls. (*a*), (*b*) or (*c*) of S. 111. If, and only if it acts under Cl. (*a*) or (*b*), and an order to that effect is made then the Civil Court can try the question of title If it acts under Cl. (*c*) the Civil Court's jurisdiction is wholly ousted. The fact that the Revenue Court violates the law would not invest the Civil Court with jurisdiction to try the question of title. (*Lindsay, J. C*) RAM LAKHAN SINGH *v.* RAMPAL SINGH.
63 I. C 272 : 24 O. C. 143.

———S. 111—*Refusal of partition by Revenue Court—No order under S. 111—Suit not filed within six years in Civil Court.*

Where the Revenue Court without making an order under S. 111 declined to make a partition unless the rights of the parties were settled by a Civil Court the order did not deprive the co-sharers of their right to have their shares divided off at any time. (*Daniels, A. J. C.*) SAKHAWAT ALI *v.* ABU SAID. **52 I. C. 73 : 22 O. C. 100.**

U. P. LAND REVENUE ACT (III OF 1901), S. 111.

——— S. 111—*Partition—Question of title—Jurisdiction of Civil Courts.*

A Civil Court has no jurisdiction to determine a question of title with regard to a property under partition before a Revenue Court, unless the latter Court refers the question for decision by an order under S 111. (*Lindsay, J, C. and Daniels, A. J. C.*) CHAUBAR SINGH *v.* BAKHATWAR SINGH. **47 I. C. 897 : 5 O. L J. 486.**

——— S. 111—*Partition proceedings—Revenue Court—Question of title—Civil Court—Jurisdiction.*

In a partition case filed in a Revenue Court, before any notices were issued to the recorded co-sharers or objections filed by them the applicants themselves asked the Court to postpone the case pending decision of the question of title by a Civil Court. The Revenue Court granted the required postponement and the applicants instituted the proposed suit in the Civil Court, *Held*, that the Civil Court had jurisdiction to entertain the suit. (*Lindsay, J. C.*) DEOKI NANDAN *v.* KALI SHANKAR. **45 I. C. 873 : 5 O. L. J. 116.**

——— S. 111—*Revenue Court, order by, to file suit in Civil Court within a fixed time—Civil Courts, jurisdiction of.*

Where an Assistant Collector under S. 111 ordered plff. to file a suit in Civil Court within three months to establish their right, the suit must be filed in Civil Court within three months from the order of the Assistant Collector. (*Lindsay, J. C.*) DHANESH PRASAD *v.* GAYA PRASAD.
33 I. C. 365 : 18 O. C. 343.

———S. 111—*Revenue Court—Jurisdiction to decide title—Decision whether bar in a civil suit —Mere irregularity in procedure by Revenue Court—Effect.*

A Revenue Court is competent under S. 111 of the Act to decide a question of title in partition proceedings and when such decision is given it operates as a bar to the re-opening the same matter in Civil Courts and a mere irregularity in the procedure of the Revenue Court does not affect its validity. (*Kanhaiya Lal, A. J. C.*) KALI PERSHAD *v.* TUAKUR DEI. **23 I. C. 965 : 1 O. L. J. 81.**

——— Ss. 111 (1) (b) and 233 (k)—*Suit instituted after time allowed—Whether maintainable.*

The jurisdiction of Civil Court is barred under S. 233 (k) to entertain a suit instituted after the time allowed by S. 111 (1) (b) and no extension can be granted. (*Rafique and Piggo't, JJ.*) TAIMUR ALI SHAH *v.* SHAH MAHOMED KHAN.
41 All. 211 : 17 A. L. J. 83 : 57 I. C. 846 : 2 U. P. L. R. (A) 326.

———S. 111 (1), Cl. (b)—*Civil Court—Suit instituted in Courts not having jurisdiction.*

The words "Civil Court" in S. 111 (1) (b) of the Act mean a Civil Court of competent jurisdiction. A suit instituted in pursuance of an order under S. 111 (1) (*b*) of the Act in a Court having no jurisdiction and presented in the proper Court beyond the time specified in the order cannot be entertained. (*Stuart, A. J. C.*) NURUL HASAN *v.* SARJU PRASAD. **43 I. C. 473 : 4 O. L. J. 553.**

U. P. LAND REVENUE ACT (III OF 1901), S. 111.

——— S. 111 (3)—*Decree—Formal or actual.*

In partition cases before the Revenue Courts no actual or formal decrees are required to be drawn up under S. 111 (3) of the Act. (*Stuart, J. C.*) MAHESHAR *v.* BRIJ MOHAN.

39 I. C. 719 : 4 O. L. J. 113.

——— S. 112—*Jurisdiction—Civil and Revenue Courts—Partition proceedings.*

If a partition in a Revenue Court is objected to, on the ground of an existing private partition, the Revenue Court may allow the parties to have their rights settled in Civil Courts. (*Banerjee and Walsh, JJ.*) RAMANARAYAN *v.* JAGGANNATH PRASAD. **38 All. 115 : 32 I C. 184 : 14 A. L. J. 23.**

——— S. 114—*Objection filed beyond time—Jurisdiction of Revenue Court to entertain.*

Under S. 114 of the Act a Revenue Court is not precluded from dealing with an objection filed beyond the time fixed by it if no action, has been taken until then under the section. (*Kanhaiya Lal, A. J. C.*) KALI PRASAD *v.* THAKUR DEI.

23 I. C. 965 : 1 O. L. J. 81.

——— S. 118—*Partition—House—Jurisdiction of Revenue Court.*

A Revenue Court making a partition under the provisions of Ch. VII of the Land Rev. Act has no jurisdiction to make a division of houses. Consequently plaintiffs who founded their case upon the partition in order to put forward the title which they wish to vindicate are out of Court. (*Lindsay, J.*) GOVIND PERSHAD *v.* KALIAN.

1922 All. 216.

——— S. 118—*Rights of parties to partition where a plot of land with cattle trough and heap manure is allotted to one of them—Cattle trough and heap of manure whether dwelling-house.*

A heap of manure or cattle trough not being a dwelling-house, a co-sharar to whom a plot of land with heap of manure or cattle trough of another co-sharer is allotted is entitled to actual possession thereof. (*Richards, C. J. and Banerjee, J.*) RAM KISHORE MISRA *v.* KALKA DICHHIT.

39 I. C. 575.

——— S. 118—*Partition—Site of house belonging to one given to another co-sharer—Effect of.*

Where the site of the house belonging to one co-sharer was given to another at the time of partition and no steps were taken under the action for the occupier to pay rent and retain possession, the co-sharer to whom the share has been allotted in partition can recover possession of the site by removal of the materials of the house. (*Rafique, J.*) RAMJAN MAL *v.* ZAHARYA SINGH.

28 I. C. 358

——— S. 118—*Co-sharers—Partition—Site of building of one co-sharer allotted to another.*

In a partition proceeding before a Revenue Officer a site of a building occupied by one co-sharer was allotted to another. The co-sharer in possession of the building did not show to the Revenue Authorities that there was a building and did not ask for an order fixing a ground rent under S. 118 *Held*, that the other co-owner was entitled to possession under the partition decree and only an opportunity of removing the building could be given to the former. (*Piggott, J.*) BHURE LAL *v.* JAGANATH.

26 I. C. 933.

U. P. LAND REVENUE ACT (III OF 1901), S. 143.

——— S. 118—*Civil and Revenue Court—If Civil Court is bound to wait for decision of Revenue Court.*

A Civil Court is not bound to await the result of an application to a Revenue Court or to dismiss the suit. (1906) A. W. N. 194, Dist. (*Rafique, J.*) SAGWA *v.* RAM SARAN. **25 I. C. 197.**

——— Ss. 122 to 127—*Ex-proprietary tenancy.*

Ss. 122 to 127 describe fully how ex-proprietary tenancy is created, except some references made in S. 127 to Agra Tenancy Act and Oudh Rent Act. (*Piggott, J.*) SARANAM SINGH *v.* BISRAM SINGH. **16 I. C. 81 : 9 A. L. J. 701.**

——— S. 126—*Applicability of—Hindu joint family—Partition of* sir *and* khudkasht.

Where in a partition of the *sir* and *khudkasht* lands of joint family, each member agrees to take his share unencumbered by any *ex-proprietary* ights on the part of others, no ex-proprietary tenancy arises. The case does not fall under Sec. 126. (*Griffin and Chamier, JJ.*) SARNAM SINGH *v.* BISRAM SINCH. **18 I. C. 723.**

——— Ss. 133 and 212—*Partition case—Orders passed on disputes after confirmation of partition—Second Appeal.*

Orders passed in respect of disputes arising between the parties to a partition case after the partition has been confirmed, are subject to second appeal. (*Holms and Campbell, JJ.*) KANDHAIYA LAL *v.* NARAIN DAS.

33 I. C. 262 : 2 O. L. J. 742.

——— S. 138, Sub. Ss. (3) and (4)—*Scope of—Responsibility for rent payable to Talukdar.*

In S. 138, Sub Ss. (3) and (4) provision is made for the limitation of the joint responsibility of the co-sharers in any newly constituted mahal to the rent due in respect of that mahal only. It is also provided that all objections to distribution of the lands of a mahal into new mahals at the time of partition shall be decided by the Collector. There can be no doubt that the responsibility of the co-sharers mentioned in these provisions would support the contention. S. 138 merely refers to the responsibility for revenue to Government *inter se* of the owners of talukdari mahal which was partitioned and does not refer to the responsibility *inter se* of the lessees for rent to the Talukdar in the various lessee mahals. (*Ashworth, J. C.*) JUGNU KHAN *v.* RUDRA PARTAB SINGH. **26 O. C. 118 : 1923 Oudh 216.**

——— S. 138, Chap. VII—*Joinder of parties—Splitting up of liabilities.*

In a partition suit between lessees of Mahal the rent of which is fixed by Settlement Officer, the superior proprietor need not be joined. The Chap. VII nowhere states that Revenue Court can split up joint and several liabilities of lessees without superior proprietor's consent. (*Lindsay, J. C.*) RUDRA PARTAB SINGH *v.* SIKANDARKHAN.

39 I. C. 598 : 20 O C. 104

——— S. 143—*Interest on arrears of revenue if can be recovered by assignee of Government Revenue.*

U. P. LAND REVENUE ACT (III OF 1901), S. 144.

An assignee of Government Revenue cannot recover interest on arrears of revenue. (*Tudball, J.*) NAUBAT SINGH *v.* WAHIDUDDIN.

11 I. C. 44

——S. 144—Lambardar—*Suit for—Recovery of revenue paid.*

Some lands in a village once held revenue free by defts. were assessed to Government Revenue. The plff., the *lambardar* of the village, had to pay the revenue and sued the defts. for its recovery on the ground that they were liable to pay it. *Held*, assuming that the liability for the land revenue of these plots of land lies on the defendants; they were jointly and severally responsible for the revenue of the Mahal and the payment of the revenue assessed upon these plots would be rightly made on behalf of the defendants by the *lambardar*. (*Piggott and Walsh, JJ.*) MURLI DHAR *v.* BABU RAM.

42 All. 311 : 18 A. L. J. 121 : 55 I. C. 74 : 2 U. P. L. R. (All.) 41

——S. 144—Lambardar—*Negligence to collect rents.*

A *lambardar* deliberately neglecting to collect rent of a share and allowing the tenants to cultivate without paying rents is guilty of gross negligence and he must pay the co-sharer his share of profits. (*Stuart, A. J. C.*) BAIJNATH *v.* SHEO GOBINDA.

30 I. C. 203 : 2 O. L. J. 206.

——S. 144—*Profits, suit for*—Lambardar's *rights—Onus of proving collections.*

A *lambardar* can claim collection expenses in addition to his fee under S. 144 of the U. P. Land Revenue Act. A *lambardar*, failing to produce his account books cannot claim a reduction in the gross rental. The onus of proving the actual collection lies on him. (*Kanhaiya Lal, A. J. C.*) UBAID ULLAH KHAN *v.* NAZIR HUSSAIN KHAN.

24 I. C. 15 : 1 O. L. J. 184.

——Ss. 146 and 148—*Proprietor—Revenue sale*—Muafidar.

The word 'proprietor' in Ss. 146 and 148 refers only to those who in the *wajib-ul-arz* are set out as being the person on whom the revenue had been, at the time of settlement, assessed jointly or severally. *Muafidars* are not such persons and their rights is not extinguished by a sale for arrears of revenue of a Mahal. (*Knox and Rafique, JJ.*) KUARSEN *v.* JWALAPRASAD.

35 All. 190 : 19 I. C. 79 : 11 A. L. J. 217.

——Ss. 160, 161 and 162—Taquair *is revenue—Land sold for arrears of revenue—Incumbrance—Benefit to property.*

Taquair is revenue and for arrears of *taquair* land should be sold free of all incumbrances. Where the sale certificate shows that the land was sold under the provisions of Ss. 160 and 161 of the U. P. Land Rev. Act and purchased free of all incumbrances, the Court may presume that the proceedings were lawfully taken and that the *taquair* had been granted for the benefit of the property sold. (*Lyle, A. J. C.*) BABU RAM *v.* BABU RAM.

66 I. C. 620 : 8 O. L. J. 343.

U. P. LAND REVENUE ACT (III OF 1901), S. 233.

——S. 167—*Mortgage of Nankar—Revenue sale.*

A mortgage created by Nankar holders does not become extinct by the subsequent sale of the nankar property for arrears of revenue and can be enforced against the purchasers at the revenue sale. (*Knox and Rafique, JJ.*) KUNWAR SEN *v.* JWALA PRASAD.

35 All. 190 : 19 I. C. 79 : 11 A. L. J. 217.

——S. 188—*Partition—Land occupied by house.*

Where the site of the house of one co sharer has been allotted to another, the presumption under S. 118 of the Act is that the owner of the house is to retain possession of the house; and the mere fact that the ground rent is not assessed cannot deprive the owner of the house, of his right to it. (*Knox, C. J., Banerji and Tudball, JJ.*) SORUP LAL *v.* LALA.

39 All. 707 : 42 I. C. 589 : 15 A. L. J. 757 (F. B.).

——S. 207—*Effect.*

The effect of S. 207 is to bar the institution of a suit to set aside an award acted upon by a Revenue Court. It does not bar a suit based upon title, independently of the decision of the Revenue Court, 14 A. L. J. 95. Foll. (*Piggott and Walsh, JJ.*) SAPU SINGH *v.* HARDEO SINGH.

39 All. 711 : 42 I. C. 681 : 15 A. L. J. 773.

——S. 207 (2)—*Mutation proceedings—Arbitration award, does not bar suit in Civil Court.*

Where an award under an arbitration is made regarding entries made in Revenue Papers, S. 207 (2) of the Act does not bar a suit for possession in a Civil Court. (*Banerji and Gokul Prasad, JJ.*) DHALIP SINGH *v.* MANKUAR.

43 All. 389 : 61 I. C. 156 : 19 A. L. J. 156.

——Ss. 211 and 233 (k)—*Objection in partition proceeding rejected as time-barred—Civil suit barred.*

An objection as to proprietary title was disallowed by the partition officer as made out of time. A civil suit in respect of the same subject-matter is barred under S. 233 (k) of the Act. (*Tudball and Rafique, JJ.*) BHAGWAT PRASAD *v.* LACHMI NARAIN.

19 I. C. 978 : 11 A. L. J. 621.

——S. 233—*Partition suit—Rev. Court deciding question of Proprietary title—Power of Civil Court.*

Where in partition proceedings a question of proprietary title is raised before the Revenue Court and the Revenue Court has refused impliedly to permit its decision by the Civil Court and has proceeded to determine the question itself its decision is final. (*Stuart, J.*) DEOKI DUBE *v.* UMA DAT.

1923 All. 369

——S. 233—*Partition—Mistake.*

Where there has been a mistake in distributing the lands of a mahal between the co-sharers in a partition, the proper remedy for correction is to apply to the Revenue Court. (*Piggott, J.*) DALGIT SINGH *v.* SHAMBU SINGH.

30 I. C. 189 : 13 A. L. J. 779.

U. P. LAND REVENUE ACT (III OF 1901), S. 233.

——S. 233—*Can a partition by Revenue court be re-opened—Jurisdiction of Civil Courts.*

Where in a partition effected by Revenue Courts, it appears subsequently that certain property was under a mortgage though supposed all along of a proprietary right, the loss is to be borne by all the parties equally. A suit for a declaration of a right to re-open a partition on this ground is not maintainable Subsequent titles may be defined by Civil Courts but the partition according to the decree must be made by Revenue Courts which however will not be considered as repartition. (*Kanhaiya Lal and Kendall, A J.Cs.*) SHEO SINGH *v.* LAKHA SINGH. **39 I. C. 392 : 20 O. C. 79.**

——S. 233 (1)—*Declaration suit—Cause for.*

An order of a Revenue Court against the landlord declaring A to be an under-proprietor gives sufficient cause for him to bring a declaration suit in a Civil Court that A has no proprietary rights. Under the section a Civil Court is not competent to decide a question as to the nature of tenancy or the question of estoppel. (*Stuart and Kanhaiya Lal, A. J. Cs.*) HIRDE *v.* MUHAMMAD ABDUL HASAN KHAN. **30 I. C. 207 : 2 O. L. J. 335.**

——S. 233 (k)—*Application for perfect partition—Objection by part proprietors—Completion of partition—Suit after seven years is barred.*

One of the proprietors of a Mahal applied for perfect partition under the U. P. Land Revenue Act and another proprietor objected claiming that he was also part proprietor. The objector was directed by the Revenue authorities to establish his claim in the Civil Court and he brought a suit and obtained a decree declaring his rights. The Revenue Court was not informed of this fact at all and the partition proceedings were completed seven years later he sued for recovery of possession of his share in the Mahal, *Held* that the suit was barred under S. 233 (k) of the Land Revenue Act (*Ryves and Daniels, JJ.*) RAM CHARITRA *v.* MOHAN DEI. **45 A 309 : 21 A. L. J. 159 L.R. 4 A. 82 (Rev.) : 1923 All. 210.**

——S. 233 (k)—*Question of title raised in partition Court—Suit in Civil Court is barred.*

Pending partition proceedings in the Revenue Court a party sued another party in the Civil Court involving the same question of title which was the subject-matter of partition. *held*, that the suit was barred under S. 233 (k) of the Act. (*Lindsay and Stuart, JJ.*) RAM SUHBAG SINGH *v.* DIP NARAIN. **64 I. C. 489 : 19 A L. J. 865.**

——S. 233 (k)—*No applicability to partition of land in village Abadi.*

S. 233 (k) does not apply to a suit for partition of a plot of land in village Abadi, the parties to which are not co-sharers in the Mahal. The suit is cognizable by a Civil Court. (*Walsh and Ryves, JJ.*) RAHTU MAL *v.* BALDEO SAHAI. **19 A. L. J. 307: 3 U. P. L. R. (All.) 4 : 62 I. C. 420 : 43 All. 454.**

——S 233 (k)—*Objection to application not entertained—Suit not barred.*

U. P. LAND REVENUE ACT (III OF 1901), S. 233.

A partition suit is not barred by S. 233 (k) when in the partition proceedings one of the co-sharers claimed certain property as his own and sought partition and the other co-sharer was not given any opportunity of raising an objection thereto. (*Walsh and Ryves, JJ.*) SHEIKH HASAN ALI *v.* MOHUBULLAH. **3 U. P. L. R. (All.) 1.**

——S. 233 (k)—*Imperfect partition—Plaintiff party to partition proceedings—Pltff.'s land allotted to deft.—Declaration.*

Where the property in dispute was sold by the predecessor-in-interest of the defendants and was pre-empted by the plaintiff in 1897 who remained in possession ever since and mutation of names was never effected in his favour and the property continued in the name of the vendor and in 1913 the defendants applied for an imperfect partition of their share as recorded in the *khevat* which included the aforesaid property; and the plaintiff also made a similar application in respect of his recorded share which did not include the said property, according to which partition was effected and the property in dispute was allotted to the defendants but after the partition had been confirmed the plaintiff sued in Civil Court for a declaration that the said property which stood in the defendant's name and had been allotted to them at the partition belonged to him. *Held*, that S. 233 (k) barred the suit. (*Tudball and Kanhaiya Lal, JJ.*) BHUPAL SINGH *v.* UJAGAR SINGH. **43 All. 88 : 18 A. L J. 928 : 58 I. C. 122 : 2 U. P. L. R. (A) 306.**

——S. 233 (k)—*Partition—Unrecorded proprietor—Suit to recover property.*

A partition conducted in the absence of a person at a time when he has only recently acquired proprietary rights in the Mahal and has not succeeded in obtaining formal delivery of possession over the property so acquired, does not bind him and not being a recorded co-sharer he would be under no obligation to appear before the partition Court, to protect his own rights. A suit by such a person, therefore, to recover his own property from certain persons to whom it has been assigned by the partition officer, is not contrary to S. 233 (k). (*Piggott and Kanhaiya Lal JJ.*) ZAHURUL HAQ *v.* NABI BAKSH **57 I. C. 478 : 2 U. P. L. R (All.) 221.**

——S. 233 (k)—*Partition—Revenue Court—Jurisdiction—Civil Court.*

After a partition has been effected the question whether or not an actual distribution of lands between the co-sharers necessitated by the formation of a new mahal, is one to be decided exclusively by the Court conducting the partition and Civil Court cannot disturb the distribution of land within the limits of the mahal effected at the time of partition nor can it impeach the jurisdiction of the Revenue Courts when conducting the partition. (*Piggott and Walsh, JJ.*) FAYAZ ALI *v.* MUSHARRAF ALI. **57 I. C. 72 : 2 U. P. L. R. (All.) 161.**

——S. 233 (k)—*Scope of—Declaration of possession.*

S. 233 (k) does not bar a suit for declaration that the pltff. is entitled exclusively to the

mahal formed on partition between him and deft. (*Knox and Banerjee, JJ.*) LAL BEHARI *v.* PARKALI KOER. **42 All. 309 : 18 A. L. J. 110 : 55 I. C. 22 : 2 U. P. L. R. (All.) 50.**

——— S. 233 (k)—*Suit to set aside order of Revenue Court—Fraud.*

An action can be brought in the Civil Court to provide a remedy where a person's rights have been infringed by some fraudulent act of the deft. even though the fraud was practised on the Revenue Court and would affect the result of partition proceedings in the Revenue Court. 25 All. 19; 23 All. 291 ; 49 I. C. 306, Foll. (*Walsh and Stuart, A J. Cs.*) JHUMAK RAI *v.* BINDESHRI RAI. **41 All. 626: 17 A. L. J 797: 51 I. C. 125: 1 U. P. L. R. (H.C.) 62.**

——— Ss. 233 (k), 107 and 110—*Partition—Jurisdiction of Civil Court—Partition and Union of mahals, meaning of.*

Where the RevenueCourt drew up proceedings under S. 114 putting down plff.'s share as that given in the application by plff. and deft. a suit by plff. more than a year after this for recovery of possession of the share allotted to defts. was barred under S. 233 (k). 38 All. 243, Dist. Per *Banerji, J.*—In determining whether S. 233 (k) applies the Court must look to the substance of the claim and not to the form in which it is dressed up. Per *Richards, C. J.*—The word "petition" and the wo ds "union of mahals" in S. 233 (k) refer to "units" of area which the Revenue Authorities create in the course of partition proceedings. (*Richards, C. J., Banerjee and Tudball, JJ.*) BIJAI MISIR *v.* KALI PRASAD. **39 All. 469: 41 I. C. 912 : 15 A. L. J. 496 (F.B.).**

——— S. 233 (k)—*Plea of bar—Where applicable*

Plea of bar for a suit for possession can be raised only against a party to the partition proceedings. (*Knox, J.*) LAKHPAT THAKURAI *v.* GURSARAN THAKURAI. **36 I. C. 273.**

——— S. 233 (k)—*Partition.*

A person entitled to more than one share in a mahal is not bound to include all that he is entitled to in his application for partition. *Obiter*:—The Revenue Authorities might u der circumstances refuse to make partition unless the applicant was prepared to have partition of all he is entitled to. (*Richards, C. J., Tudball and Rafique, JJ.*) KALKA PRASAD *v.* MANMOHAN LAL. **38 All. 302: 33 I. C. 86 : 14 A. L J. 373 (F. B.).**

——— S. 233 (k)—*Imperfect partition—Suit in Civil Court—Whether* res judicata.

Where on an application for imperfect partition an erroneous inclusion is made, a suit for declaration of title and for possession by the lawful owner is not barred by S. 233 (k) (*Richards, C.J., Tudball and Rafique, JJ.*) SHAMBU SINGH *v.* DALGIT SINGH. **38 All. 243: 33 I. C. 19 : 14 A. L. J. 293.**

——— S. 233 (k)—*Partition—Subsequent suit claiming a share.*

A suit by plff claiming to have become entitled by inheritance as reversionary heirs to a share dealt with in a particular way at a partition, is not barred by the section. (*Chamier and Piggott, JJ.*) MANORATH CHOUBE *v.* SUMERA. **28 I. C. 454.**

——— Ss. 233 (k), 110 and 111—*Suit for declaration by tenant of his record rights.*

S. 233 (k) applies only to persons who were parties to the partition proceedings or who should have been made parties thereto and whose claims could have been heard under Ss. 111 and 112. Plaintiffs were recorded as tenants of some plots in a village which was the subject of partition and they were not made parties to the partition proceedings. Their plots were allotted to one co-sharer and in a suit in ejectment plaintiffs set up their right and were referred to Civil Courts. *Held*, in a suit for declaration that S. 233 (k) did not bar the suits. 28 All. 432; 4 A L. J. 662, Ref. (*Sunderlal, J.*) SHAMBHU *v.* CHETRAM. **26 I. C. 119: 12 A. L. J. 1017.**

——— S. 233 (k)—*Partition of separate Mahals.*

The Revenue Courts are given exclusive jurisdiction to partition a Mahal. A separate proceeding for partition has to be instituted for each Mahal and it is not necessary to bring all the Mahals in which a party is a co-sharer, into Court for partition (*Sunder Lal, J.*) DHARAM SINGH *v.* RAMDIAL SINGH FULLAR. **25 I. C. 177: 12 A. L. J. 1126.**

——— S. 233 (k)—*Partition—Forum.*

Where after an application by a co-sharer to a Revenue Court for partition, the plff. co sharer instituted a suit for joint possession in a Civil Court. *Held*, that the suit is barred by S. 233 (k) of the Act. (*Piggott, J.*) GANESH TEWARI *v.* SALIK PANDE. **25 I. C. 32: 12 A. L. J. 949.**

——— S. 233 (k)—*Partition proceedings—Agra Tenancy Act (II of 1901), S. 199 (1) (a)—Question of title—Decision* res judicata.

S. 233 (k) does not prohibit a Revenue Court from acting under S. 199 (1) (a) of the Agra Tenancy Act if the result of the suit might even indirectly affect the share of a co-sharer on partition. (*Ryves, J.*) RESAL *v.* MAHA RAM. **21 I. C. 229 : 11 A. L. J. 686.**

——— S. 233 (k)—*Declaration, suit for.*

A suit for a declaration that the plff. is in possession of property, which is subject-ma ter of partition, is barred by S. 233 (k) of the Act. (*Griffin and Ryves, JJ.*) RAM CHARAN *v.* HUB BAHADUR SINGH. **19 I. C. 397 : 11 A. L J. 429.**

——— Ss. 233 (k), 110 and 112—*Suit against* Benamidar.

Though a real owner did not take objection to the title of a *benamidar*, in the perfect partition of a Mahal in which he was also a co-sharer, he did not lose his right of suit for declaration of his title under S. 233 (k) of the Act. (*Banerjee, J.*) BHAIA SHEORAJ SINGH *v.* SAMPAT SINGH. **15 I. C. 339.**

U. P. LAND REVENUE ACT (III OF 1901), S. 233.

——S 233 (k)—*Application.*

If the mortgagees of certain property apply to Revenue Court for a partition of the property and the mortgagor does not object to the application, the right of redemption is not affected by such partition, even under S. 233 (k). (*Richards, C. J. and Banerji, J.*) BALBHADAR RAI *v.* BIRJ RAJ RAI. **10 I. C. 630.**

——S. 233 (k)—*Partition—Mistake of Amin in preparing map—Civil or Revenue Court—Jurisdiction.*

The Amin in preparing the map in a partition proceeding by mistake coloured a plot which belonged to the plaintiff with the colour of the defendants plot: *Held*, that the ratification of the mistake was entirely within the jurisdiction of the Revenue Court as S. 233 (k) barred any suit or proceeding regarding it in a Civil Court. A. W. N. (1900) 11, Dist. (*Knox and Banerji, JJ.*) TIRBENI SAHAI *v.* GOKAL PRASAD. **33 All. 440 : 9 I. C. 475: 8 A. L. J. 244.**

——S. 233 (k)—*Partition of* abadi *land—Civil Courts, jurisdiction of—Mahal, suits for partition of part of.*

Held, that the jurisdiction of a Civil Court is barred under the provisions of S. 233 (*k*) of the United Provinces Land Revenue Act as regards the division of *abadi* land on which no revenue is assessed. *Held* further, that the word *mahal* in S. 233 (*k*) of the United Provinces Land Revenue Act also includes part of a *mahal* and that prohibition of the institution of a suit in the Civil Court contained in that section applies to a suit for the partition of a part of the *mahal* also. *Held* also, that where the site has passed out of the possession of the *zemindar* of the *mahal* and is therefore not a *mahal* the partition of the building site would fall within the jurisdiction of the Civil Court. (*Dalal and Wazir Hasan, A. J. Cs.*) SHIAM KUNWAR *v.* FATEH SINGH. **64 I. C. 295 : 24 O. C. 268**

——S. 233 (k)—*Mortgage by conditional sale—Redemption—Partition proceedings.*

In a suit for redemption of a mortgage by conditional sale, the defendant pleaded that by reason of a partition which took place in the village in which the mortgaged property was situated they had acquired a title as owners and therefore were not liable to redemption. *Held*, that S. 233 (k) does not bar a suit in cases where the plff. had no opportunity of raising an objection on a question of proprietary title in Revenue Court in which the partition was effected. (*Lindsay, J. C.*) MAHBUL ALI *v.* MOHAMMAD HUSSAIN. **23 O. C. 125 : 57 I. C. 497: 7 O. L. J. 319.**

——S. 233 (k)—*Partition—Subsequent suit for possession.*

If the plffs. were parties to a partition proceeding and were properly represented, S 233 (k) of the Land Revenue Act bars a subsequent suit for possession of the same land. (*Daniels, A. J. C.*) ZAIBUNNISSA *v.* HASARATUNNISSA. **1 U. P. L. R. (J.C.) 1 : 52 I. C. 162: 22 O. C. 124.**

U. P. LAND REVENUE ACT (III OF 1901), S. 233.

——S. 233 (k)—*Partition proceedings—C. P. Code, O. 32—Applicability of—Representation of minor.*

Where in imperfect partition proceedings under the U. P. Land Revenue Act a minor is represented by a guardian and no question of title is raised on his behalf, it is not open to him to challenge those proceedings subsequently by suit. The provisions of O. 32, C. P. C. do not apply to partition proceedings under the U. P. Land Revenue Act. (*Kanhaiya Lal, A. J. C.*) PATESHWAR *v.* AJODHIA. **52 I. C. 123: 1 U. P. L. R. (J. C.) 9.**

——S. 233 (k)—*Partition—Co-sharer claiming exclusive title to several plots—Jurisdiction.*

A co-sharer claimed exclusive title in several plots of land in a village partitioned by the Revenue Court. He was a party to the partition proceeding, but failed to apply to the Court either to exclude those plots from partition or to allot them to his Mahal of another co-sharer. *Held*, that the suit was barred by S. 233 (k). (*Kanhaiya Lal and Daniels, A. J. Cs.*) BADAL SINGH *v.* MAHABIR SINGH. **51 I. C. 554 : 22 O. C. 54.**

——S. 233 (k)—*Suit for partition — Jurisdiction.*

A sharer in a mahal though not a recorded co-sharer can sue for partition in the Civil Court. (*Stuart, J. C.*) GOPAL *v.* RAM HARAKH TIWARI. **50 I. C. 923.**

——S. 233 (k)—*Partition.*

Once a partition is over, parties to a partition may afterwards deal with their shares as they like except obligation to pay revenue and cesses. (*Stuart, J. C.*) JHURI SINGH *v* DWARKA SINGH **50 I. C. 193 : 6 O. L. J 84.**

——S. 233 (k)—*Jurisdiction of Civil Court.*

S. 238 (k) of the Act does not bar a suit by a person who had no *locus standi* to appear in and was no party to partition proceedings 38 All. 302, 28 A. L. J. 432 : Foll. 14 I. C. 685, Dist. (*Kanhaiya Lal, A. J. C.*) BHAGWAN DEI *v.* ARJUN SINGH. **4 O. L. J. 479 : 42 I. C. 8 : 20 O. C. 241.**

——S. 233 (k)—*Jurisdiction of Civil and Revenue Courts—Question of.*

Civil Court cannot enter into a question of title adjudicated upon by a Revenue Court in the course of partition proceedings. (*Stuart, A. J. C.*) SILVANTA SHUKUL *v.* MAHBIR SHUKUL. **41 I. C. 88 : 4 O. L. J. 363.**

——S. 233 (k)—*Jurisdiction of Revenue and Civil Courts in regard to partition of grove land and claim for possession of a Bazaar.*

Civil Court has no jurisdiction to disturb a partition of grove land made by Revenue Courts. But a Civil Court can entertain a claim to possession of a Bazar as distinct from a proprietary right in the land of the Bazar notwithstanding a previous decision in partition proceedings. Re-

U. P. LAND REVENUE ACT (III OF 1901), S. 233

venue Court's power of partition being restricted to land cannot be stretched to apply to incomes arising out of it such as income from market and fair. (*Daniels, A. J. C.*) NAIPAT *v.* GUR PRASAD
39 I. C. 400 : 20 O. C. 92

——— Ss. 233 (k), 107 and 111—*Entry in partition papers regarding certain lands subject to mortgage whether bars a suit for declaration that the property is not so subject — Jurisdiction of Civil Court.*

Civil Courts are not barred from entertaining a suit for declaration that certain lands are not subject to mortgage even if there is an entry made in Revenue Records in partition proceedings to that effect. A mortgagee for fiscal purposes of Revenue Law may be regarded as proprietor but the question of mortgagee-rights is not a question of proprietary title. (*Lindsay, J. C.*) BALVANT SINGH *v.* SARDAR SINGH. 39 I. C. 613 : 20 O. C. 115.

——— S. 233 (k) — *Partition proceedings — Wrongful allotment of lands—Suit for possession —Jurisdiction.*

Under S. 233 (k) of the Act a suit for possession of lands wrongfully allotted to defts. in a partition by the Revenue Court does not lie in a Civil Court. When an objection was raised in a partition proceeding, the Revenue Court referred the objector to Civil Court for relief, it cannot be said that partition was made subject to decision of Civil Court. 1 I. C. 166 (P. C.) Dist. (*Lindsay, J. C.*) SANWAL SINGH *v.* BHIKHARI.
23 I. C. 860 : 1 O. L. J. 38.

——— S. 233 (k)—*Jurisdiction—Civil and Revenue Court—Partition.*

A suit for a declaration that certain lands held in severalty by the plff. had been wrongly included in the shares allotted by the Revenue Courts is barred by reason of S. 233 (k) of the Act. All objections to the mode of partition by the Revenue Courts are exclusively cognisable by those Courts 10 O. C 363. Expl. (*Piggott, J. C.*) RAGHURAR DAYAL SUKHA *v.* MITHAN KUNWAR.
20 I. C. 145.

——— S. 233 (k)—*Jurisdiction—Civil and Revenue Courts—Partition.*

Civil Courts have no jurisdiction to question the action of the Revenue Courts in matters relating to partition which is entirely and exclusively cognizable by the latter. (*Piggott, J. C.*) BACHCHA SINGH *v.* PIRTHI SINGH. 20 I. C. 56.

——— S. 233 (k)—*Civil and Revenue Courts—Jurisdiction—Suit for possession of* abadi *land partitioned by Revenue Courts.*

Where *abadi* lands had been partitioned by the Revenue Courts and plff was in possession of his share for a long time before he was dispossessed by the defendant, *held*, that S. 233 (k) does not debar a Civil Court from entertaining a suit for possession against the defendant and from enforcing the plff's. title both under the partition proceedings themselves and in virtue of their undisturbed possession for a long time. (*Piggott, J. C.*) DEBI SINGH *v.* BALDEO SINGH. 20 I. C. 46.

U. P. LOCAL RATES ACT (I OF 1914), S. 14.

——— S. 233 (k)—*Suit for possession against alienee from co-sharer.*

A suit by a co-sharer for possession of a portion of land transferred by a co-sharer lies in a Civil Court as the third person cannot be joined in the partition proceedings, and the relief claimed in the suit cannot possibly be detained by a partition proceeding in the Revenue Court. S. 233 (k) is no bar to such suit. (*Lindsay, J. C. and Stuart, A. J. C.*) RAMRATTAN *v.* MUMTAZ AHMAD.
16 I. C. 876 : 15 O. C. 301.

——— S. 233 (k)—*Decision as to title.*

Where a question of proprietary title was raised and declared against the appellant in a partition proceeding, the Civil Court cannot entertain a fresh suit regarding the same question. 23 All. 291, Ref. (*Evans, A.J.C.*) AZIZUNNISSA *v.* RASUL BANDI. 9 I. C. 59.

——— S. 233 (m)—*Claim arising out of recovery of money realisable as revenue.*

A claim arising out of the collection of a sum of money which is under S. 5 of the Agriculturists Loans Act realisable as Revenue, is not cognizable by Civil Court by virtue of S. 233 (*m*). (*Tudball, J.*) NIHAL CHAND *v.* KANHAI.
19 A. L. J. 360 : 62 I. C. 544 : 3 U. P. L. R. (All.) 66.

——— S. 234—*Powers of Revenue Board.*

The Revenue Board can frame rules under S. 234 laying down method of determining rent but it cannot exclude under-proprietor from the operation of S. 79. (*Stuart and Kanhaiya Lal, A. J.Cs.*) SHANKAR SAHAI *v.* GUJADHAR PRASAD.
20 O. C. 171 : 40 I. C. 200 : 4 O. L. J 409.

——— S. 234—*Suit against Municipal contractor for damages by lessee of* Mandi—*Maintainability.*

A suit by the lessee of a *Mandi* against a Municipal contractor for damages caused by unlawfully stacking materials on the land of the *Mandi* is maintainable. To such a suit S. 234 does not apply. (*Tudball, Lindsay and Kanhaiya Lal, JJ.*) MOHAMED GHAZANFAR ULLAH *v.* BABU LAL.
43 All 614 : 19 A. L. J. 521 : 1922 All. 477 (F. B.).

——— Sch. IV, R (d), Serial Nos. 47 and 48—*Continuation of proceedings.*

When proceedings for execution are initiated within time as is required, they can then go on for a considerable time. (*Walsh and Sundar Lal, JJ.*) BIRJ BHUKHAN *v.* MAHADEO PERSHAD.
35 I. C. 205.

U. P. LOCAL RATES ACT (I of 1914),

——— S. 14—"*Contract*"—*Meaning of.*

"Contract" as used in S. 14 of the U. P. Local Rates Act must mean a contract between the landlord and the under-proprietor or permanent

U. P. MUNICIPALITIES ACT (I OF 1900), S. 8.

lessee, in addition to being a contract in its legal sense. (*Wazir Hasan, A. J. C.*) SHEIKH ALI ABBAS *v.* RAJA KUNWAR SHER BAHADUR SINGH. **75 I. C. 267 : 9 O. & A. L. R. 815.**

U. P. MUNICIPALITIES ACT (I OF 1900).

——— **S. 17**—*Powers of Municipal Board.*

The Municipalities Act of 1916 has not altered the powers of Municipal bodies of suing and being sued in the name of Corporation, and hence a Municipal Board can grant sanction for prosecution for an offence committed under Act of 1900. (*Knox, J.*) BACHA LAL *v.* EMPEROR. **40 I. C. 700 : 18 Cr. L. J. 700 : 15 A. L. J. 530.**

——— **Ss. 19, 20 and 25**—*Election—Petition to unseat several successful candidates.*

An unsuccessful candidate can join in a single petition a claim against all the successful candidates praying that all or anyone of them be declared not duly elected. (*Walsh and Stuart, JJ.*) MOHAMMAD ABDUL BAQUI KHAN *v.* SIRAJ-UL-HASAN. **41 All. 696 : 52 I. C. 67 : 17 A. L. J. 844.**

——— **S. 49**—*Necessity of notice.*

A deft. acting under S. 49 is entitled to a notice before a suit for damages for malicious prosecution. 26 All. 220, Dist. (*Stanley and Banerji, JJ.*) JUGUL KISHORE *v.* JUGAL KISHORE. **33 All. 540 : 10 I. C. 1 : 8 A. L. J 509.**

——— **Ss. 87 and 152**—*Permission for repair refused—Remedy.*

The remedy against an order of the Municipal Board refusing to give leave to repair is an appeal under S 152 of the Act, and not a suit for perpetual injunction and damages. (*Richards, C. J and Banerjee, J.*) ABDUL SAMAD *v.* MUNICIPAL BOARD, MEERUT. **36 All. 329 : 25 I. C. 207 : 12 A. L. J. 445.**

——— **S. 87**—*Erecting a pump in public street.*

Proceedings under S. 87 against a person erecting a pump in a public road are misconceived. But such a person is liable under S. 147 if his action contravenes any rule made by the Municipality under S. 128. Any member of the public prejudiced by such pump can sue for its removal in a Civil Court as his right of using the public way is obstructed. (*Walsh, J.*) JAGANNATH *v.* EMPEROR. **35 I. C. 526 : 17 Cr L. J. 350.**

——— **S. 87**—*Application—Building overhanging street.*

The section does not apply to that part of the building which overhangs a public street as a building may adjoin a public street but may not overhang. Where a building with additions of *sandas* and *chhajja* is erected on old foundations without sanction from the Municipality a notice given by it to demolish the additions is considered to be under Ss. 87 and 88 of the Act and it is a valid notice and in such cases Civil Courts have no jurisdiction, the remedy of the aggrieved party being that laid down in S. 52 of the Act. (*Rafique, J.*) RAHAS BIHARI LAL *v.* MUNICIPAL BOARD, CAWNPORE. **35 I. C. 222.**

——— **Ss. 87, 88 and 147**—*Disobedience of notice.*

U. P. MUNICIPALITIES ACT (I OF 1900), S. 91.

Prosecution under S. 87 is not legal when the Board issues notice under S. 88. A person applied to the Municipality for permission to build and as no notice was taken of the application, sent a written remainder and after 15 days of its receipt by the Board began to construct the building complained of. *Held*, the Board should be deemed to have sanctioned the construction and there can be no prosecution under S. 87. (*Banerji, J.*) RAMNATH *v.* MUNICIPAL BOARD OF MUTTRA. **26 I. C. 670 : 16 Cr. L. J. 78 : 12 A. L. J. 740.**

——— **S. 87**—*Re-erection without sanction—Whether an offence.*

Where an accused without obtaining any sanction had dismantled an old balcony and had erected in its place a covered balcony, *held* that such an act certainly amounted to an alteration of a building but it was not a material alteration or enlargement of a building and so the penal sections would be inapplicable in such a case. (*Knox, J.*) SHIMLA *v.* EMPEROR. **14 I. C. 602 : 13 Cr. L. J. 250 : 9 A. L. J. 664.**

——— **S. 87**—*Refusal of permission to erect building—Grounds for—Height of proposed structure.*

S. 87 of the U. P. Municipalities Act wants a Municipal Board simply to assign a cause for refusing permission to erect a building. A Municipal Board can refuse to sanction the erection or re-erection of a building on the ground that it will be of such a height as will render it an unsuitable building in the locality. (*Stuart, A. J. C.*) GANESH PERSHAD *v.* MUNICIPAL BOARD OF LUCKNOW. **49 I. C. 463 : 6 O. L. J. 33.**

——— **Ss. 87 (1) (a) and 168**—*'Erect or re erect—Grain pit, digging of.*

The digging of a grain pit does not amount to an 'erection' or 're-erection' within S. 87 (1) (a) of the Act. (*Ryves, J.*) HAR SARAN DAS *v.* EMPEROR. **20 I. C. 611 : 14 Cr. L. J 451 : 11 A. L. J. 688.**

——— **S. 88**—*Removal of balcony— Notice—Scope of.*

The Board can, under S. 88 of the Act require the removal of a balcony overhanging a public road, and it is not necessary that reasons for the notice should be given, or compensation tendered to the person who would be damaged by the removal (*Tudball, J.*) NAUNA MAL *v.* MUNICIPAL BOARD OF HATHRAS. **35 All. 375 : 20 I. C. 405 : 14 Cr. L. J. 421 : 11 A. L. J. 486.**

——— **S. 88**—*Daily fine—Legality.*

A daily fine cannot be imposed for an offence under S. 88. (*Banerjee, J.*) RAMNATH *v.* MUNICIPAL BOARD OF MUTTRA. **26 I.C. 670 : 16 Cr. L. J. 78 : 12 A. L. J. 740.**

——— **S. 91**—*Powers of Municipal Board to close drain.*

Although a person has obtained a decree declaring his right to pass water along a drain through his neighbours' house, the Municipal Board is entitled to close the drain if it is injurious to public health. (*Chamier, J.*) CHAULI *v.* THE MUNICIPAL BOARD OF MUZAFFARNAGER. **26 I. C. 781 (1) : 12 A. L. J. 1102.**

U. P. MUNICIPALITIES ACT (I OF 1900), S. 91.

——S. 91—*Re-construction of privy*

S. 91 of the Act does not apply to a case of re-construction of a ruined and fallen down privy, without the permission of the Board. (*Tudball, J.*) NAUNA MAL *v.* MUNICIPAL BOARD OF HATHRAS. **11 A. L. J. 486 : 20 I. C. 405 : 14 Cr. L. J. 421 : 35 All. 375.**

——S. 128 (a)—*Rules—Charge of digging up road—Proof of—Right to dig up road or drain.*

No one has any right to dig up any portion of a roadway or to dig up or alter any portion of a drain. Where the applicant was allowed to put a stone over a drain in front of his shop for use of himself and of persons visiting his shop and was charged for having dug up the road when in fact, expecting a visit from the Chairman of the Municipal Board he was getting the soil from underneath the projection removed *Held*, the applicant was not guilty of digging the road. (*Walsh, J.*) GULAB SINGH *v.* EMPEROR. **35 I. C. 964 : 17 Cr. L. J. 404.**

——S. 128 (a) (1)—*Peace of public entertainment and resort.*

S. 128 (a) (1) does not empower a Municipality to charge the hawkers for sale of good articles on the public street or patri adjoining thereto, which are not included in the words 'place of public entertainment and resort' in that section; as words cannot be read distributively. (*Knox, C. J. and Banerjee, J.*) IMAMI *v.* EMPEROR. **10 A. L. J. 426 : 16 I. C. 833 : 13 Cr. L. J. 685 : 35 All. 24.**

——S. 128, Cls (h) and (i)—*Seller—Meaning.*

A dandidar who simply weighs things brought to a market to be sold, is not a seller of these things. (*Tudball, J.*) JABBAR SINGH *v.* EMPEROR. **13 Cr. L. J. 797 : 17 I. C. 541 : 11 A. L. J. 39.**

——S. 129—*Standing orders—Building—Refusal of permission.*

Where the Local Government extends S. 129 to a Municipality it has power to make standing orders with regard to the specification and design of any building constructed within its limits and if the specification of the building proposed to be constructed does not comply with the requirements laid down in standing orders, the proposal will be rejected automatically unless the Municipal Board directs otherwise. But, when the provisions of the section have not been applied by a Municipality, each case has to be taken on its merits and the propounder of a design is not under any obligation to see that it complies with any particular regulation. But the existence of that section does not prevent a Municipality from refusing permission to erect or re-erect building under the provisions of S. 87 on the points mentioned in S. 129. (*Stuart, A. C. J.*) GANESH PERSHAD *v.* MUNICIPAL BOARD OF LUCKNOW. **49 I.C. 463 : 6 O. L. J. 33.**

——S. 130 (a) and (e)—*Essentials for punishment under.*

The render a person liable to punishment for committing breach of rules under (a) and (e) he must be served with a notice as provided by the section. (*Banerjee, J.*) JHAMMANATH *v.* EMPEROR. **38 All. 455 : 17 Cr. L. J. 269 : 34 I. C. 989 : 14 A. L. J. 604.**

U. P. MUNICIPALITIES ACT (I OF 1900), S. 168.

——Ss 133 and 168—*Resolution of Municipality—Not published nor sanctioned—Breach.*

Where the resolution of a Municipality was neither published nor sanctioned as required by S. 133 of the Act the accused could not be convicted for its breach. (*Ryves, J.*) HAR SARAN DAS *v.* EMPEROR. **21 I.C. 176 : 14 Cr. J. 576.**

——S. 147—*Boards order disobeyed—Conviction — Persistent disobedience second trial—First conviction—Whether can be changed.*

A person was ordered by the Municipal Board of Cawnpore to pull down a *chhajja* alleged to be in a ruinous condition. On his disobeying the order he was prosecuted and was fined rupees five. As he persisted in disobeying the Board's order he was prosecuted again. Before the institution of the second prosecution he challenged the correctness of the first conviction by means of applications to the District Magistrate and to the High Court but the applications were thrown out. At the second trial he wished to challenge the correctness of the first conviction. *Held*, that he was not entitled to challenge the correctness of the first conviction. (*Chamier, J.*) SITAL PARSHAD *v.* MUNICIPAL BOARD, CAWNPORE. **12 A. L. J. 595 : 25 I. C. 323 (2) : 15 Cr. L. J. 571 : 36 A. 430.**

——S. 147—*Masonry edging added to chabutra—Whether a material alteration—Conviction.*

A mere addition of a masonry edging to a chabutra attached to a house is not a material alteration for which a conviction would lie. (*Rafique, J.*) RADHA BALLAPH *v.* EMPEROR. **23 I.C. 192 : 15 Cr. L. J. 240 : 12 A. L. J. 227.**

——S. 147—*Disobedience of a notice—Conviction—Where lies.*

No conviction under S. 147 lies for disobedience of a notice unless the notice was lawfully issued by the Municipal Board. (*Ryves and Piggott, JJ.*) EMPEROR *v.* PIRARI LAL. **12 A. L. J. 254 : 23 I. C. 745 : 15 Cr. L. J. 377 : 36 All. 185.**

——S. 147—*Shop on land lawfully in the owner's possession.*

The Municipal Board cannot require a person to give up his shop standing on land not belonging to Municipality but lawfully in his possession. (*Knox, J.*) JIWA *v.* EMPEROR. **17 I. C. 713 : 13 Cr. L. J. 841 : 10 A. L. J. 286.**

——S. 152—*Notice—Defence that the paper was not a notice at all.*

An accused is not prevented by S. 152 from setting up a defence that the paper served on him was not a notice from the Board or a person in authority. In such a case, the Magistrate must inquire and get himself satisfied. (*Piggott, J.*) HAZARI LAL *v.* EMPEROR. **36 All. 327 : 25 I. C. 328 : 15 Cr. L. J. 574 : 12 A. L. J. 312.**

——Ss 168 and 170—*Unharnessing horse on road.*

Where the accused unharnessed his horse on the road-side and then placed the horse in the

U. P. MUNICIPALITIES ACT (I OF 1900). S. 187.

stable and the coach in the coach-house, and the vehicle did not stand for a long time upon the public road, *held*, that no offence was committed either under S. 168 or under S. 170. The Municipal Board could not by its resolution extend the scope of S. 170 of the Act. A *Nazul Daroga* is not competent to file a complaint under S. 170 of the Act. (*Tudball, J.*) NALIA KUMAR *v.* EMPEROR. **20 I. C. 1003 : 14 Cr. L. J. 523 11 A. L. J. 721 :**

——S. 187—*Election—Validity of—Question by suit.*

The validity of a Municipal election cannot be questioned except by petition presented according to S. 187 of the Municipalities Act and a regular suit will not lie. (*Richards, C. J. and Banerjee, J.*) MUHAMMAD INAMUL HAQ *v.* MUHAMMAD AHSAN. **21 I. C. 655 : 12 A. L. J. 459**

——S. 187—*Rules under—Municipal election—Validity of—How impeached—Appeal to Civil Court.*

The validity of a Municipal election cannot be questioned except by an election petition to one tribunal and its order is final and non appealable. 20 I. C. 497, Appr. (*Richards, C. J. Banerjee and Tudball, JJ.*) NAND RAM *v.* CHOTEY LAL. **35 All. 578 : 21 I. C. 575 : 11 A. L. J. 945.**

——S. 187—*Rules under Municipal Elections—Rules framed in 1910 in force—Direction by Government in 1884*—Ultra vires.

A direction of the Government issued in 1884 contrary to the rules framed in 1910 under the Act of 1900 is *ultra vires* and an election in compliance with that direction is contrary to law. (*Griffin and Chamier, JJ.*) RAGHUNANDAN PRASAD *v.* SHEO PRASAD. **35 All. 308 : 20 I C. 490 : 11 A. L. J. 349.**

——S. 187—*Election—False personation—Specific instances—Evidence—Practice.*

Where an elector on the roll of a Municipality files a petition under the rules framed by the Local Government against a successful candidate in a Municipal election alleging various instances of personation of voters for which the opposite party was stated to be legally responsible, it is competent to the Court to allow the petition to be amended by the addition of fresh instances of personation (*Richards and Tudball, JJ.*) NAWAB KHAN *v* MAHOMED ZAMIN. **34 All. 649 : 16 I. C. 191 : 10 A. L. J. 289.**

——S 187 *Government rules for Municipal elections—R. 42—'Competent Court'- Appeal.*

The words 'Competent Court' in R 42, framed under S. 187 of the U. P. Municipal Act by the Government mean a Civil Court. An order under R. 42 by a Civil Court is not appealable. A Civil Court has no authority to set aside a Municipal election in the absence of a rule framed under S. 187 (*b*) of the Act. (*Stuart, A. J. C.*) SUNDAR LAL *v.* MUHAMMAD FAIQ. **18 I. C. 122 : 16 O. C. 36.**

——S. 187 (h)—*C. P. C., Ss. 2 and 96—Election petition—Appeal.*

The order of a Civil Court on a Municipal election petition is not a decree under S. 2 of the

U. P. MUNICIPALITIES ACT (II OF 1916), S. 16.

C. P. C, and is therefore not appealable. 18 I. C. 122, Appr. (*Tudball and Rafique, JJ.*) KHUNNI LAL *v.* RAGHUNANDAN PERSHAD. **35 All. 450 : 20 I. C. 497 : 11 A. L. J. 659.**

——S. 187, R. 42—*Municipality—Power of Government to make rules regarding Municipal elections—"Competent Court"—Meaning of.*

Where certain draft rules were published in the Local Government Gazette relating to Municipal elections and after considering the objections and criticisms, the rules were published in the Gazette as having been made under S. 187 of Act, (I of 1900). *Held*, that the publication was valid and the rules so published had the force of law though the rules as published differed in details from the draft rules. The expression "Competent Court" in Rule 42 means a Civil Court of competent jurisdiction with reference to the declaration fixed by the petitioner in his petition, (*Karamat Hussain and Tudball, JJ.*) GUR CHARAN DAS *v.* HAR SARUP. **34 All. 391 : 14 I. C. 191 : 9 A. L. J. 383.**

U. P. MUNICIPALITIES ACT (II of 1916).

——*Lane vests in Municipality—Right to complain for trespass.*

Under the U. P. Municipalities Act land used as a public thoroughfare within the limits of the Municipality, vests in the Municipal Board. An act of trespass is an act of interference with the surface of the soil and with the use of the land as a public lane, and no one except the Municipal Board has a right to complain of such trespass. (*Piggott, J.*) MD. RAZI KHAN *v.* MD. ASKAR KHAN, **1922 All. 485.**

——Ss. 2 and 116 (g)—*Public street—Encroachment.*

A land or street over which the public as such have no right to pass along, does not become "public" only because there is an underground sewer of old times within the meaning of S. 2 of the U P. Municipalities Act (II of 1916) and S. 116 (*g*) does not help the Municipal Board, as it deals with only public streets, payments, etc., which vest in the Municipality. (*Gokul Prasad, J.*) MUNICIPAL BOARD OF BENARES *v.* RAM KISHNA DAS. **1922 All. 386.**

——S. 16 (3) (c)—*"Place of profit"—Meaning of—Election—Municipal contractor.*

The words "place of profit" have a definite historical association and when coupled with the word "office" are familiar. A contractor who receives remuneration for supply of articles to a municipality cannot in accordance with the ordinary meaning of the word "place" be said to hold a place of profit. The proper meaning which should be ascribed to the words "place of profits" in S. 16 (3) (c) is one which denotes position and employment in the sense of having a title attached to such employment and a definite standing and partaking of the nature and character of that of master and servant. That is, a position in relation to the Board in which the Board can require a person to obey its command and to do certain work or to render personal services in return for remuneration. Instances of this kind

U. P. MUNICIPALITIES ACT (II OF 1916), S. 20.

readily occur to one, *e.g.*, a consulting Engineer who for a retaining fee holds himself at readiness to give expert opinions and furnishes reports ; a whole or part time medical officer with defined duties towards the Municipal Board ; and each and every Municipal servant of any grade. This rule is necessary because members of a Board should not be in the false position of being masters and servants at one and the same time. (*Mears, C. J. and Piggott, J.*) MAHOMED BAKSH *v.* MAHOMED ABDUL BAGI KHAN.
45 A. 720 : 21 A. L. J. 661 : L. R. 4 A. 587 : 1924 A. 135.

——— **Ss. 20 and 22**—*Petition need not be presented personally to collector—Practice.*

Ss. 20 and 22 of the U. P. Municipalities Act need not be construed so strictly as to invalidate petitions not presented personally to the Collector. If it was the practice of the particular District that petitions to the collector or in his absence received by some other officer who would hand them over then presentation to that officer is sufficient. It must reach the collector well within the period of limitation. (*Mears, C. J. and Piggott, J.*) SURAJ NARAIN *v.* JANG BAHADUR.
45 A. 687 : 1924 All. 132.

——— **S. 23 (c)**—*Election—Rival candidates—Withdrawal of one during polling leaving survivor sole candidate—Procedure.*

The poll opened with two candidates for one vacancy in a Municipal Council and before the time came for the poll to close and votes to be counted and the Returning Officer to declare who was elected, before that time arrived there was only one candidate and that one candidate a candidate for the one vacancy. The Returning Officer thereupon closed the poll and declared the remaining member duly elected. *Held* that his action was legal. Rule 36 (1) of the Municipal Rules and Bye-Laws of the particular Municipality, provided that a poll should be taken on the day for the election when the number of duly nominated candidates who were entered in the schedule and who had not withdrawn their candidature before the time fixed for the poll exceeded that of the vacancies. When you have got duly nominated candidates in the excess of vacancies you have got to have an election, Rule 36 (2) provided, "If the number of such candidates is equal to the number of vacancies, all such candidates shall be deemed to be elected." Therefore if there are three candidates and three vacancies, all such candidates shall be deemed to be elected : similarly two, similarly one. Though in terms rule 36 (2) does not contemplate nor is there any where any provision which contemplates the withdrawal of a candidate during the few hours during which the polling is in progress, by analogy to the duties of the Returning Officer before the opening of the poll. It is the proper course for the Returning Officer to act in conformity with R. 36 (2) and if he finds only one candidate left for the one vacancy, to declare that man duly elected. (*Mears, C. J. and Piggott, J.*) SULTAN BAKSH *v.* ABDUL HAMID.
45 A. 685 L. R 4 A. 335 : 21 A. L. J. 639 : 1924 All. 134.

U. P. MUNICIPALITIES ACT (II OF 1916), S. 178.

——— **S. 85**—*Strike by scavengers—Punishment.*

The provisions of Sec. 85 of the U. P. Municipalities Act are rigorous and must be used with caution. The sweeper who is guilty of abandoning or resigning Municipal service and if by his doing so sanitation might not be impaired then a lighter punishment would do while the punishment is justified if there is danger to public health owing to a strike by scavengers. (*Daniels, J.*) ANGNOO *v.* EMPEROR.
L. R. 4 All. 202 (Cr.) : 21 A. L. J. 808 : 9 O. & A. L. R. 922 : 46 All. 41 : 1924 All. 188.

——— **S. 116**—*Municipal rubbish and night-soil—Property in—Municipal servant selling night-soil and rubbish and appropriating proceeds—Breach of trust—Penal Code, S. 420.*

S. 116 of the U. P. Municipal Act vests in the Municipality the care of night-soil deposits and also on rubbish and night-soil collected by the Municipality from houses. An arrangement by which the Municipality undertakes to collect all night-soil and refuse from private houses, through the instrumentality of customary sweepers for a reward arranged by contract between them from time to time does not affect the right of the Municipality to the rubbish and when collected. Where, therefore a Sanitary Inspector of the Municipality used his influence with the sweepers and had the night-soil sold privately and appropriated the proceeds. *Held* that he was guilty of an offence under S. 409 I. P. C. (*Walsh, J.*) HORI LAL *v.* EMPEROR.
45 A 281 : 21 A. L. J. 149 : L. R. 4 A. (Cr.) 62 : 1923 All. 480.

——— **S. 128 (B)**—*Breach of sanction—Penalty.*

Where persons are charged with erecting buildings contrary to approved plans, the object is to enable the public authority to control streets and buildings. Penalties are only intended *in terrorem* and should not be applied vindictively for technical offences. (*Walsh, J.*) NIHAL MUHAMMAD *v.* EMPEROR.
21 A L. J. 774: L. R. 4 A. 226 : 1924 All. 200 (Cr.).

——— **S. 155**—*Octroi duty—Failure to pay—Offence.*

The broker of a consignee taking delivery of the goods without paying octroi duty is guilty of an offence under S. 155 of the Act.(*Bannerjee, J.*) BABU RAM *v.* EMPEROR.
46 I. C. 848 : 19 Cr. L. J. 832 ; 16 A L. J. 632.

——— **S. 155**—*Octroi duty—Omission to pay—bona fide mistake.*

S. 155 of the U. P. Municipality Act does not apply to a case where there has been no attempt to defraud and octroi duty has not been paid on account of an absolutely honest mistake. (*Stuart, J C.*) MUNICIPAL BOARD, RAE BARELI *v.* MAHOMED MUQIM.
51 I. C. 477 : 20 Cr. L. J. 493 : 6 O. L. J. 174.

——— **S. 178**—*Compound wall—Alteration in building abutting on public road.*

A building the walls of which are 40 feet from the road cannot be said to be abutting on or adjacent to a public road or street. The mere fact

U. P. MUNICIPALITIES ACT (II OF 1916), S. 185.

that the proposed compound wall would if constructed abut on a public road does not require a notice under S. 178 of the Act to the Board (*Lindsay, J. C.*) MAHOMED RAZA *v.* EMPEROR.
65 I. C. 767 : 23 Cr. L. J. 191 : 8 O. L. J. 603.

——S. 185—*Act done before the passing of the Act.*

An offence committed before the coming into force of the Act cannot be punished under the provisions of the Act, as the Act contains no saving clause. (*Tudball, J.*) AMIR HASAN KHAN *v.* EMPEROR. **38 I. C. 736 : 18 Cr. L J. 352 : 15 A. L. J. 159.**

——S. 185—*Material alteration—What is.*

The raising of the plaint and the alterations made in the size, position or number of the doors or windows cannot be treated as material alteration within the meaning of S. 185. (*Kanhaiya Lal, J. C.*) EMPEROR *v.* BABU RAM.
25 O C. 1 : 23 Cr. L. J. 476 : 1923 Oudh 35 (1).

——Ss. 185 and 186—*Notice, necessity of.*

Issue of notice under S. 185 is not necessary for prosecution under S. 186. Where a person after lapse of sanction to erect a building, erects one without fresh sanction, prosecution is the more appropriate remedy rather than demolition of the building. (*Banerjee and Piggott, J.*) EMPEROR *v.* HASHIM ALI. **39 All. 482 : 40 I. C. 307 : 18 Cr. L. J. 659 : 15 A L. J. 461.**

——Ss. 209 and 210—*Structure.*

The word "structure" in S. 209 means one of a permanent character. 28 All. 199, Foll. (*Banerji, J.*) EMPEROR *v.* MUHAMMAD USUF.
39 All. 386 : 40 I. C. 317 : 18 Cr. L. J. 669: 15 A. L. J. 290.

——S. 247 (b)—*Complaint—Evidence.*

Before an order could be passed under S. 247 (b) it is necessary for the Magistrate to satisfy himself by evidence that the complainants were persons residing in the immediate vicinity of the house and the house was being used for the purposes mentioned in Cl. (a) to the annoyance of respectable persons. (*Banerji, J.*) IMAMAN *v.* EMPEROR. **18 A. L. J. 302 : 21 Cr. L. J. 370 : 55 I. C. 850 : 2 U. P. L. R. (All.) 73.**

——S. 265—*Erection of scaffolding.*

The prosecution in a case of erection of scaffolding in contravention of the provisions of S. 265 the Act need not be affirmatively prove the actual obstruction caused by an erection, except where such an inference can be drawn. (*Piggott, J.*) BHATIBY CHUNILAL *v.* EMPEROR.
58 I. C. 944 : 21 Cr. L J. 864

——S. 267—*Removal of building—Prior grant of permission—Effect.*

Even when the Municipality has sanctioned the construction of a building, there is nothing to prevent it the interests of public health from directing the removal or demolition of the same. (*Daniels, J.*) BABU LAL *v.* MUNICIPAL BOARD, FARRUKHABAD. **21 A. L J. 828 : L. R. 4 A. 567 : 9 O. & A. L. R. 1053 : 1924 A. 157.**

——S. 267—*Open cess-pool—Notice—Grounds for.*

U. P. MUNICIPALITIES ACT (II OF 1916), S. 298.

The purpose of S. 267 of the U. P. Municipalities Act is to empower the Municipality to take steps to protect the public against insanitary conditions. It does not contemplate or deal with any objection not based upon sanitary grounds. A notice was issued by a Municipality under 267 in respect of an open cess-pool not because it was insanitary but because passersby were likely to fall into it at night. *Held*, that the notice was bad and the person to whom it was issued committed no offence in ignoring it. (*Walsh, J.*) MUNICIPAL BOARD, ETAWAH *v.* DEBI PRASAD. **42 All. 485 : 58 I. C. 146 : 21 Cr. L. J. 722 : 18 A. L. J. 572.**

——Ss. 267 (b) and 318—*Order, cannot be questioned on merits.*

An order or direction of a Municipality cannot be questioned on the merits, if they are made within the powers conferred on the Municipality. But its legality can be questioned in any Court, if it is shown that it is an order or direction which the Municipality cannot make. (*Walsh, J.*) KASHMIRI LAL *v.* EMPEROR. **43 All 644 : 19 A. L. J. 541 : 22 Cr. L. J 650 : 63 I. C. 410 : 3 U. P L. R. (A.) 175.**

——Ss. 271 and 307—*Paving by Municipality of a certain enclosure after notices to owner—Suit by the owner against the Municipality for the restoration.*

Where plaintiffs were found to have received the notices sent by the Municipal Board to pave the yard with brick so as to make it sanitary and thereafter the municipal board itself paved it with brick and sent the bill of costs to the plaintiffs, *held* that the action of the municipality was perfectly legal and within its powers and that no suit lies against it for this action. (*Gokul Prasad, J.*) MAHOMED QUASIM *v.* THE MUNICIPAL BOARD, SAHARANPUR.
1923 A. 371.

——S. 274 (2)—*Occupier—Meaning.*

A person responsible for the upkeep and cleanliness of temple and for all work of the temple is not its occupier within S. 274 (2). (*Knox, J*) PIARE LAL *v.* EMPEROR.
15 A. J. 187 : 38 I. C. 308 : 18 Cr. L. J. 277 : 39 All. 309.

——S. 295—*Refusal to pay Municipal charge is not an offence—Obstruction.*

A refusal to pay a Municipal charge is not an offence and an advice to a person not to pay a Municipal charge to a peon does not amount to an obstruction of a Municipal servant in the performance of his duties. (*Stuart, J.*) BALDEO PANDEY *v.* EMPEROR.
64 I. C. 130 : 22 Cr. L. J. 738 : 19 A. L. J. 914.

——Ss. 298 and 299—*Refusal of a licence.*

The applicant whose application for licence to store firewood is rejected has remedy of appeal. His persistence in storing firewood without licence after such rejection is an offence. (*Piggott, J.*) MANNU *v.* EMPEROR. **18 A. L. J. 187 : 58 I. C. 153 : 21 Cr. L. J. 729 : 42 All. 294.**

——Ss. 298, 318 and 321—*Licence—Refusal of—Arbitrary—Jurisdiction of Civil Court.*

U. P. MUNICIPALITIES ACT (II OF 1916), S. 307.

Under the U. P Municipalities Act of 1916 the jurisdiction of the Civil Courts is limited by the provisions of Ss. 318 and 321 of the Act. Under these sections the only remedy of a person who considers himself aggrieved by a bye-law made under S. 298 (g) of the Act is by an appeal to the higher authority referred to in S. 318 of the Act. A suit would lie for an injunction to compel a Municipal Board to grant the plff. a license for carrying on a particular trade, provided always that the plff. was prepared to carry out the conditions prescribed by the bye-laws and could satisfy the Court that the Municipal Board has refused him the license for reasons wholly unconnected with the public health, safety or convenience. (*Piggott, J.*) MANNUA *v.* EMPEROR.

20 Cr L. J. 705 : 17 A. L. J. 976 : 52 I. C. 785 : 1 U. P. L. R. (H. C.) 126

——S. 307—*Notice — Disobedience — Conviction.*

For a conviction under S. 307 of the Municipalities Act for disobedience of a notice issued, it must be shown that the notice was issued by the Chairman of the Executive Officer under the authority of the Board. Where the notice was issued under the signature of the Secretary and served on a servant of the accused, *held*, the accused did not receive any notice and could not be prosecuted for disobedience. (*Knox, J.*) RAM PRATAB MARWARI *v.* EMPEROR. **18 A. L. J. 229 : 55 I. C. 302 : 21 Cr. L. J. 286 : 2 U. P. L. R. (All.) 97.**

——S. 307 (b)—*Failure to comply with notice —Daily fine when to be imposed.*

Where the accused was convicted under S. 307 (b) for failure to comply with a notice by the Municipal Board requiring him to construct a drain on a certain property and by the same order the accused was directed to pay a daily fine of Re. 1-0-0 till the notice is complied with, *held*, that latter part of the order was illegal. (*Piggott, J.*) AMIR HASAN KHAN *v.* EMPEROR.

40 All 569 : 19 Cr. L. J. 694 : 46 I. C. 150 : 16 A. L. J. 527.

——Ss. 314 and 333 and Cr. P. C., S. 537—*Sanction—Prosecution—Irregularity.*

S. 333 of the Act., does not authorise a Tahsildar to sanction a prosecution under the Act. The prosecution under S. 333, therefore without the proper sanction under S. 314 is illegal. An irregularity in the sanction cannot be cured by S. 537 of Cr. P. Code, which are not applicable to the sanction under S. 314. (*Sulaiman, J.*) JUGGAN *v.* EMPEROR.

65 I. C. 447 (2) : 19 A. L. J. 942.

——S. 314—*Prosecution of an offence—Inspector of water-works.*

Under S. 314 of the Act, the prosecution for an offence punishable under the Act can be started upon information received from, or complaint made by, a person generally or specially authorised. The Inspector of waterworks has no such authority (*Knox, J.*) PARSHOTAM DAS *v.* EMPEROR.

50 I. C. 494 : 20 Cr. L. J. 318 : 17 A. L. J. 354.

U. P. MUNICIPALITIES ACT (II OF 1916), S. 326.

——S. 318—*License — Refusal—Criminal proceedings.*

A Municipality claimed certain land in the possession of the applicant as theirs and prosecuted him for storing firewood on it. He applied for a license to store firewood but the Municipal Board refused to grant it to him without giving any reasons. The applicant stored firewood again without permission. *Held*, that the applicant having failed to seek his remedy by an appeal under S. 318 of the Municipal Act could not challenge the order of the Board in these proceedings and was rightly convicted. 17 Cal. 329; 20 Cal. 634, Ref. (*Piggott, J.*) MANNU *v.* EMPEROR.

42 All. 294 : 58 I. C. 153 : 21 Cr. L. J. 729 : 18 A. L. J. 187.

——S. 321 (1)—'*Question*'—*Meaning of.*

The word "question" in S. 321 (1) of the Act means called in question as regards its reasonableness or practicability and not 'challenging its legality.' (*Walsh, J.*) KASHMIRI LAL *v.* EMPEROR. **19 A. L. J. 641 : 3 U. P. L. R. (All.) 175 : 63 I. C. 410 : 22 Cr. L. J. 650 : 43 All. 644.**

——S. 326—*Disallowance of bill of Contractor —Suit—Limitation.*

Plff. contracted with a municipal council to build certain huts. On examining *A*'s bills the Municipal Engineer reported that certain items could not be allowed. The Municipal Board thereupon withheld payment for those items In a suit by the plaintiff after the lapse of 4 years for recovery of the amount *held* that the suit was barred by the provisions of S. 326 of the Municipal Act inasmuch as the act was done by the Board in its official capacity. (*Mears, C. J. and Banerjea, J.*) ABDUL WAHID *v.* THE MUNICIPAL BOARD, ALLAHABAD. **21 A. L. J. 161 : L. R. 4 A. 479 : 1923 A. 267 (1) : 9 O. & A. L. R 327.**

——S. 326—*Right to collect carcases —Not immoveable property—Suit for Limitation.*

A right to collect carcases of dead animals is not immoveable property. The period of 6 months allowed by S. 326 of the U. P. Municipalities Act applies to a suit for declaration of such a right against the Municipality. (*Rafiq and Stuart, JJ*) JHUNWA *v.* MUNICIPAL BOARD, DHAMPUR. **45 A. 267 : L R. 4 A. 363 : 21 A. L. J. 101 : 1923 A. 179.**

——S. 326—*Suit for declaration of title and injunction against Municipality—Notice.*

In a suit for declaration that a certain projection was the ancestral property of the plff. and that a notice served on him by the deft. Municipality for its demolition is invalid and for an injunction, *held*, that the injunction not being the only relief claimed, service of the notice as provided for in S. 326 of the Act was necessary and the suit having been commenced before the expiration of two months of notice could not be maintained. (*Richards, C. J. and Tudball, J.*) THE MUNICIPAL BOARD OF BENARES *v.* GAJADHAR. **41 All. 162 : 47 I. C. 848 : 16 A. L. J. 793.**

U. P. MUNICIPALITIES ACT (II OF 1916), S. 326.

——S. 326 (1) and (3)—*Suit to recover compensation—Tort—Limitation.*

Plff. exported some cloth from Municipal limits and claimed a refund of octroi duty under the rules. The Municipality refused to pay. Plff. sued for recovery more than six months after the refusal. *Held*. that the suit was for damages by way of reparation for the tortious act committed by the defts. having been brought more than six months after the accrual of the cause of action was barred. (*Lindsay, J.*) LALA MAKHANLAL *v.* THE MUNICIPAL BOARD OF AGRA.
18 A L J. 180 : 54 I. C. 459 : 1 U. P. L. R. (H. C.) 178.

U. P. REGISTRATION RULES.

——R 174—Waqf *to Aligarh College.*

Rule 174 does not make the registration of a deed of *waqf* to the Aligarh College, ineffective simply because the registering officer was a trustee of the College. The defect, if any, is one of procedure. (*Banerjee and Tudball, JJ.*) RUSTAM ALI KHAN *v.* MUSHTAQ HUSAIN.
35 I. C. 718 : 14 A. L. J. 554.

U. P. RENT ACT (XII OF 1881).

——S. 7—*Usufructuary mortgage.*

S. 7 does not cover a usufructuary mortgage and therefore a mortgagor does not become ex-proprietary tenant of his *sir* land. (*Chamier, J.*) DEBI CHAND *v.* BHARAT. **16 I. C. 44.**

——S 9—*Succession to occupancy tenure—Reversioners of widow.*

Succession to occupancy tenure is governed by Agra Tenancy Act XII of 1881. Reversioners claiming after death of widow must have been joint cultivators. (*Ryves and Gokul Prasad JJ.*) BECHU SINGH *v.* BALDEO SINGH.
20 A. L. J. 165 : 44 A. 327 : 1922 All. 84.

——S. 9—*Occupancy holding—Transfer by will—Validity.*

Act, (XVIII of 1873) and Act (XII of 1881), render void the terms of any will in existence on the date on which they are passed, if those terms contravened the prohibition against transfer by will of occupancy rights enacted by it. (*Piggott and Walsh, JJ.*) MAHADEO MISIR *v.* DIRGPAL PANDE. **41 A. 356 : 51 I. C. 146 : 17 A. L. J. 381.**

——S. 9—*Mortgagee—Adverse possession—Illegal sale of occupancy rights.*

The Zemindar could sue the vendee of a non-transferable occupancy holding in a Civil Court within 12 years. An occupancy tenant sold his occupancy rights to another in 1888 who held a mortgage order the entire mahal from the Zemindars. The plaintiff purchased in 1901 one half of the mortgaged mahal and redeemed the entire mahal. In a suit for possession, *held*, that the vendee's position was that of a trespasser, the sale being illegal. (*Karamat Hussain, J.*) GANDHRAP SINGH *v.* HARI KRISHNA.
10 I. C. 999 : 8 A. L. J. 458.

——S. 9—*Auction sale of occupancy holding.*

The purchaser in auction sale of an occupancy holding sold as fixed rate holding gets no title and the tenant can prove that it was really occupancy holding. (*Richards, J.*) PAL AHIR *v.* ASGAR HUSSAIN. **10 I. C. 145 : 8 A L. J. 404.**

U. P. TOWN IMPROVEMENT ACT, S, 56.

——S. 9—*Mortgage—Termination.*

Mortgage of an occupancy holding valid under N. W. P. Rent Act terminates when the occupancy tenant comes to an end as by lapse to the Zamindar. 2 A. L. J 471 : 27 All. 372 ; 21 All. 204, Con. (*Griffin, J.*) SHEOBARAN *v.* BINALK DAT. **9 I. C. 51.**

——S. 9—*Occupancy holding—Hindu widow—Rights of.*

Under S 9 of the U. P. Rent Act of 1881, an occupancy right devolves as if it were land and the interest of a Hindu widow succeeding to an occupancy holding is a mere life-interest. (*Ferrard, S. M. and Hopkins, J. M.*) MAHABIR LAL *v.* GIRJA PRASAD. **52 I. C. 438 : 1 U P. L. R. (B. R.) 21.**

U. P. TENANCY ACT (II OF 1901).

See also AGRA TENANCY ACT.

——Ss. 10, 20 and 83—*Policy of the Act—Sale of mahal—Sir lands—Agreement to relinquish, invalidity of—Damages.*

The N.W.P. Ten. Act secures and preserves to a proprietor whose proprietary rights in a mahal are transferred otherwise than by gift or exchange between co-sharers in the mahal, a right of occupancy in his *sir* lands and in the lands which he has cultivated for 12 continuous years at the date of the transfer, notwithstanding any agreement to the contrary Where the proprietors of a mahal sold the mahal together with the *sir* lands in their occupation and agreed to execute a deed relinquishing the latter with a provision for damages on default, *held*, that the agreement was invalid as being contrary to the policy of the N. W. P. T. Act, (II of 1901) and damages could not be claimed for failure to give possession of the *sir* lands. (*Sir John Edge,*) MOTI CHAND *v.* IKRAM ULLAH KHAN.
39 All. 173 : 44 I. A. 54 : 15 A L. J. 150 : 5 L. W 388 : 21 M. L. T. 267 : 21 C W. N. 616 : 19 Bom. L R 433 : 26 C. L. J. 24 : (1917) M. W. N. 453 : 39 I. C. 454 : 32 M. L. J. 383. (P. C.)

——S. 57 (d)—*Ejectment—Grove lands—U. P. Tenancy Act, S. 25.*

A tenant grove holder is not liable to be ejected from a grove land on the ground of having sub let. 17 A. L. J. 971. Dist. (*Stuart, J.*) LALA SHEO PRASAD *v.* BABU RAM. **1923 All. 168.**

——S. 158—*Grant to idol—"Successors to the original grantee"—Priests in office are not.*

Where a rent-free grant of land is made to an idol, successive priests in office cannot be deemed to be "successors to the original grantee" within the meaning of S. 158 of the Act. (*Piggott and Walsh, JJ*) MATHURA PRASAD *v.* RAMESHWAR.
65 I. C. 371 : 19 A L J. 964.

U.P. TOWN IMPROVEMENT ACT.

——Ss. 56 to 59—*District Judge—No jurisdiction to entertain application of the acquisition officer.*

A land acquisition officer referred a question arising under Improvement Trust Act to the

UNIVERSITIES ACT (II OF 1857).

District Judge, although a question arising in respect of the acquisition of the same land by the Improvement Trust had already been before the Improvement Trust tribunal The District Judge without the slightest jurisdiction proceeded to consider whether he had jurisdiction or not, and decided that the tribunal constituted under the 1919 Act has ceased to exist. *Held*, that the Judge had no jurisdiction to consider whether it had or it had no jurisdiction and that his decision was in direct breach of the provisions of Ss. 56 to 59 of the Improvement Trust Act (*Walsh and Ryves, JJ.*) M. T. SUKHRANI KUNWAR *v.* BHUKHAN SINGH. **21 A. L. J. 193 : L. R. 4 A. 141 : 1923 All. 286.**

UNIVERSITIES ACT (II OF 1857).

——*University Regulations. Ch. XI, Cl. 12 (G. and I. Act 2 and 3, Geo. V. Ch. 6)—Sp. Rel. Act, S. 45—Provision for appointing a place for lectures—Obligation to appoint within a definite time—Estoppel and part performance—Question between University and Governor-General-in-Council—Regulations, Cl. 11—Provision for post graduate studies.*

Whether the sanction required under the University Regulations under Ch. XI, Cl. 12 is *ultra vires* or not having regard to 2 and 3 Geo. V, Ch. 6 cannot be tried in proceedings under S. 45 Sp. Rel. Act, where the Government concerned are not parties to the suit. The provision in the University Regulations that the Syndicate shall appoint a place for lectures in consultation with the Senate, imposes no obligation on the Syndicate to appoint one in any definite time; the Courts are unwilling to interfere in matters of internal arrangement. Though the doctrine of estoppel and part performance apply to Corporations yet no sort of part-performance or ratification can bind a Corportion to a transaction, which the Legislature has forbidden it to undertake. All persons dealing with a statutory body like the University are deemed to have notice of the limits, set to their authority and a Corporation will not be bound by anything done by its agent when the transaction is on the face of it in excess of the powers defined by the statute. Any question between the University and the Governor-General-in-Council can be decided only in a separate suit and not in summary proceedings under S. 45 of the Specific Relief Act. The provision for post graduate studies under S. 1, Ch. X1 of the University Regulations is not compulsory but only an enabling one. (*Chaudhuri, J.*) A RASUL, *In the matter of*, **41 Cal. 518 : 24 I. C. 404 : 18 C. W. N. 430.**

——**(VIII OF 1904)**

——*Object of—'Student', meaning of.*

The object of Act is to extend the usefulness of the University. The term 'student' is not confined to students belonging to any University but also includes men who because of the exceptional gifts may well be requisitioned by the University to extend their knowledge To construe the term "students" to mean student of the University alone is to fall into a rigidity of interpretations not justified by the language or the purpose of the Act. (*Imam and Greaves, JJ.*) JITENDRANATH PALIT *v.* LOKENDRANATH PALIT. **34 I. C. 657 : 22 C. L. J. 593.**

UNLIQUIDATED DAMAGES.

——**S. 25**—*Rules under R. 5—Not* ultra vires *—Punjab University.*

Rule 5 of the Regulations framed by the University for the conduct of examinations and providing for the disqualification of a candidate from passing an examination and appearing for the same, for two more years, if he is detected in giving or receiving help or using some unfair means, is not *ultra vires* (*Jones and Moti Sagar, JJ.*) TAJ AHMED *v.* UNIVERSITY OF THE PUNJAB, LAHORE. **62 I. C. 861 : 2 Lah. 197.**

——**S. 25**—*Issue of* mandamus—*Scheme of the Act—Regulations.*

The Regulations framed under the Indian Universities Act must be read as supplementing the Act, being of the nature of delegated legislation and can be enforced by a writ of *mandamus*. Where a Corporation or public body has a statutory duty of a public nature towards another person, a *mandamus* can be issued to compel its performance at the suit of any person aggrieved by the refusal to perform the duty unless there is another remedy "equally convenient, speedy, beneficial and effectual" as the *mandamus* and by remedy is meant not a remedy by act of the party but a *remidium juris* or some specific legal remedy or a legal right. Though the grant of a writ of *mandamus* is at the discretion of the Court, the discretion is not arbitrary but guided by legal principles. Where a person has a legal right to the performance of a public duty and having no other effective means of enforcing that right comes to that Court *bona fide* within a reasonable time after the performance of the duty has been refused, the Court will issue a *mandamus*. Regulation 64 in so far as it purports to extend the rights of protest to a resolution other than a resolution under Section 25, or a resolution on any other matter requiring Government sanction is *ultra vires* of the Senate. The general scheme of the Act and the regulation framed thereunder is that the Senate should be the Legislature and the Syndicate the Executive Government of the University the powers of the Senate being subject in certain matters to the control of the Government. In some matter Regulations 95 and 96 confer exclusive powers on the Syndicate. In case of statutory bodies particular acts should be done in particular way prescribed. Regulation 64 gives an absolute rights to every fellow of the Senate to protect against any resolution passed by the Senate The Syndicate has to forward the protest to Government with the memorandum representing the opposite point of view. It has no right to dictate to any fellow what his protest should contain. (*Coutts Trotter and Kumaraswami Sastri, JJ.*) G. A. NATESAN, *In re.* **40 Mad. 125 : 38 I.C. 847 : 31 M. L. J. 634.**

UNLAWFUL CONSIDERATION.

See CONTRACT ACT, S. 23.

UNLIQUIDATED DAMAGES.

See (1) CONTRACT ACT, S. 74.
(2) DAMAGES.

UNPROFESSIONAL CONDUCT.

See LEGAL PRACTITIONERS ACT, S. 13.

UNRECORDED CO SHARER.

See CO SHARER.

UN-REGISTERED ASSOCIATION.

See (1) COMPANY.
(2) CORPORATION.

UNSEAWORTHINESS.

See INSURANCE—MARINE.

UNSIGNED DOCUMENTS.

See DEED—CONSTRUCTION.

UPPER BURMA CIVIL COURT REGULATIONS (1 OF 1896).

——S. 10 (d)—*Divisional Courts—Appeal from decree of.*

There is no provision for appeal from a decree or order of a Divisional Court in any original case, *i.e.* a petition under S. 10 of the Divorce Act. (*Fox, C. J Hartnoll, Ormond and Twomey, JJ.*) W. N. HARDINGE *v.* H. E. HARDINGE.
6 Bur. L. T. 10 : 19 I. C. 53 : 7 L. B. R. 8 (F.B.).

——S. 13—*Jurisdiction of Civil Court—Maintenance order under* S. 488, *Cr. P. C.*

The jurisdiction of Civil Courts to grant a declaratory decree cannot be affected by the provisions of the Criminal P C. relating to the maintenance of wives and children. The Civil Courts no doubt have no jurisdiction to cancel an order for maintenance or to grant an injunction against a criminal court, but there is no reason why a civil Court having issued a declaration, the party who has obtained it should not apply to the criminal Court, under the Provisions of section 489 of Cr. P. C. or otherwise for an order to stay the payment of maintenance (18 A. 29; 30 M. 400 and 14 C. 276. (*Saunders, J. C.*) MAUNG PO THE IN *v.* MA ME SAN. **1922 U. B. 20.**

——S. 25—*Recognised agent—Power to act for client.*

Section 25 of the Upper Burma Civil Courts Regulation does forbid a recognised agent doing such acts as examining and cross—examining a witness or addressing the Court on behalf of his client. (*Saunders, J C.*) S. C. BANERJEE *v.* A. C. MUKERJEE. **49 I. C 44 : 3 U. B. R. (1918) 94.**

——Ss. 25 and 26—*Unqualified person—Advocate.*

An unqualified person practically performing the functions of an Advocate under cover of special powers of attorney is liable to punishment under S. 26 of the Regulation. 14 Cal. 556 Foll. (*Shaw, J. C.*) NGA NYUN *v.* NGA PO O.
25 I. C. 163 : 7 Bur. L. T, 206

UPPER BURMA COURTS MANUAL.

——Para 295—*Appearance by pleader.*

Magistrate may permit a person, including a pleader not authorised to practice in his Court to appear for accused before the Court ; this discretion should be exercised judicially and permission should be given only when the Magistrate considers it necessary in the interest of the accused. (*Saunders, J. C.*) W. CALO-GREEDY *In re.*
(1916) 2 U B. R. 121 : 38 I. C. 729 : 18 Cr L. J. 345 : 10 Bur. L. T. 117.

UPPER BURMA LAND AND REVENUE REGULATIONS (III OF 1889), S. 53.

——*Mere allotment—Rights under.*

The mere "allotment" of State waste land without actual possession ten years ago gives no right which can be enforced in a civil court against the persons actually in possession. (*Brown, A. J. C.*) MA NGWE PYU AND THREE *v* MAUNG PON SAING. **4 U. B. R 128 : 1923 R. 117.**

——S. 53—*Oil well—Mortgage—Further advance—Redemption—Limitation.*

Where in a suit instituted in 1908 for redemption of a mortgage of an oil well executed in 1875 it appeared that in 1879 the mortgagor received a further advance and executed a *parabaik* document to evidence the same, and the nature of the second transaction, *viz*, whether it was a sale or further charge was in dispute, *held*, that if the transaction amounted to a sale, the vendee was in adverse possession for over 12 years and that if it was a mortgage the right to redeem accrued more than 30 years before a suit and that in either view the suit was barred. (*Lord Moulton.*) NGA LU GALE *v* NGO PO THAN. **24 I. C. 310 : I L. W. 695 (P. C.).**

——Ss. 53 (2) and 24 (2)—*'Claim', meaning of.*

The word 'claim' in S. 53 (2) of the Regulation means, claim as against the State and does not include disputes between private individuals and has the same meaning as 'claim' in S. 24 (2) and S. 53 (2) does not bar the jurisdiction of the ordinary Civil Courts over disputes between parties. (*Heald, A. J. C.*) BURMA OIL CO., LTD. *v.* BAIJNATH SINGH. **59 I. C. 960 ; (1920) 3 U. B. R. 212.**

——S. 53 (2) (ii)—*Jurisdiction of Civil Court in respect of State land, if barred.*

The section neither bars nor purports to bar the jurisdiction of Civil Courts over claims over State lands except in matters allotted specially by Local Government to the Revenue officers to dispose of. (*Saunders, C. J.*) SONI LAL SHEOSHANKAR *v.* DELAWAR. **(1916) 2 U. B R. 151 : 39 I. C. 367 : 11 Bur. L T. 42.**

——S. 53 (2) (ii)—Ultra vires.

S 53 upper Burma Land and Revenue Regulation, debars a civil Court from trying any question as to the limits of any state land and therefore, from deciding whether any particular piece of land is State land or not. A suit for declaring that a house situate on Government land is not liable to be sold in execution is cognizable by a Civil Court. 40 Cal. 391 (P. C.) Foll. (*Mc Coll, A. J. C.*) MAHOMED AMIN *v.* NACHIAPPA CHETTY.
29 I.C. 736 : 8 Bur. L. T. 45.

UPPER BURMA LAND AND REVENUE REGULATIONS (III OF 1889), S. 53.

——S. 53 (2) (x)—*Jurisdiction of Civil Courts —Whether barred.*

Cl. (x) of Sub-section (2) of S. 53 when read with Sub section (1) of that section does not bar the jurisdiction of Civil Courts to all claims to a right to fish and rights connected therewith. But the claims which the Local Government or a Revenue Officer is empowered to dispose of by or under the regulation are barred. (*Saunders, C. J.*) MAUNG HWE *v.* MAUNG TUN HLA.

(1916) 2 U.B.R. 136 : 39 I. C. 408 : 11 Bur L. T. 87.

UPPER BURMA REGISTRATION REGULATION, (I OF 1897).

——Ss 4 and 6—*Executed — Documents not signed—Registration.*

Documents which are complete without signature according to Burmese custom, are 'executed' within S. 4 and must be registered if they fall within that section. Without registration they are not admissible in evidence according to S. 6. (*Heald, A.J.C.*) MA SAT PU *v.* MA SIN.

60 I. C. 16 : (1920) 3 U. B. R. 258.

URALAN.

See MALABAR LAW.

USAGE.

See CUSTOM.

USE AND OCCUPATION.

See (1) DAMAGES.
(2) LANDLORD AND TENANT.

USUFRUCTUARY MORTGAGE.

See (1) MORTGAGE.
(2) T. P Act, S. 58.

USURIOUS LOANS ACT (X OF 1918).

——*Applicability of—Judgment on admissions in pleadings—Power of Court*

The Usurious Loans Act can be applied in favour of a defendant who confesses judgment. (*Robinson, C. J. and May Oung, J.*) S. P. R. M. FIRM *v.* MAUNG PO KYA.

1 Rang. 580 : 1924 R. 144.

——S. 3 (1)—*Unfair transaction— Re-opening.*

A court is authorised to consider the merits of a transaction in a case of recovery on a bond in which the deft does not appear. If in such a suit, Court finds the payment of interest substantially unfair it is a fit case to re-open the transaction between the parties and to give relief in respect of the excessive interest. Where even after the progressive discharge of principal the fixed rate of interest continues on the whole sum borrowed, the provision as to interest is unconscionable and unfair and will not be enforced. (*Pratt, J.*) KERING RUPCHAND CO. *v.* BAYLEY.

44 Bom. 775 : 58 I C. 433 : 21 Bom. L.R. 1126.

USURY.

See USURIOUS LOANS ACT.

UTBUNDI TENURE.

See LAND TENURE.

VACANT SITE.

See ADVERSE POSSESSION.

VATAN ACT (III OF 1874), S. 64.

VACCINATION REGISTER

See EVIDENCE ACT, Ss., 35 and 74.

VAKIL VAKALATNAMA.

See (1) C. P CODE, O. 3.
(2) LEGAL PRACTITIONER.

VALUATION OF SUIT.

See (1) COURT FEES ACT.
(2) SUITS VALUATION ACT.

VARAM PATTA.

See (1) LANDLORD AND TENANT.
(2) LAND TENURES.
(3) MADRAS ESTATES LAND ACT.

VARIANCE BETWEEN PLEADINGS AND PROOF.

See PRACTICE—PLEADINGS—VARIATION.

VATAN.

See also (1) BOMBAY VATAN ACT.
(2) GRANT.
(3) VATAN ACT.

——*Sale of lands in execution against widow of vatandar—Validity.*

A sale in execution of a money decree against vatandar after the death of the latter, being for legal necessity is valid. (*Macleod, Kt C. J. and Shah, J.*) GANESH RAMACHANDRA KULKARNI *v.* LAXMIBAI VENKATESHNARAYAN.

24 Bom. L. R. 249 : 46 B 726 : 1922 B. 96.

——*Palkhi inam—Treating inam as vatan and issue of sanad — What passess with the grant.*

Where the Mahomedan rulers granted a village as *Palkhi Inam* to certain persons who were *Deshpande Vatandars* and under the English settlements the same was classified as *Deshpande Vatan, held* that as the village was granted to the vatandars to pay their Palkhi expenses, it became an appanage of the vatan. The effect of the Privy Council decisions in *Survanarayana* v. *Patanna* (45 I. A. 209) and *Venkata Sastrulu* v. *Sertharamadu* (46 I A. 123) on the presumption as to inam grants considered (*Macleod, C. J. and Shah, J.*) TUNGABAI GOPAL DESAI *v.* KRISHNAJI RAMACHANDRA DESHPANDE,

46 Bom. 741 : 24 Bom. L. R. 252 : 1922 Bom. 5.

VATAN ACT (III OF 1874).

——S. 10—*Collector — If subordinate High Court's jurisdiction.*

Where the Collector, before issuing his certificate under S. 10 of the Vatan Act was called upon to make some inquiry and, thus exercising a judicial function, he was subject to control by the High Court, should he make his authority a mere cloak for illegal and wholly unreasonable proceedings. 8 Bom. 264; 22 Bom. 802, Ref. (*Scott, C. J and Batchelor, J.*) LADHA IBRAHIM & CO. *v.* ASSISTANT COLLECTOR OF POONA.

35 Bom. 146 : 8 I. C. 166 : 12 Bom L. R. 839.

——S. 64—*Vatan Register incorrect—Suit —Maintainability.*

Where the order given by the Collector is not an order within the meaning of S. 4 (a) Para. 3, Revenue Jurisdiction Act, but, merely a direction to give effect to the Vatan Register as settled in 1895, a suit to declare that a Vatan Register was

VENDOR AND PURCHASER.

void and should not be given effect to would not lie. No action will be taken under S. 18 unless an application is made by an interested party. (*Macleod, C. J. and Coyajee, J.*) GOVIND BALAKRISHNA BAVE *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **1922 Bom. 155.**

VENDOR AND PURCHASER.
See TRANSFER OF PROPERTY ACT, Ss. 54—56.

VENUE OF SUIT.
See (1) C. P. C., Ss. 16—21.
(2) JURISDICTION.

VERIFICATION.
See C. P. C., O. 6, R. 15.

VESTED RIGHTS.
See (1) INTERPRETATION OF STATUTES.
(2) TRANSFER OF PROPERTY ACT, S. 19.

VICINAGE.
See PRE-EMPTION.

VILLAGE ABADI.
See LANDLORD AND TENANT—ABADI.

VILLAGE CHOWKIDARI ACT (VI OF 1870).
——Ss. 50 and 51—*Object and Scope of S. 51—Chowkidari Chakran lands, Zemindar's right to—Settlement prior to resumption.*

Chowkidari Chakran lands form part of the estate, within whose limits they are situated, and the Zemindar has a qualified title therein. Such lands when vacated by the Chowkidar, pass into the possession of the Zemindar, before they are resumed and transferred by the Collector to the Zemindar under the Act. He does not become a trespasser and a settlement by him before the resumption proceedings is not invalid. The new estate is in continuation and confirmation of his pre-existing interest. The object of S. 51 is to maintain the validity of contracts made by the Zemindar in respect of Chowkidari Chakran lands and it is immaterial whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings. The section cannot be limited to cases where there has been a contract by the Zemindar in respect of lands other than Chowkidari Chakran lands. (*Mookerjee and Walmsley, JJ.*) SHIV CHANDRA BANERJEE *v.* SURENDRA CHANDRA.
45 Cal. 515 : 27 C. L. J. 560 : 41 I. C. 759 : 22 C. W. N. 997.

VILLAGE COMMUNITY.
See (1) CUSTOM (PUNJAB).
(2) ADVERSE POSSESSION.

VILLAGE SERVICE INAMS ACT (II OF 1894).
——Ss. 11 and 18 — *Enfranchisement of Inams—Pattahs, to whom to be issued—Localization for quit rent.*

The Village service inams are enfranchised and pattahs are issued for the benefit of Inamdars. If they do not accept the same the proper course is to resume those lands if they desire to do so. The Government cannot force the pattahs on the Zemindars, though the lands are in incapable of identification. In imposing quit rent, Government should localize lands and cannot rely on a presumption that Zemindars must have been in possession of the lands though they cannot be identified. (*Sir John Edge.*) CHIMAN LAL *v.* HARI SINGH CHAND. **40 Cal. 879 : 40 I. A. 157 : 102 P. R. (1913) : 17 C.W. N. 885 : 126 P. W. R. 1913 : 187 P. L. R. 1913 : (1913) M. W. N 509 : 18. C. L. J. 70 : 15 Bom. L. R. 646 : 19 I. C 669 : 14 M. L. T. 83 (P. C.).**

WAIVER.

VILLAGE SITE.
See LANDLORD AND TENANT.

VIS MAJOR.
See TORT.

VIZAGAPATAM AGENCY RULES.
See AGENCY RULES (VIZAGAPATAM).

VOIDABLE ASSIGNMENT.
See ASSIGNMENT.

VOIDABLE SALE.
See (1) LIMITATION ACT, ARTS. 44 AND 97.
(2) T. P. ACT, S. 53.

VOID AGREEMENT.
See CONTRACT ACT, S. 23.

VOID OR VOIDABLE.
See WORDS.

VOLUNTARY PAYMENT.
See CONTRACT ACT, Ss. 69 AND 70.

VRITTIS.
See (1) C. P. C., S. 60.
(2) GRANT.
(3) HINDU LAW, RELIGIOUS OFFICE.

VYAVAHARA MAYUKHA.
See HINDU LAW TEXTS.

WAGER.
See also CONTRACT ACT, Ss. 23 AND 30.
——In Wagering contracts it is necessary for the defendant to prove that both parties agreed neither to ask for nor to give delivery. (*Kincaid, J.*) MANUBHAI PERMANAND *v.* KESHAVJI RAMDAS. **24 Bom. L. R. 60 : 1922 B. 66.**

WAGERING CONTRACT.
See (1) CONTRACT ACT, Ss. 23 AND 30.
(2) WAGER.

WAGING WAR.
See (1) ALIEN ENEMY.

WAIVER.
See also (1) C. P. C., S. 100.
(2) LIM. ACT, ART. 74.

——*Inference from conduct.*
Waiver may be evidenced by conduct inconsistent with the continuance of the rights waived. (*Prideaux, J.*) KAWADJI *v.* GANGARAM. **64 I. C. 461.**

——*Plea of—Validity.*
There may be circumstances under which a plea of waiver cannot be entertained by a Court of justice as being contrary to public policy. 6 C. L. J. 62 ; 6 C. L. J. 111 Rel on. (*Mookerjee and Teunon, JJ.*) BASANTA KUMARI *v.* RAMKANAI SEN. **9. I. C. 698 : 13 C. L. J. 192.**

——*Question of, is one of fact—Instalment bond—Acceptance of, part of overdue instalment—Waiver—A question of fact.*

WAIVER.

It cannot be laid down as a general rule that where an instalment bond gives the creditor the right to sue for the whole amount due under the bond on default of payment of a single instalment. There is no waiver of that right by acceptance of part of an overdue instalment or by receipt of interest. The question of waiver is a question of fact to be determined according to the circumstances of each particular case. (*Woodroffe and Carnduff, JJ.*) OSMAN SHAHA *v.* MAHOMED AMAR SIRKAR. **9 I. C. 22 (2).**

——*Delay in filing a suit.*

Delay in filing a suit till the period of limitation cannot constitute a waiver of the right. (*Johnstone, C. J. and Shadi Lal, J.*) NAIDHAN *v.* BUTA. **36. I. C. 700 : 107 P. R. 1916.**

——*Agreement to discharge debt in particular manner—Effect on other remedies of creditor.*

An agreement that the debt may be discharged in a certain manner does not show that the creditor has waived all other remedies. (*Sankaran-Nair and Spencer, JJ.*) CHIDAMBARA CHETTI *v.* RAMASWAMI CHETTIAR. **26 I. C. 911 : 27 M L. J. 631.**

WAJIB UL-ARZ.

See also PRE-EMPTION,
Alluvion and Diluvion.
Binding effect.
Construction of words in.
Custom of pre-emption.
Custom of resumption.
Evidentiary value.
Family custom.
Groves.
Miscellaneous.

Alluvion and Diluvion.

——*Alluvion and diluvion.*

Bare statement in *wajib-ul-arz* that alluvion and diluvion occur in a village does not imply the custom of *dhardhura.* (*Mears, C. J. and Tudball, J.*) SHOHRAT SINGH *v* GHULAM EZID. **55 I. C. 366 : 18 A. L. J. 195.**

——*Alluvion and diluvion—Adverse possession—Khewatdars.*

The *wajib-ul-arz* provided that the land belonging to proprietors which became submerged and remained under water for more than 12 years was upon re-appearance to be treated as the shamilat of the whole village though it belonged to defts. before diluvion. The land in dispute emerged some time between 1856 and 1880 and was accordingly recorded as shamilat in Revenue papers and at the partition in 1904-1905 was treated as such and defts. were allotted shares. *Held*, that the plffs.' claim to exclusive ownership by reason of anterior title is invalid since by common consent the proprietors had decided that the right of the ownership in the submerged land belonging to a proprietor should on re appearance vest in all the proprietors in the village. The possession of the plff. is adverse to the defts. according to the entry in the *wajib-ul arz.* (*Shadi Lal, J.*) AHMAD *v.* JAM KHAN. **92 P. L. R. 1916 : 36 I. C. 200 : 183 P. W. R. 1916.**

WAJIB-UL-ARZ—Construction of Words in,

Binding effect.

——*Binding effect—Entries in—Non-proprietary residents of village.*

Non-proprietary residents of the village were not bound by the provisions of the *wajib-ul-arz* in respect of an institution which they managed for themselves as regards their own cattle. (*Kensington, J.*) KANHIYA *v.* SEWA. **4 P. L. R. 1912 Sup. : 15. I. C. 108 : 226 P. W. R. 1912.**

——*Binding effect—Abadi.*

In the Chhindwara *wajib-ul-arz*, house sites held by cultivators cannot ordinarily be transferred. The *wajib ul-arz* contemplates the existence of right over houses and house-sites and these rights are maintained but non-agriculturists will hold on such terms as they may agree upon with the malguzar. The site reverts to the malguzar when it is relinquished, and this only in the absence of a special agreement to the contrary. In the Nagpur, Nimar and Bandara the site belongs to the malguzar. (*Mittra, A. J. C.*) RAMRAO *v.* GOVINDRAO. **4 N. L. J. 65.**

——*Binding effect—Entry in — Value of—Custom.*

A person wishing to avoid the binding effect of a custom recorded in a *wajib-ul-arz* must show that the custom has been modified by contract or otherwise. (*Findlay, A. J. C.*) AJODHYA PRASAD *v.* KARAN. **53. I. C. 550.**

Construction of Words in.

——*Construction of words in.*

The *Wajib-ul-arz* provided the rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares and the daughter does not get any share by inheritance. If a co-sharer has several wives, of whom one has one son and the other several, then on the death of the co-sharer his share will be divided equally among his sons." *Held*, the only construction which can be put on the entry is that on the death of an owner of the village no daughter of his under any circumstances entitled to a share in the property by right of inheritance whether he had left sons or not. If a daughter had no right to inherit her issue could not inherit. The provision that on the death of a co-sharer his sons become owners of his share in equal shares was probably inserted to exclude any claim under a custom of primogeniture which is not an uncommon custom in Oudh. (*Sir John Edge,*) BALGOBIND *v.* BADRIPRASAD. **45 M. L. J. 289 : 26 O. C. 217 : 45 A. 413 : 38 C. L. J. 302 : 33 M. L. T. 317 : (1923) M. W. N. 799 : 9 O. & A. L. R. 581 : 10 O. L. J. 368 : 50 I.A. 196 : 21 A L. J. 578 : 1923 P. C. 70. (P. C.)**

——*Construction of words in—Record of agreement between parties.*

A *Wajib ul-arzz-prima facie*, is to be construed as embodying a record of custom, but it is quite clear that this presumption must give way if the language of the documents itself indicates that the record is not one of custom, but of contract. While it may be the case that the word " iqrar "

WAJIB-UL-ARZ—Construction of Words in.

which is often interpreted "agreement" is an ambiguous word. The words "so long as this Settlement lasts the following conditions shall be binding on us" clearly indicate that whatever usages were recorded in this document were recorded as usages of contract and not of custom. (*Rafique and Piggott, JJ.*) HARI SINGH *v* HARBANS LAL. **1923 A. 488 (1).**

——— *Construction of words in—Ejectment—Right of Zamindar.*

A *Wajib ul-arz* of a village provided that "If the proprietors turn out, or eject or put out any of the inhabitants, that inhabitant will have the right to remove the materials" *held* that it was not open to the Zamindar to turn out an inhabitant from his house on village abadi without assigning sufficient cause A Zamindar who claims to turn out his tenants arbitrarily must strictly make out that right. (*Grimwood, C. J. and Banerji, J.*) DINA SINGH *v.* LALA DEVICHAND. **1923 All 263 (2).**

——— *Construction of words in—Custom or contract—Record prepared under directions of the Board of Revenue.*

A *Wajib-ul arz* prepared in 1868 in accordance with the directions of the Board of Revenue to prepare a record of "custom and usage prevalent in an estate" contained a paragraph headed *Zikr-Haqi-Shufa.* On a question arising as to the interpretation of the *wajib-ul-arz* in a pre-emption case. *Held,* that the *wajib-ul-arz* was only a record of custom and not of contract (*Rafiq and Lindsay, JJ.*) SITAL PRASAD *v.* MAHABIR SINGH, **20 A. L J. 954 : L. R. 4 All. (Civ) 17 : 1922 All. 537.**

——— *Construction of words in—Parjote—Liability to pay.*

Where the *wajib-ul-arz* of a village recorded that every shopkeeper in the village was liable to pay *Parjote* at a certain rate, *Held,* that the entry in the *wajib-ul-arz* pointed to the fact that the payment was based not on custom but on agreement and that being rent payable in kind could not be recovered by suit. (*Knox, Ag. C. J. Tudball and Rafique, JJ.*) MUHAMMAD FAIYAZALI KHAN *v.* BEHARI. **40 All 56 : 45 I. C. 329 : 15 A. L. J. 873. (F.B.)**

——— *Construction of words in.*

Court cannot give a strained meaning to an entry in clear words in a *wajib-ul-arz.* (*Richards, C. J. and Rafique, J.*) BRIJ NARAIN RAI *v.* RAM DHARI RAI. **40 I. C. 40.**

——— *Construction of words in—Intiqual.*

Per *Richards, J.*—The word "intiqual" is a very general word and includes all classes of transfers and the decision should not depend upon the interpretation to be put upon particular words occuring in the *wajib-ul-a z.* (*Richards, C. J and Tudball, J.*) KHURSHED ALI *v* ABDUL MAJID **38 All. 361 : 35 I. C. 210 : 14 A. L. J. 441.**

——— *Construction of words in—'They.'*

In the *Parcha lasdig* of 1881-82, there was an entry that the occupancy tenants who were real brothers had stated that they had occupied the land in 1860. *Held,* that the word 'they' does not necessarily include their father. (*Chevis. J.*) BAHADOOR *v.* RAM SINGH. **60 I. C. 456.**

WAJIB-UL-ARZ—Construction of Words in.

——— *Construction of words in—*Nazdiki Bhai. *etc., meaning of.*

Nazdiki Bhai in the *wajib-ul-arz* of Mouza Bhawan, Tabsil Sirsa, Hissar District, taken in connection with succession to occupancy rights, should be taken to include only descendants of the first occupier of the land. (*Johnstone J.*) SAHIB DITTA *v.* KHANDA. **39 P. W. R. 1913 : 19 I. C. 243 : 70 P. L. R. 1913.**

——— *Construction of words in—*Maveshi—*Meaning of—Grazing rights over shamilat land.*

Where a *wajib-ul arz* confers grazing rights on non-occupancy tenants and other non proprietary residents over shamilat land, *held* that the word 'Maveshi' means only cattle used for agricultural purposes and not sheep and goats kept for trading purposes. (*Rattigan, J.*) HANSRAJ *v.* NARAINCHAND. **86 P R. 1911 : 13 I. C. 716 : 229 P. W. R. 1911.**

——— *Construction of words in—Drug District.*

Where the *wajb-ul-arz* of the Drug District did not mention the right over buildings existing prior to the grant of proprietary rights to the Malguzar in 1865 but before proprietary rights were granted to the Malguzar in Drug, there were valuable houses belonging to the non-agriculturists, whose rights over the sites on which these houses stood, bad never been questioned, held these rights were not in the nature of a mere license. (*Mittra, A. J C*) RARU PRASAD *v.* GAIN SINGH. **4 N. L J, 186.**

——— *Construction of words in—Rights of—Lambardar.*

Where a *wajib-ul-arz,* while recognising the general power and responsibility of the Lambardar to create tenancies provided that in letting waste lands he should consult the wishes of his co-sharers ; *Held,* that this clause will not avail a co-sharer for the purpose of avoiding any lease of waste land which may have been created by his representative the lambardar, without consulting him. *Held* further that his remedy, if any, lies in action against the Lambardar for damages, for his removal from office or by claiming partition. (*Stanyon, A. J. C.*) POONAMCHAND *v.* NANDLAL. **48 I. C. 72.**

——— *Construction of words in—Qarib—Meaning of.*

Where in the *wajib-ul-arz* the provision governing inheritance in a family contained the word 'qarib", *Held* in the absence of words of limitation, the term must be taken in its widest sense as meaning "nearest in degree," (*Lyle, A. J C.*) NIAMAT ALI *v.* ASHIQ ALI. **9 O. L. J 127 : 1922 Oudh 96.**

——— *Construction of wordsin—Oudh—Rae Bareli.*

The statements in Cls. (1) and (9) of the *wajib-ul-arz* of Rae Bareli are nothing more than a description of the conditions and customs obtaining in the town prior to annexation. They cannot be treated as a declaration that the proprietary rights in the town area had been restored by the

WAJIB-UL-ARZ—Construction of Words in.

British Government. (*Lindsay, J. C, and Wazir, Hasan, A. J. C.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* MUHAMMAD QUASIM.
8 O. L. J. 160 : 24 O. C. 77 : 61 I. C. 871 : 3 U.P. L. R. (J.C.) 19.

———*Construction of words in—Same words.*

Unless there are strong reasons to the contrary, if the same word is used in several places in a *wajib-ul-arz* it should be construed in the same sense. If the whole document is loosely and carelessly worded, it has to be interpreted by taking it as a whole and seen what on a natural construction it means to lay down. (*Daniels and Lyle, A. J. Cs.*) KESRI KUMAR *v.* RAM RANI.
53 I.C. 725 : 6 O. L. J. 431.

———*Construction of words in — "Malik Kamila."*

Where a Hindu widow without a son is said to be *Malik Kamila*, it means she is an "absolute owner." (*Stuart, A, J. C.*) THAKURDIN SINGH *v.* BHAGWANT KUAR.
32 I C. 784 : 2 O. L. J. 629.

———*Construction of words in—'Farar' meaning of.*

The word '*Farar*' could not apply to a man who left the village openly, and not in a clandestine or irregular manner, in order to take up his residence in an adjoining village but it applies to an absconder or a deserter. 2 O C. 281 at p. 283 Ref. (*Stuart, A. J. C.*) GAURI SHANKAR SINGH *v.* BHAGWAN DIN.
32 I. C. 337 : 2 O. L. J. 485.

———*Construction of words in—Viran.*

The term "Viran" used in a *wajib-ul-arz*; means deserted or desolate and not dilapidated; and where a tenant dies without an heir, his house is "khali Shuda and Viran" within the meaning of the *wajib-ul-arz* and the talukdar would be entitled to take possession thereof (*Evans, J. C.*) NAROTAMDOSS *v.* RAJA MAHOMED.
12 I. C. 776: 14 O. C. 231.

Custom of Pre-emption.

———*Custom of pre-emption — Evidentiary value.*

A *wajib-ul-arz* containing statements as to pre-emption which are not in contravention of Hindu, Mahomedan or any other system of law, is a reliable evidence of a custom of pre-emption and the *wajib-ul-arz* need not be corroborated by other evidence of instances of that custom, though it is open to rebuttal by contrary evidence. (*Sir John Edge.*) DIGAMBAR SINGH *v.* AHMAD SAYED KHAN. **37 All. 129 : 42 I. A. 10 : 13 A L. J. 236 : 19 C. W. N. 393 : 17 M. L. T. 193 : 2 L. W. 303 : 21 C. L. J 237 : 17 Bom. L. R. 393 : (1915) M. W. N. 581 : 28 I. C. 34 : 28 M. L. J. 556 (P C.)**

———*Custom of pre-emption—Rebuttal.*

There was an entry in the *wajib-ul-arz* of a village about the existence of a right of pre-emption; evidence was let in that 50 years previously there was only one proprietor in the village, *Held* this did not rebut the presumption of correctness, as the right of pre-emption might have grown up

WAJIB-UL-ARZ—Custom of pre-emption.

in the period of 50 years. (*Lindsay and Sulaiman JJ.*) RAM DAS RAI *v.* SHEIKH ABDUL GHAFOOR.
1924 A. 146.

———*Custom of pre-emption—Classes of pre-emptors.*

Where the *wajib-ul-arz* of a village provided that in case of a transfer of property, the right to claim pre-emption would be "first to *warisan ek jaddi qaribi*, then to *hissedar* of the *patti* and then to co-sharers in the village," *held*, that the right of pre-emption arose only where there was sale to a stranger and that the clause does not apply to a sale between the classes *inter se.* (*Tudball and Sulaiman, JJ.*) MATHURA SINGH *v.* RAM LAL SINGH. **64 I. C. 486 : 19 A. L. J. 903.**

———*Custom of pre-emption.*

Where a statement was made in the *wajib-ul-arz* that when a co-sharer wishes to sell or mortgage, he should first offer his share to his nearer co-sharer and in case of his refusal to any other co-sharer in the village and if they refuse then he may sell to a stranger. *Held*, that the subsequent statement that in case of a sale to a stranger a willing co-sharer may pre-empt does not affect the statement of the rights of the co-sharers *inter se.* (*Tudball and Rafique, JJ.*) JAIPAL RAI *v.* SAHDEO RAI. **55 I. C. 35 : 18 A. L. J. 99.**

———*Custom of pre-emption.*

Where in the *wajib-ul-arz* a right of pre-emption is given to a co-sharer in the Zemindari in case of sale by another co-sharer of his right and there is a distinct statement that the owners of the miscellaneous plots have a right to sell their property without the permission of the Zamindar, *held*, such owners are not bound by the custom of pre emption. (*Tudball and Rafique, JJ.*) BISHAMBAR NATH SINGH *v.* BASANT LAL. **55 I. C. 31.**

———*Custom of pre-emption — Entry in—Custom, proof of.*

Mere entry in the *wajib-ul arz* providing that every co-sharer must offer his property to other co-sharers if he would desire to sell, does not sufficiently establish acustom of pre-emption. (*Richards, C.J. and Rafique, J.*) SUNDER SINGH *v.* JAISIRI RAI. **50 I. C. 50.**

———*Custom of pre-emption.*

An extract from *wajib-ul-arz* recording a custom of pre-emption is *prima facie* evidence of the existence of the custom and as pointed out by the Privy Council in 37 All. 129, it is unnecessary for the plff. to give instances in support of the entry. But the deft. in such a case is entitled to give evidence to show that no custom of pre-emption exists. (*Richards, C.J. and Banerjee, J.*) KALLU *v.* KALLU SINGH. **43 I. C. 854.**

———*Custom of pre-emption—Construction of.*

The *wajib-ul-arz* ran as follows :—Whenever a co-sharer wishes to make an absolute sale of his share, or mortgage by conditional sale, he must offer it to the other co-sharers. In the circumstances, pre-emption did not apply to cases of exchange. (*Richards, C. J. and Tudball, J.*) BHAGWAN SINGH *v.* RAJWANTA KUMAR. **38 I. C. 157.**

WAJIB-UL-ARZ—Custom of pre-emption.

——*Custom of pre-emption — Evidentiary value of.*

A *wajib-ul-arz* is merely evidence: it is not conclusive of a custom of pre-emption.(*Richards, C.J. and Tudball, J.*) BECHU SINGH *v.* LACHMI NARAYAN SINGH. **15 I. C. 54.**

Custom of Resumption.

——*Custom of resumption—Grove denuded of trees.*

Where the terms of a *wajib-ul-arz* treated one grove on a different footing from others and laid down that when it would be denuded of trees the landlord should bring it under cultivation and that the tenant had no right to plant a grove or other scattered trees, *held*, the character of the land as grove was not lost by planting new trees. (*Piggott and Kanhaiya Lal, JJ.*) CHOKHEY LAL *v.* BEHARI LAL. **2 U.P.L.R. (All.) 292: 60 I. C. 115 : 18 A. L. J. 820.**

——*Custom of resumption—Entry, value of.*

Where the *wajib-ul-arz* is not a *wajib ul arz* prepared to ascertain custom or practice after due enquiry and it was merely the statement of a landlord in his own favour as that of an interested party an entry in the *wajib ul arz* showing a muafi to be resumable is no proof of the fact that the muafi is resumable. (*Baillie, S.M.*) NISARUL RAHMAN *v.* TIKAM DAS. **26 I. C. 860 (1): 1 O. L. J. 680.**

Evidentiary Value.

——*Evidentiary value of—Not conclusive but important piece of evidence.*

Entries in the *khewat* register of a village and the *wajib-ul-arz* are evidence of facts stated therein and their importance may vary with circumstances. They are not by themselves conclusive evidence of the facts recorded. It may turn out that they are in accord with the general bulk of the evidence in the case they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony in the case. They should not however be given any greater weight. (*Lord Shaw.*) NAGESHAR *v.* GANESHA. **42 All. 368 : 7 O. L. J. 48 : 2 U. P. L. R. (P.C.) 37 : 23 O. C. 1 : 18 A. L. J. 532 : 22 Bom. L. R. 596 : 28 M L.T. 5 : 56 I. C 306 : 38 M. L. J. 521 (P.C).**

——*Evidentiary value of—Title—Presumption.*

Though an entry as to title in a *wajib-ul-arz* or Record of Rights does not create a title, it gives rise to a presumption in its support, which prevails until the correctness is successfully impugned. (*Jenkins, J.*) DAKAS KHAN *v.* GHULAM KASIM KHAN. **45 Cal. 793 : 24 M. L. T. 271 : 28 C. L. J. 441 : 20 Bom. L. R. 1068 : 26 P. L. R. 1919 : 48 I. C. 473 : 9 L. W. 558 (P.C).**

——*Evidentiary value of—Record of tradition—Effect of.*

A *wajib-ul-arz* is a village administration paper prepared by a village official, in which are recorded the statements of persons possessing interests in the village relative to the existing rights and customs. As such they are of considerable value in the determination of such

WAJIB-UL-ARZ—Evidentiary value of.

rights and customs. But statements which merely narrate traditions and purport to give the history of devolution in certain families, not even of the narrators stand in no better position than any other tradition. (*Mr. Ameer Ali.*) MURTUZA HUSAIN KHAN *v.* MUHAMMAD YASIN KHAN. **38 All. 552 : 43 I. A. 269 : 20 M. L. T. 362 , 14 A. L. J. 1083 : 18 Bom. L R. 884 : (1916 2 M W. N. 555 : 25 C. L. J. 1 : 19 O. C. 290: 1 Pat. L. W. 122 : 21 C. W N. 410 : 4 O L. J. 8 : 4 L. W. 538 : 36 I. C. 299 : 31 M L.J. 804 (P.C.).**

——*Evidentiary value of—Proprietary right.*

The *wajib-ul-arz* is cogent evidence of the right as they obtained when it was made, of those holding proprietary or other rights within the particular *mauza*. (*Sir John Edge.*)FATEH CHAND *v.* KISHAN KUNWAR. **34 All. 579 : 39 I. A, 247: 16 C. W. N. 1033 : 12 M. L. T. 413 : (1912) M. W. N. 1085: 10 A. L. J. 335 : 14 Bom. L. R. 1090 : 17 C. L. J. 1 : 16 I. C. 67 : 23 M.L.J. 330 (P.C.).**

——*Evidentiary value of—Rebuttal.*

The *wajib-ul arz* is strong *primafacie* evidence of custom and in order to overturn the presumption in its favour, there must be strong evidence for satisfying the Court that in fact the *wajib-ul-arz* could not reasonably be treated as evidence of custom. (*Lindsay and Kanhaiya Lal, JJ.*) SHER MUHAMMAD KHAN *v.* PARBHU LAL. **21 A. L. J. 801 : 46 All. 47 : 1924 All. 274.**

——*Evidentiary value of.*

An entry in a *wajib-ul-arz* is *prima facie* evidence of the existence of a custom unless there is anything in the *wajib-ul-arz* itself which contradicts the idea of such an existence or there is other evidence to the contrary or such custom is unreasonable or unenforceable, the presumption would be that such a custom exists. (*Lindsay and Sulaiman, JJ.*) GAYAN SINGH *v.* BABU LAL. **21 A L. J. 822 : L. R. 4 A. 557 : 9 O. & A. L. R. 1019 : 1924 All. 86.**

——*Evidentiary value of*—Haq chaharun—Halat debi—*Effect of.*

The *wajib-ul-arz* of 1866 recorded a custom of a right to *Haq chaharun* or ¼ share of the sale proceeds of a house to the Zemindar. But a document called *halat debi* prepared in 1885 did not mention the existence or non-existence of the custom. *Held*, the latter did not abrogate the custom established in the *wajib-ul arz* (*Lindsay and Kanhaiya Lal, JJ.*) BECHAI *v.* BADRI NARAYAN. **63 I. C. 292 : 19 A. L. J. 719.**

——*Evidentiary value of*—Parjote.

A statement in a *wajib ul arz* made by a Zemindar is not a statement narrating a tradition but it is a statement by a person possessing an interest and an existing right in a village, and is *prima facie* evidence that he is entitled to the right recorded therein. A *wajib ul arz* recorded that for every shop, the occupier would have to pay 12 maunds of cotton seed or their value and this payment was called *parjote* or ground rent. *Held*, that the payment was realizable as being rent payable in kind under the terms of the *wajib ul arz*. The use of the word *parjote* in the *wajib-ul-arz* showed that the payment contem-

WAJIB-UL-ARZ—Evidentiary value of.

plated was based upon an agreement and not upon custom. (*Knox, C.J., Tudball and Rafique, JJ.*) MUHAMMAD FAIYAZ ALI KHAN *v.* BEHARI. **40 A. 56 ; 45 I. C. 329 : 15 A.L.J. 873 (F.B.).**

——*Evidentiary value of—Custom—Whether custom—Ambiguous entry therein.*

The record in *wajib ul-arz* is not custom, but a mere record of it: and if its language is ambiguous it may by itself not suffice to prove the custom or any particular incident thereof. (*Richards, C. J. and Tudball, J.*) JEHANGIR *v.* AMIR SINGH. **23 I. C. 245: 12 A. L. J. 19**

——*Evidentiary value of—Custom.*

A *wajib-ul-arz* is only evidence of a custom and often varies in its weight as evidence (*Richards, C.J. and Tudball, J.*) AHMAD SAYED KHAN *v.* DIGAMBAR SINGH. **16 I C. 361**

——*Evidentiary value.*

Wajib-ul-arz is only a piece of evidence to be considered while enquiring into a custom alleged (*Richards, C.J. and Tudball, J.*) MAWASI *v.* MUL CHAND. **34 A. 434 : 14 I. C. 278: 9 A. L. J. 670.**

——*Evidentiary value of.*

The Court ought to hold that certain custom prevailed upon the unrebutted evidence of the *wajib-ul-arz.* (*Richards, C. J. and Tudball, J.*) HUKAM SINGH *v.* THAKUR DAS. **12 I. C. 738: 8 A. L. J. 1135**

——*Evidentiary value of—Riwaj-i-am.*

A *wajib-ul arz* being part of a Revenue record is of greater authority than a *riwaj-i-am* which is of general application and is not drawn up in respect of individual villages. (*Le Rossignol and Campbell, JJ.*) GURBAKHSH SINGH *v.* MT PARTAPO. **2 Lah. 346: 1922 Lah. 234.**

——*Evidentiary value of— Entries—incorrectness.*

There is a presumption as to the correctness of entries in a *wajib ul arz* but though such entries are evidence, the presumption as to their correctness is rebuttable. (*Broadway and Bevan Petman, JJ.*)GULAM MUHAMMAD *v.* GUAHAR BIBI **54 I. C. 419 : 18 P. W. R, 1920.**

——*Evidentiary value of — Entry — Presumption.*

Entries in a *wajib-ul-arz* are presumed to be correct in the absence of any real proof to the contrary. (*Scott-Smith and Jones, JJ.*) SULTAN *v* GHULLA. **68 P. W. R. 1917 : 41 I. C. 283 : 139 P. L. R, 1917.**

——*Evidentiary Value of — Whether can override the provision of a statute.*

An entry in a *wajib-ul arz* enumerating the persons who are to succeed, if it does not expressly exclude collaterals, cannot have the effect of excluding them because they are not mentioned therein. It cannot override the statutory law as to succession. (*Shadi Lal, J.*) WALAYAT BEGAM *v.* SHER ALI SHAH. **39 I. C 232 . 19 P, R. 1917.**

——*Evidentiary value of— Custom— Subsequent settlement.*

A *wajib-ul-arz* holds good only for a particular settlement. A recital in an old *wajib-ul-arz* and

WAJIB-UL-ARZ—Evidentiary value of.

unsupported by any instances carries little weight especially when it professes to apply to all people, *e. g.*, Hindus, Muhammadans and Christians etc. a curious custom. (*Kensington and Chevies, JJ.*) MUHAMMAD ISLAM *v* HARI LAL. **7 P. W. R. 1914 : 21 I. C. 944: 16 P. L. R. 1914.**

——*Evidentiary value of— Conflicting entries —Presumption*

Where there are conflicting entries in the *wajib-ul-arz* neither of which is based on known instances, the presumption is in favour of the entry which least conflicts with general custom. (*Kensington and Beadon, JJ.*) TAJ MAHOMED *v.* ISLAM. **95 P. R 1913: 343 P. L. R. 1913 : 21 I. C. 681: 230 P. W. R. 1913.**

——*Evidentiary value of.*

A *wajib-ul-arz* is a mere record of custom and it does not create a right. (*Mittra, A. J. C.*) SITA-RAM *v.* RAKALU. **54 I. C. 177.**

——*Evidentiary value—Circumstances.*

The weight due to a wajib-ul-arz may be very slight or may be considerable according to the circumstances of the case. (*Simpson and Wazir Hassan, A.J.C.*) BALBHADAR PRASAD *v.* NARAYAN. **9 O. L. J. 518 : 1923 Oudh 102.**

——*Evidentiary value of—Presumption — Record of custom.*

The presumption in the case of *wajib ul-arz* is that the entries therein are a record of custom (*Kanhaiya Lal and Daniels, A. J. Cs.*) SITARAM *v.* BANYAD ALI KHAN. **63 I. C. 530 : 8 O. L. J. 331.**

——*Evidentiary value of—Custom of variance with law—Corroboration— Necessity for.*

In a general *wajib-ul-arz* is admissible to prove a custom set out therein and suits based on custom may be decreed on the strength of the entries made therein ; where those entries indicate the existence of a well-established custom rather than connote the views of individuals as to the proposed practice. When the custom is startingly at variance with the law a Court can look for substantial corroboration. (*Kanhaiya Lal, J. C.*) TIKA *v.* MUSSAMMAT RAM KUER. **7 O. L. J. 234 : 56 I. C, 696 : 23 O, C. 106.**

——*Evidentiary value of.*

Athough a tenant may be bound by an entry in the *wajib-ul-arz* which was made in his absence such entry is not necessarily conclusive proof against the tenant. (*Ashworth, A. J. C.*) MUSAMMAT HAMID FATIMA *v.* BHOLA **52 I C. 869 : 6 O. L. J. 349.**

——*Evidentiary value of.*

A *wajib-ul-arz* unsupported by other evidence may be sufficient to establish a family custom. If the lower Appellate Court has rejected a *wajib-ul-arz* under an erroneous view of the law, it is open to the High Court to interfere in second appeal. 4 O L. J 50 Cons. (*Daniels, A. J. C.*) BOHI RAM. *v.* MENDA. **21 O. C. 384 : 49 I. C. 514: 6 O L. J. 154.**

——*Evidentiary value of.*

It is not correct to lay down that a *wajib-ul arz* contains exclusively statements relating to custom

and it would not afford any evidence of a custom excluding pre-emption, except where there is clear entry therein to that effect. (*Lindsay J C.*) JASWANT SINGH *v.* RAJA SINGH. 20 O. C. 226 : 42 I. C. 21 : 4 O. L. J. 562

——— *Evidentiary value of—Entry attested only by* Asamis—*Not sufficient.*

An entry in *wajib-ul-arz* that a land is held rent free by local custom, is not established if it is attested by the *Asamis* and not by Muafidars. (*Holms, J. M.*) GANESH PRASAD *v.* SHEO DAYAL. 30 I. C. 392 : 2 O. L. J. 370.

——— *Evidentiary value of — Entries in — Landlord and Muafidar.*

Where entries in a *wajib-ul-arz* have been attested by the landlord alone and not by the Muafidar they are irrel vant and therefore are not binding on the latter. (*Tweedy, S. M. and Holms, J M.*) RAUSHAN ZAMAN KHAN *v.* RAMA NANDMISRA. 28 I. C. 229 : 2 O. L. J. 121.

Family Custom.

——— *Family custom — Mere opinions and wishes.*

A *Wajib-al-arz* containing mere wishes and opinions of the parties does not establish a custom at variance with personal law of the parties. (*Stuart and Kanhaiya Lal, A J. Cs.*) MUHAMMAD ALI KHAN *v.* GAZANFAR ALI KHAN. 60 I. C. 147 : 7 O. L. J. 474.

——— *Family custom—Construction.*

A *wajib-ul-arz* regulated the succession of Hindu widows providing that if one only, of the widows has sons the others should be life-tenants only, without power of transfer and if all are sonless, all should take equal shares absolutely. *Held*, that it recorded a custom of life-estate for a sonless Hindu widow. (*Lyle, A. J. C.*) BANSI DHAR *v.* SITA RAM. 58 I. C. 307.

——— *Family custom—Entry in unsupported, by actual instances—Value of.*

Unless it can be proved that effect was given to a custom by which a childless widow used to get a full estate in the property of her husband, the record of the custom in a "wajib-ul-arz" will have no value. (*Kanhaiya Lal, J C*) KANCHAN *v.* SARABJIT. 53 I. C. 740 : 6 O. L. J. 517.

——— *Family custom—Entries in—Value of.*

The value of a *wajib-ul-arz* as evidence of a custom depends upon the circumstances under which the entry with regards to the custom came to be recorded in it. (*Kanhaiya Lal and Daniels, A. J. Cs.*) RAGHUBAR SINGH *v.* GUJRAJ SINGH. 47 I. C. 920 : 5 O L J. 508.

——— *Family custom— Entry in weight of.*

A family custom cannot be proved merely by the production of an entry in the *wajib-ul-arz.* (*Kanhaiya Lal, A. J. C.*) BANDI BIBI *v.* MUSHARRAF. 42 I. C. 199 : 4 O. L. J. 509.

——— *Family custom—Entry in—Value of.*

An entry in a *wajib ul-arz* signed and verified by the parties to the effect that " a sonless widow succeeds to her husband's estate and has no

power to alienate and on her death the share dissolves on husband's heirs " records and proves a family custom which while giving the widow only life-estate confers on her absolute power of alienation. The interpretation of one *wajib-ul-arz* does not govern another. (*Stuart, A. J. C.*) MUSAMMAT PUNNI *v.* CHET RAM. 24 I. C. 640 : 1 O. L. J. 319.

——— *Family custom—Other villages than the one in dispute—'Family custom'— 'Family'—If includes clan.*

The word ' family ' as used in the expression ' family custom ' is not wide enough to include a clan and the *wajib-ul-arz* of other villages than the one in dispute is inadmissible to prove the " family custom " set up, even though the owners of those villages belong to the same clan as the owner of the v llage in dispute. (*Lindsay, A.J.C.*) LALMAN *v.* NAND LAL. 20 I. C. 894 : 17 O. C 1

Groves.

——— *Groves—Rights of proprietor.*

A wajib-ul-arz provided that at the time of sale the proprietor of the land receives ¼ of the sale price in virtue of his proprietary rights and also that any grove holder in possession under this custom could fell any tree and appropriate the timber to his own use. *Held* where the grove holder did not fell the trees, remove the timber and sell the same for their own profit, but they sold the trees as they stood and the vendee cut them down, the proprietor was entitled to ¼ price. (*Piggott, J.*) KRISHNA DATT DUBE *v.* BRIJ LAL. 1923 All. 269.

——— *Groves—Diluvion.*

Where a *wajib-ul-arz* provided 'where a grove is denuded of trees the grove-holder will have preferential right to cultivate it. In future no person will be entitled to plant new trees without the permission of the pattidars. *Held*, that this clause was a general one and meant that if a grove holder wanted to plant new trees, he must get the permission of the Zeminder, even for replacing trees cut down. A *wajib ul-arz* is part of the Record of Rights and the entries in it must be deemed to be correct till the contrary is proved. (*Banerjee, J.*) ISHAR DIN *v.* MUMTAZ HUSSEIN KHAN. 39 I. C. 974.

——— *Groves— Construction— Landlord and Tenant—"Malik"—Right to transfer.*

A *wajib-ul-arz* provided that persons who plant a grove with the consent of the Zemindars of it, are to have the rights of a malik. *Held*, such persons have an interest in the grove which they are entitled to transfer. (*Richards, C. J. and Tudball, J.*) MUHAMMAD YASIN *v.* ILAHI BAKSH. 34 All. 545 : 16 I. C. 455 : 10 A. L. J. 73.

Miscellaneous.

——— *Provision regarding refuse in the village.*

As non-proprietors plff. dwell in the village on sufferance on sites which are the property of the proprietary body, the condition as to refuse in the *wajib-ul-arz* was binding on them and was not inequitable. Payment of *Quota* towards the upkeep of extra sweepers after the entries in the

WAJIB-UL-ARZ—Miscellaneous.

wajib-ul-arz were made, does not affect the right of proprietors. (*Shah Din and Le Rossignol, JJ*) KARIM BAKSH *v.* ALTAF ALI. **88 P. R. 1915 : 31 I. C. 469 : 180 P. W. R 915.**

——*Suit for correction of —New wajib-ul-arz omitting right entered under the old one—Effect — Kotwar recorded as sub-tenant in Wajib-ul-arz—Claim for possession.*

At the last settlement the settlement officer decided that one Kotwar sufficed for the village. Of the two Kotwars one was retained by lot and the other dismissed. The latter was however to retain possession of the field under his cultivation as sub-tenant of the retained Kotwar, paying him the assessed rental as embodied in the settlement record and wajib-ul-arz. At the current settlement the entire village service holding was recorded in the sole name of Kotwar's son and the new wajib-ul-arz omitted the clause as to the sub-tenancy. On ejectment the sub-tenant sued for reinstatement in possession and correction of the new wajib-ul-arz. *Held*, a right of sub-tenancy was created in favour of Kotwar whose services were dispensed with and he is entitled to remain in possession of the field in his cultivation and the new wajib-ul-arz should be modified by insertion of an entry that the sub-tenancy enjoyed by him until ejectment will enure for his lifetime only. (*Drake Brockman, J. C.*) JHIBLIA *v.* DAWLATIA. **1922 Nag. 158.**

——*Customary dues—Zemindar—Exclusion of right to, by contract.*

A *wajib-ul-arz* prepared in respect of a Zemindari, recognised certain customary dues payable to the Zemindar. The Zemindar alienated a portion of the Zemindari agreeing to make no demand for anything but the assessed revenue and cesses payable to him as superior proprietor. *Held*, that he must be deemed to have given up his rights to receive the dues *qua* Zemindar and the *wajib-ul-arz* could not override his express contract. (*Stanyon, A. J. C.*) SAKHARAM *v.* SONA BAPU. **51 I. C. 8.**

——*Custom wider than, if can be proved.*

A custom wider than what might be inferred from the terms of the Village *wajib-ul-arz* can be proved. (*Piggott, J. C.*) KUNJ BEHARI *v.* RAMESHWAR. **20 I. C. 40.**

WAKF

See MAH. LAW—WAKF.

WANT OF JURISDICTION.

See JURISDICTION.

WAR.

See (1) ALIEN ENEMY.
(2) CONTRACT ACT, S. 56.

WARD.

See GUARDIAN AND WARD.

WARRANTY.

(1) CONTRACT ACT, S. 114.
(2) T. P ACT S. 55.

WASTE LAND RULES (1876).

——*Prior unregistered mortgage— Second mortgage for the same sum khalsa subsequent mortgage—Priority.*

WIDOW.

An unregistered mortgage was executed by Deft. No. 1 of a field for the premium for a perpetual lease of that field in favour of the plff. who was then the *izaradar* of the village. Later on, he executed a registered mortgage to secure the same amount. Owing to the expiry of the mortgagee *izaradar's* lease the village was made *khalsa* and the *izaradar* appointed its patel. So the mortgagor was recorded occupant of the land and he mortgaged it to Deft. No. 2. *Held*, that the mortgagor's tenancy created by the plff. did not determine on the expiry of *izara*, but continued on the village becoming *khalsa*, and so priority should be given to the plff.'s mortgage over that of Deft. No. 2. (*Mittra, A. J. C*) JAMAN DAS *v.* PAIKU. **26 I. C. 715 : 10 N. L. R. 170.**

WASTE LANDS ACT (XXIII OF 1863).

——Ss 7 and 18—*Scope of—Waste lands—Sale of, by Government—Insufficient and misleading notification—Suit to recover property—Limitation.*

The procedure prescribed by the Waste Lands Act (1863), is not confined to waste lands held by the Government and applies to the sale of or dealing with lands to which the Government could not show any title. S. 18 which prescribes a special period of limitation for the making of claims is applicable only to proceedings before the special Court to be constituted under the Act. The Act in question makes a great invation on private rights and those pleading it in bar of a claim must bring the matter strictly within its provisions. An advertisement of a proposed sale incorrectly stating the name of the *parganna* in which the lands are situate is misleading and insufficient. A suit for recovery of possession of the property so sold might be brought in the ordinary Courts within the ordinary period of limitation. (*Lord Dunedin.*) SECRETARY OF STATE *v.* RADHA KISHORE MANIKYA. **44 Cal. 328 : 43 I. A 303 : (1917) M. W. N. 25 : 14 A. L. J. 1205 : 18 Bom. L. R. 1027 : 21 C. W. N 291 : 5 L. W. 570 : 38 I. C. 379 : 25 C. L. J. 425 (P. C.).**

WATER.

See (1) EASEMENT,
(2) EASEMENTS ACT.
(3) FERRY.
(4) RIPARIAN RIGHTS.

WATER-COURSE.

See RIPARIAN RIGHTS.

WATER RATE OF CESS.

See MADRAS IRRIGATION CESS ACT.

WAY.

See RIGHT OF WAY.

WELL.

See (1) CO-SHARER.
(2) HINDU LAW—PARTITION.

WIDOW.

See HINDU LAW—
(1) ALIENATION.
(2) REVERSIONER.
(3) SUCCESSION.
(4) WIDOW.

WIFE.

See (1) HUSBAND AND WIFE.
(2) RESTITUTION OF CONJUGAL RIGHTS.

WILD ANIMALS.

See ANIMALS.

WILL.

Accumulation.
Administrator.
Attestation.
Bequest.
Codicil
Construction.
Essentials.
Executor.
Formalities.
Legacy.
Oral will.
Power.
Probate.
Proof of.
Revocation.
Testamentary capacity.
Trust.
Validity of.

Accumulation.

———*Accumulation—Religious dedication.*

Where a Will stated that the revenues and rents of certain properties were to be applied in a certain manner, with a direction for accumulation of surplus income, and then continued that "out of the income of such funds" the shebait shall have power to celebrate religious ceremonies *held* that the words "such funds" included the added accumulations, that the accumulations became part of the *corpus* and were subject to the charitable trust created by the Will. (*Lord Buckmaster.*) GNANENDRANATH DAS *v.* SURENDRANATH DAS.
24 C. W. N. 1026 : (1920) M. W. N 550 : 61 I. C. 323 : 28 M. L. T. 453 (P. C.)

———*Accumulation—Direction to pay to person named, if void*

A direction that no payments are to be made except to the persons mentioned was not a direction to accumulate and so is void. (*Chaudhury, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* HUGHES. 21 I. C. 183 : 40 Cal. 192

———*Accumulation—Creation of fund.*

A Will provided that the balance after making certain payments should be accumulated to form a 'fund' and on the fund reaching to Rs. 10,000, it should be utilized for some purposes and the balance to be added to the 'fund.' *Held*, that there was no intestacy as to the balance. (*Wallis, C. J. and Ramesam, J.*) SEERANGATHANNI *v.* VAITHILINGA MUDALIAR.
29 M. L. T. 281 : (1921) M W. N. 248 : 63 I. C. 104 : 13 L. W. 392 : 40 M. L. J. 532.

Administrator.

———*Administrator—Title of—Grant of letters.*

An administrator derives his title solely from the grant of letters and cannot sue as an administrator before he gets his grant. The case of an

WILL—Bequest.

executor is different as he gets his title from the will and probate is only evidence of the title. (*Lord Parkar.*) SOONA MAYNA KENA ROONA MEYAPPA CHETTY *v.* SOONA NAVENA SUPPRAMANIAM CHETTY. 43 I. A. 113 : 20 C. W. N. 833 : (1916) 1 M. W. N. 455 : 18 Bom. L. R. 642 : 35 I. C. 323 : 114 L. T. 1002 : 85 L. J. P. C. 179 : (1916) 1 A. C. 603 (P. C.)

Attestation.

———*Attestation—Validity.*

The requirements of law are satisfied if the Sub-Registrar and the person who identified the testator put their signatures after the execution of the bill but in the presence of the testator. (*Das and Kulwant Sahay, JJ.*) RAJENDRA LAL BHATTA CHARJI *v.* MENOKA DEBI.
1 Pat. L. R. 267.

Bequest.

———*Bequest—General and specific—Devise of entire estate to one and devise of particular village to another.*

When there is a devise by the testatrix of her whole estate to one person subject to conditions and a devise of a particular village to another to be "sole owner and possessor," the latter devise is an absolute one, and does not detract from the former devise with conditions, being only an exception to it. 18 M. L. J. 7 (P. C.) Foll. (*Lord Shaw.*) FATEH CHAND *v.* RUP CHAND.
38 All. 446 : 43 I. A. 183 : 18 Bom. L R. 900 : 21 C. W. N. 102 : 4 L. W. 597 : (1916) 2 M. W. N. 567 : 26 C. L. J. 182 : 37 I. C. 122 : 20 M. L. J. 481 (P. C.).

———*Bequest to two persons—Joint tenancy or tenancy-in-common.*

A bequest in a Will in favour of two persons without specifying their shares, creates a tenancy in common and not a joint tenancy. (*Walsh and Lindsay, JJ.*) RAMPIARI *v.* KRISHNA PIARI.
43 All. 600 : 63 I. C. 301 : 19 A. L. J. 60

———*Bequest—Vested interest — Interest to take effect after death of testator and his wife—Legatee surviving testator but predeceasing his wife- Legatee, if has a vested interest.*

Where a bequest is to take effect after the death of the testator and his wife, the legatee who survives the testator, though he predeceases the wife, has a vested interest transmitable to his heirs. (*Stanley, C. J. and Banerji, J.*) BILASO *v.* MUNNI LAL. 33 All. 558 : 11 I C. 516 : 8 A. L. J. 577.

———*Bequest—Partly valid—Effect*

Where immoveable property is given for fixed purposes, partly valid and partly invalid, the beneficial interest in the invalid portion passes to the heirs. (*Stanley, C. J. and Banerjee, J.*) MAZHAR HUSAIN KHAN *v* ABDUL HADI KHAN.
33 All. 400 : 9 I. C. 753 : 8 A. L. J. 162.

———*Bequest—Construction—Charity—Alternate bequest to charity—Life-estate.*

A will by a Hindu disposed of the tastator's house absolutely and his cash standing in his account books in the widow's name, household

WILL—Bequest.

effects and the stridhan of his widow in favour of his widow. By a provision in the will he gave the widow a life estate in the house with power to dispose of for certain purposes in her lifetime and on her death to his daughter for life and on her death to her lineal male descendants, if any, and if not, to a certain charity called *Ananthasrama Dharmada* fund. The widow died and after her, the daughter died without issue. Deft. No. 2 the husband of the daughter claimed the house adversely to the trust which was represented by Deft. No. 1, the trustee of the above charity. Deft. No. 2, contended that as the gift over to the charity was contingent on the daughter dying childless it could not take effect until that event occurred before the period of distribution before the widow's death, in other words, the charity could only take if the daughter died sonless in the lifetime of the widow. *Held* that as a gift to the daughter was for life and not an absolute estate under S. 111 of the Succession Act the charity would be entitled to the house owing to the non-applicability of that section and that the bequest to the male issue was under the rule of the Tagore case void but it will not affect the other alternative bequest to the charity. As regards cash, if neither the widow nor the daughter exercises the power of disposal the property was to go to the charity according to the will. The widow by her will gave the cash and the household effects absolutely and her stridhan to her daughter absolutely with a condition that the same should not be sent to her heirs in the event of her dying issueless but should go to charity. Deft. No 2 contended that the condition was not operative and as the will was not governed by the Hindu Wills Act, S. 118 of the Succession Act did not apply. *Held*, that the condition which was attached to an absolute gift was not repugnant because a Hindu testator can provide for the defeasance of a prior absolute estate contingently on the happening of a future event; that the widow had no power to dispose of the cash by will and it therefore went to the charity and the charity was undoubtedly entitled to the household effects which could not be considered as cash and to her stridhan (*Pratt, J.*) THE ADVOCATE GENERAL OF BOMBAY *v.* VITHALDAS.

58 I. C 996 : 22 Bom. L. R. 1005.

——— *Bequest—Vesting of—Time at which to take effect.*

The testator's death is ordinarily the period of payment or distribution of the fund bequeathed (*Batchelor and Rao, JJ.*) JEHANGIR *v.* KAIKHUSRU.

9 I. C. 951 : 13 Bom. L. R. 141.

———*Bequest—Condition precedent—Impossibility of performance—Effect.*

The intentions of a testator cannot be ascertained or varied by events subsequent to the Will. It must be determined from the terms of the bequest, and where the performance of a condition appears to be the motive for a bequest, the impracticability of the performance will be a bar to the claim of the legatee. (*Mookerjee and Buckland, JJ.*) RAJENDRA LAL GHOSE *v.* RAKHAL.

64 I. C. 977 : 33 C. L. J. 418.

———*Bequest—Absolute estate — Tenants-in-common.*

WILL—Bequest.

Property was devised to trustees upon trust to pay the income to *G* and *B* in equal shares as tenants in common and to hold half of the corpus for such persons as *G* and *B* may respectively appoint by will and in default to appoint to the heir's executor and administrator. *Held*, that each of *G* and *B* took an absolute estate in a moiety of the property. (*Chitty, J.*) BALTHAZAR, G. C. *v.* SAMUEL BALTHAZAR

42 I. C. 285 : 21 C. W. N. 992.

———*Bequest — Gift to uncertain person — Validity.*

A gift by a testator to his grand daughter's husband, when the grand-daughter was not married at the testator's death is bad for uncertainty. (*Chitty and Chatterjee, JJ.*) SHYAMA CHARAN BHATTACHARYA *v.* NABA CHANDRA CHAKRAVARTHY.

11 I. C. 634.

——— *Bequest—Restrictions on bequest.*

A testator can give property whether by way of remainder or by way of executor bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. A Hindu, who has a power to transfer his property, though not self-acquired can make a will with a gift over. (*Abdul Raoof and Lunsden, JJ.*) PREM SINGH *v.* HARDIT SINGH.

1923 Lah. 649.

———*Bequest—Charity—Void.*

A bequest or trust for *dharmarth* is void on account of its vagueness. The property designated for such purpose is undisposed of. 23 Bom. 725, Foll. (*Robertson and Rattigan, JJ.*) GURDIT SINGH *v.* SHER SINGH.

78 P. R. 1912 : 63 P. W. R. 1912: 14 I. C. 247 : 106 P. L. R. 1912.

———*Bequest — Void for uncertainty—How construed.*

Per *Srinivasa Iyengar, J.*—A will should be construed, if possible, to give effect to the legacy. The modern doctrine is not to hold a will void for uncertainty if it is possible to give a meaning to it. Per *Wallis, C. J.*—The rules of construction of wills in England are somewhat too artificial to apply to Hindu agriculturists' will. A legacy in a will which does not specify the lands bequeathed out of the properties of the deceased, is not void for uncertainty but should be given effect to by means of partition with regard to good and bad quality. (*Wallis, C.J. and Srinivasa Aiyangar, J.*) BARADWAJA MUDALIAR *v.* KOLANDAVELU MUDALIAR.

29 M. L. J. 717 : 31 I. C. 786 : 19 M. L. T. 141.

———*Bequest—Charity—Cypres — Validity—English Law.*

If a devise in a will can be construed to be a bequest to 'charity' as that word is understood in English Law, the disposition is valid but if it is a devise in the alternative for purposes which are not charitable, though benevolent or philanthropic then the bequest is void. Where the scope and terms of a will indicate an intention to benefit charities or a class of charities generally treating the particular named object of gift as

WILL—Codicil.

instruments for carrying out such general intention, the general purpose of charity will be executed according to the doctrine of cypres. Where a testatrix devised her estate to a trustee that "he of his own judgment give as a donation or apply or invest the balance to or for any person for his use or benefit or to or for any charitable or religious institution or object as he may think proper" *Held*, that the bequest was void for uncertainty. (*Batten and Stanyon, A. J. Cs.*) MRS. ELKINS *v.* REV. DR CULLEN.

40 I. C. 791 : 13 N. L. R. 51.

Codicil.

——*Codicil—Construction—Oudh talukdar's estate—Will binding on talukdari—Codicil not conforming to the law—Binding on the other than the talukdari property.*

An Oudh talukdar executed a will charging a maintenance of Rs. 500 for his wife on the talukdari but before his death executed a codicil, which did not conform to the conditions which would make it binding on the talukdari estate, raising the maintenance allowance to Rs. 1,000 and the talukdar had other properties as well. *Held*, that the codicil could not be construed as merely textually altering the terms of the will by the substitution of Rs. 1,000 for Rs. 500. Even though the codicil stated "from this date to be given Rs 1,000" it should be construed as a wish that the allowance should begin to run at once after death, the idea that the donee was creating an annuity during his own life by *inter vivos* conveyance being opposed to the whole circumstances surrounding the execution of the document (*Lord Dunedin.*) DEPUTY COMMISSIONER OF KHERI *v.* BIJAI RAJ KORR. **20 O. C. 260**

22 C W. N. 305 : 4 O. L. J. 739 : (1918) M. W. N. 324 : 43 I. C. 987 : 8 L. W. 1 (P. C.).

——*Codicil—Revocation of will when operative as revocation of codicil.*

Although a codicil is dependent upon a Will it cannot be deemed to be an integral component of it. The mere revocation of the Will will not operate to revoke the Codicil also. (*Mookerji and Cuming, JJ.*) SURENDRA NATH *v.* SHIADAS.

35 C. L. J. 488 : 1922 C. 182.

——*Codicil—Construction.*

A codicil unless it expressly revokes an earlier codicil or will does not prevent its operation. A codicil does not always operate as if the will was made simultaneously with the codicil. (*Chaudhuri, J.*) ADMINISTRATOR GENERAL OF BENGAL *v.* HUGHES. **21 I. C. 183 : 40 Cal. 192.**

——*Codicil—What is.*

A document signed by the testator which came into the hands of the trustees at the same time and under the same circumstances as the will itself and which gave directions to the trustees is a codicil though there is no reference to the will itself. (*Batten. O. J. C.*) MT. RAMDULARI *v.* BISHWESHWAR DAYAL.

18 N. L. R. 143 : 1923 N. 105.

——Construction.

Absolute estate.
After-acquired property.

WILL—Construction—Absolute estate.

Deed Inter vivos.
Duty of Court
English Rules.
Gift over.
Intention of testator.
Joint power.
Life estate.
Meaning of words.
Personal designate.
Residuary clause.
Vested estate.
Miscellaneous.

Construction—Absolute estate.

——*Construction—Absolute estate—Gift to wife—Sir land — Election — Person claiming under will cannot dispute other bequests*

Where a testator bequeathed to his "wife for life 500 rupees per mensem besides *siratmakbuza* (Sir lands) in her possession". *Held* that the wife took an absolute estate in the sir lands Where a person claims property under a Will and has no title to it apart from the will, he cannot dispute the right of another legatee under the Will. (*Sir John Edge.*) RANI BIJAI RAJ KUNWAR *v.* THAKUR JAI INDRA BAHADUR SINGH.

44 A. 435 : 31 M. L. T. 69 : 9 O. L. J. 385 : 4 U. P. L. R (P. C.) 76 : 25 O. C. 260 : 36 C. L. J. 511 : 49 I. A. 262 : 1922 P. C. 317 (P. C.)

——*Construction —Absolute estate — Devise by one as malik-o-quabiz.*

In a devise by a testatrix as *malik-o-quabiz* the latter term would import full ownership. (*Lord Shaw.*) FATEH CHAND *v.* RUP CHAND.

38 All. 446 : 43 I. A. 183 : 18 Bom. L. R. 900 : 20 M. L. T. 481 : 21 C W. N. 102 : 4 L. W. 507 : (1916) 2 M. W. N. 567 : 37 I. C. 122 . 26 C. L. J. 182 (P. C.)

——*Construction—Absolute estate — Grant of—Absence of words of restraint on alienation —Provision for successive life estates.*

In the absence of words imposing an effective restriction on the estate bequeathed the donee takes an absolute estate, even though the testatrix attempted ineffectually to create a succession of life estates. (*Mears, C. J. and Banerjea, J.*) MARTIN *v.* HIRDEY RAM.

44 A. 397 : 20 A. L. J 266 : L. R. 3 A. 201 : 4 U. P. L. R. (All.) 175 : 1922 All. 120.

——*Construction — Absolute estate—Occupancy rights are not affected by transfers of proprietary rights—Transfer by the heir of the property—Whether conveyed full title.*

Where a legacy was sold by the legatee to the deft. who already had the occupancy right in the land, *held* that in a suit by the remainderman, the deft.s' occupancy right could not be disturbed; but that plff. could get only proprietary possession. Where a widow entitled to only a life-estate in a farming lease of waste land under the will of her husband received from Government full proprietary rights in the property, a transfer by her subsequently conveys full proprietary title to the vendee irrespective of the provisions of the

will in favour of remaindermen. (*Tudball and Rafique, JJ.*) RAJ KISHORE DAS *v.* JAINT SINGH. 36 All. 387 : 23 I. C. 364 : 12 A. L. J. 717.

——*Construction — 'Absolute' estate — Defeasance clause.*

A bequeathed property to her grandson *B*, and directed that delivery of possession should be postponed till *B* had a son or daughter twenty years old. If *B* would die without issue, there was to be a gift over of the property. *Held*, that the direction as to postponement of delivery is invalid and that the grandson got an absolute estate liable to be defeated on his dying issueless (*Macleod. C. J. and Shah, J.*) NAVALCHAND *v.* MANEK CHAND. 62 I. C. 98 : 23 Bom L. R. 450.

——*Construction—Absolute estate.*

A clause in a will that *A* and *B* were proprietors half and half of the whole estate means that *A* and *B* each took an absolute interest in half of the estate. 9 B. L. R. 377, Foll. (*Batchelor and Rao, JJ.*) JEHANGIR *v.* KAIKHUSRU. 9 I. C. 951 . 13 Bom L. R. 141

——*Construction—Absolute estate in earlier part of the will—Restrictions on power of alienation and mode of enjoyment—Effect of.*

A Hindu testator provided in his will that after him his daughter should be malik with power to alienate and to enjoy the property down to her son, grandson, etc. The daughter was to live in the testator's ancestral *bhita* and perform the pujas inaugurated by him and it was provided that she should not otherwise transfer the property, except in the case of unavoidable necessity or for the education of her son, etc. On a question arising as to the nature of the estate taken by the daughter. *Held*, that though the earlier words in the will by themselves would create an absolute estate still considering all its terms it must be held that the earlier part was qualified by the provisions in the other parts of the will and that the daughter got only a limited estate. In constructing a will regard must be had to the central idea of the testator on the whole rather than to isolated expressions in the will. 24 C. 406 14 C.W. N. 458; 18 C. W N. 140; 40 C. 274, dist; 8 C. L. J. 20 ; 12 C. L. J. 391 ; 12 C. W. N. 412 ; 35 C. 896, foll. (*Chatterjee and Cuming, JJ.*) SUKENDRA NATH CHATTERJEE *v.* SAROJBANDU BHUTTACHARJEE. 26 C. W. N. 893.

——*Construction—Absolute estate—Bequest by Hindu to his widow—'Malik'.*

Where a Hindu left a will whereby his widow was to succeed to all his properties as 'malik' with powers of sale and gift and that if the widow found it necessary to sell it she could do so to a stranger if the testator's heirs and co-sharers refused to purchase it for adequate consideration. *Held*, that the word, 'malik,' imports full proprietary rights unless there is something in the contest to qualify it. The fact that donee is a Hindu widow is not sufficient for the purpose. The restraint on alienation in the Will was not sufficient to cut down the plain meaning of the words giving an absolute estate. It only gave the heirs a right of pre-emption. (*Richardson and Chaudhuri, JJ.*) SUDHAMONI DAS *v.* SARATLAL DAS. 66 I. C. 628 : 25 C. W. N. 527.

——*Construction—Absolute estate.*

Where the testator bestowed absolute estate upon his brother and daughter and a portion of the estate upon his widows and to propitiate his brother for this bestowal of absolute estate upon the widow bestowed upon him a greater portion of his estate upon which the brother consented to the will, *held* the estate upon the widow was absolute estate. (*Martineau and Zafar Ali, JJ.*) MT. SHERA KHATUN *v.* MAHOMED ALI SHAH. 1923 Lah. 559.

——*Construction—Absolute estate—Gift to female—"Malik," meaning of.*

Where a Hindu testator died leaving a Will stating that his wife would be malik of, and would have the interest of milkiat in his properties. *Held*, that she took an absolute estate of the property bequeathed. The expression malik is not a term of art and its meaning depends on the context. (*Wazir Hasan, A J. C.*) BIJAI BAHADUR SINGH *v.* MATHURA SINGH. 25 O. C 345 : 9 O. L. J. 327 : 4 U. P. L. R. (O. C.) 66 : 1922 Oudh 278.

——*Construction —Absolute estate—Hindu widow's estate, will by the widow.*

Cl. (1) of a will, gave the testator's wife the whole of the property moveable and immoveable left by him subject to the terms of the will. Cl. (2) provided that she would be the absolute owner of ilaqa in Hardoi, and proceeded "as regards the remaining property, namely, the ilaqa in district Kheri and Maqbuya in District Hardoi, she shall have the rights as sanctioned by the Shastras and shall be in proprietary possession of the same." *Held*, that it was only in respect of the ilaqa in district Kheri and Maqbuya in district Hardoi, that the legatee's estate had been limited to Hindu widow's estate. She was given a full estate in property in cl. 1 with power to dispose of it by will or otherwise. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* SHIAM BAHADUR. 1922 Oudh 231.

——*Construction—Absolute estate—Restriction on alienation.*

Where a testator in terms gives an absolute gift to a legatee and subsequently professes to impose restrictions on alienation by the legatee or his heirs, the restrictions as to alienation are invalid and a legatee will take an absolute estate under the will 18 W. R. 359; 4 Mad. 200. ref. (*Dalal, A.J.C.*) LALA MANNI LAL *v.* RAJA PARTAB BAHADUR SINGH. 9 O. L. J. 19 : 1922 Oudh 22.

——*Construction —Absolute estate— Principles—Widow— Life estate or absolute estate.*

Where the language in which a deed is written is not the language of a trained draftsman or a skilled conveyancer but of an amateur or layman, all that is necessary to interpret such a deed is to give the plain meaning to the words used, neglecting grammatical errors and remembering the limitations and deficiencies of the draftsman. A will executed by a Hindu gentleman in favour of his wife declared that he left his property to her absolutely and entirely and that if she wished to utilise the powers she possessed in order to make an endowment of a religious or

WILL—Construction—Absolute Estate.

a charitable nature such an object would meet with his approval, though if she did this he would be opposed to her giving the manager of the endowment too free a hand. *Held*, that under the above will the testator devised a full complete estate and not merely a life estate to his wife. (*Stuart and Kanhaiya Lal, A. J. Cs.*) GANGA BAKSH SINGH *v* GOKUL PRASAD.
44 I. C. 645 : 4 O. L. J. 744.

——*Construction—Absolute estate—"Malik" and "Varis"—Estate conferred.*

Where in a will executed by a Hindu in favour of his wife, the words "malik" and "varis" occur and there is nothing in the text or circumstances to indicate an intention to cut down the absolute estate clearly and unmistakeably, then an absolute estate must be deemed to have been be queathed. (*Kennedy, J. C. and Kemp. A. J. C.*) TIRATHMAL LOKOOMAL *v.* THAWARSINGH. **66 I C. 720 : 15 S. L. R. 202.**

Construction—After-acquired Property.

——*Construction—After-acquired property.*

A mere use of the present tense as "properties I am in possession of" in the will does not stand in the way of the property passing under the will although the property may have been acquired between the date of the will and the testator's death. Courts will not, where the testator has purported to make a complete disposition of property decide in favour ofan intestacy as to a portion of that property unless there is absolutely no help. A will must be read as a whole and the intention of the testator should be gathered from it. The above rules apply even to wills made in places where the Hindu Wills Act is not law. (*Chitty and Teunon, JJ.*) JITENDRA KUMAR *v.* NRITYA GOPAL. **16 I. C. 831 : 18 C. W. N. 140.**

——*Construction—After-acquired property—Specific immoveables—Right to immoveable property subsequently acquired.*

A Hindu testator executed a will in favour of his son-in-law. The immoveable properties devised were described item by item in the will; the moveables were also described with full details. The testator expressly bequeathed not only moveables then in extstence but such as he might acquire before his death. The properties left to the devisee were described "as moveable and immoveable properties left by the testator and described in the will" and in another place "as properties left." *Held*, that it was not the testator's intention to make a general gift of all the properties which he might die possessed of. His intention was to give only the specific properties mentioned in the will and the will did not vest in the devisee such immoveable properies. as the testator acquired by inheritance after the execution of the will. (*Mookerji and Beachcroft, JJ.*) BAIKUNTHA NATH *v.* KASHI NATH.
16 I. C. 553 (Cal.)

Construction—Deed inter vivos.

——*Construction—Deed* inter vivos—*Registration.*

Where in alleged will contains nothing more than a declaration of an intended adoption which

WILL—Construction—Duty of Court.

was however never carried out and a statement of the wishes of the executant thereafter, and is in the nature of a transaction *inter vivos* and the document is not registered, it is not legally valid. Calling a document a will does not make it a will. (*Lord Moulton.*) TIRUGNANAPAL *v.* PONNAMMA NADATHI. **28 M. L. T. 190 : (1920 M. W. N. 559 : 12 L. W. 660 : 58 I. C. 228 : 25 C. W. N. 511 (P.C.).**

——*Construction—Deed* inter vivos—*Document styled a will but effecting a partition of properties* in praesenti.

A document styled a will but effecting a partition *in praesenti* among all the members of the family, *i.e.*, the sons of the executant was construed as effecting a family arrangement in spite of a clause as to revocation. (*Lord Moulton.*) BRIJRAJ SINGH *v.* SHEODAN SINGH.
35 All. 337 : 40 I. A. 161 : 17 C. W. N. 449 : 11 A. L. J. 698 : 14 M. L. T. 11 : 18 C. L. J. 57 : (1913) M. W. N. 515 : 19 I. C. 826 : 15 Bom. L. R. 652 : 25 M. L. J. 188 (P.C.)

——*Construction — Deed* inter vivos—*Sale deed to come into effect only after death of executant—Effect.*

Where a sale deed has been executed but it appeared that no title was intended to pass until the plff. vendor's death. *Held*, that the document was really intended to be a will and was revocable by plff. at any time (*Ayling and Tyabji, JJ.*) GOVINDASWAMY RAJA *v.* KUPPAMMAL.
31 I. C. 77.

Construction—Duty of Court.

——*Construction—Duty of Court.*

The construction of a will or for the matter of that of any document is the exclusive function of the Court. Omission to ask for a prayer for construction of a will where such construction is essential for the proper disposal of the suit, cannot in any way be fatal to the suit. (*Karamat Hussain and Piggott, JJ.*) RAJENDRA CHANDRA *v.* MANIK LAL. **11 I C. 235 : 8 A. L. J. 1063.**

——*Construction—Duty of Court.*

Regard should be had not to what the testator meant but to the actual wording used. (*Batchelor and Rao, JJ.* JEHANGIR *v.* KAIKHUSRU.
9 I. C. 951 : 13 Bom. L. R. 141.

——*Construction — Duty of Court—Terms clear.*

In the absence of an ambiguity in the terms of a will, the rule that a will by a Hindu must be construed with regard to Hindu habits and notions, has no application. A clear right conferred by a will cannot be deprived by adding what the testator might have been presumed to have intended if certain future contingencies had been in the mind of the testator. (*Sadasiva Aiyar and Spencer, JJ.*) BOMMAYA HEGADE *v.* SRINIVASA HEBBARA. **25 I. C. 900 : 27 M. L. J. 305.**

——*Construction—Duty of Court—Wishes of testator.*

A will should be construed scrupulously regarding the wishes of the tastator. (*Stuart, A. J. C.*) INDERKUAR *v.* CHHEDA SINGH.
6 O. L. J. 88 : 50 I. C. 197 : 22 O. C. 7.

WILL—Construction—Duty of Court.

———*Construction — Duty of Court—Hindu widow—Will by, legality of—Reversioner, affirmation by, when validates will*

A Court is bound to give effect to every word of a will without change or rejection, provided effect can be given to it not inconsistent with the general intent of the whole will taken together, but if that cannot be done, the general intent has to be pursued, though it may involve the rejection or transposition of a superfluous or misplaced word. *Held*, that the words in the will "properties which are or may hereafter be in my possession" included properties which vested in the testator as reversioner after the will and before his death, though the properties were not reduced to possession. A will by a Hindu widow is void and no amount of affirmation by a reversioner can validate it. (*Kanhaiya Lal, A. J. C*) DHAMSA BAKSH SINGH *v* JAGMOHAN SINGH.

32 I. C. 209 : 2 O. L. J. 491.

———*Construction— Duty of Court—Propriety of disposition not for the Court.*

If a will is properly proved to have been executed by the testator it is no business of the Court to enquire into the reasons for giving certain property to persons named in the will and not to others. (*Jwala Prasad and Adami, JJ.*) LAKHIAMAJIN *v.* LOKH NATH DASS.

1 Pat. L. T. 77 : 58 I. C. 437 : 5 Pat. L. J. 147.

Construction—English Rules.

———*Construction—English rules—Parsi will—Heirs—Time of ascertainment of.*

The rule of law in construing wills is to ascertain the intention of the testator as declared by him, and apparent in the words of his will and to give effect to this intention so far as, and, as nearly as may be, consistent with law. Rules of construction developed by the English courts are highly artificial and are inapplicable to the construction of wills in India. 38 I. A. 54 ; 23 I. A. 18, Ref. A Parsi testator died in 1905 leaving his widow *D*, his son *J*, *J*'s wife, two daughters and four grandsons. By his will he directed that after the death of his widow his reversionary estate should be held in trust by his executors and that the income should be paid to *J* for life and on *J*'s death to *J*'s widow and children. There was a further provision that if *J* died without issue, the executors should pay a lump sum to *J's* widow and divide a moiety of the residue among the testator's heirs as if he died intestate excluding *J*'s widow. *J* died without issue and his widow as his administratrix claimed a share of the residuary estate of the testator. *Held*, on the construction of the will, that the testator did not intend that his son *J* should take any interest under the will as an heir and consequently *J*'s wife could not claim a share of the residue. (*Lord Parmoor*). DINBAI *v.* NUSSERWANJI RUSTOMJI.

31 M. L. T. 213 : 37 C L J. 420 : (1922) M. W. N. 787 : 4 U. P. L. R. (P.C.) 105 : 27 C. W. N. 199 : 49 I A. 323 : 49 C. 1005 : 17 L. W. 174 : 25 Bom. L. R 625 : 1922 P. C. 311 (P.C.).

———*Construction—English rules.*

English rules as regard the construction of wills are not applicable to India unless consonan

WILL—Construction—Gift over.

with justice, equity, etc. (*Lord Macnaghten.*) BHAGBATI BARMANYA *v.* KALI CHARAN SINGH.

38 Cal. 468 . 38 I. A. 54 : 15 C. W. N. 393 : 9 M. L. T. 411 : 13 C. L. J. 434 : 21 M. L. J. 387 : 8 A. L J. 433 : 13 Bom. L. R. 375 : 10 I. C. 641 : (1911) 2 M. W. N. 295 (P.C.).

Construction—Gift over.

———*Construction—Gift over—Validity of.*

A gift over by a Hindu on indefinite failure of male issue in the line of donor is void. (*Mr. Ameer Ali.*) PURNA SASHI *v* KALIDHAN RAI.

38 Cal. 603 : 15 C. W. N 693 : 8 A. L. J. 681: 13 Bom. L. R. 451 : 14 C. L. J. 1 : (1911) 2 M. W. N. 403 : 10 M. L. T. 361 : 11 I. C. 412 : 21 M. L. J. 1119 (P.C.).

———*Construction—Gift over—Successive and substitutionary bequests—Absolute estate cut down to life estate—Succession Act, Ss. 82 and 111.*

A testator made a bequest in the following terms :—"On my death my younger brother's widow *B* and on her death her daughter *K* that is my niece, will get one-fourth share, etc." *Held*, the testator did not make a substitutional gift to the niece in the event of her mother B predeceasing him, but that the gift which he made was a gift of successive interests, *i.e.*, the interest was to go first to the brother's widow *B*, and then on her death the property was to go to her daughter *K*. Notwithstanding S. 82 of the Succession Act, the gift in favour of the brother's widow *B* was not a gift of an absolute interest, so that the gift over on her death to her daughter *K*, was not void as being repugnant to the form of the gift to the mother. The apparently absolute nature of the gift in favour of the mother *B* was cut down to a life-estate by the direction that on her death the property would go over to her daughter. (*Fletcher and Huda, JJ.*) HARENDRA CHANDRA LAHIRI *v.* BASANTA KUMAR MAITRA.

43 I. C. 991 : 22 C. W. N. 689.

———*Construction—Gift over—Absolute estate.*

If a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate a gift over is void both as regards reality and personality. (*Mookerjee and Roe, JJ.*) SURES CHANDRA PALIT *v.* LALIT MOHAN DUTTA.

22 C. L. J. 316 : 31 I. C. 405 : 20 C. W. N. 463.

———*Construction—Gift over—Absolute estate—Gift over on death.*

If property is given to a person with power to sell, give away, etc., he takes an absolute interest therein. An absolute gift to a legatee with a gift over on a contingency of death, refers to death before the period of distribution. (*Fletcher and Richardson, JJ.*) NISTARINI DEBYA *v.* BEHARI LAL MOKHAPADYA.

27 I. C. 239 : 19 C. W N. 52

———*Construction—Gift over—Adopted son.*

Where a will authorised the testator's widow to adopt a son and provided that if she died without adopting a son or if the adopted son predeceased her without any male issue the estate after the death of the wife should passed to the testator's sister's son: *held*, that the widow and

WILL—Construction—Gift over.

the adopted son took a qualified interest and on the death of the adopted son without issue and of the widow thereafter the estate will pass to the nephews. (*Jenkins, C. J. and Woodroffe, J.*) BHUPENDRA KUMAR GHOSE *v.* AMARENDRA NATH DEY. **41 Cal. 642 : 24 I. C. 458 : 18 C. W. N. 360.**

———*Construction—Gift over—Sale or gift—Sale for no consideration—Test to be applied—Intention of parties.*

In the case of an ostensible sale for no consideration the test is was the transaction intended to transfer title. If intended to be operative mere postponement of payment does not matter; if however operation was intended to be postponed until payment of consideration, transfer becomes operative only on such payment. In any case, the test is the intention of the parties (*Mookerjee and Beachcroft, JJ.*) KASHIDAS GOSAIN *v.* CHAITHRU PATRAS URAON. **23 I. C. 813 : 19 C. L. J. 239.**

———*Construction — Gift over— Transfer of house by legatee—Condition not impossible of performance—Ultimate gift in favour of agnate or Brahmin void for uncertainty.*

A will of a Hindu provided "upon a son being adopted by my wife he shall, upon the death of the wife, be entitled to all my properties. If an adopted son be not procurable then my daughter's son N should he live in my dewelling-house, will, with his sons, son's sons and other heirs in succession, be entitled to my properties, but if N. or his sons or son's sons, etc., fail to live in my house then my grand-daughter's husband or his son shall upon living in my house be entitled to my properties." There were other limitations over, each being conditioned on residence in the testator's house first to the husband of the testator's daughter's daughter, and then to "any of my agnates or any other Brahmin who may be brought in and settled in my dwelling-house at first by my wife and upon her death by my daughter-in-law" Finally, 'should all these fail, then on the death of my wife and daughter-in-law at first any one of my agnates, then on their failure, any Brahmin who should with his family live in my dwelling house shall be entitled to my properties." *Held*, that N got merely a contingent interest during the widow's life-time the contingency being the death of the widow without adopting, that the residence required was residence after the interest conferred became an estate in possession, and the condition as to residence could not be satisfied if N lived for some time in the house with the widow as he never did in the house after her death and he had put it out of his power to do so by joining with the widow in conveying the house to a stranger and that N was deprived of the interest given him by the will. *Held* also, that the ultimate gift over in favour of an agnate or a Brahmin was void for uncertainty. (*Stephen and Richardson, JJ.*) SHYAMA CHARAN BHATTACHARYA *v.* NABA CHANDRA CHAKRAVARTI. **14 I. C. 708: 17 C. W. N. 39.**

———*Construction—Gift over—Joint tenancy.*

Where a bequest made to two persons, directs that each shall divide it and take it in equal

WILL—Construction—Intention of testator.

shares, there is no gift in joint tenancy. (*Sankaran Nair and Bakewell, JJ.*) ISSAKI AMMAL *v.* MUTHUSAWMY PILLAI.
20 I. C. 632 : (1913) M W. N. 604.

———*Construction — Gift over — Grant to widows and to daughter on their death.*

Where land is granted by a will to two widows and on their death to the daughter, the land given to each widow would on her death devolve upon the daughter. (*Abdur Rahim and Spencer, JJ.*) GOVIND PILLAY *v.* MEENATCHI ACHI.
10 M. L. T. 493: (1911) 2 M W. N. 563: 13 I. C 152: 22 M. L. J. 204.

———*Construction—Gift over.*

Where an absolute estate is granted in a will, a gift over, is void. (*Daniels and Dalal, A. J. Cs.*) RAJESHURI *v.* MATHURA SINGH. **24 O. C. 187: 63 I. C. 348 : 3 U. P. L. R. (J. C.) 59.**

Construction—Intention of Testator.

———*Construction—Intention of testator.*

A will provided :—"I alone am the owner of the properties acquired by * * * * If a male issue be born to me, then he shall remain the owner. Should perchance a son be not born to me, then my heir is Chiranjiv Keshari Singh. Should a heir (i.e.) a son be born to Chiranjiv Keshar Singh, then he shall be the heir in the future. Should perchance no son be born to Chiranjiv Keshar Singh and should it be necessary to bring (a son) from (some) other place, then during the lifetime of my wife (a son) from our Gotra shall be brought (adopted) with the consent of my wife. *Held* the words of the will, "Should perchance a son be not born to me, then in that case my heir is Chiranjiv Keshar Singh," and the subsequent words, "I appoint Chiranjiv Keshar Singh (be) my heir" are sufficient words to pass the property from the date of the death of the testator, and although the subsequent terms of the will as to the adoption of a son with the consent of the testator's wife in the event of no son being bornto the respondent, and other expressions used, may appear to give an unusual authority to the wife, there is nothing in them to cut down the express terms of the will appointing defendant to be the testator's heir. An intention to leave the wife in the same position as if he had died intestate cannot be implied in a case where the testator has made a will in which he has deliberately made no express provision with reference to the plaintiff. (*Lord Carson*) FOOL COOVERBAI *v.* RAI SAHEB KESHRI SINGH RAJMAL. **45 M. L. J. 249: 25 Bom. L R. 621: 18 L.W 153: (1923) M.W.N. 578: 33 M. L. T. 214 (P. C.) L. R. 4 P. C. 151: 9 O. & A. L. R. 799 : 1923 P. C. 112 (P. C.).**

———*Construction — Intention of testator — Direction to make a Will.*

A testator appointed his wife executrix, gave her full powers of management, and an estate for life and directed her to make another Will of her own according to his oral instructions. He also made a gift over, in case his wife would die intestate *Held* the wife got a general power of management uncontrolled by the oral instructions and

WILL—Construction—Intention of testator.

the power was not void for uncertainty. (*Viscount Cave.*) BAI SHRINIBAI *v.* RATANBAI.
45 Bom. 711 : 48 I. A. 69 : (1921) M W. N 165 : 19 A. L. J. 215 : 23 Bom. L. R. 618 : 25 C. W. N 890: 33 C. L. J. 271 : 29 M L T 236 : 14 L. W. 183: 60 I. C. 222: 40 M. L. J 277 (P. C) : [On appeal from 43 Bom. 845 : 51 I. C. 209 : 21 Bom. L. R. 384.]

——*Construction of — Intention of—testator.*

In confirming a will the court's first duty in all cases is to ascertain from the language of the testator what his intentions were. But in doing this, the Court should take into consideration other matters such as the surrounding circumstances, the testator's race, religion, aims, etc. In the case of Indians, the Court should bear in mind the probable ignorance of the testator of the correct legal forms to express his intentions and of the procedure by which his intentions are to be carried out. The court should carry out the testator's intention gathered in this manner and should not add anything not seen to be intended by the testator If a testamentary disposition is against law, it should fail. Where any eventuality has not been provided for, on the happening of the contingency, the ordinary law of succession would supersede the testament. (*Lord Moulton.*) VENKATANARASIMHA APPA RAO *v.* PARTHASARATHY APPA ROW 37 Mad 199 : 41 I A. 51 : (1914) M. W. N. 299 : 12 A. L. J. 315 : 18 C. W. N 554 : 26 M. L J. 411 : 15 M.L.T. 285 : 23 I. C. 166 : 16 Bom. L. R. 328 (P. C.).

——*Construction — Intention of testator—Form of expression.*

In construing wills of Indian people Courts should not regard the form of expression but should regard their intention to be gathered from words used. A will creating absolute interest in its first part and limited interest in favour of the same legatee in the latter part, must be construed as a whole. Only limited interest is created in cases like the above. (*Batchelor, A. C. J. and Shah, J.*) D'SOUZA *v* SERPES.
41 Bom. 70 : 38 I. C. 9 : 18 Bom. L. R. 943.

——*Construction—Intention of testator.*

A will purported to confer an absolute estate in one portion while other clauses indicated a contrary intention, *held* the heir cannot be regarded as given an absolute estate with absolute power of alienation merely upon what is stated in the earlier part of the will entirely ignoring the other provisions of the will, on the ground that an absolute estate having been conferred the other provisions being repugnant to the nature of the estate must be rejected. Importance ought not to be attached to isolated expressions but the court must look to all the clauses of the will and giving effect to all the clauses ignoring none as contradictory or redundant. (*Chatterjee and Cuming, JJ.*) SURENDRA NATH CHATTERJEE *v.* SAROJ BHANDU BHATTACHARJEE.
70 I. C. 923 : 26 C. W. N. 893.

WILL—Construction—Intention of testator.

——*Construction—Intention of testator—Legacy on a condition precedent if takes effect when the condition by reason of subsequent events becomes impossible of performance.*

A testator bequeathed a sum of money to some of his relatives asking them to re-excavate a tank with the money and take the surplus. But the testator himself re-excavated the tank before his death : *Held*, that the re-excavation of the tank was a condition precedent, *i. e.*, there was no gift intended unless the condition was fulfilled. The ascertainment of the testators intention shown by the will cannot be varied by events which occur afterwards. That intention must be determined from the terms of the bequest, and where the performance of the condition appears to be the motive of the bequest the impracticability of the performance will be a bar to the claims of the legatee. In such a case the bequest does not take effect, discharged of the condition. (*Mookerjee and Buckland, JJ.*) RAJENDRA LAL GHOSE *v.* SRIMATI MRINALINI DASI. 26 C W. N. 378 : 1922 Cal. 116.

——*Construction — Intention of testator—Absolute* debuttar.

A will provided "The *sheba* established by my ancestors is performed at my house. It is necessary to make some arrangements for their performance Gokul, my brother's son will attend upon me during my life-time and after my death will perform the acts mentioned in the Will. He (Gokul) shall take on my death all my moveable and immoveable property absolutely. If Gokul does not perform the *sheba* and directs one of my *jnati* who will perform it shall take the property absolutely and Gokul shall not object to it." *Held* the Will gave estate to Gokul subject to the charge of *sheba* and that there was no absolute *debuttar* and the property was liable to attachment and sale in execution of a decree against Gokul. (*N. R. Chatterjee and Panton, JJ.*) MAKHAN LAL SARKAR *v.* GOKUL CHANDRA CHAKRAVARTHI. 62 I. C. 882.

——*Construction — Intention of testator—Perpetual annuity.*

A will provided for the payment of annuity to the legatee, his sons, grandsons and so on in the order of succession, *held*, the Will created a perpetual annuity and the annuity was a charge upon the property. (*Teunon and Newbould, JJ.*) SOBHA KANTA MISRA *v.* KARIMAN HALVAL.
60 I. C. 750.

——*Construction —Intention of testator — Life interest, forfeiture of.*

A Will provided "The...homestead...will remain in possession of my mother but she will not have power to sell it. On her death my heirs will get it. If, in the mean ime she goes elsewhere by leaving my homestead she will not get my property". The mother sold the property in 1867 and left the house. In a suit by heir of the testator for possession from the alienee from the mother *held*, that the intention of the testator was that the interest of the mother should cease in the event of her leaving the house, that there was a forfeiture of the estate in 1867 and that the suit

WILL—Construction—Intention of testator.

brought more than 12 years thereafter is barred. (*N R. Chatterjee and Duval, JJ*) KALI KANTA CHAKRABUTTI *v.* RAJANI KANTA CHAKRAVARTY.
59 I. C. 308.

———*Construction—Intention of testator.*

A father provided in his Will that the share which each son would get on attaining his 26th year "by virtue of partition wilfully belong to him in title after vesting absolutely in his sons and grandsons, etc. and from that time the right of inheritance will vest in his heirs." *Held*, the testator intended each of his sons to take his share as ancestral property. (*Richardson and Huda, JJ.*) MUKTI PROKASH NANDE *v.* ISWARI DEI DEBI. **57 I. C. 858 : 24 C. W. N. 938.**

——— *Construction—Intention of testator—Intestacy or testacy as to a portion.*

When the dispositions in the will taken as a whole, lead to the inference that the intention of the testator was to dispose of all the properties. then if there is any doubt, the will ought, if possible, to be so read as to lead to testacy. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) SAROJINI DASI *v.* GNANENDRA NATH DAS.
33 I C. 102 : 23 C. L. J. 241.

———*Construction—Intention of testator—Bequest to charity — Vagueness — Uncertainty — Cypres.*

In construing a will bequeathing properties to a charity the primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended the funds left by him should be appropriated to that object courts are bound to see that the persons appointed by the testator do not misappropriate the funds. If the Court can ascertain that there was a general charitable intention the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income will not be any reason for holding that the bequest failed either wholly or in part. The doctrine of cypres should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not vitiated If a testator has legally the power to dispose of his property by will his wishes should be given effect to if they are expressed in language which makes it clear what they are and how they should be carried out. When a testator creates a trust it must be for a definite and lawful object. 23 B. 725 ; 31 B. 583 : 31 C. 895 : 37 M. L J. 489, Rel. (*Abdul Raoof and Campbell, JJ.*) SUNDAR LAL *v.* KULLU RAM. **65 I. C. 820.**

———*Construction — Intention of testator—Intention from the document.*

The Court must interpret a will according to the intention which can be gathered from all the clauses in the will. (*Shadi Lal, J.*) NEK MAHOMED *v.* MAYARAM. **32 I. C. 605 : 35 P. W. R. 1916.**

WILL—Construction—Intention of testator.

———*Construction—Intention of testator--Self acquired property of a Hindu left by him to one daughter and on her death to another —Absolute estate to survivor.*

A Hindu willed away his self-acquired property on the terms that it should go to his widowed daughter A, but on her death it was to go to his married daughter B. A predeceased B. It was held that the intention was to make the provision for A for her life if she predeceased B but if A survived B, she was to have absolute estate. A will should not be construed with literal strictness. The Courts should look to the provisions of it with a view to find out the intention of the testator which is to be gathered from the general tenure of the document. (*Johnstone and Rattigan, JJ.*) RAMACHAND *v.* DEVANCHAND.
65 P. R. 1912 : 99 P. L. R. 1912 : 13 I. C. 571 : 209 P. W. R. 1912.

———*Construction—Intention of testator — Hindu testator.*

The Wills of Hindu testators should be construed with reference to their ordinary notions of Hindu Law in the absence of reasons for supposing that he clearly intended to depart from them. Where a Hindu testator provided by his Will that his two wives ought to take the properties in parts without alienation, and after their death his daughter should take the entire properties, *held*, that on the death of one of the widows, the other took thewhole estate for life-time andonly after her death, the daughter gets the entire estate. (*Wallis, C. J. and Krishnan, J*) ACHAMMAL *v.* NARAYANASAMI NAICKEN. **14 L. W 532 : 69 I. C. 5 : (1921) M. W. N. 695 : 41 M. L. J. 329.**

———*Construction--Intention of testator—Two testamentary papers inconsitent— Construction.*

Where a testator left two inconsistent testamentary papers but the one did not expressly revoke the other ; *held* that the two documents should be read together and the intention of the testator gathered therefrom. If, judged by that test, the two legacies are inconsistent and could not have been intended to be cumulative the intention must be taken to be that the earlier Will should be revoked. (*Ayling, O. C. J. and Odgers, J.*) CHINNAPPA *v.* KAILASAM.
41 M. L. J. 661 : 14 L W. 570 : 68 I. C. 11 : 1921 M. W. N. 812.

———*Construction — Intention of testator—Testator having limited interest in property.*

The intention of a testator having a limited interest in property and purports to dispose of the property itself can be gathered only to the extent of his limited interest : and if it is sought to carry the disposition further, it must be shown that he intended to dispose of more than his interest. Regard may be had to the context of the will and the inaptitude of the testamentary limitations if applied to the testator's actual interest. (*Ashworth, A. J. C.*) MAHESA *v.* RAMESHWAR.
26 O. C. 329 : 10 O. L. J. 24 : 1923 Oudh 173.

———*Construction—Intention of testator.*

In all cases the primary duty of a court is to ascertain the true intention of the testator from an examination of the entire will. The court is in fact entitled to put itself into the testator's

WILL—Construction—Joint power.

chair and say having regard to the language used in the different clauses, when read together what the testator's intention was. (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) MOHAMAD YAKUB KHAN *v.* MAHAMAD SHAHID ALI KHAN.

25 O. C. 21 : 9 O. L. J. 160 : 1922 Oudh 87.

Construction—Joint power.

——— *Construction—Joint power to* personae designatae—*Death of one.*

If two *personae designatae* are to do an act if and when they think fit and one of them dies the power is incapable of being exercised by a survivor. *Obiter* :—Where the power is vested in the occupants of an office. (*Lord Parker.*) VENKATA NARASIMHA APPA ROW *v.* PARTHASARATHY APPA ROW.

41 I. A. 51 : 17 C. W. N. 1221 : 14 M. L. T. 259 : 18 C. L. J. 393
21 I. C. 339 : (1913) M. W. N. 791 : 15 Bom. L. R. 1010 : 25 M. L. J. 386.

——— *Construction—Joint power—Administration—Panchas.*

Where the will directed six persons to be Panchas of whom one was to supervise the work of administration and Panchas were given power to appoint other Panchas. *Held*, that power could only be exercised by the whole body of Panchas. Evidently the testator had never intended that Panchas should have the power to appoint other Panchas by will because it was intended by the testator that they should exercise that power as a body. That would exclude any power to appoint by will. At the most one pancha would be a person who might apply for letters of administration *de bonis non.* (*Macleod, C. J. and Crump, J.*) SHANKER GANPAT *v.* DAMODAR. **1923 Bom. 216 (1).**

——— *Construction—Joint power — Right of survivorship.*

An annuity to two persons means that on the death of one of them the other should get a proportionate amount. But where there is a contrary intention the gift is a joint gift with right of survivorship *inter se.* (*N. R. Chatterjee and Panton, JJ.*) HEMANTU KUMAR *v.* SUDHANGSU GOBIND. **62 I. C. 436 : 25 C. W. N 262**

Construction—Life estate.

——— *Construction—Life-estate— Reversionary trust to a particular legatee—Estate, when becomes vested.*

Where there is a gift after prior interests to persons living, the word "then" refers most naturally to the last antecedent. A Parsi testator by his will devised a house to his wife for her life and directed that after her decease his executors should hold the house in trust for his son J for life and in the event of J's death in trust for J's widow and for J's issue and in default of such issue, the testator's son K "if then living". J died unmarried in the lifetime of the testator's widow, and of K. *Held*, that upon the death of J the house vested absolutely in K, subject the life interest of the testator's widow. *Archer* v. *Jegon.* 8 Sim. 446. *Milne*, In re, 57 L. T. 828. Rel. on. (*Lord Phillimore.*) KAIKHUSHRU BEZONJI NANABHOY CAPADIA *v.* SHRINIBAI BEZONJI CAPADIA

43 Bom. 88 : 21 Bom. L. R 130 : 23 C.W.N. 419 : 51 I. C. 481 : 9 L. W. 485. (P. C.).

WILL—Construction—Life-estate.

——— *Construction—Life-estate— Gift over — Rules of construction—Justice, equity and good conscience—English law.*

An Englishman domiciled in India died in November 1864 leaving a will made in October whereby he bequeathed his Zemindari to his eldest illegitimate son and to his lawful male children, "and in the event of my eldest son dying without lawful male children the above mentioned Zemindari shall descend to my next male heir and should all my sons die without lawful male children to my female children. . . . . ." "The eldest male son, who was 14 years of age in 1864 died in 1900 without male issue. *Held*, on a construction of the will that the testator's intention was not to confer an absolute estate on his eldest son but merely to constitute him a tenant for life. The will to which the provisions of Succession Act did not apply, must be construed not according to the artificial rules of construction adopted by the English Courts of Equity but according to justice, equity and good conscience. (*Lord Shaw*) RICHARD ROSS SKINNER *v.* KUNWAR NAUNIHAL SINGH. **35 All. 211 : 40 I. A. 105 : 25 M. L. J. 111 : 1913 M. W. N. 500 : 13 M. L T. 488 : 11 A. L. J 494 : 17 C. L. J. 555 : 15 Bom. L. R 502 : 19 I. C. 267 : 17 C. W. N. 853. (P. C.).**

——— *Construction — Life-estate — Power to dispose of residue—Power in the nature of trust.*

A testator by his will appointed his wife sole executrix and gave her his property for life and empowered her to dispose of his estate" as I have directed her orally and according to the times, *i.e.*, as circumstances demand." *Held*, that the widow took only a life estate that the words 'as have directed her orally and according to the times, *i.e.*, as circumstances demand" indicated the existence of special directions as to the objects in whose favour the power was to be exercised and did not confer a testamentary power. On the death of the testator's widow there was an intestacy as regards the property of the testator in her hands and undisposed of at her death. (*Scott, C. J. and Macleod, J.*) SHRINBAI *v.* RATANBAI.

43 Bom. 845 : 51 I. C. 209 : 21 Bom. L. R. 384.

——— *Construction—Life estsate—Gift over to daughters—Surviving daughter—Vested remainder—After-acquired property.*

A Hindu testator in disposing of his self acquired property by will, excluded his son and bequeathed it to his son's wife as follows :—" If I die, my son's wife Bai Ganga is the owner of the above-mentioned immoveable and moveable properties. The said Ganga shall during her lifetime spend and use and enjoy out of my property and as to whatever property may have remained over after her decease, her two daughters are the owners thereof." At the date of the will, Ganga had two daughters but one of them died and a third daughter was born to her before the death of testator. *Held*, that the property acquired subsequent to the will was not intended to be disposed of, that Ganga took under the will an estate for life with power of disposal in her lifetime that the daughter who was the survivor of the two named in the will took a vested interest in the whole

WILL—Construction—Life estate.

residue which was both heritable and transferable. (*Scott, C. J. and Batchelor, J.*) MAFATLAL *v.* KANNAYA LAL. **30 I.C. 915 : 17 Bom. L. R. 705**

———*Construction—Life estate— Reservation of—Instrument reserving life-estate to maker not a will.*

Any instrument which confers or reserves a life-estate to the maker can hardly in strictness be called a will. (*Beaman, J.*) PIRSAB *v.* GURAPPA. **38 Bom. 227 : 24 I. C. 716 : 16 Bom. L. R. 111.**

———*Construction — Life estate— Limited estate—Disposition to Hindu wife—Estate taken by her.*

Where a will recited "my wife should be heir to everything and she and *M* should live amicably as of one family and if they cannot then *M* should be paid Rs. 4,000 and my wife should enjoy all the remaining properties, etc." *Held*, that the use of the words "should be heir" and which remain in the testamentary disposition cannot confer a larger estate on the wife than she will take under the Hindu Law and that she took only a limited estate. (*Ayling and Seshagiri Aiyar, JJ.*) RATNA CHETTIAR *v.* NARAYANASWAMI CHETTIAR. **24 I. C. 796 : 26 M. L. J. 616.**

———*Construction—Life estate--Creation of —Remainder, vesting of.*

Whenever a life estate is created by will the remainder cannot remain in suspense but must vest in some one. (*Daniels and Lyle, A. J. Cs*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD **25 O. C, 189 : 9 O. L. J. 235 : 1922 Oudh 236.**

Construction—Meaning of words.

———*Construction — Meaning of words — Analogy.*

It is always dangerous to construe the words of one will by the construction of more or less similar words in a different will. (*Sir John Edge.*) SASIMAN CHOWDHURAIN *v.* SHIB NARAYAN. **3 Pat. L. T. 133 ; 26 C. W. N. 425 : 1 P. 305 : 15 L. W. 434 : 42 M L. J. 492 : 24 Bom. L. R 576 : 35 C. L. J. 427 : 20 A.L.J. 362 : (1922) M. W N. : 368 : 30 M. L. T. 242 : 49 I. A. 25 : 1922 P. C. 63 (P.C).**

———*Construction — Meaning of words "Family"—Cash "— Interpretation of words— Decisions on.*

The word "family" is elastic and capable of different interpretations, but there was no reason in the particular case for extending it to include people other than those existing when the testator died. Where the will clearly stated that there-venues and rents of stated properties are to be applied in a particular manner with a direction for accumulation of surpluse income, and then continued with a provision that out of the income of such fund the shebait should have power to celebrate religious ceremonies, the word "such fund" included the added accumulations and was not confined to the original debutter fund. The decisions which assign a particular meaning to any word in a will, only assign that meaning in connection with the terms of the will and that meaning is always capable of modification and alteration if it be seen that the limited meaning was not intended. "Cash" may have a wider

WILL—Construction—Meaning of words.

meaning than coin or money on hand. (*Lord Buckmaster.*) GNANENDRA NATH DAS *v.* SUNDRA NATH DAS. **24 C. W. N. 1026 : (1920) M W. N. 550 (P.C.).**

———*Construction — Meaning of words— 'Aulad' — 'Khandan' — Illegitimate sons if legatees—Bequest to illegitimate children treated as Hindu, but of Mahomedan birth.*

A Hindu testator of the Kshatriya caste had an illegitimate son *J* by a Mahomedan mistress whom he brought up as a Hindu, got him married to Kshatriya ladies one after another, treated these marriages as lawful marriages and the offspring of the union as legitimate, and was anxious that others should treat *J* as a Hindu, his marriages with Kshatriya ladies as proper, and the offspring as legitimate. The testator made a will to the effect that the income from certain properties should go for the maintenance of *J* and his "aulad" from generation to generation as long as his Khandan (family) was in existence. *J* died leaving a son born of the Kshatriya lady and several others born by Mahomedan concubines. *Held*, on a construction of the will the son of *J* by his Khastraya wife took the estate and the illegitimate sons of *J* by the Mahomedan concubine were not intended to be included in the term "aulad" and could not take under the will. Whether the son of *J* by his Kshatriya wife was in law a legitimate son or not, he was so considered by the testator. The word "aulad" should be given its *prima facie* significance of a "legitimate issue." Nor was there any reason for extending the meaning of "khandan" which normally refers to the group of descendants who constitute the family of the progenitor so as to include illegitmate offspring. Where a gift is made by will of the corpus of a fund or of a life interest in the fund to the children of the testator or of another as a class, there may be good reason in such cases for holding that in India, the word children includes illegitimate children. (*Lord Atkinson.*) SHER BAHADUR *v.* GANGA BAKHSH SINGH. **36 All. 101 : 41 I A 1 : 17 O. C. 68 : 18 C. W N. 401 : 15 M. L T. 169 : (1914) M. W. N. 184 : 12 A. L. J 188 : 19 C. L. J. 277 : 1 O. L. J. 109 : 22 I. C. 293 : 16 Bom. L. R. 306 : 26 M. L. J. 291 (P. C.).**

———*Construction—Meaning of words—Doubtful.*

Where the meaning of the words of defeasance in a Will is doubtful, a construciton most favourable to the heir will be adopted. (*Macleod, C. J. and Shah, J.*) NAVALCHAND *v.* MANEKCHAND. **62. I. C. 98 : 23 Bom. L. R. 450.**

———*Construction — Meaning of words— "Will shall not have any effect"—Codicil.*

Held that the word the "will shall not have any effect" in a codicil meant only that the payment directed was not to be made to the persons mentioned till 2 years after the death of the testator but they did not prevent the accrual of the right of the legatees. (*Chaudhury, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* HUGHES. **21 I. C. 183 : 40 Cal. 192.**

WILL—Construction—Meaning of words.

—— ——*Construction — Meaning of words*— 'Malik'.

'Malik' implies absolute ownership unless there is anything in the context or the surrounding circumstances to qualify such meaning and the word cannot be said to be so qualified by the mere fact that the donee is a widow (*Broadway and Abdul Raoof, JJ.*) MOHAN LAL *v.* NIRANJAN DAS. **60 I. C. 619**

——*Construction — Meaning of words* '*Malik*'.

The words 'shall be malik' in a Hindu will import the bequest of a heritable and alienable estate, unless the context indicates a different intention and clear and ambiguous dispositive words are not to be controlled or qualified by any general expression of intention. A will gave certain property to *X* and *Y* in equal shares and recited that they shall be *maliks* and *kabil* thereof and went on to say and that share of *Y* shall be entrusted to *X* as *Y* is subject to fits of epilepsy. In case he dies on account of the said disease his wife shall be entitled to maintenance and all the brothers shall be owners of the property in equal shares. The words "in case he dies" must be construed as meaning" in case he dies without issue before me" and that *Y*'s son was entitled to succeed to his father's share under the will. (*Johnstone, C. J. and Shadi Lal, J.*) UDHORAM *v.* MEHR CHAND. **38 I. C. 652 : 114 P. R. 1916.**

——*Construction—Meaning of words in.*

Per *Ramesam, J.*:—The words "my landed property" in a Will, mean all the immoveable property of the testator at his death. (*Wallis, C. J. and Ramesam, J.*) SEERANGATHANNI *v* VAITHILINGA MUDALIAR. **(1921) M W. N. 248 : 29 M. L. T. 281 : 13 L. W. 392 : 63 I. C. 104 : 40 M. L. J. 532.**

—— ——*Construction--Meaning of words—Devise of land—Mortgage interest, if passes.*

A Hindu devised to his wife his one-fourth share in a mitta in the belief that he was absolutely entitled thereto. On the testator's death it appeared that he had only a mortgagee's interest in the mitta along with other equal shares. *Held* that the testator's intention was to dispose of whatever interest he had in the mitta in favour of his widow and that his mortgage interest passed to her. In India, there is no distinction between reality and personality as to descent and the question of ascertaining the testator's intention from the terms of the will is less complicated than in England (*Wallis, C. J. and Spencer, J.*) SUBBARAYA GOUNDAN *v.* MUTHAYAMMAL. **49 I. C. 260 : 35 M. L. J. 684.**

——*Construction—Meaning of words—Representatives.*

A bequest to two persons, their heirs, executors, administrators upon trust that they and the survivor of them ; her heirs, executors and administrators shall receive the rents and profits and pay an allowance to the testator's adopted son and the balance to his wife during her life and after her death to his daughter-in-law. A during her life and after death to his heirs, executors, administrators and representatives with an injunction against alienation. *Held*, the words 'heirs, executors, administrators and representatives," are words of purchase and not of limitations. The words 'after daughter in-law's death' have direct reference to death of *R* and indicate the beneficiaries are to be determined on her death. The word "representatives" includes all persons who would take the estate upon her death *testate* or *intestate* whether they are appointed by will or by Court. The intention of the testator was to tie up his property and create a perpetual trust and so it is void. 11 Cal. 684, (P. C.) Foll. (*Bakewell, J.*) KRISHNAMMA BOYEE *v.* GOPAL RAO **24. I. C. 485; 15 M. L. T. 405.**

WILL—Construction—Persona designata.

——*Construction — Meaning of words — General intent—Particular words.*

A Court is bound to give effect to every word of a will without change or rejection if effect can be given to it not inconsistent with the general intent of the whole will taken together. If that cannot be done the general intent has to be pursued though it may involve the rejection or transposition of a particular superfluous or misplaced word. Property "moveable and immoveable before mentioned which is or may hereafter be in my possession" includes a reversionary interest on the date of the bequest although the testator in his lifetime did not take any steps to acquire its possession. (*Kanhaiya Lal, A. J. C.*) UHAMSA BAXSH SINGH *v* JAGMOHAN SINGH. **32 I. C 209 : 2 O. L. J. 491.**

——*Construction—Meaning of words.*

When a Hindu uses about himself or his property terms which have a special meaning in Hindu Law he must unless the contrary be established be held to use them in their special meaning (*Leggatt, A. J. C.*) GOKAL DAS *v.* CHANDA BAI. **10. I. C. 967 : 4 S. L. R. 225.**

Construction—Persona designata.

——*Construction* — Persona designata—*Adopted son—Adoption not proved.*

The wife's brother's son of the testator lived with him for many years. The testator adopted him as his son and made a gift of the bulk of the property to him in 1891 and put him in possession. Years later he executed a will in his favour describing him as an adopted son. *Held*, that having regard to the circumstances it was not the intention of the testator in bequeathing the property to the deft. to give him only in the capacity of an adopted son, and that the bequest was to a person designated. (*Walsh and Ryves, JJ.*) KHUB SINGH *v.* RANJI LAL. **41 All. 666 : 52 I. C. 311 : 17 A. L. J. 853.**

——*Construction*—Persona designata—*Naikin—Adoption of daughters.*

A, a Naikin made a will in favour of *B*, a daughter of her near relative, stating that she had adopted *B*, and that her property was to go to her. *Held*, *B* was not to take the property as the adopted daughter but that *B* was the special object of *A*'s bounty, *B* took as *persona designata* though the adoption was invalid in law. (*Batchelor and Rao, JJ.*) HIRA NAIKIN *v.* RADHA NAIKIN. **37 Bom. 116 : 17. I. C. 834 : 14 Bom L. R. 1129.**

WILL—Construction—Persona designata.

——*Construction*—Persona designata.

A provision making all the provisions in the will applicable to the Palak son is too vague to be susceptible of the interpretations that there was a gift to the Palak son, even as a *persona designata* (*Batchelor and Rao, JJ.*) JEHANGIR *v.* KAIKHUSRU. **9 I. C. 951 : 13 Bom. L. R. 141.**

——*Construction — Persona designata — Gift to adopted son—Adoption invalid—Effect.*

Where a testamentary disposition contains a gift to an adopted son, but the adoption fails courts have to consider whether under the circumstances of the particular case whether the adoption was the reason or motive for the gift or whether the mention of the donee adopted son was merely description, in which latter case he would still take. (*Shadi Lal C.J and Lumsden, J.*) ISHER SINGH *v* SURAT SINGH.

4 Lah. 356 : 1924 Lah. 103.

Construction—Residuary clause.

——*Construction—Residuary clause.*

Testator appointed his wife the only executrix and entrusted all his property to her with instructions in giving his sons and daughters their shares as directed below. After termination of twelve months from her death the property left by her as residue was to be devided equally between his soos and daughters. Clause (12) of the will provided :—"After payment of all the (above mentioned) sums and legacies shall have been made as to whatever (property) there my remain over all that belongs to my wife Bai Manekbai and (I hereby) give (the same) to her". A question having arisen where she was the residuary legatee under the will by virtue of the said clause *Held*, that she was the testator's residuary legatee under his will within Ss. 196 and 197 of the Succession Act. Cl.(12) of the will guarded against contingencies such as lapsed shares and the residue under the gifts went to the testator's son and daughter. What the testator proposed was that on his wife's death the property which she had not disposed of in her lifetime by any act *inter vivos* was to go substantially to his children ; and as all the sons and daughters lived after the testator or left issue who survived him, they took vested interests and were the parties to take under the testator's will on the death of the widow. (*Marten, J.*) RUSTOMJI FRAMJI LENTIN, *In re.*

22 Bom. L R. 355.

——*Construction—Residuary clause—Fund in existence unknowns-to testator.*

Where the testator apecified the property and there was a residuary clause, the clause does not apply to the property unknown to the testator and it goes to the heirs as on an intestacy, *Obiter* The residuary clause in the form in which it appears in English wills, is practically unknown to the ordinary testator in Madras, and the rules of construction laid down by English Courts are not applicable. (*Bakewell, J.*) KUNTHALAMAL *v.* SURYAPRAKASAROYA MUDALIAR.

38 Mad. 1096 : 31 I. C. 494 : 29 M L. J. 682.

Construction—Vested estate.

——*Construction—Vested estate.*

A will provided maintenance for the daughters in the following terms :—" When they will be

WILL—Construction—Miscellaneous.

married and if they desire to live in separate houses the person in whose management the property is, will make a separate houses for them. For their maintenance I fix an allowance of Rs. 600". *Held*, on the construction of the will the payment of the maintenance is not contingent on the marriage of the ladies and that they would be entitled to maintenance even though they were not named, in the lifetime of the testator. S. 11, of the Succession Act having no application. (*Lord Mersey*) CHANDRA KISHORE ROY *v.* PRASENNA KUMARI DASI.

38 Cal. 327 : 15 C. W. N. 121 : 38 I. A. 7 : 9 M L.T. 71 : (1911) 2 M. W. N. 30 : 13 C. L J. 58 : 8 A. L. J. 96 ; 13 Bom. L. R. 67 : 4 Bur. L. T. 65 : 9 I. C 122 : 21 M. L. J. 116 (P. C.)

——*Construction—Vested estate—Bequest of profits in perpetuity—Grant of corpus.*

When the words in the will do not indicate that the legatees are specifically debarred from claiming proprietary interest. a bequest of the profit of property in perpetuity vests the property itself in the legatees. (*Dalal, J C. and Neave, A. J, C.*) MAHOMED AHSAN ALI *v.* MASUD ALI.

10 O.L.J. 339 : 1924 Oudh 149.

Construction—Miscellaneous.

——*Construction—Bequest to two brothers.*

A devise of property by a maternal grand father in favour of two grandsons, without specifying what share each was to take, creates only a tenancy in common and not a joint tenancy. (*Walsh and Lindsay, JJ.*) RAM PIARI *v.* KRISHNA PIARI. **43 All. 600: 63 I. C. 301: 19 A. L. J. 608.**

——*Construction*—Postobit *bond--Revocation.*

The deceased, a few years before his death, executed a document which contained the following terms: "Owing to my health becoming weak day by day I give this paper in writing of my free-will that you will kindly accept Rs. 10,000 for the fee for the nursing which you have done for me and my family for 10 to 12 years and Rs. 10,000 a present from me in all Rs. 20,000 to be paid after my death out of my estate." In a suit by the plaintiff for recovery of the said sum of Rs.20,000 as being due to her under the will of the deceased, the defendants, executors, contended that the plaintiff attended only once on the deceased as a nurse for which she had been paid, that the relations between the plaintiff and the deceased were of an immoral character and that the document which was of a testamentary character had been revoked by the last will of the deceased. The document was held by the court as not being a *postobit* bond but one of a testamentary character and that the testator had by a later will effectively revoked the provision of this document and viewed as a bond. it was not enforceable because the consideration was immoral and illegal.(*Macleod, C. J. and Crump, J.*) HUSSEINALI CASAM MAHOMED *v.* DINBAI

25 Bom. L R. 252: 1924 Bom. 135.

——*Construction —Technicalities — Reference to other wills.*

A will made in India by a native of India should not be construed very strictly or technically.

WILL—Construction—Miscellaneous.

The true intention of the testator has to be ascertained from the whole clause To construe one will with reference to expressions of more or less doubtful import in other wills in reported cases is unprofitable. (*Davar, J.*) SARDAR NAVROJI *v.* PULBI BAI. **37 Bom. 644: 19 I. C. 832: 15 Bom. L. R. 352.**

——*Construction— Guardian, appointment of, by implication.*

The words of the will in this case were held sufficient to constitute the executor the guardian of the persons and properties of the minor sons of the testator. (*Fletcher and Newbould, JJ.*) DHANONJOY BUNJA *v.* NINAI CHAND DAS. **42 I. C. 574: 21 C W. N. 1134**

——*Construction—Conditional gift—Condition impossible of fulfilment—Effect.*

A testator granted an annuity to his wife by a clause in the will that on her living permanently in his house or family dwelling house she would get for maintenance Rs. 50 per month out of the estate up to the end of her life but she would forfeit the gift by residing in her father's house or any where except his house. The will further provided that he had then no family dwelling house but he or his executors should build one: No house was built by the testator or by the executors. *Held*, the widow should get the annuity if she lived elsewhere than her father's house, though not in the abode of the testator. (*Fletcher and Richardson, JJ.*) SATISH CHANDRA NEOGI *v* SARAT SUNDARI DEBYA. **38 I. C. 103.**

——*Construction—Intestacy.*

A bequest of the absolute estate to the widow who was pregnant at the execution of the will providing that in the event of a son being born, he would take his father's place as owner provides only for an absolute estate to the widow on condition of a son not being born, and so in case a son had been born and died during the testator's lifetime there was an intestacy. 31 Mad. 310; 33 Cal. 947; Dist., 16 Cal 283. Con. (*Reid, C. J.*) PREM KUAR *v.* JAGAT SINGH. **15 P. W R. 1911: 9 I. C. 742: 175 P L. R. 1911.**

——*Construction— Power to sell includes power to mortgage.*

Where power of sale is given by a will to a person he has implied power to mortgage. (*Schewabe, C. J. and Wallace, J.*) PARTHASARATHI NAIDU *v.* MUKUNDAMMAL. **43 M. L. J. 551: 45 M. 867: 16 L. W 670: (1922) M. W N 729: (1923) M. W. N. 14: 1923 M 84.**

——*Construction—Ratification—Partition.*

Where a testator by his will declared that the share given to him in a partition deed between the co-parceners in his Tarwad was to be taken by his heirs on his death if he died not question the partition in his lifetime and died without questioning. *Held*, that silence on the part of the testator amounted to ratification of the partition and that as a conditional ratification of the partition it was valid. (*Wallis, C. J and Seshagiri Aiyar, J.*) KALLIANI AMMAL *v.* NARAYANA MENON. **45 I. C. 758: (1918) M W. N. 38**

——*Construction—Authority to adopt—Implied authority.*

WILL—Construction—Miscellaneous.

The prohibition to adopt may be express or implied. A provision in a will by a testator that 'if by divine favour I happen to have a child of the male sex" means only a natural son and does not confer an authority to adopt even by necessary implication. (*Abdur Rahim, Offg. C. J. and Phillips, J.*) SHIYALI SUBBAYA CHETTY *v.* CALVE SUBRAYA CHETTIAR. **21 M. L. T. 315: 37 I. C. 404: 5 L. W 740**

——*Construction — Tenants-in-common—Survivorship.*

Where the legatees of a will took as tenants-in-common the survivor of them cannot retain the whole merely because he happened to be the *Karanavan* of the Tarwad. (*Trotter and Seshagiri Aiyar, JJ.*) PARAKKAL ARIPPAYIL KADER *v.* PARAKKAL ARIPPAYIL PAKKEARMMAR. **33 I. C. 988: (1916) 1 M. W. N. 190.**

——*Construction—Lagacy—Charge on moveable property.*

A will provided that a certain stipend was to be paid to a person out of the testatrix's allowance from *Wasika* and notes, etc., and that the whole of her landed property was to be divided among relations. *Held*, that the stipendiary must look for payments only to the fund consisting of the notes and the testatrix's moveable property and not to the immoveable property. (*Lindsay, J. C.*) AMIR MIRZA *v.* HAIDER MIRZA. **28 I. C. 217: 2 O. L. J. 113.**

——*Construction—Property bequeathed for performance of ceremonies—Stranger—Rights of.*

The testator by his will directed that defts. 1 and 2 who had lived with him as his own children should get the residence of his estate, namely, 1 bigga and 5 Kathas of land and that they should sell the property and perform his shradhs with the proceeds. The children were minors and the shradh ceremonies were validly performed by a volunteer: *Held*, that defts. 1 and 2 nevertheless took the property freed from the burden and there was no intestacy as regards that property. (*Ross, J.*) MOTI LAL *v.* RAM KHELAWAN DAS. **1924 P. 171.**

——*Construction—Gift—Transfer of property in* presenti.

In dealing with the internal evidence of a document upon its own character, neither the reservation of property to the testator nor the alleged delivery of possession to the legatees are in themselves sufficient to destroy the character of the document which purports to be a will. Nor is there any authority for the proposition that actual delivery of possession to beneficiaries is fatal to a testamentary bequest It is no doubt evidence against the disposition being testamentary but it is not a fact that *per se* annuls its testamentary character. As evidence, it can be rebutted by other evidence. It is a natural and intelligible position that a testator may wish to put his legatees in immediate possession to test the success of the disposition, to avoid disputes as to the interpretation of the Will and to familiarise the beneficiaries with their eventual properties. Courts must necessarily recognise such temporary possession

WILL—Construction—Miscellaneous.

as not incompatible with a will, provided that the disposition to which possession was given effect to is unmistakeably revocable and that possession is not intended to confer a permanent interest during the testator's lifetime. The essential of a gift is that the donor should intend immediately to divest himself of the property. In the present case the executant specifically reserved to himself in the deed the right of modification and did not so divest himself. *Held*, the document was a will and the contention that it was not acted upon as such because possession was given under it, cannot be maintained. (*Pipon, J. C.*) YUSAF KHAN *v* MISAL KHAN. 73 I. C. 99.

——— *Construction—Rules.*

In construing wills the test is what did the testator mean having regard to the words used. One of the cardinal rules in construing a will is to avoid an intestacy whether wholly or partially. (*Raymond and Madgaskar, A. J. Cs*) NARAINDAS *v.* TEK CHAND. 1923 Sind 42

——— *Construction—Period of vesting—Exclusion from inheritance.*

Held, on a construction of the will that the testator intended that his son's widow should be entirely excluded from any share in the distribution whether as heir of the son or otherwise. It is open to the testator to direct the class of heirs or next of kin to be ascertained at any time and in any manner he chooses. (*Fawcett, A.J.C.*) DINBAI *v.* NUSSERWANJI MEHTA. 28 I. C. 481.

Essentials.

——— *Essentials of—Testamentary instrument—Disposition of property*

Where a Hindu by an instrument styled a will, appoints executors gives his wife authority to adopt and makes certain dispositions of property over which he had disposing power on that date, the document is a will. (*Lord Wrenbury.*) VENKATANARAYANA PILLAI *v* SUBBAMMAL.

39 Mad. 107: 43 I. A. 20: 20 C. W. N. 234 : 3 L. W. 177: 19 M. L. T. 147: 14 A. L. J. 178 : (1916) 1 M. W. N. 97 : 23 C. L. J. 366 : 18 Bom. L. R. 372 : 32 I. C. 373 : 29 M. L. J. 851 (P. C.).

——— *Essentials of—Testamentary disposition—What constitutes.*

A talukdar in 1862 in compliance with the directions issued by the Government, declared that "I wish and file this application, that after my death Umrao, the eldest son (sic) (shall succeed.) My estate should continue in my family undisposed in accordance with the custom of *rajgaddi* and that the younger brothers should be entitled to maintenance from *gaddi nashin*". *Held*, that there was a valid testamentary disposition by the talukdar of his estate in favour of his eldest son. (*Lord Macnaghten.*) UMRAO SINGH *v.* LACHMAN SINGH.

33 All. 344 : 38 I. A. 104 : 14 O. C. 133 : 15 C. W. N 497 : 8 A. L. J. 465 : 13 C. L. J. 519 : 9 M. L. T. 507 : 13 Bom. L. R. 404 : (1911) 2 M. W. N. 242 : 10 I. C. 285 : 21 M. L. J. 637 (P. C.).

——— *Essentials of—Instructions as to disposal of property—Document written by Cutchi Memon.*

WILL—Executor.

A document written by a Cutchi Memon in the nature of instruction to be given to his legal adviser for disposition of his property among his relatives, may operate as a will. (*Marten, J.*) SARABAI *v* MAHOMED CASIUM.

43 Bom. 641 : 49 I. C. 637 : 21 Bom. L. R. 49.

——— *Essentials of—Nomination of successor by mahant.*

Document by mahant appointing his successor is not a will. (*Chitty and Teunon, JJ.*) MADHUSUDHAN DAS *v* JAGADINDRA NATH ROY.

27 I. C. 24 : 20 C. L. J. 307.

——— *Essentials of—Answers to interrogatories.*

The rule of English Law that even answers to interrogatories may be regarded either as a codicil or will, may not apply to testamentary dispositions in India. Under the Hindu Wills Act, and the Indian Succession Act it is doubtful whether such informal declarations could be regarded as a testamentary. (*Abdur Rohim and Seshagiri Ayyar, JJ.*) MUTHUKRISHNA NAICKEN *v.* RAMACHANDRA NAICKEN.

47 I. C. 611 : 37 M. L. J. 489.

——— *Essentials of—Letter—'Dispositions'*

A portion of a letter containing dispositions of property after the writer's death operates as a will notwithstanding that the remainder of the letter effects an immediate settlement and contemplates the execution of a more formal document. (*Oldfield and Tyabji, JJ.*) SOMANCHI VENKATASUBBARAYADU *v.* SOMANCHI PULLAMMA.

26 I. C. 363.

——— *Essentials of—Draft undated and unsigned.*

A draft will unsigned and undated may be legally a will if it contains the last wishes of the testator. (*Batten, A. J. C.*) RAMACHANDRA *v.* DATTAYA. 48 I. C. 742.

Executor.

——— *Executor—Delay in filing accounts—Effect of—Duties and liabilities of.*

Mere delay in filing accounts does not destroy any right of indemnity that may exist but in any case for such right to exist the executors must show that they are not indebted to the estate. If one of the assets consists of a family banking business carried on as opposed to the terms of the will and without permission or direction obtained from the Court, the executors would be personally liable for any money borrowed for that business and not the estate. (*Greaves, J.*) SUDHIR CHANDRA DAS *v* RASSESWARI CHAUDHURI.

69 I. C. 796 : 35 C. L. J. 46.

——— *Executor—Doubt as to continuance of office.*

When by construction of the will, continuance of executorship is doubtful, mortgages *bona fide* executed by the executor and assented to by legatees bind the estate. (*Chatterjee and Panton, JJ.*) RADHA LAKSHIMI DELUJA *v.* JOGESH CHANDRA ROY. 50 I. C. 479.

——— *Executor—Power of sale—Mortgage—Suit to enforce mortgage.*

An executor under a will with express power to sell has power to mortgage except in cases where a prohibition against mortgage can be

WILL—Executor.

inferred from the terms of the will. In a suit upon a mortgage made by an executor under a will with express power of sale the onus is not on the mortgagee to prove as part of his case that the executor was acting properly in effecting the mortgage (*Schwabe, C. J. and Wallace, J.*) PARTHASARATHI NAIDU *v.* MUKUNDAMMAL.

16 L. W. 670 : (1922) M. W. N. 729 : 45 M. 867 : 43 M. L. J. 551 : 1923 M. 84

———*Executor— Legatee creating mortgage pending administration —Decree on mortgage — Executor if entitled to declaration of invalidity of decree.*

Pending the complete administration of the estate of the deceased, one of the legatees mortgaged his interest and upon that a decree was obtained. In a suit by the executor for a declaration that the properties were not saleable and for an injunction preventing such sale. *Held*, as the defendant had done nothing to prejudice the title of the executor the suit was not maintainable. Accepting the legatee's interest as security did not amount to throwing a cloud on the title. (*Spencer and Ramesam, JJ.*) SOUNDARATHAMMAL *v.* NARAYANASWAMI AIYAR.

15 L. W. 639 : 31 M. L. T. 50 (H. C.) : 42 M. L. J. 567 : 1922 Mad. 306.

———*Executor—Liability of heir of.*

The heir of a deceased executor is not personally liable for any breach of obligation of executor. (*Jenkins, C. J. and Mookerjee, J.*) KHETRAMANI DASEE *v.* DHIRANDRA NATH ROY.

25 I. C. 370 : 41 Cal. 271.

———*Executor—Debtor of the testator appointed as executor—Suit by legatee against the representatives of the executor—Nature of—Limitation—Right to claim interest against representatives of executor.*

If a person appointed as an executor renounces the office or dies without having acted or without obtaining probate, he will be in the position of a stranger debtor and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt If the executor fails to do his duty and refuses or neglects to sue, a legatee may sue the executor in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt due to the estate. If the debtor himself is one of the executors, the debt payable by him is deemed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands, on which interest at 6 per cent. per annum is charged if the amount is not invested, whether the executor proved the will or not, provided he acted as executor. A legatee does not represent the estate and has no direct claim against any debtor to the estate. His only right is to recover as legatee his share of the residue which was bequeathed to him from the executors and if the executors had died possessed of property belonging to the testator, he can recover the same from their representatives. One executor is as much entitled to be in possession of the assets of the testator and expend it in due course of administration as his co-executor, and there can ordinarily be no suit against him by the co-executor to

WILL—Legacy.

pay over the assets to him. A suit by the legatee falls under Art. 123. A creditor or a legatee may bring a suit for administration to recover the debt or legacy, to which persons beneficially interested may not be necessary parties but the decree would be for an account of the property in the hands of the executor, where when the plff. legatee is not entitled to payment of the legacy on the date of the decree, the Court should order the executors to pay it into Court and to direct its investment. (*Ayling and Srinivasa Aiyangar, JJ.*) CHINNA *v.* VENKATASUBBA ROW.

6. L. W. 85 : 41 I. C. 605 : 33 M. L. J. 195.

———*Executor—Keeping monies in unauthorised securities.*

Where a testator directed (under his will) that a certain sum of money was to be kept in a particular bank for a period of 3 years and that after that date X and Y will be entitled to principal and interest and the executors never took out the money and the bank failed afterwads. *Held*, it was not obligatory on the executors to take out monies after the 3rd year and pay off the beneficiaries or to keep in monies in approved securities. (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) DHUPATI SRINIVASACHARLU *v.* INDOOR PERINDAVAMMA.

33 I. C. 604.

Formalities.

———*Formalities of— Execution without attestation—Attestation before Sub-Registrar whether valid.*

A will executed without attesting witnesses and deposited in the Registrar's office but taken out at the Registrar's office 10 years afterwards in the presence of witnesses who signed the same in the proper places, sufficiently satisfies the provisions of S 50 of the Indian Succession Act and must be taken as having been executed and registered on the same day. (*Piggott, J. C. and Lindsay, A. J. C.*) MIR SYED HASAN *v.* TAIYABA BEGAM.

26 I. C. 547 : 1 O. L. J. 581.

Legacy.

———*Legacy - Debt due from legatee—Effect.*

A legatee could not claim payment of his legacy from the estate until he pays even unascertained debt due to the estate on the general principle that on a distribution of a fund a party cannot lay claim to a share in the distribution till he brings into *hatchpot* the money due from him to the fund that is being distributed (*Scott, C. J. and Davar, J.*) HALAI *v.* CHATURBHUJ GOPALJI.

31 I. C. 500: 17 Bom. L. R. 985.

———*Legacy—Suit for—Limitation—Suit by legatee against executor* de son tort.

Legacies could not be sued for until the termination of the litigation and therefore time under the Statutes of Limitation does not begin to run until there are available assets. The argument that an executor *de son tort* could not be sued by a legatee, at any rate, in the absence of the legal personal representative, applies only where there is any legal representative. But when a representative of the deceased or a person in possession of he estate is proved to have received enough to pay all demands against the

estate in full no such rule can apply. Per *Kumaraswami Sastri, J.*—When the same heirs are brought on record in a suit covering both the personal properties of the widow and the properties in which she has a limited estate, the legal representatives should be said to be on record as her own legal representatives. It seems that in order to apply the doctrine that a person claiming under colour of a hostile title cannot be made executor of his own wrong, a claim must be made *bona fide. Coote* v. *Whittingdon*, (1873) 16 L. R. Eq, 534 Ref. (*Schwabe, C. J., Coutts-Trotter and Kumaraswami Sastri, JJ.*) ZAMINDAR OF BHADRACHALAM *v.* SRI RAJA VENKATADRI APPA RAO.

43 M. L. J 486 : 16 L. W. 369 : (1922) M W. N 532 : 31 M. L. T. 221 (H C.) : 46 M. 190 : 1922 Mad. 457.

———*Legacy attacked on the ground of undue influence—Onus of proof.*

Where a lagacy under a will is sought to be set aside on the ground of undue influence it must be proved not only that the legatee was in a position to exercise influence but that the influence was unduly exercised, the burden of proving both being on the party a tacking the legacy. Courts do not look with favour on attempts to attack bequest on the ground of undue influence (*Sadasiva Aiyar and Spencer, JJ.*) RAJARAJESWARA SETHUPATHI *v.* KUPAUSAMI AIYAR.

41 M. L. J. 474 : 68 I. C. 352 : (1921) M. W. N. 722.

———*Legacy—Release of right to unknown legacy.*

A release by the natural heir of all his claims against the estate before the property was known to and disposed by the testator could not affect his rights to the money discovered to belong to the testator after his death (*Bakewell, J.*) KUNTHALAMMAL *v.* SURYAPRAKASAROYA MUDALIAR.

38 Mad. 1096 : 31 I. C 494 : 29 M. L. J. 682.

———*Legacy—Validity of—Bequest to relative's prospective wife.*

There is nothing in Hindu Law to invalidate a legacy to the prospective wife of a relation, if she was in existence at the time of the testator's death. (*Batten, O. J. C.*) RAMDULARI *v.* BISHESHWAH DAYAL.

18 N. L. R. 143 : 1923 Nag. 105.

Oral will.

———*Oral will—Proof of — Trial Judge's opinion—Weight due to.*

When a zemindar died leaving behind him a widow and a daughter, he disposed of his property by will and expressly excluded his nephew from participation in the ceremonies etc. The widow some years afterwards adopted the same nephew's son alleging verbal authority to do so. The trial Judge found for the authority though there were discrepancies in the evidence. *Held*, that opinion of the trial Judge was entitled to weight and the balance of testimony was in favour of his conclusion. That such discrepancies as there were, might well be accounted for by the fact that the conversation which the witnesses described

had taken place some 13 years previously. (*Viscount Haldane.*) ADWAITYA PRASAD *v.* BALDEO DAS.

(1916) 1 M. W. N. 377 : 4 L. W. 587 : 33 I. C 852 : 20 C. W. N. 650 (P. C.).

———*Oral will—Proof of.*

The evidence in proof of an oral will must be precise and explicit. The statements of witnesses who are at variance as to the time, place and the words used by the deceased are worthless. (*Rafique and Lindsay, JJ.*) BALBHADDAR PRASAD *v* PRAG DATT.

41 All. 492 : 50 I. C. 938 : 17 A. L. J. 765.

———*Oral will—Soldiers' will—Requisites of.*

Entries in the kindred roll and names of heirs made about a soldier by the military authorities are not tentamount to the soldier's will. (*Macleod, C J. and Crump, J.*) BHAGHUBAI TUKARAN *v.* APPAJI SITARAM.

47 Bom 552 : 25 Bom. L. R. 157 : 1923 Bom. 260.

———*Oral will—Proof—Recital in an unregistered deed.*

The fact of the oral will can be proved by the admission of the plaintiff, although it is found in a recital in a deed which, to take effect as a deed of gift, would require registration. If the recital is required to be used to prove an oral will, then it can be proved, and any question of registration is irrelevant (*Macleod. C. J and Shah, J.*) BAI SITA *v.* BHEGI LAL AMRITLAL.

46 B. 56 : 1922 Bom. 149.

———*Oral will—Proof of.*

Where a person bases his title on an oral will the onus of proving the precise words spoken on which he relies, lies heavily on him. (*Scott-Smith and Shadi Lal, JJ.*) NARAIN *v.* GAINDO

85 P. W. R. 1918 : 45 I. C. 183 : 83 P. L. R. 1918.

———*Oral will—Proof of.*

In a nuncupative will, he who rests his title on the spoken words of a man since deceased must prove with utmost precision the words on which he relies with every circumstance of time and space. (*Robertson, J.*) TOLAK NATH *v.* JAGANATH.

240 P. L. R. 1911 : 12 I. C 51 : 117 P. W. R. 1911.

———*Oral will—Proof.*

The person setting up a nuncupative will must allege and prove with the utmost precision the words of the deceased he relies upon with every circumstance of time and place. (*Wallis, Offg. C. J. and Seshagiri Aiyar, J.*) KUMARASWAMI PILLAI *v.* VAIRAVANATHA PILLAI.

26 I. C. 14.

———*Oral will - Strict proof—Discrepancy in—Statements of witnesses—Finding of fact.*

Courts must insist on precise proof of the terms of a nuncupative will but this does not mean that an oral will cannot be proved unless all the witnesses give precisely the same words in telling what the testator said. It is only to be expected that the recollection of the witness should use slightly different terms of expression but if the effect of the language is the same it does not matter. The question whether the will has been proved is one of fact and the findings of the lower

WILL—Power.

Appellate Court will be binding on second appeal. (*Hallifax, A. J. C.*) BHAWANIRAM *v.* DAMMAR SINGH. 5 N. L. J. 188 : 1922 Nag. 46

Power.

——*Power—Appointment—Exercise of the power in donee's lifetime*

Where by a will the legatee was not at liberty to sell or mortgage the house and after the decease of the legatee the house was to go to persons appointed by the legatee by will or deed, *held*, that the legatee could convey the absolute estate in a property willed in his favour. (*Macleod, C. J.*) BAPUJI *v.* HAJI ESMAIL. 64 I. C. 644 : 23 Bom. L. R. 1259.

——*Power—Appointment—Execution—Validity of—Onus.*

Per *Scott, C. J*—A Court will not try to compel the execution of a trust where the terms of trust are not ascertained or ascertainable. Where a power in the nature of a trust has been executed in the professed compliance with the authority given, the burden of proving that the execution was a fraud on the power lies on those who seek by challenging the execution to get possession of the property in the hands of those benefiting by the act of the donee of the power. (*Scott, C. J. and Macleod, J.*) SHRINBAI *v* RATNABAI. 43 Bom. 845 : 51 I. C. 209 : 21 Bom. L. R. 384.

Probate.

——*Probate—Grant of, when testator domiciled abroad*

The will of a testator domiciled abroad although not proved in the place of the testator's domicile, is capable of probate in British India if it is valid according to the law of the testator's place of domicile and if there are assets of the testator in India. (*Lord Parker.*) SOONA MAYNA KENA ROONA MEYAPPA CHETTY *v.* SOONA NAVENA SUBRAMANIAN CHETTY 43 I. A. 113 : 20 C. W. N 833 : (1916) 1 M. W. N. 455 : 18 Bom. L. R. 642 35 I. C 323 : 85 L. J. (P. C.) 179 : (1916) 1 A. C. 603 : 114 L. T. 1002 (P. C.).

——*Probate—Refusal of executor—Effect.*

If an executor called upon by citation refuses to take probate within the limited time, any competent applicant may be granted a copy of will and Letters of Administration. (*Beaman and Heaton JJ.*) KAVASJI SORABJI AIBADA *v.* BAI DINBAI. 40 Bom. 666 : 36 I. C. 373 : 18 Bom. L. R. 766.

——*Probate—Grant of—Unattested alteration in will—Presumption.*

Where unattested alterations occur in a will, the presumption of law is that such alterations were made after the execution of the will and in the absence of rebutting evidence. Probate will be granted in the original state omitting the alteration. (*Mookerjee, C. J. and Fletcher, J.*) SURENDRA KRISHNA MONDAL *v.* RANI DASEI. 47 Cal. 1043 : 33 C. L. J. 34 : 59 I. C. 814 : 24 C. W. N. 860.

——*Probate—Refusal of—Will is inefficacious—Improper.*

WILL—Proof of.

Probate of a will cannot be refused on the ground simply that it is what lawyers in ancient time called "inefficacious." That doctrine does not apply to India. (*Fletcher and N. R. Chatterjee, JJ.*) RAMMAL DASS KOCH *v.* KAKAL KOLI KOCHINI. 43 I. C. 208 : 22 C. W. N. 315.

——*Probate—Not taken out—Effect of—Duty of Judge.*

When a will is set up the Judge is bound to consider it though probate has not been granted. (*Jenkins, C J and Woodroffe, J.*) AKHOY KUMARI DEBI *In the matter of.* 42 Cal. 953 : 28 I. C. 972 : 19 C. W. N. 513.

——*Probate—Revocation after many years—Onus on petitioner to offer reasonable explanation of delay.*

Where the petitioner comes to Court after considerable delay and knowledge of and acquiescence in, the grant of probate on his part are shown, the Court will not allow him to reopen the probate unless he offers some reasonable and true explanation of the delay. (*Holmwood and Chapman, JJ.*) MANORAMA CHOWDRANI *v.* SHIVA SUNDARI MAJUMDAR 42 Cal. 480. 28 I. C. 886 : 19 C. W. N. 366.

——*Probate—Letters of Administration—Distinction*

No distinction between a grant of probate and a grant of Letters of Administration can be drawn so far as the proof of the genuineness and validity of the will is concerned. Both are conclusive evidence of the factum and validity of the will. *Wicker Hume*, 7 H L.C. 124, Foll (*Abdur Rahim, Offg. C.J. and Krishnan, J.*) KALA BANDI VENKATRATNAM *v.* RALA BANDI RAJA RAM MOHANA RAO. 4 L. W. 248 : 35 I. C. 854 : 31 M. L. J. 277.

——*Probate proceedings—Title to properties and determination of adoption questions—Jurisdiction*

The title of a testator to the properties covered by his will or the question whether or not a person was adopted by a testator, are not matters which could be decided in probate proceedings. 20 Bom. 210 Dist. (*Atkin on and Kingsford, JJ.*) MAHASUNDER KUER *v.* RAM RATAN PRASAD. 35 I. C. 416 : 1 Pat. L. W. 370.

——*Probate—Burden of proof—Suspicious circumstances.*

Where there are suspicious circumstances about a will it is for those who propound the will to prove affirmatively that the testator knew and approved of the contents thereof and it is only if this is down that the onus is thrown on those who oppose the will to prove fraud or undue influence to displace the case made for proving the will. (*Rigg, J.*) PAUL G. H. V. *v.* T. THOMPSON. 59 I. C. 535 : 13 Bur L. T. 80.

Proof of.

Attestation.
Disposing state of mind.
Evidence
Non-registration.
Onus of Proof.
Signature.
Miscellaneous.

Proof of—Attestation.

———*Proof of—Attestation — Attesting witnesses not of superior position—Mention of adoption—Whether can be questioned.*

Where the terms of a will are natural enough and where the testator had suddenly become ill and got such persons as were available at the spot to attest the will. The contention that the will should not be accepted as genuine because the witnesses to its execution were not of a superior position in the absence of any evidence of perjury or forgery, is not sound. Something more than mere suspicion is necessary in such a case to make convincing an argument made on the social position of the witnesses. 22 I.A. 12 and 41 I.A. 80 Foll. The Court may also consider the question of adoption with reference to genuineness of the will only and not as a substantial question. (*Sir John Edge.*) DULHIN GENDA KUNWAR *v.* HARNANDAN SINGH.

20 C. W. N 617 : (1916) 1 M. W. N. 358 : 4 L. W. 214 : 33 I. C. 790 : 30 M. L. J. 624 (P C.)

———*Proof of—Attestation by servants and dependants—Natural and reasonable dispositions—Presumption.*

Where a will is reasonable, natural and proper in its terms and in accord with the feelings and tenor of life of the testator, and its execution is proved by anything like reasonable evidence, the fact that the attesting witnesses are servants or dependents of the testator is not an element to be taken into account in considering whether it was validly executed. Blank forms and sheets signed by people other than the testator are not relevant to prove that the attestator was also in the habit of signing similar blank paper and that the will might have been written on some such paper after his death. (*Lord Shaw.*) MUSAMMAT JAGRANI KOER *v.* KUARDURGA PARSHAD. **36 All. 93 : 1 O. L. J. 57 : 41 I. A 76 : 16 O. C. 386 . 12 A. L J. 125 : 15 M L. T. 125 : (1914) M. W. N. 137 : 19 C. L J. 165 : 18 C. W. N. 521 : 16 Bom L R 141 : 22 I. C. 103 : 26 M. L. J. 153 (P.C.).**

———*Proof of—Attestation—Execution—Common law of Scotland—No witness—Validity.*

According to the Common Law of Scotland a paper which is in the handwriting of a deceased constitutes a valid will though there are no witnesses. (*Richards, C J. and Bannerjee, J.*) D. MACINTYRE, *In the goods of.*

41 All. 248 : 56 I. C. 683 : 17 A. L. J. 247

———*Proof of—Attestation—Proof.*

Where a will was registered in 1873 and all the attesting witnesses thereto were dead, the production of a registration copy thereof and the evidence of a person who swore that he was an identifying witness before the Registrar, were held, under the circumstances of the case, to be sufficient proof of the attestation. (*Woodroffe and Walmsley, JJ.*) KHAGESWAR SARMA BHATTACHARYA *v.* SOMESWAR BHATTACHARYA.

63 I. C. 518 : 33 C. L. J. 382.

———*Proof of—Attestation—Execution.*

For proving due execution and attestation it is enough to establish from the circumstances that the relative position of the executant and the attesting witnesses was such, that they might have seen the execution and attestation respectively and it is not necessary that affirmative evidence should be forthcoming that the executant did as a matter of fact see the attesting witnesses put their signatures or that the attesting witnesses did actually see the executant sign the document. Every presumption will be made in favour of due execution and attestation when a will is regular on the face of it and is apparently duly executed. (*Mookerjee and Beachcroft, JJ.*) BRAMHADATT TIWARI *v.* CHANDAN BIBI.

34 I. C 686 : 20 C. W. N. 192 :

———*Proof of—Attestation—Onus.*

The burden of proving a will rests on the party propounding it. (*Krishnaswami Aivar and Ayling, JJ.*) KANNAPPAREDDI *v.* KANNAPPAREDDI.

(1911) 1 M. W. N. 131 : 9 I C. 727 : 9 M. L. T. 338.

Proof of—Disposing state of mind.

———*Proof of—Disposing state of mind—Perfect in form—Court not to recreate the will that the testator ought to have made.*

When a will has once been made and is apparently in perfect form and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to re-create the kind of will that the man ought, in the opinion of the Court, have made. Once the man's mind is free and clear and is capable of disposing his property, the way in which it is to be disposed of rests with him and it is not for any Court to try and discover whether a will could not have been more consonant either with reason or with justice. (*Lord Chancellor*) ARUNACHALLAM CHETTY *v.* RAMASWAMI CHETTY.

20 C. W N. 673 : 3 L W. 508 : (1916) 1 M W. N. 399 : 18 Bom. L. R. 408 : 23 C L.J. 632 : 20 M. L. T. 50 : 35 I. C. 1 : 30 M. L. J. 555 (P C.).

———*Proof of—Disposing state of mind.*

The onus of proving testamentary capacity lies on those propounding the will. But this is sufficiently discharged by proof of sober and disposing mind notwithstanding illness at the time of execution. (*Lord Robertson.*) BUR SINGH *v.* UTTAM SINGH.

38 Cal. 355 : 38 I. A. 13 : 21 P. L. R. 1911 : 1 P. W. R 1911 : 15 C. W.N 177 : 13 C. L. J. 72 : 13 Bom. L. R 59 : 9 M. L T. 115 : (1911) 1 M. W. N 86 : 8 A. L. J. 123 : 4 Bur. L. T. 35 : 9 I C. 33 : 21 M. L. J. 100 (P.C.).

———*Proof of—Disposing state of mind.*

In order that a will may be found good by a Court it need not proved that a testator was in a perfect state of health, or that his mind was so clear as to enable him to give complicated instructions. It is sufficient if it is proved that he was able to give the outlines of the manner in which his estate was to be disposed of and was able, when the result of the lawyer's effects was read out to him, to understand that his instructions in the main had been complied with (*Macleod, C.J. and Shah, J.*) GORDHAN DAS NATHALAL PATEL *v.* BAI SURAJ.

64 I. C. 257 : 23 Bom L. R. 1068.

———*Proof of—Disposing state of mind—Loss of original.*

WILL—Proof of—Disposing state of mind.

Where an application for Letters of Administration the caveators admitted the testatrix had a disposing mind on the date on which the will was alleged to have been executed and it was proved by expert evidence that the impression on the will was the thumb mark of the testatrix. The will was supported by the scribe and the three attesting witnesses. *Held*, that it was not proved that the original will was lost and the theory of a dishonest conspiracy to forge a will could not be sustained in view of the positive evidence produced in support of the will. (*Leslie Jones, J.*) BHAGIRATHI *v.* GHISA SINGH. **47 I. C. 174.**

——Proof of—Disposing state of mind—Execution—Burden of proof.

The burden of proving that a document in dispute is the last will of a free and capable testator lies on the propounder. He has therefore to allege and prove a sound disposing mind on the part of the testator. It is not sufficient in all cases to prove execution and rely upon the presumption of capacity. This may be so in a non-contentious case. (*Kotwal, A.J.C.*) MUKTABAI *v.* WAMAN. **1923 Nag. 63.**

Proof of—Evidence.

——Proof of—Evidence—Quantum necessary—Similarity of signatures—Value of—Appreciation of evidence by trial judge.

A will is one of the most solemn documents known to law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. Where no formalities are prescribed by law, proof of the testator's signature is all that is needed; but, in cases of doubt or dispute, justice requires that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect. Mere resemblance in signature is of no value where witnesses are available to prove the execution of the will and they are not called or are not believed. Where no evidence was forthcoming to show when the alleged will was found or why it was kept back until a claim based on intestacy was put forward, and no other details of the history of the will were placed before the court and the attesting witnesses had not been called, the conclusion is irresistable that the will is not genuine. (*Lord Buckmaster*) RAM GOPAL LAL *v.* AIPNA KUNWAR. **31 M. L. T 277 (P. C.) : 49 I. A 413 : 44 All. 495. 21 A. L. J. 402 : 27 C. W. N. 485 : 1922 P. C. 366 (P.C.)**

——Proof of—Evidence.

A suspicion, that a will does not express the mind of the testator, must be one inherent in the will itself and not the doubt that may arise from a conflict of testimony regarding the will. In order to prevail against positive evidence, in support of a will, the improbability must be clear and cogent and must approach very nearly to, if not altogether constitute, an impossibility. In the case of a will, reasonable, natural and proper in its terms, it is not in accordance with sound principles of construction that it should be looked with a rigorous scrutiny (*Mookerjee and Buckland, JJ.*) SARAGINI DASSI *v.* HARI DAS. **34 C. L. J 373: 66 I. C. 774 : 26 C. W. N. 113.**

——Proof of—Evidence—Internal evidence—Value of.

To conclude whether a will is genuine internal evidence is of value, but an improbability to prevail against direct evidence of disinterested wtinesses, must be clear and cogent. (*Shadi Lal, J.*) MAYA RAM *v.* MALAN DEVI. **145 P. L. R. 1915 : 29 I. C. 687 : 66 P W. R. 1915.**

——Proof of—Evidence.

Evidence as regards events that happen between first inception of the idea of making a will and the final drafting is of great importance in enabling the Court to come to a conclusion as to the genuineness of the will. (*Krishnaswami Aiyar and Ayling, JJ*) KANNAPPA REDDI *v* KANNAPPA REDDI. **(1911) 1 M W. N. 131 : 9 I. C. 727 : 9 M. L. T 338.**

Proof of—Non-registration.

——Proof of non-registration—Unregistered will—Mutation—Reversioner, when can object.

A Hindu by an unregistered will authorised his widow to adopt a son to perpetuate the name of his family. On his death his widow applied for mutation of her name mentioning the will. The reversioners did not object to the valid execution of the will. In a suit to set aside the adoption by the widow of her brother's son on the strength of the will, questioning the genuineness of the will, *held*, that the will was proved as validly executed that in adopting to her husband she was acting contrary to her own interests as the adoption deprived her of her control over the property. (*Lord Shaw.*) BHAGWATI PRASAD SINGH *v.* NAND PRASAD SINGH. **33 I. C. 596.**

——Proof of—Non-registration— Presumption against its genuineness.

When a will is alleged to be false the circumstances which throw suspicion on its genuineness are (1) the smallness of the properties bequeathed to wife and daughter compared with that bequeathed to an apopted son: (2) non-registration of the will though the testator lived for a period of six months after the date of its execution: (3 attestation of the will by only one witness besides its writer. If in addition to the above it is proved that the person setting up the will is a man of unscrupulous character and that he gave contradictory accounts in regard to its execution at different times, considerable doubt arises as to its genuineness and the will should not be upheld. (*Benson and Sundara Aiyar, JJ.*) GAJAGOPALA *v.* MANGALATHAMMAL. **11 I. C. 739 : (1911) 2 M. W. N. 42.**

——Proof of—Non-registration—Sound disposing state of mind—Presumption.

The person who sets up a title under a will must satisfy the Court that the will was "duly executed" that is to say he must furnish proofs of execution which carries with it a conviction that

the testator knew and approved of the contents of the instrument. This involves the proposition that he was a free and capable testator The ordinary rule is that the execution of a will by a competent testator raises a presumption that he knew and approved of the contents of the will; and ordinarily the competency of the testator is presumed if nothing appears to rebut the ordinary presumption. But where the mental capacity of the testator is challenged by the evidence, it is the duty of the Court to find whether upon the evidence it is established that the testator was of sound disposing mind and did know and approve of the contents of the will. In order to constitute what is known in law as a sound disposing mind it must be shown that the testator was able to understand his position, able to appreciate his property and able to form a judgment with respect to the parties whom he chose to benefit. 21 Cal. 279 Foll. (*Lindsay, J. C. and Daniels, A. J. C.*) RAJ BACHAN SINGH *v.* SHATRANJO
47 I. C. 963 : 5 O. L. J. 519

Proof of—Onus of proof.

——*Proof of—Onus of proof—Reversionary heirs excluded—Suit to declare forgery.*

In a suit by the reversionary heirs of the deceased for a declaration that a will alleged to have been executed by him is a forgery the onus of proving that the will propounded is the will of the deceased, is in the defendant. (*Mr. Ameer Ali.*) BINDESHRI PRASAD *v.* BAISAKHA BIBI.
61 I. C. 431 : 24 C. W. N. 674 (P. C.).

——*Proof of—Onus of proof—Provision* prima facie *reasonable—Position of witnesses—Suspicion—Attestors.*

Where the provisions of a will are *prima facie* reasonable and natural they do not excite suspicion as to the genuineness of the disposition. 36 All. 93 Ref. It is not enough to suggest doubts as to the veracity of a witness without producing the means of contradiction available to a party. In every case the *onus probandi* lies on the person propounding a will of satisfy the Court that the instrument propounded is the last will of a free and capable testator. Though it is desirable that all the attesting witnesses capable of being called should be examined to remove all suspicion of fraud, it is not absolutely necessary that, where there are many attesting witnesses, the absence of every one not called, should be specifically explained. 47 Cal 1043, Ref. (*Mookerjee and Buckland, JJ.*) PRASANNAMAYI DEBI *v.* BAIKUNTHA NATH CHATTERJEE. **25 C. W. N. 779 : 66 I. C. 782 : 34 C. L. J. 384.**

——*Proof of—Onus—Sound disposing—State of mind—What is.*

The propounders of a will must show that the testator had testamentary capacity, *i. e.*, capacity to comprehend the nature and effect of his act. It must be shown that he was able to dispose of his property with understanding and reason, to realise his position, to appreciate his property and to form a judgment with respect to the parties whom he decided to benefit. Mere ability to sign one's name does not imply possession of full mental powers. But where the terms of the will are unusual and the evidence of testamentary capacity doubtful, the Court will require to be

satisfied beyond all reasonable doubts that the testator was fully cognizant of its contents and in a condition to exercise and did exercise thought, judgment and reflection respecting the act he was doing. When a testator is of sound mind when giving instructions for a will but at the time of signature accepts the instruments drawn in pursuance thereof, even though not able to follow its provisions then, he must be deemed to be of sound mind when it is executed (*Mookerjee and Beachcroft, JJ.*) SUSIL KUMAR BANERJEE *v.* APSARI DEBI. **20 C. L. J. 501 : 27 I. C. 276 : 19 C. W N. 826.**

——*Proof of—Onus of proof.*

The propounder of a will should prove beyond all doubt that it was executed in accordance with law and that the testator at the time of the execution was in a state of mind and body to be able to execute it (*Chitty and Chatterjee, JJ.*) PADAMAPRIYA DEBIA *v* DHARMA DAS. **10 I C. 965. 15 C. W. N. 728 :**

——*Proof of—Onus.*

The burden of proving the soundness of testtator's mind at the execution of the will lies on those who propound the will which is discharged by proving that the testator was of sound mind at the time of execution. (*Reid, C. J. and Johnstone, J.*) MURAD BIBI *v.* KHADIM HUSSAIN.
12 I. C. 49 : 114 P. W R. 1911.

——*Proof of—Onus.*

Persons who propound the will must prove affirmatively that the testator knew and approved of the contents of the document and then the onus of proof is shifted on the other side to prove fraud or undue influence. (*White, C. J. and Spencer, J.*) MARMAVULU *v.* ANNAPURNI.
10 M. L. T 304 : 12 I. C. 393 : (1911) 2 M. W. N. 330.

——*Proof of—Onus.*

The burden of proving a will rests on the party propounding it. (*Krishnaswami Aiyar and Ayling, JJ.*) KANNAPPAREDDI *v.* KANNAPPAREDDI.
9 M. L T. 338 : 9 I. C. 727 : (1911) 1 M. W. N. 131.

——*Proof of—Onus.*

The burden is upon the propounder of a will to prove that the testator not only did make the will but that he possessed sound testamentary mind at the time of making the will, and made it out of his own accord and not on account of any importunity or coercion. Advice or even persuasion is not prohibited by law unless it deprives the testator of the freedom of the will and amounts to coercion nor does illness invalidate the will unless it deprives the executant of the power of understanding the consequences of making the will. (*Chapman and Jwala Prasad, JJ.*) NARAIN DEO *v.* KUSUM KUMARI. **40 I. C. 597.**

——*Proof of—Onus.*

The burden of proving that a will is binding on the heirs of the testator rests on the person propounding it. (*Hayward and Waley Cohen, A. J. Cs.*) GHULAM KADIR *v.* SARDOZI.
9 I. C. 721 : 4 S. L. R. 261.

Proof of—Signature.

———*Proof of—Signature—Absence of—Probabilities.*

The fact that the alleged testator did not sign the will, the absence of her relations, the proponent's conduct, and delay in putting forth the will, the absence of some of the attesting witnesses from the witness box, were held to be sufficient circumstances to justify the finding that the will was not proved in view of the trial court's finding that it did not believe the proponent's witnesses. (*Sir Lawrence Jenkins.*) BAIKUNTHA NATH CHATTERJEE *v.* PRASANNAMOYI DEBEYA.

27 C. W. N 797 : 44 M. L. J. 699 : 1922 P. C 409 (P. C.).

———*Proof of—Signatures—Shaky signature.*

The fact that the signature is shaky but not uncharacteristic is almost in favour of the will being genuine, because, if a man sets himself to commit a forgery, he would naturally try to make the signature as exactly like the genuine signature as he could, and certainly would not introduce shakiness into the signature. (*Lord Dunedin.*) PALCHUR SANKARAREDDI *v.* PALCHUR MAHALAKSHMAMMA.

17 L. W 1 : 27 C. W. N. 414 : 31 M L T. 307 : 1922 P. C. 315 (P. C.).

———*Proof of signature—Execution—Comparison of signatures—Dangerous method.*

Proceeding on a comparison of a signature in a will with that of other signature written seven or eight days before, and reversing the finding of fact by the trial judge on that ground, is dangerous in regard to the execution of a will. (*Jenkins, C. J., Mookerjee and Holmwood, JJ.*) PANCHUMONI DASSI *v.* CHANDRA KUMAR GHOSH.

31 I. C. 319 : 22 C. L. J. 298.

Proof of—Miscellaneous.

———*Proof of—Suspicious circumstances.*

Held, that the suspicion which attached to the evidence as to the preparation of the draft of the will (*i. e.*), that it had not been prepared beforehand but had been made from the will itself did not destroy the evidence as to the execution of the will. The Court did not consider the non-examination of all the attesting witnesses as destructive of the case of the propounder of the will, most of them having been present to give their evidence on one or more of the dates fixed for the recording of evidence but were not examined owing to pressure of work in the Court, the rest appearing to be persons living near the Court and there being nothing to indicate that any of them were intentionally kept out of the witness box by the propounder. (*Sir John Edge.*) BANKIM BIHARI MAITI *v.* SRIMATI MATANGINI DASI.

24 C. W. N. 626 (P. C.)

———*Proof of—Legacy in favour of spiritual adviser of testator—Burden of proof.*

In case of a will of a deceased person made a day before his death in which the testator's spiritual guide is named as the universal legatee, it ought to see that the spiritual influence was not exercised improperly by terrifying the dying man or by holding out hopes of benefiting his soul (*Fletcher and Cuming, JJ.*) SRIMATI BASINI DASI *v.* KRISHNALAL CHATTERJEE.

51 I. C. 1007.

———*Proof of—Person admitting existence but denying validity—Denial on mistaken ground—Effect of.*

Where a person admits the existence of a will but denies its validity, the fact that the denial is mistaken cannot alter the scope of the admission or affect his other objections. (*White, C. J and Oldfield, J.*) LAKSHMAMMA *v.* RATNAMMA.

38 Mad. 474 : 21 I C. 698 : 25 M L. J. 556.

———*Proof of—Contents of will—Suppression of—Presumption.*

Where a will is suppressed by person in a position to produce it, it may be presumed that the will, if produced, would be unfavourable to that person, but nothing can be presumed as to the actual contents of the will or as to the legacies. Persons claiming the benefit of its provisions must prove it in the usual way. 25 Mad. 367, Rel. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) PECHETI SWAMIGADU *v* YERAPRAGADA AIYAPPARASU.

16 I C. 815.

———*Proof of—Prior will only a few days ago.*

On 1st August 1904 the testator executed a will and two days later another will was set up, as having been executed by him under circumstances which made it highly improbable that he had executed it. *Held*, that the latter will was not genuine. (*Benson and Munro, JJ.*) CHINNA BASAVAYYA *v.* ELAMANCHILI BAPAMMAL.

10 I C. 420 : 9 M. L. T 354.

———*Proof of—Production of document insufficient.*

In a suit based upon the will, the mere production of the will proves nothing. It must be proved that the will has been acted upon. (*Stuart, J. C.*) PARAGI *v* GOURI SHANKER.

51 I. C. 86 : 6 O. L. J. 157.

Revocation.

———*Revocation—Right to—Devise with reservation of powers.*

When a testatrix as sole owner and possessor makes a devise of her entire estate reserving to her possession with full powers of alienation, such a reservation is only a surplusage and neither strengthens nor detracts from her complete ownership and possession. (*Lord Shaw.*) FATEH CHAND *v.* RUP CHAND.

38 All. 446 : 43 I. A. 183 : 18 Bom. L. R. 900 : 20 M. L T. 481 : 21 C. W. N. 102 : 4 L. W. 597 : 26 C. L. J. 182 : 37 I. C. 122 : (1916) 2 M W. N, 567 (P. C.).

———*Revocation—Dependent relative revocation—Authority to adopt—Later invalid will—Effect of.*

The application of the doctrine of dependent relative revocation is a question of intention which has to be ascertained from the language of the testator as found in his testamentary documents. An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property. *Alexander* v. *Kirkpatrik*, L. R. 2 H.L. Sc. 397 ;

WILL—Revocation.

Appr.; *Tupper* v. *Tupper*. 1 K. and J 665; *Quinn* v. *Butler*, L. R 6 Eq. 225, Dist. *Held*, that a later invalid will of a Hindu testator which does not expressly revoke the earlier Will, but contained inconsistent dispositions of property, had not the effect of revoking a authority to adopt given to his wife by the earlier Will. (*Lord Wrenbury.*) VENCATANARAYANA PILLAI *v.* SUBBAMMAL. **39 Mad 107 : 43 I. A 20 : 20 C. W. N. 234 : 3 L. W. 177 : 19 M L T. 147 : 14 A. L J 178 : (1916) 1 M W N. 97 : 23 C. L. J 366 : 18 Bom. L. R. 372 : 32 I. C 3.3 : 29 M. L. J. 851. (P. C.)**

[On appeal from 4 I. C 1046 : 6 M. L T. 116.]

——*—Revocation—Presumption.*

The presumption that a Will which was in the possession of the deceased, when he died and which was not produced by the legatees must have been destroyed, must be cautiously applied in India in view of the habits and condition of the people where the will is either lost or stolen from the possession by the opponents. Registration office copy is admissible. (*Mr. Ameer Ali.*) PADMAN *v.* HANWANTA. **93 P. R. 1915 : 18 M. L. T. 54 : 19 C. W. N. 929 : 13 A L. J. 801 : 17 Bom. L. R. 609 : 2 L. W. 645 : (1915) M W. N. 500 ; 22 C. L. J 72 : 110 P. W. R. 1915 : 29 M. L. J. 307 : 29 I. C. 807 : 11 P. L. R. 1915. (P.C.).**

——*—Revocation—Destruction—Presumption*

Where a will is not forthcoming, the presumption is that the testator destroyed it with a view of revoking it. (*Stanley, C. J. and Banerjee, J.*) SOHAN BIBI *v.* HIRAN BIBI. **10 I. C. 230.**

——*—Revocation—Presumption—Lost will.*

Where a Will last seen in the testator's possession is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed by the testator *animo revocandi* (*Macleod, C. J and Fawcett, J.*) ADITRAM GIRDHAR *v.* BAPU LAL. **45 Bom. 906 : 61 I C. 455 : 23 Bom. L R. 276.**

——*Revocation—Proof of—Will not forthcoming—Presumption—Succession Act (X of 1865) S. 57.*

When a will shown to have been in the testator's custody is not proved at the death, the presumption is that it has been destroyed for revocation. If this is an issue in the suit the presumption may be rebutted. When the due execution of a will is legally proved the objector should plead and prove revocation. If revocation is not pleaded the Court will not presume the revocation from the fact that a registered will is not forthcoming. (*Cox and Kay, JJ.*) SARAT CHANDRA BYSAC *v.* GOLAP SUNDARI DASI. **21 I C. 121 : 18 C. W. N. 587.**

——*—Revocation—What amounts to.*

A will is an ambulatory document and can operate only upon the property which exists at the time of the testator's death. The mere fact that a testator during his lifetime disposed of part of the property specified in the will cannot be regarded as an act revoking the will particularly

WILL—Revocation.

when the testament contains an express provision (which under the law is unnecessary) that the testator can dispose of his property during his lifetime as he pleases and that the devisees would get only the property remaining undisposed of at the time of his death. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND *v.* ROSHNI BAI. **68 I. C 92 : 2 Lah. L. J. 178.**

——*Revocation—Codicil — Modification by subsequent testamentary declaration.*

A person seeking to establish a modification in the terms of a will by a subsequent testamentary declaration, must prove an actual intention to revoke clauses which he seeks to avoid. The testator's expressions declaratory only of a future design will not be sufficient. A will containing a clear and unambiguous disposition of property, real or personal, cannot be revoked by a codicil except by the use of words equally clear and distinct. *Kellet* v. *Kellet* 3 H. L. 160, Ref. (*Shadi Lal and Le Rosignol, JJ.*) NARINJAN DASS *v.* DEVI DASS. **112 P. W. R. 1916 : 35 I. C. 899 : 41 P. L. R. 1917.**

——*Revocation—Mode of—When actual destruction of formal revocation in writing unnecessary.*

Actual destruction of a formal revocation in writing is not essential to revoke a will not governed by the Succession Act, English Law or any other statute specifying a particular mode of revocation 25 Mad. 678 (P. C.) 3 Cal. 326 (P. C.) Ref. (*Rattigan and Shadi Lal, JJ.*) MIRAN BAKSH *v.* MAHIR BIBI. **6 P. W. R. 1916 : 31 I C. 693 : 41 P. L. R. 1916.**

——*—Revocation—Presumption.*

Where the testator made his will When he was a batchelor but subsequently married and had a son, who would have been left destitute if the will was given effect to, and the will itself is not to be found after the testator's death a presumption of revocation of the Will arises. (*Rattigan and Beadon, JJ.*) UTTAM DAS *v.* CHANAN DAS. **51 P R 1913 : 283 P. L. R. 1913 : 20 I. C. 462 : 200 P. W. R. 1913.**

——*Revocation—Extraneous evidence—Evidence Act, S. 94.*

Where several wills are executed on different dates by a person if the subsequent instrument does not profess to be a codicil and is adequate to the disposition of the entire property there is no such *a priori* improbability that it was intended wholly to cancel the prior instrument. When there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous suit will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions The fact that the testator's properties were situated in different jurisdictions did not affect the question of the disposition of all his properties. (*Oldfield, Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) PANAKAL IYYAPPAN *v.* ELACHAR CHAKKUNNI. **41 I. C. 556. : (1917) M. W. N. 645.**

——*Revocation — Right to—Will—Speaks from the death of testator.*

WILL—Revocation.

A will speaks only from the death of the testator and can be revoked previously. 19 M.L.J 106; 7 M L.T. 296 Foll. (*Sadasiva Aiyar and Natier, JJ.*) AIYASAMI UDAYAN *v.* APPASWAMI UDAYAN.
1 L. W. 983 : (1914) M. W. N. 889 26 I. C. 249. 28 M L J 542.

———*Revocation— Change of circumstances.*

The statutory law of wills in this country has not adopted the principal that a will shall be deemed to be revoked in consequence of a change in the circumstances of the testator or change with respect to his right to dispose the property 30 Mad. 369 Ref. A will has the same effect as if it were executed at the date of the testator's death. Property which a person does not possess at the time of the will may be bequeathed. The same principle appears with respect to property which he owns as absolute property both at the time of the bequest and at the time of his death but with respect to which he loses his right of testamentary disposition during sometime between the two dates (*Benson and Sundara Aivar, JJ.*) BODI *alias* LAKSHMAKKA *v.* VENKATASWAMI NAIDU.
38 Mad. 369 : 14 M. L T 181 : 25 M L J. 363 : 21 I. C. 73 : (1913) M.W.N. 779.

———*Revocation—Later will silent as to earlier will—Doctrine of dependant -- Relative revocation.*

The Court can discover an intention to revoke only in the altered disposition which is attempted to be made by the second instrument, and if that disposition fails then also the court must fail to perceive an indication of an intention to revoke the first, the court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect. (*White, C J. and Sankaran Nair, J.*) PILLAI *v.* SUBBAMMAH (1912) **M. W. N 519: 11 M. L. T. 307 : 14 I. C. 209 : 22 M. L. J. 395.**

———*Revocation—Allegation as to execution of subsequent will.*

A will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming unless it is proved by clear and satisfactory evidence that the later disposition is so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earliar will if it cannot be shown what the difference consisted in (*Stuart and Kanhaiya Lal, A.J.Cs.*) LALA TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER OF FYZABAD. **47 I. C. 225 : 5 O L. J. 294.**

———*Revocation —Implied— Adoption of son by testator.*

The adoption of a son does not in itself operate to nullify or revoke a will by the adoptive father in favour of his wife any more than the birth of a natural son does. (*Piggott, J.C. and Lindsay, A. J.C.*) MIR SYED HASAN *v.* TAIYABI BEGAM.
26 I. C. 547 : 1 O. L. J. 591

———*Revocation—Revival on failure of subsequent one.*

The mere revocation of a will coupled with a disposition subsequently found to be ineffectual will not revive the original one unless the two

WILL—Testamentary capacity.

acts are so connected that the revocation was conditional on the substitution of an effectual disposition. (*Chamier, J. C.*) MUHAMMAD ADIL KHAN *v.* BLUL BIBI. **9 I. C. 748 : 14 O. C. 49.**

Testamentary capacity.

———*Testamentary capacity—Draft of will is material evidence.*

The draft of a will is material evidence if the question was whether the testator understood an instrument admitted or proved to have been executed by her, or if her mental capacity had been questioned. (*Sir Lawrence Jenkins*) BAIKUNTHA NATH CHATTORAJ *v.* PRASANNAMOYI DEBYA
44 M. L. J. 699 : 27 C W. N 797 : 1922 P. C. 409.

———*Testamentary capacity—Proof of—Undue influence—Coercion—Illness Effect of.*

The onus of proving that a will was duly executed by the testator in his proper senses is on those propounding the will. *Held*, that a strong *prima facie* case in favour of the will in question had been made out and that it was not displaced by mere proof of serious illness or antecedent intemperance, or by evidence that there was motive and opportunity for the defendants to exercise undue influence and that some of them actually benefited by the will to the exclusion of other near relations. Circumstances of that character might suggest suspicion and would lead the Court to scrutinise with special care the evidence of those propounding the will. But, in order to set it aside, there must be clear evidence that the undue influence was actually exercised or that the illness of the testator so affected his mental faculties as to make him unequal to the task of disposing of his property. (*Lord Robson,*) BUR SINGH. *v* UTTAM SINGH. **38 Cal. 356 : 38 I. A. 18 : 21 P. R 1911 : 1 P. W. R 1911 : 15 C. W. N. 177 : 13 C. L J. 72 : 21 P. L. R. 1911 : 13 Bom. L. R.59 : 9 M. L. T. 115 : (1911) 1 M. W N. 86 : 8 A. L. J. 123 : 4 Bur. L T. 35 : 9 I. C. 33 : 21 M L J. 100 (P.C.).**

———*Testamentary capacity—Requisites of.*

The mere fact that the testator had sense or consciousness or that he was able to answer a question or two put by a doctor about his illness is not sufficient to prove testamentary capacity. (*Chatterjee and Pearson, JJ.*) JOGESH CHANDRA SHAHA *v.* BHIKU SAN PARAMANIK. **1924 C. 512.**

———*Testamentary capacity — Condition of testator.*

Testamentary capacity is not a relative thing; it is to be considered with reference to the particular will, the question being, not whether the testator had capacity for will making, but whether he had capacity to make the disputed will. He may have had capacity to make that will in the circumstances and yet not have had the capacity to make a more complex will or he may not have had the capacity to make the will in suit and yet have had capacity to make a less complex or different one; whether he understood the particular thing he was doing is the vital question. Where a testator has given instructions for the will while in health and executes the document prepared in accordance therewith while in illness slight proof of knowledge and

WILL—Testamentary capacity.

approval will suffice, and the will may be held valid, though at the time of execution the testator merely recollects that he has given those instructions but believes that the will which he is executing is in accordance with them. (*Mookerjee and Chotzner, JJ.*) SARADINDU NATH RAI CHAUDHURI *v.* SUDHIR CHANDRA DAS
50 Cal. 100 : 35 C. L. J. 569 : 1923 Cal. 116.

———*Testamentary capacity*—Onus probandi.
The *onus probandi* lies in every case upon the party propounding a Will and he must satisfy the Court that the will so propounded is the last will of a free and capable testator. This burden is generally discharged by proof of capacity and the fact of execution but mere ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of the property. (*Mookerjee and Fletcher, JJ.*) SURENDRA KRISHNA MONDAL *v.* RANEE DASI. **47 Cal. 1043 : 33 C. L. J. 34 : 59 I. C. 814 : 24 C. W. N. 860.**

———*Testamentary capacity—Presumption of due execution -Sound disposing state of mind—Physical weakness.*
There is a presumption in favour of the due execution and attestation of the will which is apparently duly executed. A will is not revoked by the subsequent insanity of the testator. Where a testator has given instructions for a will when he is of sound mind but is not in a normal state of mind at the time of the execution of the deed drawn up in accordance with those instructions he must be deemed to be of sound mind when it is executed. Physical weakness is not incompatible with a disposing state of mind. (*Scott-Smith and Wilberforce, JJ.*) WOOLMER *v.* DATY.
55 I. C. 798 : 1 Lah. 173

———*Testamentary capacity—Gift* inter vivos.
When the power of gift *inter vivos* exists, the power to transfer by will is to be presumed until the contrary is proved 48 P. R. 1903, Foll. (*Kensington and Johnstone, JJ.*) KARAM BAKSH *v.* CHIRAGH DIN. **66 P. R. 1911 : 104 P. L. R. 1912 : 12 I. C. 862 : 190 P. W. R. 1911.**

———*Testamentary capacity--Disposing mind.*
"Disposing mind" requires among other things knowledge of extent and nature of property as also claims of her sons excluded. (*Rattigan, J.*) INDAR NARAIN *v.* ONKAR LAL. **20 P. R. 1912 : 141 P. L. R. 1911 : 10 I C. 130 : 233 P W. R. 1911.**

———*Testamentary capacity—Sound disposing mind*
If the testator approved of the terms embodied by his legal adviser in the final will it is not necessary that it should be read out to him when he affixes his signature to it. 23 M. L. J. 4, Foll. It is necessary for the validity of a will that the testator should have a sound disposing mind *i.e.*, sufficient capacity to deal with and appreciate the various dispositions of property to which he is about to affix his signature. (*Sadasiva Aiyar and Napier, JJ.*) NAMBERUMAL CHETTY *v.* PASUMARTY KANNIAH CHETTY. **28 I. C. 959.**

WILL—Validity of.

———*Testamentary capacity—Instructions—Preparation Validity.*
A will prepared on the instructions given by the testator is good as if executed by him if he is able to judge that it was so prepared. (*White, C. J. and Sadasiva Aiyar, J.*) VENKATARAGAVALU REDDIAR *v.* BAGGIAMMAL. **14 I. C. 550 : 23 M L. J. 54.**

———*Testamentary capacity—Registration—Effect.*
The registration of a Will is a conclusive evidence that at least at the time of registration the testator was on his senses and fully competent to make the will, and that he consented to the contents being his intentions. (*Hallifax and Prideaux, A. J. Cs.*) MURLIDAS *v.* HARIDAS.
62 I. C. 246.

———*Testamentary capacity — Burden of proof—Undue influence—Nature of proof.*
The burden of proving that a will has been executed under undue influence is not discharged by merely showing that the beneficiary had the power unduly to overbear the will of the testator ; it must be proved that in the particular case the power was so exercised and the execution of the Will obtained thereby. (*Lindsay, J. C. and Daniels, A. J. C.*) AHMAD KHAN *v.* HURMAUZI KHAJAM. **61 I. C. 177 : 8 O. L. J. 27.**

Trust.

———*Trust—Creation of.*
A Hindu father by will left a house to his two nephews making them executors to discharge duties of a religious trust and to take the income after such discharge. No transfer of the house was allowed. *Held*, the will created a trust and conferred no absolute interest upon the nephews. (*Richards, C. J. and Rafique, J.*) MURLIDHAR *v.* DEWAN CHAND. **38 All. 214 : 32 I. C. 945 : 14 A. L. J. 249.**

———*Trust — Benami transaction—Will by lady—Description of devisee as grand-daughter's husband—Devise, whether benami for grand-daughter.*
The mere description of the devisee as the husband of her grand-daughter in certain wills by a Hindu lady does not show that the transactions was *benami* for grand-daughter. (*White, C. J. and Oldfield, J.*) MEENAKCHI AMMAL *v.* MANICKA CHETTY. **24 I C. 918 : 1 L. W. 360.**

Validity of.

———*Validity of—Joint will.*
A joint will can validly be made by two persons. (*Macleod, C J. and Fawcett, J.*) JETHABHAI GOKULDAS *v.* PARSHOTTAM. **45 Bom 987 : 61 I. C. 400 : 23 Bom. L. R. 393.**

———*Validity of—Clause uncertain and repugnant to gift made—Operativeness.*
A clause in a will to the effect that division of the testator's estate will not be made till his sons come of age and earn their livlihood and all his daughters are married, is ineffective both on the ground of repugnancy to a gift made and on the ground of uncertainty, because the events mentioned above might either not take place or be indefinitely postponed. (*Woodroffe and Cuming, JJ.*) J. N. GHOSE *v.* B. B. DASI. **1922 Cal. 302.**

WILL—Validity of.

———*Validity of—Succession—Exclusion of legal heirs.*

Per *Mookerjee, J.*—Mere expressions in a will that the heir-at-law shall not inherit any part of the estate is insufficient to disinherit him unless there is a valid disposition of the estate to some one else. 4 Bean. 318, Foll. (*Sanderson C. J., Woodroffe and Mookerjee, JJ.*) SAROJINI DASSI *v.* GNANENDRA NATH DAS. **33 I. C. 102 : 23 C. L. J. 241.**

——*Validity of—Rule of succession not to be altered—Disinherison of heirs.*

A testator cannot create a new rule of succession unknown to Hindu law. A document executed by a Hindu before his death recited that from the date of its execution the executant ceased to have any connection with his first son, that the latter was to have no concern with any of the former's property and that after the death of the executant and his wife the first son was to have no rights as a son and the other sons should perform all the funeral ceremonies. *Held*, that the meaning of the document was that the first son was to lose all his rights in his father's property from the date of the execution of the document, and that the recital that he would not have the rights of a son after the death of the executant, referred to rights of a religious character and not to rights in the property. The document was not a will and was inadmissible in evidence for want of registration. It was also ineffectual for another reason, *viz.*, that while it contained no mention of a gift of the property being made to any person it purported to alter the rule of the Hindu law regarding succession. Such an attempt to alter the mode of succession is void, 38 C. 603 Ref (*Broadway and Martineau, JJ.*) MADAN LAL *v.* LABHU RAM. **1922 Lah. 421.**

———*Validity—Suspicious circumstances.*

Where under a will which is sought to be propounded the testator's wife and children are not mentioned at all, for 20 years after the death it had not been probated, and in prior proceeding regarding the estate, the testator had been treated by all as having died intestate it is to be held that thewill is not genuine. (*Spencer and Venkatasubba Rao, JJ.*) ROSA MARIA *v* JACOB SUZA **(1923) M. W. N. 647 : 18 L. W. 588 : 1924 Mad. 161.**

———*Validity of—Absence of attestation.*

A made a deposit in a Nidhi and nominated *B* as the person entitled to receive the money after his death in accordance with the articles of association. In a suit for recovery of the money. *Held*, that the nomination could not be enforced as a will as it was not attested by two witnesses and therefore *B* had no interest in the property. (*John Wallis, C. J. and Krishnan, J.*) NANA TAUKER *v.* BHAVANI BOYEE **43 Mad. 728 : 39 M. L. J. 391 ; 60 I. C 239 : (1921) M. W. N. 70.**

———*Validity of—Partial intestacy—Effect of.*

Wherever there is partial intestacy either because no person is alive to claim under the will, or the bequest is void and ineffectual, there is a resulting trust in favour of the heir-at law, in spite of the wishes of the testator to the contrary. The failure takes effect from the death of the testator and there cannot be a divesting of the estate once vested. (*Kanhaiya Lal and Daniels, A. J. Cs.*) BRIJ RAJ KUAR *v.* MAHADEO. **21 O. C. 374 : 50 I. C. 249 : 6 O. L. J. 101**

WINDING UP.

See (1) COMPANY.
(2) COMPANIES ACT,

WITHDRAWAL OF SUIT.

See C. P. CODE, O. 23, R. 1.

WITNESS.

See EVIDENCE ACT, S. 118.

WORDS AND PHRASES.

———*'Abwab'—Meaning of.*

Abwab means an arbitrary and indefinite imposition levied by the landlord on their tenants. An item which forms part of the consideration for which the lease is granted is not an Abwab. (*Jenkins, C. J. and Chatterjee, J.*) KALI KUMAR ROY *v.* KAILASHNATH ROY. **27 I. C. 470.**

——Adhiar—*Position.*

An *adhiar* generally means a tenant. (*Woodroffe and Newbould JJ.*) DEB NATH DAS *v.* RAM SUNDAR BARMAN. **31 I. C 579 : 19 C. W. N. 1205.**

———*"Adhin" —Meaning of.*

"Adhin" means "appertaining to" and not "subordinate" to howla (*Chatterjee, J.*) MADAN MOHAN *v.* SASHI BHUSAN. **31 I. C. 549 : 19 C. W. N. 1211.**

———*"Adverse possession"—Meaning of—Bengal Tenancy Act (VIII of 1885), S. 167.*

An adverse possession is one which can be annulled by a purchaser at an execution sale of a decree. (*Beachcroft, J.*) EASIN *v.* INTIGERENESSA. **58 I. C. 745 : 24 C. W. N. 659.**

———*Agachh trees, meaning of.*

"Agachh trees" means trees are valueless for fruit bearing or timber purposes. (*Bucknill and Das, JJ.*) NATHUNI RAI *v* MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR **1 Pat. L. R 289 : 1924 P. 147.**

———*"Agricultural cattle"—Meaning of.*

The term "agricultural cattle" means and includes animals employed in agriculture and in purposes subservient to agriculture, including the domestic requirements of the tenant but not animals kept as stock of a dairy farm or for sale or other commercial purposes. (*Stanyon, A. J. C.*) NANHU *v.* NARBADA PRASAD. **34 I. C. 695 : 12 N. L. R. 83.**

———*Ainthugai account.*

Among the Nattukottai Chetties an *Ainthugai* account is an account of the properties in the possession of a person and it may include properties held by him on trust. (*Wallis C J. and Seshagiri Aiyar, J.*) RAMANATHAN CHETTY *v.* MURUGAPPA CHETTY. **3 L. W. 210 : 33 I. C. 969 : (1916) 1 M. W N. 208.**

———*Alien enemy—British subject.*

Under the terms alien enemy' are comprised (1) subjects of a country at war with Great

WORDS AND PHRASES.

Britain, (2) British subjects voluntarily residing in hostile country, and (3) subjects of a natural state voluntarily residing in hostile country and under British subject are comprised all persons born within the dominions subject to the Crown irrespective of the nationality of one or both parents but the term does not include (1) child of a foreign sovereign, ambassador or diplomatic agent, (2) child born of alien parents in British Territory occupied by a foreign army at the time of birth. *Keyzinger v. Samule.* (1915) 31 T. R. 162. Foll. (*Fox, C J.*) GREENBERG *v* A. S. PINTO. 37 I. C. 88 : 9 Bur. L. T. 176.

———*Ante-ezara tenant.*

The claim to hold as ante-ezara tenant means that the landlord has no right to enhance the rent (*Mittra, Offg. A.J C.*) BHIVAJI *v.* TUKARAM. 39 I C. 15 : 13 N. L. R. 11.

———*Arh—Rehen — Mustagharaq-power of sale.*

The three words are themselves sufficient to convey power of sale. (*Lindsay, J. C.*) GAUHAR KHAN *v.* AJUDHIA SINGH. 20 I.C. 870

——— *Arrears of rent—Meaning.*

Arrears of rent continue to be arrears though suits have been instituted and decrees passed in respect of those arrears. (*Chatterjee and Panton, JJ.*) ANANDA MOHAN ROY *v.* PROMOTHANATH GANGULI. 57 I C. 874 : 25 C. W. N. 863.

———*Assets.*

Realisable property possessed by insolvent at the material moment is 'assets' which however does not include future earnings as they cannot be sold. (*Piggott and Walsh, JJ.*) DEBI PRASAD *v.* ALLEN GRANT. 39 I. C. 916

——— *Asthan—Sanyashi, meaning of—Alienation by Mohunt—Capacity to hold property.*

Asthan is mainly an institution of ascetics and sanyashis having no wordly connections of wealth or family and the mohunt is presumed to have no property other than that of the institution and the offerings made to him. But he may hold private property, the character of which he must prove as such. In absence of such proof an alienation by a mohunt is *ultra vires.* The fact of many alienations by successive mohunts means so many breaches of trust. (*Daniels and Wazir Hasan, A. J Cs.*) RAM PAT *v.* DURGA BHARTI 7 O. L. J. 547 : 60 I. C. 440 : 23 O. C. 303

———"*Aulad*"—*Khandan.*

Illegitimate descendants are not contemplated by these words. (*Lord Atkinson.*) SHER BAHADUR *v.* GANGA BAKSH SINGH 36 All 101 : 41 I. A. 1 : 18 C. W. N. 401 : 15 M. L. T. 169 : (1914) M. W. N. 184 : 12 A. L. J 188 : 19 C I. J. 277 : 1 O L. J. 109 (2) : 22 I. C. 293 (2 P. C.) : 17 O C 68 : 16 Bom. L R. 306 : 26 M. L. J. 291.

———"*Aulad*".

The word 'aulad" is used in its generic sense and includes male and female children. (*Le Rossignol and Abdul Quadir, JJ.*) SAIDAN *v* FAZAL. 1922 Lah. 215.

WORDS AND PHRASES.

———"*Aulad*"—*Meaning of — Female and male.*

The word "Aulad" ordinarily includes all descendants male and female. 89 P. R. 1892, Dist. (*Reid and Clarke, JJ.*) KALLUMAL *v.* CHAHINDI. 36 I. C. 222 : 97 P. L. R 1916.

———"*Aulad*"—*Females as heirs recognised -Meaning of.*

In a tribe which recognises females as heirs the word "aulad" used in regard to succession must be taken to include female as well as male heirs. (*Rattigan and Shah Din, JJ.*) SULTAN *v.* ALI MUHAMMAD. 23 I. C. 535 : 56 P. L. R. 1914.

———"*Auladdar aulad*" *Meaning of.*

The words 'auladdar aulad' include descendants whether male or female except descendants through females. (*Macleod, C. J. and Crump, J.*) SYED MIRA SAHIB *v.* BAI CHHOTI BEGAM. 1924 B 281.

———"*Aun santhathi.*"

Unless excluded by force of the context an adopted son is included in the expression of "aun santhathi" (male descendant.) (*Sankaran Nair and Spencer, JJ.*) BALA SUBRAMANIA PILLAI *v.* PITCHAI PILLAI. 33 I. C. 552 : (1916) 1 M. W. N 306.

———*Aurasa Putra Poutradhik—Babuana—Grant.*

The words as used in these grants or sanads are not words of general inheritance but are words of limitation consistent with custom. (*Sir John Edge.*) EKARADESHWAR SINGH *v.* JANESHWARI BAUSAIN. 42 Cal. 582 : 41 I.A. 275 : 18 C. W N. 1249 : 16 M. L. T. 382 : 1 L W. 863 : (1914) M. W. N 8 7 : 12 A. L. J 1217 : 21 C. L. J 9 : 17 Bom. L. R 18 : 25 I. C 417 : 27 M. L. J. 375. (P. C.),

———"*Bahamah wajah*".

The words "Bhamah wajah" mean "with all rights". (*Rafique and Lindsay, JJ.*) RAM CHANDRA SARUP *v.* KIRPA DEVI. 1923 All. 216.

———"*Bemiade Patta*"—*Mearing*

Bemiade Patta means a lease without a term. The more mention of the rights of the lessee and his heirs to the minerals in the leased property do not make it permanent. It is only a lease from year to year with the incidents attached to such a lease. (*Chapman and Roe, JJ.*) PERSHAN KUER *v.* TULSI KUER. 2 Pat. L. J. 180 : 1 Pat. L. W. 447 : 39 I. C. 658 : 1918 Pat. 11.

———"*Besides Poramboke*" —*Meaning of—Inam grant.*

The words exclude burning and burial grounds and other portions required for communal purposes, which are vested in the Government as trustees for the public. (*Sadasiva Aiyar and Spencer, JJ.*) VENKATARAM SIVAN *v.* SECRETARY OF STATE FOR INDIA. 9 L. W. 381 : 25 M. L T. 232 : (1919) 1 M W. N. 191 : 50 I. C. 360 : 36 M. L. J. 208.

———*Bhai and Beradarzadah—Include distant relations.*

WORDS AND PHRASES.

The words Bhai and Beradarzadah are not limited in urdu language to brother and his son but extend to more distant relations. (*Rafique and Lindsay, JJ.*) SYED FAZAL HAQ *v.* AZIZ HASAN. **L.R. 4 All 23 : 1923 A. 163.**

——*Bhai Bhatija Hakiki.*

A sister is included in the term 'Bhai Bhatija Hakiki', *i. e.*, own brothers and nephews. (*Richards, C. J. and Tudball, J.*) NIAZ FATIMA *v.* TAMIZ BEGAM. **15 I. C. 175**

—*Bhai Hakiki—Meaning of.*

The word *Bhai Hakiki* includes a sister also. (*Richards, C. J. and Tudball, J.*) MUSSAMMAT NAJIBAR *v.* NIHAL SINGH. **19 I. C. 647.**

——*'Bhaiya' 'Walda'—*

The words—Walda' 'Bhaiva' are applied out of love and affection as mother and brother and they cannot be taken literally. (*Daniel J C. and Dalal, A J. C.*) MUMTAZ-UN-NISSA BEGAM *v.* WAZIRALI. **65 I. C. 308 : 8 O. L. J. 569**

——*Bhatija.*

"*Bhatija*" has a far wider meaning than 'brother' or "nephew" in English (*Tudball and Rafique, JJ.*) SAMHER SINGH *v.* SHER SINGH. **18 A. L J 454 : 56 I. C: 183 : 2 U. P L. R. (All.) 158.**

——*'Biswi'.*

Where land held by a tenant is mortgaged by the proprietor with the tenant such a mortgage is called 'Biswi' in eastern Oudh. (*Kanhaiya Lal, J. C.*) SAT DEO *v.* JAI NATH. **9 O. L. J. 141 : 1922 Oudh 75.**

——*'Borokta' does not imply—Fixity of rent.*

'*Borokta*' in a *Kabuliat* means in due and proper time and does not imply fixity of rent (*Chatterjee and Newbould, JJ.*) BISESWAR ROY *v.* BROJO KANTA ROY. **62 I. C. 49 : 33 C L J. 296.**

——*British India—Wadhwan Civil station.*

Wadhwan Civil Station is not a part of British India 9 Bom 244, Overruled. (*Batchelor and Heaton, JJ*) EMPEROR *v.* CHIMANLAL JAGJIWAN. **37 Bom 152 : 14 Bom L R 876 : 17 I. C. 534 : 13 Cr. L. J. 790.**

——*'Cash'—Meaning*

Ordinarily '*cash*' has a narrower meaning than money. (*Sanderson, C.J., Woodroffe and Mookerjee. JJ.*) SAROJINI DASI *v.* GNANENDRA NATH DAS. **33 I. C. 102 : 23 C. L. J. 241.**

——*'Cause of action' See also C.P. Code, O. 2, R. 2.*

The "cause of action" for a suit is the sum total of the facts and circumstances which the plff. has to prove in order to entitle him to the relief claimed. (*Piggott and Walsh, JJ.*) RAM HARAKH *v.* RAM LAL. **38 All. 217 : 33 I. C. 124 ; 14 A L. J. 257.**

——*Common carrier—Definitions of.*

A "common carrier" is one who offers to carry goods for any person between certain termini and on a certain route. He is bound to carry for all who tender to him goods and the price of carriage and insures the goods against all loss but that arising from the act of God or the public enemy and has a lien on the goods for the price of carriage. A common carrier is entitled to demand and to be paid the full price of carriage and if this is not paid he may lawfully refuse to carry at all But the price demanded must be reasonable. It is also essential to the character of a common carrier that he his bound to carry the goods of all persons applying to him. (*Macleod, J.*) BOGGIANO & CO. *v.* ARAB STEAMERS, LTD. **40 Bom. 529 : 33 I. C. 586 : 18 Bom. L. R. 126.**

——*Composition deed—Meaning of.*

A composition deed does not mean a deed, composing differences but means a deed by which a debtor compounds with his creditors. (*Fletcher and Shamsul Huda, JJ.*) GOSTA BEHARI DE *v.* GOSTA BEHARI LUMANTA. **46 I. C. 243.**

——*'Default'—Meaning.*

'Default' means omission to do something which the person concerned is legally bound to do (*Lindsay, J. C.*) NARINDRA BAHADUR *v.* GANGA SAGAR. **7 O. L. J. 337 : 57 I. C 509 : 23 O. C. 166.**

——*'Dhardhura'—Meaning of.*

Dhardhura is not a term of art, signifying necessarily always and under all conditions that the deep stream continues to be a permanent boundary between two estates on the opposite banks of a river. There are many variations in the sense of the word. (*Simpson and Wazir Hasan, A. J. C.*) BALBHADDAR PRASAD *v.* NARAYAN DAS. **9 O L. J. 518 : 1923 Oudh 102.**

——*E. and O. E.—Receipt.*

The letters E and O. E commonly put in India under a bill have no effect whatever on its finality. (*Macleod, J.*) ALIMAHOMED RAHMITULLAH *v.* PANDURANG LAXMAN. **33 I. C. 701 : 18 Bom L R. 156.**

——*'Farokha,' meaning of.*

Where the co-sharers in a zamindari claimed a customary right to pre mortgage on the strength of a clause in the wazib ul-arz which ran as follows :—

"In case none of the co sharers is prepared to purchase or to accept a mortgage or lease, then the co sharer in question may sell to a stranger" *held* that the word "Farokha" cannot be *held* to mean "transfer" as it is inconsistent with the ordinary meaning of the word. (*Rafique and Piggott, JJ.*) SURAJ NARAYAN PRASAD PANDE *v.* RAM GHULAM SHUKUL. **45 A 321 : 1923 A. 361 (2).**

——*'Farzandan'—Means offspring.*

The term Farzandan means offspring or lineal descendants and includes daughters and daughter's sons. (*Dhobley, J. C.*) SHAIKH CHOTU *v.* MIR AKABAR ALI. **1923 N. 170.**

——*Fazendari—Meaning.*

Fazendari, though indicates nature of rent does not necessarily decide the nature of tenure which depends upon the agreement between the parties. (*Scott and Davar, JJ.*) YESHWANT VISHNU NENE *v.* KESHAV RAO BHAIJI. **27 I. C 523 : 16 Bom. L. R. 720.**

——— *'Good-will'—Definition.*

The term "good-will" is defined in the case quoting from the case of *Trego* v. *Hunt* as follows :—" Every positive advantage as contrasted with the negative advantage of the late partner not carrying on the business himself that has been acquired by the old firm in carrying on the business whether connected with the premises in which the business was previously carried on or with the name of the late firm or with any other matter, carrying with it the benefit of the business. It is the connection thus formed together with the circumstances whether of habit or otherwise which tend to make it permanent that constitute the good will of a business. (*Chatterjee and Walmsley, JJ.*) PARASULLA MULLICK *v.* CHAMBA KANTA DASS. **39 I. C. 177 : 21 C. W. N. 979.**

——— *Good will—Meaning—In India the law of trade marks is not governed by statute.*

There is no statutory system of registration, the rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England 38 Cal. 110 Ref. It is inherent in nature of a trade mark that it cannot be assigned or descend in gross for it is a mode of representing the origin of goods to which it is attached or their Trade Association. The representation of a trade mark may perhaps be true only of its originator but usage has sanctioned a more liberal treatment based in the principle of identification by succession and therefore successors in business have been allowed to use their predecessor's trade-marks where the representation still continues to be substantially true. An originator of a trade-mark of natural product who certifies to their good quality is entitled to it and has a right to alienate it. A trade-mark can be assigned together with the good will of the business to which it relates. (*Jenkins. C. J. and Stephen, J.*) G. S. HANNAH *v.* JAGANATH & Co **27 I. C. 483 : 19 C. W. N. 1**

——— *Haqa chaharum—Meaning of.*

Haqa chaharum is a right of the Zamindar to take ¼ share of the sale proceeds from the tenants. This right is based on a custom. (*Stuart and Sulaiman, JJ.*) KEDAR NATH *v.* DATTA PRAKASH. **20 A. L. J. 646 : 44 A. 739 : 1922 A. 370.**

——— *Haqiyat—Meaning of.*

Haqiyat means rights in immoveable property and though it is usually used in connection with landed property it may as well be applied to house property. (*Chevis, J.*) BAWA SINGH *v.* LACHMAN SINGH. **24 P. R. 1911 : 186 P. L. R. 1911 : 10 I. C. 850 : 56 P. W. R. 1911.**

——— *Hasilat—Meaning.*

The word 'Hasilat' does not mean land revenue but the produce of the land (*Robertson and Shadin, JJ.*) SANTA *v.* MUSSAMMAT DAROPTI. **47 P. W. R. 1913 19 I. C. 612 : 191 P. L. R. 1913.**

——— *"Hearing"—Meaning.*

The word 'Hearing' is not defined in the C. P. Code and is used in different rules with a view to state the different purposes for which a date for hearing is fixed. (*Jwala Prasad, A.C.J. and Das, J.*) ABDUL RAHAMAN *v.* SHIB LAL SAHU. **63 I. C. 570 : 2 Pat. L. T. 572.**

——— *"Hissadar karibi" Meaning of.*

Hissadar Karibi is an ambiguous expression and may mean a co-sharer nearer in space or nearer in blood relationship. (*Lindsay and Sulaiman, JJ.*) BHOLAI PANDEY *v.* KHHIALI PANDEY. **L. R. 4 All. 550 : 1924 All. 456.**

——— *'Ijmal'—Behar.*

Per *Chapman, J.* –The word 'Ijmal' in Bihar means a residuary share. Per *Mullick, J.*—It means simply 'joint'. (*Chapman, Mullick and Atkinson, JJ.*) DAYAL GIR *v.* ABDUL GAFFUR. **2 Pat. L. J. 402 : 40 I. C. 13 : 2 Pat. L. W. 229.**

——— *'Importation'.*

Importation does not mean only importation from outside the territory but it also means from any district of the said territory into another district of the same. (*Martineau, J.*) SITA RAM *v.* EMPEROR. **23 Cr. L. J. 732 : 1924 L. 160.**

——— *"Incumbrance" — Right of passage included in.*

A right of passage is included in the term "incumbrance" in S 16 of the Land Acquisition Act. (*Viscount Haldane.*) MUNICIPAL CORPORATION OF BOMBAY *v.* GREAT INDIAN PENINSULAR RY. CO. **41 Bom. 291 : 43 I. A. 310 : 21 M. L. T. 1 : 19 Bom. L. R. 48 : 15 A. L. J. 63 : (1917) M. W. N. 83 : 21 C. W. N. 447 : 38 I. C. 923 : 25 C. L. J. 209 (P. C.).**

——— *"Instroke"—"Upstroke"—Meaning.*

Meaning of the words "instroke" and "upstroke" with reference to mining law explained. (*Asutosh Mookerjee and Beachcroft, JJ.*) RAMA PRASAD ROY *v.* ANUKUL CHANDRA. **27 I. C. 444 : 20 C. L. J. 512.**

——— *Intention.*

Intention is the result of working of the brain, and can be gathered from judging the act itself and the circumstances under which it was done. (*Fox, C.J.*) EMPEROR *v.* ALI COSSIM ARIFF. **10 I. C. 929 : 12 Cr. L J. 329 : 4 Bur. L. T, 97.**

——— *"Irrigation by percolation"—Meaning of.*

The words "irrigation by percolation" cover cases where subsoil water derived by percolation from a river or channel belonging to Government is taken by percolation to the roots of trees. 34 Mad. 21 : 35 Mad. 197; 34 Mad. 366 Ref. (*Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Phillips, JJ*) SECRETARY OF STATE *v* MAHADEO SASTRIGAL. **40 Mad. 58 . 32 M. L J. 411 : (1917) M. W. N. 376 : 21 M. L. T. 337 : 39 I. C. 193 : 5 L. W. 817. (F.B.).**

——— *"Jadd" does not include entering into family by marriage.*

The word "*Jadd*" literally means grandfather, and "*ashkhas jaddi*" means persons descended from a common ancestor and cannot include a woman who is not descended from such common ancestor but enters into the family by marriage. (*Tudball and Sulaiman, JJ.*) RAM PAL *v.* MT. BATASHIA. **19 A. L. J. 820 : 1922 Lah. 300.**

——— *'Jagir'—'Saranjam'—Meaning.*

Saranjam is the Marathi equivalent of Jagir. The terms *Saranjam* and *Inam* are not mutually exclusive. The latter is more general term and applies to Government grant as a whole. (*Lord Shaw.*) RAGHOJI RAO SAHEB *v.* LAKSHMAN RAO SAHEB.
36 Bom 639 : 39 I. A. 202 : 16 C. W. N. 1058 : 12 M. L T. 472 : (1912) M. W. N. 1140 : 14 Bom. L. R. 1226 : 17 C. L. J. 17 : 16 I. C. 239 : 23 M. L J. 383 (P. C)

——— *'Jagir'—Punjab.*

In the unjab, the term Jagir is ordinarily restricted as meaning an assignment of land revenue only. Jagir is ordinarily not land. (*Kensington and Rattigan, JJ.*) MAYA DAS *v.* GURUDIT SINGH.
146 P W. R. 1912 : 16 I. C. 855 : 167 P. L. R. 1912.

——— *"Jis Serazi ho" meaning of.*

"Jis se razi ho" means that the person who wishes to sell has some right of selecting the person to whom he will make the offer. (*Rafique and Lindsay, JJ.*) PANDIT NATHU RAM *v.* GHANSHYAM.
1923 All. 519.

——— *'Jote' does not always mean 'ryoti.'*

The expression "Jote" in a deed does not mean that the tenancy is a ryoti holding The expression "Jote" is a general term and does not necessarily mean a 'Ryoti" "Jote." (*Chatterjea and Pearson. JJ.*) KRISHNENDRA NATH SARKAR *v.* RANI KUSUM KAMANI DEBI.
1923 Cal. 351.

——— *Judicial proceeding.*

An application to leave to sue is a stage in a judicial proceeding. (*Chaudhuri, J.*) BUDHU *v.* CHOTU.
25 C. L. J. 401 : 18 Cr. L. J. 793 : 41 I. C. 313 : 21 C. W. N. 654.

——— *Kabizdarmiani—Meaning of.*

The words "Kabizdarmiani" can only be interpreted to mean "under proprietor" in the sense in which that word is used in the Oudh Rent Acts (*Stuart and Kanhaiya Lal, A. J. C.*) LAL SRIPAT SINGH *v.* LAL BASANT SINGH.
25 I. C. 743 : 1 O. L. J. 421.

——— *'Kar'—Includes "cess."*

The word 'kar' is wide enough in its ordinary meaning to include the word 'cess.' (*Newbould and Cuming, JJ.*) ANNADA CHAKAN *v.* HABIBULLA.
1923 Cal. 283.

——— *'Kasht—Bakasht.'*

Kasht and Bakasht are the words of art in Revenue Records they apply to cultivation of lands by proprietors and tenants. (*Jwala Prasad and Das, JJ.*) NANDKISHORE SINGH *v* MATHURA SAHU.
3 P. L. T 13 : 1922 P. 193.

——— *"Korfa" Tenant—Meaning of.*

A *Korfa* tenant does not necessarily mean an under-raiyat. A *korfa* tenant is a sub-lessee whether of a taluqdar or of a raiyat. (*Tennon and Chaudhuri JJ.*) SECRETARY OF STATE *v.* JADAV CHANDRA MISRA.
39 I. C. 409 : 21 C. W. N. 452.

——— *Kudivaram—Melwaram.*

The word *Kudivaram* is a Tamil word and literally signifies the cultivator's share of the produce of land held by him as distinguished from the landlord's share of the produce which is called Melvaram. "Kudivaram" is also used to denote a permanent right of occupancy. (*Sir John Edge.*) SURYANARAYAN *v* PATANNA.
41 Mad. 1012 : 45 I A. 209 : (1918) M. W. N. 859 : 23 C W. N. 273 : 9 L. W. 126 : 29 C. L . 153 : 1 U. P. L. R. (P C.) 11 : 21 Bom. L. R. 547 : 48 I C 689 : 25 M. L. J. 30 : (1919) M. W. N. 463 : 36 M. L. J. 585 (P. C.).

——— *Kudivaram.*

Kudivaram literally means the share of the cultivator in the produce raised, in this sense Kudivaram belongs to the cultivating tenant whether he has permanent occupancy rights or is a mere lessee from year to year or even a tenant-at-will. *Kudivaram* also means the rights of such a tenant so long as he is in possession of the land. The word also means the right of a tenant having permanent occupancy rights In the last sense it is also called *Mirasidari* right or *Kudimiras* right. (*Sadasiva Aiyar and Napier, JJ.*) NAINA PILLAI *v.* RAMANATHAN CHETTIAR.
41 I. C. 788 : 33 M L J. 84.

——— *'Kul' irrigated means 'capable of being irrigated by kul'*

Description of lands in *Jamabandi* was '*Kul* irrigated,' *held* this does not mean that they were as a matter of fact irrigated from a particular *Kul.* The description only means that the lands were capable of being irrigated from a *Kul.* (*Moti Sagar, J.*) MANSA RAM *v.* KALU RAM.
1923 Lah. 605.

——— *Lunatic—Person of weak memory or weak mental strength.*

A man of weak memory or of even more weak mental strength cannot be called an idiot or a man of unsound mind. (*Sadasiva Aiyar and Spencer, JJ.*) PACHI *v* CHARNI.
26 I. C. 344 : 16 M. L. T. 529.

——— *Mafrur—Meaning of.*

A person who has totally abandoned his place of residence and rights over the grove, is a *mafrur or farar ho Jawe* (*Piggott, A. J. C.*) PARTAB SINGH *v.* CHANDRA BHUKAN.
12 I. C. 409.

——— *Mahasil—Meaning of.*

"Mahasil" when used in connection with cultivation means the produce of land. (*Sultan Ahmad, J.*) CHANDRA KISHORE JOTSHI *v.* SUDAMA RAI.
57 I. C. 756.

——— *Makan Champal—Meaning.*

Makan champal being a covered building is a Makan. (*Chamier, J. C.*) BIKRAMAJIT SINGH *v.* SAKNAM.
10 I. C. 186.

——— *Malaranai.*

In the District of Madura and Tinnevelly the word "Malaranai" is used in a very loose manner to indicate not only transaction wholly colourable but also transactions intended to have some other legal effect than the one which the language of the document imports. (*Ayling and Sadasiva Aiyar, JJ.*) VENKATASUBBA SASTRIAL *v.* SUBRAMANIA AIYAR.
6 L. W. 703 : 42 I. C. 827 : (1917) M. W. N. 674.

WORDS AND PHRASES.

——"*Malguzari*"—*Meaning of.*

The word "Malguzari" although usually meaning an amount paid to the Crown is capable of meaning the amount due from under-proprietors to the superior proprietor. (*Stuart and Kanhaiya Lal, A.J.Cs.*) CHARU CHANDRA BISWAS *v.* LALLAN SINGH. **40 I. C. 42 : 4 O. L. J. 148.**

——"*Malik*"—*Import of—Absolute interest in the property.*

The word "*malik*" as used in a will, in itself has considerable force, as indicating that the person in reference to whom it is used should take absolute interest in the properties conferred. (*Lord Atkinson.*) SUDHAMANI DAS *v.* SURAT LAL DAS. **18 L. W. 86 : 45 M. L. J. 247 : (1923) M. W. N. 601 : 38 C. L. J. 253 : 1923 P. C. 65 (P. C.)**

——'*Malik*'.

The word 'malik' ordinarily means an owner possessed of full proprietary rights, (*Sir John Edge.*) SASIMAN CHOWDHURAIN *v.* SHIB NARAYAN. **42 M. L. J. 492 : 3 Pat. L. T. 133 : 26 C. W. N. 425 : 1 Pat. 305 : 15 L. W. 434 : 24 B. L. R. 576 : 35 C. L. J. 427 : 20 A. L. J. 362 : (1922) M. W. N. 368 : 30 M. L. T. 242 : 49 I. A. 25 : 1922 P. C. 63 (P. C.).**

——"*Malik*"—*Absolute owner—Context qualifying absolute estate*

The word 'malik' confers on the donee a heritable and alienable estate but the context may qualify or cut down the absolute rights implied by the word. (*Mookerjee and Panton, JJ.*) SULOCHANA DEBI *v.* JAGATTARINI DEBI. **53 I. C. 602: 30 C. L. J. 51.**

——'*Malik.*'

Ordinarily the word 'malik' means absolute owner. (*Hallifax, A. J. C.*) SUNDRA BAI *v.* JAGANNATH. **1923 Nag. 56.**

——"*Malik.*"

The word 'Malik' indicates the conveyance of an absolute estate. (*Syed Wazir Hasan, J.*) BIJAI BAHADUR SINGH *v.* MATHURA SINGH. **9 O. L. J. 327 : 1922 Oudh 278.**

——'*Malik' implies full ownership.*

"Malik" does not necessarily define quality of the estate but exclusive ownership. "Malik" imports exclusive and free enjoyment of property and free power of disposition (*Coutts and Ross, JJ.*) ASHURFI SINGH *v.* BISESWAR PRATAP NARAIN SAHI. **1 P. 295 : 3 P. L. T. 273 : 1922 Pat. 70 : 1922 P. 362.**

——Malik—*Milkiat or Malikiat.*

The word "Malik" means literally one who holds 'Mulk' or land. Milkiat or Malikiat implies something appertaining to a *Malik.* Per *Chapman, J.*—The word "Malik" a word which is in common every day use in the country, cannot be converted by judicial decisions into a technical term of conveyancing. (*Chapman and Roe, JJ.*) SASIMAN *v.* SIBNARAIN. **39 I. C. 755 : 1 Pat. L. W. 375.**

——'*Malik*'—*Meaning of.*

In absence of facts showing contrary intention, the words 'Malik' and 'Waris' indicate absolute estate. (*Kennedy, J. C. and Kemp, A. J. C.*) TIRATHMAL LOKOOMAL *v.* THANWARSINGH. **66 I. C. 720 : 15 S. L. R. 202.**

——"*Malikana*"—*What is—Portion of holder.*

Malikana is a right to a portion of the benefits of an estate in consideration of rights which are proprietary. (*Mookerjee and Rankin, JJ.*) SOUDAMINI DASSYA *v.* SECRETARY OF STATE. **50 Cal. 822 : 1924 Cal. 197.**

——"*Malik Mustakil kamil*"—*Do not necessarily confer absolute estate.*

'Malik Mustakil Kamil' means permanent and full ownership. This right confers only a life estate and not absolute estate upon a widow. (*Coutts and Ross, JJ.*) SORABJIT PANDE *v.* RAI KUMAR PANDE. **1922 Pat. 74 : 1923 P. 87.**

——'*Malik wari*'—*Absolute estate.*

The use of the words "malikwa waris" confers absolute estate on female donee. (*Hallifax, A. J. C.*) MANGALJI *v.* RAMBHACO. **1922 Nag. 73.**

——"*Marfat.*"

The use of the word 'Marfat' cannot be used to resist the claim of purchaser to take objection under S. 47. (*Newbould and Cuming, JJ.*) GAGAN CHANDRA *v.* NAFAR CHANDRA. **64 I. C. 124.**

——'*Marhi' means a mutt.*

The word 'marhi' only means a mutt or temple and a person does not divest himself all authority over his house, merely by calling it a 'marhi.' (*Kincaid, J. C. and Raymond, A. J. C.*) GOVERDHANGIR *v.* VISHINGIR. **63 I. C. 370 : 15 S. L. R. 38.**

——"Mera Shufa."

The words "*Mera Shufa*" are words denoting a pre-emption demand on a particular property but they do not, when repeated twice, by themselves constitute a valid *tulab-i-mawasibat* under the Muhammadan Law. A.W.N. (1897) 93, Dist. (*Karamat Husain, J.*) MAKDIN BAKSH *v.* MUHAMMAD NAZIR KHAN. **10 I. C. 143.**

——Merchant—*Karachi usage.*

According to Karachi mercantile usage 'merchant' means a member of merchant class of Karachi and includes a broker and also a person actually dealing in sale and purchase of goods. (*Fawcett, J. C. and Kincaid, A. J. C.*) ABDUL HAROON *v.* E. D. SASSOON & CO. **56 I. C. 76 : 13 S. L. R. 201.**

——Minerals—*Meaning of.*

Minerals include granite, clay, limestone, free stone and the stone used. (*Sadasiva Aiyar and Spencer, JJ.*) SECRETARY OF STATE *v.* SHRINIVASA CHARRIAR. **23 I. C. 144 : 15 M. L. T. 277.**

——Miras—*Meaning of.*

The word *Mireshorotto* is a misspelling. The use of the words "*Mireshorotto Jansudiya*" implies heritability from generation to generation. (*Walmsley and Suhrawardy, JJ.*) AJIMANNESSA BIBI *v.* PANNA LAL SIL. **27 C. W. N. 1037 : 1923 C. 705.**

——'Mireshorotto Jansudiya' *means heritable tenancy.*

WORDS AND PHRASES.

The words '*Mireshorotto Jansudiya*' show that the tenancy is heritable and is to be enjoyed by the grantee from generation to generation. (*Walmsley and Suhrawardy, JJ.*) AJIMANNESSA BIBI *v.* PANNALAL SIL.

27 C. W. N. 1037 : 1923 Cal. 705.

———Mistress—*Meaning of.*

The Buddhist Law speaks of wives and concubines. The mistress of Western Europe is not the concubine of the Bhammatalas. So application of the term to a wife or a lawful concubine is against the cause of religious virtue as well as the Buddhist Law. (*Shaw, J. C.*) MI SHWE MA *v.* MI ME. **12 I. C. 191 : 4 Bur. L. T. 235.**

———Mokarari—*Meaning of words.*

Maurasi Mokarari patta implies grant at fixed rent. (*Mookerjee and Chotzner, JJ.*) BHAIRAB CHANDRA DAS *v.* MIDNAPORE ZAMINDARI CO., LTD. **38 C. L. J. 372 : 1924 C. 513.**

———*Mouth—Makurari Puttah with all rights—Mai hak—Hakuk—Meaning of.*

The words "with all rights" in a patta do not increase the actual corpus of the subject affected by it. The phrase means that the corpus being once ascertained, all the rights appurtenant thereto will pass with it. *Held*, on the facts that mineral rights were not included in the patta, which gave the Mokuraridar only surface rights, the mineral rights remaining in the Zamindar grantor. (*Lord Shaw.*) GIRDHARI SINGH *v.* MEGHULAL PANDEY. **45 Cal. 87 : 44 I. A. 246 : 15 A. L. J. 851 : 3 Pat. L. W. 169 : 26 C. L. J. 584 : (1917) M. W. N. 232 : 22 C. W. N. 201 : 7 L. W. 90 : 20 Bom. L. R. 64 : 42 I. C. 657 : 22 M. L. T. 358: 33 M. L. J. 687 (P.C.). [On appeal from 74 Cal. 355 : 34 Cal. 358].**

———*Moveable property—House and materials—Cutcha buildings.*

It is a question of fact whether a particular house and its materials are moveable or immoveable property. (*Mears, C. J. and Bannerjee, J.*) JITAN TAMBALI *v.* NANKO. **L. R 3 A. 128 : 1922 A. 45.**

———'Muafi Khairati'—*Interpretation of.*

The word '*Muafi-Khairati*' does not in itself imply that the muafi has an effect only during the pleasure of the grantor. (*Baillie, S. M.*) NISARUL RAHMAN *v.* TIKAM DAS.

1 O. L. J. 680 : 26 I. C. 860 (9).

———*Municipal Ferry—Ferry Boat.*

The word 'Ferry,' in Municipal Ferry must mean the starting place of boats on the banks of river and the right of ferry is the right to carry passengers from that place. Ferry boat is a boat used for carrying passengers from one side of river to another from any place on the bank. (*Chatterjee and Richardson, JJ.*) KASIM ALI *v.* CHAIRMAN OF MUNICIPAL COMMISSIONERS, CHITTAGONG.

21 C. W. N. 601: 35 I. C. 782 : 25 C. L. J. 639.

———*Naslan bad naslan.*

The use of the words Naslan bad Naslan shows an intention to convey an absolute interest. (*Wazir Hasan, A. J. C.*) LACHHMAN DAS *v.* BHAGWANT RAM. **65 I. C. 707.**

WORDS AND PHRASES.

———'*Occupation*' *Transval—Statute—Prohibition of Asiatic occupation.*

The word "occupy" is a word of uncertain meaning. Sometimes it indicates legal possession in the technical sense, as when occupation is made the test of rateability ; and it is in this sense that it is said that the occupation of premises by a servant if such occupation is subservient and necessary to the service, is the occupation of the master. At other times occupation denotes nothing more than physical presence in a place for a substantial period of time. *Held*, that the expression was used in the latter sense in S. 4 (*b*) of Vrededorp Stands Act, 1907 (South Africa) prohibiting Asiatic occupation of the stand. (*Viscount Cave.*) THE MADRASSA ANJUMAN ISLAMIA *v.* THE MUNICIPAL COUNCIL OF JOHANNESSBURG.

31 M. L. T. 114 : 4 U. P. L. R. (P.C.) 97 (P.C.).

———'*On behalf of*'—*Meaning.*

The expression 'on behalf of' connotes some benefit to the person on whose behalf another person acts. (*Caspersz and Sharfuddin, JJ.*) ULTAN CHAND *v.* EMPEROR.

16 C. W. N. 551 : 15 C. L. J. 401 : 15 I. C. 1007 : 13 Cr. L. J. 591 : 39 Cal. 344.

———'*On demand*'.

Except in case of negotiable instruments the words 'on demand' require an actual demand before a right to the money arises. (*Seshagiri Aiyar J.*) SEETHARAMA AIYAR *v* MUNISAWMI MUDALIAR.

(1919) M. W. N. 185 : 9 L. W. 427 : 50 I. C. 87 : 37 M. L. J. 613.

———*Open mines.*

A mine is open when it is devoted by its owner to make a profit by working and selling the minerals therein. (*Mookerjee and Beachcroft, JJ.*) CHRISTIAN *v.* TEKAITINI NARBADA KOERR.

19 C. W. N. 796 : 27 I. C. 471 : 20 C.L. J. 527.

———*Ownership and possession—Distinction.*

Ownership and possession are two distinct juristic conceptions and in every transfer of ownership from one person to another by the act of the party, a transfer of possession is not necessary. (*Karamat Hussain and Chamier, JJ.*) MUHAMMAD TALIB HUSSAIN *v* INAYATJAN.

33 All. 683 : 11 I C. 762 : 8 A. L. J. 746.

———*Pakka adatia—Meaning.*

A *pakka adatia* is a *delcredere* agent in Bombay who can allocate his principal's contracts to himself. (*Beaman, J.*) BHAGVANDAS PARASHRAM *v.* BURJORJI RUTTONJI.

19 I. C. 29 : 15 Bom. L. R. 85.

———*Paramsana—Meaning of.*

When a tenant appropriates a portion of the rent due from him to the proprietor by way of interest due to him for loan advanced to the latter and pays the balance over to the landlord, such balance is called 'paramasana'. (*Kanhaiya Lal, J. C.*) SAT DEA *v.* JAINATH.

9 O. L. J. 141 : 1922 Oudh 75.

———"*Pending proceeding*"—*Meaning of.*

A legal proceeding is said to be pending as soon as it is commenced and until it is concluded,

that is, so long as the Court having cognizance of it can make an order on the matters in issue which are to be dealt with therein. 30 I. C. 37, Not. foll. (*Pratt, J. C. and Crouch, A. J. C.*) JEWANJEE *v.* GULAM HUSSAIN.
47 I. C. 771 : 12 S. L. R. 20.

———Praja—*Meaning.*

In Cuttack and Cooch Behar *praja* may mean a cultivator. Elsewhere it means a tenant. A lease created by a *Prajagiri Patta* does not mean that the interest granted by the lease is that of a cultivator. (*Fletcher and Teunon, JJ.*) SECRETARY OF STATE *v.* GOBIND PRASAD.
39 I. C. 934 : 21 C. W. N. 505.

———Profit aprendre *in gross.*

The right to hunt in a jungle and to appropriate the game is a right known in English Law as a right to a *profit aprendre* in gross. (*Mullick and Jwala Prasad, JJ.*) MAHARAJ BAHADUR SINGH *v.* GANDAURI SINGH. **2 Pat. L. J. 323 : 39 I. C. 868 : 2 Pat. L. W. 282.**

———*Property—Money, if.*

Money is also property. (*Saunders, J. C.*) MANIKCHAND *v.* GIRIDHARI LAL.
46 I. C. 342 : (1918) 3 U. B. R. 69.

———*'Public place.'*

Where the public have access to a place without their access being refused or interfered with, that place is a public place. (*Stuart, J.*) SUKHNANDAN SINGH *v.* EMPEROR.
20 A. L. J. 80 : 1922 A. 542.

———*Public right.*

A right of way common to several persons is not necessarily a public right. (*Das, J.*) RAMMANOHAR SAHI *v.* MITHILA PRASAD SAHI.
57 I. C. 151.

———*" Putrapoutradi " — Lineal heirs only Chota Nagpur custom.*

In spite of the words " putrapoutradi " in the grant of a jagir, the estate reverts to the donor on failure of lineal male heirs under the custom of Chota Nagpur. (*Sir John Edge.*) RAM NARAIN SINGH *v.* RAM SARAN LAL.
46 Cal. 683: 29 C. L. J. 332 : 17 A. L. J. 398 : 21 Bom. L. R. 597 : 23 C. W. N. 866 : 50 I.C. 1 : (1919) M.W.N. 518: 36 M.L.J. 344 (P.C.).

———'Putrapautradi krame.'

The expression "*Putrapautradi krame*" denotes perpetual and heritable estate. (*Teunon and Newbould, JJ.*) RAJENDRA MOHAN *v.* UPENDRA NATH. **64 I. C. 518.**

———Putrapoutrade Krame—*Meaning of.*

The words imply perpetuity and transferability. (*Mookerjee and Rankin, JJ.*) TARAKASWAR PAL *v.* SHISH CHANDRA GHOSH MANDAL.
27 C. W. N. 964 : 1924 Cal. 236.

———Putrapoutradi Krame — *Absolute and heritable estate.*

When a grant of a Jagir is made accompanied by words *putrapoutradi krame* the grantee takes an absolute and heritable estate and as passing an estate of inheritance. (*Stephen and Mullick, JJ.*) RAMSHARAN LAL *v.* RAM NARAYAN SINGH.
28 I. C. 610 : 19 C. W. N. 466.

———*'Putra Poutradi Krame.'*

The use of the words " Putrapautradi Krame " indicates that it is intended to be a perpetual estate. (*Mookerjee and Chotzner, JJ.*) GHULAM RAHAMAN MISTRI *v.* GURDAS KUNDU CHOUDRI.
1923 Cal. 505 : 38 C. L. J. 350.

———*"Putrapoutradi Santati."*

The words " Putrapoutradi Santati " convey absolute estate of inheritance. No matter whether found in a will or lease. (*Macleod, Kt. C. J. and Shah, J.*) CHANDMAL KASHARMAL *v.* VISHVANATH BALWANT SOHANI. **24 Bom. L R. 300 : 46 B. 816 : 1922 Bom. 45.**

———*Qarib.*

The word 'qarib' when it stands alone means 'near in degree. (*Lyle, J. C.*) NIANATALI *v.* ASHIQ ALI. **9 O. L. J. 127 : 1922 Oudh 96.**

———*'Quabiz.'*

The use of the word 'quabiz' does not necessarily mean that a limited estate is conveyed. (*Broadway and Qadir, JJ.*) GOPIRAM *v.* ACHHRU RAM. **65 I. C. 462.**

———*'Raiyat'.*

The word 'Raiyat' is often used in judgments in the sense of tenants of various classes. (*Teunon and Chaudhuri, JJ.*) SECRETARY OF STATE FOR INDIA *v.* JODHY CHANDRA MISRAS.
39 I. C. 409 : 21 C. W. N. 452.

———*Restraint of Princes—Contract of shipping, how affected by—Reasonable apprehension —Test.*

A ship owner may refuse to ship goods on a reasonable apprehension of restraints of princes in spite of there being no restraint actually in existence at the time of the refusal and events occurring after such refusal may be taken as a test to show the true state of affairs at the time of the refusal. *Obiter* : An apprehension though unfounded may yet be reasonable. (*Pratt, J. C.*) SANDAY PATRICK & CO. *v.* BRITISH INDIA NAVIGATION COMPANY **37 I. C. 285 : 10 S. L. R.100.**

———*'Santan' in Bengali—Meaning of.*

The word 'Santan' as used in Bengali documents at the end of the 19th and the beginning of the 26th century means "issue" generally and not necessarily male descendants. (*Fletcher and Newbould, JJ.*) KUMAD KRISHNA MANDAL *v.* JOGENDRA NATH. **21 C. W. N. 854 : 41 I. C. 511 : 26 C. L. J. 250.**

———*" Santhathi " is wider than Puthra Pouthra.*

The word '*Santhathi*' is wider than *Puthra Pouthra* or 'from son to grandson.' (*Wallis, C. J. and Ramesam, J.*) GURUVAJAMMAH *v.* RUNGASWAMI MUDALIAR. **62 I. C. 745 : 13 L. W. 513.**

———*Santhathi paramparayamai—Maintenance grant.*

The use of the words 'santhathi paramparaya-

WORDS AND PHRASES.

mai" in a grant for maintenance does not exclude the right of collateral heirs to inherit. (*Lord Phillimore.*) RAJA RAJESHWAR *v.* SUNDAR PANDIYASAWMI.

42 Mad. 581 : 17 A. L. J. 153 : 23 C. W. N. 549 : 29 C. L. J. 551 : 25 M. L. T. 400 : 21 Bom. L. R. 885 : (1919) M. W. N. 511 : 10 L. W. 322 : 49 I. C. 704 : 36 M. L. J. 164 (P. C.).

[On Appeal from 27 I. C. 283 : 27 M. L. J. 694.]

———"*Saranjam*"—*Meaning of.*

The word "saranjam" is a Marathi term and is equivalent to a Jagir. The terms "Saranjam" and "Jagir" are not mutually exclusive. (*Lord Shaw.*) RAGPOJI RAO SAHEB *v.* LAKSHMAN RAO SAHEB.

36 Bom. 639 : 39 I. A. 202 : 16 C. W. N. 1058 : 12 M. L. T. 472 : (1912) M. W. N. 1140 : 14 Bom. L. R. 1226 : 17 C. L. J. 17 : 16 I. C. 239 : 23 M. L. J. 383 (P. C.).

———'*Saranjami' means collection charges.*

The word 'Saranjami' ordinarily signifies collection charges. (*Mookerjee, C. J. and Fletcher, J.*) BHABANI NATH ROY *v.* PURNA CHANDRA SARKAR.

25 C. W. N. 308 : 61 I. C. 818 : 33 C. L. J. 332

———' *Settled for periods'.*

The words "settled for periods" are not an admission that the settlement was *de jure.* (*Lord Phillimore.*) KUMAR NARESH NARAYAN ROY *v.* SECRETARY OF STATE FOR INDIA.

50 Cal. 446 : (1923) M W. N. 511 : 50 I. A. 121 : 32 M. L. T. (P. C.) 162 : L. R. 4 (P. C.) 50 : 28 C. W. N. 453: 1923 P. C. 1 : 45 M. L. J. 444 (P.C.).

———'*Shade Right'—Incidents of*

A 'Shade-right' is the customary right of the owner or occupier of the land to compensation for the damage done to his crops by the shade of adjacent trees. It is a covenant running with the land, and cannot be transferred independently. (*Skinner, A. J. C.*) APPAJI *v.* KHUSHAL.

10 I. C. 689 : 7 N. L. R. 1.

———*Shahjog Hundi.*

A shahjog is not a bill of exchange nor a promissory note. It is payable to the holder only and does not mean a hundi payable to bearer. (*Mookerjee and Roe, JJ.*) KESHARI CHAND *v.* ASHARAM MAHATO. 22 C. L. J. 209 : 33 I. C 250 : 19 C. W N. 1326

———'*Shawls'—Railwaye Act, S. 72.*

The term 'shawls' refers to Indian Shawls of special value and not to articles of inferior value. (*Macleod, Kt. C.J. and Shah, J.*) EAST INDIAN RAILWAY CO., *v.* DAYABHI VANMALIDAS

24 Bom. L R. 416 : 47 B. 18 : 1922 B. 416.

———" *Shipment* "—*Meaning of.*

The term " shipment " includes not merely the loading of goods on board the ship but also the starting of the ship. (*Asutosh Mookerjee and Beachcroft, JJ.*) KALI KANTA SAHA *v.* ISMAIL.

20 C. L. J. 133 : 27 I. C. 7 : 20 C. W. N. 159

WORDS AND PHRASES.

———' *Shop '—Building mainly used as residence.*

The word " shop" denotes a building primarily used for the retail sale of goods. Where a building was mainly used as a residence the mere fact that a part of it is used as a tailor's workshop does not convert the whole of it into a shop. (*Scott-Smith, J.*) SANT SINGH *v.* GOBIND RAM.

1923 Lah. 209.

———' *Shop '—Residential place with an oven for making rotis, is not a shop.*

The word " shop" in its ordinary meaning denotes a building or an apartment which is primarily used by buying and selling goods. Where a place was used as a residential place. *Held*, that it was not a shop though there was in it an oven for cooking *rotis* for any one who brought his own flour for the purpose and paid in cash or kind. (*Shadilal and Le Rossignol, JJ.*) BHAMBA RAM *v.* ALLAH BAKHSH.

69 P. R. 1915 : 31 I C. 191 : 156 P. W. R. 1915.

———"*Sicca Rupee*"—*Meaning of—History and origin.*

The Calcutta Sicca Rupee though coined by the company is never known as company's Sicca Rupee. (*Teunon and Richardson, JJ.*) MAHARAJ BAHADUR SINGH *v.* JADAB CHANDRA GHOSE.

46 Cal. 347 : 47 I. C. 109 : 30 C. L. J. 246.

———*Sons includes grandsons.*

'Sons' in Mitaksbara Chap II, 6 (1) includes 'grandson.' (*Sir John Edge.*) ADIT NARAYAN SINGH *v.* MAHABIR PRASAD TIWARI.

(1921) M. W. N. 153 : 48 I. A. 86 : 19 A. L. J. 208 : 2 Pat. L. T. 97 : 33 C. L. T. 263 : 29 M. L. T. 240 : 6 Pat. L. J. 140 : 23 Bom. L. R. 692 : 25 C. W N. 842 : 14 L. W. 20 : 60 I. C. 251 : 40 M. L. J. 270 (P. C.).

[On Appeal from 35 I. C. 687.]

———" *Sudda Inam* ".

"Sudda" Inam does not show that the inam consisted merely of the melvaram. It only means that there is nothing payable in consideration of the inamdar's possession of the land. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) TIRUMALAI *v.* AMBADAM.

17 I. C. 481.

———"*Surpanch.*"

'Surpanch' might indicate either an umpire in case of difference of opinion or a Chief arbitrator. Where matter was referred to arbitration to three persons, two of whom were described as panches and the third as Surpanch it was held that this did not mean that the two panches alone were to act and the surpanch was only to be approached in case of difference of opinion. (*Kanhaiya Lal, A. J. C.*) LALA *v.* ABDUS SAMED.

16 O. C. 84 : 17 I. C. 320.

———'Swamibhogam' *implies ownership in soil.*

The word *Swamibhogam* usually implies that the ownership of the soil does vest in the person who is entitled to *Swamibhogam.* (*Sadasiva Aiyar and Napier, JJ.*) SUBRAMANYA KARIYALOM *v.* SIVASUBRAMANYA PILLAI.

62 I. C. 750 : 14 L.W. 40: 41 M. L. J. 175.

WORDS AND PHRASES.

——"*Tanaka*"—*Mortgage.*

The word "tanaka" occurring in a document evidencing a loan means a mortgage and not merely an assignment of land revenue. 39 Mad 1010, Foll. (*Sadasiva Aiyar and Phillips, JJ.*) ZAMINDAR OF KARVETINAGAR *v.* SUBBARAYA PILLAI. **(1918) M. W. N. 146 : 43 I. C. 871 : 7 L. W. 36.**

——"*Teji mandi*"—*Wager.*

Teji-mandi contracts are not wagering contracts if giving or taking of delivery is purported. Teji means brightness and mandi means dullness. (*Kincaid, J.*) MANUBHAI PERMANUND *v.* KESHAVJI RAMDAS. **1922 B. 66.**

——'*Thika and mokra*'—*Meaning of.*

Thika indicates creation of tenancy and mokra means perpetual rent. (*Mukerjee and Panton, JJ.*) RAJA KESHEE CASE LAW *v.* SATISH CHANDRA PAUL. **35 C. L. J. 90 : 1922 C. 123.**

——'*Timber' includes Bamboo trees.*

'Timber' means such trees only as are used for building or repairing houses therefore bamboo trees are timber. (*Das and Ross, JJ.*) RAMESHWAR SINGH *v.* BARDEO SINGH. **60 I. C. 521: 6 Pat. L. J. 127.**

——'*Vamshasthas*'—*Means descendants.*

The word 'Vamshasthas' means descendants in the ordinary course of law. (*Seshagiri Aiyar and Moore, JJ.*) VITTAPPA KUDVA *v.* DURGAMMA. **11 L. W. 116 : 55 I. C. 781 : (1920) M. W. N. 188 : 38 M. L. J. 190.**

——'*Veetukutti*'—*Who is.*

Veetukutti is the son of a sambhandham wife and is not brought to her husband's wife and he is not entitled to share in his father's property. (*Schwabe, J.*) KUNHI KUTTY *v.* RAMAN. **44 M. L. J. 274 : (1923) M. W. N 173 : 46 M. 597 : 18 L. W. 525 : 1923 M. 452.**

——'*Waris*'—*Meaning of.*

In absence of facts showing contrary intention, the words 'Malik' and 'Waris' indicate absolute estate. (*Kennedy, J. C. and Kemp, A. J. C.*) TIRATHMAL LOKOOMAL *v.* THANWAR SINGH. **66 I. C. 720 : 15 S. L. R. 202.**

——"*Waris*".

The word 'waris' is not always intended to be an expression of limitation. (*Broadway and Quadir, JJ.*) GOPIRAM *v.* ACHHRU RAM. **65 I. C. 462.**

——"*Week*" *Meaning of—Court allowing Court-fee to be paid "in a week"—If includes the day on which the order was made.*

Where the Court ordered plff. to file deficit Court-fee "in a week" it was held that that construction should be given which is favourable to the plff. and that the plff. should be given full seven days. (*Mookerjee and Carnduff, JJ.*) GOPAL LAL *v.* BAHORNI. **13 I. C. 900 : 15 C. L. J.120.**

——'*Wilful neglect*'—*Meaning of.*

A person is said to be guilty of wilful neglect when he intentionally, and of set purpose, does something which ought either to be done in a different manner or not at all or omits to do something which ought to be done. A loss is said to be due to wilful neglect when such neglect is the sole effective cause of loss or so connected with it as to be materially contributing to it. (*Pratt, J. C. and Crouch, A. J. C.*) FIRM OF DOULAT *v.* SECRETARY OF STATE. **32 I. C. 551 (2) : 9 S. L. R. 177.**

——"*Without prejudice.*"

Words "without prejudice" in private documents have not the same meaning as they have when used in connection with an actual or impending litigation (*Spencer, Coutts-Trotter and Napier, JJ.*) VENKATA SUBBIAH CHETTY *v.* SUBBA NAIDU. **2 L. W. 977 : 18 M. L. T. 533 : 31 I. C. 152 : (1915) M. W. N. 822.**

——'*Yati*'—*Chela*—Satsishya—*Meaning.*

Satsishya is one who is assiduous in the study of theology in retaining the holy science and in practising its ordinances. *Chela* is a personal attendant who may be raised to the rank of sishya. *Yati* is a Bhiksha an ascetic or anchorite and in order that a person may fall under this category there must be absolute abandonment of all secular property and a complete and final withdrawal from earthly affairs. (*Chauduri, J.*) GAURI SHANKAR BYAS *v.* NIADAR SINGH. **23 I. C. 287 · 18 C. W. N. 59.**

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859).

——*Artificer*—*Contractor to carry stones is not.*

A contract by a person to carry stones on his camels is not the contract of an artificer or workman or labourer within S. 1 of the Workmen's Breach of Contract Act. (*Shadi Lal, C.J.*) JAFAR *v.* EMPEROR. **3 Lah. 371 : 1922 L. 443.**

——*Bandsman*—*If workman.*

A Musician in a band is not an artificer or labourer and is not a workman within the meaning of the Act XIII of 1859. (*Miller, J.*) ROSARIO QUADROS, *In re.* **16 Cr. L. J. 629 : 38 M. 551.**

——*Wilful refusal*—*Physical fitness.*

In a prosecution under the Act, if it is proved that the workman has refused to work and that there is a finding that he is physically fit for the same he must be held to have refused "wilfully and without lawful or reasonable excuse". (*Macgregor, J.*) HEETH LAL KADRIA *v.* MOOKSUD ALLY. **1 Bur. L. J. 109: 1923 R. 79 (2).**

——**S. 1**—*Contract entered into where Act not in force is not enforceable, contract with minor or for more than one year is void.*

A contract entered into under the Act at a place where it is not in force is not enforceable and the contracting workman is not liable for any breach thereof. A contract under the same Act for a period exceeding one year or with a minor is void. (*Gokul Prasad, J.*) MAZHAR HUSSAIN *v.* EMPEROR. **22 Cr. L. J. 50 : 59 I. C. 194.**

——**Ss. 1 and 2**—*Breach of contract*—*Refusal to work*—*Act to be strictly enforced.*

The provisions of the Act are not confined only to fraudulent breaches of contract as stated in the preamble. An application to the Magistrate asking him to enforce the provisions of Ss. 1 and 2

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859), S. 1.

of the Act should be disposed of on evidence and not dismissed summarily. 16 A.L.J. 164, Foll. (*Knox, A. C. J.*) AZIZ-UR-RAHMAN *v.* HANSA.
16 A. L. J. 715 : 47 I. C. 441 : 19 Cr. L. J. 925 : 40 All. 670.

——S. 1—*Workman—Dealer in stones—Liability of.*

A dealer in stones agreeing to supply stones under the terms of a contract is not an artificer, workman or labourer under S. 1 of the Act. (*Banerjee, J.*) BHAGWAN DIN *v.* MAHAMAD ALI.
19 Cr. L. J. 598 : 45 I. C. 502 : 16 A. L. J. 407.

——Ss. 1 and 2—*Labourer.*

A workman laying and burning bricks is a labourer and the fact that the period of time within which the contract was to be performed has elapsed, cannot prevent the Magistrate from passing an order for refund of advance. (*Tudball, J.*) BHAROSA *v.* EMPEROR.
15 Cr. L. J. 599 : 25 I. C. 351 : 12 A. L. J. 490.

——Ss. 1 and 2—*Agreement by workman to work for 50 months in lieu of advance made to him whether enforceable under the Act.*

An agreement by a workman to work for 50 months in lieu of advance to him made by his employer is enforceable under the Act (XIII of 1859). (*Knox and Karamat Husain, JJ.*) LUCAS, C. J. *v.* RAMAI SINGH.
15 Cr. L. J. 233 : 23 I. C. 185 : 12 A. L J. 152.

——S. 1—*Loan after termination of work.*

The Act does not apply to loans made at a time when the work had been finished and nothing of it remained to be done. (*Rafique, J.*) GIGA *v.* MUHAMMAD AMIN. 35 All. 61 :
17 I. C. 799 : 13 Cr. L. J. 863 : 10 A. L. J. 468.

——Ss. 1 and 2—*Advance to be paid off by wages.*

The Act has no application to a contract of service for a term of years accompanied with an advance of money which might be paid off from the wages earned by the workman. Such a contract is not made on account of the work contracted to be performed. (*Heaton and Shah, JJ.*) RAMAKRISHNA *v.* EMPEROR.
20 Cr. L. J. 701 : 52 I. C. 669 : 21 Bom. L. R. 753.

——Ss. 1 and 2—*Contract of service—Revision—High Court.*

Contract to cart logs of wood from forest to a forest depot is not a contract of an artificer, workman or labourer within the Act. The High Court can revise an order under the first part of S. 2 of the Act. The power of revision extends to proceedings of all inferior criminal Courts. (*Heaton and Pratt, JJ.*) DEVAPPA *v.* EMPEROR 21 Bom. L. R. 277 :
50 I. C. 492 : 20 Cr. L. J. 316 : 43 Bom. 607.

——S. 1—*Employer—Strict interpretation.*

A person supplying labour to the employer or master, cannot proceed as an employer against a workman under the Act. (*Batchelor and Roe, JJ.*) EMPEROR *v.* NAGA TIMA.
13 Cr. L. J. 853 :
17 I. C. 789 :14 Bom. L. R. 956.

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859), S. 1.

——S. 1—*Applicability—Advance in nature of debt—Conditions inequitable.*

The Act does not apply where an advance is practically in the nature of a debt or if not in the nature of a debt the conditions are inequitable ; neither does the Act apply where the advance is made repayable not from out of work done but from the wages of the workman. (*Chandavarkar and Hayward, JJ.*) ABDUL RASUL ISMALJI, *In re.*
12 Cr. L. J. 402 :
11 I. C. 586 : 13 Bom. L. R. 548.

——Ss. 1 and 2—*Loan disguised as advance—Breach of contract—Workman, whether liable.*

The Act does not apply to a case where it is sought to disguise the fact that an advance is really a loan. Where a workman receiving an advance of some rupees agreed to work in the factory on condition that two rupees be deducted from his monthly wages per mensem to satisfy the advance and he failed to fulfil the agreement. *Held*, he could not be prosecuted under the Act as the advance was really aloan. (*Broadway, J.*) SANDHI *v.* KHEMCHAND.
56 I. C. 850:
21 Cr. L. J. 546.

——S. 1—*Labourer—Cartman.*

A cartman is not a labourer to whom the provisions of the Act apply. (*Scott-Smith, J.*) EMPEROR *v.* GURDUTTA.
33 P. R. 1917 Cr. : 18 Cr. L. J. 891 :
41 I. C. 1003 : 39 P. W. R. 1917 (Cr.).

——S. 1—*Applicability of—Complaint after work has been completed—Offence.*

To apply the provisions of the Act there must first of all be a finding as to whether the petitioner was a workman or a sub-contractor. Further the Act cannot be applied to a case in which the work stipulated to be done has been completed. 28 Mad. 37, Rel. (*Scott-Smith, J.*) EMPEROR *v.* AMAR SINGH.
18 Cr. L. J. 488 : 39 I.C. 328 : 8 P.R. 1917 (Cr.)

——Ss. 1 and 2—*Labourer—Agreement to deliver ballast.*

An agreement to deliver ballast for the advanced money does not create the relationship of a labourer or workman and the Act does not apply. (*Shadi Lal, J.*) FAZAL ILLAHI *v.* EMPEROR.
3 P. W. R. 1916 Cr. :
32 I.C. 678 : 17 Cr. L. J. 86 : 2 P.R. 1916 (Cr).

——S. 1—*Scope of—Contracts to perform agricultural service—Provision of penalty for breach.*

The Act was not intended to apply to a contract to perform agricultural service ; where a contract prescribed a penalty for its breach, the remedy under the Act cannot be availed of. (*Shadi Lal, J.*) EMPEROR *v.* KHUDA BAKHSH.
38 P. R. 1914 Cr. : 16 Cr. L. J. 229 :
27 I. C. 901 : 207 P. L. R. 1915.

——S. 1—*Advances.*

S. 2 does not apply to advances which are not in money. (*Shadi Lal, J.*) EMPEROR *v.* CHIRAGHA.
23 P. R. 1914 : 15 Cr. L. J. 603 :
25 I. C. 515 : 278 P. L. R. 1914.

——S. 1—*Contract for service — Specific Relief Act, S. 21 (g).*

A contract binding the debtor to work for the creditor for more than 3 years and for no other person cannot be enforced under Act (XIII of 1859) by reason of S. 21 (g) of the Specific Relief Act. 22 I. C. 742, Foll. (*Chevis, J.*) EMPEROR *v.* AMIR BAKHSH. **22 P. W. R. 1914 : 24 I. C. 159 : 15 Cr. L. J. 423 : 61 P. L. R. 1914.**

——S. 1—*Contract of service—For more than three years—If enforceable.*

A contract of service for a period more than three years, cannot be enforced under Act (XIII of 1859) even for a limited period. A contract by which a workman agrees to repay an initial advance taken by him from the employer, is not affected by Act (XIII of 1859). The Act does not apply to the case of a contract which provides a definite penalty for breach. (*Kensington, J.*) EMPEROR *v.* MAHOMED DIN. **96 P. L. R. 1914 : 22 I. C. 742 : 15 Cr. L. J. 166 : 23 P. R. 1913 Cr.**

——Ss. 1 and 2—*Proceedings under--Whether criminal—Order of acquittal—Criminal Procedure Code, S. 247, review.*

The proceedings under the Workmen's Breach of Contract Act up to the stage of passing an order by the Magistrate, for repayment or performance under S. 2 are not criminal proceedings at all. An inquiry directed by S. 1 of the Workmen's Breach of Contract Act cannot be held to be one under Chap. XX, Cr. P. C., and an order acquitting the accused, because the complainant did not appear on the date of hearing though purporting to be made under S. 247, Cr. P. C., is in effect not passed under that section but is merely a dismissal of the complaint and there is nothing to prevent a Magistrate from reviewing the same, if he sees cause to do so. (*Ayling and Odgers, JJ.*) N. RAMANNA *v.* M. GURUNATHAM. **32 M. L. T. 347 : (1923) M. W. N. 402 : 45 M. L. J. 36 : 18 L. W. 111 : 24 Cr. L. J. 465 : 1923 M. 719.**

——S. 1—*Proceedings under—Not criminal.*

Proceedings under Workmen's Breach of Contract Act are not criminal. (*Ayling and Odgers, JJ.*) RAMANNA *v.* GURUNATHAM. **32 M. L. T. 347 : 1923 M. 719 (H. C.).**

——S. 1—*Contract with two workmen or artificers—Elements of offence.*

Notwithstanding the language of S. 1 of the Workmen's Breach of Contract Act, it is open to an employer to start proceedings under the Act in respect of a contract entered into with two artificers jointly. In a case under the Act, the court has to find on the evidence whether the artificers have received an advance of money. (*Oldfield and Devadoss, JJ.*) KANDASWAMI MUDALI *v.* GURUSWAMI PILLAY. **44 M. L. J. 53 : 24 Cr. L. J. 13 : 31 M. L. T. 475 : 16 L. W. 883 : 1923 Mad. 184.**

——S. 1—*Workman or artificer—Compositor is a.*

A compositor is not a workman is at least an artificer, and is governed by the Act. Where the agreement was that the advance received by an employee was to be repaid by periodical deductions from the amount of wages earned by the employee the relationship created is not of creditor and debtor alone. (*Oldfield and Hughes, JJ.*) BHOGIRAVATHU SOMMANNA *v.* KANDIVADA CHELAPATHI RAO. **12 L. W. 631 : 60 I. C. 52 : 29 M. L. T. 4: 339 M. L. J. 710.**

——S. 1—*'Criminal proceeding'—Complaint under S. 1—Withdrawal of.*

A complaint under S. 1 of Act which is withdrawn before any order is made by the Magistrate under S. 2 of the Act either for a refund of the advance paid or for specific performance of the contract, is not a criminal proceeding within S. 211, I. P. C. 28 M. 37, Ref. (*Ayling and Coutts Trotter, JJ.*) HUSSAINA BEARI *v* EMPEROR. **22 Cr. L. J. 13 : 59 I. C. 45 : 43 Mad. 443.**

——Ss. 1 and 2—*Workman — Supervisor of coolies—Onus of proof.*

"Workman" in S. 1 of the Act means a manual labourer of some kind skilled or unskilled. A person doing work of an intellectual nature in connection with a contract involving manual labour does not come within the section. A supervisor of coolies who has contracted to get work done by them is not within the Act. The onus of proving that the accused is a workman, labourer or artificer is on the complainant. (*Ayling, J.*) NATUTHODI KUNCHI MOIDIN *v.* CHAMU NAIR. **41 Mad. 182 : 22 M. L. T. 435 : 19 Cr. L. J. 211 : 43 I. C. 787 : 6 L. W. 745 : (1917) M.W.N. 825 : 33 M. L. J. 607.**

——S. 1—*Scope of—Payment of advance to be deducted from wages.*

A case in which a contract is that the workman shall work for wages deducting from his wages a certain sum periodically to make good an advance is within the scope of the Act. (*Miller, J.*) JELAGAN SUBRAMANIYA NAIDU *v.* K. SINGARA MUDALI. **16 Cr. L. J. 112 : 27 I. C. 160 : 27 M. L. J. 616.**

——S 1—*Scope of.*

Where a person agreed to convey clay to the complainant's factory by means of his own labour and another person hired by him and afterwards neglected the work, *held*, he came within S. 1 of the Act nothwithstanding his employing another person under him. 13 Mad. 351, Dist. (*Ayling and Tyabji, JJ.*) MAMO BEARI, *In re.* **(1914) M. W. N. 651 : 16 M. L. T. 235 : 1 L. W. 657 : 15 Cr. L. J. 651 : 25 I. C. 979 : 27 M. L. J. 392.**

——S. 1—*Loan—Advance.*

Where an advance made to a workman is merely a loan the Act has no application. A contract to work 8 hours for 12 years and for wages not above market rate and to live in any house provided, is a form of slavery and to be prohibited as illegal. (*Sankaran Nair, J.*) AMBU, *In re.* **23 I. C. 752 : 15 Cr. L. J. 384.**

——S. 1—*Advance—To be reimbursed from monthly wages—Applicability of Act.*

An advance of money paid to a workman on condition of its being reimbursed by monthly deductions from his wages is " an advance of money on account of any work which he shall

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859), S. 1.

have contracted to perform " within the Act. 23 Mad. 203 : 7 Mad. 131, Foll. (*Benson and Tyabji, JJ.*) GOVINDA CHETTY *v.* MUNNOANY NAIK. **20 I. C. 224 : 14 Cr.L. J. 400.**

——S. 1—*Contract to be performed outside British India.*

A contract which is to be performed outside British India does not come within the purview of this Act. 10 Mad. 21, Foll. (*Pratt, J.*) S. PO THIT *v.* MA SAW SHIN. **20 Cr. L. J. 576 : 12 Bur. L. T. 223 : 52 I. C. 64 : 10 L. B. R 53.**

——S. 1—*Proceedings under criminal—Person undertaking to supply coolies and work with them.*

Proceedings under the Act are judicial proceedings the workman being in the position of an accused and he cannot therefore be compelled to make a thumb impression in Court for the purpose of identifying his thumb impression. A person who undertakes to supply coolies and to work along with them is a " workman" within the meaning of S. 1 of the Workmen's Breach of Contract Act. (*Twomey, C. J.*) RAMNATH PANDARAM *v.* KARUPPANA THEVAR. **19 Cr. L. J. 175 : 43 I. C. 591 : 11 Bur. L. T. 207.**

——Ss. 1 and 2—*Artificer, labourer or workman—Contractor.*

The Act applies only to " artificer, labourer or workman " as defined by the Act. To make the Act applicable, the relation between the parties to the contract must be that of labourer and employer of labour. A contractor is not ordinarily an artificer, labourer or workman, and the Act would apply to a contract of labour or an agent for the supply of goods if the contractor has contracted to supply his personal labour but not otherwise. (*U. Kin, J.*) BABA KHAN *v.* MAUNG NAING. **9 L. B. R. 21 : 35 I. C. 830 : 17 Cr. L. J. 398 : 9 Bur. L. T. 108.**

——S. 1— " *Workman* " — " *Artificer* " — *Whether includes head artificer or supervisor.*

" Artificer " in S. 1 of the Act covers a head artificer or supervisor who without working with his own hands gets work done by others. (*Twomey, J.*) SEIN YIN *v.* AH MOON SHOKE. **15 Cr. L J. 235 : 23 I C. 187 : 7 L. B. R. 82.**

——S. 1—*Object of—Application—Dismissal for default—Effect—Cr. P. C., Ss. 247 and 403.*

The offence created by the Act is not the neglect or refusal to perform the contract but the failure by the workman to comply with the order of the Magistrate under the Act. Therefore where an application under the Act is dismissed for default, Chap. XX and S. 403 of the Code do not apply and the proceedings might be re-opened again. 24 Mad. 660, Appr. Although one object of the Act may have been to provide a speedy remedy for employers against the workmen the main object is to provide for the punishment of the workmen who have taken advances and have fraudulently broken their contracts to work. (*Hartnoll, Offg. C. J.*) KRISHNA PERDAN *v.* PASAND. **6 Bur. L. T. 108 : 14 Cr. L. J. 404 : 20 I. C. 228 : 9 L. B. R. 35.**

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859), S. 2.

——S. 1—*Magistrate of Police—Who is.*

A Magistrate of Police is a Magistrate within whose jurisdiction the employer resides or carries on his business. A Magistrate within whose jurisdiction a contract was made or advance received, has no special jurisdiction under S. 1 of the Act. No Court can try an offence unless it is expressly authorised by the statute. (*Crouch and Hayward, A. J. Cs.*) SOBRAJ DWARKADAS *v* EMPEROR. **19 Cr. L. J. 591 : 45 I. C. 399 : 11 S. L. R. 128.**

——S. 1—*Contract—Meaning of.*

An agreement to render services higher than those of manual labour as for, *e. g.*, to serve at a butcher's shop and to keep and render accounts does not come within the Act. (*Pratt, J. C. and Kemp, A. J. C.*) RAMZAN *v.* NUR MUHAMMAD YAKUB. **15 Cr. L. J. 383 : 23 I C. 751 : 7 S. L. R. 100.**

——S. 2—*Order to perform service—Contract to repay money—Order to pay compensation—Cr. P. Code, S. 250.*

An order by a Magistrate dismissing a complaint under S. 1 requiring the complainant to pay compensation is illegal. (*Lindsay, J.*) JAMIL AHMAD *v.* MUHAMMAD ISHAQ. **41 All. 322 : 52 I. C. 58 : 20 Cr. L. J. 570 : 17 A. L. J. 165.**

——(XIII of 1859 amended XII of 1920), S. 2—*One year does not mean working at odd intervals for 365 days.*

An agreement that the accused should work every day should not be transformed by the Court into an agreement to work for 365 days at odd intervals, if the complainant so chose, when the accused should fail to work one day after the other. (*Ryves, J.*) ASGAR ALI *v.* EMPEROR. **1923 A. 609 (2).**

——S. 2—*Applicability — Provision for damages—Contract to supply real metal.*

An employer of labour is not precluded from availing himself of the provisions of the Act merely because, in the contract of service between himself and his workmen, there is a stipulated penalty capable of enforcement by a civil suit, in the event of breach of the contract on the part of the workmen, which penalty has admittedly not been enforced, nor payment of the same tendered on the part of the workmen. (*Piggott, J.*) RAM LAL *v.* EMPEROR. **41 All. 390 : 51 I. C. 205 : 20 Cr. L J. 429 : 17 A. L. J. 386.**

——S. 2—*Refusal to perform contract—Smallness of advance.*

The smallness of the advance is not a reasonable excuse for refusing to perform the contract within the meaning of S. 2 of the Act. 23 I. C. 185. Ref. When a man enters into a contract he must carry out the terms of the contract into which he has entered, unless he can show some reasonable excuse. One of the terms of the very same contract can hardly be afterwards held up as a reasonable excuse for non-performance. (*Knox, J.*) BAKHTAWAR *v.* EMPEROR. **16 A. L. J. 164 : 43 I. C. 832 : 19 Cr. L. J. 240 : 40 All. 282.**

WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859), S. 2.

——S. 2—*Order for working.*

When a Magistrate orders a workman, under the Act, to work for the period of contract and the order is disobeyed, the Magistrate can only sentence the workman for imprisonment and not add to it an order that he should work for some more period and also repay the advance. (*Banerjee and Chamier, JJ.*) TIRKHA *v.* ITWARI.

15 Cr. L. J. 592: 25 I. C. 344: 12 A. L J. 678.

——S. 2—*Scope of—Magistrate's power.*

The Act can be put in motion only by that employer. A Magistrate cannot act under the Act if the case before him is one under the Penal Code. (*Tudball, J.*) CHEDI *v.* MOHAMMAD ALI.

11 A. L. J. 117: 18 I. C. 885: 14 Cr. L. J. 133 : 34 All. 143.

——S. 2—*Order of imprisonment—When to be passed—Order under S. 2—Appeal.*

An order of imprisonment cannot be passed under S. 2 unless there is a non-compliance with the order of repayment or carrying out of the contract. S. 2 of the Act does not come under S. 408 of the Cr. P. Code and hence no appeal lies to a Sessions Judge. (*Imam and Chapman, JJ.*) ANNUKUL CHANDRA ROY *v.* KAMARAL SARDAR.

15 Cr. L. J. 697 : 26 I, C. 145: 18 C. W. N. 1271.

——Ss. 2 and 3—*Advance—Meaning—Marriage expenses.*

Under the Act, an advance for marriage expenses of the workman, is a loan but not an advance, which, under the Act, must be repaid, in the form of work which the workman has contracted to perform, and not in the form of money instalments. (*Scott-Smith and Leslie Jones, JJ.*) BHOLANATH *v.* MUNSHI.

22 Cr. L. J. 288 : 60 I. C. 688 : 3 U. P. L. R. (Lah.) 28.

——S. 2—*Option to claim money or work.*

The option of claiming repayment of money or performance of work is in the complainant and a Magistrate cannot give this option to the debtor and pass an alteration order. (*Chevis, J.*) EMPEROR *v.* AMIR BAKHSH.

22 P. W. R. 1914 (Cr.) : 24 I, C. 159 : 15 Cr. L. J. 423 : 61 P. L. R. 1914.

——Ss. 2 and 3—*Summary trial—Not allowed—Order for imprisonment, when to be made.*

A case under the Act is not triable summarily. 33 Bom. 22, Foll. Order for imprisonment in default can only be made after the labourer has failed to comply with the order calling on him to refund the money or get the work performed as the case may be. (*Chevis, J.*) EMPEROR *v.* HARLAL.

27 P. W. R. 1912 (Cr.) : 14 I. C. 194 : 13 Cr. L. J. 194 : 5 P. R. 1912 (Cr.).

——S. 2—*Slavery—Agreement for service when amounts to—Applicability.*

For a sum of Rs. 160 due by the accused, father and son to the complainant they entered into an agreement with him whereby they undertook to work in his (Complainant's) cocoanut tope for a period of one year and subsequently to repay any money that might be found still due by them to him at the end of the year. They were to be paid Rs. 6 per month out of which Rs. [illegible] month were to be taken towards the debt Rs. [illegible] being paid in cash. This working in the tope was to continue for only a year, and there was no obligation under the agreement to work in the tope thereafter and the bond then converted itself into a simple money debt bond *Held*, that there was nothing unfair in the arrangement, and nothing which would amount to *slavery*. Where the second class magistrate directed the two accused to work for a period of 6 months the balance of the period of one year stipulated for in the agreement, *held*, that his order was right and that the case was not one for the application of S. 2 of the Workman's Breach of Contract Act. (*Krishnan, J.*) ELIAN, *In re.*

45 M. L. J. 842: (1924) M. W. N. 41: 25 Cr. L. J. 209 (1): 1924 Mad. 351.

——S. 2 — *Enforcement after stipulated period.*

A Court cannot enforce a contract entered into under the Act after the expiry of the stipulated period and order to work out the balance due from the workmen. (*Ayling and Coutts Trotter, JJ.*) CHINNIAH CHETTY *v.* ABDUL KAREEM.

21 Cr. L. J. 827 : 58 I. C. 827 : 12 L. W. 43.

——S. 2—*Contract to be performed in foreign country—It can be enforced under the Act.*

A contract the performance of which is to take place in a foreign country cannot be enforced under the Act. 10 Mad. 21, Foll. (*Oldfield, J.*) SINNA KARUPPAN, *In re.*

16 Cr. L. J. 61 : 26 I. C. 653 : 16 M. L. T. 303.

——S. 2—*Artificer—Meaning of — Musician if within the Act—Discretion of Court.*

A person who plays a musical instrument in a band is not an artificer, workman or labourer within the meaning of S. 1 of the Workman's Breach of Contract Act. S. 2 of the Workman's Breach of Contract Act as amended by Act XII of 1920 gives a Magistrate complete discretion to order either the re-payment of the advance or the performance of the work. (*Saunders, J. C.*) NGA THA GYAN *v.* NGA BA E.

23 Cr. L. J. 2 : 4 U. B. R. (1921) 7 : 1922 U. B. 9.

——S. 2 (Proviso (a) *to Cl.* (1)—*Scope of.*

S. 2 (1) (*a*) proviso of the Act merely provides that an order directing repayment of the advance or performance of the contract shall not be made unless the employer moves the Court within 3 months of the breach of the contract. It does not apply where the complainant has already obtained an order under S. 2 (1) and is applying for an order of imprisonment under S. 2 for failure to obey the order under sub-S. (1) (*Robinson, J.*) JESMUDIN *v.* ISADALLY.

22 Cr. L. J. 149 : 59 I. C. 853 : 10 L. B. R. 240.

——S. 2—*Order imprisonment along with order for payment.*

Order for imprisonment passed simultaneously with one for payment is not legal. The Act does not apply to one who is not himself an artificer, workman or labourer. (*Parlett, J.*) MAUNG THEIN LO *v.* MESSRS. STEEL BROTHERS & CO.

18 Cr. L. J. 984 : 42 I. C. 600 : 11 Bur. L. T. 203.

WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859), S. 2.

——— S. 2—*Scope of.*

Under first part of section, a Magistrate should order accused to repay advance within time to be fixed in the order. In default of payment only, can the Magistrate proceed to pass sentence. (*Parlett, J.*) CHINTAPILI *v.* EMPEROR.

18 Cr. L. J. 281 : 38 I. C. 313 : 10 Bur. L. T. 251.

——— S. 2—*Settlement with workman — Failure of the latter to pay according to it—Liability.*

A settlement with a workman for repayment of the balance due and for stopping work, takes the case out of the Act and the liability, if any, is purely a civil one, and failure to act on the settlement will not bring back the case under the Act. 4 L. B. R. 365. Dist. (*Shaw, J. C.*) JUGARAM *v.* NGA TUN BAW. **15 Cr. L. J. 662 : 25 I. C. 990 : (1914) 2 U. B. R. 18.**

——— S. 2—*Jurisdiction—Expiration of term of contract or completion of work—Object of the Act.*

In a case under the Act, where either the work has been completed or the term of the contract has expired, a Magistrate has jurisdiction to entertain a complaint under S. 1 and to order repayment of the advance under S. 2 of that Act. 28 Mad. 37. Dist. One object, of the Act may have been to provide against workman a speedy remedy for employers who have made advances on account of work; but the main object as the preamble shows, is to provide for the punishment of workman who have taken advances and have frandulently broken their contract to work. The impossibility of a master being able to exercise the option of demanding an order from a Magistrate ordering a workman to perform the work does not affect his right to ask for an order for the repayment of the advance and subsequently for an order for the workman's punishment by imprisonment if he fails to comply with the order. (*Fox, C. J., Hartnoll, Atkinson, Parlett and Young, JJ.*) GURUDEEN TAILY *v.* S. MUTTU SERVAI.

6 L B. R. 89 : 15 I. C 996 : 13 Cr. L. J. 580 : 5 Bur. L T. 133 (F. B.).

——— Ss. 2 and 5—*Jurisdiction.*

Under the Act, which was passed for the relief of the employer, the jurisdiction of the Court is determined by the place of residence or business of the employer but not by the place where the advance was made, where the work was to be performed, where the breach occurred or where the employee resided, 25 Cal. 637, Ref. (*Pratt, J. C. and Crouch, A. J. C.*) ALI MAHOMED *v.* EMPEROR. **17 Cr. L. J. 308 : 35 I. C. 484 : 10 S. L. R. 56.**

——— S. 2—*Failure to comply with order of repayment of advance—Sentence—Appeal.*

A person sentenced under the Act for imprisonment for failing to comply with an order of repayment of advance has no right to appeal; but his remedy is by way of application in revision. (*Pratt, J. C.*) THAIRIO *v.* EMPEROR.

15 Cr. L. J. 372 : 23 I. C. 740 : 7 S.L. R. 80.

——— S. 2—*Summary procedure.*

The proceedings of a Magistrate up to the order under S. 2 of the Act do not constitute a trial for any offence and therefore the procedure under S 260, Cr. P. C. is not applicable. (*Pratt, J. C. and Hayward, A. J. C.*) EMPEROR *v.* SOHRAB.

14 Cr. L. J. 256 : 19 I. C. 512 : 6 S. L. R. 165.

——— S. 2 (b)—*Order to show cause not issued—Award of compensation illegal.*

Where the Magistrate omitted before ordering the complainant to pay compensation under S. 2 (*b*) of the Act, to call on him to show cause. *Held* that his order was illegal. (*Daniels, J.*) ABDUL SAMAD KHAN *v.* EMPEROR.

45 A. 616 : 1923 A. 599.

——— S. 4—*Contract—Meaning of.*

The meaning of 'contract' as defined in S. 4 of the Indian Contract Act, 1872, is applicable to all contracts. But the exception lies in the case where its performance is to take place after the lapse of one year. When a 'novatio' is formed which superseded the old contract it is valid under the Act. (*Kanhaiya Lal, J.*) ABDUL RASHID KHAN *v.* HAJI NISOR MAHOMED KHAN.

45 A. 691 : 21 A. L. J. 622 L R. 4 A. 137 (Cr.) : 1924 All. 143.

——— S. 5—*Notification—Government—Delegation of judicial function—Right to resume.*

The notification of the 7th September, 1917 under S 5 of the Act, directing that the powers conferred on all Magistrates shall be exercised only in cases in which the advance was made and the work was to be performed within the local limits of their ordinary jurisdiction, is not *ultra vires.* Per *Pratt, J. C.*—S. 5 confers a power to appoint several officers to exercise powers in local areas, and this implies a power to distribute the business in that area between such officers. (*Pratt, J. C. and Fawcett, A. J. C.*) RAM RATAN CHAND *v.* PERU KHAN MAHOMED.

20 Cr. L. J. 731 : 52 I. C. 891 : 13 S. L. R. 93.

WORLDLY AFFAIRS, ABANDONMENT OF.

See HINDU LAW—SUCCESSION.

WORSHIPPER.

See (1) C. P. CODE, S. 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) MAHOMEDAN LAW—RELIGIOUS ENDOWMENT.

WORSHIP, RIGHT OF.

See HINDU LAW—REL. ENDOWMENT.

WRITTEN STATEMENT.

See C. P. C., O. 8.

WRONGFUL ATTACHMENT.

See TORT.

ZAILDAR.

See also LAND TENURE.

——— *Appointment of pleader—Validity.*

Irrespective of the pleader's unfitness for Zaildarship, having regard to the exceptional services rendered by the pleader during the war his appointment was upheld. (*Maynard, F. C.*) HARBANS SINGH *v.* SARDAR GAJJAN SINGH.

3 Lah. L. J. 718.

ZAILDAR.

———*Zaildar—Qualifications — Acquisition of lambardari by arrangement—Appeal in zaildari cases.*

Resort to special arrangements to qualify oneself for zaildarship is unobjectionable. The Deputy Commissioner's recommendation for the candidature of an Inamdar in preference to a *lambardari* cannot be rejected in appeal without very strong grounds. Nor should appeals in zaildari cases be encouraged. In making an appointment, previous good public services of the candidate and fact of his discharging his duties satisfactorily when acting as Sarbarah of the late zaildar should be given due weight. (*Fenton, F. C.*) ATAR SINGH *v.* GANGA SINGH.
1 P. W. R. 1913 (Rev.) : 1 P. R. 1913 (Rev.) : 18 I. C. 594 : 148 P. L. R. 1913.

ZAMINDAR.

See also (1) BENGAL PERMANENT SETTLEMENT REGULATION.
(2) LANDLORD AND TENANT.
(3) LAND TENURES.
(4) MADRAS PERMANENT SETTLEMENT REGULATION.

———*Haq-i-chaharum—Right of Zamindar—Liability of purchaser of house property.*

ZUR-I-PESHGI LEASE.

The Zamindar's right is to a share of the purchase money and therefore it is incumbent on the purchaser to see that the zemindar is satisfied in respect of his due and he cannot discharge himself by a payment to the vendor. (*Stuart and Sulaiman, JJ.*) KEDAR NATH *v.* DATTUPRAKASH.
20 A. L J. 646 : 44 A. 739 : 1922 A. 370.

———*Village sites—User of land by tenants—Adverse possession.*

In ordinary agricultural villages, Zamindars are owners of the entire village land. The mere fact that a village has become big enough to be called a town does not by itself affect or alter the Zamindar's rights, but it is by the process of transfer, grant or adverse possession which however, is not presumed from mere acts of favour of Zamindars that the various owners acquire proprietary rights. 16 Bom. 338, Foll. (*Walsh and Sunder Lal, JJ.*) PUTTA MAL *v.* BHARAT INDU.
41 I. C. 613.

ZOROASTRAIN RELIGION.

See PARSIS.

ZUR-I-PESHGI LEASE.

See (1) LEASE.
(2) T. P. ACT, SS. 58 AND 107.

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